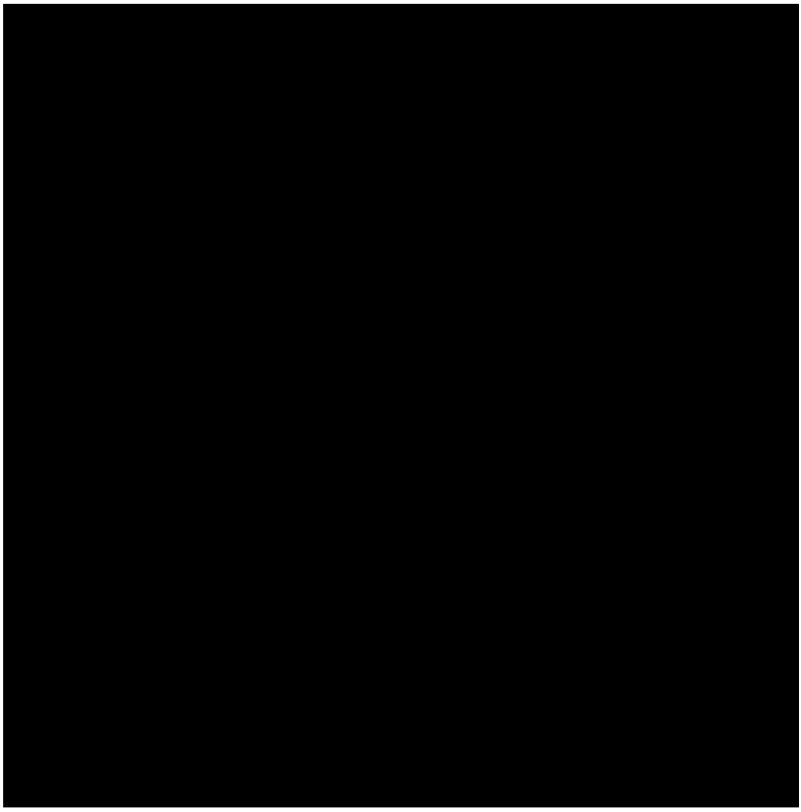

[redacted]

Mary BICE *v.* WATERLOO INDUSTRIES, INC.

CA 99-1259 26 S.W.3d 129

Court of Appeals of Arkansas
Division III
Opinion delivered August 30, 2000

Philip M. Wilson, for appellant.

Riffel and King, by: *V. James King, Jr.*, for appellee.

JOHN E. JENNINGS, Judge. Mary Bice was employed by Waterloo Industries, Inc., on April 4, 1998. She was injured when her hand was caught in a press she was operating. The index, middle, and ring fingers of her right hand were broken and required pinning by an orthopedic surgeon. An administrative law judge found her injury compensable, but the full Commission reversed in a 2-1 opinion. The sole contention on appeal is that the Commission's decision is not supported by substantial evidence. We agree and reverse.

The Commission denied compensation on the basis of Ark. Code Ann. § 11-9-102(5)(B)(iv) (Supp. 1999), which provides that an injury is not compensable if the accident was "substantially occasioned by" the use of illegal drugs and that the presence of illegal drugs creates a rebuttable presumption that the injury was substantially occasioned by their use. Whether the presumption has been overcome is a question of fact for the Commission. *Express Human Resources III v. Terry*, 61 Ark. App. 258, 968 S.W.2d 630 (1998). We will affirm the decision of the Commission on a question of fact if it is supported by substantial evidence. *Hope Livestock Auction Co. v. Knighton*, 67 Ark. App. 165, 992 S.W.2d 826 (1999). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Weaver v. Whitaker Furniture Co.*, 55 Ark. App. 400, 935 S.W.2d 584 (1996).

Appellant's injury occurred on a Saturday morning. The following Monday afternoon appellant was given a drug test which showed positive for codeine and methamphetamine. The Commission invoked the rebuttable presumption based on the following colloquy between appellee's counsel and the appellant:

> Q. Okay. Well, there's been a drug screen, Ms. Bice, which we've talked about before, which shows positive for

Methamphetamines and also for Codeine. Are you aware of that?

A. Yes.

Q. Where would you think the codeine came from?

A. The Codeine probably came from the Tylenol 3 with Codeine.

Q. And where did you get that?

A. I got them from my mother.

Q. Now, do you have any idea where the Methamphetamine might have come from?

A. I have no idea unless it came out of one of those bottles.

Q. Did you between Saturday morning when this occurred and Monday afternoon when you took the — you have a sample for a drug test. Is that right?

A. Yes.

Q. Did you take anything that would have had Methamphetamine in it during that time?

A. No, not that I'm aware of.

Q. Okay. So it should have been the same on Saturday it would have been on Monday, you would have thought?

A. I would think. I took a lot of stuff for pain over the weekend.

The Commission stated, "Consequently, pursuant to claimant's own testimony, had she taken a drug test immediately following her accident, it would have shown positive for methamphetamines." We need not decide whether the evidence relied upon by the Commission is sufficient to raise the presumption because we are persuaded that, in any event, the Commission erred in not finding that the presumption had been overcome.

Only three witnesses testified at the hearing – the appellant, the appellee's plant manager, Kenneth Bates, and the appellee's safety supervisor, Ron Margo. Ms. Bice explained how the

machine operated and testified that the press was equipped with straps that pulled the worker's hands out when the die "came down." She further testified that she put the straps on, and that Mr. Bates checked and adjusted her straps and signed the card stating that she was safe to operate the press. Ms. Bice then explained how the accident happened. She testified that when she talked with Mr. Margo on Monday he told her that a boy had gotten his hand caught in the same machine the night before she did and that she should never have been running it. She also testified that another employee, Bonnie Mancea, was injured running the same type of product. She testified that the maintenance people told her that they had found a "double pinch point" and that was one of the reasons she had gotten her hand in the press.

Had this been the only testimony as to the cause of the accident the Commission might well have been justified in finding that the presumption had not been overcome. The testimony of a party need not be credited by the trier of fact. *See Tyson Foods v. Disheroon*, 26 Ark. App. 145, 761 S.W.2d 617 (1988). But here the appellant's testimony was certainly supported by that of the appellee's plant supervisor and safety supervisor. Mr. Bates testified that within a twenty-four-hour period another person had been injured while running the same machine. He stated that he had personally checked appellant's straps on the date of the accident, and that since the accident the company had put a double hand control button on the press. Mr. Margo testified that the accident was caused by a "pinch point" and that it was "all corrected with a double hand-actuating device." Indeed, the Commission expressly found that two other workers had experienced difficulties with this press, that appellee's witnesses testified about the press "malfunctioning" on two other occasions, and that the accident was a result of the double pinch point. Unaccountably, the Commission's opinion states that the evidence indicated that the claimant was the only person who actually sustained an accidental injury. Apart from the appellant's testimony, the appellee's plant supervisor also testified that another employee was injured.

Given the testimony of appellee's witnesses and the findings of the Commission it is clear that appellant's accident was caused by the press's double pinch point. If the presumption was properly invoked, it was effectively rebutted by the testimony of

appellee's witnesses and the facts found by the Commission. We do not think the Commission could reasonably conclude otherwise.

Reversed.

HART and ROAF, JJ., agree.

C.J. CARPENTER *v.* Oras MILLER

CA 00-5 26 S.W.3d 135

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered August 30, 2000

John Adam Harkey, for appellant.

Murphy, Post, Thompson, Arnold & Skinner, by: *Blair Arnold*, for appellee.

K. MAX KOONCE, II, Judge. In this case, we are asked to review the probate judge's interpretation of the will of Eunice Carpenter, deceased. The judge found that the will unambiguously devised the residue of the decedent's estate to five particular individuals. Appellant C.J. Carpenter, a co-executor of the decedent's estate, argues that the judge erred in determining that no ambiguity existed. We affirm.

Eunice Carpenter died in 1999 leaving an estate valued at approximately $361,000. Her husband, Hubert Carpenter, predeceased her. In her will, decedent devised virtually all of her property to her husband but declared that, should he predecease her, her estate would pass as provided in articles four and five of her will. Article four bequeathed $1,000 to each of twenty-three nieces and nephews. Article five then devised the residue of the estate as follows:

> In the event that my husband, HUBERT C. CARPENTER, should predecease me, after the payment of the TWENTY-THREE THOUSAND DOLLARS ($23,000.00) above-mentioned in paragraph "IV", I hereby give, devise and bequeath my entire estate to ERNEST L. CARPENTER; BRYAN A. CARPENTER; ORILLA CARPENTER PINKSTON and PAUL L. CHAUDOIN.
>
> In the event that either of the above-named brothers of HUBERT C. CARPENTER, or the above-named sister of HUBERT C. CARPENTER should predecease me, then in that event his or her interest shall lapse and the surviving beneficiaries of the FOUR (4) beneficiaries above-named shall take the interest that the deceased beneficiary would have received had he or she survived me; except that in the event of the death of PAUL L. CHAUDOIN, his interest shall not lapse, but the interest that he would have taken had he survived my death shall be given to the following parties, share and share alike.
>
> 1. KENNETH CHAUDOIN, my nephew;
> 2. ORAS MILLER, my nephew;
> 3. J. C. MILLER, my nephew;
> 4. LILLIAN MILLER PROVINCE, my niece; and
> 5. ELLA JEAN MILLER VEST, my niece.

Of the four primary beneficiaries listed above, three of them — Ernest Carpenter, Bryan Carpenter, and Orilla Carpenter Pinkston — were siblings of the decedent's late husband. The fourth primary beneficiary — Paul Chaudoin — was the decedent's brother. The five individuals listed as taking Paul Chaudoin's interest in the event of his death were the decedent's only heirs-at-law at the time of her death. They will be referred to hereafter as the "Chaudoin heirs."

The language at issue in this case is the phrase which reads, "in that event [that Ernest, Orilla, or Bryan should predecease the testatrix] his or her interest shall lapse and the surviving beneficiaries of the FOUR (4) beneficiaries above-named shall take the interest that the deceased beneficiary would have received had he or she survived me." The language is important because all four of the primary beneficiaries predeceased Eunice Carpenter — Ernest in 1991, Orillia in 1996, Paul in 1997, and Bryan in 1998.

Appellant, who is co-executor of the estate and whose interest is aligned with the children of Ernest Carpenter, Bryan Carpenter, and Orilla Pinkston (hereafter "Carpenter heirs"), argues that article five is ambiguous and may be interpreted to mean that, upon the deaths of Ernest, Bryan, and Orilla, each of their one-fourth interests passed to their own heirs or legatees. Under this interpretation, the Carpenter heirs would receive three-fourths of the residue of the estate and the five individuals listed as taking Paul's interest would receive one-fourth. Appellee, who is the other co-executor of the estate and whose interest is aligned with the Chaudoin heirs, argues that the will is susceptible to only two interpretations, either of which would result in the Chaudoin heirs receiving the entire residuary estate. His first interpretation is that the shares bequeathed to Ernest, Orilla, and Bryan lapsed upon their deaths, in which case their shares passed to the Chaudoin heirs by intestate succession. His alternative interpretation is that, upon the death of each primary beneficiary other than Paul, that beneficiary's bequest lapsed and served to increase the shares of the surviving primary beneficiaries. The practical result of this interpretation is that, upon the death of Ernest in 1991, his bequest lapsed and served to increase the shares of Orilla, Paul, and Bryan so that each of them was then beneficiary of a one-third interest; upon the death of Orilla in 1996, her bequest lapsed and served to increase the shares of Paul and Bryan so that each of them was then a beneficiary of a one-half interest; upon Paul's death in 1997, his bequest did not lapse because the Chaudoin heirs became entitled to take Paul's share; and then upon Bryan's death in 1997, his share lapsed and the Chaudoin heirs, who stand in Paul's stead, became the sole beneficiaries inasmuch as Paul's share is determined as if Paul had survived the testatrix, and had he survived her, he would have been the sole surviving primary beneficiary.

After a hearing on the issue, the probate judge determined that there was no ambiguity in the will and that the Chaudoin heirs were the beneficiaries of the entire residue of the estate. Appellant appeals from that ruling.

Probate cases are reviewed *de novo* on appeal. *Gifford v. Estate of Gifford*, 305 Ark. 46, 805 S.W.2d 71 (1991). However, we do not reverse a probate court's findings unless they are clearly erroneous. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence

is left with the definite and firm conviction that a mistake has been committed. *Adkinson v. Kilgore*, 62 Ark. App. 247, 970 S.W.2d 327 (1998). In the interpretation of wills, the paramount principle is that the intent of the testator governs. *In Re: Estate of Harp*, 316 Ark. 761, 875 S.W.2d 490 (1994). The testator's intent is to be gathered from the four corners of the instrument itself. *Id.* However, extrinsic evidence may be received on the issue of the testator's intent if the terms of the will are ambiguous. *See Burnett v. First Commercial Trust Co.*, 327 Ark. 430, 939 S.W.2d 827 (1997). An ambiguity has been defined as an indistinctness or uncertainty of meaning of an expression in a written instrument. *See id.*

We hold that the language in article five is not ambiguous. It provides that, upon the deaths of Ernest, Orilla, and Bryan, their interests shall "lapse" if they predecease the testatrix. The term "lapse" is a technical one, with a specific meaning in probate law. It means that a devise fails or takes no effect. *See* BLACK'S LAW DICTIONARY 407-08 (5th ed. 1979). Thus, a lapsed devise will not pass to a devisee's heirs. Consistent with this, Arkansas law provides that, when a bequest to a residuary legatee lapses, his interest passes to the other residuary legatees in proportion to their interests. *See Crittenden v. Lytle*, 221 Ark. 302, 253 S.W.2d 361 (1952). The technical meaning of the term "lapse" as used in this case means that any bequest to Ernest, Bryan, or Orilla would cease to exist if they predeceased the testatrix and would not be passed on to their respective heirs but would increase the shares of the remaining residuary legatees.

We also hold that the decedent's express declaration that, upon the deaths of Ernest, Bryan, or Orilla, his or her interest would pass to "the surviving beneficiaries of the FOUR (4) beneficiaries above-named" is not ambiguous. The phrase refers to the survivors from among the four primary beneficiaries, *i.e.*, upon Ernest's death in 1991, the interest he was bequeathed lapsed and served to increase the shares of Bryan, and Orilla, and Paul, who were the "surviving beneficiaries of the four." The language used by the decedent is similar to that used in *Chlanda v. Estate of Fuller*, 326 Ark. 551, 932 S.W.2d 760 (1996). There, the testator declared that his estate would be shared equally among certain beneficiaries "or the survivor thereof." The supreme court held that the words "the survivor thereof" did not mean the heirs of any beneficiary but

unambiguously referred to the person among the designated class who outlived the other.

Affirmed.

ROBBINS, C.J., and JENNINGS, MEADS, and ROAF, JJ., agree.

STROUD, J., dissents.

JOHN F. STROUD, Judge, dissenting. I disagree with the majority's conclusion that article five of the will is unambiguous. It is susceptible to at least two and possibly three interpretations. Even appellee, in his brief, suggests two possible interpretations of the will. Both of his interpretations and the interpretation suggested by appellant are reasonable and merit further exploration with the aid of extrinsic evidence, especially in light of the complex and somewhat confusing language used by the testatrix.

The majority relies in part on the decedent's use of the term "lapse" to describe what would happen to the interests of those who predeceased her. Although it is possible that she meant to employ this term in its technical sense, it is equally possible that she was using it in a more generic sense. This is evidenced by the fact that, soon after declaring that her bequests to Ernest, Bryan, and Orilla would lapse, she felt the need to designate those to whom their lapsed interests would pass. If she was using "lapse" in its technical sense, her instruction that the lapsed interest would pass to the "surviving beneficiaries of the four" was superfluous. The confusion in the use of the word "lapse" is further amplified by the next paragraph of the will. The testatrix again uses the word "lapse," but this time says "in the event of the death of Paul L. Chaudoin, his interest shall not lapse...." Although providing that the bequest shall *not* lapse, she also proceeds to name who shall receive the bequest.

In light of the foregoing, it is worth considering that the testatrix was not speaking technically when using that term. Technical terms need not be construed in their technical sense when the testator uses explanatory words to give them a different meaning. *Crittenden v. Lytle*, 221 Ark. 302, 253 S.W.2d 361 (1952).

I also disagree that the *Chlanda* case is dispositive here. The testator in that case used different language than the testatrix used in

this case. Our testatrix did not refer to "the survivors of the four" or "the survivors among the four" but "the *surviving beneficiaries* of the four." (Emphasis added.) That language creates an ambiguity not present in *Chlanda*.

W. Todd VER WEIRE *v.*
ARKANSAS DEPARTMENT of HUMAN SERVICES

CA 00-34 26 S.W.3d 132

Court of Appeals of Arkansas
Division II
Opinion delivered August 30, 2000

Mashburn & Taylor, by: *Michael H. Mashburn*, for appellant.

One brief only.

JOHN F. STROUD, JR., Judge. Appellant, W. Todd Ver Weire, appeals a finding by the trial court that he violated Rule 11 of the Arkansas Rules of Civil Procedure. The circumstances giving rise to this appeal began within the context of a dependency and neglect proceeding. The issues involved in this independent appeal, however, pertain only to 1) the trial court's finding that appellant, who was the mother's lawyer in the underlying dependency-neglect matter, violated Rule 11, and 2) the trial court's denial of an oral motion to recuse that was made during the hearing on appellant's motion to reconsider the court's finding of a Rule 11 violation. We reverse and dismiss.

For his first point of appeal, appellant contends that the trial court abused its discretion in its *sua sponte* application of Rule 11 sanctions. Although appellant couches this point of appeal in terms of the *sua sponte* application of Rule 11 by the trial court, the substance of his argument does not focus on the *sua sponte* nature of the court's action.[1] Rather, the substance of the first point of appeal is that the trial court abused its discretion in determining that appellant had violated Rule 11. We agree that there was an abuse of discretion.

Rule 11(a) provides in pertinent part:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any

[1] Under the language of the rule itself, the trial court may impose sanctions for Rule 11 violations upon its own initiative.

> improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . *If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.*

(Emphasis added.)

The primary purpose of Rule 11 sanctions is to deter future litigation abuse. *Hodges v. Cannon,* 68 Ark. App. 170, 5 S.W.3d 89 (1999). The imposition of sanctions pursuant to Rule 11 is a serious matter to be handled with circumspection, and the trial court's decision is due substantial deference. *Id.* This court reviews a trial court's determination of whether a violation of Rule 11 occurred under an abuse-of-discretion standard. *Id.* In exercising its discretion under Rule 11, the trial court is expected to avoid using the wisdom of hindsight and should test the lawyer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. *Id.* The essential issue is whether the attorney who signed the pleading or other document fulfilled his or her duty of reasonable inquiry into the relevant law, and the indicia of reasonable inquiry into the law include the plausibility of the legal theory espoused in the pleading and the complexity of the issues raised. *Id.* The moving party establishes a violation of Rule 11 when it is patently clear that the nonmoving party's claim had no chance of success. *Id.*

Here, appellant stated in paragraph 2 of his motion for recusal that in an April 7, 1999, review hearing the trial court, "without provocation and with no criminal charges being filed, . . . referred to [the child's mother] as a 'murderer' " with respect to the bathtub drowning of another child in the family. However, at the outset of the subsequent hearing on the motion to recuse, appellant modified his motion with the following explanation:

> This morning Ms. McLemore [counsel for Arkansas Department of Human Services] and I had a chance to discuss this in the hallway. She informed me that she listened to the tape this morning and the term that was quoted in the brief "murderer" was not used during the hearing. That portion of the motion will be withdrawn. That part of the motion was based on my trial notes as well as a conversation with Mr. Hornsey [the father's counsel] confirming the accuracy of my notes.

In its September 15, 1999, order denying the motion to recuse and finding that appellant violated Rule 11, the trial court stated:

> [Appellant] failed to properly investigate the allegations contained in paragraph two of his Motion; [appellant] could have easily reviewed the transcript of the April 7th hearing before making such a statement. The Court finds that such an inaccurate statement was made in violation of Rule 11 of the Arkansas Rules of Civil Procedure, ...

At the hearing on appellant's motion to reconsider this finding of a violation of Rule 11, appellant was represented by counsel and testified that his trial notes provided: "Judge - client = murder"; that he consulted with James Hornsey, who had been present at the hearing as counsel for the father; that Hornsey confirmed the essential correctness of the trial notes; that appellant then consulted with Professor Howard Brill regarding whether to ask for recusal; that upon learning that the term "murder" was not used by the court, he had retracted the word from his motion at the outset of the hearing for recusal; that the transcript of the hearing subsequently revealed that the judge used the term "killed" rather than "murder"; and that he believed his investigation had been reasonable even though he had not ordered the transcript prior to the hearing on the motion for recusal.

The transcript of the April 7, 1999, review hearing was admitted as an exhibit. It shows the following colloquy:

> THE COURT: Counsel, it's my understanding that Jeffrey came into custody in September of 1998. That his infant brother, Christopher, had been found dead and there was an investigation into the child's death. Ms. Rye, has there been any sort of finding as far as the cause of the child's death?
>
> MS. RYE: Your Honor, it's my understanding that it was ruled accidental and that no charges were brought.
>
> MR. HORNSEY: That's correct.
>
> THE COURT: Accidental? How did this child die?
>
> MS. RYE: He — what the investigators — police investigators determined was that he flipped over the edge of the bathtub and could not lift himself out, is my understanding, at the time.
>
> THE COURT: And he drowned in the bathtub?
>
> MS. RYE: Yes.

. . . .

THE COURT: So, [the mother and the father] were divorced at the time this child — was — was *killed* and died.

MR. VER WEIRE: At the time the child died, Your Honor, yes.

THE COURT: Well, he was *killed* because he drowned. I'm not saying whoever *killed* him, but he was — he died.

(Emphasis added.)

James Hornsey testified about his discussions with appellant concerning the court's reference "to either murder or kill" and that he did not get any sense that appellant was filing the motion to recuse to be vindictive or to forum shop. Moreover, he stated that had he not been relieved as counsel in the case, he probably would have joined appellant in a joint motion.

Howard Brill, a professor at the University of Arkansas School of Law who has written a book entitled *Arkansas Professional Judicial Ethics,* testified that use of the term "killed" rather than "murder" did not change his view that it was proper for appellant to file a motion to recuse; that ordering a transcript would have been helpful, but that he did not think it was essential; that "if the attorney was there, has a strong recollection, confirms it with perhaps other people who were there, that is the equivalent — not the same, but provides some safeguards to support what the attorney has done."

Despite the broad discretion that is afforded to trial courts in determining whether a violation of Rule 11 has occurred, our review of the record in this case convinces us that the trial court abused its discretion in finding such a violation under the circumstances of this case.

For his second and third points of appeal, respectively, appellant contends that the trial court abused its discretion by failing to accord him the benefit of the safe-harbor provision of Rule 11, and that the trial court abused its discretion by failing to recuse at the hearing on reconsideration. It is not necessary for us to address either of these points of appeal inasmuch as we have concluded under the first point that the trial court abused its discretion in finding a Rule 11 violation.

Reversed and dismissed.

KOONCE and MEADS, JJ., agree.

Mark SIMMERSON *v.* STATE of Arkansas

CA CR 99-1277 25 S.W.3d 439

Court of Appeals of Arkansas
Division IV
Opinion delivered September 6, 2000

Baim, Gunti, Mouser, Robinson, & Havner, by: *Greg Robinson* and *Michelle Rollins*, for appellant.

Mark Pryor, Att'y Gen., by: *C. Joseph Cordi, Jr.*, Ass't Att'y Gen., for appellee.

JOHN B. ROBBINS, Chief Judge. The appellant, Mark Simmerson, was charged by information with manslaughter, was convicted of that offense in a jury trial, and was sentenced to a term of five years in prison. As his only issue on appeal, he contends that the trial court erred in denying his motion to dismiss the charge of manslaughter and to substitute for it a charge of negligent homicide. We find no error and affirm.

On the evening of October 30, 1998, appellant was driving a van that was involved in a head-on collision which resulted in the death of a twelve-year-old child, Britteny Kientz, who was a passenger in the other vehicle driven by her father, Rick Kientz. There was testimony that appellant's vehicle had been observed weaving and crossing the center line of the highway prior to the accident and that the accident occurred when appellant crossed the center line and hit the oncoming Kientz vehicle. The result of appellant's blood alcohol test was .19 percent, and in his testimony appellant admitted that he had been drinking with his brother that night and had consumed six to eight beers, or possibly more. He also stated that he had declined his brother's invitation to stay the night with him, choosing instead to drive home.

On appeal, appellant does not argue that the evidence does not support his conviction for manslaughter, which is committed when a person recklessly causes the death of another person. *See* Ark. Code Ann. § 5-10-104(a)(3) (Repl. 1997). Instead, he contends that under these facts the law required him to be charged with negligent homicide and that the trial court erred by not amending the information. Appellant bases this argument on the 1987 amendment to the negligent homicide statute, found at Ark. Code Ann. § 5-10-105(a)(1), which provides:

> (a)(1) A person commits negligent homicide if he negligently causes the death of another person, not constituting murder or manslaughter, as a result of operating a vehicle, an aircraft, or a watercraft:
>
> (A) While intoxicated; or
>
> (B) If at that time there is one-tenth of one percent (0.1%) or more by weight of alcohol in the person's blood as determined by a chemical test of the person's blood, urine, breath or other bodily substance.

He contends that the amendment reflects the legislature's intent that a person responsible for the death of another in an alcohol-related, vehicular accident must exclusively be charged with negligent homicide. We uphold the denial of appellant's motion. We do not agree that the negligent homicide statute precludes a prosecutor from charging the appellant with manslaughter. When we construe a statute, we look first at the plain language of the statute and give the words their plain and ordinary meaning. *Bush v. State*, 338 Ark. 772, 2 S.W.3d 761 (1999). By its plain wording, Ark. Code Ann. § 5-10-105(a)(1) expressly allows for murder or manslaughter charges to arise from a homicide involving the operation of an automobile. We can discern no contrary intent on the part of the legislature.

Because our criminal code allows for a range of charges to address a vehicular homicide, the choice of which charges to file against an accused is a matter entirely within the prosecutor's discretion. *Simpson v. State*, 339 Ark. 467, 6 S.W.3d 104 (1999); *State v. Vasquez-Aerreola*, 327 Ark. 617, 627, 940 S.W.2d 451, 455 (1997). Accordingly, the trial court did not err in refusing to amend the information.

Affirmed.

PITTMAN and CRABTREE, JJ., agree.

Danny MITCHELL *v.*
Kenneth HOUSE and Rhonda House

CA 00-10 26 S.W.3d 586

Court of Appeals of Arkansas
Division IV
Opinion delivered September 6, 2000

John C. Throesch, for appellant.

Castleman Law Firm, by: *Bob Castleman*, for appellees.

JOHN MAUZY PITTMAN, Judge. This case involves an agreement between appellant and appellees concerning certain real property in Randolph County. Appellees, as owners of the property, claim that they entered into a month-to-month lease with appellant in September or October of 1997. When appellant refused to pay rent or vacate the property in April 1999, they filed a unlawful detainer action against him in circuit court. Appellant answered that his agreement with appellees was in fact a lease with a five-year option to purchase, and he counterclaimed for specific performance. Upon his pleading that equitable doctrine, the circuit judge transferred the case to chancery court. Following a hearing, the chancellor awarded appellees $6,000 in damages for unlawful detainer, plus costs and attorney fees. He denied appellant's prayer for specific performance. On appeal, appellant contends that the chancellor's ruling was erroneous and that he was wrongfully deprived of a jury trial. We find no error and affirm.

We first address appellant's argument that he was improperly denied a jury trial on appellees' unlawful detainer action, which is cognizable in circuit court. *See* Ark. Code Ann. § 18-60-306 (1987). The Arkansas Constitution provides that the right of a trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy. Ark. Const. art. 2, § 7. However, the constitutional right to a jury trial does not extend to an equity case. *See Riggin v. Dierdorff*, 302 Ark. 517, 790 S.W.2d 897 (1990). When appellant interposed a claim for specific performance, the circuit court properly transferred the case to equity. It is undisputed that specific performance is an equitable remedy, cognizable only in equity. *Hardy Constr. Co. v.*

Arkansas State Hwy. & Transp. Dep't, 324 Ark. 496, 922 S.W.2d 705 (1996). Once equity acquired jurisdiction for the purpose of deciding the specific-performance issue, the clean-up doctrine allowed it to retain all claims in the action and to grant all relief, legal or equitable, to which the parties were entitled. *See Fox v. Fox*, 68 Ark. App. 281, 7 S.W.3d 339 (1999). Our supreme court has held that application of the clean-up doctrine does not violate Article 2, Section 7, of the Constitution. *See Colclasure v. Kansas City Life Ins. Co.*, 290 Ark. 585, 720 S.W.2d 916 (1986), *cert. denied*, 481 U.S. 1069 (1987). Thus, the chancery court had jurisdiction, and appellant's argument concerning his right to a jury trial is without merit. *See Priddy v. Mayer Aviation, Inc.*, 260 Ark. 3, 537 S.W.2d 370 (1976).[1]

Appellant's other argument is that the trial court erred in finding that no lease-with-an-option-to-purchase contract existed between him and appellees, thus denying him the remedy of specific performance. Chancery cases are reviewed *de novo* on appeal. *Tolson v. Dunn*, 48 Ark. App. 219, 893 S.W.2d 354 (1995). We will not disturb a chancellor's findings of fact unless they are clearly erroneous. *See id.* Specific performance is an equitable remedy which compels performance of a contract on the precise terms agreed upon by the parties. *Dossey v. Hanover, Inc.*, 48 Ark. App. 108, 891 S.W.2d 67 (1995). Because it is an equitable remedy, courts of equity are allowed some latitude in granting or withholding that relief, depending upon the equities of a particular case. *Id.* Whether or not specific performance should be awarded in a particular case is a question of fact for the chancellor. *Id.*

Appellant claims that, in approximately August 1997, he approached appellees about leasing their property with an option to purchase it. According to him, appellees agreed to such an arrangement. Appellant had his attorney draft a lease-with-option-to-purchase contract, but the contract was never executed. However, for the next eighteen months, appellant drafted a monthly check to appellees and made notations in the memo portions of the checks which he says indicated that payment was being made for a lease/purchase option. The notations included "LOP," "LOP Payment,"

[1] Appellant does not contend that Ark. Code Ann. § 18-60-308 (1987), which prohibits adjudication of title to the premises in unlawful detainer actions, has any application to his argument.

and "Lease/Purchase Payment." He argues on appeal that the unexecuted contract constitutes an offer on a lease/purchase agreement and that appellees, by accepting the checks, accepted his offer. *See Childs v. Adams*, 322 Ark. 424, 909 S.W.2d 641 (1995), holding that a party's manifestation of assent to a contract may be made wholly by spoken words or conduct. However, appellee Kenneth House testified to a different version of events. According to House, he never spoke with appellee regarding an option to purchase, and he never saw a copy of the unexecuted contract. Further, there is evidence that the memo sections of at least eight of appellant's checks were altered after the checks were canceled and returned to him. Bank records revealed that three of the four checks introduced at trial as bearing the notation "Lease/Purchase Payment" had no writing on them at the time appellant's bank photocopied them. The fourth check was unreadable on the bank's microfilm. Other checks that purportedly bore notations in the memo section either had blank memo sections at the time they were photocopied by the bank or merely bore the term "LOP" to which the word "Payment" was later added. Such evidence has a direct bearing on appellant's credibility, and we defer to the chancellor's superior position to assess credibility. *Tolson v. Dunn, supra.*

In light of the abovementioned facts, we cannot say that the chancellor's decision in this case was clearly erroneous. The evidence was in conflict, and we have recognized that the chancellor may exercise his prerogative as trier of fact to resolve conflicts in testimony in favor of one party. *See Belcher v. Stone*, 67 Ark. App. 256, 998 S.W.2d 759 (1999).

Affirmed.

JENNINGS and CRABTREE, JJ., agree.

Phil G. SMITH *v.* Charles O. CAMPBELL
and Charles K. Childs

CA 99-1314 26 S.W.3d 139

Court of Appeals of Arkansas
Division III
Opinion delivered September 6, 2000
[Petition for rehearing denied October 11, 2000.]

Chet Dunlap, for appellant.

Henry S. Wilson, for appellees.

JOSEPHINE LINKER HART, Judge. Appellant, Phil G. Smith, appeals the trial court's award of summary judgment in an unlawful detainer action and the denial of his motion to remove appellees' attorney. Appellant argues that the trial court erred by determining that there were no genuine issues of fact regarding whether a landlord-tenant relationship existed and that appellees

had title to the property and a consequent right to a reversionary interest in the property. Appellant also argues that it was error for the trial court to hold inapplicable his affirmative defenses based on the statute of frauds and statute of limitations. Further, appellant argues that the trial court erred by ruling that appellees' attorney, a retired judge who served, on occasion, as a special judge, did not violate the Arkansas Rules of Judicial Conduct by representing appellees.

Appellees' complaint for unlawful detainer sought both damages and possession of the real property.[1] Appellees claimed that they rented the property to appellant on a year-to-year tenancy, and appellant, in compliance with the rental agreement, paid rent in 1987 and 1991 through 1994. Thereafter, appellant refused to pay further rent or vacate the property despite notice for him to do so.

In response, appellant filed both an objection to appellees' notice of intention to issue a writ of possession and an answer that alleged appellees were not the true owners of the property and that raised the affirmative defenses of statute of frauds and statute of limitations. Also, appellant counterclaimed and prayed for damages equal to the amount of rent he had paid appellees. Appellees denied appellant's allegations and moved to strike appellant's objection.

After a hearing, the trial court granted the writ of possession and struck from appellant's pleadings the allegations of fraud and the pleading denying appellees' ownership and asserting third-party ownership of the property in dispute. Pending final adjudication, the court order provided that appellant could retain possession of the disputed property by posting a $3,000.00 bond.

Appellant posted the bond, and appellees filed a motion for summary judgment. Appellant's response to that motion asserted that appellees had failed to prove a landlord-tenant relationship existed between the parties and again raised the defenses of statute of frauds and statute of limitations. Appellant admitted in his supporting affidavit that in 1987 and from 1991 to 1994 he made payments to appellees, however, in the winter of 1994 or spring of

[1] Prior to final adjudication, Campbell died and the trial court appointed Childs as special administrator and substituted him for the deceased.

1995, he was told by the manager of the drainage district that the property on which the boathouse was located was owned by the drainage district and, thereafter, he paid no additional rent. Initially, the trial court agreed with appellant and denied appellees' motion. However, prior to trial, the court, relying heavily on *Denton v. Denton*, 209 Ark. 301, 190 S.W.2d 291 (1945), reconsidered, and in a letter opinion granted appellees' motion, finding that appellant could not dispute appellees' title without first surrendering possession.

I. Summary Judgment

On appeal, the standard of review of a summary judgment is oft-stated and well-settled. Recently our supreme court stated in *Welch Foods, Inc. v. Chicago Title Ins. Co.*, 341 Ark. 515, 518, 17 S.W.3d 467, 469 (2000):

> Our review of a trial court's summary judgment focuses on whether the evidence presented by the movant left a material question of fact unanswered. *Mashburn v. Meeker Sharkey Financial Group, Inc.*, 339 Ark. 411, 5 S.W.3d 469 (1999). The moving party bears the burden of sustaining the motion, and the proof submitted is viewed in a light most favorable to the party resisting the motion. Once the moving party establishes a prima facie entitlement to summary judgment by affidavits or other supporting documents or depositions, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Flentje v. First National Bank of Wynne*, 340 Ark. 563, 11 S.W.3d 531 (2000).

See also Ark. R. Civ. P. 56.

In our view, the trial court properly relied on *Denton* in awarding summary judgment. In *Denton*, the parties entered into a written rental agreement for certain real property. Thereafter, the landlord sent the tenants a notice to vacate. After the tenants refused to vacate, the landlord then filed an unlawful detainer action against the tenants. The tenants counterclaimed and questioned the landlord's title to the disputed property. A trial resulted in a verdict for the tenants based on their counterclaim. The supreme court reversed and stated that "[a] tenant cannot dispute the title of his landlord while he remains in possession under him, nor acquire possession from the landlord by lease and then dispute his title, but

must first surrender possession and bring his action." *Denton*, 209 Ark. at 303, 190 S.W.2d at 292 (quoting *Dunlap v. Moose*, 98 Ark. 235, 135 S.W. 824 (1911)).

Appellant fails to offer a reason as to why this case is significantly distinguishable from *Denton* or how the law since *Denton* has materially changed. We are, therefore, disposed to apply the rule as stated in *Denton* that appellant must surrender the subject property prior to contesting appellees' title to the property.

Appellant argues there is a genuine issue of material fact as to whether there was a landlord-tenant relationship between himself and appellees. He argues that reasonable people could differ as to whether appellees proved two of the common-law elements of such a relationship, specifically that:

> (2) The occupancy of the tenant must be in subordination to the rights of the landlord, and a reversionary interest must remain in the landlord.
>
> (3) There must be a transmission of the estate to the tenant, and he must gain possession of the demised premises.

Gray v. Davis, 270 Ark. 917, 921, 606 S.W.2d 607, 610 (1980) (citing *Love v. Cahn*, 93 Ark. 215, 124 S.W. 259 (1909)). The fallacy with this argument is that the fundamental factual matter upon which these elements are based is whether a landlord has title. As stated, appellant is unable to dispute the appellees' title because he has retained possession of the premises.

In addition, we disagree with appellant that the statute of frauds is a valid defense in this case. Appellant failed to present proof to counter appellees' proof that evidences a landlord-tenant relationship between the parties based on an oral lease agreement that created a year-to-year periodic tenancy. In fact, this conclusion is strengthened by appellant's remarks in both his pleadings and testimony that the payments made in 1987 and from 1991 to 1994 were rental payments. In addition, for such a lease to violate the statute of frauds, it must be for "a longer term than one (1) year . . . " Ark. Code Ann. § 4-59-101(a)(5) (Repl. 1996). A year-to-year periodic tenancy, however, does not violate that provision of the statute of frauds. Although it is possible that a periodic tenancy can violate the statute of frauds, "[v]irtually all periodic tenancies,

however, designate an initial period of one year or less and thus fit within the exception permitting oral leases of one year or less." David A. Thomas, *Thompson on Real Property* § 39.06(a)(4) (Thomas ed. 1994).

Finally, we do not agree with appellant's argument that the trial court erred by refusing to apply the statute of limitations. The three-year statute of limitations provided in Ark. Code Ann. § 18-61-104 (1987), "does not begin to run until the cessation of a tenancy." *Sanders v. Hall*, 172 Ark. 1177, 288 S.W. 914, 915 (1926). Viewing the evidence in a light most favorable to appellant, the earliest cessation of the tenancy occurred in 1995. The uncontested proof is that he paid rent for the 1994-1995 period. Accordingly, the unlawful detainer claim, which was filed in 1997, did not violate the aforementioned statute of limitations.

II. Removal of Appellees' Attorney

Appellant next contends that the trial court erred by denying his motion to disqualify appellees' counsel. He argues that appellees' counsel should be disqualified because he is a former judge and serves from time-to-time as a special judge pursuant to Ark. Const. amend. 77.

Unless it can be demonstrated that the court abused its discretion, we will affirm a trial court's order that denies a motion to disqualify an attorney. *See SEECO, Inc. v. Hales*, 334 Ark. 134, 137, 969 S.W.2d 193, 195 (1998) (citing *Berry v. Saline Memorial Hosp.*, 322 Ark. 182, 907 S.W.2d 736 (1995)). Furthermore, "[a]n abuse of discretion may be manifested by an erroneous interpretation of the law." *Id.* (citing *Steward v. McDonald*, 330 Ark. 837, 958 S.W.2d 297 (1997); *Ford Motor Co. v. Nuckolls*, 320 Ark. 15, 894 S.W.2d 897 (1995)).

Although not designed for the purpose of disqualifying an attorney from a case, the Model Rules of Professional Conduct have been used "to determine whether an attorney should be disqualified because of a conflict of interest." *Norman v. Norman*, 333 Ark. 644, 651, 970 S.W.2d 270, 272 (1998). Under the Model Rules, "a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer. . . ." Model Rules of Professional Conduct 1.12(a).

In this case, there is no allegation that appellees' attorney violated the aforementioned Rule. Accordingly, we conclude that the trial court did not abuse its discretion and affirm on this issue.

Affirmed.

MEADS and ROAF, JJ., agree.

Leo CHAVEZ *v.* STATE of Arkansas

CA 99-1373 25 S.W.3d 431

Court of Appeals of Arkansas
Division I
Opinion delivered September 6, 2000

Douglas R. Coppernoll, for appellant.

Mark Pryor, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.

SAM BIRD, Judge. Appellant Leo Chavez, who was born October 9, 1984, was adjudicated delinquent on July 13, 1999, for possession of an instrument of a crime and for failure to appear, and placed on probation. On August 16, 1999, he was arrested, arraigned, and pled not guilty to residential burglary, sexual abuse in the first degree, battery in the second degree, and assault in the second degree.

After holding that Chavez was in violation of his probation, the court, on its own motion, set a hearing to consider whether to transfer Chavez's case to circuit court. The hearing on the motion to transfer took place on September 8, 1999. Over objections of the State and Chavez, the judge transferred the case to circuit court. Chavez brings this appeal, and the State agrees that reversible error was committed because the juvenile court does not have authority to *sua sponte* transfer the case to circuit court. Therefore, we reverse the judge's decision to transfer this case to the Washington County Circuit Court.

Arkansas Code Annotated section 9-27-318 (Supp. 1999) governs when a juvenile case may be transferred to circuit court. This section reads, in part:

> (a) A juvenile court has exclusive jurisdiction when a delinquency case involves a juvenile:
>
> (1) Fifteen (15) years of age or younger when the alleged delinquent act occurred, except as provided by subdivision (c)(2) of this section;
>
> ....
>
> (b) The state may file a motion in juvenile court to transfer a case to circuit court or designate a case as an extended juvenile jurisdiction offender case when a case involves a juvenile:
>
> (1) Fourteen (14) or fifteen (15) years old when he engages in conduct that if committed by an adult, would be:
>
> ....
>
> (B) Battery in the second degree in violation of § 5-13-202(a)(2), (3), or (4);

....

(2) At least fourteen (14) years old when he engages in conduct that constitutes a felony under § 5-73-119(a)(1)(A); or

(3) At least fourteen (14) years old when he engages in conduct that, if committed by an adult, constitutes a felony and who has, within the preceding two (2) years, three (3) times been adjudicated as a delinquent juvenile for acts that would have constituted felonies if they had been committed by an adult.

(c) A circuit court and a juvenile court have concurrent jurisdiction and a prosecuting attorney may charge a juvenile in either court when a case involved a juvenile:

....

(2) Fourteen (14) or fifteen (15) years old when he engages in conduct that, if committed by an adult would be:

(A) Capital murder, § 5-10-101;
(B) Murder in the first degree, § 5-10-102;
(C) Kidnapping, § 5-11-102;
(D) Aggravated robbery, § 5-12-103;
(E) Rape, § 5-14-103;
(F) Battery in the first degree, § 5-13-201;
(G) Terroristic act, § 5-13-310.

....

(h) Upon a finding by clear and convincing evidence that a juvenile should be tried as an adult, the court shall enter an order to that effect.

(i) Upon a finding by the circuit court that a juvenile age fourteen (14) or fifteen (15) and charged with the crimes in subdivision (c)(2) of this section should be transferred to juvenile court, the circuit court shall enter an order to transfer as an extended juvenile jurisdiction case.

(j) If a juvenile age fourteen (14) or fifteen (15) is found guilty in circuit court for an offense other than the offense listed in subsection (b) or subdivision (c)(2) of this section, the circuit court shall transfer the case to juvenile court for the court to enter a juvenile disposition.

....

Subsection (a) clearly states that a juvenile court has exclusive jurisdiction when a delinquency case is filed. While there are exceptions to this broad rule, none of them are applicable here;

therefore, the circuit court does not have jurisdiction over the juvenile in this case.

Chavez was fourteen years old at the time of the filing of the delinquency petition on the charges of residential burglary, sexual abuse in the first degree, battery in the first degree and assault in the second degree.

Subsection (b)(1) provides that the State may file a motion to transfer the case to circuit court when the juvenile has committed certain crimes, including battery in the second degree. Here, the State did not file a motion to transfer, but the court held a hearing on its own motion, at which time the State asked the court not to transfer the case.

Subsection (b)(2) is not applicable because it provides that transfer is appropriate only if the juvenile is fourteen years old when he engages in conduct that constitutes a felony under § 5-73-119(a)(1)(A). That section prohibits persons in this state under the age of eighteen to possess a handgun. Chavez was not charged with possession of a handgun.

Subsection (c)(1) provides for concurrent jurisdiction of a juvenile court and circuit court if the juvenile is sixteen years old at the time he engages in conduct that, if committed by an adult, would be a felony. Under (c)(2), the circuit and juvenile courts have concurrent jurisdiction if the person is fourteen or fifteen years old and engages in certain crimes. Chavez was neither sixteen years old when he was charged, nor was he charged with any of the specified crimes. Therefore, neither of these two sections is applicable.

Because there is no basis for the circuit court to exercise jurisdiction over Chavez, he is subject exclusively to the jurisdiction of juvenile court, and the juvenile court erred in transferring his case to circuit court.

Reversed.

GRIFFEN and NEAL, JJ., agree.

Lee D. JABLONSKI *v.* Patricia A. JABLONSKI

CA 99-1089 25 S.W.3d 433

Court of Appeals of Arkansas
Division III
Opinion delivered September 6, 2000

Kenneth G. Fuchs, for appellant.

Brazil, Adlong & Winningham, PLC, by: *Caroline L. Winningham*, for appellee.

ANDREE LAYTON ROAF, Judge. Lee D. Jablonski appeals the portion of a Faulkner County Chancery Court divorce decree that divided real and personal property and awarded to his ex-wife, appellee Patricia A. Jablonski, her attorney fees. On appeal, Lee argues that the chancellor erred in finding some items to be marital property and in the apportionment of other items. He also challenges the award of attorney fees to Patricia. We affirm the property division as modified and reverse the award of attorney fees.

Patricia and Lee were married on July 9, 1966, when they were twenty-two and thirty-three, respectively. On January 17, 1997, Patricia petitioned for divorce, alleging general indignities. On July 16, 1998, the date of the final hearing, Patricia filed an amended petition, alleging that the parties had lived separate and apart since December 1, 1996. Ultimately the divorce was granted on the grounds alleged in the amended petition. At the time that Patricia filed for divorce, Lee had retired from the Union Pacific Railroad and was drawing a $1,900 per month pension. Patricia was employed as a nurse and had a monthly salary of approximately $4,000. Prior to his marriage, Lee inherited his father's home in Grand Island, Nebraska. In 1974, his mother died, leaving him more than $440,000. According to Lee, he lost approximately $80,000 in commodity trading and approximately $20,000 on

Union Pacific stock. However, he had more than $100,000 in a credit union account and a similar amount in Northwest Bank, in addition to "other monies" held by American Charter. Lee stated that he used some of the money to pay for the marital home, various cars, and his children's education, but that approximately $202,000 held in an ITT Hartford annuity and various mutual funds, was directly traceable to the inheritance. These accounts were solely in Lee's name as of the filing of Patricia's divorce petition. Although he admitted that at one time he placed Patricia's name on some accounts that contained the inheritance money, Lee claimed he did so when he was traveling with the railroad and worried that something might happen to him. Lee also testified that after he and Patricia had been married for approximately seven years, they kept their own checking accounts in which they kept the earnings from their employment separate. Furthermore, Lee stated that Patricia never touched "his money" until 1993, when she withdrew $1,750 from his checking account and put it into her checking account. At that point, he "got scared" and had her name taken off his accounts. Although that action nearly caused the Jablonskis to divorce in 1993, they reconciled.

Patricia confirmed that both she and Lee maintained separate accounts in which they deposited their earnings, and she stated that they would each be responsible for different family expenditures. She testified that she used "my money" to take care of "household matters, kids' clothes, foods, any of their activities and things, [and] doctors' bills," and that it was her decision to do so. She stated that while for the first seven years of their marriage she gave Lee her check and he gave her money for household expenses, she "finally decided that one of us needed to be happy and it was going to be me. So I kept my check, and that's when I continued then, you know, to — to buy things, and, uh, for the kids, and took care of day-to-day type expenses." Patricia stated that Lee paid for the house payment and utility bills. Nonetheless, she disputed the fact that Lee did not intermingle his inheritance. She claimed that it was deposited in a joint account at the Crossroads Bank in Omaha, Nebraska, and that her name was on his investments. However, she only recently became "aware" of his annuity and the other accounts. She recalled going to the bank to take her name off the accounts in 1993, but "found out later that actually he had changed my name — or take — either taken my name off the account, or in some way changed it so that I was no longer the survivor." She

stated that she no longer had "right of survivorship" on the accounts after that. Patricia also admitted that she did not know "the specific accounts" that Lee had over the years and essentially inferred that her name was on the accounts because Lee told her that he was investing for their retirement. She refused to say that she had not seen her name on the accounts, but she could not specifically recall doing so. Patricia also conceded that the accounts contained Lee's inheritance, but she thought that they also may have contained the proceeds from both their paychecks. Regarding her own inheritances, she stated that she always kept them separate from marital funds.

Lee also attempted to trace the money from his inheritance into the marital home, asserting that the $50,000 down payment came from property that he had inherited in Nebraska and that $17,000 worth of improvements including the addition of a family room, a new roof, and vinyl siding came from his own funds. However, the house was titled in both Lee's and Patricia's names, and Patricia testified that she contributed her paycheck for family expenses.

Regarding a 1968 Ford Mustang Convertible, a 1976 Cadillac Seville, a 1985 Corvette, and a 1986 Toyota truck, Lee claimed that he bought them all from his "savings." However, he was unable to state conclusively that all the money for the vehicles came solely from his inheritance, and essentially admitted at least a portion of the money came from money he had earned during the course of the marriage.

Also at issue was a boat and trailer that was titled in both Lee's and Patricia's names. Lee testified that $6,000 of the $7,200 purchase price came from a settlement he received in a hearing-loss case. However, he admitted that the remainder came from funds that could have been from his marital employment as well as his inheritance.

The last piece of disputed property that is the subject of this appeal is a 16-gauge shot gun. Lee claimed that the gun was forty years old and that he acquired it before the marriage. In her testimony, Patricia did not dispute that the shotgun was nonmarital property.

The chancellor found that Lee had "failed to trace nonmarital funds, namely his inheritance," into the disputed assets, and she

declared it all to be marital property. The chancellor, however, found that Patricia's inheritances had not been intermingled and were nonmarital property. She also found that the case "has gone on a year longer than necessary based on [Lee's] behavior," and awarded Patricia her attorney fees.

Lee first argues that the trial court erred in finding that all of the mutual fund accounts, the ITT Hartford account, the guns, the cars, the boat, and house were marital property. He concedes that he placed Patricia's name on the disputed accounts as a "beneficiary," but, citing *Cole v. Cole*, 53 Ark. App. 140, 920 S.W.2d 32 (1996), he urges this court to find significant the fact that he took her name off those accounts in 1993, and she never requested to have it placed back on. He also notes that Patricia testified that she had no idea how much money was in the accounts and asserts that Lee had total control over the money. Regarding the automobiles that were acquired during the marriage, Lee concedes that the Cadillac and Corvette were purchased with intermingled funds, but claims that the Toyota pickup and 1968 Mustang were bought with money exclusively from his inheritance. As to ownership of the boat, Lee claims that $6,000 came from a settlement he got for job-related hearing impairment, and the balance came from his inheritance. Regarding the 16-gauge shotgun, Lee asserts that it was purchased prior to the marriage and should have been found to be nonmarital property. Finally, he argues that the chancellor erred in failing to order a $67,000 set-off for the money he "sank" into the house. We only find merit in Lee's argument concerning the 16-gauge shotgun.

■ With respect to the division of property in a divorce case, we review the chancellor's findings of fact and affirm them unless they are clearly erroneous, or against the preponderance of the evidence. *Thomas v. Thomas*, 68 Ark. App. 196, 4 S.W.3d 517 (1999).

■ First, regarding the 16-gauge shotgun, Lee clearly testified that it was purchased prior to the marriage, and his testimony was not controverted by Patricia. Accordingly, we hold that the chancellor's finding that the shotgun was marital property is clearly against the preponderance of the evidence, and we modify the property division to award the shotgun to Lee as nonmarital property.

We next consider the money that Lee inherited from his mother and subsequently deposited in various accounts. The testimony of both Lee and Patricia indicates that at least at one time, it was held in a joint account. Lee's testimony also indicated that he intermingled his marital earnings with his inheritance. Once property is placed in the names of both husband and wife without specifying the manner in which they take, such property is presumed to be held by them as tenants by the entirety. *Creson v. Creson*, 53 Ark. App. 41, 917 S.W.2d 553 (1996). In order to rebut this presumption, the party claiming the property as separate property must present clear and convincing evidence that there was no intent to make a gift of the property to the spouse. *Mathis v. Mathis*, 52 Ark. App. 155, 916 S.W.2d 131 (1996). Clear and convincing evidence is evidence by a credible witness whose memory of the facts about which he testifies is distinct, whose narration of the details is exact and in due order, and whose testimony is so direct, weighty, and convincing as to enable the fact-finder to come to a clear conviction, without hesitation, of the truth of the facts related. *McLain v. McLain*, 36 Ark. App. 197, 820 S.W.2d 295 (1991). On review, the issue is whether the chancellor's finding that the appellee overcame the presumption that these items were held by the entirety by clear and convincing evidence is against a preponderance of the evidence. *Id.*

We hold that because the funds in question were placed in a joint account, Lee was obliged to present clear and convincing evidence to enable the chancellor to trace his inheritance. *Mathis v. Mathis, supra.* This, he simply failed to do. Conspicuous by its absence in this case was the will or other probate documents establishing how much money Lee actually inherited and a comprehensive set of bank records showing deposits and withdrawals as well as the names on the accounts. For the most part, the chancellor had only Lee's testimony, which not only was disputed by Patricia in several key respects, but also lacked the precision and clarity required to constitute clear and convincing evidence. Accordingly, we cannot conclude that the chancellor was clearly erroneous in finding that Lee failed to meet his burden in establishing his ownership of the money in the accounts that he controlled.

Similarly, regarding the boat, while it may be true that Lee received a $6,000 settlement for his hearing impairment, he did title the boat as tenancy by the entirety property, and he admitted that he used some of his earnings from the marriage to make up the

rest of the purchase price. Under these circumstances, we cannot say that the chancellor erred in finding that Lee failed to overcome the presumption that he intended to make the boat a gift to his family. We also cannot conclude that the chancellor erred in finding that the Mustang and the Toyota are marital property. Lee testified that he bought the Mustang in "'70 sometime." His mother did not pass away until 1973, and, according to his own testimony, the inheritance that he received from his father was tied up in real estate at the time. Accordingly, the Mustang had to have come from marital funds. While the Toyota pick-up is a closer case, we note that in his testimony, Lee only specified that he purchased it from his "savings," which he acknowledged contained both marital and nonmarital funds. No evidence was provided as to when the truck was purchased, from which bank account the purchase money was drawn, and the source of the funds contained in the account. Again, we cannot conclude that the chancellor was clearly erroneous in finding that Lee had failed to prove that the Toyota was nonmarital property.

Finally, regarding the marital home, not only was it titled as tenancy by the entirety, Lee testified that he regarded it as his duty as a husband and father to provide for his family. Totally absent was any formal or informal agreement to treat Lee's contribution as anything other than a gift to his family. *Cf. Dennis v. Dennis*, 70 Ark. App. 13, 13 S.W.3d 909 (2000). Accordingly, we cannot conclude that the chancellor erred in awarding Lee only half the proceeds of the sale of the marital home.

Lee next argues that the trial court erred in awarding fees because, pursuant to the plain language of Ark. Code Ann. § 9-12-309(a) (Repl. 1998) fees are only allowable "during the pendency" of the divorce, and thus, the statute was not followed. He also contends that the chancellor's finding that Lee was responsible for fees because the divorce case took "longer than necessary" was clearly erroneous, because the grounds on which the divorce was granted were that the parties lived separate and apart for eighteen months, and the eighteen-month period had not elapsed until the month of the final hearing. Finally, citing *Price v. Price*, 29 Ark. App. 212, 780 S.W.2d 342 (1989), he argues that the chancellor erred by failing to consider the relative financial position of the parties in that he was retired and living on a pension of less than $23,000 per year while Patricia was still employed and was earning

more than twice that much. We find the latter portion of Lee's argument persuasive.

A chancellor has considerable discretion to award attorney's fees in a divorce case. *Gavin v. Gavin*, 319 Ark. 270, 272, 890 S.W.2d 592 (1995). However, in determining whether to award attorney's fees, the chancellor must consider the relative financial abilities of the parties. *Anderson v. Anderson,* 60 Ark. App. 221, 963 S.W.2d 604 (1998); *Paulson v. Paulson,* 8 Ark. App. 306, 652 S.W.2d 46 (1983); *see also Lee v. Lee,* 12 Ark. App. 226, 674 S.W.2d 505 (1984).

This case involved a marriage of more than thirty years and complex property-division issues. The record also indicates that the chancellor herself had a crowded docket that complicated timely scheduling of ample hearing time to address all of the property-division issues. We also note that the grounds upon which the divorce was granted, eighteen months' separation of the parties, had not accrued until just days before the final hearing. Furthermore, the chancellor awarded each party an equal share of the marital property despite the fact that Lee was retired and was living on a pension that was less than half of Patricia's income. Accordingly, Patricia was clearly in a better financial position to bear the costs of this litigation than Lee. We therefore hold that the chancellor abused her discretion in awarding Patricia her attorney fees.

We are not unmindful that the chancellor blamed Lee for the relatively long time that it took to resolve this matter and found Lee in willful contempt of its orders. However, the chancellor made an express finding that the award of fees was not for the contempt and that Lee had been sufficiently punished by twice being incarcerated.

Affirmed as modified in part and reversed in part.

HART and MEADS, JJ., agree.

Makybe Shinda HARSHAW *v.* STATE of Arkansas

CA CR 99-1421 25 S.W.3d 440

Court of Appeals of Arkansas
Division II
Opinion delivered September 13, 2000

[redacted]

William R. Simpson, Jr., Public Defender, by: *Deborah R. Sallings*, Deputy Public Defender, for appellant.

Mark Pryor, Att'y Gen., by: *Leslie Plowman Fisken*, Ass't Att'y Gen., for appellee.

JOHN B. ROBBINS, Chief Judge. Appellant Makybe Shinda Harshaw was charged with and convicted of second-degree murder for the shooting death of Casey Cunningham. His conviction resulted in a twenty-year prison sentence. On appeal, appellant argues that the trial court erred in not instructing the jury on the lesser-included offense of manslaughter and that this constitutes reversible error. We agree and reverse and remand for a new trial.

When there is a rational basis for a verdict acquitting a defendant of the offense charged and convicting him of an offense included in the offense charged, an instruction on the lesser-included offense should be given, and it is reversible error to fail to give such an instruction when warranted. *Rainey v. State*, 310 Ark. 419, 837 S.W.2d 453 (1992). An instruction on a lesser-included offense should be given if it is supported by the slightest evidence. *Kail v. State*, 341 Ark. 89, 14 S.W.3d 878 (2000). However, we will affirm a trial court's decision to exclude instructions on a lesser-included offense if there is no rational basis for giving the instruction. *Id.; see also Cobb v. State*, 340 Ark. 240, 12 S.W.3d 195 (2000). "No right has been more zealously protected by this Court than the right of an accused to have the jury instructed on lesser-included offenses." *Rainey v. State*, 310 Ark. at 424, 837 S.W.2d at 456. This is so no matter how strongly the trial judge feels that the evidence weighs in favor of a finding of guilty on the more serious charge. *Robinson v. State*, 269 Ark. 90, 598 S.W.2d 421 (1980).

The evidence presented in this case indicated that appellant played cards and drank beer with his friends on the night of July 8, 1998. The gathering was at a friend's house in southwest Little Rock. Though appellant left to drive a friend home at one point, he returned to see Cunningham arguing with another one of his friends, a woman, outside the residence. The woman was the mother of Cunningham's child. At one point during the confrontation, Cunningham pointed his finger directly into her face. Appel-

lant approached, stating that the two did not need to be fighting, to which Cunningham took offense. Cunningham indicated that appellant should stay out of his business. Cunningham then stated, "If I got a problem, I just boom-boom-boom, like that," insinuating that if there were a problem, Cunningham would settle it with a gun. Thereafter, appellant and Cunningham walked to their respective cars. Appellant retrieved a shotgun from the trunk of his car; Cunningham stood by the driver's side door of his car and reached down into the car through the open window. As Cunningham came back up from reaching into the car, appellant shot him in the chest. Appellant testified that he was afraid of Cunningham because he was acting and talking "crazy" and that he thought Cunningham was about to shoot him. Appellant ran from the scene but was apprehended by the police several blocks away. After the presentation of the evidence in this case, the trial court instructed the jury on second-degree murder and justification. Second-degree murder in this context required proof that the accused knowingly caused the death of a person under circumstances manifesting extreme indifference to the value of human life. Ark. Code Ann. § 5-10-103(a)(1) (Repl. 1997). Appellant proffered a jury instruction that would have permitted the jury to find appellant guilty of manslaughter, and a further instruction containing the definition of manslaughter from Ark. Code Ann. § 5-10-104(a)(3), i.e., whether appellant "recklessly caused the death" of Cunningham. Appellant's counsel urged the trial court to consider that although appellant believed he was justified in the use of deadly force, there nevertheless was evidence from which the jury could conclude that he formed this belief recklessly, meaning that he may have acted too hastily in deciding to shoot Cunningham. The trial court refused appellant's proffered manslaughter instructions. The trial court reasoned that appellant asserted self-defense and therefore intended to shoot Cunningham; thus, knowing intent coupled with a justification defense was inconsistent with reckless intent.

■ Appellant concedes that justification is not a defense to manslaughter. *See* Ark. Code Ann. § 5-2-614(a)(1997). This is an accurate statement of the law. However, we agree with appellant that asserting self-defense to second-degree murder did not preclude the jury from considering manslaughter because there was at least the "slightest evidence" to support a conviction on this lesser

offense. *See, e.g., Martin v. State*, 290 Ark. 293, 718 S.W.2d 938 (1986).

This case is significantly similar to the case of *Williams v. State*, 17 Ark. App. 53, 702 S.W.2d 825 (1986). In that case, appellant James Charles Williams was charged with the first-degree murder of his brother and was convicted of second-degree murder by a jury in Pulaski County Circuit Court. The only issue on appeal was whether the trial court committed reversible error by refusing to instruct the jury on the lesser-included offense of manslaughter. The supreme court held that it did and reversed and remanded for retrial.

The evidence indicated that appellant Williams, his brother, and two other men were playing cards one night when an argument arose when Williams' brother suspected Williams was cheating. The testimony from the two other men present at the game tended to establish that Williams pulled a knife on his brother first and that the brother defended himself with a chair. In contrast, Williams testified that his brother scooted away from the table quickly as the argument ensued, that Williams did not know what was going on, that his brother grabbed a chair and scooted back, that Williams went into his pocket to get a knife, that before he could retrieve the knife his brother struck him on the shoulder with the chair, and that then Williams started to swing the knife. Upon seeing blood coming from his brother, Williams got scared and ran, though he testified that he observed his brother still standing with the chair in his hands as he left. Williams testified that he did not mean to kill his brother and that everything happened very fast. The autopsy demonstrated that the victim died as a result of five stab wounds.

Our court concluded that Williams was entitled to a new trial because there was evidence presented upon which the jury might have found that he recklessly caused the death of his brother. We determined that, though unlikely, the jury could have believed Williams' version of events and found that the requisite criminal intent was lacking for any greater offense. It is the jury's sole prerogative to evaluate the conflicting evidence and to draw its own inferences. *Id.*

The State argues that this case is more aligned with *Cobb v. State, supra*, where the trial court was affirmed for refusing to give a

manslaughter instruction. We disagree because in that case, Cobb admitted to shooting an unarmed victim once in the back causing paralysis and then a second time while the victim was incapable of moving or causing harm to Cobb. There the justification defense was inconsistent with "recklessly causing" death. No rational basis existed there because there was no real or imagined threat, a scenario inconsistent with the evidence presented by the appellant before us today.

"[W]here a jury believes that the defendant shot under the belief that he was about to be assaulted, but that he acted too hastily and without due care, and was therefore not justified in taking life under the circumstances, he is guilty of manslaughter." *Bruder v. State*, 110 Ark. 402, 415, 161 S.W.2d 146 (1913). In the case before us now, all of the witnesses who were present that night took Cunningham's remarks to mean that he would shoot a gun to end any problem, and they all saw Cunningham thereafter reach for something in his car. The trial court committed reversible error by failing to give the proffered manslaughter instruction.

Reversed and remanded.

CRABTREE and MEADS, JJ., agree.

Joseph L. PERRY, Jr. *v.* LEE COUNTY

CA 99-1045 25 S.W.3d 443

Court of Appeals of Arkansas
Division I
Opinion delivered September 13, 2000

Appellant, pro se.

No response.

JOSEPHINE LINKER HART, Judge. Six landowners filed a petition in the Lee County Court seeking to vacate a county road. Appellant, Joseph L. Perry, Jr., and several others, objected to the petition. The county court entered an order vacating the road on May 28, 1998. Appellant filed on November 25, 1998, a notice of appeal in the Lee County Court and filed on December 8, 1998, a notice of appeal in the circuit court. Appellant appealed from the

county court to the circuit court pursuant to two statutes, specifically Ark. Code Ann. § 16-67-201(a) (1987) [1] and Ark. Code Ann. § 14-298-116(a) (1987)[2] Arguing before the circuit court, appellant noted that only six freeholders signed the petition to vacate the county road, while the statute specifically required that ten freeholders sign the petition. *See* Ark. Code Ann. § 14-298-103(a) (1987)[3] and Ark. Code Ann. § 14-298-117(a) (1987).[4] The circuit court ruled that appellant's appeal to the circuit court was untimely. The court further ruled that the county court properly vacated the road pursuant to Ark. Code Ann. §§ 14-18-105 to -109 (Repl. 1998). We reverse and dismiss.

We disagree with the circuit court's conclusion that Ark. Code Ann. §§ 14-18-105 to -109 (Repl. 1998), apply to the facts of this case. The question presented to the county and circuit courts involved the vacation of a county road, a procedure which is specifically governed by Ark. Code Ann. § 14-298-103 (1987), and

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[1] The section provides:

> Appeals shall be granted as a matter of right to the circuit court from all final orders and judgments of the county court relating to any bond issue at any time within thirty (30) days after the rendition of the final orders and judgments and from all other final orders and judgments of the county court at any time within six (6) months after the rendition thereof, either by the court rendering the order or judgment or by the clerk of the circuit court of the proper county, with or without supersedeas, as in other cases at law, by the party aggrieved filing an affidavit and prayer for an appeal with the clerk of the court in which the appeal is taken.

[2] The section provides:

> An appeal from the final decision of the county court for a new county road or for vacating, altering, or reviewing any county road shall be allowed to the circuit court; notice of the appeal is given by the appellant during the same term of the county court at which the decision was made." Pursuant to Ark. Code Ann. § 16-15-101(a) (Repl. 1999), "The regular terms of the county courts of the several counties of this state shall commence on the first Mondays in January, April, July, and October of each year.

[3] The section provides:

> All applications for laying out, viewing, reviewing, altering, or vacating any county road shall be by petition to the county court, signed by at least ten (10) freeholders of the county.

[4] The section provides:

> When any county road, or any part of any county road, shall be considered useless, any ten (10) citizens residing in that portion of the county may make application by petition agreeable to § 14-298-124 to the county court to vacate the road, setting forth in the petition the reason why the road ought to be vacated, which petition shall be publicly read at a regular session of the county court, with the proof of notice and publication required by this chapter. No further proceedings shall be had thereon until the next regular session of the court.

Ark. Code Ann. § 14-298-117 (1987). The statutes relied on by the circuit court concern vacation of streets in platted lands outside municipalities. Thus, the circuit court erred as a matter of law in applying these statutes to the facts at hand.

While, arguably, the circuit court was correct in concluding that appellant's appeal was untimely, we do not address that issue. In a case involving similar facts, *First Pyramid Life Ins. Co. v. Reed*, 247 Ark. 1003, 449 S.W.2d 178 (1970), appellees asked that the Arkansas Supreme Court dismiss the appeal because appellant failed to timely perfect its appeal to circuit court. The court, however, concluded that it was not necessary to determine whether this omission was fatal to the circuit court's jurisdiction. Rather, the court held that a petition to open a county road must be signed by at least ten freeholders of the county and that the county court can only acquire jurisdiction of a proceeding when there is strict compliance with the requirements of the statutes relating to the signing of the petition to open a county road. Because only six freeholders signed the petition, the court concluded that neither the county court, the circuit court, nor the Arkansas Supreme Court had jurisdiction to pass upon the merits of the case and reversed and dismissed the case.

■ As in *First Pyramid*, because the petition to vacate the road did not contain the signatures of at least ten freeholders of the county, there was not strict compliance with the statutes. Again, as in *First Pyramid*, the county court can only acquire jurisdiction of a proceeding under these sections when there is strict compliance with the requirements of the statutes relating to the signing of the petition. Because of the failure to strictly comply with the applicable statutes, the county court did not acquire jurisdiction of the case, and neither the circuit court nor this court can pass upon the merits of the case. Therefore, we reverse and dismiss.

Reversed and dismissed.

JENNINGS and GRIFFEN, JJ., agree.

Melvin SHARKEY *v.* STATE of Arkansas

CA CR 99-1263 25 S.W.3d 458

Court of Appeals of Arkansas
Division III
Opinion delivered September 13, 2000

Mike Connealy Marshall, for appellant.

Mark Pryor, Att'y Gen., by: *Valerie L. Kelly*, Ass't Att'y Gen., for appellee.

JOSEPHINE LINKER HART, Judge. After a bench trial, appellant, Melvin Sharkey, was convicted of the crime of residential burglary and sentenced to forty-two months in the Arkansas Department of Correction, to be followed by a suspended imposition of sentence of thirty-six months. For reversal, appellant, who admits he did not make this argument to the trial court, contends

that the evidence was insufficient to support his conviction because the State failed to prove an element of the crime. Specifically, he argues that the State did not establish that he had the requisite intent to commit a felony when he entered the residence.[1] Further, appellant argues on appeal that the evidence was insufficient to support the conviction because his witnesses testified that he was elsewhere at the time the crime was committed and they, rather than the State's witnesses, should be believed. We do not address appellant's former argument because in order to be preserved for appellate review, challenges to the sufficiency of the evidence must be specific. We reject appellant's latter argument because it is based on an erroneous assumption. Thus, we affirm.

At a bench trial, to preserve a challenge to the sufficiency of the evidence on appeal, an appellant must move for dismissal at the close of all of the evidence and "state the specific grounds therefor." Ark. R. Crim. P. 33.1(b) & (c) (2000). "A motion for directed verdict or for dismissal based on insufficiency of the evidence must specify the respect in which the evidence is deficient." Ark. R. Crim. P. 33.1(c) (2000). This rule, amended on April 8, 1999, by a per curiam order of the Arkansas Supreme Court, became effective immediately and thus was in effect at the time of appellant's July 6, 1999, trial.

Appellant admits that he failed to specifically argue before the trial court that he lacked the requisite intent to commit a residential burglary. The failure to specifically raise this argument precludes this court from reviewing his argument on appeal. *See* Ark. R. Crim. P. 33.1 (2000).

Appellant specifically argued to the trial court that his witnesses, and not the State's witnesses, should be believed. On appeal, however, we do not weigh the credibility of the witnesses; rather, we determine whether there is substantial evidence to support the trial court's findings. *See, e.g., Freeman v. State*, 331 Ark. 130, 959 S.W.2d 400 (1998). Because appellant's argument is based on the improper assumption that this court may assess a witness's credibility, his argument fails.

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[1] A person commits the crime of residential burglary "if he enters or remains unlawfully in a residential occupiable structure of another person with the purpose of committing therein any offense punishable by imprisonment." Ark. Code Ann. § 5-39-201(a)(1) (Repl. 1997).

Affirmed.

MEADS and ROAF, JJ., agree.

Albert J.M. "John" WATSON *v.* STATE of Arkansas

CA CR 99-1434 26 S.W.3d 588

Court of Appeals of Arkansas
Division IV
Opinion delivered September 13, 2000

G. Keith Watkins, for appellant.

Mark Pryor, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.

SAM BIRD, Judge. Albert J.M. "John" Watson was charged with first-degree murder. He was convicted by a jury in the Sharp County Circuit Court of second-degree murder. The jury fixed his sentence at a term of twenty years, to be served in the Arkansas Department of Correction, and imposed a $15,000 fine. By a separate verdict, the jury found that Watson had used a firearm in the commission of the offense. After the jury was dismissed, the State, acting pursuant to Ark. Code Ann. § 16-90-120 (1987), asked that the court enhance Watson's sentence by the maximum of fifteen years to be served consecutively with his twenty-year sentence in the Department of Correction. Insofar as is pertinent to this case, section 16-90-120 provides that the term of imprisonment of a person convicted of a felony involving the use of a firearm may be, in the discretion of the sentencing court, increased for an additional term of up to fifteen years. Watson objected to the additional term of imprisonment. After noting that the victim had been shot three times, that Watson had fled the scene, and that he had lacked remorse for the commission of the crime, the court granted the State's request and imposed an additional term of fifteen years to run consecutively to the twenty-year sentence imposed by the jury.

Watson filed a motion for resentencing, contending that the statute under which Watson was sentenced by the jury and the statute by which the judge enhanced his sentence were conflicting. He argued that the court erred by enhancing his sentence because section 16-90-120 was repealed by Ark. Code Ann. § 5-4-103(a) (Repl. 1997) and that by enhancing his sentence pursuant to section 16-90-120, Watson was denied his constitutional right to a jury trial. The court denied his motion, and Watson brings this appeal. We disagree with Watson that the two statutes are in conflict and that section 16-90-120 was repealed by section 5-4-103(a), but we agree that the court erred by enhancing Watson's sentence. Therefore, we affirm his conviction and modify his sentence.

Arkansas Code Annotated section 16-90-120 states, in pertinent part:

> (a) Any person convicted of any offense which is classified by the laws of this state as a felony who employed any firearm of any character as a means of committing or escaping from the felony, in the discretion of the sentencing court, may be subjected to an additional period of confinement in the state penitentiary for a period not to exceed fifteen (15) years.
>
> (b) The period of confinement, if any, imposed pursuant to this section shall be in addition to any fine or penalty provided by law as punishment for the felony itself. Any additional prison sentence imposed under the provisions of this section, if any, shall run consecutively and not concurrently with any period of confinement imposed for conviction of the felony itself.

Arkansas Code Annotated section 5-4-103(a) provides:

> If a defendant is charged with a felony and is found guilty of an offense by a jury, the jury shall fix punishment in a separate proceeding as authorized by this chapter.

Watson argues on appeal that section 5-4-103, which was enacted in 1975, repealed section 16-90-120, which was enacted in 1969. He states that the Act that established section 5-4-103 contained a repealing provision that repealed all conflicting laws.

■ On appellate review, we construe criminal statutes strictly, resolving any doubts in favor of the defendant. *Graham v. State*, 314 Ark. 152, 861 S.W.2d 299 (1993). Nothing is taken as intended that is not clearly expressed. *Id.* Although the repeal of prior statutory

provisions by implication is not favored, *Mixon v. Mixon*, 65 Ark. App. 240, 987 S.W.2d 284 (1999), when the later act covers the subject matter of the previous one and adds provisions clearly showing that it was intended as a substitute for the former provision, the older provision is repealed by implication. *Id.* Where two statutes do not conflict, one does not repeal the other by implication. *Manatt v. State*, 311 Ark. 17, 842 S.W.2d 845 (1992). We must construe all statutes relating to the same subject matter together. *Robinson v. Langdon*, 333 Ark. 662, 970 S.W.2d 292 (1998).

The statutes at issue in the case at bar speak to two different issues, and we have no difficulty in reading the two statutes in harmony. Section 5-4-103 requires a jury to fix punishment for a crime. Section 16-90-120 permits the sentencing court to enhance the sentence if the defendant utilized a firearm in the commission of a felony. Furthermore, when the legislature enacted section 5-4-103, it did not expressly overrule or repeal section 16-90-102. Because we find that these two statutes do not conflict, we do not find that section 5-4-103 repealed section 16-90-120.

Even though we disagree with Watson that the statutes conflict, we find that the court in this case should not have enhanced Watson's sentence because Watson was found guilty and sentenced by a jury. In the case at bar, the jury was the sentencing court and not the judge. Therefore, in addition to having the jury determine whether a firearm was used by Watson in the commission of the felony for which it found him guilty, the jury should also have been given the option of adding the additional term of imprisonment. Because the judge was not the sentencing court in this case, he could not enhance Watson's sentence.

In *Johnson v. State*, 249 Ark. 208, 458 S.W.2d 409 (1970), the supreme court set aside the portion of the trial court's judgment that added an additional seven-year term of imprisonment for the use of a firearm in a robbery. The supreme court set forth two reasons for its action: 1) the use of a firearm was not alleged in the Information charging the defendant, and 2) the trial court made its own determination concerning the use of the firearm and then added the seven-year sentence to the fifteen-year sentence that had already been imposed by the jury. *See Johnson v. State*, 249 Ark. at 214, 458 S.W.2d at 412.

In *Cotton v. State*, 256 Ark. 527, 508 S.W.2d 738 (1974), as in the case at bar, the jury made a finding that the defendant had used a firearm in committing robbery and imposed a sentence of twenty-one years. After the jury was dismissed, the judge added an additional seven years imprisonment to the sentence. The court held:

> Here, though the jury did reply affirmatively to the interrogatory submitted as to whether Cotton used a firearm, the jury did not render the punishment therefor, the seven years being added by the court. This constituted error. Accordingly, this portion of the judgment must be reversed for two reasons. First, the Information did not contain a charge against Cotton of using a firearm in the robbery, and second, the jury did not fix the amount of time to be imposed for violation of this statute.

Cotton v. State, 256 Ark. at 530, 508 S.W.2d at 741.

In *Redding v. State,* 254 Ark. 317, 493 S.W.2d 116 (1973), the court elaborated on the meaning of the phrase, "sentencing court," as used in Ark. Stat. Ann. § 43-2337, a predecessor to Ark. Code Ann. § 16-90-120. The court wrote,

> ... [T]he "court" in criminal trials in our state ordinarily consists of judge and jury and the words "the sentencing court" have no definite meaning.
>
> ....
>
> We are of the view that the legislature's use of the words "sentencing court" was intended by the legislature to refer either to the judge or the jury and that the factual issue as to the use of a firearm is to be determined by the trial court if a jury is waived and otherwise by the jury as in the case at bar.

Redding v. State, 254 Ark. at 320, 493 S.W.2d at 118.

In the case at bar, even though the jury found that Watson had used a firearm in committing second-degree murder, the record does not reflect that he was charged with using a firearm. As abstracted, the Information reads:

> ... the state of Arkansas accuses Alber [sic] J.M. "John" Watson III of crime/or cromes [sic] or [sic] Murder in the First Degree, a violation of A.C.A. 5-10-102, Class Y Felony. Committed as follows, to-wit:

> The said Albert J.M. "John" Watson III, count I — Did, unlawfully and feloniously, with the purpose of causing the death of another person, cause the death of another person, to-wit: David Frolos ....

In addition, the jury did not enhance Watson's sentence; the judge did. Pursuant to *Redding v. State*, *supra*, the judge in the case was not the sentencing court because Watson was tried by a jury. Therefore, the judge was without authority to enhance Watson's sentence.

We affirm Watson's conviction, but we modify his sentence by removing the additional fifteen years imposed by the judge, leaving intact the twenty-year sentence and $15,000 fine imposed by the jury for appellant's conviction on the charge of second-degree murder.

Affirmed as modified.

KOONCE and ROAF, JJ., agree.

Robin Gail JOHNSON and James H. Johnson *v.*
STATE of Arkansas

CA CR 00-18 25 S.W.3d 445

Court of Appeals of Arkansas
Division I
Opinion delivered September 13, 2000

George H. Stephens, for appellant James H. Johnson.

Richard R. Parker, Public Defender, for appellant Robin Gail Johnson.

Mark Pryor, Att'y Gen., by: *Leslie Plowman Fisken*, Ass't Att'y Gen., and *James R. Gowen, Jr.*, Ass't Att'y Gen., for appellee.

WENDELL L. GRIFFEN, Judge. James Johnson and his wife, Robin Johnson, received a joint jury trial on charges relating to the sexual abuse of Robin's daughter. James was convicted of two counts of rape, two counts of sexual abuse, and terroristic threatening. Robin was convicted of permitting the abuse of a child. James argues the evidence was insufficient to sustain his convictions. Robin argues that the trial court erred by denying her motion to sever the trial, by allowing the State to elicit testimony from her daughter with leading questions, and by denying her motion to suppress statements made during her interview with police. We disagree, and affirm on all points.

On Sunday, January 10, 1999, Sheila Slaughter, a teacher at Eagle Heights Elementary School in Harrison, Arkansas, was working in her classroom when she heard a child crying. That child was Robin's then eight-year-old daughter, who told Slaughter that she was upset because her stepfather would not let her pray at the table. She also told Slaughter that her stepfather had molested her.

Slaughter relayed the information to the victim's teacher, Cindy Newton. Newton told Pam Jones, the school's counselor. Jones reported the suspected abuse. Rebecca Madden of the Arkansas State Police and Troy Holton of the Harrison Police Department conducted an investigation.

Detective Holton interviewed the victim, who informed him that her stepfather had sexually abused her. The victim also told Holton that she had informed her mother of the abuse, but her mother did not believe her. On January 15 Dr. Eric Spann examined the victim, and confirmed that she had been sexually abused, as recently as three months prior to the examination.

James was charged with two counts of rape under Arkansas Code Annotated section 5-14-103 (Repl. 1997), two counts of first-degree sexual abuse under Arkansas Code Annotated section 5-14-108 (Repl. 1997), and first-degree terroristic threatening under Arkansas Code Annotated section 5-13-301 (Repl. 1997). Robin was charged with permitting abuse of a child under Arkansas Code Annotated section 5-27-221 (Repl. 1997).

Robin filed a motion to sever the trial and a separate motion to suppress statements she made during her interview with police. The trial court conducted a hearing on both motions and denied these motions. Robin renewed her motion to sever after the jury panel had been sworn. The trial court again denied her motion.

During trial, Robin's attorney obtained a continuing objection to the leading questions the State asked in eliciting testimony from the victim. The court overruled these objections and allowed the State to ask leading questions. At the close of the State's evidence and at the close of all of the evidence, appellants moved for directed verdicts on the charges against them. James's counsel argued that the victim's testimony failed to establish that the incidents testified to by the victim occurred within the time alleged in the charges. The State moved to amend the charges contained in the affidavit to comport with the facts as testified to by the victim in court. The trial court allowed the amendment, over James's objection. James's counsel then asked for a directed verdict on the ground that the victim had not testified as to the conduct supporting the second sexual-abuse charge. The trial court denied James's motion.

Robin's counsel argued that the only evidence connecting Robin to the incidents were the inconsistent statements made by the victim. The trial court denied her motion for a directed verdict, noting that "the Court doesn't grant directed verdicts on the basis of inconsistency in the testimony."

A jury found both appellants guilty. James was sentenced to serve a total of fifty years in the Arkansas Department of Correction, and Robin was sentenced to serve six years.

I. Appellant James Johnson

A. Charges and Standard of Review

James was charged with rape for engaging in sexual intercourse with a child six years of age during the school year 1996-1997, and engaging in deviate sexual activity (oral sexual penetration) by forcible compulsion with a person younger than fourteen years old in early January 1999. He was also charged with first-degree sexual abuse for purposely engaging in acts of sexual touching or fondling of a girl less than eight years old during the school year 1997-1998; and for touching his mouth to the genitalia of a girl less than eight years old during the 1996-1997 school year. Finally, the State charged him with terroristic threatening for threatening to cause physical injury to the victim to prevent her from reporting the abuse.

A motion for a directed verdict is treated as a challenge to the sufficiency of the evidence. *See Killian v. State*, 60 Ark. App. 127, 128, 959 S.W.2d 432, 433 (1998). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, whether direct or circumstantial. *See id.*, 959 S.W.2d at 433. When reviewing a denial of a directed verdict, we will look at the evidence in the light most favorable to the State, considering only the evidence that supports the judgment or verdict. *See Darrough v. State*, 330 Ark. 808, 810, 957 S.W.2d, 707, 708 (1997); *Killian, supra* at 128, 959 S.W.2d at 433. We will affirm if there is substantial evidence to support a verdict. *See Ryan v. State*, 30 Ark. App. 196, 786 S.W.2d 835 (1990). Evidence is sufficient to support a verdict if it is forceful enough to compel a conclusion one

way or another. *See Hall v. State*, 315 Ark. 385, 868 S.W.2d 453 (1993).

B. Witness Competency

James argues that the victim's testimony was insufficient to sustain his convictions for rape, first-degree sexual abuse, and terroristic threatening, because the trial court failed to follow the proper procedure to determine the competency of the witness, and because her testimony was inconsistent. He maintains that under *Harris v. State*, 238 Ark. 780, 384 S.W.2d 477 (1964), it is reversible error for the trial court to fail to exclude the testimony of a child witness where the inconsistencies and irreconcilable conflicts in the child's testimony bear on essential elements of the crimes and render the witness unable to transmit to the jurors in a reasonable, clear, and coherent manner what she saw, heard, and felt.

James implies that because the victim replied on eight different occasions that she could not remember what happened, she was an incompetent witness. However, he did not object to her competency at trial. Instead, the bases for his directed-verdict motion at trial were that the victim's testimony did not prove that the incidents happened in the time frame alleged in the charges, and that she did not testify as to conduct supporting the second charge of sexual abuse. He does not raise either of these arguments on appeal, and is bound by the nature and scope of the arguments he raised at trial. *See Harris v. State*, 320 Ark. 677, 899 S.W.2d 459 (1995). Therefore, we only address whether substantial evidence supports each of his convictions and hold that the trial court did not err in denying his motion for a directed verdict on each charge.

C. Rape Charges

A person commits rape if he engages in sexual intercourse or deviate sexual activity with another person, not his spouse, who is less than fourteen years of age. *See* Ark. Code Ann. § 5-14-103(a)(4) (Repl. 1997). Sexual intercourse is defined as the "penetration, however slight, of the labia majora by a penis[.]" Ark. Code Ann. § 5-14-101(9) (Repl. 1997). Deviate sexual activity includes any act of sexual gratification involving the penetration,

however slight, of the mouth of one person by the penis of another. *See* Ark. Code Ann. § 5-14-101(1)(A) (Repl. 1997).

The victim testified that when she was six or seven years old and her family lived on Maple Street, "James and I were in bed together and he got on top of me. On that occasion he stuck his private in my private. This hurt me and I tried to get him to stop. He stopped a couple of minutes later after I was kicking around and told him to stop." She further testified that when she was eight, at their home on Chestnut street, her stepfather forced her to perform oral sex on him. She stated that "he put his private inside my mouth," and that "his private tasted slimy and gross." The jury found the victim's testimony to be credible, and we defer to the jury's determination on the matter of witness credibility. *See Williams v. State*, 338 Ark. 178, 992 S.W.2d 89 (1999). Further, a rape victim's testimony need not be corroborated. *See Sublett v. State*, 337 Ark. 374, 989 S.W.2d 910 (1999). Therefore, we hold that substantial evidence supports James's conviction on this charge, and the trial court did not err in denying appellant's motion for a directed verdict on this charge.

D. Sexual Abuse — Count One

A person commits first-degree sexual abuse if he is eighteen years old or older, and engages in sexual contact with a person not his spouse who is less than fourteen years old. *See* Ark. Code Ann. § 5-14-108(a)(4)(Repl. 1997). Sexual contact includes "any act of sexual gratification involving the touching, directly or through the clothing, of the sex organs, or buttocks or anus of a person or the breast of a female." Ark. Code Ann. § 5-14-101(8)(Repl. 1997.)

The victim further testified that earlier the same day James forced her to perform oral sex on him, and he also fondled her. She stated that she, her two brothers, and James were riding home from her grandmother's house, where the children had been staying over Christmas break. She testified that James "stuck his hand in my panties and started touching my privates. He was rubbing the area between my legs in the truck." She stated that her brothers were unaware of what James was doing, because they were looking out the window at the road.

Again, based on our deference to the jury's determination on the matter of witness credibility, *see Williams v. State, supra,* and on the fact that a rape victim's testimony need not be corroborated, *see Sublett v. State, supra,* we hold that substantial evidence supports James's conviction on this charge, and that the trial court did not err in denying appellant's motion for a directed verdict on this charge.

E. Terroristic Threatening

A person commits terroristic threatening under Arkansas law if "[w]ith the purpose of terrorizing another person, he threatens to cause physical injury . . . to another person[.]" Ark. Code Ann. § 5-13-301(b)(1) (Repl. 1997). That is, it must be the accused's "conscious object" to cause fright. *Knight v. State,* 25 Ark. App. 353, 758 S.W.2d 12 (1988). The victim testified that when the parties lived on Maple Street, when she was six or seven years old, James raped her. She testified that after he raped her, "he told me not to tell anyone or else he would beat me." She also testified that in January 1999, after the incident in which James forced her to perform oral sex on him, he "told me that if I told anybody else he'd beat me until my butt was all red and bloody." James testified, and denied threatening or molesting the victim in any way. We again defer to the jury's determination of witness credibility, and hold that substantial evidence supports appellant's conviction with respect to this charge.

F. Sexual Abuse — Count Two

The second charge of first-degree sexual abuse arose from an alleged incident in which James orally touched his mouth to the victim's genitalia. The State conceded below that the victim did not directly testify as to the specific conduct alleged supporting the second charge of sexual abuse. In his motion for a directed verdict, James's counsel first argued to the trial court that her testimony did not establish conduct within the time frame alleged in the charge, but subsequently argued that *no* testimony was presented in this regard.[1]

[1] James does not argue the plain-error doctrine should apply. Further, our supreme court has recently reiterated its reluctance to adopt this doctrine. *See State v. Montague,* 341

The trial court indicated that it did not remember any testimony with regard to this charge. At that point, the following dialogue took place:

STATE:	No, sir. There was no testimony of that but there was testimony as to sexual contact. And, Your Honor, the specific testimony about sexual contact covers the crime. The crime is sexual contact. Whether it is by mouth or by hand, it's still sexual contact. Now, we've met the burden of establishing by evidence in this case that there was an act of sexual contact.
JAMES'S COUNSEL:	Your Honor, I think I understand what —
COURT:	So you're not — the — even though the information says — talks about fondling by touching his mouth to the genitalia then that's not your allegation?
PROSECUTOR:	It was my original allegation based on the affidavit, Your Honor. But at this time —
COURT:	Well, I'm talking about in terms of the testimony in this case.
PROSECUTOR:	What I'm — what I'm saying, Your Honor, is from the testimony the allegation is still sexual contact but now I'm relying on what she would testify today which was that he touched [her] genitalia with his hands, rubbing her vaginal area.
JAMES'S COUNSEL:	Your Honor —
	***
PROSECUTOR:	I could not get her to go into the oral touching.
	***
COURT:	*And on count four, [what] you're saying is the fondling which occurred on some other occasion at some time undetermined?*
PROSECUTOR:	*She wasn't specific about it, Your Honor. She did acknowledge that it happened on other occasions.*

Ark. 1411, 14 S.W.3d 867 (2000).

JAMES'S COUNSEL:	*Your Honor, I would just ask the court to grant my motion on that. I don't think that there was any testimony as far as the mouth touching genitalia that I know of* and I think that's the —
COURT:	Well —
PROSECUTOR:	*I concur in that she would not — she would not go there but what I'm saying is we provided testimony as to other acts of sexual contact —*
COURT:	Which says —
PROSECUTOR:	— which the law requires from us.
COURT:	The allegation there is engaged in sexual touching or — so anyway the motions will be denied then.

(Emphasis added.)

Thus, the prosecution argued below that the victim's testimony, even though it excluded testimony regarding any specific incident in which James touched his mouth to her genitalia, supported the second charge of sexual abuse, because the victim testified that he touched her "private" on more than one occasion.

The obvious issue that arises from the denial of the motion for a directed verdict on this charge is whether James had proper notice of the alternative basis for the second sexual-abuse charge. It is axiomatic that due process requires that the defendant be provided sufficient notice of the precise criminal charges brought against him and that he must have adequate opportunity to prepare his defense. Moreover, our state constitution requires that a formal indictment or information be filed. *See* Ark. Const. art. 2 § 8; Ark. Const. amend. 21, § 1. However, by statute, the prosecuting attorney may amend an indictment as to matters of form, or may file a bill of particulars, but cannot amend an indictment so as to change the nature of the crime charged. *See* Ark. Code Ann. § 16-85-407 (Repl. 1997); *Harmon v. State*, 277 Ark. 265, 641 S.W.2d 21 (1982).

In *Harmon, supra*, the defendant was accused of capital felony murder with kidnapping as the underlying felony. On the day of the trial, the prosecutor amended the information to add robbery as an alternate felony. *Id.* at 269, 641 S.W.2d at 23. The *Harmon* court held that the nature of the charge was undoubtedly changed by the addition of robbery, because the defendant would be required to defend an essentially different charge of capital murder. *Id.* at 270,

641 S.W.2d at 24. However, in *Gillie v. State*, 305 Ark. 296, 808 S.W.2d 320 (1991), the supreme court found no error where the appellant had been charged with capital murder while attempting to commit the felony crime of robbery, and on the day of trial, the prosecution amended the charges to add the charge of aggravated robbery. The court reasoned that appellant's counsel stated he was aware from the outset that the capital felony charge was entwined with the aggravated-robbery charge, but neither objected that he had no time to prepare a defense, nor asked for a continuance. *Id.* at 304, 808 S.W.2d at 324.

In this case, the State did not change the degree of the charge, or file an additional charge. Rather, the State contended that the victim's other testimony, in lieu of her testimony regarding the specific incident involving the oral penetration of her genitalia, was sufficient to support the second preexisting first-degree sexual-abuse charge. James undoubtedly had notice that his alleged conduct on more than one occasion supported a second sexual-abuse charge. He was charged with not one, but two, counts of first-degree sexual abuse. Under Arkansas Code Annotated section 16-85-403(a)(2) (Repl. 1997), the State is not required to allege the act or acts constituting the offense, unless the offense cannot be charged without doing so. It would seem that had the State not provided a statement of the acts constituting the charges, the victim's testimony that James had touched her genitals on more than one occasion would have been sufficient to sustain two counts of first-degree sexual abuse. Morever, in this case, the State argued essentially that the same conduct that supported the first charge, i.e., fondling the victim's genitalia, also supported the second charge. Therefore, although the State relied on different conduct than was cited in the information, *the State was not alleging an additional basis supporting a first-degree sexual abuse than had already been alleged.* Rather, the State simply alleged that similar conduct occurred on multiple occasions and supported more than one charge of sexual abuse.

Moreover, although James objected to the amendment of the information regarding the timing of the incidents, he neither alleged prejudice below nor alleges prejudice on appeal resulting from the amendment of the information and the denial of the directed verdict on this charge. Even where it is clear that the amendment changes the *degree of the crime* (which was *not* the case

here), appellant must show he was prejudiced by the amendment. *See Holloway v. State*, 312 Ark. 306, 849 S.W.2d 473 (1993) (affirming where charge was amended from attempted rape to rape, where appellant failed to demonstrate prejudice). Our courts will not presume prejudice when a defendant fails to move for a continuance or claim surprise after he is put on notice that the State plans to amend an information. *Id.* For the above reasons, we find that the trial court did not err in allowing the State to amend the indictment.

With regard to the sufficiency of the evidence on the second sexual-abuse charge, the victim testified that appellant touched her genitals on more than one occasion. She testified as follows:

> Q. Okay. Now, [were] there other times that he's touched you?
> A. Yes.
> Q. Where did that take place?
> A. He —
> Q. Are there several different times?
> A. Yes.
> Q. Okay. Do you remember any specific other times that he touched you?
> A. Not exactly. Pretty much the same. One day he did the same thing and then the next day he'd do the same and then a different thing and then the same.
>
> ***
>
> A. *He would do it in my room or he'd do it in the car when no one was watching.* He would try to do it real fast and then if someone goes like that to look, he'd try to slip his hand away from me and drive again.
> Q. *Okay. So he'd reach in and touch you like you described he did around the ice storm, around Christmas?*
> A. *Yes.*
> Q. *He did that other times.*
> A. *Yes.*

(Emphasis added.)

As noted previously, sexual contact includes any act of sexual gratification involving the touching, directly or through the clothing, of the sex organs of a person. Ark. Code Ann. § 5-14-101(8)(Repl. 1997). Further, a rape victim's testimony need not be corroborated to support a conviction. *See Sublett v. State, supra.*

Therefore, we hold that the victim's testimony is sufficient to support the additional charge of first-degree sexual abuse, just as her testimony was sufficient to support the other charges against James in this case.

II. Appellant Robin Johnson

A. Motion to Sever

Robin filed a written motion to sever on July 8, 1999, and the trial court conducted a hearing on the matter on August 6, 1999. At the hearing, she argued that statements would be introduced in a joint trial that would not be otherwise admissible and that the inflammatory nature of the case against James would "taint" the case against her. The trial court denied the motion to sever, noting that the inflammatory nature of the charges against James would still be an issue even if she were to be tried separately. Robin renewed her motion for severance the day of the trial, after the jury panel had been sworn, but before *voir dire* took place. When she renewed her motion before *voir dire*, she argued that a joint trial would limit her peremptory strikes, would create the perception that she participated in a joint enterprise with her husband, and would make it difficult for the jury to segregate the confusing evidence with regard to the time frame of the alleged incidents.

We hold that Robin waived her challenge to the trial court's denial of her severance motion because she failed to renew the motion before or at the close of the evidence, as is required under Arkansas Rule of Criminal Procedure 22.1(b).[2] This rule provides: "If a defendant's pretrial motion for severance was overruled, he may renew the motion on the same grounds before or at the close of all of the evidence. Severance is waived by the failure to renew the motion."

Robin maintains on appeal that she renewed her motion before *voir dire* in order to present the issue to the trial court at the

[2] Had the trial been severed, the State would have presented the same evidence against Robin as it presented against both appellants in this case. Thus, even if Robin had properly preserved her argument for appeal, we would not be inclined to hold the trial judge abused his discretion in denying her motion to sever.

earliest opportunity, thus preserving the issue for appeal. However, that did not relieve her of the burden to renew her motion before or at the close of all of the evidence under Rule 22.1(b). In *Rockett v. State*, 319 Ark. 335, 891 S.W.2d 366 (1995), our supreme court held that appellant's severance argument was not preserved for appeal where appellant filed a pretrial motion the day of trial, and renewed his motion twice the day of the trial before and after *voir dire*, but failed to renew the motion thereafter. Moreover, in *Wynn v. State*, 316 Ark. 414, 871 S.W.2d 593 (1994), our supreme court held that a general renewal of all objections at the close of the case does not renew a motion for severance because such a motion does not make clear the grounds for severance. However, in this case, Robin failed to even make a general renewal before or at the close of the evidence. *See generally Brown v. State*, 315 Ark. 466, 869 S.W.2d 9 (1994) (finding severance argument not preserved for appeal where appellant moved for severance in a pretrial motion but never again raised the issue); *Gray v. State*, 327 Ark. 113, 937 S.W.2d 639 (1997) (finding severance argument not preserved for appeal where appellant moved for severance in a pretrial motion but never again raised the issue). *Compare Bunn v. State*, 320 Ark. 516, 898 S.W.2d 450 (1995) (stating appellant complied with Rule 22.1(b) where he renewed his motion to sever at the close of the State's case-in-chief and at the end of his case). Based on these authorities, we affirm the trial court's denial of appellant's motion to sever.

B. Leading Questions

Robin also argues that the trial court erred in permitting the State to ask leading questions of the victim. She maintains that she "was prejudiced by this testimony because of the time period it establishes and the grossness of the behavior it describes by James Johnson against the victim, thus inflaming the jury." With regard to the time frame, Robin maintains that "linking the oral sex to a date certain, January 1999, by the means of leading questions brought the abuse into the time period 1996-1999, in which appellant was charged; and, [*sic*] prejudiced in this regard." In other words, she argues the trial court erred in allowing the State to use leading questions to elicit testimony that incriminated her.

Robin points to two specific instances where the State used leading questions. The first instance regards testimony about an incident immediately following the incident where James rubbed the victim's vagina in the presence of her two brothers while the four of them rode home in the family truck.

Q. Now, when you got home, what did he do?
A. I can't remember what he did when I got home.
Q. Okay. Let me just ask you this. Do you remember telling people that when you got home that you went into your room and [James] followed you in?
A. Yes.
Q. When he followed you in, what did he do?
A. I can't remember.
Q. Now, you've told me about this before. Do you remember telling me about it.
A. Yeah, but I can't remember what I said.
Q. Okay. Well, now you don't have to remember the words you said. Can you just tell us what you remember happening?
A. I went in my room to put my toy up that my grandma gave me.
Q. Uh-huh.
A. That Grandma Mary gave me and he followed me in the room.
Q. And then what happened.
A. I can't remember.
Q. Okay. Did something similar happen to what happened at Mr. Foster's house happen?
A. Yeah.
Q. Okay, can you tell us about it?
A. I can't remember.
Q. Now . . . let me ask you this then. He followed you in, do you remember that he closed the door?
A. Yes.
Q. Okay. And then do you remember he asked you to do something?
A. Yes.
Q. What did he ask you to do?
A. I can't remember.
Q. Okay. Amber, do you remember telling people what he said?
A. Yes.
Q. When you were talking to the teacher and then when you were talking to Ms. Madden and Officer Holton, the police officer —
A. Yes.
Q. — do you remember what you told them?

A. Yes. He told me that if I told anybody else he'll beat me until my — until my butt is all red and bloody.
Q. Okay. So he threatened to beat you?
A. Yes.
Q. But didn't he tell you that after he did something to you?
A. Yeah, but I can't remember what he did.
Q. Okay. Amber, do you remember that time anything about him putting his private in your mouth.

At this point, Robin objected that the victim had stated four times that she could not remember what happened in her bedroom. After several more attempts to elicit testimony about the bedroom incident, the following exchange occurred, in which appellant maintains that the State virtually testified for the victim.

Q. Okay. Let me ask you this. Was this the time you told me about what things tasted like?
A. Yes.
Q. Now, what was it that tasted? How did it taste?
A. His private and it tasted slimy and gross like.
Q. And you tasted it that day, is that right?
A. Yes.
Q. And it was his private part that you tasted?
A. Yes.
Q. And —

At this point Robin's counsel asked the court to note her continuing objection, and the court so noted.

Q. How did — what you remember about how you came to taste his private part?
A. I don't understand the question.
Q. Okay. Amber, what part of you touched him or what part of him touched you?
A. His private.
Q. And where did it touch?
A. I can't —
Q. Well, you don't remember what part of you he touched with his private?
A. I think it was my private, but I also think it was my mouth, but I can't —
Q. So you think it was your mouth and you think he also touched your private?
A. Yeah.

Q. Okay. If you think it was your mouth, did he put his private inside your mouth?
A. Yes.
Q. Now, is that how you tasted it?
A. Yes.

[redacted] Leading questions are allowed under Arkansas law where the witness is a very young victim of sexual crimes and if it appears to the trial judge that such questions are necessary to elicit the testimony. *See Clark v. State*, 315 Ark. 602, 870 S.W.2d 372 (1994). Our courts allow leading questions in such cases due to the seriousness of the crime, the natural embarrassment of the witness, the child's fear of testifying in a courtroom full of people, the necessity of the testimony from the victim, the threats towards victims by the perpetrators, and to avoid the possibility than an accused might escape punishment simply because of the victim's reluctance to testify. *Id.* at 609, 870 S.W.2d at 376. The appellate court will not reverse the trial court's decision to allow leading questions absent abuse of discretion. *See id.*; *Jackson v. State*, 290 Ark. 375, 720 S.W.2d 282 (1986). The youth, ignorance, and timidity of the witnesses are important factors that militate against the finding of an abuse of discretion. *See Clark v. State, supra*; *Jackson v. State*, 290 Ark. 375, 870 S.W.2d 372 (1994).

[redacted] We hold that the trial court did not abuse its discretion in allowing the State to use leading questions in this case. The victim was as young as six years when the abuse occurred, and was nine years old at the time of the trial. She was understandably reluctant to answer embarrassing questions regarding specific acts of sexual abuse by James. The record shows a repeated pattern of the victim stating that she could not remember when asked what happened in general terms, but then providing detailed responses to specific questions. Moreover, she appeared unfamiliar with the proper terminology needed to describe James's actions to the jury. For example, she referred to both male and female genitalia as "privates."

In addition, the victim stated several times that she remembered telling her teachers, the police, and the prosecutor about the abuse but admitted that she was having trouble remembering the details on the day of the trial. She stated, "It's confusing because he did other things to me other times." Another time she stated, "You are asking me to remember too much." However,

Robin never challenged her competency as a witness. It appears from the record that the prosecutor's questions were necessary to elicit the testimony from the victim, and that the prosecution did not, as Robin contends, "virtually testify" for the victim. We hold that the trial court did not abuse its discretion in allowing the prosecution to use leading questions in this case.

C. Motion to Suppress

Finally, Robin argues that the trial court erred in denying her motion to suppress her custodial statement. In reviewing a trial court's ruling on a motion to suppress, we make an independent determination based on the totality of the circumstances. *Travis v. State*, 331 Ark. 7, 959 S.W.2d 32 (1998); *Burris v. State*, 330 Ark. 66, 954 S.W.2d 209 (1997); *Wofford v. State*, 330 Ark. 8, 952 S.W.2d 646 (1997); *Hale v. State*, 61 Ark. App. 105, 968 S.W.2d 627 (1998); *Holmes v. State*, 39 Ark. App. 94, 839 S.W.2d 226 (1992). When the trial court denies a defendant's motion to suppress, we will reverse only if, in viewing the matter in the light most favorable to the State, the trial court's ruling is clearly against the preponderance of the evidence. *Travis*, *supra*; *Burris*, *supra*; *Wofford*, *supra*.

Robin sought the suppression of two statements. Officer Holton called Robin at work and asked her to come to the police department because of an emergency. Robin stated that she assumed that one of her sons was in trouble. She testified that when she walked into the interview room and saw Madden, Robin recognized her from a previous investigation of sexual abuse involving her children, and she said, "God, not again." After this statement, but before Robin's second statement, Officer Holton advised Robin of her *Miranda* rights, and Robin indicated that she understood each of the rights. After Holton advised Robin of her rights, he asked her if she knew why she was being interviewed. She stated that she knew why she was there. She stated that she did not believe her daughter, because her daughter would kiss and hug James and sit on his lap. At that point, Robin requested an attorney and Holton terminated the interview. He testified that the interview lasted ten to fifteen minutes.

We hold that the trial court did not err in denying appellant's motion to suppress the statement, "God, not again." It

is clear that this statement was a spontaneous statement. Robin made this statement, according to her testimony at the suppression hearing, when she walked into the room and recognized Madden, before any questioning had begun. Because the statement was spontaneous, it is irrelevant whether the statement was made before or after *Miranda* warnings had been issued, and whether Robin was in custody at that point. *See Stone v. State*, 321 Ark. 46, 900 S.W.2d 515 (1995).

With regard to Robin's statement that she did not believe her daughter, the State contends that although Holton had read Robin her *Miranda* rights, she was not in custody at that time, so the trial court properly refused to suppress this statement because it was not a custodial statement to which *Miranda* protections are afforded. *See Wofford v. State*, 330 Ark. 8, 952 S.W.2d 646 (1997). We do not address whether Robin was in custody because we hold that even if she was in custody, she made a knowing, voluntary, and intelligent waiver of her right to remain silent.

A person knowingly and intelligently waives his rights if he does so with the full awareness of both the right being abandoned and the consequences of the decision to abandon it. *See, e.g.*, *Rankin v. State*, 338 Ark. 723, 1 S.W.3d 14 (1999). A custodial confession is presumptively involuntary, and the State has the burden to show that the confession was voluntarily made. *See Davis v. State*, 330 Ark. 76, 953 S.W.2d 559 (1997). Our supreme court has explained the voluntariness requirement as follows:

> A statement is voluntary if it is the product of a free and deliberate choice rather than intimidation, coercion, or deception. In making this determination, we review the totality of the circumstances, and reverse the trial court only if its decision is clearly erroneous. Relevant factors include the age, education, and intelligence of the accused; the lack of advice as to his constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of mental or physical punishment. Two other pertinent factors are the statements made by the interrogating officers and the vulnerability of the defendant.

Conner v. State, 334 Ark. 457, 467, 982 S.W.2d 655, 660 (1998) (citations omitted).

We hold that Robin made a knowing, voluntary, and intelligent waiver of her *Miranda* rights. She was called to come down to

the station because of an emergency, and went voluntarily; the police did not bring her into the station. When Robin entered the interview room, she recognized Madden from a prior instance in which the police had investigated reports of sexual abuse on her daughter and one of her sons. Thus, this was the second time Robin had been interviewed concerning the possible sexual abuse of her daughter.

Robin was thirty-one years old at the time of the interview, and she indicated on the *Miranda* form that she had completed two years of college. She signed the form indicating she understood her rights and verbally confirmed to Officer Holton that she understood her rights. She does not allege that she was coerced, but argues that she was not aware of the rights she was abandoning, because she was not aware that she was a suspect for permitting abuse of a child.

Her argument is not persuasive. First, as previously noted, she had been through this investigatory process before. Whether she knew she was a suspect, and even if she assumed she was being questioned related to possible charges against her husband, by signing the *Miranda* form and verbally stating that she understood her rights, Robin affirmed that she understood that subsequent statements she made could be used to prosecute *her*. Second, she cites no authority for the proposition that a defendant must be aware that he is a suspect of a specific crime, and must be aware of the specific nature of the possible charges against him, in order to make a voluntary, knowing, and intelligent waiver of his *Miranda* rights. We do not hear arguments on appeal that are not supported by authority and where it is not apparent, without further research, that the arguments are well-taken. *Hodges v. Lamora*, 337 Ark. 470, 989 S.W.2d 530 (1999); *Gnas v. Burger & Assocs., Inc.*, 295 Ark. 569, 750 S.W.2d 58 (1988).

Based on the above authorities and the totality of the circumstances in this case, we hold that even if Robin was in custody, she made a knowing, intelligent, and voluntary waiver of her *Miranda* rights. Therefore, we hold the trial court did not err in denying Robin's motion to suppress her statement that she did not believe her daughter.

Based on the foregoing arguments and authorities, we affirm each of the appellants' convictions.

Affirmed.

BIRD and NEAL, JJ., agree.

Ruby WORLEY *v.* STATE of Arkansas

CA CR 00-179 26 S.W.3d 142

Court of Appeals of Arkansas
Division IV
Opinion delivered September 13, 2000

Appellant, pro se.

Mark Pryor, Att'y Gen., by: *Vada Berger*, Ass't Att'y Gen., for appellee.

ANDREE LAYTON ROAF, Judge. After a *de novo* appeal from a conviction on the same offense in municipal court, *pro se* appellant Ruby L. Worley was convicted in a Garland County jury trial of harassment, for which she received a three-day jail sentence and a $1,000 fine. On appeal, she argues that the trial court erred in failing to dismiss her case for violation of her right to a speedy trial. We agree and reverse and dismiss.

Worley was convicted of harassment in Hot Springs Municipal Court on June 25, 1998, and sentence was entered on July 6, 1998. Apparently she encountered some difficulty in getting the clerk to certify the record; in accordance with Rule 9(c) of the Arkansas Inferior Court Rules, Worley filed an affidavit, file marked August 6, 1998, disclosing this difficulty. The filing of the affidavit was recorded on a Garland County civil docket sheet.

Meanwhile, the special judge presiding over the Hot Springs Municipal Court that heard Worley's case required that she post a $1,000 appeal bond. Worley resisted filing a bond until October 15, 1998, and her Garland County criminal docket sheet reflects that her appeal from municipal court only dated from October 14, 1998. However, nearly a year later, on September 13, 1999, Worley obtained a writ of mandamus that dissolved the municipal court's bond requirement and directed the clerk to file the transcript for her appeal.

Although the trial date was originally set for March 17, 1999, the State was granted a continuance on March 8, 1999, and the trial was reset for August 4, 1999. Later, the trial date was reset to October 15, 1999. The criminal docket sheet also reflected that a Garland County circuit judge requested the appointment of a special judge on June 14, 1999, and an order concerning the appointment was docketed on June 17, 1999.

On October 6, 1999, Worley filed a motion to dismiss, alleging a violation of her right to a speedy trial. Worley was tried as scheduled on October 15, 1999. The Criminal Docket sheet reflects that Worley's Motion to Dismiss was denied on that date, prior to trial. On October 21, 1999, Worley filed a document styled "Motion to Reconsider Motion to Dismiss," which was denied by written order filed for record on November 10, 1999. In that order, the judge recited that Worley's appeal was not perfected until October 14, 1998, and the three days required to secure the appointment of a special judge was necessary and reasonable excludable time.

As a preliminary matter, the State argues that reaching the merits of this appeal is barred because Worley has failed to abstract or place in the addendum her judgment and conviction order. However, her statement of the case explicitly states that she was convicted of harassment, and her addendum includes a copy of the jury verdict form. Because there is no doubt as to the outcome of this case, this court should reach the merits. *See Williams v. State*, 328 Ark. 487, 944 S.W.2d 822 (1997).

Worley's sole point on appeal is that the trial court erred by denying her motion to dismiss for violation of the speedy-trial rule, Ark. R. Crim. P. 28.1(c). Worley asserts that after she made a showing that she was tried more than a year after her appeal from municipal court, the State was required to prove that the delay was justified, and the State simply did not meet its burden. Citing Arkansas Inferior Court Rule 9(c), she argues that the circuit court erred in concluding that her appeal was perfected as of October 14, 1998; she contends that the affidavit that she filed on August 6, 1998, made that date the true filing date. This argument has merit.

Under Ark. R. Crim. P. 28.1, an accused must be brought to trial within twelve months unless necessary delay occurs as authorized in Ark. R. Crim. P. 28.3. Once the defendant presents a *prima facie* case of a speedy-trial violation, i.e., that the trial is or will be held outside the applicable speedy-trial period, the State has the burden of showing that the delay was the result of the defendant's conduct or was otherwise justified. *Eubanks v. Humphrey*, 334 Ark. 21, 972 S.W.2d 234 (1998). The speedy-trial period commences to run "without demand by the defendant." Ark. R. Crim. P. 28.2.

In the instant case, the trial court was apparently proceeding under a misconception that Worley's appeal from municipal court was not perfected until October 14, 1998. However, as Worley correctly argues, in accordance with Arkansas Inferior Court Rule 9(c), her appeal was perfected upon her filing of an affidavit that stated that the Hot Springs Municipal Court Clerk refused to certify and prepare the record for her appeal. Rule 9(c) states:

> (c) When the clerk of the inferior court, or the court in the absence of a clerk, neglects or refuses to prepare and certify a record for filing in the circuit court, the person desiring an appeal may perfect his appeal on or before the 30th day from the date of the entry of the judgment in the inferior court by filing an affidavit in the office of the circuit court clerk showing that he has requested the clerk of the inferior court the inferior court] to prepare and certify the records thereof for purposes of appeal and that the clerk [or the court] has neglected to prepare and certify such record for purposes of appeal. A copy of such affidavit shall be promptly served upon the clerk of the inferior court [or the court] and the adverse party.

See also Shaw v. State, 18 Ark. App. 243, 712 S.W.2d 338 (1986). Accordingly, Worley established a *prima facie* case in that 435 days had elapsed between the time she had perfected her appeal and the time the court heard her motion to dismiss for a speedy-trial violation. Although the record could be clearer, we know from the trial court's November 10, 1999, order that it only found three days of excludable time. In reviewing the record, we cannot conclude that there was any more time that should be excluded. It is noteworthy as well that the State has failed to direct this court to any docket entry concerning time that should have been excluded.

Reversed and dismissed.

BIRD and KOONCE, JJ., agree.

Rosa Lee HOLLAND *v.* STATE of Arkansas

CA CR 99-1044 27 S.W.3d 753

Court of Appeals of Arkansas
Division III
Opinion delivered September 20, 2000

Morris & Morris P.A., by: *Tim R. Morris*, for appellant.

Mark Pryor, Att'y Gen., by: *Jeffrey Weber*, Ass't Att'y Gen., for appellee.

JOHN MAUZY PITTMAN, Judge. The appellant was charged as a habitual offender with possession of methamphetamine with intent to deliver, possession of drug paraphernalia, being a felon in possession of a firearm, and simultaneous possession of drugs and firearms. Appellant made a pretrial motion to suppress physical evidence obtained following an assertedly illegal search. The motion was denied, the case proceeded to trial, and appellant

was convicted of the offenses with which she had been charged. From that decision, comes this appeal.

Appellant's arguments for reversal are directed at the trial court's denial of her motion to suppress. She asserts that the search and seizure were unlawful because there was reasonable suspicion to search only the automobile in which appellant was a passenger, and that the police officers exceeded the permissible scope of a protective search of appellant after the vehicle was stopped. She also contends that her flight from police officers following the stop of the vehicle did not give rise to probable cause to arrest her, so that the search of her person and effects was not incident to a valid arrest. We affirm.

We do not reach the merits of appellant's arguments because they are not preserved for appeal. At the suppression hearing, appellant's attorney expressly stated that he was challenging only the initial stop of the vehicle, and expressly conceded "that if the initial stop was justified then everything else would be admissible into evidence and would not violate her rights." Now, on appeal, appellant expressly concedes that "[t]he officers had reasonable suspicion to stop the vehicle," but argues that her rights were violated by events that took place after the initial stop of the vehicle. Even constitutional arguments are barred on appeal if they are not raised before the trial court, *Hunter v. State*, 330 Ark. 198, 952 S.W.2d 145 (1997), and a party is bound on appeal by the scope and nature of the objections and arguments presented at trial: he cannot change the grounds for an objection on appeal. *Brown v. State*, 326 Ark. 56, 931 S.W.2d 80 (1996).

Furthermore, we would affirm even were we to address appellant's arguments on the merits. It appears from the record that a reliable informant told Fort Smith police officers that a white vehicle driven by Dale Ward would be arriving at a local motel, and that Ward and an otherwise-unidentified black female would have in their possession a large quantity of methamphetamine. Uniformed police officers waited and attempted to stop the vehicle when it arrived. On seeing the officers, Ward attempted to drive away but got stuck in a ditch. Appellant then exited through the window of the vehicle, beer can in one hand and purse in the other, and attempted to flee on foot. An officer grabbed her purse and, after a brief flight and a struggle, subdued her. A contemporaneous search

of the purse showed that it contained a firearm, methamphetamine residue, and drug paraphernalia. Over seven grams of methamphetamine were found on appellant's person.

We are inclined to think that, on these facts, the search of appellant's purse and person were permissible. Appellant concedes on appeal that there was reasonable cause to stop the vehicle in which she was a passenger, and police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search. *Wyoming v. Houghton*, 526 U.S. 295 (1999). The pat-down search of appellant's person, we think, was justified in light of the reliable information that she and Ward possessed methamphetamine and the fact that she fled at the sight of the approaching police officers. *Illinois v. Wardlow*, 528 U.S. 119 (2000). In any event, the challenged evidence was largely cumulative of other evidence admitted without objection, including appellant's own testimony at trial where she admitted that she had possession of most, if not all, of the items she previously sought to have suppressed. *See Schalski v. State*, 322 Ark. 63, 907 S.W.2d 693 (1995).

Affirmed.

STROUD and NEAL, JJ., agree.

Jerry PRYOR *v.* STATE of Arkansas

CA CR 99-726 27 S.W.3d 440

Court of Appeals of Arkansas
Divisions III, IV, and I
Opinion delivered September 20, 2000

Alvin Schay, for appellant.

Mark Pryor, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.

ANDREE LAYTON ROAF, Judge. Jerry Pryor was convicted in a Howard County jury trial of robbery and sentenced as an habitual offender to forty years in the Arkansas Department of Correction. On appeal he argues that the trial court erred in: 1)

refusing to allow him to impeach one of the State's witnesses with a prior inconsistent statement; and 2) denying his motion to suppress an in-court identification by the victim. We agree that the trial court erred in refusing to allow evidence of the prior inconsistent statement, and reverse and remand for a new trial.

Pryor does not challenge the sufficiency of the evidence, only two evidentiary rulings. Accordingly, only a brief recitation of the facts is necessary. On the night in question, the victim, Quirimo Morales, was sleeping in his car outside his apartment in Nashville. According to Morales's testimony, he had visited his daughter in Hot Springs earlier that morning until 1:00 a.m., then had visited a cousin in Glenwood, and arrived back at his residence at approximately 5:00 a.m. At about 5:30 a.m., he was awakened from a sound sleep by a punch in the jaw, and a black man, whom he had never seen before but subsequently identified in a police photo line-up as Pryor, was in the process of stealing his wallet. According to Morales, the assailant threw the wallet down when he discovered that it had no money in it and ran away. Jeffrey Hubbard, a neighbor, claimed that he witnessed the robbery and identified Pryor as the robber.

The first point dealt with cross-examination of Hubbard, one of the State's witnesses. On direct, Hubbard admitted that he was convicted of aggravated assault in 1997 and was on probation at the time of the incident. He claimed that he was aware that Morales had parked outside, and when he looked out of his window to check on him, he saw a tall black man standing over him. According to Hubbard, he recognized Pryor, an acquaintance of thirteen or fourteen years, and called out to him. Pryor then turned and ran down the street. Hubbard stated that he did not notice an odor of alcohol about Morales. Hubbard also admitted that he had talked to Robert Willis after the robbery, but denied that he told Willis that Morales was drunk and passed out in the car on the morning of the robbery. Hubbard also admitted that he had a run-in with Pryor about a month before the robbery.

Robert Willis was called by Pryor as an alibi witness. Willis testified that he saw Pryor while he was on the way to work, between 5:00 a.m. and 5:20 a.m. He then was questioned about encountering Hubbard after the robbery. He admitted that he talked to Hubbard. When Pryor's trial counsel attempted to ask the

question: "And what did [Hubbard] tell you about the condition that Quirimo Morales was in the morning that . . .." The State objected on hearsay grounds. Pryor argued that the question went to Hubbard's credibility and, among other things, that he was attempting to elicit a prior inconsistent statement. The trial court sustained the objection, stating that it did not fall under one of "twenty-eight" hearsay exceptions.

The second point deals with the suppression of the identification testimony by the victim, Quirimo Morales. In a pretrial hearing on Pryor's motion to suppress the identification, Officer Thomas Free of the Nashville Police Department testified that Jeffrey Hubbard contacted him and told him who had robbed Morales. He subsequently went to Aero Metalcraft where he interviewed Hubbard and asked Hubbard and Morales to look at a photo lineup. He stated that both Hubbard and Morales picked Pryor out of the lineup, and that Hubbard did not influence Morales's selection in any way. The photo array was not abstracted. Morales testified that he picked Pryor out because he recognized him from the robbery. He also stated that he had never seen Pryor before the robbery, but that he had seen him a few days after the robbery when he was with Hubbard, and that Hubbard had pointed Pryor out and said, "Hey that's the guy who robbed you." However, Morales claimed that he recognized Pryor's face from the robbery and only asked Hubbard for Pryor's name. Morales also claimed that he was sleeping in his car because he was comfortable, and he denied being intoxicated. He stated that he was awakened when Pryor punched him in the jaw. By that time, Pryor had already taken his wallet. According to Morales, he viewed Pryor for "three to five minutes," but he later revised downward his estimate to two to three minutes. Morales also denied that it was too dark to see Pryor clearly, and he stated that his efforts to describe his assailant were hampered by his inability to speak English.

At trial, Morales made an in-court identification of Pryor. However, during his testimony, Morales's story changed. He admitted that he had been drinking, but had not admitted it to the police because he already had two DWIs. He also stated that he had seen Pryor two times since the robbery. Pryor did not object to the admission of Morales's identification testimony until his directed verdict motion.

Pryor first argues that the trial court committed reversible error when it refused to allow the defense counsel to impeach a State witness, excluding as hearsay testimony by Robert Willis concerning a statement that Hubbard purportedly made to Willis that Morales was intoxicated at the time of the robbery. Citing *Allen v. State*, 277 Ark. 380, 641 S.W.2d 710 (1982), he contends that the statement was admissible pursuant to Ark. R. Evid. 613 as a prior inconsistent statement. This argument is persuasive.

Rule 613 of the Arkansas Rules of Evidence states:

> (a) *Examining Witness Concerning Prior Statement.* In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.
>
> (b) *Extrinsic Evidence of Prior Inconsistent Statement of Witness.* Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 501 (d)(2).

Citing *Davis v. State*, 319 Ark. 460, 892 S.W.2d 472 (1995), the State contends that this argument is not preserved for appellate review because Pryor failed to proffer Willis's testimony. However, the failure to make a formal proffer is not fatal to this point because it is well settled that an offer of proof is not necessary when the substance of the evidence sought to be introduced is apparent from the context within which the questions are asked. *Billett v. State*, 317 Ark. 346, 877 S.W.2d 913 (1994); *Hill v. State*, 54 Ark. App. 380, 927 S.W.2d 820 (1996). *See also Lewis v. Gubanski*, 50 Ark. App. 255, 905 S.W.2d 847 (1995). Here, the substance of the evidence is readily apparent from the question posed to Hubbard, his denial, the subsequent questioning of Willis, and defense counsel's argument to the trial court, in which he stated: "I asked Mr. Hubbard if he didn't tell Mr. Willis that he was drunk and in fact he did, and Mr. Willis can tell that."

The State also contends that because Pryor did not actually say that the testimony was admissible under Rule 613(b), this

argument is raised for the first time on appeal. However, Pryor did argue that he was attempting to elicit evidence of a prior-inconsistent statement, a direct reference to Rule 613(b), so this argument was appropriately made to the trial court.

A trial court is accorded wide discretion in evidentiary rulings, and will not be reversed on such rulings absent a manifest abuse of discretion. *Dansby v. State*, 338 Ark. 697, 1 S.W.3d 403 (1999). In *Fowler v. State*, 339 Ark. 207, 219, 5 S.W.3d 10, 16 (1999), the supreme court recently stated:

> As a general rule, all relevant evidence is admissible. Ark .R. Evid. 402. Relevant evidence is any evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Ark .R. Evid. 401. A witness's credibility is always an issue, subject to attack by any party. *Dansby v. State* 338 Ark. 697, 1 S.W.3 403 (1999); Ark .R. Evid. 607. The scope of cross-examination extends to matters of credibility. Ark .R. Evid. 611. A matter is not collateral if the evidence is relevant to show bias, knowledge, intent, or interest. *See Dansby v. State, supra*; *Arthur v. Zearley,* [337 Ark. 125, 992 S.W.2d 67 (1999)]; Pyle v. State, 314 Ark. 165, 862 S.W.2d 833 (1993); *Goodwin v. State*, 263 Ark. 856, 568 S.W.2d 3 (1978). Proof of bias is "almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." United States v. Abel, [469 U.S. 45, 52 (1984)]. In other words, matters affecting the credibility of a witness are always relevant.

The *Fowler* court further stated, "This court has traditionally taken the view that the cross-examiner should be given wide latitude because cross-examination is the means by which to test the truth of the witness's testimony and the witness's credibility." 339 Ark. at 220, 5 S.W.3d at 17 (*citing Wilson v. State*, 289 Ark. 141, 712 S.W.2d 654 (1986)). Moreover, although *Allen v. State, supra*, was also a Rule 615 case, in disposing of one of the State's arguments seeking to support the exclusion of evidence, the supreme court stated that prior inconsistent statements are admissible because they are not hearsay.

Here, the State's case boiled down to the testimony of two eyewitnesses, Morales and Hubbard. Morales admitted that he committed perjury in the suppression hearing, had been drinking

on the night of the alleged robbery, and had told what was pretty much an improbable story. However, this improbable tale was corroborated by Hubbard. Hubbard's tale was also improbable, but it backed up Morales's. Consequently, the impeachment of Hubbard's credibility would have further weakened the State's case. Exposing Hubbard's willingness to lie under oath was an indispensable part of Pryor's defense, and the trial court erred in excluding the testimony. Finally, under the circumstances of this case, because it rested entirely on the credibility of the two witnesses, we reject the State's contention that the exclusion of this testimony could be harmless error.

Pryor also argues that the trial court committed reversible error in denying his motion to suppress the in-court identification by Morales, based on suggestive procedures and the testimony of Morales. He contends that Morales's identification was unreliable, primarily because his testimony varied significantly between what he presented at the suppression hearing and what he presented at trial. Further, citing *Bowen v. State*, 297 Ark. 160, 761 S.W.2d 148 (1988), he asserts that a review of the first two of the six factors listed by the supreme court in that case supports the conclusion that he carried his burden of proving there is a very substantial likelihood of irreparable misidentification. Specifically, he contends that Morales's opportunity to view him was only seconds, not the two or three minutes that Morales testified to. Further, he asserts that at 5:30 a.m., it was dusk and a tree shaded a nearby street light. Regarding the accuracy of the prior description, Pryor argues that Morales only stated that it was a "black man." Finally, he contends that his alibi witnesses should factor into the totality of the circumstances. However, we cannot reach the merits of this issue because it is not preserved for review. Pryor failed to object to Morales's in-court identification until after the State had rested. Failure to object to an in-court identification prevents the issue from being considered on appeal. *Goins v. State*, 318 Ark. 689, 890 S.W.2d 602 (1995).

Reversed and remanded for a new trial.

ROBBINS, C.J. STROUD, GRIFFEN, and MEADS, JJ., agree.

JENNINGS, KOONCE, CRABTREE, and BIRD, JJ., dissent.

SAM BIRD, Judge, dissenting. I believe that this case should be affirmed because Pryor did not proffer the testimony that he argues was erroneously excluded and, therefore, has not preserved for appeal the issue upon which the majority relies in reversing and remanding.

The majority has reversed and remanded this case, agreeing with Pryor's argument that the trial court erred in failing to permit him to introduce into evidence, through the testimony of Robert Willis, an alleged prior inconsistent statement of Jeffrey Hubbard. Although I agree that Pryor should have been permitted to introduce the prior inconsistent statement made by Hubbard through the testimony of Willis, I do not believe the point was preserved for appeal. In order to preserve the error for appeal, it was incumbent upon Pryor to proffer the alleged inconsistent statement to which Hubbard would have testified. Without that proffer, we are unable to determine what statement Pryor alleges that Hubbard may have made that was allegedly inconsistent with his earlier statement. Unless statements forming the basis of an Ark. R. Evid. 613 argument are proffered, their exclusion is not an issue that is preserved for appellate review, *Davis v. State*, 319 Ark. 460, 892 S.W.2d 472 (1995).

The majority opinion relies on *Billett v. State*, 317 Ark. 346, 877 S.W.2d 913 (1994), *Hill v. State*, 54 Ark. App. 380, 927 S.W.2d 820 (1996), and *Lewis v. Gubanski*, 50 Ark. App. 255, 905 S.W.2d 847 (1995), to support its conclusion that Hubbard's alleged inconsistent statement is apparent. I do not agree that those cases support the majority's position. In *Billett*, the excluded testimony was apparent because it had been the subject of the State's motion in limine to exclude evidence that a witness had been pregnant and had had three abortions. The court had granted the motion on grounds that such evidence was not relevant. When Billett's attorney sought to elicit such evidence from the witness, the State objected, and the court sustained the objection. On appeal, Billett contended that the court's exclusion of that evidence was erroneous, but the State argued that the issue had not been preserved for appeal because the witness's testimony had not been proffered. The supreme court held that the issue was preserved, notwithstanding Billett's failure to proffer the witness's testimony, because the testimony excluded was set out by the prosecutor in the State's motion in limine and clearly understood by the judge.

In *Hill, supra*, the evidence excluded by the trial court was also the subject of a motion in limine by the State. There, Hill desired to impeach the State's witness, a police officer, through testimony that the officer had left the police force after filing a false police report and giving a false statement about his police car having been stolen. The court granted the State's motion in limine. On appeal, the State contended that since Hill did not proffer the excluded testimony, the court's error in excluding it was not preserved. We held that the issue was preserved because, "[u]nder these facts, there is no question about the substance of the testimony." *Hill*, 54 Ark. App. at 381, 927 S.W.2d at 822.

Similarly, in *Lewis v. Gubanski, supra,* it was held that a proffer of a prior inconsistent statement was unnecessary to preserve for appeal the trial court's erroneous exclusion of a prior inconsistent statement where the substance of the excluded testimony had been made known to the judge by appellant's lawyer during the testimony, in chambers, of another witness. The court noted that, "taking into consideration all the above circumstances, we cannot agree that the substance of the evidence . . . was not known to the trial judge."

The cases relied upon by the majority bear no similarity to the case at bar. In the case now before us, there was no motion in limine or in chambers hearing that would have had the effect of apprising the court of the substance of Hubbard's alleged prior inconsistent statement. The substance of Hubbard's alleged prior inconsistent statement, if there was one, is not at all apparent. While we can speculate that Pryor's attorney thought he might know what the answer to his question would be (or else he might not have asked it), we have no way of knowing whether Willis would or would not have testified that Hubbard had earlier told him that the victim was intoxicated when he was robbed.

Contrary to the majority's assertions, the substance of Willis's testimony is certainly not apparent from the question that was asked of Hubbard. When Hubbard was asked whether he had earlier made a statement to Willis that Morales was drunk and passed out in his car on the morning he was robbed, Hubbard stated twice, unequivocally, that, "I did not tell him that." According to the theory of the majority opinion, we should presume that because Hubbard twice denied making the statement, then when Willis was

asked whether Hubbard made the statement, Willis must have been about to contradict Hubbard.

The substance of the excluded testimony is not apparent from defense counsel's argument to the court. Defense counsel merely argued that he should be permitted to ask the witness about Hubbard's alleged prior inconsistent statement. As I have already stated, I agree, but in order for the defense counsel to preserve the point for this court to address, he should have proffered the testimony. However, at no time did defense counsel advise the court of what he expected Willis's testimony to be.

The effect of the majority opinion is to extend the holdings in *Billett* and *Hill, supra,* far beyond holding that a proffer need not be made to preserve an issue for appeal where the substance of the testimony is clear. Under the holding of the majority opinion, a proffer will no longer be required if the appellate court can speculate as to what the excluded testimony might have been had defense counsel received the answer for which he had hoped.

I respectfully dissent.

JENNINGS and CRABTREE, JJ., join.

K. MAX KOONCE, II, Judge, dissenting. I agree with the dissenting opinion of Judge Bird in his assertion that Pryor failed to proffer the testimony that was wrongfully excluded from evidence, and that this omission by Pryor disqualifies the issue from consideration on appeal. To challenge a ruling excluding evidence, an appellant must proffer the excluded evidence so we can review the decision, unless the substance of the evidence is apparent from the context. Ark. R. Evid. 103(a)(2).

I further dissent from the decision announced in the majority opinion due to harmless error. Although I agree that the trial court erred in precluding appellant from impeaching Jeffrey Hubbard with a prior inconsistent statement, I think the error was harmless in light of all the evidence before the jury. When the evidence of guilt is overwhelming and the error is slight, we can declare that the error was harmless and affirm. *See Byrd v. State*, 337 Ark. 413, 992 S.W.2d 759 (1999); *Abernathy v. State*, 325 Ark. 61, 925 S.W.2d 380 (1996).

The jury heard the victim's testimony at trial in which he admitted that he had been drinking on the morning of the robbery, which was inconsistent with his pretrial statement and inconsistent with Hubbard's trial testimony. Thus, the jury had before it evidence that would call into question both the victim's and Hubbard's credibility. Regardless of the discrepancies, inconsistencies, and contradictory evidence, matters of credibility are for the jury to determine. *See Bell v. State*, 324 Ark. 258, 920 S.W.2d 821 (1996). In the instant case, the victim unequivocally identified appellant as the person who robbed him. Our courts have consistently held that the testimony of one eyewitness is sufficient to sustain a conviction. *See Rawls v. State*, 327 Ark. 34, 937 S.W.2d 637 (1997). Accordingly, I would affirm.

Jerry TIMMONS and Rex Vint *v.* Robert McCAULEY

CA 99-1334 27 S.W.3d 437

Court of Appeals of Arkansas
Division III
Opinion delivered September 20, 2000

Michael T. Sherwood, P.A., by: *Michael T. Sherwood*, for appellant.

Jon Johnson, for appellee.

ANDREE LAYTON ROAF, Judge. Jerry Timmons and Rex Vint appeal from a portion of an order of the Pulaski County Circuit Court transferring to appellee Robert McCauley possession of a 1937 Chevrolet truck that was the subject of a contract dispute. The order also granted their motion to consolidate and transfer the two cases before the court to chancery court, where a third lawsuit concerning the truck had been filed. On

appeal, Timmons and Vint argue that the order to deliver the truck should be reversed because: 1) the trial court lacked subject-matter jurisdiction over the truck; 2) there was no evidence to sustain the court's ruling; 3) the court erred in finding a partial default in this matter because the answer of a codefendant serves as an answer for both; and 4) the ruling of the court was arbitrary and capricious. McCauley contends that this appeal should be dismissed because the order is not final. We must reverse and dismiss that portion of the circuit court's order transferring possession of the truck because the circuit court, as a court of law, not of equity, lacked subject-matter jurisdiction to grant what was in effect a temporary mandatory injunction.

This case involves a trade of automobiles. In September of 1998, Timmons agreed to trade a 1937 Chevrolet pick-up truck to McCauley for a 1963 Impala SS, a 1962 Ford truck, a television set, and $5,000. The Chevrolet was titled in Vint's name. At some point after Timmons executed a written contract to make the transaction and Vint signed a bill of sale and negotiated the title to the Chevrolet over to McCauley, Vint and Timmons changed their minds and offered to return McCauley's money. McCauley insisted on taking possession of the vehicle; Timmons and Vint refused to surrender it.

McCauley filed a *pro se* small claims complaint in Sherwood Municipal Court against Timmons, alleging breach of contract, fraud, deceit, and bad faith, and seeking declaratory, injunctive, and monetary relief. McCauley's *pro se* complaint had nine notarized "Exhibits" attached, including the contract, bill of sale, and title to the Chevrolet. Timmons answered with a general denial and moved to transfer the case to Little Rock Municipal Court. The transfer motion was granted; however, the case was transferred, *sua sponte,* to Pulaski County Circuit Court on January 7, 1999.

On March 2, 1999, McCauley filed a complaint in replevin in the Sixth Division of the Pulaski County Circuit Court. Vint and Timmons separately answered the complaint, and both men counterclaimed for breach of contract and the tort of deceit and asserted that the case belonged in chancery court. Timmons also prayed for Rule 11 sanctions. Apparently, the municipal court case ended up in the Seventh Division, and on June 2, 1999, McCauley successfully moved to transfer and consolidate the Sixth Division case with

the Seventh Division filings. The consolidated case was heard in the Seventh Division on August 13, 1999.

At the hearing, however, Vint and Timmons moved to transfer the case to chancery court, where they claimed that ownership of the Chevrolet was an issue in a divorce proceeding filed by Timmons's wife. The trial judge granted the order transferring the case to chancery court, but ordered that the Chevrolet be delivered to McCauley, who according to the title document that was attached to the *pro se*complaint, was the owner of record of the vehicle.

As a threshold issue, McCauley argues that this case should be dismissed because there is no final appealable order. We disagree. Pursuant to Ark. R. App. P.—Civ. 2(a)(6) (2000), this court has appellate jurisdiction over "an interlocutory order by which an injunction is granted." *See Villines v. Harris*, 340 Ark. 319, 11 S.W.3d 516 (2000). An injunction is a command by a court to a person to do or refrain from doing a particular act. It is mandatory when it commands a person to do a specific act, or prohibitory when it commands him to refrain from doing a specific act. *Tate v. Sharpe*, 300 Ark. 126, 777 S.W.2d 215 (1989). An injunction may be preliminary, interlocutory, or permanent. Ark. R. Civ. P. 65(e). The order transferring possession of the Chevrolet was clearly a mandatory injunction. Moreover, in *Smith v. Ferguson*, 302 Ark. 388, 790 S.W.2d 162 (1990), the supreme court held that where the circuit court granted a directed verdict on a plaintiff's complaint for cancellation of a contract and transferred the defendant's counterclaim for foreclosure to chancery court, there was nothing remaining in the circuit court, and its judgment became a final and appealable order without the necessity of complying with the formal requirements of Rule 54(b) of the Arkansas Rules of Civil Procedure[1] Accordingly, this court has jurisdiction to decide this appeal.

It is also because the circuit court granted a temporary injunction that we must now reverse this case. We hold that in so doing, the circuit court acted without subject-matter jurisdiction to fashion an equitable remedy. Subject-matter jurisdiction is the

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[1] *See* John J. Watkins, *Law and Equity in Arkansas* — OR WHY TO SUPPORT THE JUDICIAL ARTICLE, 53 ARK. L. REV. 401, 422-25 (2000), for a discussion of *Smith v. Ferguson, supra,* and the serious trap for the unwary posed by Ark. R. Civ. P. 54(b) because of our dual court system.

power of a court to adjudge certain matters and to act on facts alleged. *Robinson v. Winston*, 64 Ark. App. 170, 984 S.W.2d 38 (1998). Where the question is one of subject-matter jurisdiction, it does not matter how it arises; this question may be raised for the first time on appeal or the court may raise it on its own, but the parties to an action may not confer subject-matter jurisdiction on a court. *Vanderpool v. Fidelity & Cas. Ins. Co.,* 327 Ark. 407, 939 S.W.2d 280 (1997). Subject-matter jurisdiction is an issue that we are required to raise on our own, even when the parties do not contest jurisdiction. *Hoyle v. Faucher*, 334 Ark. 529, 975 S.W.2d 843 (1998).

Although the state of the law regarding the authority of circuit courts to grant injunctive relief is by no means free from uncertainty,[2] in *Villines v. Harris, supra*, the supreme court has recently stated unequivocally that the circuit courts of this state do not possess the power to grant injunctive relief. In *Villines,* the court cited *Monette Road Improvement Dist. v. Dudley*, 144 Ark. 169, 222 S.W. 59 (1920), for its holding that the creation of the chancery courts in this state left no vestige of equity jurisdiction in the circuit courts. *See also Cummings v. Fingers*, 296 Ark. 276, 753 S.W.2d 865 (1988). The circuit court therefore was without subject-matter jurisdiction to order the transfer of possession of the Chevrolet. *See id.* A court that acts without subject-matter jurisdiction or in excess of its power produces a result that is void and cannot be enforced. *West v. Belin*, 314 Ark. 40, 45, 858 S.W.2d 97, 100 (1993). Accordingly, we reverse and dismiss the order transferring possession of the Chevrolet truck.

Reversed and dismissed.

HART and MEADS, JJ., agree.

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[2] Watkins, *supra* note 1, at 427-433.

Betty B. EDDINS, Personal Representative of
the Estate of James M. Berry, Deceased *v.*
STYLE OPTICS, INC., and Sidney Dobbins

CA 99-1355 35 S.W.3d 315

Court of Appeals of Arkansas
Division I
Opinion delivered September 27, 2000
[Petition for rehearing denied October 25, 2000.]

[redacted]

Diana M. Maulding, for appellant.

Stanley D. Rauls, for appellee.

JOSEPHINE LINKER HART, Judge. The crux of this appeal is the allowance by the probate court of appellees' claims for court-awarded attorney's fees and costs. This case is the sequel to two earlier appeals and both cases, as here, concern attorney's fees awarded appellees as a consequence of appellees being the prevailing party in a breach-of-contract suit brought by the personal representative. For reversal, the personal representative argues that the probate court erred in allowing appellees' untimely-filed claims and ordering the estate to post bond. Further, the personal representative cites as error the probate court's findings that its request for a setoff was barred and the inventory, as filed, was inadequate. We disagree with the personal representative and affirm.

In the first appeal, *Estate of James M. Berry, Deceased v. Styles Optics, Inc., et al.*, CA 98-222, slip op. at 8-10 (Ark. App. Nov. 11, 1998), the personal representative appealed a chancery court's decision in which the chancellor found in favor of appellees in a breach of contract claim brought by the personal representative and awarded appellees attorney's fees of $13,141.11. This court affirmed the chancellor's decision.

In the second appeal, the personal representative attempted to reverse the probate court's decision that she was estopped from denying appellees' claim despite the fact that the claim had been filed months after the statute of nonclaim had run. The order, which was filed on June 1, 1998, gave the personal representative two options: "(1) deposit funds or a surety bond in the amount of $16,000 to ensure that the claim, if allowed, would be paid; or, (2) recover assets previously distributed equal to that amount." The appeal, however, was dismissed because this court concluded that

the provision "if allowed" prevented the order from being a final, appealable order. *Betty B. Eddins, Administratrix v. Style Optics, Inc.*, CA 98-862, slip op. at 4 (Ark. App. Feb. 10, 1999).

After remand, appellees filed a petition seeking to require the personal representative to file an inventory[1] and filed an additional claim for $102, the costs awarded for the second appeal. This claim was in addition to their previous claim for attorney's fees of $13,141.11. The personal representative again denied appellees' claims and moved to have the June 1, 1998, order set aside. After a hearing on April 28, 1999, the court: (1) ordered the personal representative to file on or before May 10, 1999, an inventory of the deceased's assets as of the date of his death; (2) relying on *Brickey v. Lacey*, 247 Ark. 906, 448 S.W.2d 331 (1969), allowed appellees' claims of $13,141.11 and $102, and, consequently, denied the personal representative's requests.

Following the entry of that order on July 30th, there was a series of letters between the probate court and the personal representative's attorney. Ultimately, the probate court entered a second order on August 27, 1999, finding that the inventory filed by the personal representative was "wholly inadequate" and ordered the estate to file another inventory, required the personal representative to secure a bond in the amount of $16,000, and ruled that the doctrine of *res judicata* barred the estate from receiving a setoff. Thereafter, the personal representative appealed both the July 30, 1999, and the August 27, 1999, orders.

■ On appeal, "[p]robate cases are reviewed *de novo* . . . [and] we will not reverse the probate judge's findings of fact unless they are clearly erroneous. . . . A finding is clearly erroneous when, although there is evidence to support it, we are left on the entire evidence with the firm conviction that a mistake has been committed." *Snowden v. Riggins*, 70 Ark. App. 1, 7-8, 13 S.W.3d 598, 602 (2000) (citations omitted); *see also* Ark. R. Civ. P. 52(a). Furthermore, "[w]hile we will not overturn the probate judge's factual determinations unless they are clearly erroneous, we are free in a *de novo* review to reach a different result required by the law." *Standridge v. Standridge*, 304 Ark. 364, 370, 803 S.W.2d 496, 499 (1991) (citing *Winn v. Chateau Cantrell Apartment Co.*, 304 Ark. 146, 801

[1] The distributees had earlier filed waivers of inventory and accounting.

S.W.2d 261 (1990); *Ferguson v. Green*, 266 Ark. 556, 587 S.W.2d 18 (1979)).

I. Allowance of Appellees' Claims

The personal representative argues that *In Re Estate of Spears*, 314 Ark. 54, 858 S.W.2d 93 (1993), instead of *Brickey* controls the outcome of this case. In our view, however, the probate court properly relied on *Brickey* in allowing appellees' claims. A review of the facts of these cases demonstrates that the personal representative's reliance on *Spears* is misplaced.

The decedent in *Spears* was the principal owner of a real estate company and a construction company. In January 1989, Spears, the decedent, entered into a contract with Jimmie and Gay Bowling whereby he agreed to provide a lot and build a house in Little Rock for the Bowlings, and they agreed to convey to Spears a house that was mortgaged in which Spears would assume the note payments. Thereafter, Spears made timely payments on the assumed note until May 1990, when he conveyed the mortgaged property to his brother, who stopped making payments the following February.

Consequently, demand was made upon the Bowlings for delinquent note payments in May 1991, when they learned that Spears had died in September 1990. The mortgaged property went into foreclosure and a deficiency judgment of $24,314.90 was entered against the Bowlings, who in turn filed a claim against the estate in an attempt to satisfy the judgment. The probate court found that the Bowlings' claim was filed more than three months after the first publication of the statutory notice and, therefore, violated the statute of nonclaim. Further, the probate court found that the Bowlings were not reasonably ascertainable creditors and, thus, not entitled to file their claims within the two-year limitations period found in Ark. Code Ann. § 28-50-101(h) (Supp. 1991). The probate court's decisions were affirmed on appeal.

In *Brickey*, on the other hand, the estate sought and received permission from the probate court to bring an unlawful detainer action against Lacy. Lacy surrendered possession of the premises, but filed an answer denying the personal representative's right to possession and prayed for damages caused by his eviction. The trial resulted in a judgment in favor of Lacy for $8,028.26, and that

judgment was affirmed on appeal. Lacy, accordingly, filed a claim against the personal representative to collect. The probate court allowed the claim and the personal representative appealed arguing that the claim was barred by the statute of nonclaim. Our supreme court, however, affirmed and held that Lacy's demand was a "cost of administration" and not barred by the statute of nonclaim. *Brickey*, 247 Ark. at 908-909, 448 S.W.2d at 332.

Plainly, *Spears* and *Brickey* deal with entirely different types of claims. Claims arising from a creditor's dealings with the decedent prior to death is the subject of the court's decision in *Spears*. However, in *Spears* the court did not discuss *administrative claims*, which is the subject of the court's decision in *Brickey*. While all claims are certainly subject to strict application of applicable statutes, it is fair to state that, generally speaking, an administrative claim is distinct:

> The duties of finding the assets of the estate, of discharging its obligations, of preventing waste, and, if there is a will, of carrying out the expressed wishes of the testator, necessarily require financial outlays by the executor. Debts arising in the performance of these duties are classified as "expenses of administration."

3 James M. Henderson, *Probate Practice* § 960, at 1634 (1928). In this case, the personal representative, in accordance with her duties as personal representative, sued appellees to find and secure estate assets. Appellees, however, prevailed and were awarded attorney's fees, which created a debt that arose in the performance of the personal representative's duties.

The personal representative's counter-argument is that if appellees' claims are administrative expenses, then the claims are not among the allowable claims listed in Ark. Code Ann. § 28-48-108 (1987). We interpret that statute, however, as mainly providing formulas to compensate personal representatives and attorneys, and not limiting the type of allowable administrative claims.

We also reject the personal representative's argument that *Brickey* was overruled by *Johnson & Hudson v. Poore*, 266 Ark. 601, 587 S.W.2d 44 (1979). The issue in *Johnson & Hudson* was whether a tort action could be brought *against* an estate after the expiration of the statute of nonclaim, and the supreme court reversed the trial court and remanded for trial.

Equally unconvincing is appellant's argument that the probate court erred in finding that both appellees filed claims. Citing *Cleveland Chem. Co. of Arkansas, Inc. v. M.G. Keller*, 19 Ark. App. 7, 716 S.W.2d 204 (1986), the personal representative argues that appellees' claims are invalid because Sidney Dobbins is the only person who signed the claims. A resolution of the case at bar is given little guidance by the case cited by appellant. *Cleveland Chem.* holds that a person is personally liable on an instrument if the instrument does not demonstrate he signed in a representative capacity. Here, the claim bore the typed name of both Style Optics, Inc. and Sidney Dobbins, but only had the signature of Sidney Dobbins. We conclude that the probate court did not err by allowing these claims because the judgment for attorney's fees was jointly awarded to "the defendants," which included both appellees in this case,[2] and, as such, each joint party may independently attempt to collect the judgment by filing a claim. *Cf.* 33 C.J.S. *Executions* § 20 (1998) ("Either of several joint judgment creditors may take out execution without consulting the others, unless there is some agreement to the contrary.").[3]

We, therefore, conclude that *Brickey* controls, and now apply its holding to the case at bar. The statute of nonclaim provides:

> Except as provided in §§ 28-50-102 and 28-50-110, all claims against a decedent's estate, *other than expenses of administration* and claims of the United States which, under valid laws of the United States, are not barrable by a statute of nonclaim, but including claims of a state or territory of the United States and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise, shall be forever barred as against the estate, the personal representative, or the heirs and devisees of the decedent, unless verified to the personal representative or filed with the court within three (3) months after the date of the first publication of notice to creditors. However, claims for injury or death caused by the negligence of the decedent shall be filed within six (6) months

[2] The defendants who were awarded the attorney's fees award were Style Optics, Inc.; Sidney Dobbins; and Betty Dobbins, Secretary.

[3] The issue of the ownership of the funds, including the corporation's ownership, is not before us in this appeal.

> from the date of first publication of the notice, or they shall be forever barred and precluded from any benefit in the estate.

Ark. Code Ann. § 28-50-101(a) (Supp. 1999) (emphasis added). If appellees' claims had been something other than an expense of administration, then the personal representative's argument might prevail under a strict application of the statute. However, *Brickey* considered a claim to collect a judgment awarded a defendant who was sued by a personal representative to be an administrative claim, and, therefore, not subject to the statute of nonclaim.[4] Because appellees' claims in our view are of the type considered to be administrative claims under *Brickey*, we affirm the probate court's allowance of appellees' claims and denial of the personal representative's motions opposing the claims.

II. Bond

The personal representative argues, without challenging the constitutionality of the probate code, that the order requiring the personal representative to secure a bond constitutes a violation of due process inasmuch as it orders the estate to do something it cannot because a significant portion of the property that once belonged to the estate has been partially distributed.[5] We disagree with appellant and affirm.

The key provision of the probate codes states:

> [I]f any person asserting a claim against the estate or having or claiming any interest in the estate files a written demand, the personal representative shall give bond as required in § 28-48-201 or in such other amount as the court shall direct after considering the amount of the alleged claim or asserted interest; but, if it is shown to the court that the alleged claim is invalid or has been paid or that the person alleging the interest in the estate has, in fact, no interest therein, then bond shall not be required.

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[4] We do not consider, as the personal representative argues, the filing of a claim such as appellees' in a pending probate action to constitute an attempted execution on the estate's property in violation of Ark. Code Ann. § 28-50-114 (1987).

[5] We do not address appellant's argument that the probate court violated the probate code by ordering the *estate* instead of the *Personal representative* to secure the bond because she conceded during oral argument that the proper interpretation of the order was that the personal representative was to secure the bond.

Ark. Code Ann. § 28-48-206(c)(2) (Supp. 1999). Appellees complied with this statute by filing their written demand (*i.e.*, their administrative claim) and petitioning the probate court for an order directing the estate's assets be returned or, alternatively, requiring the personal representative to secure a bond. The petition was served upon the personal representative, and the probate court held a hearing on the petition and granted the relief sought in the petition. Ultimately, the probate court in the August 27, 1999, order removed as an option the returning of property to the estate and simply ordered the personal representative to secure a bond.[6] The personal representative was given both notice of the petition and an opportunity to be heard regarding the relief sought in the petition. The order for the personal representative to secure a bond, in our view, complies with the probate code, and furthermore, does not constitute a deprivation of due process.

III. Setoff

The personal representative next argues that the probate court erred by finding that the estate was unable to receive a setoff for appellees' administrative claims. This argument is based on the personal representative's assertion that both Sidney Dobbins and Style Optics, Inc., were awarded the attorney's fees and the fact that the estate and Dobbins each control equal shares of the corporation. As such, the personal representative argues that the estate is entitled to a setoff equal to fifty percent of the judgments to account for and reflect the estate's fifty percent ownership in the corporation. We find no merit to this argument.

A setoff is proper when "a *distributee* of an estate is indebted to the estate . . . ." Ark. Code Ann. § 28-53-111 (1987) (emphasis added). A distributee, however, "denotes a person entitled to real or personal property of a decedent, either by will, as an heir, or as a surviving spouse . . . ." Ark. Code Ann. § 28-1-102(a)(7) (1987). Because there is no allegation that a distributee is indebted to the estate, the probate court did not err by denying the estate's request for a setoff, and we affirm.

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[6] Thus, we do not agree with appellant's argument that the probate court has rendered a "conditional order." The latest order from the probate court did not provide the personal representative with an option — she was ordered to secure a bond.

IV. Inventory

For her final argument, the personal representative contends that the trial court erred in finding that her inventory was "totally inadequate." Appellees, in support of the probate court's order, argue that "[t]he inventory filed by the personal representative . . . was not in the form required by the Arkansas Supreme Court; it did not even list the property disclosed by the probate file . . .; and it claimed (without legal basis) the debt owed to the estate by the personal representative was forgiven." The inventory itself lists as the decedent's assets, at the time of death, multiple parcels of real property in Arkansas and Florida with values, if known; several items of personal property including a boat, motor, car, and truck with values, if known; assets in Style Optics, Inc., with values; and half of the corporate funds expended in the defense of the chancery suit. The inventory also states the decedent's liabilities at the time of death, which include funeral expenses, credit and charge-card balances, homeowners insurance, etc.

The relevant provisions of the probate court provide:

> (a)(1) Within two (2) months after his qualification or as the court may direct, a personal representative shall, except as provided in this section, make and file a true and complete inventory of all property owned by the decedent at the time of his death, except such interests as terminated by reason of his death, describing each item of property in detail and setting out the personal representative's appraisement of the fair market value of the property as of the date of the death of the decedent.
>
> (2) *The personal representative shall append to the inventory his affidavit to the effect that the inventory is complete and accurate to the best of his knowledge and belief and that the personal representative was not indebted or obligated to the deceased at the time of his death* except as stated in the inventory.

Ark. Code Ann. § 28-49-110(a) (1987) (emphasis added).

Because the probate court failed to express the reason why the inventory was "wholly inadequate," we are left in the dark as to why the court reached that conclusion. Nevertheless, we conclude in our *de novo* review that the conclusion was correct because of the personal representative's failure to attach an affidavit as required by Ark. Code Ann. § 28-49-110(a). If the statute is unambiguous,

then strict compliance is required. *See, e.g., Norton v. Norton*, 337 Ark. 487, 989 S.W.2d 535 (1999). In this case, the requirement in the statute is clear and unambiguous, and the personal representative failed to strictly comply with that statute. Therefore, the probate court's finding that the inventory was "wholly inadequate" is affirmed.

Affirmed.

JENNINGS and GRIFFEN, JJ., agree.

Kathy Lynn CLARK *v.* RANDOLPH COUNTY, *et al.*

CA 00-44 36 S.W.3d 353

Court of Appeals of Arkansas
Division IV
Opinion delivered September 27, 2000

Bill W. Bristow, for appellant.

Riffel & King, P.L.C., by: *V. James King, Jr.*, for appellees.

K. MAX KOONCE, II, Judge. This is an appeal from the trial court's order of summary judgment. Appellant contends that the trial court erred in granting summary judgment in favor of appellees finding that the county was not required under the Motor Vehicle Safety Responsibility Act to insure vehicles that are not subject to registration in this state. We disagree and affirm.

Appellant, Kathy Lynn Clark, was injured when her car collided with a road grader owned by Randolph County and operated by James Burnett. Appellant was traveling in the southbound lane of a county road when she approached the top of a hill and collided with the road grader, which was heading north in the southbound lane. Appellant filed suit against James Burnett, Randolph County, and USF&G, Randolph County's insurance carrier.

USF&G moved for summary judgment on the basis that the policy did not provide coverage for the accident. The trial court granted USF&G's motion, which is not at issue in the present appeal. Randolph County then filed a motion for summary judgment on the basis that the county and its officers and employees, while acting on behalf of the county, have tort immunity. Appel-

lants responded by arguing that, pursuant to Ark. Code Ann. § 21-9-303 (Repl. 1996), the county was required to carry liability insurance on their motor vehicles or become self-insured for their vehicles in the minimum amounts prescribed by the Motor Vehicle Safety Responsibility Act, which is codified at Ark. Code Ann. §§ 27-19-101 to -720 (Repl. 1994 & Supp. 1999).

A hearing on the motion was held on August 24, 1999. After the parties made brief arguments, the judge granted the motion from the bench. As outlined in its order, the court found that the road grader was not a vehicle required to be licensed under the motor vehicle registration laws and that the county was not required under the Motor Vehicle Safety Responsibility Act to insure vehicles that are not subject to registration. Appellant appeals the trial court's order granting summary judgment.

Our standard of review with regard to summary judgment is well established. While it is no longer considered a drastic remedy, summary judgment is only approved when the state of the evidence as portrayed by the pleadings, affidavits, discovery responses, and admissions on file is such that the non-moving party is not entitled to a day in court. *Guidry v. Harp's Food Stores, Inc.*, 66 Ark. App. 93, 987 S.W.2d 755 (1999). The moving party bears the burden of sustaining a motion for summary judgment. *Id.* On appeal, we view the evidence in a light most favorable to the nonmoving party. *Id.*

Appellant argues that the county's road grader is a motor vehicle pursuant to Ark. Code Ann. § 27-19-206 (Repl. 1994), and the county was therefore required, pursuant to Ark. Code Ann. § 21-9-303, to carry liability insurance on its motor vehicles or become self-insured to the extent provided in the Motor Vehicle Safety Responsibility Act. Arkansas Code Annotated section 27-19-206 defines motor vehicle as follows:

> "Motor vehicle" means every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires but not operated upon rails.

Further, Arkansas Code Annotated section 21-9-303 provides that all political subdivisions must carry liability insurance or become self-insurers for their vehicles in the minimum amounts prescribed in the Motor Vehicle Safety Responsibility Act. The county con-

tends that a road grader is not a vehicle subject to the registration laws of the State of Arkansas and that the county was not required under the Motor Vehicle Safety Responsibility Act to insure vehicles which are not subject to registration.

Our supreme court addressed this issue in *Cousins v. Dennis*, 298 Ark. 310, 767 S.W.2d 296 (1989). In *Cousins*, Tracy Cousins was injured at school when she was struck in the left eye by a rock which was thrown by a bush-hog mower pulled by a tractor. The tractor was driven by appellee L.D. Dennis who was mowing grass on the school grounds under the direction of the school maintenance supervisor. Tracy Cousins's father sued the Huntsville School District and L.D. Dennis alleging that their negligence caused his son's injury.

The supreme court in *Cousins* addressed the same issue that is raised in the present appeal — whether the school district was required, pursuant to Ark. Code Ann. § 21-9-303, to insure the vehicle that was involved in the accident. Cousins argued that the tractor used by the school district was a motor vehicle within the meaning of Ark. Code Ann. § 21-9-303. Cousins relied on *Thompson v. Sanford*, 281 Ark. 365, 663 S.W.2d 932 (1984), where the Dardanelle School District was held liable for negligence of its employee who was using a tractor on a highway when it struck a motorcycle. The supreme court was quick to dismiss Cousins's reliance on *Thompson* because the court never addressed the issue of whether a tractor is a motor vehicle under Ark. Code Ann. § 21-9-303. The Huntsville School District argued that the tractor is not a motor vehicle that is required to be insured under Ark. Code Ann. § 21-9-303. The supreme court reasoned that a tractor is excepted from registration laws under Ark. Code Ann. § 27-14-703 (Repl. 1994) as an implement of husbandry. The supreme court held that the school district was not required to insure its tractor under Ark. Code Ann. § 19-10-303(a) because the vehicle was not required to be registered under Arkansas law.

The supreme court discussed its interpretation of the relevant statutes as follows:

> In construing 21-9-303(a), it is tempting to conclude that since the General Assembly failed to mention the vehicle registration statutes, those registration laws do not apply and, thus, a political subdivision should insure every motor vehicle it owns,

registered or not. Such a construction would be erroneous for several reasons. One reason is that the language in 21-9-303(a) specifically refers to the entire Motor Vehicle Responsibility Act, which, as we previously have discussed, relies, in turn, upon Arkansas's vehicle registration and licensing laws. Another, and more important reason, is if Arkansas's vehicle registration laws are not considered when construing 21-9-303(a), absurd results would be reached. For example, if we limited the construction of 21-9-303(a) to require political subdivisions to carry liability insurance on all motor vehicles meeting the definition found in 27-19-206, a self-propelling riding lawn mower would qualify, thereby requiring the school district to include its mowers under liability coverage. This same rationale would include any self-propelled vehicle even though it is not designed or used primarily for transportation of persons or property. If we were to construe 21-9-303(a) without considering all relevant provisions of Arkansas's vehicle registration laws and Motor Vehicle Responsibility Act, another absurdity would arise by requiring political subdivisions to acquire liability insurance coverage on vehicles, which no one else in the state would be required to insure. We decline any interpretation of 21-9-303(a) that would result in an absurdity or injustice. *Ragland v. Alpha Aviation, Inc.*, 285 Ark. 182, 686 S.W.2d 391 (1985).

We believe the General Assembly, in requiring political subdivisions to purchase motor vehicle liability insurance, never intended non-registered vehicles to be covered. In passing 21-9-303, the legislature undoubtedly was aware of how Arkansas's Motor Vehicle Responsibility Act and vehicle registration laws worked together in requiring security deposits and liability insurance coverage only on those vehicles which are subject to registration. In keeping with this view, we have held that in construing any statute, we should place it beside other statutes relevant to the subject and give it a meaning and effect derived from the combined whole. *City of Fort Smith v. Brewer*, 255 Ark. 813, 502 S.W.2d 643 (1973).

In sum, in applying Arkansas's registration laws, we find, as may reasonably be expected, that mowers and other vehicles not designed for transportation purposes are designated as special mobile equipment and exempted from registration. Ark. Code Ann. 27-14-703(4) and 27-14-211 (1987). Thus, self-propelling mowers and other equipment not designed or intended for transportation purposes — being exempt from registration are not required to comply with the security deposit or liability insurance provisions required under the Act. For the same reason, the

> Huntsville School District in the present case was not required to insure its tractor, because the vehicle is an implement of husbandry, which is specifically excluded from vehicle registration under 27-14-703(3).

Cousins, 298 Ark. at 314-15, 767 S.W.2d at 298-99.

Appellant attempts to make a distinction between *Cousins* and *Thompson*. In *Thompson*, a school-district employee was driving a tractor on a public road, as opposed to school grounds, and injured the plaintiff. The supreme court affirmed the judgment of the trial court based on *Sturdivant v. City of Farmington*, 255 Ark. 415, 500 S.W.2d 769 (1973), where the supreme court held that a municipality which fails to conform to the insurance requirements would be responsible as a self-insurer for liability not to exceed the minimum amounts set out in the Motor Vehicle Safety Responsibility Act. The court in *Thompson* did not address the issue of whether the tractor involved in the accident was a motor vehicle within the purview of Ark. Code Ann. § 21-9-303(a), as the court in *Cousins*specifically mentioned when it discussed the Cousins's misplaced reliance on *Thompson*.

■ ■ Appellees argue that the road grader involved in the present case did not have to be registered and therefore was not subject to the provisions of the Motor Vehicle Safety Responsibility Act. Arkansas Code Annotated section 27-14-703 provides that "special mobile equipment" as defined in Ark. Code Ann. § 27-14-211 (Repl. 1994) does not need to be registered. Arkansas Code Annotated section 27-14-211 provides the following definition of special mobile equipment:

> "Special mobile equipment" means every vehicle not designed or used primarily for the transportation of persons or property and incidentally operated or moved over the highways, including farm tractors, road construction or maintenance machinery, ditch-digging apparatus, well-boring apparatus, and concrete mixers. This enumeration shall be deemed partial and shall not operate to exclude other such vehicles which are within the general terms of this section.

A road grader falls within the definition of special mobile equipment because it is not used primarily for the transportation of persons or property and it is only incidentally operated or moved over the highways. In addition, the definition specifically includes

road construction or maintenance equipment. Because a road grader is not subject to the registration law, the county was not required to insure the road grader. This court is bound by the holding in *Cousins*. *See Metcalf v. Texarkana Sch. Dist.*, 66 Ark. App. 70, 986 S.W.2d 893 (1999). Therefore, we must affirm the trial court's order granting summary judgment.

Appellant's final point on appeal is that the trial court should be reversed because the legislature waived sovereign immunity to provide citizens with redress when injured on the highways of this state and this court should give effect to such intention. Because this court is bound by the precedent set by our supreme court, our decision cannot be affected by this public-policy argument.

Affirmed.

BIRD, J., agrees.

ROAF, J., concurs.

ANDREE LAYTON ROAF, Judge, concurring. I concur in this affirmance, because road construction or maintenance machinery is specifically enumerated as included within the definition of "special mobile equipment" in Ark. Code Ann. § 27-14-211 (Repl. 1994), but I do not agree that a road grader, for which the sole purpose is to grade roads, is only "incidentally" operated or moved over the highways, under any commonly understood definition of "incidentally." However, it is well-settled that we will not interpret a statute so as to reach an absurd conclusion that is contrary to legislative intent. *See, e.g. Brandon v. Arkansas Public Service Comm.*, 67 Ark. App. 14, 992 S.W.2d 834 (1999).

BOBBY COX BAIL BONDS, INC. *v.*
STATE of Arkansas

CA CR 00-54 36 S.W.3d 752

Court of Appeals of Arkansas
Division IV
Opinion delivered September 27, 2000

Wright & Van Noy, by: *Herbert T. Wright, Jr.*, for appellant.

Mark Pryor, Att'y Gen., by: *Leslie Plowman Fisken*, Ass't Att'y Gen., for appellee.

ANDREE LAYTON ROAF, Judge. Bobby Cox Bail Bonds, Inc., appeals the forfeiture of a $50,000 bond after criminal defendant Patrick A. Capps failed to return after a lunch break in his trial on drug charges. On appeal, it argues that the trial court erred in ordering the forfeiture because Capps was in the custody of the trial court when he absconded and the trial court was without authority to release Capps on bond where it had not agreed to remain as surety. We affirm.

The facts in this case are largely not in dispute. Bobby Cox Bail Bonds, Inc., wrote a bail bond for Capps on July 19, 1998, in the amount of $50,000 to secure his appearance on charges of being a principal and an accomplice in the manufacture of a controlled substance. Capps appeared for his scheduled May 12, 1999, jury trial. After the jury was selected, the court recessed at 11:30 for lunch, and Capps failed to return.

A bond-forfeiture proceeding was held on November 9, 1999, in which James Gooch, on behalf of the bonding company, asserted that no one made arrangements for Capps to remain on bond after he was produced at trial, and therefore the company's liability under the bond was extinguished. On cross-examination, however, he admitted that the bond that he had signed stated in pertinent part:

> Bobby Cox Bail Bonds, Inc. does hereby undertake and guarantee that the Defendant will appear before the Court designated at the time indicated, and further guarantees all subsequent appearances before any court having jurisdiction, including appearances related to appeals and on demand, until the Defendant is lawfully discharged or upon rendition of final judgment has surrendered himself in execution thereof.

A forfeiture order was subsequently entered on November 22, 1999.

On appeal, Bobby Cox Bail Bonds argues that the trial court erred in ordering forfeiture of the bail bond. In support of its argument, it cites Ark. Code Ann. § 16-84-111(b) (Supp. 1999)(providing: "However, for a felony when a defendant is upon bail, he may remain upon bail or be kept in actual custody as the court may direct. If the defendant remains on bail, any surety's liability shall be exonerated unless the surety has agreed to remain as the surety until final judgment is rendered") and *Liberty Bonding v. State*, 270 Ark. 434, 604 S.W.2d 956 (1980)(reversing a bond forfeiture where there was no evidence that a bonding company agreed to remain on bond after sentencing). Bobby Cox Bail Bonds, Inc., argues that because it did not expressly consent to continue as surety through the trial, its liability under the bond ceased when Capps showed up for trial. This argument is without merit.

As noted above, the bond expressly states that Bobby Cox Bail Bonds, Inc., would remain obligated to guarantee Capps's

appearances "until the Defendant is lawfully discharged or upon rendition of final judgment has surrendered himself in execution thereof." Because neither of these conditions had been met, the bond remained in force. Bobby Cox Bail Bonds' resort to *Liberty Bonding v. State, supra*, does not compel a different conclusion. In *Liberty Bonding*, where the language in the bond at issue is virtually identical to that in the instant case, the supreme court found that the trial court erred in ordering a bond forfeiture where the trial court allowed the defendant to remain at liberty after sentencing, solely upon the representation by the defendant's attorney that the bonding company would agree to remain on bond. In short, the trial court in *Liberty Bonding* erred because it held the bonding company liable for an obligation to which it had not consented. In the instant case, Capps was still covered by the express terms of the bond.

Bobby Cox Bail Bonds also argues on appeal that Ark. Code Ann. § 16-84-111(b) conflicts with Rule 9.2(e) of the Arkansas Rules of Criminal Procedure and that the language in the statute should control. The pertinent language from Rule 9.2(e) states:

> An appearance bond and any security deposit required as a condition of release pursuant to subsection (b) of this rule shall serve to guarantee all subsequent appearances of a defendant on the same charge or on other charges arising out of the same conduct before any court, including appearances relating to appeals and upon remand.

We do not agree that there is a conflict between the statute and the rule. Furthermore, we note that the language of the bond form used by Bobby Cox Bail Bonds echoes the language contained in Rule 9.2(e) that we quote above, which constitutes an essential part of Bobby Cox Bail Bonds' contractual obligation in this case.

We find no error and affirm.

BIRD and KOONCE, JJ., agree.

Linda COBLE *v.* Rhonda SEXTON

CA 00-260 27 S.W.3d 759

Court of Appeals of Arkansas
Division II
Opinion delivered October 4, 2000

Lorie L. Whitby, for appellant.

Bill Bristow, for appellee.

JOHN B. ROBBINS, Chief Judge. In this case, funds from a 401(k) savings plan were deposited in the registry of the Greene County Chancery Court after a dispute arose as to who was entitled to the funds. Appellant Linda Coble appeals from the chancellor's order that awarded the proceeds to the designated contingent beneficiary, appellee Rhonda Sexton, instead of to her. Cross-appellant Laura Mersch appeals the award as well, arguing that she should have been awarded the proceeds. We reverse and remand.

The facts giving rise to this cause of action are as follows. The 401(k) savings plan was owned by Mr. William E. Sexton, who died on November 18, 1998. Mr. Sexton had two biological daughters, appellant Linda Coble ("Linda") and cross-appellant Laura Mersch ("Laura"). Mr. Sexton had been married to their mother, but they divorced in 1984. Their mother remarried, and Laura was adopted by her stepfather in 1986, when she was fifteen years old. It was unknown if Mr. Sexton was ever aware that this adoption took place. Appellee Rhonda Sexton ("Rhonda") is the niece of the late Mr. Sexton, being the daughter of his brother.

Mr. Sexton executed a Designation of Beneficiary Form with regard to the savings plan on May 31, 1995, wherein he attempted to name the person to receive the proceeds of the savings plan upon his death. The primary beneficiary was designated to be "Laura Cobble, Daughter, of 2135 State, Granite City, Illinois." The form provided that if the primary beneficiary died prior to the complete distribution of the account, then the contingent beneficiary would receive the proceeds. The contingent beneficiary was designated to be "Rhonda Sexton, Niece, of Jonesboro, Arkansas."

After Mr. Sexton's death, Schneider National Carriers, Inc., which managed the savings plan, could not determine who should receive the proceeds as primary beneficiary because it discovered that there is no such person as "Laura Cobble." The names of Mr. Sexton's biological daughters are Linda Coble and Laura Mersch. Furthermore, though both biological daughters did live for some period of time at 2134 State Street, Granite City, Illinois, this address is one digit different from the beneficiary form. Laura lived

at that address on the date that the beneficiary designation form was completed; Linda did not.

Confronting its inability to determine the proper beneficiary, Schneider National filed an interpleader action, asking the chancery court to permit it to deposit the funds into the court's registry. The funds were accepted, and Schneider National was dismissed from the matter.

Linda and Laura filed responses to the interpleader action in which each requested that she be found to be the primary beneficiary. Rhonda responded to the interpleader by stating that she thought Mr. Sexton intended for Laura to be the primary beneficiary, but if that designation failed, then she should be awarded the proceeds as the contingent beneficiary. Mr. Sexton's widow responded that she thought that Linda should receive the proceeds as his only legal daughter; she disclaimed any interest in the savings plan.

A consolidated hearing was held on the interpleader action and on Linda's motion for determination of heirship, which was pending in a related probate case. Mr. Sexton's will was admitted without objection for consideration in the probate proceeding. During the hearing, counsel for Laura and counsel for Rhonda moved that the chancellor consider extrinsic evidence in construing the meaning of the words in the primary beneficiary designation. The chancellor denied the motion, and a proffer of that testimony and evidence was made. Later, the motion was renewed, but was again denied.

After taking the matter under advisement, the chancellor determined that Mr. Sexton completely failed in his attempt to name a primary beneficiary and that the contingent beneficiary was entitled to the proceeds in the amount of $74,580.01. In his order, the chancellor found it significant that Mr. Sexton, in his January 28, 1995, holographic will, described Laura Mersch as his "daughter." This appeal followed.

Linda's contentions on appeal are that the chancellor erred (1) in considering the holographic will as extrinsic evidence of the primary beneficiary, (2) in finding that there was a failure to name a primary beneficiary, and (3) in awarding the proceeds of the savings plan to the contingent beneficiary. Linda asserts that the chancel-

lor's judgment should be reversed and the funds awarded to her as primary beneficiary. Laura argues in her cross-appeal that the judgment should be reversed because the chancellor erred in not finding the contract to be ambiguous and not considering the proffered extrinsic evidence. We agree with Laura that the trial court erred when it did not find the contract ambiguous and in not considering the proffered extrinsic evidence. We reverse and remand on this point.

When contracting parties express their intention in a written instrument in clear and unambiguous language, it is our duty to construe the written agreement according to the plain meaning of the language employed. *Miller v. Dyer*, 243 Ark. 981, 423 S.W.2d 275 (1968). However, where the meaning of a written contract is ambiguous, parol evidence is admissible to explain the writing. *Brown and Hackney v. Daubs*, 139 Ark. 53, 213 S.W. 4 (1919). Ambiguities are both patent and latent. When, on its face, the reader can tell that something must be added to the written contract to determine the parties' intent, the ambiguity is patent; a latent ambiguity arises from undisclosed facts or uncertainties of the written instrument. *Johnson v. Mo. Pac. R. R. Co.*, 139 Ark. 507, 214 S.W. 17 (1919); *Taylor v. Union Sawmill Co.*, 105 Ark. 518, 152 S.W. 150 (1912). However, the initial determination of the existence of an ambiguity rests with the trial court, and if ambiguity exists, then parol evidence is admissible and the meaning of the term becomes a question for the factfinder. *Fort Smith Appliance and Serv. Co. v. Smith*, 218 Ark. 411, 236 S.W.2d 583 (1951); *Brown and Hackney v. Daubs, supra*; *Easton v. Washington County Ins. Co.*, 391 Pa. 28, 137 A.2d 332 (1957). While we do not set aside a trial court's finding of fact unless it is clearly erroneous, Ark. R. Civ. P. 52, the determination of whether a contract is ambiguous is a matter of law. *Western World Ins. Co. v. Branch*, 332 Ark. 427, 965 S.W.2d 760 (1998); *C&A Construction Co. v. Benning Construction Co.*, 256 Ark. 621, 509 S.W.2d 302 (1974); *Arkansas Burial Ass'n v. Dixon Funeral Home*, 25 Ark. App. 18, 751 S.W.2d 356 (1998).

Here, there existed a latent ambiguity because, on the face of the document, a reader would not anticipate that additional information was needed to determine who the primary beneficiary was. However, a latent ambiguity became apparent when evidence was introduced that there was no such person as "Laura Cobble." The proffered evidence should have been considered to determine

if it shed light on the meaning of the words used in the primary beneficiary designation. Apparently, the chancellor was inclined to consider Mr. Sexton's holographic will for that purpose. We reverse and remand this case for the chancellor to consider extrinsic evidence in his attempt to resolve this ambiguity.

Because we reverse and remand on this issue, we need not address appellant's and cross-appellant's other points on appeal.

Reversed and remanded.

CRABTREE and MEADS, JJ., agree.

Jeffrey S. THOMPSON *v.*
WASHINGTON REGIONAL MEDICAL CENTER

CA 00-36 27 S.W.3d 459

Court of Appeals of Arkansas
Division III
Opinion delivered October 4, 2000

Tolley & Brooks, P.A., by: *Jay N. Tolley*, for appellant.

Bassett Law Firm, by: *Tod Bassett*, for appellee.

JOHN MAUZY PITTMAN, Judge. The appellant in this workers' compensation case had been employed as a delivery-truck driver by Washington Regional Medical Center for approximately two and one-half years when he was injured in a one-vehicle accident while returning from a delivery on July 16, 1998. He filed a claim for benefits that was denied on the strength of a finding that he failed to prove by a preponderance of the evidence that his injury was compensable. From that decision, comes this appeal.

The Commission found that, at the time of his injury, appellant knew that he was medically restricted from driving because of a seizure disorder but that, when asked by his employer if there was any reason he could not resume driving the company vehicle, appellant said that he knew of no such reason. Appellant argues on appeal that this finding is not supported by substantial evidence, and that the Commission erred as a matter of law in ruling that such a willful false representation of his physical condition would preclude appellant from obtaining workers' compensation benefits under the rule enunciated in *Shippers Transp. v. Stepp*, 265 Ark. 365, 578 S.W.2d 232 (1979).

First, we address the sufficiency of the evidence to support the Commission's findings of fact. In determining the sufficiency of the evidence to support the findings of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings, and we will affirm if those findings are supported by substantial evidence, *i.e.*, such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Second Injury Fund v. Exxon Tiger Mart*, 70 Ark. App. 101, 15 S.W.3d 345 (2000). The determination of the credibility and weight to be given a witness's testimony is within the sole province of the Commission. *Id.*

Viewing the evidence, as we must, in the light most favorable to the Commission's findings, the record shows that

appellant suffered a blackout while visiting relatives on May 24, 1998. He was examined by Dr. David Brown on June 1, 1998. Dr. Brown diagnosed appellant's loss of consciousness as a generalized seizure, ordered an MRI, and informed appellant that, because he had experienced a seizure, the law prohibited him from driving for at least one year. Appellant informed his supervisor that he had fainted and that he could not drive until he received the results of some tests. He did not state that he had experienced a seizure, and he did not inform his supervisor that his physician had informed him that he should not drive for one year. Appellant was assigned to other duties for four or five days. Appellant's supervisor then asked appellant if he could drive, and appellant stated that there was no reason why he could not resume driving. Appellant did resume driving and, approximately five weeks later, suffered another seizure while driving the company vehicle, lost consciousness, lost control of the vehicle, and was injured when he struck a tree. Appellant's supervisor testified that, had he known that appellant was restricted from driving, he would not have been allowed to drive. We hold that this constitutes substantial evidence to support the Commission's finding that appellant knowingly misrepresented to his employer that he was not restricted from driving.

■ Next, we address appellant's contention that the Commission erred as a matter of law in ruling that his false representation of his physical condition precluded him from obtaining workers' compensation benefits under *Shippers Transp. v. Stepp, supra.* The *Shippers Transport* case held, in pertinent part, that:

> [W]e are of the view that public policy, in the absence of a clear legislative intent to the contrary, requires the application here of the test as stated in 1B Larson's Workmen's Compensation Law § 47-53:
>
> > The following factors must be present before a false statement in an employment application will bar benefits: (1) the employee must have knowingly and wilfully made a false representation as to his physical condition. (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. (3) There must have been a causal connection between the false representation and the injury.

Air Mod Corporation v. Newton, 215 A.2d 434 (Del. 1965); *Cooper v. McDewitt & Street Company*, 196 S.E.2d 833 (S.C. 1973); *Martinez*

> *v. Mechenbier, Inc.*, 56, P.2d 843 (N.M. 1977); *see also City of Homestead, Dade County v. Watkins*, 285 So.2d 394 (Fla. 1973); *Martin Company v. Carpenter*, 132 So.2d 400 (Fla. 1961); *Long v. Big Horn Const. Co.*, 295 P. 750 (Wyo. 1964). The rationale of Larson's rule is demonstrated by the fact that Workmen's Compensation Law requires that the employer must take an employee as it finds him. Employment places on the employer the risks attendant upon hiring a known or unknown infirm employee. Consequently, it is only fair that the appellant employer here have a right to determine a health history before employment of the appellee as a mechanic to avoid the possible liability for an accidental injury, causally related to an infirmity.
>
> Here we think the fair and just policy is to adopt the rule enunciated in Larson, supra, that a false representation as to a physical condition in procuring employment will preclude the benefits of the Workmen's Compensation Act for an otherwise compensable injury if it is shown that the employee knowingly and wilfully made a false representation as to his physical condition, the employer relied upon the false representation, which reliance was a substantial factor in the employment, and there was a causal connection between the false representation and the injury.

Shippers Transp. v. Stepp, 265 Ark. at 369, 578 S.W.2d at 233-34 (1979).

We think that *Shippers Transport* was properly applied in this case. The rule enunciated in *Shippers Transport* is based on considerations of public policy, and has been described as a "common-sense rule made up of a melange of contract, causation, and estoppel ingredients." 3 A. Larson, *Larson's Workers' Compensation Law* § 66.03 (2000). In the present case, the Commission found that appellant was injured after he knowingly performed an activity that was contrary to his medical restrictions, and such behavior has been held to constitute an independent intervening cause relieving the employer of liability. *See Broadway v. B.A.S.S.*, 41 Ark. App. 111, 848 S.W.2d 445 (1993). Furthermore, the doctrine of estoppel is applicable in workers' compensation proceedings if the following elements are established: 1) the party to be estopped must know the facts; 2) he or she must intend that his or her conduct shall be acted upon or must act so that the party asserting the estoppel has a right to believe the other party so intended; 3) the party asserting the estoppel must be ignorant of the true facts; and 4) the party asserting the estoppel must rely on the other party's

conduct to his or her injury. *Southern Hospitalities v. Britain*, 54 Ark. App. 318, 925 S.W.2d 810 (1996). Given the Commission's findings, we think that these elements have been established in the case at bar. Finally, although appellant's misrepresentation was not made in the context of a pre-employment questionnaire, it was made for the purpose of procuring reinstatement to a particular employment activity, driving a delivery vehicle. We find it especially significant that accidents arising out of this employment activity affect not merely the worker and the employer, but also the public at large. Consequently, in keeping with the public policy underlying the rule and in light of the danger posed to the public by the misrepresentation in this case, we hold that the Commission did not err in ruling that appellant's willful false representation of his physical condition precluded him from obtaining workers' compensation benefits under the rule enunciated in *Shippers Transp. v. Stepp, supra.*

Affirmed.

STROUD and NEAL, JJ., agree.

Amy FOSTER *v.* FARM BUREAU
MUTUAL INSURANCE COMPANY of Arkansas

CA 00-228 27 S.W.3d 464

Court of Appeals of Arkansas
Division I
Opinion delivered October 4, 2000

Grider Law Firm, PLC, by: *Murrey L. Grider*, for appellant.

David W. Cahoon, for appellee.

JOHN E. JENNINGS, Judge. This is a case involving underinsurance coverage. Appellant Amy Foster was a passenger in her own vehicle that was being driven by Allen Plank when an accident occurred with a vehicle operated by Stephanie Datsun. Appellant was seriously injured in the accident, and Plank was killed. Ms. Datsun was determined to be at fault, and her insurance company paid appellant the maximum liability limit of her policy in the amount of $25,000.00. Appellant also collected $50,000.00 in underinsurance from her own insurance carrier. Claiming that her damages exceeded $125,000.00, appellant filed this suit seeking underinsurance coverage from Plank's insurer, appellee Farm Bureau Mutual Insurance Company of Arkansas. Both parties filed motions for summary judgment in agreement that there were no material issues of fact in dispute.

The trial court granted appellee's motion for summary judgment, holding that underinsurance coverage did not extend to appellant under the terms of Plank's policy. On appeal, appellant contends that the trial court's decision was in error. We disagree and affirm.

The resolution of the issue on appeal is dependent on the language used in the insurance policy. In Arkansas, insurance policies are to be interpreted like other contracts. *Agricultural Ins. Co. v. Ark. Power & Light Co.,* 235 Ark. 445, 361 S.W.2d 6 (1962). The language in an insurance policy is to be construed in its plain, ordinary, and popular sense. *Tri-State Ins. Co. v. Sing,* 41 Ark. App. 142, 850 S.W.2d 6 (1993). Contracts of insurance should receive a practical, reasonable, and fair interpretation consonant with the apparent object and intent of the parties in light of their general object and purpose. *First Financial Ins. Co. v. Nat'l Indemnity Co.,* 49 Ark. App. 115, 898 S.W.2d 63 (1995). If there is no ambiguity, and only one reasonable interpretation is possible, it is the duty of the courts to give effect to the plain wording of the policy. *See Western World Ins. Co. v. Branch,* 332 Ark. 427, 965 S.W.2d 760 (1998).

As pertinent to appellant's argument, the underinsurance motorist endorsement in this case provides as follows:

> COVERED PERSONS
>
> We will provide coverage for:

1. You or any member of your family residing in your household;

2. Any person while occupying your auto with your permission.

COVERAGE EXCLUSIONS

The Underinsured Motorist Coverage does not apply to:

6. Any auto a covered person is driving or using without the permission of its owner or a person having lawful custody of the auto; or when the auto is stolen or is reasonably known to be stolen.

The liability portion of the policy provides:

COVERAGE EXTENSIONS

When your policy insures a private passenger auto for Bodily Injury and Property Damage Liability Coverage, we provide those same coverages for the use of certain other autos.

We will provide coverage for:

1. Use of Other Autos

Coverage applies to autos that are not owned by you or members of your household or available for regular use by you or any other covered persons. This extension applies only on policies issued to individual persons (not organizations).

Appellant's argument that underinsurance coverage applies to her is based on the coverage extension for the use of other autos found in the basic policy provisions, and the coverage exclusion found in the underinsurance endorsement. She argues that underinsurance coverage exists because Plank's use of other autos was covered and the exclusion applied only to vehicles used without the owner's permission, which was not lacking in this case. We disagree, because appellant's argument ignores the specific language found in the underinsurance endorsement.

[redacted] Appellant does not claim that she was a member of Plank's family who resided in his household. In that case, the underinsurance endorsement does extend coverage to "any person while occupying *your auto* with your permission. The term "your auto" is defined in the policy as "the vehicles described on your policy

Declaration." Under the plain and clear language of the underinsurance endorsement, coverage for occupants is limited to those who occupy vehicles specifically named in the policy. Appellant, however, was an occupant of her own vehicle, not one of Plank's that was listed in the policy declaration. Consequently, the trial court did not err in granting appellee's motion for summary judgment.

Appellant further argues that Ark. Code Ann. § 23-89-209 (Repl. 1999) requires the insurer to extend coverage to her. Arkansas Code Annotated section 23-89-209 provides in relevant part that:

> (a)(1) No private passenger automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicles in this state shall be delivered or issued in this state or issued as to any private passenger automobile principally garaged in this state unless *the insured* has the opportunity, which he may reject in writing, to purchase underinsurance motorist coverage.
>
> (2) After a named insured or applicant for insurance rejects underinsured motorist coverage, the insurer or any of its affiliates shall not be required to notify any insured in any renewal, reinstatement, substitute, amended or replacement policy as to the availability of such coverage.
>
> (3) The coverage shall enable *the insured* or *the insured's* legal representative to recover from the insurer the amount of damages for bodily injuries to or death of an insured which *the insured* is legally entitled to recover from the owner or operator of another vehicle whenever the liability insurance limits of such other owner or operator are less than the amount of the damages incurred by *the insured.*
>
> (4) Underinsured motorist coverage shall be at least equal to the limits prescribed for bodily injury or death under § 27-19-605.
>
> (5) Coverage of *the insured* pursuant to the underinsured motorist coverage shall not be reduced by the tortfeasor's insurance coverage except to the extent that the injured party would receive compensation in excess of his damages.

An insurer may contract with its insureds upon whatever terms the parties agree so long as the terms are not contrary to a

statute or public policy. *Pardon v. Southern Farm Bureau Cas. Ins.*, 315 Ark. 537, 868 S.W.2d 468 (1994). The statute in question, however, does not broadly specify any class of persons for coverage other than "the insured." Therefore, we cannot conclude that the policy provides less coverage than the statute requires.

Affirmed.

HART and GRIFFEN, JJ., agree.

Anthony MAXFIELD *v.* STATE of Arkansas

CA CR 00-28 27 S.W.3d 449

Court of Appeals of Arkansas
Division III
Opinion delivered October 4, 2000

Ben Seay, for appellant.

Mark Pryor, Att'y Gen., by: *Jeffrey A. Weber*, Ass't Att'y Gen., for appellee.

JOHN F. STROUD, JR., Judge. Anthony Maxfield was found guilty by a jury of rape, kidnapping, aggravated robbery, and breaking or entering. He was sentenced for these convictions to a total of forty-two years in the Arkansas Department of Correction. His sole point of appeal is that the trial court erred in denying his motion to suppress his custodial statement because it was not given

voluntarily. The basis of his appeal is that at his *Denno* hearing, the State did not produce as a witness or explain the absence of an officer who promised leniency to him. Appellant asks that the judgment and conviction be reversed and that his cause be remanded for a new trial. The State responds that this point is not preserved for appeal, or, in the alternative, that the trial court's denial of appellant's motion to suppress was harmless beyond a reasonable doubt. We find that the point was preserved for appeal, but we are unable to say that the denial of the motion to suppress was harmless beyond a reasonable doubt. We find further that this case must be remanded to the trial court for a new hearing on determining the voluntariness of appellant's confession, but that a new trial is not required at this point.

Appellant was questioned at the Hope Police Department by Officers Morris Irving and Hays McWharter on January 5, 1999. He was then nineteen years old, had experienced problems in school and been put back in ninth grade courses, and had quit school in the tenth grade to get his GED. He initialed and signed a *Miranda* form, and he then signed a statement of confession written by McWharter. In the statement, appellant admitted entering an unlocked van, lying down in the back until a young woman left a restaurant and started the vehicle, grabbing the woman's throat and holding a knife to it after she began driving, grabbing her pony tail, and directing her where to drive. He described his rape of the woman, committed while he wore a white mask and kept the knife in his hand. He stated that when he was finished, he told her that he was sorry and that she would never see him again, and he took $10 from her apron.

Appellant filed a motion to suppress the statement on the grounds that the statement was not voluntarily and freely made without hope of reward. At the *Denno* hearing on his motion, he testified to the following circumstances regarding the giving of his statement. Before the interrogating officers brought out the *Miranda* form, they tried to get him to cooperate. This lasted thirty minutes, at most. Irving, and definitely not McWharter, told appellant that they already had enough evidence to convict him without a confession, and that if he cooperated they would talk to the judge and the prosecuting attorney to see if they could get him twenty years with his sentences running concurrently. Based on what Irving told him about the twenty years, appellant decided to

cooperate about confessing; he signed the waiver of rights form at 11:15 p.m. and signed the statement at 12:16 a.m. There were no breaks in the hour-and-thirty-to-forty minutes of questioning, and McWharter was present the entire time except for stepping out for two or three minutes to get a soda. Appellant had not wanted the statement tape-recorded, so McWharter wrote out the statement that he signed.

McWharter testified at the *Denno* hearing that he was with appellant for the entire interview and was not aware of any time that appellant was alone with Irving. McWharter stated that he was certain that no indication was made to appellant that a specific sentence would be discussed with the prosecutor.

After the hearing and denial of the motion to suppress, appellant filed a motion for reconsideration. Appellant stated in his motion that Irving, a material witness to the taking of the statement, was not present at the hearing; that Irving had promised leniency to appellant; and that the promise had induced appellant to confess. No hearing was held on the motion, but a docket entry indicates that the motion was denied.

The State contends that this appeal is barred because appellant did not object at the *Denno* hearing to Irving's absence. Appellant notes in his reply brief that the State's position is contrary to case law. When challenging a statement as involuntary, a defendant is not required to point out, in precise words, that a material witness was not called. *Smith v. State*, 254 Ark. 538, 494 S.W.2d 489 (1973). In *Smith v. State*, 256 Ark. 67, 68, 505 S.W.2d 504, 506 (1974), our supreme court explained:

> The burden of proving that a confession is voluntary is one which the State must assume when the admissibility of a confession is questioned on the grounds that it was coerced. Only by producing all material witnesses connected with the controverted confession can the State discharge this burden.

(*quoting People v. Armstrong*, 282 N.E.2d 712 (Ill. 1972)). A custodial statement is presumptively involuntary; it is the State's burden to prove by a preponderance of the evidence that a custodial statement was given voluntarily and was knowingly and intelligently made. *Knight v. State*, 62 Ark. App. 230, 971 S.W.2d 272 (1998). As a part of its burden, the State must produce at a *Denno* hearing all of the

persons who were witnesses to the taking of a statement or must explain their absence. *Foreman v. State*, 328 Ark. 583, 945 S.W.2d 926 (1997). When the necessary witnesses are not produced and no satisfactory explanation of their absence is forthcoming, evidence of the accused that his statement was involuntarily given stands uncontradicted. *Id.*

Here, we determine that by failing to produce or explain the absence from the *Denno* hearing of Officer Irving, who was a witness to the taking of appellant's custodial statement, the State failed to meet its burden of proving that appellant's statement was given voluntarily. This does not, however, end our review, for the admission of an "involuntary confession" is subject to a harmless-error analysis. *Riggs v. State*, 339 Ark. 111, 3 S.W.3d 305 (1999).

The Supreme Court has directed the reviewing court to use extreme caution in subjecting an involuntary confession to the harmless-error analysis:

> A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. ... [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so." *Bruton v. United States*, 391 U.S., at 139-140 (WHITE, J., dissenting). See also *Cruz v. New York*, 481 U.S., at 195 (WHITE, J., dissenting) (citing *Bruton*). While some statements by a defendant may concern isolated aspects of the crime or may be incriminating only when linked to other evidence, a full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision. In the case of a coerced confession..., the risk that the confession is unreliable, coupled with the profound impact that the confession has upon the jury, requires a reviewing court to exercise extreme caution before determining that the admission of the confession at trial was harmless.

Arizona v. Fulminante, 499 U.S. 279, 296 (1991). In addition to following the analysis of *Fulminate*, under *Chapman v. California*, 386 U.S. 18 (1967), we are required to excise the confession and determine whether the remaining evidence shows beyond a reasonable

doubt that the error did not contribute to the verdict. *See Criddle v. State*, 338 Ark. 744, 1 S.W.3d 436 (1999).

Once appellant's confession is excised from the evidence in the present case, there remains other evidence introduced by the State at trial. The victim testified that her attacker ordered her to drive to a certain location and to perform sexual acts, that he inserted his penis into her anal area, and that she gave her money to him after he ordered her to do so; she also stated that he held a knife to her throat during these acts. She testified that he wore a mask similar to a "Jason" Halloween mask, never exposing his face to her. Forensic scientists from the state crime laboratory testified concerning a vaginal smear slide and swabs, and a rectal smear slide and swabs, which were among the contents of a rape assault kit in this case; and a piece of upholstery with a spot on it, taken from the victim's van. They testified that no semen or blood was detected on the slides or swabs, but that semen was found on the upholstery. In the opinion of the supervisor of the laboratory's DNA testing, the DNA sample from the upholstery came from appellant. Officer Steve Gulik, who had responded to a call about the alleged incident shortly after it occurred, testified that the victim reported that she had felt a sharp pain but, because she had never had sex before, was uncertain whether penetration actually occurred. Officer Irvin testified that six days after the reported crime, he found a Jason mask on the same block where appellant lived and about three blocks from the restaurant where the van had been parked. Appellant's girlfriend testified that a Jason mask belonging to her son had been in the home she shared with appellant, but that she could not remember seeing it since the date when the officer had found a mask; she also testified that she had found in appellant's clothing a medical card bearing the victim's name.

Thus, the evidence before the jury aside from the excised confession was the victim's testimony, DNA evidence, and testimony that a mask similar to the one used in the crimes was accessible to appellant. We do not review this evidence to determine whether it was sufficient to sustain the convictions against appellant; rather, the determination we must make is whether, beyond a reasonable doubt, the erroneously admitted confession and its description of the manner in which he committed these crimes did not contribute to the jury's verdict of guilty. We are unable to say that it did not so contribute.

The trial court's failure to suppress appellant's statement, however, does not in and of itself entitle appellant to a new trial. Instead, we employ only the "limited-remand procedure" to the trial court with instructions to hold a hearing and rule on the issue of the voluntariness of appellant's confession. *See Rankin v. State*, 329 Ark. 379, 948 S.W.2d 397 (1997); *Guinn v. State*, 27 Ark. App. 260, 771 S.W.2d 290 (1989) (citing *Jackson v. Denno*, 378 U.S. 368 (1964)). At this hearing, the State must produce Officer Irving or must explain his absence. A new trial should be ordered only if the trial court finds the confession to have been involuntary. *Guinn, supra.*

Remanded for a new *Denno* hearing.

PITTMAN and NEAL, JJ., agree.

Stephanie Scott BURNETT *v.* STATE of Arkansas

CA CR 99-1403 27 S.W.3d 454

Court of Appeals of Arkansas
Division I
Opinion delivered October 4, 2000

John Joplin, for appellant.

Mark Pryor, Att'y Gen., by: *C. Joseph Cordi, Jr.*, Ass't Att'y Gen., for appellee.

OLLY NEAL, Judge. The appellant, Stephanie Scott Burnett, was convicted in a jury trial of delivering a con-

trolled substance (cocaine) and sentenced to ten years in prison. On appeal, Burnett, who is black, contends the trial court erred in allowing the State to exercise one of its peremptory challenges to exclude an African-American from the jury in violation of the Equal Protection Clause as construed by the United States Supreme Court in *Batson v. Kentucky*, 476 U.S. 79 (1986).

Our courts have developed a three-step process for assessing *Batson* challenges. *Hinkston v. State*, 340 Ark. 530, 10 S.W.3d 906 (2000).

> First, the strike's opponent must present facts to raise an inference of purposeful discrimination; that is, the opponent must present a *prima facie* case of racial discrimination. Second, once the strike's opponent has made a *prima facie* case, the burden shifts to the proponent of the strike to present a race-neutral explanation for the strike. If a race-neutral explanation is given, the inquiry proceeds to the third step, wherein the trial court must decide whether the strike's opponent has proven purposeful discrimination. Here, the strike's opponent must persuade the trial court that the expressed motive of the striking party is not genuine but, rather, is the product of discriminatory intent.

Id. at 538-39, 10 S.W.3d at 911-12. (internal citations omitted). Within this three-step process, the opponent of the strike never relinquishes the burden of establishing purposeful discrimination. *MacKintrush v. State*, 334 Ark. 390, 978 S.W.2d 293 (1998). We will not reverse a trial court's finding that a peremptory strike was not exercised based on race unless the finding is clearly against the preponderance of the evidence. *Williams v. State,* 338 Ark. 97, 991 S.W.2d 565 (1999).

During voir dire, the State exercised three of its peremptory strikes to remove African-American venirepersons resulting in an all-white jury. Prior to striking the third African-American, Thurl Willis, the prosecutor asked to approach the bench and stated that he wished to strike Mr. Willis, anticipated a *Batson* challenge, and wished to articulate his reasons for the strike. The prosecutor's stated reason for striking Mr. Willis was because Mr. Willis had been previously arrested for battery. Although there had been no conviction for the battery, further investigation revealed the arrest had been for fighting with a law enforcement officer. Based on Mr. Willis's alleged altercation with a law enforcement officer, the prosecutor stated he had doubts about Mr. Willis's ability to be fair to

the prosecution in a case that would depend heavily on the credibility of undercover police officers who would be testifying at trial.

Burnett argued the prosecutor's reason was pretextual and was being used in an effort to establish an all-white jury. Specifically, she argued Mr. Willis stated during voir dire that he could be fair in judging Burnett's case and believed undercover officers are sometimes necessary to apprehend criminals. Moreover, appellant noted that Mr. Willis served on a jury that returned a guilty verdict only days before. The trial court concluded the prosecutor's explanation was race-neutral and found no discriminatory intent in striking Mr. Willis.

Prima Facie *Case*

A *prima facie* case may be established by: 1) showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose; 2) demonstrating total or seriously disproportionate exclusion of African-Americans from the jury; or 3) showing a pattern of strikes, questions, or statements by a prosecuting attorney during voir dire suggesting racial motivation. *Bosquet v. State*, 59 Ark. App. 54, 953 S.W.2d 894 (1997). In this case, the prosecution offered a race-neutral explanation for striking Mr. Willis, and the trial court ruled on the ultimate question of intentional discrimination. Once a race-neutral explanation is offered and the trial court rules on the question of intentional discrimination, the issue of whether the defendant has made a *prima facie* case becomes moot. *Prowell v. State*, 324 Ark. 335, 921 S.W.2d 585 (1996).

Race-Neutral Explanation

Once the strike's opponent establishes a *prima facie* case, the burden of producing a racially neutral explanation shifts to the proponent of the strike. *MacKintrush v. State, supra.* The race-neutral explanation must amount to more than a mere denial of discrimination. *Id.* The explanation, however, is not required to be persuasive or plausible. In fact the explanation may be silly or superstitious. *Id.*

Here, we conclude that the reasons offered by the State for striking Mr. Willis, namely his arrest for battery stemming from an alleged altercation with a law enforcement officer, is race-neutral.

Our supreme court has concluded that striking a juror because he has been investigated for criminal activity is an acceptable race-neutral explanation. *Hinkson v. State, supra* (striking a potential juror because he had been investigated for methamphetamine problems although no formal charges were ever filed is racially neutral); *Jackson v. State*, 330 Ark. 126, 954 S.W.2d 894 (1997) (holding a peremptory strike to be racially neutral based on the fact that one of the potential jurors had been in the prosecutor's office "in connection with serious crimes" and had an ex-husband who had been charged with past crimes by the same prosecutor).

Discriminatory Intent

If the State provides a race-neutral explanation for the strike, the trial court must then decide whether the strike's opponent has proven purposeful discrimination. *MacKintrush v. State, supra.* At this point, it is incumbent upon the strike's opponent to present additional evidence or argument if the challenge is to proceed. *Id.*

In this case the appellant presented evidence that Mr. Willis had previously sat on a jury that returned a conviction and during *voir dire* had shown that he would be a fair juror. During *voir dire*, the following exchanges between the prosecutor and Mr. Willis occurred:

> Q: I anticipate the Judge will instruct all of you that you need to set aside any sympathy you have one way or the other and to decide the case solely on the testimony and the evidence, and so my question is, can you set aside any sympathy you may have for one side or the other, any sympathy at all, and decide the case solely on the evidence and the testimony? Can you do that?
>
> A: Yes.
>
> Q: What do you think about law enforcement using undercover methods, Mr. Willis?
>
> A: They've got to do whatever they've got to do.
>
> Q: Would you agree that it is an important tool that law enforcement has in narcotics investigations?
>
> A: (*Nodding*).

Q: And that would be the only way to catch violators of narcotics laws in the State of Arkansas; would you agree with that?

A: (*Nodding*).

Appellant argues that when the answers Mr. Willis provided are compared with those of white jurors who were not struck from the jury, the prosecutor's discriminatory intent becomes obvious. The answers of two white jurors, Mr. Bates and Ms. Newton, whom the prosecutor did not strike, warrant particular attention. After the prosecutor asked another juror if she believed using undercover methods was the only means of catching violators of narcotics laws, the following colloquy occurred between the prosecutor and Mr. Bates:

Q: How about you, Mr. Bates?

A: No, I don't.

Q: You don't agree with that?

A: No, I don't.

Q: What do you think?

A: I think — I don't believe undercover is the only way to catch a narcotics person. I believe a lot of times it is used unethically.

Q: What would be an example of undercover investigation —

A: — that was unethical because it limits exposure to other witnesses, causes entrapment which I have a problem with a police officer may initiate something and say, you know,"I need this, or do that," or whatever, and they initiate the response. Somebody may be tempted into something for a financial gain or whatever that they may need at that time, and basically starts them down a long road. I believe it is an active tool, but I believe it is very dangerous one.

A similar exchange occurred between the prosecutor and Ms. Newton.

Q: So, you can listen to — Even though they are law enforcement officers, you can listen to their testimony and render a fair and impartial decision?

A: You know, I don't — Not all the time, I wouldn't.

Q: Well, I understand not all the time, but what — Gosh, I'm not sure what you mean by that, not all the time.

A: I mean most of the time they are not right about their decisions and so —

Q: Most of the time they are not right?

A: That's right.

Q: So, law enforcement officers are wrong quite often, I guess?

A: I think they are, yes, sir. I've got grandkids that have been involved in —

Q: In what? Substances?

A: A drug case.

Q: A drug case. Were there narcotics detectives involved?

A: I believe so.

Q: Was it here in Fort Smith?

A: Sure is.

Q: Was it narcotics detectives in Fort Smith Police Department?

A: Sure.

Q: Well, gosh, so you would have a tough time, probably, with narcotics detectives, maybe, here in Fort Smith?

A: Probably would.

Q: You probably would?

A: Yes.

Q: Would you be willing to give less weight to the investigator's testimony?

A: I think so.

Q: You think you would? Okay. That's human nature, and that's based on the experiences you have had with your family members?

A: That's right.

Q: Concerning controlled substances?

A: Yes.

In this third and final step of assessing a *Batson* challenge, the trial court is to consider the evidence and explanations given along with observations of the proceedings to determine whether the explanations provided are genuine or pretextual. *Sonny v. Balch Motor Co.*, 328 Ark. 321, 944 S.W.2d 87 (1997). The appropriate standard in determining pretext is not whether race was the only factor motivating a peremptory strike, but rather, whether race caused the challenged strike. *Murray, v. Groose*, 106 F.3d. 812 (8th Cir. 1997). That is, we ask whether the juror would have been kept but for his race. *Id.*

One of the ways pretext can be established is by showing the prosecutor failed to consistently apply stated reasons for striking black jurors to similarly situated white jurors. *See, e.g., Turner v. Marshall*, 121 F.3d 1248 (9th Cir. 1997) (striking black juror because he was uncomfortable viewing gruesome photographs of murder victim was pretextual where prosecutor did not strike white juror who expressed an even greater reluctance to view the photographs); *Jones v. Ryan*, 987 F.2d. 960 (3rd Cir. 1993) (finding pretext where prosecutor exercised peremptory challenges to exclude black jurors with children the same approximate age of the defendant but did not exclude similarly situated white jurors); *Walton v. Caspari*, 916 F.2d 1352 (8th Cir. 1990) (finding pretext where prosecutor struck black jurors because they were nurses or because they had friends or relatives who had been charged with a crime but did not strike white nurses or white venirepersons who had been convicted or charged with a crime); *Garrett v. Morris*, 815 F.2d 509 (8th Cir. 1987) (finding pretext where prosecutor struck black, high-school-educated venirepersons because they lacked education but did not strike white venirepersons who had not completed high school); *Gadson v. Florida*, 561 So.2d 1316 (Fla. 1990) (striking black real estate agent who had previously worked as a teacher was pretextual where prosecutor did not strike a white bank secretary who had previously worked as a seventh-grade teacher); *Illinois v. McDonald*,

530 N.E.2d 1351 (Ill. 1988) (striking black jurors because they were married to teachers was pretext where prosecutor allowed white teacher to remain on jury); *Holmes v. Great Atlantic & Pacific Tea Co.*, 622 So.2d 748 (La. App. 1993) (striking white venirepersons was discriminatory where plaintiff did not exercise peremptory strikes to remove black venirepersons sharing identical characteristics with stricken white jurors); *State v. Oglesby*, 379 S.E.2d 891 (S.C. 1989) (removing black jurors from panel because they were patients of a doctor who would be testifying for the defense was pretextual because prosecutor did not strike a white juror who was also a patient of the doctor).

Based on the record before us, we conclude that the trial court's ruling was clearly against the preponderance of the evidence. The prosecutor stated his reason for striking Mr. Willis was because "I think the fact that that is all the State has as witnesses is law enforcement, and the fact he was in a fight with law enforcement, that is a reason we can ask and we can use, the State can use a Batson challenge." The prosecutor assumed from Mr. Willis's past that he would not fairly judge the credibility of police witnesses. Yet the prosecutor did not exercise peremptory strikes to remove Mr. Bates, a white juror who stated that he believed police often use undercover techniques in an unethical manner that regularly entraps innocent people. Even more troubling is the fact that the prosecutor did not strike Ms. Newton. Ms. Newton, a white juror, indicated that she believed that the Fort Smith Police Department had been wrong in accusing some of her grandchildren of involvement with controlled substances. Notably, the instant case involved the same police department and a similar offense. Furthermore, Ms. Newton stated outright that she believed police officers are often wrong and would give their testimony less weight than other witnesses. In these circumstances, we are constrained to conclude that the proffered explanation was a pretext for purposeful discrimination, and that Burnett's constitutional rights were violated.

Accordingly, we reverse and remand for a new trial.

BIRD and GRIFFEN, JJ., agree.

Mary Etta SONGER *v.* Mildred (Robertson) WIGGINS and Laura Land (Robertson) Saller

CA 99-1449 27 S.W.3d 755

Court of Appeals of Arkansas
Division I
Opinion delivered October 4, 2000

[redacted]

Grider Law Firm, PLC, by: *Murrey L. Grider*, for appellant.

Barrett & Deacon, by: *Robert J. Gibson*, for appellee.

WENDELL L. GRIFFEN, Judge. Mary Etta Songer, the only child of decedent M.O. Robertson, appeals a Craighead County chancery court decision that quieted title in Songer in an undivided one-half interest of a 100-acre farm, subject to a life estate interest in appellee Laura Robertson Saller,[1] located in Craighead County. The chancellor awarded the remaining one-half, undivided interest to appellee Mildred Wiggins. Songer argues on appeal that the chancellor erred in determining that title to the property did not pass by intestate succession and that Songer was not entitled to the entire farm. We hold that the chancellor properly admitted the decedent's unprobated, duly executed, and nonrevoked will as evidence of devise of property. Therefore, we affirm.

M.O. Robertson died testate on November 6, 1990, survived by his wife, appellee Laura Robertson Saller; his daughter, appellant Mary Etta Songer; his sister, appellee Mildred Robertson Wiggins; other siblings; and grandchildren. Following his death, decedent's will was read by his attorney in the presence of appellant, appellees, and others. The will, executed on May 16, 1983, left an undivided one-half interest outright in a 100-acre tract of farmland to appellee Wiggins, and the other undivided one-half interest to appellee Saller "for her life with the remainder in Citizens Bank of Jonesboro as Trustee of the M.O. Robertson Family Trust to hold, manage and effectively dispose of as set forth in paragraph THIRD of this my Last Will and Testament." Paragraph three provided that the trustee pay the net income from the trust to appellee Saller for

[1] Laura Robertson remarried after decedent's death. She is referred to in this opinion as Laura Robertson Saller.

her life. After her death, the trustee was to pay the net income and principal of the trust, if necessary, for the health, education, support, maintenance, and comfort of appellant Songer up to the amount of $500 per month. Upon the death of Songer, the trustee was to terminate the trust and distribute the remainder to appellant's son, Douglas Songer.[2] The parties stipulated that the will was never probated, and that decedent died more than five years ago.[3]

According to testimony offered at trial, after the reading of the will appellees met with James Brewer, a farmer who rented the farmland from decedent. Before his death, decedent and Brewer operated under an agreement whereby Brewer would pay one third of the crop as rent and retain two-thirds of the crop for himself. Expenses were split at the gin. Decedent also paid a part of the fertilizer cost and all of the real estate taxes. Appellees identified themselves to Brewer as the new owners of the property and told him they wanted to continue the same arrangement Brewer had with decedent. They also gave Brewer a power of attorney which allowed him to sign documents on their behalf.

Over the next nine years, appellees called Brewer once or twice a year and visited the farm two or three times a year. They also conversed with Brewer about various crop yields. In addition, appellees completed government documents indicating their ownership of the property. Government subsidies were received in the form of two checks, with one check for one-third of the subsidy payable to appellees and another check for two-thirds payable to Brewer. Appellees divided the costs and expenses associated with the farm. They equally paid real estate taxes and levee district taxes on the property as well as crop and liability insurance out of their own funds. Copies of Profits and Loss in Income Statements filed by appellee Wiggins from 1992 to 1998 were introduced into evidence, as well as copies of checks payable to the Craighead County tax collector for the years 1991 through 1999.

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[2] Douglas Songer, the adult son of appellant, by pleading and acquiescence, waived any interest in the property. According to appellant's testimony at trial, he agreed with his mother's position regarding her claimed interest in the property.

[3] Although a codicil to the will was executed on January 27, 1989, the codicil addressed the consequences of appellee Saller preceding decedent in death. The codicil is not at issue in the present litigation.

Although ninety-five acres of the 100-acre tract was farm property, a dilapidated house sat on the remaining five acres. According to the testimony of Brewer, Saller, Mildred Wiggins, Tony Wiggins, and Farrell Wiggins the house had termite damage and was in bad shape when decedent died. Saller testified that the house was in terrible condition and infested with termites prior to her husband's death. She stated that decedent did not rectify the termite situation, although he was aware of it and tried various home remedies such as putting moth balls under the house. Appellant testified that the house was in rentable condition and that renters continued to live in the house until a bridge leading to the property collapsed. Saller confirmed that she received rent for the house from the same tenants who lived in the house before her husband died. She told the court that she received $75 per month for rent, and that the tenants stayed in the house two or three years after her husband died.

The chancellor also heard testimony regarding the collapse of the bridge leading to the property. The bridge collapsed three or four years prior to the instant litigation. Brewer testified that he discussed repairing the bridge with appellees. He stated that when appellees told him it would cost $11,000 to repair the bridge, Brewer advised them against repairing the bridge. As a result, appellees brought some posts, set the posts in concrete, put a chain across the posts, and posted a no trespassing sign. Brewer gained access to the farm by crossing a neighbor's property. Both Brewer and Farrell Wiggins, husband of appellee Wiggins, testified that the purpose of the posts and chain was to keep people from crossing the bridge because appellees did not want to assume responsibility for injuries.

Appellee Wiggins testified that appellant did not object when the will was read. Wiggins stated that she assumed the will was probated, and acted under that presumption until July or August of 1997, when her attorney in Missouri advised her to contact attorney Coleman. Once Wiggins found out that the will had never been probated, she filed a suit on behalf of herself and Saller to quiet title in the property.

The chancellor entered a decree quieting title in Wiggins and Songer. The chancellor awarded an undivided one-half interest in Wiggins and the remaining undivided one half interest in Songer,

subject to the life time possessory interest of Saller. He initially noted that decedent was the owner in fee simple absolute of the farm. He found that: 1) the May 16, 1983, will was the duly executed and nonrevoked will of decedent; 2) there were no proceedings in probate court concerning administration of the estate; 3) the time to proceed in probate had expired; 4) both parties to the instant litigation were present at the reading of the initial will; 5) based on the reading, appellees took possession of the farm and acted pursuant to the will; 6) appellees farmed the land through a tenant farmer, received a share of rent and profits, and equally shared the costs of expenses, taxes and insurance on the property; 7) appellant was aware that appellees took possession and assumed the will was admitted to probate; and 8) appellant knew that the possession of an undivided one half interest by Wiggins was adverse to any claim of ownership she may have had. Based on the conditions and circumstances before it, the chancellor found Arkansas Code Annotated section 28-40-104 applicable. He then admitted decedent's Last Will and Testament as evidence concerning the devise of the 100-acre tract.

The chancellor found by clear and convincing evidence that: 1) Wiggins took possession of the property according to the will provisions; and 2) Wiggins continuously maintained open and adverse possession of the property during the entire time following the reading of the will. The chancellor then quieted title of an undivided interest in Wiggins. Regarding appellee Saller, the chancellor observed that appellant presented no claim to dispossess her of an undivided one-half life estate interest. However, he found that the evidence supported a finding that she was entitled to a possessory interest in an undivided one half interest during her lifetime. The chancellor noted that the trust referred to in the will was not set up or implemented. He further noted that Douglas Songer acquiesced to appellant's position and waived any interest he had in the property. As a result, he found title in the remaining undivided one-half interest, subject to the life interest of Saller, in appellant. Appellant argues that the trial court erred in its determination that title to the 100-acre farm did not pass by intestate succession. Appellees respond that the chancellor correctly applied section 28-40-104 and allowed the introduction of decedent's executed and unrevoked will as evidence of a devise. They strenuously

assert that because they, in good faith, acted in accordance with the will, the chancellor's findings were not clearly erroneous. We agree.

■ We begin by noting that we review chancery cases *de novo*. However, we will not reverse a chancellor's findings unless they are clearly erroneous. *See Mixon v. Mixon*, 65 Ark. App. 240, 243, 987 S.W.2d 284, 285 (1999). Findings are considered clearly erroneous when, even though there is evidence to support them, we are left definitely convinced that a mistake has occurred. *See Adkinson v. Kilgore*, 62 Ark. App. 247, 252, 970 S.W.2d 327, 329 (1998).

■ Section 28-40-104 of Arkansas Code Annotated provides that unless a will is declared valid by the probate court, it is not effective to prove the transfer of property. *See* Ark. Code Ann. § 28-40-104(a)-(b) (1987). However, a duly executed will that is not probated may be admitted as evidence when two conditions are satisfied. First, no probate proceeding concerning the administration of the estate must have occurred; and second, the devisee must possess the property in accordance in the will's provisions. *See id.* at (b)(1)-(2). The purpose of the statute is to provide evidence for those claiming ownership of property who have been in possession of the property consistent with the provisions of an nonrevoked, nonprobated will. *See Johnson v. Johnson*, 292 Ark. 536, 539, 732 S.W.2d 121, 123 (1987) (interpreting Ark. Stats. Section 62-2126; now codified at Ark. Code Ann. § 28-40-104). It gives effect to the testator's unrevoked, nonprobated will, so long as the conditions previously noted are met. *See Smith v. Ward*, 278 Ark. 62, 63, 643 S.W.2d 549, 550 (1982) (interpreting Ark. Stat. § 62-2126.1, now codified at Ark. Code Ann. § 28-40-104).

Johnson v. Johnson involved the case of a widow seeking to admit as evidence an unprobated will, which she alleged proved her entitlement to one half of the estate's assets. *See Johnson* at 538, 732 S.W.2d at 122. The chancellor denied the request, and our supreme court affirmed. In upholding the chancellor, the court interpreted the language of the statute as requiring actual, rather than constructive, possession. *See id.* at 539, 732 S.W.2d at 123. The court noted that the certificate of deposit at issue in the case remained in the possession of the bank, and was payable to the estate. Thus, the court determined that the chancellor correctly ruled that appellant did not meet the statutory requirement of actual possession. *See id.*, 732 S.W.2d at 123.

In the instant case, appellant contends that pursuant to the rationale set forth in *Johnson*, unless Wiggins and Saller *physically possessed* the farm, they have not met the requirement of actual possession. Appellant's interpretation is too narrow. Actual possession may exist without Wiggins and Saller living on the property, or farming the land themselves. When decedent died, the property was farmed through a tenant farmer. Immediately following decedent's death, appellees made the tenant aware that they owned the land, and that they intended to continue the arrangement the tenant had with decedent. Appellees conferred with the tenant farmer about what crops to grow and the operation of the farm. They would also visit the farm two or three times a year. Appellees signed a power of attorney and completed government documents. Further, they received subsidies from the government, and one-third of the profits generated by the tenant farmer as rent. As the will provided, appellees split the costs and income of the property evenly. They also split the costs of expenses, insurance, real estate taxes, and levee taxes. When the bridge collapsed, appellees posted no trespassing notices and blocked access to the bridge. All of these facts provide ample proof that appellees actually possessed the property in accordance with the will's provisions. The chancellor's findings are not clearly erroneous.

Affirmed.

HART and JENNINGS, JJ., agree.

AGRIBANK, FCB *v.* Ralph HOLLAND, Jr., and Patricia Holland

CA 00-76 27 S.W.3d 462

Court of Appeals of Arkansas
Division II
Opinion delivered October 4, 2000

Barrett & Deacon, by: *Ralph W. Waddell, D.P. Marshall Jr., James F. Gramling Jr.*, for appellant.

One brief only.

TERRY CRABTREE, Judge. The issue in this case is whether a judgment can be extended for ten years by a court other than the one in which it originated. The St. Francis County Circuit Court held that it cannot and dismissed this action for lack of jurisdiction. We agree with appellant that this dismissal was error and reverse.

Appellant Agribank, FCB, obtained a judgment for $89,755.96 and foreclosure against appellees Ralph Holland, Jr., and Patricia Holland on March 25, 1988, in the St. Francis County Chancery Court. Appellant purchased appellees' property at the foreclosure sale and received a deficiency judgment for $28,218.59 on May 5, 1988. On April 11, 1997, appellant caused four writs of garnishment to be issued, and $4,224.71 was applied to the judgment. Appellant never sought a writ of *scire facias* to revive the judgment. On October 26, 1998, appellant filed this action, asserting that, commencing April 11, 1997, the writs of garnishment had started a new period of limitations for the judgment. In its prayer for relief, appellant requested that the deficiency judgment be continued for ten years from April 11, 1997. In defense, appellees asserted that appellant had not revived the judgment within the ten-year statute of limitations and that the circuit court lacked subject-matter jurisdiction.

In his order, the circuit judge noted that the issuance of process or payment on a judgment will toll the statute of limitations and begin a new period from which it will run but dismissed this action for lack of jurisdiction, stating that the judgment should be revived by the court that originally rendered it. Appellant appeals from this dismissal.

Arkansas Code Annotated section 16-56-114 (1987) provides that actions on judgments must be commenced within ten years. The revival of judgments is governed by Ark. Code Ann. § 16-65-501 (1987), which provides for the issuance of writs of *scire facias* within ten years from the date of the rendition of the judgment. *See Malone v. Malone,* 338 Ark. 20, 991 S.W.2d 546 (1999). Appellant argues that this statutory process is not the only way in which judgments can be revived. It asserts that the circuit court also had jurisdiction to extend the judgment because a judgment may be revived by bringing an ordinary civil action thereon. We agree. At common law, a party has a right of action upon a judgment as soon as it is recovered, in addition to the right to take

out execution. *Garibaldi v. Carroll*, 33 Ark. 568 (1878). In *McGill v. Robbins*, 231 Ark. 411, 329 S.W.2d 540 (1959), the Arkansas Supreme Court acknowledged that, without seeking a writ of *scire facias*, a creditor can revive a judgment by suing on it.

McGill v. Robbins is recognized in footnotes annotating the following passage from 47 AM. JUR. 2D *Judgments* § 945 (1995):

> Generally, the main purpose of an action on a judgment is to obtain a new judgment, which will facilitate the ultimate goal of securing satisfaction of the original cause of action.
>
> Ordinarily, no advantage is gained by bringing an action on a judgment in the same state where the judgment was rendered since the creditor can simply proceed to collect it by, for instance, execution or garnishment. However, if the statute of limitations period has almost run on the judgment, the judgment creditor can start the limitation period anew by bringing an action on the judgment and obtaining a new judgment. Alternatively, bringing a civil action on a judgment may revive a judgment that has become dormant. In jurisdictions that provide no other specific procedure whereby a dormant judgment may be renewed or revived, a party's only choice is to bring a new action on his judgment. Such an action is deemed distinct from the original suit in which the prior judgment was rendered, and must be commenced and prosecuted as in the case of any other civil action brought to recover judgment on a debt. It is regarded as a separate, new, and independent action, and different from the proceeding in which the original judgment was obtained, even if its purpose is to revive the judgment.

"Revivor proceedings and actions on judgments are distinct and cumulative remedies. A judgment creditor may have either or both, as the creditor sees fit." 46 AM. JUR. 2D *Judgments* § 441 at 728 (1994).

Because common-law actions on judgments and statutory revivor proceedings are distinct and cumulative remedies, we hold that the circuit court had jurisdiction and that the circuit judge erred in dismissing this action.

Reversed and remanded.

ROBBINS, C.J., and MEADS, J., agree.

Donna K. ALBERSON and Pamela Curnett *v.*
AUTOMOBILE CLUB INTERINSURANCE EXCHANGE

CA 00-173 27 S.W.3d 447

Court of Appeals of Arkansas
Division IV
Opinion delivered October 4, 2000

[redacted]

Gary Eubanks & Associates, by: *Robert S. Tschiemer* and *William Gary Holt*, for appellants.

Kemp, Duckett, Spradley, Curry & Arnold, by: *James M. Duckett*, for appellee.

ANDREE LAYTON ROAF, Judge. Donna K. Alberson, individually and as administratrix of the estate of Terry Alberson, Jr., and Pamela Curnett appeal from the Faulkner County Circuit Court's grant of summary judgment in favor of appellee Automobile Club Interinsurance Exchange, hereinafter "Exchange." Alberson and Curnett had sought to collect underinsured benefits under the automobile insurance policy of a car in which they were passengers, in addition to the liability benefits they had already collected under the same policy. On appeal, they argue that the trial court erred in granting summary judgment because the policy is ambiguous, they were "insureds" under the policy, and they were entitled to recover under both the liability and underinsured provisions of the policy. We affirm.

On April 7, 1997, Terry Alberson, Jr., and Pamela Curnett were passengers in a car being driven by Donald T. Long on U.S. Highway 65. Long crossed the centerline and hit another vehicle, resulting in his death and the death of Alberson. Curnett suffered injuries in the accident. It is undisputed that Long was at fault.

The owner of the vehicle that Long was driving was insured by Exchange. Exchange interpleaded the liability policy limits of $50,000 into the Faulkner County Chancery Court, which awarded $7,000 to Alberson's estate, $23,000 to Curnett, and the remaining $20,000 to the driver of the other vehicle. Donna K. Alberson, individually and as Administratrix of the Alberson's estate, and Curnett then filed suit against Exchange, seeking to collect $25,000 under the underinsured provisions of the same policy under which they had collected liability benefits. Exchange moved for summary judgment, which was granted after a hearing in which Alberson and Curnett argued that the policy was ambiguous

and that construed in the light most favorable to the covered person, it entitled them to the underinsured coverage. The trial judge specifically found that the policy was not ambiguous.

On appeal, Alberson and Curnett raise the same argument. They argue that the policy was ambiguous because there is an offset clause in both Part A (Liability) and Part G (Underinsured Coverage) of the policy.[1] They contend that according to the policy, both liability and underinsured benefits may be received from the negligent driver "in an appropriate case." Alberson and Curnett further argue that the passengers were "insureds" under the policy, a point that is conceded by Exchange, as far as the liability coverage of the policy is concerned. Finally, they contend that because of the offset provision cited in the footnote that appears in both the liability and underinsured sections of the policy, they were "manifestly entitled to make an underinsured claim." This argument is without merit.

In reviewing summary-judgment cases, we determine whether the trial court's grant of summary judgment was appropriate based on whether the evidence presented by the moving party left a material question of fact unanswered. *Norris v. State Farm Fire & Cas. Co.*, 341 Ark. 360, 16 S.W.3d 242 (2000). The moving party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is not a genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Id.* Here, there are no material questions of fact, there is only the matter of construing the insurance policy and determining if the provisions regarding coverage are ambiguous. The question of whether there is an ambiguity in an insurance contract is initially decided by the court. *Shelter Mut. Ins. Co. v. Williams*, 69 Ark. App. 35, 9 S.W.3d 545 (2000).

Our law regarding the construction of an insurance contract is well settled. The language in an insurance policy is to be construed in its plain, ordinary, popular sense. *Norris v. State Farm Fire & Cas. Co., supra.* Once it is determined that coverage exists, it then must be determined whether the exclusionary language within

[1] The referenced provision states the following: "However, the limit of liability shall be reduced by all sums paid because of the bodily injury by or on behalf of persons or organizations who may be legally responsible. This includes all sums paid under Part A of this policy."

the policy eliminates the coverage. *Id.* Exclusionary endorsements must adhere to the general requirements that the insurance terms must be expressed in clear and unambiguous language. *Id.; See also Nationwide Mut. Ins. Co. v. Worthey*, 314 Ark. 185, 861 S.W.2d 307 (1993). In order to be ambiguous, a term in an insurance policy must be susceptible to more than one reasonable construction. *Insurance Co. of North Am. v. Forrest City Country Club*, 36 Ark. App. 124, 819 S.W.2d 296 (1991).

We conclude that the trial judge was correct when he found that there was no ambiguity in the policy and that the appellants were not entitled to underinsured coverage. While it is true that the so-called offset clause appears under both the liability and underinsured sections of the policy, it does not follow that it allows for a reasonable interpretation that the passengers of a negligently operated vehicle would be allowed to claim underinsured benefits. To come to that conclusion, one would have to ignore the exclusion provision in the underinsured coverage section that states: "We do not provide Underinsured Motorists Coverage for bodily injury sustained by any person: 1. While occupying . . . any motor vehicle owned by you." It is well settled that the intent of the parties is to be determined from the whole context of the agreement and that the court must consider the instrument in its entirety, not merely disjointed or particular parts of it. *Continental Cas. Co. v. Davidson*, 250 Ark. 35, 463 S.W.2d 652 (1971); *Fowler v. Unionaid Life Ins. Co.*, 180 Ark. 140, 20 S.W.2d 611 (1929). Because the intent to exclude passengers in the insured's vehicle from claiming underinsured benefits is expressed in clear and unambiguous language, it must be given effect by the construing court.

We affirm.

BIRD and KOONCE, JJ., agree.

BALDOR ELECTRIC COMPANY *v.* ARKANSAS EMPLOYMENT SECURITY DEPARTMENT

E 00-73 27 S.W.3d 771

Court of Appeals of Arkansas
Division I
Opinion delivered October 11, 2000

[redacted]

Chris S. Campbell, for appellant.

Allan Franklin Pruitt, Legal Section, for appellee.

WENDELL L. GRIFFEN, Judge. Baldor Electric Company appeals the award of unemployment benefits to William Releford. Releford was awarded unemployment benefits by the Arkansas Appeal Tribunal, and the award was affirmed and adopted by the Arkansas Board of Review.

Releford worked for Baldor operating a press as part of a winding team from November 1997 until September 1999. He was

terminated after pleading no contest to his second charge of domestic battering, a Class D felony, for which he received a three-year suspended sentence.[1] Releford was terminated pursuant to Baldor's "past practice" of terminating employees who plead guilty to or are found guilty of a felony.

A telephone hearing was conducted before the Arkansas Appeal Tribunal. Releford did not appear. Chris Campbell, Baldor's plant manager, testified that the purpose of its termination policy was to protect employees from violence in the workplace and to provide a safe workplace. Baldor argued that because this was Releford's second violent offense, Baldor could be liable for negligent retention of an employee who was known to be violent if it retained him and he harmed another employee. The Tribunal found a nexus between the conduct that led to appellant's felony charge and Baldor's desire to promote a safe working environment. However, the Tribunal found there had been no evidence presented that Releford's off-duty conduct harmed the employer or was done with the intent or knowledge that Baldor's interests would suffer. Thus, the Tribunal found that Releford's off-duty conduct did not constitute misconduct in connection with his work and awarded Releford unemployment benefits pursuant to Arkansas Code Annotated section 11-10-514(a) (Supp. 1999).

Baldor appealed, and the Arkansas Board of Review affirmed and adopted the Tribunal's decision. The Board, in addition, amended the Tribunal's decision to note that although Campbell indicated that missing work for jail time constituted a breach of its attendance policy, the evidence did not establish that such a breach occurred, or would have occurred; therefore, the Board found that "attendance is also not a basis for a finding of misconduct in this case." The Board concluded that Releford was discharged from his last job for reasons other than misconduct connected with work, and thus, was entitled to receive unemployment benefits.

■■ On appeal, the findings of fact of the Board of Review are conclusive if they are supported by substantial evidence. Ark. Code Ann. § 11-10-529(c)(1) (Supp.1999). Substantial evidence is

[1] His first battering charge was apparently a misdemeanor. Arkansas Code Annotated section 5-26-305 (Supp. 1999) provides that if a person within the past five years has committed domestic battering in the first, second, or third degree, a subsequent charge of domestic battering is a Class D felony.

such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *See Victor Indus. Corp. v. Daniels*, 1 Ark. App. 6, 611 S.W.2d 794 (1981). We review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board's findings. *See Feagin v. Everett*, 9 Ark. App. 59, 652 S.W.2d 839 (1983). Even when there is evidence upon which the Board might have reached a different decision, the scope of judicial review is limited to a determination of whether the Board could reasonably reach its decision upon the evidence before it. *See Perdrix-Wang v. Director*, 42 Ark. App. 218, 856 S.W.2d 636 (1993).

■ Arkansas Code Annotated section 11-10-415 (Supp. 1999) provides that, "If so found by the Director of the Arkansas Employment Security Department, an individual shall be disqualified for benefits if he is discharged from his last work for misconduct in connection with the work." In *Feagin v. Everett, supra*, this court adopted the test for determining when an employee's off-duty activities constitute misconduct in connection with work so as to render him ineligible for unemployment benefits. First, there must be a nexus between the employee's work and his off-duty activities. *Id.* at 69, 652 S.W.2d at 845. Second, the employee's off-duty activities must have harmed his employer's interests. *Id.* at 70, 652 S.W.2d at 845. Finally, the employee's conduct must have violated some code of behavior between the employee and the employer, and the violative behavior must have been performed with the intent or knowledge that the employer's interests would suffer. *Id.* at 71, 652 S.W.2d at 845-46. The code of behavior need not be a formal written contract, but may consist of reasonable rules and regulations of which the employee had knowledge and was expected to follow. *Id.*, 652 S.W.2d at 846.

■ ■ This court has stated that misconduct requires "some act of wanton or willful disregard of the employer's interest, a deliberate violation of the employer's rules, or a disregard of the standard of behavior the employer has a right to expect of its employees." *Baker v. Director*, 39 Ark. App. 5, 6, 832 S.W.2d 864, 865 (1992). We have also stated that mere inefficiency, unsatisfactory conduct, failure of good performance as a result of inability or incapacity, inadvertence, ordinary negligence or good-faith error in judgment are not considered misconduct for unemployment purposes unless they are of such a degree of recurrence as to manifest

culpability, wrongful intent, evil design, or intentional disregard of an employer's interest. *See Arlington Hotel v. Employment Sec. Div.*, 3 Ark. App. 281, 625 S.W.2d 551 (1981).

Given these standards, we must affirm the decision of the Board of Review. The fact that Releford pleaded no contest instead of pleading guilty or being found guilty is not dispositive. It is the violent conduct that led to the felony charge that provided the nexus to the workplace, not the nature of the plea. Violence in the workplace is of paramount concern to employers. An employee's violent propensities have a definite nexus with the employer's desire to maintain a safe work environment as well as its desire to avoid the negligent retention of a violent employee.

It is true that not all felonies involve the commission of a violent act, but that does not render Baldor's policy unreasonable. In this case, Baldor's termination policy was a long-standing practice of which Releford was admittedly aware. He stated on his application for unemployment benefits that he was discharged pursuant to "normal policy" and was aware that a felony conviction would result in his discharge. Thus, there was a nexus between Releford's conduct and his work, and he violated a reasonable standard of conduct of which he was aware and of which his employer had a right to expect from its employees.

However, we affirm because there was no evidence presented that Releford acted with the intent or knowledge that his employer's interests would suffer or that his behavior harmed his employer. *See Dray v. Director*, 55 Ark. App. 66, 930 S.W.2d 390 (1996) (holding employer failed to prove employee's conduct harmed employer's interests). The incident did not occur at the workplace; the victim of the domestic abuse was not a Baldor employee; and Campbell testified that Releford had never acted violently toward his coworkers. There was no proof that Releford intended to harm any interest of the employer or that any interest was actually harmed.

Therefore, we hold that substantial evidence supports the Board finding that Baldor failed to show Releford intentionally or knowingly acted to harm its interests or that he, in fact, harmed his employer's interests. Accordingly, Releford is entitled to receive unemployment benefits.

Affirmed.

JENNINGS and HART, JJ., agree.

Michael Drew KENNEDY *v.* STATE of Arkansas

CA CR 99-1087 27 S.W.3d 467

Court of Appeals of Arkansas
Division I
Opinion delivered October 11, 2000
[Petition for rehearing denied November 15, 2000.*]

* HART, J., would grant.

Kenneth G. Fuchs, for appellant.

Mark Pryor, Att'y Gen., by: *Sandy Moll*, Ass't Att'y Gen., for appellee.

MARGARET MEADS, Judge. Appellant, Michael Drew Kennedy, was found guilty by a jury of the crime of first-degree battery. He was sentenced to serve ten years in the Arkansas Department of Correction. In this appeal he does not challenge the sufficiency of the evidence, but argues only that the trial court erred when it allowed a statement given by an eyewitness, Kimberly Kennedy, to be read into evidence by Officer Ross Dean, who took the statement.

At about 2:30 a.m. on July 27, 1997, some arm wrestling took place inside the 659 Club in Choctaw, Arkansas. Later a fight occurred outside the club during which Lanny Bates was seriously cut by a knife allegedly used by appellant. There were a number of eyewitnesses to the incident, several of whom were related to each other and to appellant. Appellant asserted the justification of self defense, and much of the testimony centered around the fact that Bates somehow started the fight.

At trial, Ms. Kennedy, who is married to appellant's first cousin, testified that she made a statement to the police shortly after the incident, and that she had reviewed it. However, she said that

she could remember few details of what was in the statement. In the statement, Ms. Kennedy said that she saw a knife in appellant's hand, but on direct examination she said that she couldn't remember whether she saw a knife during the fight and didn't remember telling the officer that she saw appellant with a knife in his hand. The State then called Officer Dean, who testified concerning the statement that he took from Ms. Kennedy. Appellant objected, arguing that Officer Dean's testimony was hearsay and that the statement was not a prior inconsistent statement. The trial court found that the statement to Officer Dean was an inconsistent statement and allowed the officer to testify about what Ms. Kennedy told him; it did not allow the statement itself to be admitted into evidence.

On appeal, appellant contends that the trial court erred by allowing the officer to read Ms. Kennedy's statement to the jury as a prior inconsistent statement. He argues that the statement was not inconsistent, but was a "no recall." Appellant also contends that the statement was admitted as substantive evidence against him. The State contends that *Chisum v. State*, 273 Ark. 1, 616 S.W.2d 728 (1981), is directly on point and controlling in this appeal. We agree.

In *Chisum*, the witness, appellant's sister, professed to have forgotten what she told the sheriff concerning the shooting death of a Mr. Rackley; in her testimony, she testified to nothing unfavorable to appellant, and she could not remember any of her statements to the sheriff that implicated appellant. The trial court allowed the sheriff and his secretary to narrate the statement made by the witness, and our supreme court ruled that this evidence was properly admissible despite the witness's professed lack of memory, relying upon the following reasoning from *Billings v. State*, 52 Ark. 303, 12 S.W. 574 (1889):

> The statute does not place the right to impeach a witness by proof of contradictory statements, upon the condition of his denial. It requires his cross-examination upon the matter; nothing more. This is exacted in order that he may explain apparent contradictions and reconcile seeming conflicts and inconsistencies. If he cannot remember the fact, he is unable to do what the law affords him the opportunity to do. If he cannot remember the statement made, it is quite as probable that his recollection of the occurrence about which he testifies is inaccurate or incorrect. If contradiction properly affects the value of his testimony when he

> denies, it is difficult to see why it should not when he ignores the contradictory or inconsistent statements. The testimony is discredited because he affirms today what he denied yesterday; the legitimate effect of such contradiction cannot depend upon his power to remember it. If the defect in the memory is real, the proof of the contradiction apprises the jury of this infirmity of the witness; if he has made a false statement under the pretense of not remembering, he should not escape contradiction and exposure. We think the evidence was properly admitted.

273 Ark. at 8, 616 S.W.2d at 731.

In *Chisum*, *supra*, the defense objected to the proferred statements on hearsay grounds, and the trial court admitted the statements, finding that they were admissible for impeachment as inconsistent out-of-court statements. Likewise, in the instant case, appellant objected to the statements on hearsay grounds, and the trial court found that Ms. Kennedy's statement was an inconsistent statement. Therefore, based on *Chisum,* we cannot say that the trial court erred in allowing Officer Dean to read Ms. Kennedy's statement to the jury.[1]

In regard to appellant's argument that the statement was admitted as substantive evidence against her, appellant never asked for a limiting instruction stating that the prior statement was for impeachment purposes only. When evidence is admissible for one purpose but not for another, an objection is wholly unavailing unless the objecting party asks the court to limit the evidence to its admissible purpose. *Chisum, supra.* Thus, appellant's argument that Ms. Kennedy's statement was hearsay but was used as substantive evidence by the prosecutor is to no avail because he failed to seek a limiting instruction.

Affirmed.

CRABTREE, JENNINGS, and PITTMAN, JJ., agree.

ROAF and HART, JJ., dissent.

ANDREE LAYTON ROAF, Judge, dissenting. I do not agree that *Chisum v. State*, 273 Ark. 1, 616 S.W.2d 728 (1981),

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[1] Although the dissent states that *Chisum* has been limited, we simply note that it has not been overruled.

provides a basis for admission of Kimberly's unsworn statement to police into evidence, and would reverse and remand for a new trial. Furthermore, I do not agree with the State that Kennedy's failure to ask for a limiting instruction bars him from challenging on appeal the State's use of this statement as substantive evidence, as was surely done in this case. I also reject the State's contention that admission of this evidence was harmless error.

An unsworn prior statement made by a witness cannot be introduced as substantive evidence in a criminal case to prove the truth of the matter asserted therein. Ark. R. Evid. 801(d)(1)(i); *Smith v. State*, 279 Ark. 68, 648 S.W.2d 490 (1983). However, Rule 613 of the Arkansas Rules of Evidence permits extrinsic evidence of prior inconsistent statements of a witness to be introduced for the purpose of impeachment only if the witness is afforded the opportunity to explain or deny the statement, and does not admit having made it, and the other party is afforded the opportunity to interrogate the witness on that statement. *See Byrd v. State*, 337 Ark. 413, 992 S.W.2d 759 (1999). If the witness, however, admits making the prior inconsistent statement, then extrinsic evidence of that statement is not admissible. *Id.*

The instant case is not one where the existence of the prior inconsistent statement needed to be proved extrinsically; Kimberly admitted making the statement to police. Moreover, she admitted that her testimony at trial was different from what she told Investigator Dean. Accordingly, it was error to have the statement read, if the only purpose was to prove its existence. *See Gross v. State,* 8 Ark. App. 241, 650 S.W.2d 603 (1983).

Even if this court can find that Kimberly in essence denied making the statement, the way that the trial court allowed the statement to be admitted into evidence was clearly an abuse of discretion. The way the statement was used in and of itself can constitute reversible error. Although *Chisum v. State, supra,* suggests that reading a narrative of a prior inconsistent statement might be admissible for impeachment purposes, that holding was subsequently limited by *Smith v. State, supra,* and its progeny. In *Smith,* the very fact that a prior inconsistent statement was read in its entirety to the jury, treated as substantive evidence in argument by trial counsel, and provided the factual predicate for a jury instruction on accomplice testimony, convinced the supreme court that

the statement was impermissibly used as substantive evidence and not merely for impeachment. Apparently, this error can be recognized regardless of whether or not the appellant asked for a limiting instruction. *Gross v. State, supra; see also Hinzman v. State,* 53 Ark. App. 256, 922 S.W.2d 725 (1996) (holding use of a prior inconsistent statement in a way that "exceeded the parameters of proper impeachment" constituted reversible error). By comparison, where the statement is used more circumspectly, despite its obvious substantive content, the information contained within the statement is admissible. *See Roseby v. State,* 329 Ark. 554, 953 S.W.2d 32 (1997) (*overruled by Mackintrush v. State,* 334 Ark. 390, 978 S.W.2d 293 (1998) on other grounds) (affirming where witness was only questioned about prior statements that she claimed not to remember); *see also Hughey v. State,* 310 Ark. 721, 840 S.W.2d 183 (1992); *Gross v. State, supra.* Here, by having a police officer read it to the jury and by using it as substantive evidence in its closing argument[1], the State used Kimberly's statement to police in precisely the manner that was proscribed by *Smith v. State, supra.*

Also unavailing is the State's contention that Kennedy's failure to request a limiting instruction should be fatal to this point on appeal. This argument relies on part of the holding in *Chisum v. State, supra,* that has subsequently been limited by *Smith v. State, supra,* and *Hinzman v. State, supra.* In both *Smith* and *Hinzman,* the failure to request or accept a limiting instruction was of no moment. Conversely, when the use of a prior inconsistent statement is proper, the court's giving of a limiting instruction can be pivotal in preserving the issue for appeal. *See Roseby v. State, supra.* Because the use of Kimberly's statement to police went beyond

[1] In closing arguments, the State treated Kimberly's statement as if it were substantive evidence. Regarding a key issue of whether Kennedy was armed with a knife when Bates was not, the prosecutor stated: "Kimberly Kennedy, in her statement to police said she saw Michael Drew Kennedy with a knife in his right hand and hitting Lanny Bates in the face. The next time she saw the knife, it was in Michael Drew Kennedy's left hand. Kimberly Kennedy saw Michael Drew Kennedy with a knife." Later the prosecutor stated: "Kimberly Kennedy gave a very detailed statement to the police on August 4, 1997, which was a week after this incident. She had seven days to calm down and think about it. She saw a knife in Michael's right hand and in the left hand. She saw Lanny fall. She saw her husband pull Michael off Lanny and take him to the truck. Kimberly saw Michael hit Lanny first. That was her statement. The first blow Kimberly talked about was Michael striking Lanny in the face. That's what she said." The State also told the jury that they should "believe" Kimberly's statement because, as a person with a hearing impairment, she was "more perceptive" and a better "observer."

impeachment and was so far from being permissible, the failure to request a limiting instruction is of no consequence.

Finally, even though it was obvious error for the trial court to allow the State to have Investigator Dean read Kimberly's statement into evidence, this trial error is still subject to harmless-error analysis, and the case cannot be reversed absent a demonstration of prejudice. *See Byrd v. State, supra.* Clearly, prejudice has been demonstrated here. While it is true that there is overwhelming evidence that Kennedy slashed Bates, this fact is not conclusive of whether or not Kennedy can prove prejudice. From *voir dire* onward, Kennedy made it clear to the jury that he planned to assert self-defense as his theory of the case. Accordingly, except for his directed-verdict motion in which Kennedy argued that there was no proof that he had a knife in his possession, Kennedy stuck with this defense. Moreover, the fact that Kennedy does not argue sufficiency of the evidence renders the possession of the knife a nonissue for this appeal. The true issue for determining prejudice was and remains whether Bates or Kennedy was the aggressor and whether Kennedy's use of force was justified.

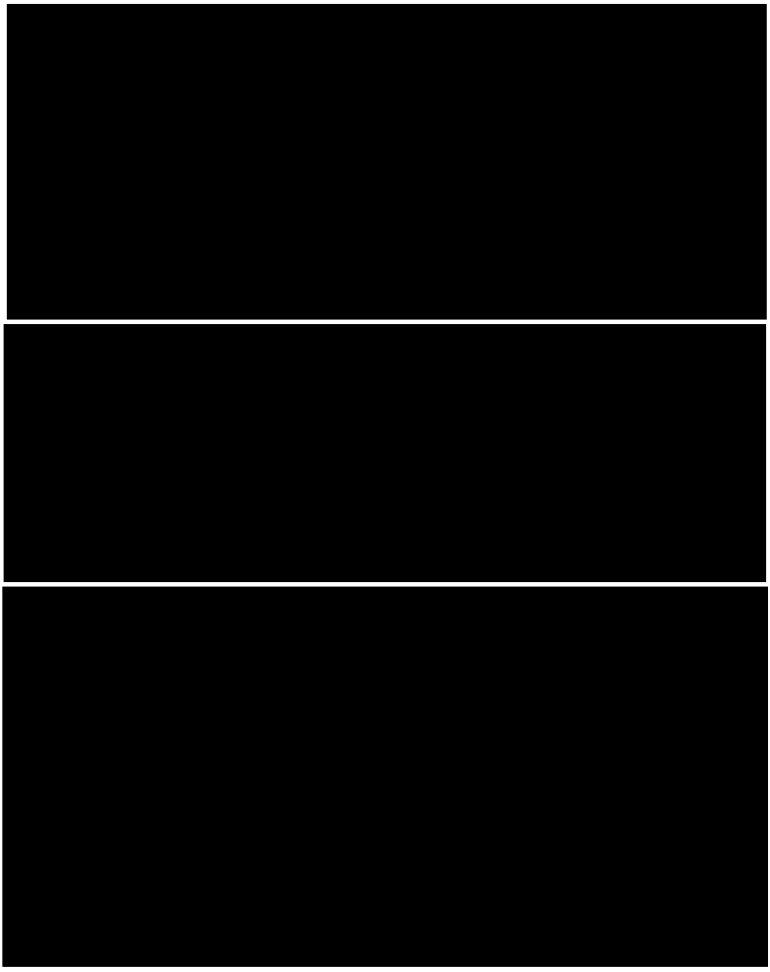
Kennedy also contends that he was denied the right to cross-examine his accuser when Investigator Dean simply read the statement. As noted above, the prosecution argued in closing arguments that Kimberly's statement established that Kennedy threw the first punch. I cannot agree that this fact was conclusively proven by Kimberly's statement, which was ambiguous on this point. Obviously it begged clarification on cross-examination. Without Kimberly's statement being used as substantive evidence, the only evidence that Kennedy was the aggressor would have come from Bates's testimony, and Bates was impeached by his financial motive, his five-million-dollar lawsuit pending against Kennedy, and the fact that he was intoxicated. Moreover, Bates's testimony was disputed by a host of defense witnesses who all claimed that Bates was the aggressor. Because Kennedy was so clearly prejudiced by the way in which Kimberly's unsworn statement was used, I would reverse and remand for a new trial.

HART, J., joins.

Joseph M. HART; Cheryl Lynn Hart; and Vinewood Communications *v.* Norman D. McCHRISTIAN

CA 00-50 36 S.W.3d 357

Court of Appeals of Arkansas
Division II
Opinion delivered October 18, 2000
[Petition for rehearing denied November 29, 2000.]



[redacted]

Harrington, Miller, Neihouse & Krug, P.A., by: *Wayne Krug*, for appellants.

John R. Eldridge, III, for appellee.

JOSEPHINE LINKER HART, Judge. Appellants Joseph and Cheryl Hart appeal an order of the chancellor confirming an arbitration award and denying their petition to vacate that award. They also seek review of the court's order holding them in civil contempt. We reverse and remand that part of the judgment concerning the arbitration award because we conclude there is a need for further development and clarification in this case. We also modify the contempt order concerning the punishment assessed by the chancellor. In all other respects, we affirm.

On January 27, 1990, appellants Joseph and Cheryl Hart, appellee Norman McChristian, and a corporation called DD&B, Inc., formed a limited partnership called Vinewood Communications for the purpose of owning and operating a radio station in northwest Arkansas. Appellants were the company's general partners and owned ten percent of the partnership units. Appellee was a limited partner and owned eighteen percent of the partnership units. The remaining seventy-two percent of the units were owned by DD&B, the other limited partner, who is not a party to this appeal.

The agreement gave the general partners exclusive discretion in the management and control of partnership business. However, it also provided that the general partners could be removed upon a proposal for their removal being made by the limited partners holding fifty percent of the partnership units. Following such a proposal, removal would be accomplished by agreement of the limited partners holding seventy-five percent of the partnership units. If the general partners objected to their removal, the matter was to be "submitted within thirty (30) days of such notice of objection . . . to binding arbitration. . . ."

On June 16, 1998, DD&B, Inc., assigned all of its partnership units to appellee in consideration for $275,000. This transaction resulted in appellee holding ninety percent of the partnership units. On July 13, 1998, appellee notified appellants of the assignment and of a scheduled meeting wherein their removal as general partners would be voted upon. According to appellee, appellants were removed at the meeting that was held on August 17, 1998. Following these events, appellee filed a complaint in Washington County Chancery Court alleging that appellants had breached the limited partnership agreement by mismanaging the partnership, misappropriating partnership assets, and operating the company for their personal benefit. Appellee sought an accounting, the appointment of a receiver, and an order requiring arbitration should appellants object to their removal. In connection therewith, appellee filed a demand for arbitration on January 25, 1999.

On February 22, 1999, a hearing was held before the chancellor during which appellants objected to arbitration. They argued that, at the time the removal vote was taken, appellee was the holder of only eighteen percent of the partnership units and thus had no authority to remove them as general partners. The question of appellee's authority to remove them, they contended, should be resolved prior to arbitrating the question of whether their conduct merited removal. The chancellor disagreed and ruled that their argument could be made to the arbitrators. A decree was entered ordering the parties to arbitration.

The arbitration hearing took place on May 10, 1999. At its conclusion, the arbitrators determined that the removal of the general partners was appropriate. The chancellor confirmed the arbitrators' award on June 28, 1999, appointed a receiver as requested by appellee, and restrained appellants from interfering with the receiver or the company assets. The receiver was directed to take possession of all partnership assets and to file an application with the Federal Communications Commission to transfer control of Vinewood Communications to a successor general partner.

On July 12, 1999, appellants filed motions to amend or vacate the arbitrators' award and the court's order confirming the award. Appellants again raised the issue of appellee's authority, as an eighteen percent owner, to effect their removal. They also claimed that the arbitrators had violated several procedural rules concerning

notice, exchanges of evidence, and requests for continuances. On July 14, 1999, appellee filed a motion asking that appellants be held in contempt for violating the chancellor's June 28 order by filing an objection with the FCC to the transfer of Vinewood Communications to the receiver. All these matters were addressed at a hearing on September 8, 1999. Following the hearing, the chancellor denied appellants' motions to vacate or modify the arbitrators' award and entered a judgment on the arbitration award commensurate with Ark. Code Ann. § 16-108-214 (1987). In addition, as requested by appellee, the chancellor held appellants in contempt on the ground that the opposition they filed with the FCC interfered with the receiver, in violation of the June 28 order. He directed appellants to withdraw their opposition, and, as punishment, to pay $7,118.90, which was the full cost of the arbitration proceedings, plus other costs incurred as the result of the contempt, and attorney fees "as subsequently determined." This appeal is brought from that judgment and order.

■ On review of a chancery matter, "the whole case is open for review; therefore, all issues raised in the court below are before us for decision, and [a] trial *de novo* on appeal in chancery involves determination of both fact questions and legal issues." *Bradford v. Bradford*, 34 Ark. App. 247, 248, 808 S.W.2d 794, 795 (1991). *See also Ferguson v. Green*, 266 Ark. 556, 587 S.W.2d 18 (1979); *Lewis v. Lewis*, 255 Ark. 583, 502 S.W.2d 505 (1974). In our *de novo* review, we will reverse only on grounds argued by appellant. *See, e.g., Country Gentlemen, Inc. v. Harkey*, 263 Ark. 580, 569 S.W.2d 649 (1978). Moreover, we will affirm the chancellor's findings unless the findings are clearly erroneous. *See* Ark. R. Civ. P. 52(a); *see also Adkinson v. Kilgore*, 62 Ark. App. 247, 970 S.W.2d 327 (1998). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Smith v. Parker,* 67 Ark. App. 221, 224, 998 S.W.2d 1, 3 (1999).

Appellants' first argument has two components: 1) whether the chancellor erred in ordering the parties to arbitrate the issue of appellee's authority to seek their removal; and 2) whether appellee actually had the authority to seek their removal, *i.e.*, whether he in fact held seventy-five percent of the partnership units at the time the removal vote was taken. As to the first component, we agree

with the chancellor's decision to send the issue to arbitration. Article XI of the written partnership agreement sets out a method by which a general partner may be removed. It establishes the percentage of ownership required to propose removal, the percentage required to effect removal, and the grounds for removal. It then provides that, if the general partner objects to removal, the matter shall be submitted to arbitration. The arbitrators shall then render "a decision as to whether or not the removal of the General Partner was appropriate under the circumstances."

Arbitration is simply a matter of contract between parties. *Neosho Constr. Co. v. Weaver-Bailey Contractors,* 69 Ark. App. 137, 10 S.W.3d 463 (2000). The question of whether a dispute should be submitted to arbitration is a matter of contract construction. *Id.* The same rules of contract construction and interpretation apply to arbitration agreements as apply to agreements generally. *Id.* Therefore, we should seek to give effect to the intent of the parties as evidenced by the arbitration agreement itself, with doubts and ambiguities being resolved in favor of arbitration. *Id.*

The contract in this case does not, as appellants suggest, distinguish between the undisputedly arbitrable issue of whether the partner's conduct merits removal and the allegedly nonarbitrable issue of whether those seeking removal have the authority to do so. The arbitrators are given the broad task of determining whether the removal of the partners was "appropriate under the circumstances." If we resolve all doubts in favor of arbitration, the "appropriateness" of a partner's removal encompasses the threshold question of whether removal was appropriately sought in the first place. Thus, the chancellor was correct in directing the parties to arbitrate this issue.

Having decided that the parties were properly ordered to arbitration, we turn to appellants' argument that appellee did not have the authority to remove them as general partners because he held only eighteen percent of the partnership units at the time the removal vote was taken. Appellants claim that the purported assignment from DD&B to appellee was deficient, thus depriving appellee of the authority to seek or vote on their removal. Our review of this argument is made difficult by the fact that appellants make no citation to authority. Generally, we do not address arguments that are not supported by convincing argument or authority. *See Golden*

Host Westchase, Inc. v. First Serv. Corp., 29 Ark. App. 107, 778 S.W.2d 633 (1989). However, we have indicated that an unsupported assignment of error will be addressed if it is apparent without further research that it is well-taken. *See id.*

While we do not address the merits of appellants' arguments on this point, it is apparent without further research that the issue requires a remand for further action. Despite their repeated requests, appellants were unable to obtain a clear ruling from either the chancellor or the arbitrators regarding appellee's authority to seek their removal. At the February 2 hearing in chancery court, appellants specifically objected to arbitration on the basis that appellee's authority to remove them should be determined first. The chancellor ruled that "arbitration...is the place to raise [this]." However, when appellants attempted to raise the issue in arbitration, the arbitrators questioned whether it was within their purview. Arbitrator Bradford, in response to appellants' request to broach the issue, said, "[n]o, that's not what we're doing today. What we're doing today is, we're going to have an arbitration hearing over whether or not the removal of the general partners was appropriate under the circumstances pursuant to the ... limited partnership agreement." Later, Bradford said that appellee's allegations and exhibits showing the assignment and notice of removal made a preliminary showing of a right to arbitrate but he also said that "apparently the [chancellor] heard the same thing, because he ordered that this matter would be arbitrated." The arbitration hearing that followed was devoted to the issue of appellants' alleged misconduct in connection with their management of the partnership. There was no indication in either the transcript of the arbitration hearing or the written award that the arbitrators actually considered and ruled upon appellants' argument.

At the September 8 hearing in chancery court following arbitration, appellants argued that the arbitrators failed to address the issue of appellee's authority to remove them. The chancellor ruled that if the arbitrators "declined to [address the issue], that's their prerogative...." When appellants argued again that arbitration was not proper in the first instance, the chancellor said that he had already ruled on the matter.

■ ■ It is clear that appellants strove for a determination of whether appellee possessed the authority to oust them. However,

the chancery court thought the matter should be resolved by the arbitrators; and the arbitrators, it appears, may well have thought the matter had been resolved by the chancellor, thus leaving the issue in a legal limbo. In equity cases, we have recognized that the interests of justice may be served by remanding a case to allow it to be more fully developed or clarified. *See Arkansas State Hwy. Comm'n v. Elliot,* 234 Ark. 619, 353 S.W.2d 526 (1962); *Jones v. Ray,* 54 Ark. App. 336, 925 S.W.2d 805 (1996); *McLain v. McLain,* 36 Ark. App. 197, 820 S.W.2d 295 (1991). Accordingly, we reverse and remand this issue with directions to the chancellor to order the arbitrators to clarify whether they addressed the threshold question of appellee's authority to seek appellants' removal as general partners. *See* Ark. Code Ann. § 16-108-209 (1987). If so, the arbitrators shall set out their award in writing, as they are required to do. Ark. Code Ann. § 16-108-208(a) (1987). If not, they shall hear the issue as originally intended by the chancellor.

Appellants argue next that the chancellor's denial of their motion to vacate was in error because the arbitrators failed to follow the rules established by the American Arbitration Association (AAA) in that they (1) failed to grant a continuance reasonably requested by appellants, (2) failed to require the exchange of exhibits five days prior to the arbitration, (3) and failed to include appellants' appointed arbitrator (Mrs. Hart) in a post-arbitration conference. We, however, disagree with appellants. The chancellor refused to vacate the award on the first two grounds argued by appellants because: (1) appellants were fully aware of the grounds upon which appellee would rely for their removal; (2) appellants had the opportunity to engage in discovery while the case was in chancery court and thus had an opportunity to ask appellee for his evidence; (3) appellants waived their argument by failing to attend a preliminary hearing on May 4, 1999, during which exhibits could have been exchanged; (4) appellants did not provide their exhibits to appellee five days in advance; and (5) appellants did not proffer any evidence contradicting the exhibit evidence offered by appellee, nor did they deny the validity of appellee's exhibits. The chancellor rejected appellants' final argument by finding that Mrs. Hart was scheduled to participate in a conference call at 10:00 a.m. on May 13, but the operator could not reach her, despite several attempts. The other two arbitrators then reviewed the evidence and made a decision on the case. Shortly thereafter, Mrs. Hart appeared and

threatened one of the arbitrators. According to the chancellor, the tactics used by appellants made arbitration more difficult than normal, but there was no evidence that the arbitrators failed to follow the rules of the AAA.

An arbitration award may be vacated on the basis of the following grounds set out in Ark. Code Ann. § 16-108-212(a) (1987):

> (1) The award was procured by corruption, fraud, or other undue means;
>
> (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
>
> (3) The arbitrators exceeded their powers;
>
> (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of § 16-108-205, as to prejudice substantially the rights of a party; or
>
> (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under § 16-108-202 and the party did not participate in the arbitration hearing without raising the objection.

Our review on appeal is limited to vacating an arbitration award only on statutory grounds, unless the award violates strong public policy. *See Anthony v. Kaplan*, 324 Ark. 52, 918 S.W.2d 174 (1996). The only applicable grounds in the above-quoted statute that correspond with appellants' allegations are contained in subsection (a)(2) — misconduct by an arbitrator prejudicing the rights of any party — and subsection (a)(4) — refusal to postpone a hearing upon sufficient cause being shown.

Neither this court nor the Arkansas Supreme Court has reviewed an arbitration award on the ground of procedural irregularities such as those alleged here. As a result, the standard for reviewing procedural irregularities in an arbitration hearing has not been established. However, if there is no case law on an arbitration issue, we may look to other states that have adopted the Uniform

Arbitration Act. *See Anthony v. Kaplan, supra.* The Alaska Supreme Court has held that the arbitrators' procedural decisions are entitled to a "deferential review" and that a litigant should be required to show "gross error" to obtain reversal on a procedural ground. *See Ebasco Constructors, Inc. v. Ahtna, Inc.*, 932 P.2d 1312 (Alaska 1997). While we do not necessarily adopt the "gross error" rule, we agree that an arbitrator's procedural decisions are entitled to deference. In light of that, we cannot say that the chancellor erred in refusing to vacate the award in this case. The well-considered reasons set forth by the chancellor for refusing to vacate the award are sound and are supported by the evidence. Therefore, we find no error on this point and affirm.

The remaining issues concern the chancellor's decision to hold appellants in contempt. In the June 28, 1999 order confirming the arbitration award, the chancellor ordered appellants to deliver all the limited partnership's assets to the receiver and "enjoined and restrained [them] ... from interfering with the Receiver...." By that same order, the chancellor directed the receiver to "file an application with the FCC to transfer control of Vinewood Communications to [the successor general partner]...." Appellants, however, filed an objection with the FCC to the transfer of control of the limited partnership to the receiver. The chancellor found this act contemptuous and, as appellants' punishment, awarded appellee a $7,118.90 judgment representing the full costs of arbitration. He also awarded an undetermined amount to appellee for attorney's fees and losses occasioned by the contempt. Appellants argue that the finding of contempt was in error and, alternatively, that the punishment was erroneous. We address each issue respectively.

[redacted] " 'Civil contempt' is defined as that which exists in failing to do something ordered to be done by a court in civil action or is a violation of a court order resulting in a proceeding for the benefit of an aggrieved party." 17 C.J.S. *Contempt* § 9 (1999). Appellants argue that they were, as citizens, free to file objections with the FCC pursuant to 47 U.S.C. § 309 (1995), and, pursuant to the supremacy clause, the finding of civil contempt must be reversed. We disagree. Appellants provide no authority supporting their argument that this federal statute provides immunity from an order of a court that presides over a case in which they are a party. In this case, appellants were plainly ordered not to interfere with the

receiver, and despite that order, they purposefully interfered with the receiver's efforts to transfer control to the new general partner by filing an objection with the FCC. In light of these facts, we conclude that the chancellor's finding of contempt was not clearly erroneous and affirm.

We do, however, modify the amount of the contempt award. Generally, "[t]he sanction of civil contempt serves two remedial purposes: to enforce compliance with an order of the court and to compensate for losses caused by noncompliance." 17 C.J.S. *Contempt* § 9 (1999). The $7,118.90 in arbitration costs awarded by the chancellor was in no way related to the contemptuous conduct in which appellants engaged. Thus, as a sanction, it did not serve the purpose of enforcing compliance with the chancellor's order or compensating appellee for appellants' violation of the order. Further, the partnership agreement had already mandated that each party pay one-half of any arbitration costs, and the arbitrators' award assessed those costs accordingly.

Based upon the foregoing, we modify the chancellor's contempt award to delete the $7,118.90 in arbitration costs which, in effect, reinstates the arbitrators' division of costs. Appellants also challenge the chancellor's award of attorney fees as punishment for contempt. We do not address that issue because no attorney fee award had been made at the time this appeal was filed.

Affirmed in part as modified, reversed in part, and remanded.

PITTMAN and MEADS, JJ., agree.

Austin STEPHENSON *v.* CITY of FORT SMITH

CA CR 00-155 36 S.W.3d 754

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered October 18, 2000

[redacted]

Claire Borengasser, Deputy Public Defender, for appellant.

Mark Pryor, Att'y Gen., by: *C. Joseph Cordi, Jr.*, Ass't Att'y Gen., for appellee.

TERRY CRABTREE, Judge. The Sebastian County Circuit Court found the appellant, Austin Stephenson, guilty of second-offense driving while intoxicated and sentenced him to forty-five days in the Sebastian County Detention Center with thirty-one days suspended, fined him $950, and ordered him to complete an alcohol treatment program. In addition, the court found appellant guilty of refusal to submit to a breath test and suspended appellant's driver's license for six months. On appeal, appellant presents two arguments: (1) the trial court erred in finding appellant in actual physical control of a motor vehicle within the meaning of the DWI statute, and (2) the trial court erred in finding appellant guilty of refusal to submit to a breath test when the facts did not show appellant in actual physical control of a motor vehicle. We agree and reverse on both points.

The parties stipulated that on July 7, 1999, at approximately 10:22 p.m., Officer Ron Depriest of the Fort Smith Police Department was dispatched to the "Kwik Trip" to investigate a person who was passed out behind the wheel of a vehicle. When he arrived, Officer Depriest saw a white Chevrolet pickup truck parked in front of the Kwik Trip's doors. The officer found appellant asleep, intoxicated, and sitting behind the steering wheel. Officer Depriest did not see appellant "driving the truck or otherwise physically operating it." However, the driver's side window was down; the motor and the car lights were off; and the keys to the vehicle were on the car dashboard.

For appellant's first point on appeal, he argues that the trial court erred in finding that he was in actual physical control of a motor vehicle. Appellant challenges the sufficiency of the evidence in regard to his driving-while-intoxicated conviction. "Actual physical control" of a vehicle is an element of driving while intoxicated pursuant to Ark. Code Ann. § 5-65-103 (Repl. 1997). Appellant contends that there is insufficient evidence that he had actual physical control of the vehicle.

When the sufficiency of the evidence is challenged on appeal, the test is whether the evidence is substantial. *Diehl v. State*, 63 Ark. App. 190, 975 S.W.2d 878 (1998). Evidence is substantial if it is forceful enough to compel a conclusion one way or another and goes beyond mere speculation or conjecture. *Id.* Our court reviews the evidence in the light most favorable to the State and considers only evidence that supports the verdict. *Id.*

In *Dowell v. State*, 283 Ark. 161, 671 S.W.2d 740 (1984), our supreme court held that Dowell was not in actual control of his vehicle within the meaning of the DWI statute. Dowell was found asleep in his automobile, which was parked with the motor not running. The keys were in the seat of the vehicle by Dowell's side. Here, appellant was also found asleep in his vehicle, which was parked with the motor not running. The keys were on the dash of the vehicle. We find that the case at bar is substantially similar to *Dowell* with the only difference being the location of the keys in the vehicle. Under these circumstances, we do not wish to create a legal distinction between keys found on the seat of a vehicle and keys found on the dash of a vehicle. Therefore, we hold that appellant was not in actual control of his vehicle. Accordingly, we reverse appellant's conviction for second-offense driving while intoxicated.

For appellant's second point on appeal, he argues that the trial court erred in finding him guilty of refusal to submit to a breath test when the facts did not show appellant in actual physical control of a motor vehicle. In order to fall under the implied-consent laws, one must operate a motor vehicle or be in actual physical control of a motor vehicle. Ark. Code Ann. § 5-65-202(a) (Repl. 1997). Ark. Code Ann. § 5-65-202(a) provides:

Implied consent.

(a) *Any person who operates a motor vehicle or is in actual physical control of a motor vehicle* in this state shall be deemed to have given consent, subject to the provisions of § 5-65-203, to a chemical test or tests of his or her blood, breath, or urine for the purpose of determining the alcohol or controlled substance content of his or her blood if:

(1) The driver is arrested for any offense arising out of acts alleged to have been committed while the person was driving while intoxicated or driving while there was one-tenth of one percent (0.10%) or more of alcohol in the person's blood; or

(2) The person is involved in an accident while operating or in actual physical control of a motor vehicle; or

(3) At the time the person is arrested for driving while intoxicated, the law enforcement officer has *reasonable cause to believe that the person*, while operating or in actual physical control of a motor vehicle, *is intoxicated or has one-tenth of one percent (0.10%) or more of alcohol in his or her blood.*

(Emphasis added.)

The State suggests that Ark. Code Ann. § 5-65-202(a)(3) requires a person to submit to a chemical test if a law enforcement officer has reasonable cause to believe that a person was operating or was in actual physical control of a motor vehicle. We disagree with the State's interpretation of the statute. We have carefully examined section 202 and find that the excerpt "reasonable cause to believe that the person" modifies and concerns the excerpt "is intoxicated or has one-tenth of one percent (0.10%) or more of alcohol in his or her blood." *See State v. Schaub*, 310 Ark. 76, 832 S.W.2d 843 (1992). Moreover, we find that the excerpt "while operating or in actual physical control of a motor vehicle" sets forth a condition precedent to a violation of the implied-consent law as set forth in section 202(a)(3). *See id.*

Because we find that appellant was not operating a motor vehicle or in actual physical control of a motor vehicle, we also must reverse appellant's conviction for refusal to submit to a breath test.

Reversed and dismissed.

ROBBINS, C.J., STROUD and NEAL, JJ., agree.

PITTMAN and MEADS, JJ., dissent.

MARGARET MEADS, Judge dissenting. I do not agree with the majority's conclusion that appellant was not in actual physical control of his vehicle, pursuant to Ark. Code Ann. § 5-65-103 (Repl. 1997). Under these facts, I believe appellant should be found to have been in actual physical control of his vehicle, and I would affirm both convictions.

The majority relies on *Dowell v. State*, 283 Ark. 161, 671 S.W.2d 740 (1984), to support its position. However, the majority fails to recognize a significant fact which I believe distinguishes that case from this one. It is true that Dowell was found asleep in his automobile, parked with the motor not running, with the keys in the seat of the vehicle by appellant's side. Yet it is not clear from the opinion whether Dowell was behind the steering wheel or even whether he was seated in the front seat or back seat of his automobile. The majority assumes, without factual basis, that the keys were found on the front seat of Dowell's vehicle.

In this case, there is no question that appellant was sitting behind the steering wheel of his pickup truck and that the keys were on the dash. Thus, I believe the facts are more akin to *Wiyott v. State*, 284 Ark. 399, 683 S.W.2d 220 (1985), where our supreme court ruled that appellant was in control of a vehicle within the meaning of Ark. Stat. Ann. § 75-2503(a) (Supp. 1983), the predecessor to Ark. Code Ann. § 5-65-103. In *Wiyott*, appellant was found behind the steering wheel of a vehicle, with the key in the ignition; he attempted to start the vehicle when he awoke; and there was no evidence anyone else had control over the vehicle. The court noted: "[T]he evidence would support the finding that appellant was exercising direct influence over his vehicle and had the authority to manage it. At any moment he could have awakened and started his vehicle." *Id.* at 402.

Moreover, I believe that the reasoning of our court in *Hodge v. State*, 27 Ark. App. 93, 766 S.W.2d 619 (1989), is persuasive. There we said that "[t]he object of this legislation is to prevent intoxicated persons from not only driving on the highways, but also from

having such control over a motor vehicle that they may become a menace to the public at any moment by driving it." 27 Ark. App. at 96, 766 S.W.2d at 620.

Here, although the keys were on the dash of the vehicle and not in the ignition, I think there is substantial circumstantial evidence to establish that appellant had actual physical control of the vehicle, because he was sitting behind the steering wheel, no one else was in the truck, and he could easily have become a menace to the public at any moment by driving.

Thus, I agree with the trial judge's finding that appellant, at any moment, could have awakened and started the vehicle and thus was in as much control of the vehicle as an intoxicated person could be. I believe there is substantial evidence to support the conclusion that appellant was in actual physical control of a motor vehicle while intoxicated.

As the majority correctly points out, in order to fall under the implied-consent laws, one must operate a motor vehicle or be in actual physical control of a motor vehicle. Ark. Code Ann. § 5-65-202(a) (Supp. 1999). Because I believe that appellant was in actual physical control of a motor vehicle, then I would also conclude that he is deemed to have given consent to a breath test, and since appellant refused the test, he is guilty of refusing to submit to a breath test.

For these reasons, I dissent.

PITTMAN, J., agrees.

Lois VAUGHT *v.* Jerome D. VAUGHT

CA 00-184 29 S.W.3d 365

Court of Appeals of Arkansas
Division IV
Opinion delivered October 25, 2000

Frances Morris Finley, for appellant.

D. Derrell Davis, for appellee.

JOHN B. ROBBINS, Chief Judge. Appellant Lois H. Vaught appeals from an order of the Pulaski County Probate Court. The order provided that Mrs. Vaught is to receive $72,423.21 as her dower interest in her deceased husband's estate. Mrs. Vaught argues on appeal that the probate court clearly erred when (1) it failed to include in the estate amounts designated as mutual funds, and (2) it did not order a sale of the marital home but calculated a commuted value of her interest on the basis of an appraisal. We reverse and remand.

Mrs. Vaught and the decedent, Lloyd Vaught, were married in June 1989. It was the second marriage for both of them. Within a year of their marriage, Lloyd Vaught suffered a stroke. Due to his mental incapacitation, Mrs. Vaught was appointed guardian of her husband's person and estate in November 1991. He died on November 5, 1997. Prior to this marriage Lloyd Vaught had executed a will leaving all of his property to his first wife, or to his children in equal shares should she predecease him. Because his first wife had predeceased him, his estate was to be distributed among his children, and appellee Jerome Vaught, one of Lloyd Vaught's children, was appointed executor of his estate. Inasmuch as the will made no provision for Mrs. Vaught, she filed an election to take against the will.

On February 17, 1998, Mrs. Vaught, as guardian of Lloyd Vaught, filed an accounting showing the value of the assets on hand in his guardianship estate to be $1,002,554.00. On July 16, 1998, Jerome Vaught's affidavit was filed in which he acknowledged that, as executor of the estate of Lloyd W. Vaught, he had received the assets reflected in the guardian's final accounting. However, on June 3, 1998, Jerome Vaught filed his inventory as executor reflecting the value of the decedent's estate as $277,066.00. This inventory did not include certain mutual fund accounts that are now in dispute on appeal.

On September 3, 1998, Mrs. Vaught filed a petition to establish her dower, and requested a finding that the mutual funds, which totaled more than $500,000.00, were subject to her one-third dower interest. However, the probate court entered an order on March 8, 1999, which held the petition in abeyance because "the issue of whether the deceased created a valid trust must be decided in chancery court." A subsequent hearing was held on October 19, 1999, in probate court where Mrs. Vaught again asserted entitlement to a dower in the mutual funds. However, the probate court refused her claim to these and awarded dower based only on the assets inventoried by the executor.

For reversal, Mrs. Vaught first argues that the probate court erred in excluding the mutual funds from the estate. Although Jerome Vaught claimed at the hearing that trusts were created on behalf of him and his siblings, and that these trusts were not part of his father's estate, Mrs. Vaught contends that he failed to produce any proof in support of this assertion. Mrs. Vaught further points

out that appellee accepted her accounting, received the funds, and even acknowledged in his testimony that he helped her prepare the final accounting. Moreover, Jerome Vaught testified that the accounts at issue were solely in his father's name prior to his death. Mrs. Vaught submits that it was incumbent upon Jerome Vaught to prove that the mutual funds were held in trust for the benefit of the decedent's children, and that because he failed to do so the court erred in excluding them from the probate estate and her dower claim.

As the probate court indicated in its March 8, 1999, order, there is a jurisdictional problem with this case. Mrs. Vaught asserts that there are no valid trusts to be excluded from the estate, but Jerome Vaught argues to the contrary. The construction, interpretation, and operation of trusts are matters that lie within the jurisdiction of chancery courts. *Schenebeck v. Schenebeck*, 329 Ark. 198, 947 S.W.2d 367 (1997). Thus, the resolution of this issue was for the chancery court. Because the probate court lacked jurisdiction of this matter, so does this court. *See Routh Wrecker Serv., Inc. v. Washington*, 335 Ark. 332, 980 S.W.2d 246 (1998). Under such circumstances, the appellate court's duty is to remand the case to the probate court for transfer to the proper court. *See Rager v. Turley*, 342 Ark. 223, 27 S.W.3d 729 (2000); *Routh Wrecker Serv., Inc. v. Washington, supra.* Therefore, we remand for the probate court to transfer the case to chancery court so the chancery court may resolve whether or not there exist valid trusts that are not subject to the probate proceeding and Mrs. Vaught's dower.

Mrs. Vaught's remaining argument is that the probate court erred in basing the commuted value of her dower in the marital home on an appraisal rather than ordering the property sold. At the hearing, both parties stipulated that the house was worth $160,000.00, and Mrs. Vaught did not elect to treat the property as a homestead. At the conclusion of the hearing, Mrs. Vaught asked for a sale of the property, and asserted that she should be entitled to one-third of the proceeds from the sale. However, the trial court agreed with the appellee that the appropriate method to establish Mrs. Vaught's dower rights in the home was to take the $160,000.00 appraisal, assume a four-percent annual income rate, and apply the commutation table. She was awarded one-third of this amount, which resulted in an award of $20,034.56 for her dower in the home. Mrs. Vaught now contends that this method of establishing her dower rights to the real property was erroneous.

We agree that the probate court erred in relying on the appraisal. In effectuating dower rights, the probate court may order the property rented and the rental divided, or it may order the property sold and the proceeds divided. *In Re: Estate of Jones*, 317 Ark. 606, 879 S.W.2d 433 (1994). However, there is no authority that would allow the probate court to receive evidence of the property's value and then to place a value on the property accordingly. *Id.* Thus, on remand we direct the probate court to order a sale of the property, to which the appellee does not now object. However, Mrs. Vaught's share of the sale proceeds will not be a whole one-third since she has only a life estate in one-third. *See* Ark. Code Ann. § 28-11-301(a) (1987). The value of this interest should then be commuted as provided in the commutation table set forth in Ark. Code Ann. § 18-2-105 (1987).

We reverse and remand to the probate court for further proceedings consistent with this opinion.

BIRD and NEAL, JJ., agree.

David A. ANDERSON *v.* STATE of Arkansas

CA CR 00-251 33 S.W.3d 173

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered October 25, 2000
[Substituted Opinion on Denial
of Rehearing delivered November 29, 2000.]

Dorcy Corbin, Arkansas Public Defender Commission, and *Val Price*, for appellant.

Mark Pryor, Att'y Gen., by: *Michael C. Angel*, Ass't Att'y Gen., for appellee.

JOHN MAUZY PITTMAN, Judge. The appellant in this criminal case was charged with murder in the shooting of a long-time friend, Jerry Markum. Appellant admitted the shooting but asserted that it was done in self-defense. After a jury trial, he was convicted

of first-degree murder and sentenced to forty years' imprisonment. From that decision, comes this appeal.

For reversal, appellant contends that the trial court erred in refusing to grant a continuance, in allowing the prosecution to introduce evidence of appellant's violent character, and in proceeding to trial without a finding that appellant was mentally fit to proceed.

Because we find it to be dispositive, we first address appellant's argument that the trial court erred in allowing the prosecution to introduce evidence of appellant's violent character. The trial judge permitted the State to introduce evidence to show that appellant had a disposition for violence, stating that he was overruling appellant's objection to this testimony at trial because appellant had put his own character at issue simply by asserting self-defense. On appeal, appellant contends that this was error. We agree.

The case of *West v. State*, 265 Ark. 52, 576 S.W.2d 718 (1979), is directly on point. It holds that a defendant does not put his own reputation for peacefulness at issue by asserting self-defense, and has been cited as authority for that proposition as recently as 1995. *See Landrum v. State*, 320 Ark. 81, 894 S.W.2d 933 (1995). Furthermore, we do not think it can be said that the error was harmless. Before an evidentiary error may be declared harmless, the reviewing court must conclude that the error is slight and the remaining evidence of a defendant's guilt is overwhelming. *Green v. State*, 59 Ark. App. 1, 953 S.W.2d 60 (1997). The error in the present case was not slight, because it went directly to appellant's propensity to commit violence and thus went to the heart of the case, appellant's intent in shooting Jerry Markum. Furthermore, although there were four eyewitnesses who testified that appellant shot the victim, three of those witnesses were incarcerated at the time of trial and the fourth expressly admitted that his memory is impaired because of a head injury. Moreover, many of the witnesses freely admitted that they had been drinking, taking drugs, or were otherwise impaired at the time of the incident. Finally, all of the witnesses were friends with the victim. The question at trial was credibility and, under these circumstances, we cannot say that the erroneous admission of the evidence was harmless.

The remaining issues argued by appellant are not likely to arise again on retrial, and we therefore need not address them.

Reversed and remanded.

NEAL, BIRD, KOONCE, and ROAF, JJ., agree.

STROUD, J., concurs.

JOHN F. STROUD, JR., Judge, concurring. While I agree with the majority opinion that the remaining issues raised by appellant are not likely to arise again upon retrial, I feel compelled to write separately in order to express what I regard as an abuse of discretion by the trial court in refusing to grant a continuance. The frustrations experienced by trial judges in dealing with requests for continuances and trying to keep their trial dockets current are fully understandable. In this case, however, it seems that the least culpable attorney bore the brunt of the trial court's frustration.

On September 3, 1999, the trial court heard defense counsel's first request for a continuance. Counsel explained that he had been appointed to the case approximately two weeks earlier, on August 19, 1999; that he had just received the case file on Monday; and that he needed a continuance to prepare for trial. The trial court responded:

> There have been several scheduling orders and continuances filed and apparently, Mr. Anderson's had difficulty with every attorney that's appointed for him John Williams, Joe Hughes. Judge Laser held a hearing on May 3, and ordered Mr. Hughes to continue the case and I see on August 19, that Mr. Hughes approached Judge Turner and he was relieved at that time and you were appointed. The case is set for the 14th and I don't see any reason to continue it further. *You're going to have to drop what you're doing and get ready for trial because I'm going to trial on the 14th.*

(Emphasis added.)

In his September 13, 1999, motion for continuance, defense counsel again explained that appellant's jury trial was scheduled for September 14, 1999; that he had been appointed to the case on August 19, 1999, taking the place of an attorney who was allowed to withdraw; that he had not received the case file until August 30, 1999; that he had requested a continuance on September 3, 1999, which was denied; and that he did not believe that he had received adequate time to prepare for trial, considering the seriousness of the alleged three felonies, which included first-degree murder. The motion was again denied.

Under the circumstances of this case, I believe it was an abuse of discretion for the trial court to expect defense counsel "to drop what you're doing and get ready for trial" without some inquiry as to defense counsel's other trial settings and commitments that would affect his ability to drop everything. See Butler v. State, 339 Ark. 429, 5 S.W.3d 466 (1999). To whatever extent the attorney is shorted in his time for trial preparation, his client is correspondingly prejudiced.

BROOKSHIRES GROCERY COMPANY *v.* Lyman PIERCE

CA 00-164 29 S.W.3d 742

Court of Appeals of Arkansas
Division III
Opinion delivered October 25, 2000

Bridges, Young, Matthews & Drake PLC, by: *Stephen A. Matthews* and *R. Scott Morgan*, for appellant.

John Richard Byrd and *Michael D. Ray*, for appellee.

JOHN MAUZY PITTMAN, Judge. The appellee in this tort case sued appellant, Brookshires Grocery Company, alleging that he fell and was injured in appellant's store on June 3, 1997, because of appellant's negligence. After trial, the jury returned a verdict in favor of appellee and awarded damages in the amount of $149,089.24 against appellant. From that decision, comes this appeal.

Appellant concedes that the immediate cause of appellee's injury was that he slipped on some grapes on the floor of appellant's store near the produce department, but contends that the trial judge erred in denying its motions for directed verdict because there is no substantial evidence to show that the grapes were on the floor because of appellant's negligence, or that the grapes were on the floor so long that they should have been discovered by appellant's employees. We find no error, and we affirm.

■ In reviewing the trial court's denial of appellant's directed-verdict motion, it is not this court's province to try issues of fact. *Conagra, Inc. v. Strother*, 340 Ark. 672, 13 S.W.3d 150 (2000). Instead, we simply examine the record in the light most favorable to the appellee and affirm the jury's verdict if there is substantial evidence to support it. Substantial evidence is that which is of sufficient force and character that it will compel a conclusion one way or another, forcing or inducing the mind to pass beyond suspicion or conjecture. *Wal-Mart Stores, Inc. v. Binns*, 341 Ark. 157, 15 S.W.3d 320 (2000).

■ A property owner has a duty to exercise ordinary care to maintain his premises in a reasonably safe condition for the benefit of an invitee and, in order to prevail in a typical slip-and-fall case involving an invitee, the plaintiff must show either (1) that the presence of a substance upon the premises was the result of the defendant's negligence, or (2) that the substance had been on the premises for such a length of time that the defendant knew or reasonably should have known of its presence and failed to use ordinary care to remove it. *Kopriva v. Burnett-Croom-Lincoln-Paden*, 70 Ark. App. 131, 15 S.W.3d 361 (2000). However, where the slippery condition is not the result of an isolated incident but is instead a recurring one, the traditional slip-and-fall analysis is inapplicable, and the question is simply whether the business owner used ordinary care to keep his premises free from dangerous conditions likely to cause injury to invitees. *Conagra, Inc. v. Strother*, 68 Ark. App. 120, 5 S.W.3d 69 (1999); *see also Heigle v. Miller*, 332 Ark. 315, 965 S.W.2d 116 (1998).

■ The question in the present case is simply whether there was sufficient evidence to support a jury finding that there was a recurrent slippery condition in appellant's store, and whether appellant employed ordinary care to keep its premises free from that

condition. There was evidence that appellee had noticed tomatoes, lettuce, onions, cauliflower, grapes, and other such items on the floor in the produce section on prior shopping trips. There was also evidence that, on the day he was injured, appellee drew the produce clerk's attention to two separate produce spills, but that the produce clerk appeared unconcerned and told appellee he would clean them up later. Appellee checked out after this incident but, upon reaching the parking lot, realized that he had forgotten an item and reentered the store. He then slipped on some grapes near the produce area and was injured. There was, in addition, evidence that store management was aware that the produce section was a particularly dangerous area for falls, and had a schedule for inspection of the floors by management that it did not adhere to. Finally, appellant's grocery manager at the time of the accident testified that it was the produce clerk's duty to keep the floor clean in his area, but that the clerk assigned to the produce section on the day appellee was injured was known to be "slouchy" and not diligent in cleaning up spilled items, but that this clerk nevertheless continued to be assigned to that area. Viewing the record, as we must, in the light most favorable to the appellee, we cannot say that the evidence does not support a finding that there was a recurrent slippery condition in appellant's produce section as the result of appellant's failure to exercise ordinary care, and we therefore affirm.

Affirmed.

STROUD and NEAL, JJ., agree.

Gladys F. HAYES *v.* WAL-MART STORES

CA 00-216 29 S.W.3d 751

Court of Appeals of Arkansas
Division III
Opinion delivered October 25, 2000
[Petition for rehearing denied February 14, 2001.]

Hale, Fogleman & Rogers, by: *Joe M. Rogers*, for appellant.

Roberts Law Firm, P.A., by: *Mike Roberts*, for appellee.

JOHN MAUZY PITTMAN, Judge. The appellant in this workers' compensation case injured her left shoulder at work in the Wal-Mart floral department. After treatment, she could no longer move her arm sufficiently to carry out her duties in the floral department and was demoted to greeter. She filed a claim for permanent partial disability benefits. The Commission denied the claim, finding that the range-of-motion studies conducted by her physician did not satisfy the statutory requirement that a finding of impairment must be supported by objective physical findings. This appeal followed.

For reversal, appellant contends that the Commission erred in finding that the range-of-motion test did not constitute an objective physical finding. We agree, and we reverse.

In reviewing a decision of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission and affirm that decision if it is supported by substantial evidence. *Geo Specialty Chemical v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). The issue on appeal is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm the Commission's decision. *Continental Express, Inc. v. Freeman*, 66 Ark. App. 102, 989 S.W.2d 538 (1999). Where, as here, the Commission denies a claim because the claimant has failed to show entitlement by a preponderance of the evidence, the substantial-evidence standard of review requires that we affirm if the Commission's opinion displays a substantial basis for the denial of relief. *Flowers v. Arkansas Highway & Transportation Dep't*, 62 Ark. App. 108, 968 S.W.2d 660 (1998).

The Commission's denial of benefits was based upon *Department of Parks & Tourism v. Helms*, 60 Ark. App. 110, 959 S.W.2d 749 (1998), where we wrote that:

> [A]ppellant argues that the four-percent impairment rating assessed by Dr. McLeod on March 8, 1996, is invalid because Dr. McLeod used *active* range-of-motion tests that do not qualify as "objective and measurable" under the Workers' Compensation Act. Appellant

asserts that any impairment rating attributable to appellee's right shoulder injury cannot be predicated on *active* range-of-motion tests. Dr. McLeod gave appellee a seven-percent shoulder impairment pursuant to the American Medical Association Guidelines, which correlates to a four-percent impairment to the body as a whole. Arkansas Code Annotated § 11-9-102(16)(A)(ii) (Repl. 1996) states:

> When determining physical or anatomical impairment, neither a physician, any other medical provider, an administrative law judge, the Workers' Compensation Commission, nor the courts may consider complaints of pain; for the purpose of making physical or anatomical impairment ratings to the spine, straight-leg-raising tests or range-of-motion tests shall not be considered objective findings.

This was not an evaluation of spine impairment. However, appellee did bear the burden to prove physical or anatomical impairment by objective and measurable physical findings. Ark. Code Ann. § 11-9-704(C)(1)(B) (Repl. 1996). "Objective findings" are those findings that cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16)(A)(i) (Repl. 1996). Dr. McLeod stated that he based the impairment rating on *active* range-of-motion tests. The legislature has eliminated range-of-motion tests as a basis for physical or anatomical impairment ratings to the spine by definition. It was incumbent upon appellee to present evidence that *active* range-of-motion tests are objective tests. In other words, it was incumbent upon her to present proof that those tests do not come under the voluntary control of the patient. She did not do so. In fact, there is authority to suggest that *active* range-of-motion tests are based almost entirely on the patient's cooperation and effort. See American Medical Association, Guidelines to the Evaluation of Permanent Impairment, (3d ed. 1988). "The full range possible of *active* motion should be carried out *by the subject* and measured by the examiner. If a joint cannot be moved *actively by the subject or passively by the examiner*, the position of ankylosis should be recorded." *Id.* at 14.

Helms, 60 Ark. App. at 114-15 (emphasis supplied).

As can be seen, *Helms* contains dicta to the effect that *active* range-of-motion tests come under the voluntary control of the patient, and therefore do not constitute objective findings under Ark. Code Ann. § 11-9-102(16)(A)(i). However, the testimony in the case at bar (which the Commission expressly found to be

credible) shows that the test performed in the present case was not one in which the limb was *actively* moved by the *subject*, but instead was a test in which the limb was moved *passively* by the *examiner*. Appellant testified, for example, that:

> At the time of the May 18, 1998, check-up Dr. Meredith performed some tests to determine range of motion to my left shoulder. These tests did not have anything to do with my spine. Dr. Meredith did not instruct me to move my arm. ...What the doctor did with the nurse present is he put his hand under my elbow towards the forearm and guided my hand upward with my arm extended and lifted it with my elbow up and then put it back down and he raised it to the level that he had it raised and went forward and he kept going forward until he stopped and then he did the same thing going to the back. ...I did not control my arm when he was doing the test. He had my arm in his hand. At all times during the test Dr. Meredith was manipulating my arm and shoulder and I was not in control of it. ...When the doctor was performing the test I did not have voluntary control of my arm. The doctor did not ask me to move my arm during the test and I could not have moved it forward to the extent that he moved it.

Doctor Meredith stated in a letter that range-of-motion studies of the type he performed can be "objectively and consistently measured by qualified physicians with reasonable accuracy and reproducibility."

The Commission was not required to accept this testimony as credible. However, given that the Commission did expressly find the testimony of appellant and Dr. Meredith to be credible, the conclusion is inescapable that the tests performed on appellant were passive range-of-motion evaluations performed by the examiner and not under the voluntary control of appellant. Under these circumstances, we hold that the Commission's opinion displays no rational basis for its finding that the range-of-motion tests performed on appellant did not constitute objective findings under Ark. Code Ann. § 11-9-102(16)(A)(i).

Reversed and remanded.

STROUD and NEAL, JJ., agree.

WAL-MART STORES, INC. *v.* Bobby WILLIAMS

CA 99-1516 29 S.W.3d 754

Court of Appeals of Arkansas
Division II
Opinion delivered October 25, 2000
[Petition for rehearing denied November 29, 2000.]

Barrett & Deacon, by: *D.P. Marshall, Jr.*, *Jim D. Bradbury*, and *Jennifer S. Cameron*, for appellant.

Easley, Hicky & Hudson, by: *Ann B. Hudson*, for appellee.

JOHN MAUZY PITTMAN, Judge. This is an appeal from a $75,000 jury verdict for appellee, Bobby Williams, in a malicious-prosecution action against appellant, Wal-Mart Stores, Inc. Because the jury's verdict is supported by substantial evidence, we affirm.

On January 29, 1994, appellee went shopping at appellant's Wynne store. Appellee testified at trial that he intended to buy two tires and to have the oil in his truck changed; because the store was so crowded, however, he decided to get the necessary items there and have the services done at another location. Appellee said that he did not get a shopping cart because the store was so crowded; instead, an employee of appellant gave him permission to put the items he intended to purchase in a shopping bag. He stated that he did so, with the exception of a can of motor oil, which he carried in his hand. Appellee testified that he realized he needed to go outside to check the size of his tires; however, he had only one check and did not have enough money to pay cash for the items in his hands. He said that the person behind the counter gave him

permission to check his tires outside and to pay for everything when he came back inside; this individual also unlocked the side door with a key to enable him to go outside. While he was kneeling down to check his tires, according to appellee, he was told by Kathy Robertson, appellant's security guard, that he was under arrest for shoplifting.

Ms. Robertson took appellee to a room to inventory the items she suspected him of shoplifting. Appellee testified that he tried more than once to explain his actions to Ms. Robertson without success; she told him that she did not want to hear it. Appellee also said that he asked Ms. Robertson to bring the automotive-department employees in so that he could identify the individual who let him outside but that she refused to do so. Ms. Robertson admitted at trial that nothing appellee could have said would have made any difference in her decision to prosecute him, because she does not listen to such explanations and makes her decision to prosecute without regard to what the accused shoplifter says. The store manager, Wayne Allen, who also came into the room where Ms. Robertson brought appellee, responded to appellee's attempts to explain by stating that he had nothing to do with the matter; he also admitted at trial that an explanation would not have helped appellee to avoid prosecution. The police arrested appellee on the strength of an affidavit signed by Ms. Robertson. This affidavit made no mention of appellee's explanation or the fact that other employees might have been able to corroborate his version of the events. At his trial for shoplifting, appellee was acquitted.

Appellant argues that the trial judge should have granted its motions for directed verdict and for judgment notwithstanding the verdict. A motion for directed verdict is a challenge to the sufficiency of the evidence. *Sparks Regional Med. Ctr. v. Smith*, 63 Ark. App. 131, 976 S.W.2d 396 (1998). When reviewing the denial of a motion for directed verdict, we affirm if the jury's verdict is supported by substantial evidence. *Wal-Mart Stores, Inc. v. Binns*, 341 Ark. 157, 15 S.W.3d 320 (2000). The same standard applies when we review the denial of a motion for judgment notwithstanding the verdict. *Home Mut. Fire Ins. Co. v. Jones*, 63 Ark. App. 221, 977 S.W.2d 12 (1998). Substantial evidence is evidence that is of sufficient certainty and precision to compel a conclusion one way or another, forcing or inducing the mind to pass beyond suspicion or conjecture. *Id.* On appeal, only the evidence favorable to the

appellee, and all reasonable inferences therefrom, will be considered. *Id.* In reviewing the evidence, the weight and value to be given the testimony of the witnesses is a matter within the exclusive province of the jury. *Rathbun v. Ward*, 315 Ark. 264, 866 S.W.2d 403 (1993). The appellate court does not try issues of fact. *City of Caddo Valley v. George*, 340 Ark. 203, 9 S.W.3d 481 (2000).

The essential elements of malicious prosecution are: (1) a proceeding instituted or continued by the defendant against the plaintiff; (2) termination of the proceeding in favor of the plaintiff; (3) absence of probable cause for the proceeding; (4) malice on the part of the defendant; and (5) damages. *McLaughlin v. Cox*, 324 Ark. 361, 922 S.W.2d 327 (1996). Appellant contends that appellee failed to prove the absence of probable cause or that appellant acted with malice.

The test for determining probable cause is an objective one based not upon the accused's actual guilt, but upon the existence of facts or credible information that would induce a person of ordinary caution to believe the accused to be guilty. *Kroger Co. v. Standard,* 283 Ark. 44, 670 S.W.2d 803 (1984). Ordinary caution is a standard of reasonableness that presents an issue for the jury when the proof is in dispute or is subject to different interpretations. *Parker v. Brush*, 276 Ark. 437, 637 S.W.2d 539 (1982). *Accord Wal-Mart Stores, Inc. v. Binns, supra; Cordes v. Outdoor Living Ctr., Inc.*, 301 Ark. 26, 781 S.W.2d 31 (1989); *Kroger Co. v. Standard, supra.* Relevant to whether appellant exercised ordinary caution is the presumption created by Ark. Code Ann. § 5-36-102(b) (1987). It provides:

> The knowing concealment, upon his person or the person of another, of unpurchased goods or merchandise offered for sale by any store or other business establishment shall give rise to a presumption that the actor took goods with the purpose of depriving the owner, or another person having an interest therein.

Rule 301 of the Arkansas Rules of Evidence provides that "a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence." Appellant asserts that section 5-36-102(b) establishes probable cause as a matter of law. Appellant also contends that, with or without permission, appellee's placing of the items in the bag amounted to "knowing concealment" under

the statute. Appellee argues that he cannot be said to have knowingly concealed merchandise when he obtained permission from the clerk to put the items in the bag and, therefore, this presumption did not arise. We need not, however, decide that question. Even if this presumption arises, it is not conclusive, and it does not, as appellant argues, establish probable cause as a matter of law.

The existence of probable cause is determined by an examination of the information known to the defendant at the time the proceedings were instituted. *First Commercial Bank v. Kremer*, 292 Ark. 82, 728 S.W.2d 172 (1987). Where a defendant relied on an eyewitness statement, but was also in possession of contradictory facts, the jury should be allowed to consider all the evidence available to the defendant to determine if ordinary caution was exercised in bringing the charges. *Id.* "To hold otherwise would allow the defendant to avoid the jury's scrutiny of evidence known which could make prosecution unreasonable." *Id.* at 90, 728 S.W.2d at 176. Here, Ms. Robertson was aware of facts that contradicted her observations — appellee told her that an employee had given him permission to go outside with the items to check his tires and let him outside through a locked door. It is obvious that the jury believed appellee's testimony and did not believe that Ms. Robertson, acting for appellant, acted with ordinary caution. It is within the jury's province to believe or disbelieve a witness's testimony and to determine the weight, if any, to accord it. *Allred v. Demuth*, 319 Ark. 62, 890 S.W.2d 578 (1994).

As for appellant's policy of automatically prosecuting suspected shoplifters without regard to their explanations, the following discussion from *Wal-Mart Stores, Inc. v. Yarbrough*, 284 Ark. 345, 349, 681 S.W.2d 359, 362 (1984), bears consideration:

> Assistant Manager Caudle testified he was able to see the pen at all times during the period he was observing the Appellee. The shoplifting presumption did not arise there and thus, the Appellee did not have to overcome the burden imposed by Rule 301. The appellant did have probable cause for the initial stop of the Appellee to question her with respect to the pen. However, it can not be held, as a matter of law, that the Appellant thereafter exercised ordinary caution in these circumstances. Once the decision to stop was made, the prosecution of Appellee was automatic, according to Appellant. There was no effort made to listen to, or believe, the explanation proffered by Appellee because there was nothing she

> could have said that could have changed the Appellant's decision to prosecute. And additionally, the Appellant continued with the prosecution after the recommendation was made by the City Attorney that the action be dismissed.
>
> While those facts, as were all others, were undisputed, they were susceptible to different inferences. The submission of the issues of false imprisonment and malicious prosecution to the jury was entirely appropriate in these circumstances. *Kroger Co. v. Standard*, 283 Ark. at page 47.

As we see it, the relevant question is not whether there was probable cause to stop and question appellee; as appellant points out, even appellee understood how Ms. Robertson could have found his actions suspicious at first. Rather, the crucial question is whether appellant had probable cause to initiate and continue with the prosecution of appellee for shoplifting. The jury obviously believed appellee's testimony that he informed Ms. Robertson that he had been allowed to go outside by an automotive-department employee to check his tires and that he had asked her to produce the employees of that department to validate his version of what happened. Ms. Robertson admitted that she refused to permit appellee to make any explanation and that nothing he said would have made any difference in her decision to prosecute. Even if viewed in light of the shoplifting presumption and Rule 301, appellee's testimony was substantial evidence that appellant failed to exercise the ordinary caution exhibited by the reasonably prudent merchant. *See Kroger Co. v. Standard, supra.* The trial judge may decide, as a matter of law, whether ordinary caution exists only when the facts and the reasonable inferences from those facts are undisputed. *Id.* Thus, the trial judge properly submitted the issue of probable cause to the jury.

Appellant also contends that appellee failed to prove that it acted with malice. Malice has been defined as any improper or sinister motive for instituting the suit. *Cordes v. Outdoor Living Ctr., Inc., supra.* Malice need not spring from any spirit of malevolence nor be prompted by any malignant passion. *Foster v. Pitts*, 63 Ark. 387, 38 S.W. 1114 (1897). Malice may be inferred from lack of probable cause. *Cordes v. Outdoor Living Ctr., Inc., supra.* It is true that a defendant's annual loss from shoplifting is relevant evidence as to his state of mind and tends to show lack of malice. *Reynolds v. Holmes*, 232 Ark. 783, 340 S.W.2d 383 (1960). However, Ms.

Robertson testified that she would lose her job if she made a "bad stop" for shoplifting and that she alone made the decision to prosecute appellee. Appellee, therefore, presented sufficient evidence of an improper motive to send this question to the jury.

Affirmed.

HART and MEADS, JJ., agree.

SECOND INJURY FUND *v.* J & S TRUCKING

CA 00-242 30 S.W.3d 112

Court of Appeals of Arkansas
Division IV
Opinion delivered October 25, 2000

David L. Pake, for appellant.

Jerry D. Pruitt, for appellee.

SAM BIRD, Judge. The Second Injury Fund appeals a decision of the Workers' Compensation Commission that: (1) held that it had failed to properly preserve for appeal the issue of the contempt penalty imposed by the administrative law judge on appellee J & S Trucking for failing to comply with a previous order; and (2) affirmed the law judge's action in holding the Fund liable for the claimant's fifteen-percent wage-loss-disability benefits. On appeal, the Second Injury Fund argues that it properly preserved for appeal the issue of the contempt assessment; that the claimant did not have the combination of disabilities or impairments necessary to invoke Second Injury Fund liability; and that it was error for the Commission to hold the Fund liable for wage-loss benefits when the employer was not insured at the time of the injury and had not paid any of the benefits it was ordered to pay in a previous Commission decision. We affirm the decision of the Commission.

When reviewing a decision of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission and affirm that decision if it is supported by substantial evidence. *Clark v. Peabody Testing Serv.*, 265 Ark. 489, 579 S.W.2d 360 (1979); *Boyd v. Dana Corp.*, 62 Ark. App. 78, 966 S.W.2d 946 (1998); *Express Human Resources III v. Terry*, 61 Ark. App. 258, 968 S.W.2d 630 (1998). Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Weaver v. Whitaker Furniture Co.*, 55 Ark. App. 400, 935 S.W.2d 584 (1996); *Wright v. ABC Air, Inc.*, 44 Ark. App. 5, 864 S.W.2d 871 (1993). The issue is not whether the appellate court might have reached a different conclusion from the

one found by the Commission, or even whether the evidence would have supported a contrary finding, but if reasonable minds could arrive at the same decision as the Commission, the decision must be upheld. *Harvest Foods v. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996).

The claimant, Dennis Watson, who is in his fifties, finished high school, earned some college credits, is a Viet Nam veteran with a service-connected disability of twenty percent, and has worked mainly in the trucking industry as a driver, dispatcher, and supervisor. He sustained a work-related injury on June 2, 1995, while stacking twelve-packs of Pepsi in the course and scope of his employment with J & S Trucking. Dr. Tom E. Cheyne, of the Holt-Krock Clinic in Fort Smith, treated Watson for a lumbar strain. An August 14, 1995 bone scan was normal and a September 21, 1995 lumbar MRI showed a small central disc bulge at L5-S1. Dr. Nils K. Axelsen, also of the Holt-Krock Clinic, to whom Dr. Cheyne had referred Watson, reported that he did not think the bulging disc was causing Watson any significant problems. Dr. Cheyne released Watson to return to work on October 12, 1995, with a five-percent anatomical-impairment rating, a twenty-pound weight restriction, and no repetitive bending, lifting, or twisting.

Watson had a previous back injury on March 14, 1988, that was not work related. It resulted in a herniated disc that required surgical repair, but he went back to work at his same job three months later and continued to work for that company for four more years. Since 1988, Watson has had periodic episodes of back pain, particularly after strenuous work. Following the 1995 injury, Watson was unable to return to work for J & S Trucking because they did not have a job for him that would be within his physical restrictions. Watson was unable to find work in the trucking industry and eventually went into business for himself doing yard work and repairing boat motors. At the time of his 1995 injury, Watson was making an average weekly wage of $349. In 1995, Watson's adjusted gross income, according to his Form 1040, was $10,014; in 1996, it was $4,831; and in 1997, his income was $7,507.

The Workers' Compensation Commission determined that Watson had suffered a wage-loss disability of fifteen percent due to the combination of his 1988 and 1995 injuries. The Second Injury

Fund's first argument is that Watson had no lasting physical problems that affected his ability to work from either his service-connected disability or his 1988 back injury and subsequent surgery. It contends that: Watson was never placed on any physical restrictions after his 1988 back surgery; he had no back problems that could not be attributed to a specific incident from which he completely recovered; he wore no back brace; a 1993 myelogram was normal; Watson never lost a job because of his physical inability to perform; Watson testified that he considered all his pre-1995 restrictions temporary; a physical examination conducted on April 10, 1994, to determine Watson's qualification for retaining his commercial driver's license noted no permanent defects from any illness, disease, or injury; and, while working for J & S Trucking, Watson was loading and unloading his own truck. Thus, the Second Injury Fund maintains that Watson's current restrictions are entirely the result of his June 2, 1995 injury.

Appellee Watson counters this argument by noting the number of times between his surgery in 1988 and his injury in 1995 that he had to return to the doctor because of back pain. On physical examination at those visits, Watson was found to have a positive straight leg raise, range of motion was decreased, muscle spasms were noted, and he was diagnosed with lumbar radiculitis on the left side.

In addition, Dr. Albert D. MacDade, a neurosurgeon, performed an independent medical examination on Watson. His report stated in part:

> NEUROLOGICAL EXAM: A focused neurological examination shows ... [t]here is a toe drop on the left that is quite substantial -3 weakness is present. The extensor digitorum brevis on the left is atrophied. There is L5 hypalgesia on the left.
>
> ....
>
> He has hard neurological findings. He denies any toe extensor weakness that he had noted prior to the 06-02-95 mishap, but review of the old records indicates that he had a substantial L5 radiculopathy on the left with marked weakness of the left toe dorsi flexors, and evertors, on Dr. Barry's examination of 03-14-88. Judging from this, I would deduce that the atrophy of the extensor digitorum brevis and toedrop on the left are probably old. The pain is new since his 06-02-95 event.

> I am persuaded that his pain relates to the new accident of 06-02-95, but his neurologic findings relate dominantly to the old injury of the nerve root detected back in 1988 that happened about the time of his lumbar discectomy by Dr. Alberty.

Dr. MacDade's report alone constitutes substantial evidence to support the Commission's finding that Watson's current disability was the result of the combination of the two injuries.

For its second point on appeal, the Second Injury Fund argues that the Commission erred in holding that it did not properly preserve the contempt issue for review. The administrative law judge had found J & S Trucking in contempt for failing to pay any of a previous award of temporary total disability benefits, costs of medical treatment, and a five-percent anatomical impairment rating. The judge fined the employer $500, and ordered the fine paid to the Second Injury Fund. The Second Injury Fund does not argue that the fine should not have been imposed against J & S, but it argues that the administrative law judge should not have ordered that the fine be paid to the Second Injury Fund. The Commission stated in its opinion that the issue was not raised on appeal by the Second Injury Fund, the party who filed the notice of appeal, and that J & S Trucking, against whom the fine was levied, did not file a cross-appeal.

From our review of the record, it appears that the question is not whether the Second Injury Fund properly preserved the issue for appeal to the Commission, but whether the Second Injury Fund had standing to appeal the contempt issue where, as here, the fine was not levied against it, and where, as here, the proceeds of the fine were ordered to be paid to the Fund.[1]

Before a party can raise an issue on appeal, it must demonstrate that it has been adversely affected or aggrieved by the action of the administrative agency. The injury must be concrete, specific,

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[1] We are aware that the Commission modified the decision of the administrative law judge by directing that the proceeds of the fine be paid to the Clerk of the Workers' Compensation Commission for deposit into the Commission's "administrative account" instead of into the Second Injury Fund. However, since the Fund's argument before the Commission was that the proceeds of the fine should *not* be paid to it, we fail to see how the Fund has standing to contest the Commission's decision *not* to pay the proceeds of the fine to it. Therefore, we decline to address the Fund's further argument that the proceeds of the fine should have been paid into the Death and Permanent Total Disability Trust Fund.

real, and immediate, rather than conjectural or hypothetical. *Estes v. Walters*, 269 Ark. 891, 601 S.W.2d 252 (Ark. App. 1980). A party has no standing to raise an issue regarding property in which he has no interest. *Nash v. Estate of Swaffer*, 336 Ark. 235, 983 S.W.2d 942 (1999); *McCollum v. McCollum*, 328 Ark. 607, 946 S.W.2d 181 (1997). *See also Etoch v. State*, 332 Ark. 83, 964 S.W.2d 798 (1998) (appellant lacked standing to raise a particular issue on appeal because he could not demonstrate that the granting of a motion of the State for a mistrial adversely impacted him).

We are simply unable to see how the Second Injury Fund has been damaged in any way by the finding of contempt and the assessment of a fine against J & S Trucking. Furthermore, since the gravamen of the Fund's complaint is that the administrative law judge ordered the fine paid into the Second Injury Fund, it cannot now complain that the Commission modified the administrative law judge's decision by directing that the fine be deposited elsewhere.

Finally, the Second Injury Fund argues that it was error to hold that the claimant could draw wage-loss disability from the Fund because the employer was uninsured and had not paid the three-percent premium tax on workers' compensation insurance that constitutes the funding for the Second Injury Fund. The Commission stated that the relationship between the claimant and the Second Injury Fund exists without reference to the employer and, therefore, the employer's omission in not carrying workers' compensation insurance, is irrelevant to the determination of whether the Fund has liability in a particular case.

Arkansas Code Annotated section 11-9-525(a)(1) (Repl. 1996) provides in pertinent part:

> The Second Injury Fund established in this Chapter is a special fund designed to ensure that an employer employing a handicapped worker will not ... be held liable for a greater disability or impairment than actually occurred while the worker was in his employment.

The Fund argues that unless the employer has paid into the pool, it is not a member of the pool, and it cannot shift its liability for an injury to the Second Injury pool. According to the Fund, it is unfair to the contributing employers to make the Fund pay the

liability of a non-contributing non-member employer. However, as argued by appellee, Ark. Code Ann. § 11-9-525(a)(2) states: "*The employee is to be fully protected* in that the fund pays the worker the difference between the employer's liability and the balance of his disability or impairment which results from all disabilities or impairments combined."

J & S Trucking also counters the Fund's argument that it had not contributed any money to the Fund. It asserts that from 1981 until 1993, it carried workers' compensation insurance and presumably contributed the required tax to the Fund. Therefore, the Fund's argument that imposing liability for Watson's wage-loss disability on it would be unfair loses its validity. Furthermore, the Second Injury Fund statute (Ark. Code Ann. § 11-9-525) makes no mention of uninsured employers, and the statute regarding an employer's liability for compensation (Ark. Code Ann. § 11-9-401 (Repl. 1996)) makes no mention of the Second Injury Fund. There is nothing in these statutes to indicate that an injured worker should be penalized or the Second Injury Fund should be relieved of liability that it was created to cover simply because the particular employer did not carry workers' compensation insurance.

Affirmed.

KOONCE and ROAF, JJ., agree.

Tom DONOVAN *v.* STATE of Arkansas

CA CR 99-1096 32 S.W.3d 1

Court of Appeals of Arkansas
Division III
Opinion delivered October 25, 2000
[Petition for rehearing denied November 29, 2000.]

[redacted]

Witt Law Firm, P.C., by: *Ernie Witt*, for appellant.

Mark Pryor, Att'y Gen., by: *Sandy Moll*, Ass't Att'y Gen., for appellee.

K. MAX KOONCE, II, Judge. Appellant was charged with theft by deception pursuant to Ark. Code Ann. § 5-36-103 (Repl. 1997). The felony information alleged that appellant unlawfully obtained property having a value of $2,500 or more from Gail Merritt between January 1, 1994, and September 30, 1994. A jury found appellant guilty of theft by deception and recommended a ten-year suspended sentence and a fine of $10,000. After the sentencing hearing, the trial court ordered that appellant serve a three-year suspended imposition of sentence, pay a $500 fine and court costs, and pay restitution to the victim in the amount of $60,000. The trial court modified the sentence by suspending the $500 fine and adding $500 to appellant's court costs. Appellant raises nine points on appeal. We affirm in part and remand in part.

On May 9, 1997, appellant was arrested after a warrant was issued by the Little Rock Municipal Court Clerk. Judge Lee Munson made a finding of probable cause for theft based on an affidavit of an investigator from the prosecutor's office. A probable-cause hearing was set for July 17, 1997. In the interim, the Pulaski County Prosecutor's Office filed a felony information with the Pulaski County Circuit Clerk charging appellant with theft by deception. The appellant filed a motion to quash the felony information on the grounds that the arrest warrant was issued without an independent probable-cause determination. The trial court denied the motion. A jury trial was held over six days in December 1998 and January 1999.

Prior to trial, appellant filed a motion in limine seeking to exclude any testimony of appellant's cocaine habit and testimony that any of the money allegedly stolen was used to purchase cocaine. The State contended that the evidence of appellant's drug

use would be used to show motive for the theft and that the checks were unauthorized. The trial court denied the motion in limine.

Gail Merritt, the victim, testified at trial. Ms. Merritt testified as to how she met appellant at a co-dependency workshop in 1988. She and appellant became close friends and eventually became intimate. Ms. Merritt was a speech-pathologist and opened her own business called Total Language Communication Clinic (TLCC). Appellant, an attorney and accountant, began to prepare Ms. Merritt's taxes in 1989 and offered professional services to her business as their relationship evolved. Ms. Merritt broke off the relationship in 1993, but they remained friends, and appellant continued to handle TLCC's bookkeeping. Ms. Merritt testified that she originally agreed to pay appellant $75 a month for his services. Later, they agreed that appellant would receive $150 per month, and appellant typed up a document that provided what services he would render. The agreement was introduced into evidence. Ms. Merritt testified that she did not authorize appellant to write himself checks on her business account above the $150 per month.

Ms. Merritt testified that appellant was authorized to sign checks for the business and to pay bills, which were sent to his home. She did not suspect there were any problems with appellant until July 1995, when her payroll checks bounced. Ms. Merritt called appellant at home, and he informed her that he would take care of it, explaining that he had forgotten to make a deposit. Those payroll checks cleared, but the payroll checks for a subsequent period bounced and never cleared, according to Ms. Merritt. Ms. Merritt stated that she called appellant on September 12, 1995, and that he told her he talked to the bank and that they were having internal problems and that he had an appointment with the bank. After calling the bank and discovering that there was no appointment, Ms. Merritt drove to appellant's house. Ms. Merritt asked appellant whether he had been stealing from her, and he admitted to stealing $30,000. He told Ms. Merritt he was using the money to buy crack cocaine and pay personal bills. Ms. Merritt stated that during her discussion with appellant, his brother, Joe Donovan, came out of the back of appellant's house where he kept an office.

Ms. Merritt testified that she entered into a settlement agreement at that time believing appellant only owed her $30,000. The agreement provided, *inter alia*, that Ms. Merritt would receive

$10,000 immediately, the equity in the house she and appellant had purchased together in 1992, and 42,000 shares of Harvey Gene stock. In return, Ms. Merritt agreed not to prosecute or sue appellant, or to file a bar complaint against appellant. Ms. Merritt later discovered that appellant had taken $62,000 from her business.

Ms. Merritt testified as to each of the approximately 148 unauthorized checks written by appellant. Numerous checks were written on TLCC's account by appellant to himself and were cashed. Others were written on TLCC's account by appellant to himself and deposited into his law firm account. Checks were also written by appellant to people Ms. Merritt did not know.

The State called Lisa Rennie, the regional support manager for Nations Bank, to testify. Ms. Rennie testified that the signature card for the TLCC account contained the names Tom Donovan and Gail McConnell (Merritt). She stated that she examined the TLCC account for 1994 and 1995, and that numerous checks contained appellant's signature. A number of these checks were written for cash.

Johnnie Degler also testified at trial. Mr. Degler testified that he met appellant on the street and got into his car. Mr. Degler identified part of State's Exhibit 5 as a check that appellant gave him to cash. This check contained Mr. Degler's endorsement on the back of the check.

Odetta Stansfield was called to testify by the State. She identified appellant and testified that appellant stopped her on 28th Street near Martin Luther King to ask where he could get some crack. Appellant gave her cash, and she bought some crack from a friend. Ms. Stansfield identified State's part of State's Exhibit 42 as a check appellant wrote her for $150 on May 3, 1995, which contained her endorsement. Ms. Stansfield stated that she and appellant would go to Clayborn Thrower's house to smoke crack, and that she had smoked crack at appellant's apartment.

Regina Staggs also testified that she and appellant smoked crack together. She stated appellant gave her a check to purchase crack cocaine. Ms. Staggs identified this check containing her endorsement, which was part of State's Exhibit 5.

Another witness for the State, Lisa Wiley, testified that appellant gave her a check to purchase crack cocaine. Appellant had represented her in a criminal proceeding. She identified part of State's Exhibit 43 as a check appellant had given her for $700 dated September 5, 1995. She testified that she had cashed the check and went with appellant to purchase crack. The entire $700 was used to buy crack.

Frederick Sheldon, testifying for the State, claimed that appellant purchased crack cocaine from him. Sheldon identified four checks given to him by appellant. Sheldon testified that one check included within State's Exhibit 41 was given to him by appellant as a loan. State's Exhibit 43 included two checks, one dated September 2, 1995, in the amount of $120 and another dated September 6, 1995, in the amount of $210, that Sheldon used to buy drugs. Sheldon also testified that he bought drugs with a check included within State's Exhibit 5 that was dated August 23, 1995, and issued for $200.

A representative of National Bank of Arkansas, Barbara Simpson, testified that Tom Donovan d/b/a Donovan Law Firm had an account at the bank. She testified as to which of the checks contained within the State's exhibits were deposited into the Donovan Law Firm account.

James Vandiver, an investigator from the prosecutor's office, testified about his investigation of the case. He stated that the amount of the checks the jury had in their possession amounted to $60,285.65. He detailed the number of TLCC checks and the value of the checks introduced.

After the State rested its case, appellant moved for a directed verdict on the basis that the State did not prove Ms. Merritt owned TLCC. The trial court denied the motion. The court adjourned for the evening, and upon reconvening the next day, appellant made two more motions for directed verdict. One was based on appellant's contention that the jury was left to speculate as to which of the 158 checks were unauthorized, and the other was based on sufficiency of the evidence incorporating the two previous motions. The trial court denied both motions.

The appellant called several witnesses to testify in his defense. Joe Donovan identified several checks that he wrote to Ms. Merritt

as part of a settlement made on appellant's behalf. He had power of attorney over appellant at that time. Joe Donovan testified that on September 12, 1995, while working at appellant's house, he heard appellant tell Ms. Merritt that he owed her $20,000 to $22,000. Joe Donovan thought that his brother's statement was an admission that he had stolen the money. Joe Donovan testified that at that time his brother had quit practicing law and devoted his life to running Ms. Merritt's errands. He testified that appellant never mentioned that he did legal work for Ms. Merritt and that she owed him money.

Appellant testified in his own defense. He testified that Ms. Merritt agreed to pay him $120 per hour for legal services and $35 per hour for non-legal work, in addition to the $150 per month. Although he stated that there was a written agreement, he did not have a copy. He testified about the legal work he did for Ms. Merritt and how many hours he spent. However, appellant did not introduce any bills, time sheets, or an agreement pertaining to his fee for legal services. Appellant testified that he had permission to write the checks at issue, and that Ms. Merritt knew he was writing those checks. He explained that half of the money he got out of the TLCC account went to Ms. Merritt, and that he had regular meetings with Ms. Merritt where the financial affairs were discussed. He further explained that he would deposit money in the TLCC account or Ms. Merritt's personal account if it became overdrawn. He denied ever using money that he was not authorized to use. With regard to TLCC's July 1995 payroll checks that bounced, appellant explained that this was due to an electronic funds transfer that had not been deposited into TLCC's account and that the checks eventually cleared.

At the close of appellant's case, appellant renewed his motions for directed verdict on the same grounds as previously set forth. The motions were denied. Appellant renewed his motions for mistrial made during the course of the trial and made a new motion for mistrial with regard to the admission of evidence regarding appellant's cocaine use. The court also denied these motions.

The jury found appellant guilty of theft of property and found that the value of the property exceeded $2500. The jury recommended that appellant serve a ten-year suspended sentence and pay a fine of $10,000. After the sentencing hearing, the trial court

ordered appellant to serve a three-year suspended imposition of sentence, to pay a $500 fine plus court costs, and to pay restitution to Ms. Merritt in the amount of $60,000. The sentence was subsequently modified by the $500 fine being suspended and added to appellant's court costs. Appellant raises nine points on appeal.

1. Whether the trial court erred by denying appellant's motion for a directed verdict

We will address appellant's sufficiency argument first. A motion for directed verdict is a challenge to the sufficiency of the evidence. *Breedlove v. State*, 62 Ark. App. 219, 970 S.W.2d 313 (1998). This court affirms the conviction if it is supported by substantial evidence. *Wilson v. State*, 56 Ark. App. 47, 939 S.W.2d 313 (1997). When a defendant challenges the sufficiency of the evidence convicting him, the evidence is viewed in the light most favorable to the State. *Bailey v. State*, 334 Ark. 43, 972 S.W.2d 239 (1998). Evidence, whether direct or circumstantial, is sufficient to support a conviction if it is forceful enough to compel reasonable minds to reach a conclusion one way or the other. *Wilson v. State*, 332 Ark. 7, 962 S.W.2d 805 (1998). We do not, however, weigh the evidence presented at trial, as that is a matter for the fact finder; nor will we weigh the credibility of the witnesses. *Id.* Only the evidence supporting the verdict will be considered. *Bell v. State*, 334 Ark. 285, 973 S.W.2d 806 (1998).

Arkansas Code Annotated section 5-36-103 provides that a person commits theft of property if he knowingly obtains the property of another person, by deception or by threat, with the purpose of depriving the owner thereof. Further, Ark. Code Ann. § 5-37-101(3)(A)(v) (Supp. 1999) states that deception includes "[e]mploying any other scheme to defraud." The State proceeded under this meaning of theft by deception.

At the close of the State's case, appellant made a motion for a directed verdict arguing that the State did not prove Ms. Merritt was a shareholder or owner of TLCC and that the checks at issue were written on the TLCC corporate account. The trial court denied the motion. The court recessed and upon reconvening the next day, the appellant made additional motions for directed verdict on the grounds that the jury was left to speculate whether the 158

checks introduced were authorized or unauthorized and based on the sufficiency of the evidence. Appellant renewed these motions for directed verdict at the close of all the evidence.

Ms. Merritt testified that she was a speech pathologist and had opened a private practice called TLCC. Ms. Merritt later took a partner, Beverly Rory, whom she practiced with until February or March 1994. Ms. Merritt's name was on the signature card for the TLCC account and referred to the TLCC account as her account. Ms. Merritt testified that appellant admitted to stealing her money, and that she had to close TLCC as a result of appellant's actions. Ms. Merritt specifically testified as to which checks were unauthorized. Ms. Merritt testified that appellant was only entitled to $150 per month for his services, although she testified that two $150 checks in February and March were unauthorized. In addition to the two checks for $150 written in February and March, appellant also challenged whether a check for the Freidman Seminar was authorized.

Appellant argues that the jury was left to speculate whether the checks introduced included the $150 per month owed to appellant and whether the Freidman Seminar check was authorized. This amounts to only three of the 158 checks introduced. In addition, four witnesses identified checks introduced by the State as checks appellant gave to them to purchase drugs. Based on the evidence presented at trial, we hold there is substantial evidence to support the conviction.

2. Whether the trial court abused its discretion when it allowed the State to introduce evidence of appellant's use of crack cocaine in the State's case in chief

Prior to trial, appellant filed a motion in limine seeking to exclude evidence that he wrote checks on the TLCC's account to purchase crack cocaine. The State responded that such evidence was relevant to prove motive. The trial court denied appellant's motion in limine. Appellant's first point on appeal is that the trial court abused its discretion when it allowed the State to introduce evidence of appellant's crack cocaine use into evidence.

Arkansas Rule of Evidence 404(b) provides as follows:

> *Other Crimes, Wrongs, or Acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Evidence that is offered pursuant to Rule 404(b) must be independently relevant. *McGehee v. State*, 338 Ark. 152, 992 S.W.2d 110 (1999). Evidence is independently relevant if it tends to prove a material point and is not introduced solely to prove that the defendant is a bad person. *Hernandez v. State*, 331 Ark. 301, 962 S.W.2d 756 (1998). The admission or rejection of evidence under Rule 404(b) is left to the sound discretion of the trial court, and this court will not reverse absent a showing of manifest abuse. *Id.* In addition, the trial court has the discretion to determine whether prejudicial evidence substantially outweighs its probative value, and its judgment will be upheld absent a manifest abuse of discretion. *Haire v. State*, 340 Ark. 11, 8 S.W.3d 468 (2000).

Appellant contends that the State, at one of the omnibus hearings, represented that it "had discovered almost $60,000 worth of checks that had been written by Mr. Donovan to himself and to other people in order to purchase crack cocaine." The State's case focused on 158 unauthorized checks written by appellant from January 1994 through September 1995. Appellant contends that the State only showed that seven of the checks were written to purchase crack cocaine and that the amount of the seven checks totaled $1,710, which is far less than the $60,000 that the State alleged was stolen by appellant. Appellant also argues that the first of the seven checks was written on May 3, 1995, and the last in August or September, thus covering a short part of the alleged twenty-month scheme, and further that there was no proof appellant used crack cocaine prior to May 3, 1995. Based on this, appellant argues that any probative value was substantially outweighed by the danger of unfair prejudice. The State argues that evidence of crack cocaine use was offered to show motive for theft and that Ms. Merritt did not authorize such expenditures.

■ The admission of evidence regarding appellant's cocaine use was proper under Rule 404(b) because it goes to prove motive for theft and that the checks were unauthorized. Although arguably prejudicial, the evidence was highly probative in that it constituted

proof of motive and evidence that the checks were unauthorized . The probative value was not substantially outweighed by the danger of unfair prejudice. We cannot say that the trial court abused its discretion in allowing this evidence.

3. Whether the trial court abused its discretion by refusing to declare a mistrial

Appellant contends under this point on appeal that the trial court abused its discretion by denying three motions for mistrial and by making two serious errors. We address each point of error separately.

Trial courts have broad discretion in deciding evidentiary issues, and those decisions are not reversed absent a clear abuse of discretion. *Harris v. State*, 339 Ark. 35, 2 S.W.3d 768 (1999). It is well settled that a mistrial is an extreme remedy that should be granted only when the error is beyond repair and cannot be corrected by curative relief. *Marta v. State,* 336 Ark. 67, 983 S.W.2d 924 (1999). "An admonition to the jury usually cures a prejudicial statement unless it is so patently inflammatory that justice could not be served by continuing the trial." *King v. State*, 317 Ark. 293, 297, 877 S.W.2d 583, 586 (1994). The trial court has wide discretion in granting or denying a motion for a mistrial, and we will not disturb the court's decision absent an abuse of discretion or manifest prejudice to the movant. *Id.*

Appellant moved for a mistrial after the State made the following statement during closing argument:

> And your common sense says that nobody, no one working or presenting themself [sic] as a professional is going to work their client's bank account into a big zero. Does that make sense to you? Absolutely not. I don't believe for one minute that there's one of you, that one of you could say, 'Well, of course, I hired professional services and paid them so much money and I — '

Appellant objected, arguing that the State made a "golden rule argument" by asking the jurors to place themselves in the position of the victim. After argument by the parties, the court sustained the objection, but denied the motion for mistrial. The trial court further cautioned the jury that they were not to receive an argu-

ment as placing themselves in that particular position, but rather limit themselves to a consideration of what has been presented at trial. In addition to the trial court's instruction that the jury was not to place themselves in a particular position, the trial court gave the standard jury instruction that remarks made during arguments by the attorneys were not evidence and should be disregarded. In light of these circumstances, we cannot say that the trial court abused its discretion by denying the motion for mistrial on the basis of the prosecutor's remark. *See King v. State, supra.*

Appellant next argues that the trial court should have granted its motion for mistrial after the prosecutor made the following statement in closing argument:

> Ladies and gentlemen, good old boys are no longer allowed to take advantage of the system. We put a stop to that a long time ago. And lawyers should be held accountable just like everybody else. As a matter of fact, they should be held to a higher standard, because they take an oath to represent the law. They take an oath to represent their clients, to protect their clients.

Appellant's counsel made a timely objection contending the prosecutor had changed the burden of proof. The trial court made the following admonition:

> Ladies and gentlemen of the jury, the court is going to admonish you to disregard any statement that Mr. Donovan is held to a higher standard because he is a lawyer. He is not. Under Arkansas Law, there is no provision that under the Theft of Property Statute or any instruction you will receive saying that lawyers are supposed to be treated differently when they sit before this court as a defendant. The legislature has not made that such a law. And you are to be bound only to the instructions that have been given you and the definitions of what constitutes theft of property.

According to the appellant's abstract, the trial court never made a ruling on the motion for mistrial, nor did appellant request a ruling. Therefore, if any impropriety occurred, it was expunged by the admonition. *See Betts v. State*, 317 Ark. 624, 882 S.W.2d 671 (1994).

Appellant made another motion for mistrial during the State's rebuttal closing argument after the prosecutor stated:

> You all will have a chance to look at the reconciliation statements, January, February, March and April. They are saying it was

> Nineteen Ninety Five. You look at them. Those were the only ones that — that were presented. Why don't you think there were any others that were presented? He said —

Appellant's counsel objected and moved for a mistrial, arguing that the State misled the jury because the four reconciliation statements were the ones given to appellant by the prosecuting attorney during discovery. At the sidebar conference, appellant's counsel informed the State that the reconciliation statements were from 1994, not 1995, and argued that the State was attempting to mislead the jury and that the statement was prejudicial. There was a significant discussion during appellant's testimony at trial with regard to the reconciliation statements. Appellant's counsel argued that there were only four because that was all that the State had in its file. However, the State argues that the four statements were not in its file, but rather that the appellant created those statements. The appellant admitted that the statements were printed from his computer.

The trial court sustained the objection, but denied the motion for mistrial. The trial court did not give a curative instruction, nor did appellant request such an instruction. The trial court's failure to give an admonition to the jury is not prejudicial error where the instruction or admonition was not requested below. *Langford v. State,* 332 Ark. 54, 962 S.W.2d 358 (1998). We cannot say that the trial court's failure to grant a mistrial on this point constitutes an abuse of discretion.

Appellant next contends that the trial court made a serious error when it overruled his objection made when the prosecutor read from the transcript of Joe Donovan's testimony during closing argument. Appellant has not alleged how he was prejudiced. The law is well settled that prejudice is not presumed, and we will not reverse absent a showing of prejudice. *Camp v. State*, 66 Ark. App. 134, 991 S.W.2d 611 (1999).

Finally, appellant argues that the prosecutor erroneously told the jury that Clayborn Thrower testified that he smoked crack cocaine with appellant. Appellant did not make an objection below, and therefore cannot raise this argument on appeal. *See Marts v. State,* 332 Ark. 628, 968 S.W.2d 41 (1998).

4. Whether the trial court abused its discretion in refusing to declare a mistrial during the trial

Under this point on appeal, appellant alleges that the trial court abused its discretion by denying seven motions for mistrial made during the course of trial. Each motion will be discussed separately.

First, appellant moved for a mistrial when the prosecutor told the jury during opening argument that appellant was stealing money not only to support his cocaine habit, but also to support his floundering law practice. Appellant argued that at one of the omnibus hearings, the State did not inform appellant it intended to prove that appellant stole money from Ms. Merritt to support a floundering law practice. The State, although requested by appellant, never gave a bill of particulars. The State responded that appellant and his counsel were aware of the evidence it intended to prove at trial, which included that appellant deposited a number of unauthorized checks into his law firm account. Appellant was also aware that a representative of National Bank of Arkansas, where appellant maintained his law firm's account, would testify that appellant made these deposits. Based on these facts, we cannot say that the trial court abused its discretion in denying the motion for mistrial.

Second, appellant moved for a mistrial because Ms. Merritt, when asked on cross-examination what co-dependency was, answered and began to ramble about how appellant was treated at a drug rehabilitation center in a program based on twelve steps. Appellant contends this statement was prejudicial because it introduced prejudicial material about the appellant when she had not been asked any question about him. The State responds that any error was harmless because there were many other references to appellant's drug treatment. We agree that appellant has failed to demonstrate how he was prejudiced. As we previously stated, prejudice is not presumed, and we will not reverse absent a showing of prejudice. *See Camp v. State, supra.*

Third, appellant made a motion for mistrial at the conclusion of the State's case based on the same facts set forth in his second point on appeal. A discussion of whether the trial court abused its discretion in admitting evidence of appellant's use of

crack cocaine is adequately discussed above. Because we find that the trial court did not abuse its discretion in admitting evidence of appellant's crack cocaine, we cannot say that the trial court abused its discretion in denying the motion for mistrial based on the same argument.

Fourth, appellant made a motion in limine at the close of his direct examination of attorney C.P. Christian to preclude the State from questioning Mr. Christian on cross-examination about any criminal charges pending against him. The State responded that appellant opened the door to this line of questioning when he asked Mr. Christian his *legal opinion* as to whether Ms. Merritt was a bona fide purchaser of Harvey Gene stock, and that Mr. Christian had recently turned in his law license because he was stealing money from his clients. The State further argued that this testimony went to credibility under Ark. R. Evid. 608. The abstract indicates that the trial court overruled the objection. The State then questioned Mr. Christian about the loss of his law license on cross-examination. At the end of appellant's redirect examination, appellant moved for a mistrial based on the State being allowed to question Mr. Christian regarding his law license.

The State contends that appellant's motion was untimely. Motions and objections must be made at the time the objectionable matter is brought to the jury's attention, or they are otherwise waived. *Johnson v. State, supra.* In *Ashlock v. State,* 64 Ark. App. 253, 983 S.W.2d 448 (1998), this court held that a motion for a mistrial was untimely where the motion was not made until after the witness completed his testimony on cross-examination and questioned further on redirect. *Id.* That is the same situation as the present case. We find that appellant's motion was untimely, and therefore cannot be addressed on appeal.

Even if appellant had preserved this issue for appeal, appellant opened the door to the admission of this evidence by asking Mr. Christian his legal opinion as to whether Ms. Merritt was a bona fide purchaser of the Harvey Gene stock. Given this fact, we cannot say that the trial court abused its discretion by denying the motion for mistrial.

Fifth, appellant argues that the trial court abused its discretion by refusing to grant a motion for mistrial based on the

prosecutor's questioning of appellant during his cross-examination that "Mr. Witt has just seen these documents for the first time this morning. You brought these with you this morning, did you not?" The trial court denied the motion for mistrial, but instructed the jury to "disregard any statement made by Mrs. Piazza as to what Mr. Witt might have seen for the first time this morning." Appellant has not asserted any prejudice. "An admonition to the jury usually cures a prejudicial statement unless it is so patently inflammatory that justice could not be served by continuing the trial." *Ward v. State,* 338 Ark. 619, 1 S.W.3d 1 (1999). Because appellant does not assert any prejudice and because an admonition was given by the trial court, we cannot say the trial court abused its discretion in this regard.

Sixth, appellant contends that the trial court erred in denying his motion for mistrial made after the State asked appellant whether he was fired from his employment with Harvey Gene. Although the trial court sustained the objection, the trial court did not make a ruling on the motion for mistrial, a fact which appellant noted in his brief. Therefore, we cannot address the argument on appeal. *Jackson v. State,* 334 Ark. 406, 976 S.W.2d 370 (1998).

Finally, appellant appeals the final motion for mistrial made at the close of evidence, renewing the prior motions. This argument need not be addressed because each individual motion is discussed herein.

5. Whether the trial court erred when it failed to give a limiting instruction after certain individuals testified concerning specific checks being used for the purpose of purchasing crack cocaine

Appellant contends that the trial court erred by refusing to give a cautionary instruction after certain individuals testified about specific checks being used to purchase crack cocaine. Appellant's counsel first requested the instruction after the testimony of Odetta Stansfield when he stated, "Judge, at this time I'm requesting the court instruct the jury limit — on a limiting instruction that the witness that just testified and any other witness that testifies in a similar fashion, that they are not to accept that testimony for truth, but to accept it only as to his credibility." The State objected that the testimony was for the truth, and the trial court asked whether

appellant's counsel was requesting a "203 instruction." AMCI 2d 203-A provides that evidence of alleged crimes or acts may not be considered to prove the character of the defendant in order to show he acted in conformity therewith, but that such evidence may be used as evidence of motive.

The court said that the instruction requested was not appropriate. Appellant's counsel then asked appellant himself to make the motion. Appellant himself stated, "Yes, your Honor. The jury should be instructed that the evidence of crack cocaine should be considered only to show credibility and not that the defendant is guilty of the crime with which he is charged, but rather to show it being a purpose, as the prosecutor alleged, when we argued these motions before the court." The court responded, "I don't feel they need to be instructed on that. I don't. I don't see that." After the testimony of Regina Staggs, the appellant again requested that the jury be instructed "as was requested before . . . [f]or the limited purpose that it is being offered for." Again, the court denied the request stating, "That is your credibility issue, though, 203. Overruled."

The State argues that appellant's argument must fail because his request did not contain the proper AMCI 2d 203 language, and that appellant must request the proper instruction and failure to do so will not preserve the issue for appeal. *See Hendrickson v. State*, 316 Ark. 182, 871 S.W.2d 362 (1994). The State's reliance on *Hendrickson v. State, supra,* is misplaced because the appellant there never sought any limiting instruction, nor was it an issue whether the proper instruction was requested.

Appellant contends that the record is clear that the trial court knew appellant was requesting a 203 instruction. However, there seemed to be some confusion when the request was first made after the testimony of Odetta Stansfield. The abstract reflects that appellant was asking that the court instruct that the evidence only be showed for purpose of credibility and to show motive, not that appellant was guilty of the crime he was charged with committing. According to the abstract, appellant did not request the instruction after the testimony of each witness who testified regarding appellant's cocaine usage, but only after the testimony of Odetta Stansfield and Regina Staggs.

Appellant cites *Smith v. State*, 316 Ark. 407, 872 S.W.2d 843 (1994), contending that he is entitled to a limiting instruction when testimony is admitted pursuant to Rule 404. However, in *Smith v. State, supra*, the instruction was never requested, and the supreme court did not state that the instruction to the jury had to be given after the testimony of the witness. In *Owens v. State,* 325 Ark. 110, 121, 926 S.W.2d 650, 656, (1996), the supreme court stated:

> Generally, evidence of other crimes, wrongs, or acts is not admissible merely to prove the bad character of the defendant and to show that his actions conformed to that character. However, if the evidence is relevant to the main issue of the case, in the sense of tending to prove some material point rather than to prove the defendant is a criminal, the evidence may be admissible with a proper cautionary instruction by the court. *Lindsey v. State*, 319 Ark. 132, 890 S.W.2d 584 (1994).

The instruction appellant requested was not the AMCI 2d 203 instruction, but rather an instruction that evidence of appellant's cocaine use only be used for the purpose of credibility and to show motive, not that appellant was guilty of the crime he was charged with committing. This evidence did not go to credibility. Further, the AMCI 2d 203-A was given to the jury at the close of the case. Based on these circumstances, we cannot say that the trial court abused its discretion.

6. Whether the trial court erred in refusing to give appellant's requested instructions

Appellant requested that instructions be given to the jury on contract, quantum meruit, accord and satisfaction, and whether appellant had a proprietary interest in the funds he was taking. The trial court refused to give these instructions. Appellant contends that the trial court should have given these instructions pursuant to Ark. Code Ann. § 5-1-111(c)-(d) (Repl. 1997), which provides in pertinent part:

> (c) The issue of the existence of a defense need not be submitted to the jury unless evidence is admitted supporting the defense. If the issue of the existence of a defense is submitted to the jury, the court shall charge that any reasonable doubt on the issue requires that the defendant be acquitted. A defense is any matter:

> (1) So designated by a section of this code; or (2) So designated by a statute not a part of this code; or (3) Involving an excuse or justification peculiarly within the knowledge of the defendant on which he can fairly be required to introduce supporting evidence.
>
> (d) The defendant must prove an "affirmative defense" by a preponderance of the evidence. An "affirmative defense" is any matter: (1) So designated by a section of this code; or (2) So designated by a statute not a part of this code.

Appellant argues that the theft statute permits the giving of the instructions requested because Ark. Code Ann. § 5-36-101(11), defining the meaning of value, provides that "[i]f the actor gave consideration for or had a legal interest in the property or service, the amount of the consideration or the value of the interest shall be deducted from the value of the property or service to determine value . . ." The only reference to value in the Ark. Code Ann. § 5-36-103 pertains to whether the crime is classified as a Class B felony, Class C felony, or a Class A misdemeanor.

Although a non-AMCI jury instruction may be given when the trial court finds that an AMCI instruction does not accurately state the law, *see Leach v. State*, 38 Ark. App. 117, 831 S.W.2d 615 (1992), *aff'd by* 311 Ark. 485, 845 S.W.2d 111 (1993); it is not error for a trial court to refuse to give a non-AMCI instruction when another instruction covers the issue. *See Williams v. State*, 304 Ark. 279, 801 S.W.2d 296 (1990). Further, a non-AMCI instruction should only be given when the trial judge finds that the AMCI instruction does not state the law or does not contain an instruction on the subject. *See Ventress v. State,* 303 Ark. 194, 794 S.W.2d 619 (1990). Appellant has not demonstrated that he was entitled to the requested instructions on quantum meruit, contract, accord and satisfaction, and on whether appellant had a proprietary interest in the funds he was taking. The trial court gave the proper instruction on theft of property, which included the meaning of value. Therefore, we cannot say the trial court erred in refusing to give the requested instructions.

7. Whether the trial court erred in refusing to quash the felony information

Appellant argues that the trial court erred in refusing to quash the felony information because the arrest warrant was issued without an independent probable-cause determination. Appellant was arrested on May 5, 1997, based on a warrant issued by the Little Rock Municipal Court Clerk. Municipal Court Judge Lee Munson made a finding of probable cause for theft based on the affidavit of an investigator for the prosecutor's office. A probable-cause hearing was scheduled for July 17, 1997. Prior to the hearing, the prosecutor filed a felony information with the Pulaski County Circuit Clerk charging the defendant with theft by deception. The felony information was not accompanied by an affidavit or any of the documents in the municipal court's file. A felony arrest warrant was issued, and appellant was arrested.

Appellant contends that Ark. R. Crim. P. 7.1 requires independent review by a judicial officer prior to the issuance of an arrest warrant. The State, citing *Nance v. State*, 323 Ark. 583, 918 S.W.2d 114 (1996) *cert. denied*, 519 U.S. 847 (1996), *and denial of postconviction relief aff'd by* 339 Ark. 192, 4 S.W.3d 501 (1999), responds that lack of probable cause is not a statutory ground to set aside an indictment. Further, the State argues the fact of an illegal arrest would not void a conviction. *See Halfacre v. State,* 292 Ark. 329, 731 S.W.2d 182 (1987).

This court has addressed this issue in regard to an appeal based on a denial of a motion to suppress. *See Lamb v. State*, 23 Ark. App. 115, 743 S.W.2d 399 (1988). In *Lamb*, we stated as follows:

> Arkansas Rules of Criminal Procedure 7.1(c) provides that the clerk of a court or his deputy may, when so authorized by the judge of that court, issue an arrest warrant upon the filing of an information or upon an affidavit approved by the prosecuting attorney. However, the authority vested in court clerks under this rule does not dispense with the requirement that warrants must be issued by a detached, neutral magistrate who makes an independent determination of probable cause. *Davis v. State*, 293 Ark. 472, 739 S.W.2d 150 (1987). Here, the warrant was issued without either the approval of a judicial officer or an independent determination of probable cause, and we hold that the warrant requirements were not met.

Id. at 118-19, 743 S.W.2d at 401. As in *Lamb*, the warrant issued by the circuit clerk based on the felony information was issued without

the approval of a judicial officer or an independent probable-cause determination. The present case, however, does not involve the admission of evidence seized pursuant to the warrant. Even if the warrant was invalid, the arrest itself is valid as it was supported by probable cause. *Davis v. State,* 293 Ark. 472, 739 S.W.2d 150 (1987). There was evidence of probable cause for arrest as evidenced by the affidavit in support of the arrest warrant sought in municipal court. The failure to meet the warrant requirements of Ark. R. Crim. P. 7.1 does not require reversal in the present case.

8. Whether this case should be reversed based upon cumulative error

Appellant contends that the trial court erred when it overruled appellant's motion for a new trial. Appellant first raised this argument below in a motion for new trial filed after the sentencing hearing. The trial court denied the motion. Appellant filed a second motion for new trial, incorporating all the arguments from the first motion for new trial, which the trial court denied. We need not address appellant's argument as this court does not recognize the doctrine of cumulative error where there are no errors to accumulate. *Harmon v. State,* 340 Ark.18, 8 S.W.3d 472 (2000).

9. Whether the trial court erred by ordering appellant to make restitution to the victim

Appellant contends that the sentence imposed by the trial court requiring restitution is an illegal sentence because the court failed to give appellant a credit for sums of money paid by appellant and his family. Appellant also argues that the court should have determined the amount of restitution by the concurrence of the victim, the defendant, and the prosecutor, pursuant to Ark. Code Ann. § 5-4-303(a)(h)(1)(a)(Supp. 1999). The State contends that appellant did not make this argument below and cannot change his argument on appeal.

During the penalty phase of trial, the jury recommended appellant serve a ten-year suspended imposition of sentence and a $10,000 fine. The trial judge then stated that before he made a decision on the recommendation, he wanted proof to be submitted as to the value of the Harvey Gene stock and proof that there has

been a transfer of the stock to Ms. Merritt that amounts to $60,000 or that the stock certificates were ready for transfer. A sentencing hearing was held on January 12, 1999, and Harvey Cobb testified regarding the value of the stock. The court then inquired whether Ms. Merritt was willing to accept the stock, and she stated that she was not.

The court then sentenced appellant to a three-year suspended imposition of sentence, a $100 SIS fee, a $500 fine and costs due on the installment plan. The court further ordered that appellant pay Ms. Merritt restitution in the amount of $60,000 plus interest. Appellant's attorney then objected that the sentence was not proper pursuant to Ark. Code Ann. § 5-1-103 (Repl. 1997). However, this section has nothing to do with sentencing, and appellant's counsel contends he stated Ark. Code Ann. § 5-4-103 and that Ark. Code Ann. § 5-1-103 was improperly recorded by the court reporter. Although the State contends this issue was not preserved for appeal, appellant himself then asked the court whether or not he was entitled to any credit for the money paid, the $10,000 in cash, the $2,800 in cash, the $2,500 paid in September 1995, and any equity in the house. The court did not change the amount of restitution based on appellant's question.

Arkansas Code Annotated section 5-4-205 (Repl. 1997) governs restitution and provides in part:

> (a)(1) A defendant who is found guilty or who enters a plea of guilty or nolo contendere may be ordered to pay restitution.
>
> (2) The sentencing authority, whether the trial court or a jury, shall make a determination of actual economic loss caused to a victim by the crime.
>
> (3)(A) The determination of the amount of loss is a factual question to be decided by the preponderance of the evidence presented to the sentencing authority during the sentencing phase of a trial.

Evidence with regard to Ms. Merritt's loss was not presented at the sentencing hearing, but rather during the course of trial. The amounts of money paid by members of appellant's family on his behalf to Ms. Merritt must be considered in determining Ms. Merritt's actual economic loss pursuant to the statute. Therefore, we remand for the trial court to make a determination as to the

amount of money paid by appellant or his family members on his behalf to Ms. Merritt and to apply such amount as a credit to the $60,000 restitution award.

Affirmed in part; remanded in part.

STROUD and GRIFFEN, JJ., agree.

Dustin HORTON, By and Through His Mother
and Next Friend, Beverlye Horton
v. Tommy E. HORTON

CA 99-1508 29 S.W.3d 367

Court of Appeals of Arkansas
Division III
Opinion delivered October 25, 2000

Turbeville Law Firm, P.A., by: *Monica L. Mason* and *Richard N. Turbeville*, for appellant.

Huckabay, Munson, Rowlett & Tilley, P.A., by: *Beverly A. Rowlett*, for appellee.

JOHN F. STROUD, JR., Judge. Appellant, Dustin Horton, is the unemancipated child of appellee, Tommy Horton. Dustin's next friend is his mother, Beverlye Horton. Beverlye Horton

lives in Texas, as does appellant. Appellee lives in Arkansas. Appellant's complaint alleged a cause of action based on the theory that appellee had negligently entrusted the use of a riding lawn mower to appellant's eighteen-year-old brother and that as a result appellant was injured when he fell from the mower. The injury occurred in Arkansas. Appellee filed a motion to dismiss the complaint based upon the doctrine of parental immunity and the failure to allege facts sufficient to state a cause of action for negligent entrustment. The trial court granted the motion and this appeal followed.

For his sole point of appeal, appellant contends that the doctrine of parental immunity should be overruled to permit an unemancipated minor to recover for injuries caused by the negligence of his noncustodial parent, particularly in light of and to the extent of the availability of liability insurance to that parent. To do so would require that we overrule a long line of supreme court cases, which we are not authorized to do. We therefore affirm.

The continued viability of the doctrine of parental immunity in Arkansas has been acknowledged by the supreme court as recently as 1999, but at the same time the court announced its intention to reexamine the doctrine at the next appropriate opportunity. *Spears v. Spears,* 339 Ark. 162, 3 S.W.3d 691 (1999). In *Spears*, the court traced the history of the doctrine in Arkansas, beginning with *Rambo v. Rambo,* 195 Ark. 832, 114 S.W.2d 468 (1938), and acknowledged that the doctrine has been abandoned by some jurisdictions:

> We are aware that while some jurisdictions like Arkansas have retained the parental immunity doctrine, other jurisdictions have either abandoned the doctrine totally or recognized a variety of exceptions to it. *See, generally,* Romualdo P. Eclavea, Annotation, *Liability of Parent for Injury to Unemancipated Child Caused by Parent's Negligence — Modern Cases,* 6 A.L.R. 4th 1066 (1981). Nevertheless, Wayne Spears does not present this court with a convincing or cogent argument for overruling its precedent of over sixty years. He states, in conclusory fashion, that thirty states have allowed suits against parents involving automobile accidents but cites no caselaw to support the conclusion and otherwise provides us with a paucity of cases to warrant changing our common law. We do not overrule our common law cavalierly or without giving considerable thought to the change. *See Zinger v. Terrell,* 336 Ark. 423, 985 S.W.2d 737 (1999).

> This court has in the past announced its willingness to revisit and reexamine our holdings on a given issue. *See, e.g., Dawson v. Gerritson,* 290 Ark. 499, 720 S.W.2d 714 (1986). By this opinion, we announce our intention to reexamine the parental immunity doctrine at the next appropriate opportunity.

Spears, 339 Ark. at 165-166, 3 S.W.3d at 693-94.

Appellant's brief to this court presents an exhaustive list of cases from other jurisdictions in making the argument that the time has come to abandon the parental immunity doctrine in Arkansas, if not in its entirety, at least to the extent of the availability of liability insurance. However, with respect to appellant's argument in favor of developing an exception to the doctrine based upon the extent of available liability insurance or the fact that parents are divorced, the abbreviated record in this case does not conclusively establish the fact that appellee had liability insurance or even that the parties are divorced. Accordingly, we affirm the trial court's decision in this case and note that a petition for review may be filed with the supreme court if appellant chooses to do so.

Affirmed.

KOONCE and GRIFFEN, JJ., agree.

Terry Lynn STEPHENSON *v.* STATE of Arkansas

CA CR 00-124 29 S.W.3d 744

Court of Appeals of Arkansas
Division III
Opinion delivered October 25, 2000

Lynn F. Plemmons, for appellant.

Mark Pryor, Att'y Gen., by: *Valerie L. Kelly*, Ass't Att'y Gen., for appellee.

JOHN F. STROUD, JR., Judge. Terry Lynn Stephenson was convicted in a bench trial of manufacturing a controlled substance, possession of a controlled substance, and possession of drug paraphernalia. On appeal she contends that the trial court erred in denying her motion to suppress evidence seized pursuant to a search warrant. We disagree and affirm.

When reviewing a trial court's ruling on a motion to suppress, we make an independent determination based upon the totality of the circumstances; we view the evidence in the light most favorable to the appellee and reverse only if the ruling is clearly erroneous or against the preponderance of the evidence. *Fouse v. State*, 337 Ark. 13, 989 S.W.2d 146 (1999). We apply the totality-of-the-circumstances test in determining whether the magistrate had a substantial basis for concluding that probable cause existed to issue the warrant. *Id.*

On November 11, 1997, Detective Jeff Anderson of the Conway Police Department's narcotics division swore out an affidavit for a search warrant. The warrant listed seven facts, which we now set forth in abbreviated form:

> 1) On October 23, 1997, the Conway Regional Drug Task Force was advised by Faulkner County detective Jim Wooley that Terry Lynn [Stephenson], who is associated with Gerald Pate of 89 Gap Road, drove Pate's blue Chevrolet Camero to the John Deere

business in Damascus and purchased "all the ether they had, which was sixteen cans of starting fluid...."

2) On October 25, 1997, a white female later identified to be [Stephenson] purchased twenty-four cans of starting fluid from Duncan Outdoor in Conway.

3) On November 8, 1997, driving her own gray Buick Skylark, [Stephenson] purchased thirty-six cans of starting fluid from Duncan Outdoor in Conway. She commented to an employee that she liked the John Deere fluid "because it is 80% ether."

4) On November 11, 1997, Investigator Travis Thorn and I went to the residence at 89 Gap View Road, where we could smell a very strong odor of chemicals. The vehicles mentioned above were at the residence.

5) Pate was convicted of first degree murder in 1959 and served twenty-six years. He also "has priors to theft and burglary and also car theft."

6) [Stephenson] "has prior for the Uniform Controlled Substance Act" in Conway and in Perry County, and also "has prior for theft of property."

7) "Due to my experience and training, these chemicals are used to manufacture methamphetamines."

The circuit judge issued a search warrant for the residence at 89 Gap Road on the basis of Anderson's affidavit. Execution of the warrant later the same day by the Conway Police Department's SWAT team resulted in seizure of items that led to the drug charges against appellant. Appellant filed a pretrial motion to suppress items seized pursuant to the warrant. After a hearing, the motion was denied.

Appellant contends on appeal, as she did below, that the last four of the affidavit's listed facts were either wholly false or intentionally misleading, and that exculpatory facts known to Anderson before he submitted the affidavit were omitted from it. Appellant points to the statement in Fact 4 of the affidavit that Anderson and another officer "could smell a very strong odor of chemicals" at the residence; she contrasts the statement with Anderson's testimony at the suppression hearing that he smelled only ether. Appellant notes the statements in Fact 5 that Gerald Pate had been convicted of

murder and had "priors" for theft, burglary and car theft; she asserts that a murder conviction has no bearing on a person's propensity to manufacture a controlled substance, and she notes Anderson's testimony at the hearing that he knew that Pate had not been convicted of theft or burglary. Regarding the statement in Fact 6 that appellant had "prior for the Uniform Controlled Substance Act," she points to Anderson's acknowledgment at the hearing that the State actually had dropped previous controlled-substance charges against her and that she had no convictions. Finally, regarding Fact 7's reference to "chemicals" used in manufacturing methamphetamine, she cites Anderson's later testimony that only starting fluid had been connected to the residence.

Our supreme court has explained the analysis to be used in determining whether false material, misleading information, or omissions render an affidavit in support of a search warrant fatally defective:

> Since *Franks* [*v. Delaware*, 438 U.S. 154 (1978),] was handed down in 1978, courts have consistently held that a warrant should be invalidated if a defendant shows by a preponderance of evidence: 1) that the affiant made a false statement knowingly and intentionally, or with reckless disregard for the truth, *and* 2) that with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause. *United States v. Clapp*, 46 F.3d 795 (8th Cir. 1995); *Pyle v. State*, 314 Ark. 165, 862 S.W.2d 823 (1993). Similarly, when an officer omits facts from an affidavit, the evidence will be suppressed if the defendant establishes by a preponderance of the evidence that: 1) the officer omitted facts knowingly and intentionally, or with reckless disregard, *and* 2) the affidavit, if supplemented with the omitted information, is insufficient to establish probable cause. *United States v. Buchanan*, 167 F.3d 1207 (8th Cir. 1999); *Pyle*, *supra*.

State v. Rufus, 338 Ark. 305, 314-15, 993 S.W.2d 490, 495-6 (1999).

Here, under the first step of *Franks*, we do not find that the affiant's reference to "chemicals" coupled with later testimony that he meant only ether and starting fluid rises to a showing that the officer made a false statement knowingly and intentionally, or with reckless disregard for the truth. We do find, however, that the affiant's use of the term "prior" without clarification that the references were only to arrests and that the charges were later dropped,

was on its own a false statement made with reckless disregard for the truth, or that omission of the clarifying information amounted to reckless disregard. The stated facts in the affidavit at the least would have led the magistrate to believe that Pate stood convicted of theft and burglary, and that appellant had been convicted under the Uniform Controlled Substances Act. Thus, we discard these parts of the affidavit.

Therefore, under the second prong of *Franks*, we must decide whether the remaining contents of the affidavit were sufficient to establish probable cause. This leaves the affiant's stated facts that appellant purchased seventy-six cans of starting fluid in a short period of time, once buying a business's entire supply and once remarking that she preferred the brand with a high ether content; and that the affiant and another investigator smelled at appellant's residence the strong chemical odor of ether, which in their experience with law enforcement, they knew to be associated with the manufacturing of methamphetamine. Although Pate's convictions for murder and car theft also remain, we do not view these as pertinent evidence establishing probable cause to search for items related to drug charges.

The question before us is whether the remaining pertinent facts, as set forth above, were enough to establish probable cause. Our supreme court has stated that the smell of ether alone is not enough to justify a nighttime search. *See Fouse v. State*, 337 Ark. 13, 989 S.W.2d 146 (1999). Here the search took place in the afternoon, and the smell of ether was not the only piece of evidence before the circuit judge. We find that probable cause to issue the warrant was shown by the affiant's stated facts that appellant purchased an unusual amount of starter fluid, that she stated a preference for a brand with a high ether content, and that the smell of ether emanated from her residence.

Affirmed.

KOONCE and GRIFFEN, JJ., agree.

FAYETTEVILLE DIAGNOSTIC CLINIC, LTD. *v.*
Dyanna TURNER

CA 00-105 29 S.W.3d 773

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered October 25, 2000

[redacted]

Bassett Law Firm, by: *Curtis L. Nebben* and *Vince Chadwick*, for appellant.

Harry McDermott, for appellee.

WENDELL L. GRIFFEN, Judge. This slip-and-fall case arises out of an injury Dyanna Turner, appellee, sustained while on the premises of appellant, Fayetteville Diagnostic Clinic

(FDC), on December 18, 1995. Turner sued FDC in tort to recover damages. At the close of a one-day trial, the jury found FDC negligent and returned a $48,703 judgment. FDC then filed a motion for judgment notwithstanding the verdict, a motion for remittitur, and a motion for a new trial, all of which were denied by order of the circuit judge. FDC now argues that there was insufficient evidence to support the verdict. FDC also argues that the amount of the award is contrary to the preponderance of the evidence. We hold that the evidence is insufficient to sustain the jury's verdict, and reverse and remand.

On December 18, 1995, Turner went to FDC for a scheduled appointment with Dr. Britt Mahan. While walking in the hallway toward the elevator, Turner fell. After her fall, Turner was placed in a wheelchair and taken to see Dr. Mahan. Dr. Mahan took an x-ray of Turner's knee and sent her to Dr. Tom Patrick Coker, an orthopaedic specialist located on the same campus as FDC. Dr. Coker placed appellee's knee in a velcro cast and gave her crutches. He treated her injury conservatively, and released her from treatment after four months.

Following Dr. Coker's release, Turner sought treatment from a pain psychologist. She returned to Dr. Coker in November 1996, and complained of aching, swelling, and burning. However, Turner's treatment from Dr. Coker was not successful. Turner went without treatment from November 1996 until September of 1997. At that time, she went to see Dr. Ken Rosenzweig. Turner told Dr. Rosenzweig that she had continuously experienced knee pain since her December 18, 1995, fall. Dr. Rosenzweig operated on her knee on October 17, 1997, and diagnosed her condition as severe patellofemoral syndrome, torn cartilage, and a mild amount of inflammation of the lining of the joint. As a result, Dr. Rosenzweig smoothed the rough edges and surfaces inside appellee's knee joint, removed torn cartilage, and cut a ligament that was holding down her kneecap too tight.

Turner then filed the instant cause of action. At the trial Turner testified that she injured her knee at FDC while walking toward the elevator. She stated that she was walking past the women's bathroom when she slipped and fell on water that came from beneath the bathroom door. She also testified that although she did not see the water on the floor when she fell, she saw the

water on the floor after she fell, and that no warning signs were posted indicating the area was wet. According to Turner, several people saw her fall, and she remained on the floor for eight to ten minutes. Turner told the jury that after she fell, employees of FDC came up to her and helped her into a wheelchair. Once in the wheelchair, Turner stated that a doctor wheeled her to Dr. Mahan's office. Turner testified that Dr. Mahan told her that he was aware of the slippery condition around the bathroom, apologized to her, and stated that the clinic would take full responsibility for everything.

Amy Cruise, Turner's niece, testified that she and a friend gave Turner a ride to the clinic. Cruise also testified that after she visited her obstetrician, who was located in the same medical complex, she walked over to FDC to see if Turner was finished. Cruise testified that she saw her aunt was on the floor in front of the women's bathroom, and saw water on the floor beside her. On cross examination, Cruise admitted that she did not see her aunt fall or accompany her aunt to see Dr. Mahan.

At the close of Turner's case FDC moved for a directed verdict, arguing that Turner failed to prove that the water on the floor was the result of appellant's negligence or how long the water was on the floor. Turner responded that she presented evidence that Dr. Mahan knew the floor was slippery, apologized for the condition of the floor, and took full responsibility for it. The trial court denied the motion and commented that although Turner presented evidence that Mahan knew the floor was slippery, she failed to present any evidence that Mahan knew there was water in front of the bathroom door on the date in question.

Following denial of FDC's motion for directed verdict, the jury heard testimony from Brenda Tooley and Dr. Mahan, and rebuttal testimony from appellee. Brenda Tooley, an employee of FDC, testified that she did not see Turner fall, but was aware of the general vicinity where Turner fell. She stated she was not aware of any maintenance or plumbing work conducted around the bathroom area the months before, during or after Turner's fall. On cross examination, Tooley admitted she was not on the premises on the day Turner fell.

Dr. Mahan, an employee and shareholder of FDC, testified for FDC. Mahan told the court he was scheduled to examine Turner

for stomach problems on the date of her fall, but as a result of the fall attended to Turner's immediate injury. On direct examination, Mahan stated that he wrote in his medical report that "[Turner] did slip on our tile floor while in the bathroom." However, on cross, Mahan stated his medical report indicated that "[Turner] slipped coming from the wet outer environment," and that the report "sounds like she slipped coming in from the wet environment. She told me she slipped around the bathroom." Mahan also testified that he wrote in his medical records that as a result of Turner's fall, she sustained bruising and pain in the left knee initially, and that although Turner could bear it, she preferred sitting in a wheelchair. Mahan told the jury that although his medical report did not indicate it, the x-ray taken of Turner's kneecap showed that the kneecap was fractured. Mahan further testified that his medical report stated there was no swelling in Turner's left knee, which directly contradicted Dr. Coker's findings. The x-ray report was not included in Turner's medical chart. Dr. Mahan denied apologizing to Turner, and told the jury he had no explanation as to why there was no medical record of his conversations or contact with Turner after she returned to see him with her x-rays. He testified that he had no information or knowledge that the floor was slippery and denied that appellee told him the floor was slippery. Dr. Mahan stated that although the average doctor at FDC saw twenty patients a week, he saw seventy or eighty patients within a week, and that the only memory he had of what happened came from his medical report. He stated that even though he normally dictated information to add to the medical chart, either the dictation did not exist or the report may have been transcribed and not placed in the chart where it could be found. Mahan testified that when he told Turner he would take care of her, he meant he would take care of her medically. Finally, Mahan stated that he had no knowledge of the condition of the floor on December 18, 1995, and that he had no memory of going to the lobby area on that date.

Following the close of the evidence, FDC again moved for a directed verdict, arguing that no evidence was presented that the water on the floor was the result of FDC's negligence or that the water came from the bathroom. Counsel for Turner responded that she proved negligence because an employee of FDC was aware of the floor's condition and took responsibility for it. The court

denied the motion for directed verdict, the jury returned a verdict in favor of plaintiff for $48,703, and the trial court denied the posttrial motions previously mentioned.

To determine if a trial court erred in denying a motion for a directed verdict, we view the evidence in the light most favorable to the appellee. *See Fred's Stores v. Brooks*, 66 Ark. App. 38, 41, 987 S.W.2d 287, 288 (1999). Our standard of review is whether the evidence submitted to the jury is of such weight that it compels the jury to reach a conclusion without resorting to mere speculation. *See id.* at 41, 987 S.W.2d at 288.

Property owners owe a general duty to invitees to use ordinary care to keep their premises reasonably safe. *See Fred's Stores*, 66 Ark. App. at 41, 987 S.W.2d at 289. *Res ipsa loquitur* does not apply in slip-and-fall cases and negligence is not presumed simply because someone slips and falls, or because a slick or foreign substance results in a slip and fall. *See Mankey v. Wal-Mart Stores, Inc.*, 314 Ark. 14, 17, 858 S.W.2d 85, 87 (1993). Rather, our appellate courts have consistently held that in order to successfully prove negligence in a slip-and-fall case, the plaintiff bears the burden of showing that the property owner breached its duty of care because 1) the owner negligently placed the substance on the floor; or 2) the substance stayed on the floor for a significant period of time such that the owner knew or should have known of its existence yet failed to use ordinary care to remove it. *See Fred's Stores*, 66 Ark. App. at 41, 987 S.W.2d at 288.

A plaintiff fails to meet the first theory for recovery when there is no scintilla of evidence presented to a jury that shows that the defendant negligently caused a substance to appear on the floor. *See id.* at 42, 987 S.W.2d at 289. As we stated in *Fred's Stores*, "possible causes of a fall as opposed to probable causes do not constitute substantive evidence of negligence." *See id.*, 987 S.W.2d at 289.

To recover under the second theory of negligence, a plaintiff must show that a significant period of time lapsed between the time the substance initially appeared on the floor and the time of the slip and fall. *See Mankey*, 314 Ark. at 17, 858 S.W.2d 85. We have held that two hours is an insignificant period of time to

establish an inference of negligence. *See Fred's Stores*, 66 Ark. App. at 42, 987 S.W.2d at 289.

In *Wal-Mart Stores, Inc. v. Bernard*, 69 Ark. App. 239, 240, 10 S.W.3d 915, 916 (2000), we held that the appellee did not present substantial evidence that water on the floor of a public restroom was the result of Wal-Mart's negligence, or that the water remained on the floor for an ample amount of time such that Wal-Mart knew or should have known of the water's existence. We pointed out that no testimony was given as to how the water got on the floor or how long the water was on the floor, and noted that a conclusion by the jury that Wal-Mart negligently caused the water puddle or that a significant period of time had lapsed to put Wal-Mart on notice was sheer speculation. *See id.* at 240–41, 10 S.W.3d at 916. As a result, we reversed the lower court's decision to deny Wal-Mart's motion for a directed verdict. *See id.* at 241, 10 S.W.3d at 916.

A similar result occurred in *Fred's Stores v. Brooks,* when we held that appellee failed to present proof of a key element — the length of time a clear hair gel remained on the floor. *See Fred's Stores*, 66 Ark. App. at 42, 987 S.W.2d at 289. To demonstrate the insufficiency of appellee's evidence, we observed that no evidence was introduced as to whether the hair gel was on the floor prior to the store's opening, or whether there were foot tracks through the gel that tended to show that employees had walked through the substance and ignored the dangerous conditions it presented. *See id.* at 42, 987 S.W.2d at 289.

■ Here, FDC argues that Turner failed to present any proof showing how the water came to exist on the floor by the bathroom, or proof of how long the water remained on the floor. Turner counters that because Dr. Mahan told her he was aware that the floor was slippery she met her burden of proving that a significant lapse of time existed between the time the water initially appeared on the floor and the time of the injury, such that FDC knew or should have known that water was on the floor and should have taken steps to remove it. Turner presents a vigorous argument, but the record lacks the requisite proof necessary to successfully satisfy either of the slip-and-fall theories of negligence. There is no proof showing how the water came to reside on the hallway floor by the restroom or how long it had been there before Turner fell. Turner also testified that she had no idea how the water came to be on the

floor or how long it remained there. No evidence was presented concerning foot tracks through the water, or if the water was on the floor when the clinic opened for business.

Turner's case rests on her assertion that Dr. Mahan told her that "he knew the floor down around the bathroom was slippery." In viewing the evidence in the light most favorable to Turner, even if Dr. Mahan told Turner that the floor around the bathroom was slippery, this does not support the inference that Dr. Mahan knew that a puddle of water existed by the bathroom door. The only way the jury could have reached a decision that FDC negligently caused the water to exist on the floor, or negligently allowed the water to remain on the floor for a significant period of time was through speculation or conjecture.

■ Because the evidence is insufficient to show that the water was on the floor as a result of FDC's negligence or that the water remained there for a substantial period time to place FDC on notice of its existence, there is no need to address FDC's request for remittitur or a new trial.

As a final matter, counsel for Turner also raised the issue in Turner's reply brief that the abstract provided to this court by appellant is both misleading and insufficient. Counsel for Turner provided a certificate stating that he spent eight hours preparing a supplemental abstract and that he is normally compensated $150 an hour by his clients.

■ Rule 4-2(6) of the Arkansas Rules of the Supreme Court require an appellant to abstract the record, without comment or emphasis, and include only those parts that are vital to an understanding to the issue(s) presented to the court. *See* Ark.. Sup. Ct. R. 4-2 (a)(6). An appellee who considers the brief provided by appellant as insufficient may call this matter to the appellate court's attention and include a supplemental abstract. *See id.* at (b)(1). To seek compensation for time spent in preparing a supplemental abstract, counsel is required to submit a statement showing the cost of the supplemental abstract along with a certificate of the time spent to prepare the supplemental abstract. *See id.* Costs are awarded to correct deficiencies in the appellant's abstract, and if this court finds that the supplemental abstract is necessary to decide the issue presented on appeal, it will allow costs and fees for preparation

of the supplemental abstract. *See Hartford Fire Ins. Co. v. Carolina Cas. Ins. Co.*, 52 Ark. App. 35, 40, 914 S.W.2d 324, 327 (1996).

A careful review of the abstract prepared by FDC reveals that it does not include, among other things, Dr. Rosenzweig's objective findings of what he found wrong with Turner's knee; the fact that employees were in the area where she fell and came up to her after she fell; Turner's assertions that Dr. Mahan was not telling the truth about the extent of her injury; that Brenda Tooley testified she was not at the clinic on the day Turner fell; that Dr. Mahan is a shareholder of FDC; that Dr. Mahan testified that his standard procedure was to document conversations with patients after seeing them and that his conversation with Turner was missing from the records; that Dr. Mahan admitted his written report inferred that appellee slipped in the entrance even though appellee told him that she slipped around the bathroom; that Dr. Mahan testified his only accurate memory came from his written records; and that a nurse accompanied Dr. Mahan when he saw Turner.

FDC argues that the above facts are not relevant to the issue raised on appeal and therefore, failure to include them does not render its abstract insufficient or misleading. We agree that the information provided by the supplemental abstract is not necessary to our understanding the issues or our holding that Turner failed to meet her burden of proving that FDC either negligently placed the water on the floor or negligently allowed the water to remain on the floor although ample time had passed for FDC to know of the water's existence. Accordingly, we deny counsel's motion for costs.

Reversed and remanded.

BIRD, KOONCE, and STROUD, JJ., agree.

ROBBINS, C.J., and NEAL, J., dissent.

OLLY NEAL, Judge. This is an appeal from a jury verdict. When reviewing a denial of a motion for a directed verdict, this court determines whether the jury's verdict is supported by substantial evidence. *State Auto Property & Cas. Ins. v. Swaim*, 338 Ark. 49, 991 S.W.2d 55 (1999). Substantial evidence is defined as evidence of sufficient force and character to compel a conclusion one way or the other with reasonable certainty; it must force the mind to pass beyond mere suspicion or conjecture. *City of Little Rock v. Cameron*, 320 Ark. 444, 897 S.W.2d 562 (1995); *St.*

Paul Fire & Marine Ins. Co. v. Brady, 319 Ark. 301, 891 S.W.2d 351 (1995). When determining the sufficiency of the evidence, we review the evidence and *all reasonable inferences arising therefrom* in the light most favorable to the party on whose behalf judgment was entered. *Arthur v. Zearley*, 337 Ark. 125, 992 S.W.2d 67 (1999); *Union Pacific R.R. Co. v. Sharp*, 330 Ark. 174, 952 S.W.2d 658 (1997). (Emphasis supplied.)

I do not agree that this jury verdict should be reversed, because I believe there was substantial evidence from which the jury could have inferred that Dr. Mahan, one of the owners of Fayetteville Diagnostic Clinic, was aware of the condition that caused Ms. Turner's fall and that he failed to take any corrective action.

Ms. Turner testified that Dr. Mahan told her that he knew the floor down around the bathroom was slippery and that they, meaning FDC, would take care of everything. According to Dr. Mahan, he never told Ms. Turner he was aware of the condition of the floor. It is not, however, our place to determine whom to believe. In reviewing the evidence, we do not pass upon the weight and the credibility of the evidence, as such determinations remain within the province of the jury. *Griffen v. Woodall*, 319 Ark. 383, 892 S.W.2d 451 (1995); *Hall v. Grimmett*, 318 Ark. 309, 885 S.W.2d 297 (1994). Moreover, jurors are entitled to take into the jury box their common sense and experience in the ordinary affairs of life. *Palmer v. Myklebust*, 244 Ark. 5, 424 S.W.2d 169 (1968); *Rogers v. Stillman*, 223 Ark. 779, 268 S.W.2d 614 (1954).

Given the substantial-evidence standard and reviewing the evidence and all inferences in favor of the jury's verdict, Dr. Mahan's statement is sufficient to allow the verdict to stand. To prove negligence in the instant case, the majority would require Ms. Turner to testify, "Dr. Mahan apologized to me for my fall and said, 'I know the floor down around the bathroom is slippery because water has been leaking from the bathroom. It has been for some time now.' " I do not believe the law requires such exactness in an admission. From Dr. Mahan's admission that he knew the floor down around the bathroom was slippery, the jury could have inferred that the slippery condition of the floor down around the bathroom had existed for such a length of time that the premises owner (Dr. Mahan) knew of its presence and failed to use ordinary care to correct it. *See Heigle v. Miller*, 332 Ark. 315, 965 S.W.2d 116

(1998). Furthermore, Dr. Mahan's statement that he knew the floor down around the bathroom was slippery was a reasonable basis from which the jury could have inferred Dr. Mahan knew why the floor down around the bathroom was slippery. These are entirely reasonable inferences from the evidence presented and are all that is required to meet the substantial-evidence standard. I would affirm this verdict.

ROBBINS, C.J., joins.

Asa John JONGEWAARD *v.* STATE of Arkansas

CA 00-92 29 S.W.3d 758

Court of Appeals of Arkansas
Division I
Opinion delivered October 25, 2000

Mason Law Firm, P.L.C., by: *G. Chadd Mason*, for appellant.

Mark Pryor, Att'y Gen., by: *Jeffrey Weber*, Ass't Att'y Gen., for appellee.

WENDELL L. GRIFFEN, Judge. Asa John Jongewaard prosecutes this interlocutory appeal from the decision by the Washington County Circuit to deny his motion to transfer a criminal case to juvenile court. Appellant, charged with one count of commercial burglary, nine counts of breaking or entering, and three counts of theft of property, argues that the circuit court's decision to retain jurisdiction is clearly erroneous because the findings of fact issued by the court did not enumerate the ten factors set out in Act 1192 of 1999. We disagree and affirm.

On August 25, 1999, the Washington County Prosecutor filed an amended felony information against appellant and two other persons for commercial burglary, five counts of breaking or entering, and one count of theft of property. The information was modified on September 22, 1999; four additional breaking or entering charges and two additional theft of property charges were added. Appellant moved to transfer the case to juvenile court, and a transfer hearing was conducted on October 27, 1999.

The circuit judge heard testimony from appellant, his parents, a family friend, and a juvenile intake officer. During direct examination, appellant testified that he and two friends were arrested in Fayetteville, Arkansas, for breaking into cars and into a Coors beer facility. He testified that the crimes occurred on two or three different nights, and involved seven or eight cars. According to appellant, he and his friends "did it just for something to do, and were under the influence of alcohol when we committed the crimes." He stated that the idea of breaking into the Coors facility originated when he and several friends were at a shopping center, that one of his friends came up with the idea, and that he had never broken into any other buildings before. He stated that his cousin kicked down the door at the facility, and that he and two other friends ran inside and took a couple of cases of beer. After they drank several beers, they decided to break into some cars. Appellant testified that he participated in the car thefts by tearing out one

or two CD players and speakers and helping his friends lift equipment out of the cars, that his friends used a crowbar to break the windows of the cars, and that they would rip out everything they could. Appellant testified that everything that was stolen was sold, but that he did not receive any benefit from the sale. He admitted his involvement in stealing the items, loading them, and transporting them. Appellant also admitted that on another occasion prior to this event, he and his friends had broken into two or three cars after drinking alcohol. He stated that his purpose for committing the criminal activity was to just go along, and he expressed remorse. Appellant also stated that he had never been arrested prior to August 1999, and that the only contact he had with juvenile court occurred when he was referred for truancy.

Appellant's testimony during cross-examination revealed numerous contradictions.[1] When the trial judge asked appellant why his testimony at trial differed greatly from statements made during his initial interview with the police, appellant responded that he had been confused and scared after his arrest. He admitted making contradictory statements to the police, but said that he could not understand the officers or hear them so he just agreed or disagreed.

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[1] For instance, appellant admitted telling the police that he took speakers and amplifiers from a white Volvo on March 23, 1999, even though he testified during direct examination that he had never been involved in car thefts prior to August 1999. Although he testified that he remembered telling the police about four vehicles on University of Arkansas lots, he denied any participation in the car break-ins that occurred. Appellant admitted discussing campus car break-ins with the police. Although he remembered telling the police that he and a friend took a Pioneer CD out of a red "Slugbug;" took two Rockford fifteens and a Punch sixteen amp out of a Jeep located by the football stadium; and CD players from a red Honda Civic and another vehicle near Yocum Hall; he adamantly denied participating in the criminal activity at the hearing. Appellant testified that he sat in the car and did not participate in the Colt Square incidents. He then admitted putting his head inside of a Thunderbird. However, he stated that his cousin would pull up to cars, break the windows, remove items, and that he would stay in the car, other than the one time he stuck his head in the Thunderbird and the time his cousin handed him a golf club, which he threw in the back seat. Appellant again denied involvement in any break-ins at the University, or at the Metro. He then admitted that he walked into an RV at the Metro, and admitted talking to the police about Colt Square car thefts and "doing" some vehicles there. Appellant also admitted stating to the police "we all decided to rob cars for kicks and thrills because there was really nothing else to do." However, appellant testified at the hearing "when I said 'we' were involved, I meant that I was there, not that I had participated in any way." On direct examination he told the court that he had told the truth to police officers. However, he told the court on cross that his statements to the police were not accurate because he had been beaten by the cops and he was scared and alone in a little room for fifteen hours. He then said the police didn't beat him for fifteen hours, but they beat him when he was first arrested.

The court also heard testimony from Jimmy Blakemore and from appellant's parents. Blakemore, a retired teacher and friend of appellant's family, testified that appellant was a model juvenile in terms of respect for his family, adults, and other people. He testified that if the court gave appellant a second chance, appellant would have the support of his family. Appellant's parents testified that appellant became more respectful and seemed remorseful for his acts following his arrest. Appellant's father stated that his son's grades had improved, that he was attending class regularly, and working part-time. He also testified that he had placed more restrictions on appellant and curtailed some of his freedom.

John Michael Dunn, an intake officer with the Washington and Madison County Juvenile court, also testified. Dunn testified that appellant had been classified as Family In Need of Services on July 26, 1999, and ordered to attend school. He testified that appellant did not appear for a review hearing set for October 1999. As a result of appellant's failure to appear, Dunn stated that a contempt hearing was set. However, the contempt hearing was not held because appellant was in jail.

The trial court denied the motion for transfer. In doing so, the trial court mentioned several factors, including: 1) the fact that appellant originally admitted to the police that he and his friends committed between twenty and thirty felonies, and that he changed his story in court; 2) that appellant testified that his criminal conduct occurred within two or three days despite proof that the conduct began in March 1999; 3) appellant's lack of credibility; 4) that appellant and his friends broke into a commercial establishment to steal intoxicants; and 5) the interest of the community in the court retaining jurisdiction, given the frequency of the types of crime committed. The court also pointed to the fact that although appellant was classified FINS in July 1999, his criminal conduct continued after that date. It found that the offenses were committed in a premeditated, willful, and to some extent "aggressive" manner, and that appellant was equally culpable with his co-defendants. The court noted that appellant appeared to have the maturity and sophistication of an eighteen-year-old. Based on the fact that appellant was seventeen, the court found appellant's prospects remote for rehabilitation in the juvenile system because the juvenile court would only have jurisdiction for a limited time. The court entered an order containing written findings of fact that denied

appellant's motion to transfer. On appeal, appellant argues that the circuit court erred because its findings of fact did not detail its decision on the ten factors listed in the statute that now governs transfer of cases between circuit and juvenile court.

In 1999 our juvenile code and the statutes governing juvenile jurisdiction and proceedings underwent substantial changes with the enactment of Act 1192, which contained no emergency clause and became effective on July 30, 1999. One statute affected by the 1999 amendments is Arkansas Code Annotated section 9-27-318 (Supp. 1999), which governs transfer of cases between circuit and juvenile courts. Because trial courts must follow procedural rules in effect at the time of a proceeding, section 9-27-318, as amended, applies to transfer hearings held after July 30, 1999. This is true even when the incident leading to the proceeding occurred prior to July 30, 1999. *See Trammell v. State*, 70 Ark. App. 210, 214, 16 S.W.3d 564, 567 (2000).

Juvenile and circuit courts have concurrent jurisdiction over juveniles who, at the age of at least sixteen years, engage in conduct that if committed by an adult would constitute a felony. *See* Ark. Code Ann. § 9-27-318(c)(1) (Supp. 1999). Upon a motion by any party, the court where the charges are filed must conduct a hearing to decide if the court should retain jurisdiction or transfer jurisdiction to another court having jurisdiction. *See* Ark. Code Ann. § 9-27-318(e) (Supp. 1999).

Prior to 1999, section 9-27-318 listed three factors for the court to analyze when determining whether to retain or transfer jurisdiction.[2] *See* Ark. Code Ann. § 9-27-318(e) (Repl. 1998). The circuit court was not required to weigh each factor equally, and there was no requirement that a party introduce proof of each element. *See Bell v. State*, 317 Ark. 289, 291, 877 S.W.2d 579, 580 (1994). Section 9-27-318, as amended by Act 1192 of 1999, now requires that the court consider ten factors before deciding whether to retain or transfer jurisdiction and requires the court to make

[2] The previous factors included: 1) the gravity of the offense, and if violence was used; 2) if the offense was part of a repetitive pattern that demonstrated the offender was beyond rehabilitation; and 3) the previous history, character, maturity level, and other pertinent information that revealed the juvenile's possibility for rehabilitation. *See* Ark. Code Ann. § 9-27-318(e) (Repl. 1998).

written findings.[3] *See* Ark. Code Ann. § 9-27-318(g) (Supp. 1999).

A defendant bears the burden of proving the necessity of a transfer from circuit court to juvenile court. *See Wright v. State*, 331 Ark. 173, 178, 959 S.W.2d 50, 52 (1998). Once the defendant meets this burden, the State must show countervailing evidence that warrants the circuit court retaining the case. *See Kindle v. State*, 326 Ark. 282, 283, 931 S.W.2d 117, 118 (1996). If the court finds that clear and convincing evidence supports trying a juvenile as an adult, it must enter an order to that effect. *See* Ark. Code Ann. § 9-27-318(h) (Supp. 1999). Evidence is clear and convincing when it invokes a strong belief in the facts it seeks to prove. *See Kindle*, 326 Ark. at 283, 931 S.W.2d at 118. We will not reverse a circuit court's decision to retain jurisdiction unless we are firmly convinced that the decision is clearly erroneous after we have viewed the evidence in the light most favorable to the State. *See Ray v. State*, 65 Ark. App. 209, 215, 987 S.W.2d 738, 741 (1999).

We hold that the trial court did not clearly err where the findings of fact rendered on appellant's motion to transfer did not explicitly detail the rulings on the ten factors contained in Ark. Code Ann. § 9-27-318 (Supp. 1999). The abstract fully supports the conclusion that the factors were considered by the trial court.

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[3] Section 9-27-318, as amended, lists the factors as follows:

> 1) the seriousness of the alleged offense and whether the protection of society requires prosecution as an extended juvenile jurisdiction offender or in circuit court; (2) whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner; (3) whether the offense was against a person or property, with greater weight being given to offenses against persons, especially if personal injury resulted; (4) the culpability of the juvenile, including the level of planning and participation in the alleged offense; (5) the previous history of the juvenile, including whether the juvenile had been adjudicated a juvenile offender and, if so, whether the offenses were against persons or property, and any other previous history of antisocial behavior or patterns of physical violence; (6) the sophistication or maturity of the juvenile as determined by consideration of the juvenile's home, environment, emotional attitude, pattern of living, or desire to be treated like an adult; (7) whether there are facilities or programs available to the court which are likely to rehabilitate the juvenile prior to the expiration of the court's jurisdiction; (8) whether the juvenile acted alone or was part of a group in the commission of the alleged offense; (9) written reports and other materials relating to the juvenile's mental, physical, educational and social history; and (10) any other factors deemed relevant by the court.

Ark. Code Ann. § 9-27-318 (Supp. 1999).

The trial court correctly observed that appellant is charged with thirteen felony offenses, of which four are designated as Class C. It cannot be disputed that appellant's alleged offenses are serious in nature.

Appellant appears to misconstrue the language in the second factor as requiring the court to determine if the alleged offense occurred in an "aggressive, violent, premeditated *and* willful manner." The language actually requires the court to consider if the act was "committed in an aggressive, violent, premeditated *or* willful manner." According to appellant's testimony, the idea of breaking into the Coors facility was discussed at Evelyn Hills Shopping Center. Appellant and his friends left the shopping center and went to Coors. His cousin kicked the door in; appellant and his friends ran inside, stole some beer, and left. Appellant testified that after he and his friends drank the beer, they went to Taco Bell where his friends decided to break into some cars. Appellant and his friends left Taco Bell and went to Red Lobster, Goldies, Firestone and various other locations that appellant couldn't remember to break into cars. A crowbar was used to smash windows to facilitate the break-ins. Appellant's testimony that his friends actually broke the windows and that his participation consisted solely of ripping out one or two CD players and equipment does not lessen the fact that, as an accomplice, he is equally culpable for the aggressive acts committed. Based on appellant's testimony alone, a trier of fact could be firmly convinced that his conduct was aggressive, premeditated, violent, or willful.

Appellant argues that his lack of prior arrests and absence of previous adjudications of delinquency serve as ample proof that he had no prior criminal history that warranted his transfer of the charges to juvenile court. He narrowly interprets subsection (g)(5) as applying only to prior juvenile adjudications, not FINS classifications or non-adjudicated charges. However, the plain language of (g) (5) states "the *previous history* of the juvenile, *including* whether the juvenile has been adjudicated a juvenile offender. . . and *any other previous history of antisocial behavior or patterns of physical violence.*" This language demonstrates that the legislature did not intend for the court to limit its consideration to prior delinquency adjudications. Therefore, the trial court correctly considered appellant's entire background.

Although appellant contends that he attended school regularly after he was classified FINS, we note that appellant was referred for truancy in July 1999, and arrested in August 1999. The school year did not begin until late August. It is impossible to know whether appellant's motivation for attending school regularly came from his FINS classification or his arrest. Although appellant completely discounts the fact that his arrest took place less than one month after his FINS classification, the trial court was not compelled to disregard appellant's arrest as evidence of appellant's continued disrespect for authority. Nor was the court required to ignore appellant's admission that he was involved in a March 1999 car break-in. This evidence demonstrates a history of antisocial behavior even without the FINS and truancy evidence.

Appellant was born July 7, 1982; he was seventeen years of age when arrested on these charges. On the date of his hearing, less than nine months remained before appellant turned eighteen. He is now eighteen. In its written findings, the trial court noted the short time period remaining before the juvenile court would have lost jurisdiction. As a result, the court found that appellant's prospects of being rehabilitated in the juvenile system were slim. Now appellant argues that the trial court erred in denying him the benefit of juvenile jurisdiction, particularly when he provided proof to the court that he benefitted from past contact with the juvenile system, as evidenced by his attending school regularly. This argument is unpersuasive. The record contains no proof of programs or remedies that might have rehabilitated him in the short time that he would have been in the juvenile system, and we have already observed that the trial court did not err when it considered appellant's history of antisocial behavior after he was classified FINS. Appellant forfeited the opportunity for further juvenile rehabilitation. The trial court did not take it from him.

Appellant also argues that the trial court erred when it based its decision, at least in part, on the high volume of property crimes in Washington County, and did not specifically consider if society needed protection from appellant as an individual defendant. Although appellant is charged with thirteen felonies, he admitted to the police when he was first arrested that he and his friends committed twenty to thirty felonies. Subsection (g)(10) allows the court to consider *any other relevant factor.* It was certainly proper for the trial court to consider the discrepancies between appellant's first

interview with the police and his testimony at trial and the high number of property thefts in Washington County, especially given appellant's admitted involvement in such crimes. Subsections (g)(3) and (g)(8) query whether the alleged offense was against property or persons and committed as part of a group. It is undisputed that appellant allegedly committed these offenses as part of a group, and that the alleged offenses were against property.

In summary, the record clearly demonstrates that the trial court carefully considered the ten enumerated factors in section 9-27-318 in making the determination to retain jurisdiction. Act 1192 of 1999 requires that the ten factors be considered and that the trial court render findings of fact. Contrary to appellant's argument, the act does not require trial judges to enumerate all ten factors in the findings. Instead, the statutory purpose is satisfied where the record shows that the trial court considered the factors in reaching the decision about whether to transfer a case or retain jurisdiction. We hold that the trial court's decision to retain jurisdiction is not clearly erroneous.

Affirmed.

JENNINGS and HART, JJ., agree.

Curtis Hoyt YANCEY and Lee Roy Cloud *v.*
STATE of Arkansas

CA CR 99-1360 30 S.W.3d 117

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered October 25, 2000
[Petition for rehearing denied November 29, 2000. *]

[redacted]

* HART and ROAF, JJ., would grant.

Sam T. Heuer, for appellants.

Mark Pryor, Att'y Gen., by: *Jeffrey Weber*, Ass't Att'y Gen., for appellee.

MARGARET MEADS, Judge. Appellants, Curtis Yancey and Lee Cloud, each appeal from their conditional pleas of guilty to one count of possession of a controlled substance (marijuana) with intent to deliver, a Class C felony, for which each received four months in a regional punishment facility followed by four years' probation and a $2,000 fine. By agreement of the parties, these cases were consolidated for trial purposes. On appeal, appellants argue that the trial judge erred in refusing to grant their motions to suppress evidence found at their residences. We affirm. When reviewing a trial court's denial of a motion to suppress, the appellate courts make an independent determination based upon the totality of the circumstances and reverse only if the trial court's ruling is clearly against the preponderance of the evidence. *Embry v. State*, 70 Ark. App. 122, 15 S.W.3d 368 (2000).

At the suppression hearing, Arkansas Game and Fish Officer David Evans testified that on June 17, 1998, at approximately 9:30 p.m., he observed a Jeep going down a road into the woods in Monroe County. He followed the vehicle, and using night-vision equipment, he observed two persons he identified as appellants get out of the vehicle and begin to water some marijuana plants. He followed appellants back out to the highway and stopped the vehicle in front of Cloud's residence in Arkansas County. When he asked them what they were doing, appellants told Evans that they had been frogging, but they had not caught any frogs. Evans asked to look in the vehicle, and appellants consented. As he shone his flashlight into the Jeep, he saw gallon jugs and five-gallon cans, but he saw no frog-gigging equipment. Additionally, Evans noticed that appellant Cloud was wearing hip boots, but instead of being wet from frogging, the boots had dry dust on them. Finding nothing further, Officer Evans left.

The next day, Evans called the Monroe County Sheriff's department to report what he had found. When he did not hear back from them, he contacted Wendall Jines, a CID investigator

with the Arkansas State Police, and took him to the marijuana patch on June 19. Jines and another deputy maintained surveillance of the patch, and when no one appeared, they harvested three of the plants. They removed the remaining fifteen plants on June 22.

On June 22, 1998, Officer Evans appeared before Municipal Judge Norman Smith seeking a search warrant of each appellant's residence. In his affidavit, Evans stated:

> At approximately 9:30 p.m. on Wednesday, June 17, 1998, I, David Evans, a wildlife officer with the Arkansas County [*sic*] Game and Fish Commission, observed a vehicle, specifically a newer model red Jeep with a white hard top, going into a remote wooded area near the "Lookout" community in Monroe County, just over the Arkansas County line. I followed the Jeep with my lights off while using night vision equipment. I parked my vehicle at the end of the road and continued to follow the vehicle on foot. I observed two individuals, whom I recognized as Curtis Yancey and Lee Cloud, exit the Jeep carrying jugs. They appeared to be watering marijuana plants. I then returned to my vehicle undetected.
>
> After a short time, the vehicle exited the woods. I waited until the Jeep passed my location and I followed it back to the highway with my lights off. After turning onto the highway, I turned my lights on and followed the vehicle until it stopped at Lee Cloud's residence at the corner of Highway 33 and River Road.
>
> I stopped and talked to both individuals. Mr. Yancey was wearing briar pants and Mr. Cloud was wearing hip boots. The individuals stated that they had been out frogging. I asked to see the frogs and they replied that they had not gotten any frogs but I was welcome to look in the vehicle. I shined the flashlight through the window and observed several plastic jugs which appeared to be empty. I also observed some plastic jugs that appeared to be partially filled with liquid. A metal five gallon can of the type used to carry liquids or chemicals was also inside the vehicle.
>
> On Friday afternoon, June 19, 1998, at approximately 2:00 p.m., I, along with Chief Deputy Frank Borman and State Police Investigator Wendall Jines, returned to the area where Mr. Yancey and Mr. Cloud were observed watering the plants. A total of eighteen marijuana plants were found growing in the wooded area.
>
> On Friday night, June 19, between the hours of 7:00 p.m. and 11:00 p.m., Chief Deputy Frank Borman and State Police Investigator Wendall Jines returned to the area where Mr. Yancey and

> Mr. Cloud were observed watering the plants. Three of the marijuana plants were harvested for evidence. The plants are now in the custody of the Arkansas State Police while awaiting transport to the Arkansas Crime Lab.
>
> On Monday, June 22, at approximately 10:00 a.m., Borman, Jines, and Evans returned to the location and harvested fifteen additional plants. Two of these plants were growing in plastic buckets and five were growing in a blue ice chest.
>
> Lee Cloud has, over the past several years, been convicted for possession of controlled substances on a number of occasions. Information and intelligence developed by different law enforcement agencies working within Arkansas County indicates that both Lee Cloud and Curtis Yancey have been involved, and continue to be involved, in the propagation, preparation, consumption and delivery of controlled substances, specifically marijuana.
>
> Authority is now sought to search the residences of Curtis Yancey and Lee Cloud, as well as all outbuildings and the curtilage surrounding the residence, and all vehicles, boats and trailers found thereon, for the presence of controlled substances, paraphernalia used in the preparation, ingestion, storage, delivery, consumption or manufacture of controlled substances, records of controlled substance purchases and deliveries, proceeds of controlled substance sales and other items connected with those persons who use or deliver controlled substances.

The affidavit was signed by Evans and attested. Based upon this information, Judge Smith issued search warrants for each appellant's house and all outbuildings, boats, trailers, and vehicles. Marijuana was found at the residence of each appellant.

Appellants contend on appeal that the search warrants were fatally defective because they failed to forge a sufficient nexus between the marijuana seized and the search of the homes. Specifically, appellants contend that: (1) the affidavit failed to state any underlying circumstances for the conclusion that appellants were involved in drugs and failed to link the drugs to their homes; (2) the affidavit given in support of the search warrant was misleading in violation of *Franks v. Delaware*, 438 U.S. 154 (1978); and (3) the affidavit omitted any reference of time to any drug activity.

■ Appellants first argue that there was no sufficient nexus between the plants seized from the marijuana patch and the search

of their residences. They contend that it was illogical to conclude that marijuana would be found at their residences, because Evans did not find any contraband when he searched the Jeep and no one saw them harvest any of the marijuana plants. In support of this argument, appellants cite *Lunsford v. State*, 262 Ark. 1, 552 S.W.2d 646 (1977), for the following proposition:

> We have long since recognized that an affidavit which states a mere conclusion of an unidentified informant is not sufficient basis for a magistrate's finding probable cause for the issuance of a search warrant, under federal constitutional standards, and that it is necessary that some of the underlying circumstances from which the informant arrived at his conclusion be included.

262 Ark. at 3, 552 S.W.2d at 647. However, Evans's affidavit did not state a "mere conclusion"; rather, it included a recitation of what Evans personally observed, as well as information gathered by law enforcement agencies. Thus, *Lunsford* does not apply.

The task of the magistrate who issues the warrant is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Our duty as a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. *Id.* This approach was adopted by our supreme court in *Thompson v. State*, 280 Ark. 265, 658 S.W.2d 350 (1983), and followed by this court in *Wolf v. State*, 10 Ark. App. 379, 664 S.W.2d 882 (1984).

We are persuaded by the reasoning set forth in cases from the Ninth Circuit cited by the State. In *U.S. v. Pitts*, 6 F.3d 1366 (9th Cir. 1993), the court of appeals held that "a 'reasonable nexus' does not require direct evidence that the items listed as the objects of the search are on the premises to be searched. The magistrate must only conclude that it would be reasonable to seek the evidence in the place indicated in the affidavit." 6 F.3d at 1369. A magistrate may "draw reasonable inferences about where evidence is likely to be kept, based on the nature of the evidence and the type of offense," *United States v. Angulo-Lopez*, 791 F.2d 1394, 1399 (9th Cir. 1986), and the magistrate may also rely on the conclusions of experienced law-enforcement officers regarding where evidence of a crime is likely to be found. *U.S. v. Terry*, 911 F.2d 272 (9th Cir.

1990). In the case of drug dealers, "evidence is likely to be found where the dealers live." *Id.* at 275; *United States v. Angulo-Lopez, supra.*

Other circuits have followed the Ninth Circuit's reasoning. In *United States v. Feliz,* 182 F.3d 82 (1st Cir. 1999), *cert. denied,* 120 S. Ct. 942, 145 L.Ed. 2d 819 (2000), the First Circuit held that there was a sufficient showing of probable cause to issue a search warrant for the appellant's residence based upon drug sales made away from the residence. In so holding, the court stated:

> The nexus between the objects to be seized and the premises searched need not, and often will not, rest on direct observation, but rather "can be inferred from the type of crime, the nature of the items sought, the extent of an opportunity for concealment and normal inferences as to where a criminal would hide [evidence of a crime] . . . ."

182 F.3d at 88, citing *United States v. Charest,* 602 F.2d 1015, 1017 (1st Cir. 1979).

Likewise, the Seventh Circuit has held that warrants may be issued even in the absence of direct evidence linking criminal objects to a particular site. *See U.S. v. Lamon,* 930 F.2d 1183 (7th Cir. 1991); *U.S. v. Malin,* 908 F.2d 163 (7th Cir. 1990),*abrogation on other grounds recognized in United States v. Monroe,* 73 F.3d 129 (7th Cir. 1995). In *Lamon,* the court of appeals upheld a search warrant for appellant's principal residence for drugs and drug-related items, even though there was no evidence that appellant had ever sold drugs out of that location. In *Malin,* the search warrant for appellant's house was upheld based upon the fact that marijuana was seen growing in appellant's yard. In finding probable cause to search the house, the *Malin* court held that probable cause deals in probabilities that are the "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Id.* at 165-66 (quoting *Brinegar v. United States,* 338 U.S. 160 (1949), *reh'g denied,* 338 U.S. 839 (1949)).

In the present case, the magistrate considered the affidavit's recitation of the events of June 17-22 and the statement that the investigation by law-enforcement agencies indicated that both appellants had been and continued to be involved in the propagation, preparation, consumption, and delivery of marijuana. Apply-

ing a practical, common-sense assessment, we believe the judge who issued the search warrant had a substantial basis to conclude that probable cause existed and that marijuana would likely be found where appellants lived.

Moreover, even if the finding of probable cause for the issuance of the search warrant had been clearly erroneous, we would still uphold the search under the good-faith exception found in *United States v. Leon*, 468 U.S. 897 (1984). In *Leon*, the United States Supreme Court held that the Fourth Amendment exclusionary rule should not bar the use of evidence obtained by officers acting in reasonable reliance upon a search warrant issued by a detached and neutral magistrate that is later determined to be invalid. The Court stated:

> It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient. Once the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law.

468 U.S. at 921.

Here, Judge Smith determined that there was probable cause based upon Evans's affidavit and his questioning of Evans. The officers acted in reasonable reliance upon the warrants issued.

Though the dissent clearly does not believe that appellants' present and past cultivation of marijuana plants justifies a search of their homes, we think the magistrate could properly rely on the personal knowledge and observations of Officer Evans, the information and intelligence developed by area law enforcement, and basic common sense to reasonably conclude that appellants would likely have marijuana at their residences. Although there was no direct evidence that marijuana was in fact located at appellants' residences, we do not believe a reasonable nexus requires direct evidence under these facts.

Appellants next contend that Evans' affidavit was misleading in violation of *Franks v. Delaware, supra,* because Evans failed to state

that he did not find marijuana in the Jeep on the night of June 17. In *Franks*, the United States Supreme Court held:

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at the hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

438 U.S. at 155-56.

Appellants do not argue that Evans included a false statement, but rather that he failed to include the fact that he found no marijuana in the Jeep when he searched it. For an omission from an affidavit to justify the invalidation of a search warrant, the party challenging the validity of the search warrant must show that the affiant knowingly and intentionally, or with reckless disregard, omitted facts, and that if supplemented with the omitted information, the warrant would be insufficient to establish probable cause. *State v. Rufus,* 338 Ark. 305, 993 S.W.2d 490 (1999). It is obvious upon reading the affidavit that no marijuana was found in the Jeep because Evans stated that he found only empty plastic jugs, some partially filled plastic jugs, and a five-gallon metal can. Moreover, had Evans found marijuana in the vehicle, that fact would surely have been included in the affidavit, as it would have made an even stronger case for issuing the warrants.

Appellants also argue that the officer placed false information in the affidavit when he stated that information developed by law-enforcement agencies indicated that appellants had been and continued to be involved in the "propagation, preparation, consumption and delivery of controlled substances, specifically marijuana." We agree with the State that appellants did not preserve this argument for review, as required by *Partin v. State,* 22 Ark. App. 171, 737 S.W.2d 461 (1987). Appellants did not meet the *Partin*

requirements. It is axiomatic that we do not address arguments raised for the first time on appeal.

Finally, appellants argue that the affidavit omits any reference of time to any drug activity in their homes. In support of this contention, they cite *Herrington v. State*, 287 Ark. 228, 697 S.W.2d 899 (1985), and *Ulrich v. State*, 19 Ark. App. 62, 716 S.W.2d 777 (1986). In both of those cases, the appellate courts reversed based upon the failure of the search warrants to mention time or establish a time. While some mention of time must be included in the affidavit for a search warrant, it can also be inferred from the information in the affidavit. *Collins v. State*, 280 Ark. 453, 658 S.W.2d 877 (1983).

Appellants are mistaken that the search warrant does not indicate a time frame. The marijuana was first observed on June 17, 1998, and the warrant was applied for on June 22. The affidavit includes the dates when Officer Evans first saw the marijuana and when he and the other officers removed the marijuana plants.

Appellants also argue that the addresses in the search warrant were not correct. However, an incorrect address is not a fatal defect. *Pike v. State*, 30 Ark. App. 107, 783 S.W.2d 70 (1992). Here, the search warrants identified with particularity the places to be searched. There is no argument that officers searched the wrong residences when executing the search warrants; therefore, if the addresses were incorrect, it is *de minimis*.

We cannot say that the trial judge's denial of appellants' motions to suppress the evidence found as a result of the execution of the search warrants was clearly erroneous. Therefore, we affirm.

Affirmed.

PITTMAN, JENNINGS, and CRABTREE, JJ., agree.

HART and ROAF, JJ., dissent.

ANDREE LAYTON ROAF, Judge, dissenting. Today the majority adopts a *per se* rule that if a person is probably a drug dealer, then as a matter of law, there is probable cause for the police to search his residence, even though there is no indication in the affidavit for search warrant that any drug activity ever took place at the person's residence. I must dissent.

As noted by the majority, on June 17, 1998, at approximately 9:30 p.m., Arkansas Game and Fish Officer David Evans observed appellants in the woods watering eighteen marijuana plants. On June 19 and 22, the police removed all of the plants. Also on June 22, Evans presented a municipal judge with an affidavit for a search warrant describing his observation of appellants and the removal of the plants. Evans further stated,

> Lee Cloud has, over the past several years, been convicted for possession of controlled substances on a number of occasions. Information and intelligence developed by different law enforcement agencies working within Arkansas County indicates that both Lee Cloud and Curtis Yancey have been involved, and continue to be involved, in the propagation, preparation, consumption and delivery of controlled substances, specifically marijuana.

Evans requested, and received, a search warrant to search appellants' residences, neither of which was anywhere near where the plants were confiscated.

An affidavit is sufficient only "if it describes circumstances establishing reasonable cause to believe that things subject to seizure will be found in a particular place." Ark. R. Crim. P. 13.1(b). "'Reasonable cause to believe' means a basis for belief in the existence of facts which, in view of the circumstances under and purposes for which the standard is applied, is substantial, objective, and sufficient to satisfy applicable constitutional requirements." Ark. R. Crim. P. 10.1(h).

We review the totality of the circumstances when determining whether the issuing magistrate had a substantial basis for concluding that probable cause existed. *Langford v. State,* 332 Ark. 54, 962 S.W.2d 358 (1998). In *Tatum v. State,* this court stated:

> In judging the sufficiency of the affidavit based on information received from an informant, the magistrate issuing the warrant must make a practical, common sense decision based on all the circumstances set forth in the affidavit. The duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed to issue the warrant. While inferences the magistrate may draw are those which a reasonable person could draw, certain basic information must exist to support an inference. The practical common sense approach used

> to examine search warrants cannot cure omissions of fact that are undisputedly necessary. (Citations omitted.)

21 Ark. App. 237, 731 S.W.2d 227 (1987).

On appeal, appellants argued "there was no statement of any fact [in the affidavit] to show how the informants knew there was marijuana in the homes." I must agree, as there is, quite simply, no allegation in the affidavit even suggesting that there was probable cause to believe items subject to seizure would be present in the appellants' residences. The affidavit in this case is even less forthcoming with facts to support probable cause than the affidavit in *Beed v. State*, 271 Ark. 526, 609 S.W.2d 898 (1980). There, police sought to search Beed's residence for a ring taken from a victim during a rape, aggravated robbery, and kidnaping. The Arkansas Supreme Court concluded as follows:

> The affidavit was not sufficient, however, in that it failed to disclose how the reliable informant knew that the ring and the other property described in the warrant were in the house to be searched. It was merely recited that the informant had said Bennie Beed had resided at the described premises during the time he was being sought by the officers for these crimes and that the property described was hidden in the house. The statement of this conclusion without any statement of underlying circumstances from which the informant arrived at it was insufficient to meet the test for showing probable cause for the search.

271 Ark. at 535, 609 S.W.2d at 898.

The affidavit in the present case lacks even the conclusory statement found in Beed that the items subject to seizure could be found at appellants' residences. Because there were no facts whatsoever in the affidavit supporting probable cause to believe that items subject to seizure were present at appellants' residences, I believe the search warrant was improperly issued. *See also Tatum v. State, supra.*

The majority attempts to gloss over this glaring absence by concluding that "it was reasonable for the judge issuing the search warrant to infer that the evidence sought to be discovered would be found where appellants resided." However, the omission of any reference to appellants' residences is so complete that none can be inferred. The majority's flawed conclusion that such an "inference" is reasonable serves only to make a mockery of the requirement that

there be reasonable cause to believe that things subject to search will be found in a particular place. The majority concludes that because appellants are involved in drug activity, then there must be drug activity taking place at their residences. Certainly, the marijuana seen growing in the woods several miles from appellants' residences would not be found at the residences because the police confiscated all of it. What is missing in the majority's analysis is some objective fact contained in the affidavit establishing probable cause to believe that some evidence of drug activity could be found at appellants' residences. Also missing is any conclusion by the officers that, based on their experience, marijuana would likely be found in appellants' homes, despite their confiscation of all the plants they had seen days earlier. The affidavit does not provide either facts or informed conclusion, so the majority presupposes, without any basis in fact or in the record before us, that persons involved in controlled substances will have drugs at their residences.

It is also patently obvious that the ninth circuit cases relied on by the majority to support the propriety of their inference do not support their position. In *United States v. Angulo-Lopez*, 791 F.2d 1394 (9th Cir. 1986), the affidavit provided that a confidential informant had told police that the defendant was selling drugs (heroin and cocaine) from his residence. In *United States v. Terry*, 911 F.2d 272 (9th Cir. 1990), the affiant averred that, in his experience, persons involved in methamphetamine trafficking keep drugs, paraphernalia, records, and money at their residences. However, in *United States v. Pitts,* 6 F.3d 1366 (9th Cir. 1993), which purported to rely on both *Angulo-Lopez* and *Terry*, there was neither direct evidence nor an officer's opinion given connecting the drugs to the residence searched. In *Pitts*, the court found the affidavit, which described an ongoing FBI investigation involving past weekly sales of cocaine where Pitts was the distributor, and a recent sale of crack cocaine by Pitts to a witness at her home some four months earlier, to provide a "reasonable nexus" between Pitts's drug dealing and his home, where police subsequently found, among other things, a shotgun, marijuana, and a bag with a trace amount of white powder. It is not clear from this opinion whether the additional information provided by the witness that she had purchased shotguns for Pitts to use in his drug dealing and his arrest for possession of those guns some six months earlier was included in the affidavit for search warrant. Thus, in both *Angulo-Lopez* and *Terry* there was at least a

conclusory statement contained in the affidavit to support the belief that the drug activity was taking place at the residence to be searched; the subsequent case, *Pitts*, although purporting to rely on these precedents, clearly exceeded the bounds of both *Terry* and *Angulo-Lopez*.

Furthermore, these Ninth Circuit cases were soundly and properly criticized in *Washington v. Thein*, 138 Wash.2d 133, 977 P.2d 582 (1999), wherein the Washington Supreme Court held that generalizations made in an affidavit regarding the common habits of drug dealers were not, standing alone, sufficient to establish probable cause to search a person's residence, and that to support probable cause to search a person's residence, there must be facts establishing a link between a person's drug activity and a person's residence. The court further noted that there were even conflicts in the decisions of the Ninth Circuit Court of Appeals and that most courts require some nexus beyond an officer's general conclusions. In the case at bar, the affidavit does not even contain an officer's general conclusions. As the Washington Supreme Court concluded, "a finding of probable cause must be grounded in fact," facts which are sorely lacking in the affidavit but which the majority here presupposes for the State. Likewise, in *Beed*, the Arkansas Supreme Court established the need for more than conclusory statements. The affidavit in the case at bar, in stating that "[i]nformation and intelligence developed by different law enforcement agencies working within Arkansas County indicates that both Lee Cloud and Curtis Yancey have been involved, and continue to be involved, in the propagation, preparation, consumption and delivery of controlled substances, specifically marijuana," can only be characterized as conclusory.

The majority also cites favorably, but inexplicably, to several cases from other circuits; these authorities are even farther afield from the facts before us than *Terry* and *Pitts*. In *United States v. Feliz*, 182 F.3d 82 (1st Cir. 1999), there was a detailed and thorough affidavit supporting the warrant[1]; in *United States v. Lamon*, 930 F.2d

[1] [The agents'] search warrant affidavit contained a paragraph setting forth in detail his training and experience in the investigation of drug trafficking crimes. Agent Dumas stated he had been a law enforcement officer for approximately four years, and was sworn as a Special Agent of the Maine DEA in May, 1996. Agent Dumas further stated that "[f]rom my experience, education, training and/or study, I know it to be quite common for those involved in the illegal trafficking/furnishing of scheduled drugs to possess, maintain and keep

1183 (7th Cir. 1991), there was an affidavit that stated appellant had sold cocaine out of the house to be searched within the past seventy-two hours and had also sold drugs out of his automobile, along with the officer's statement that "based on his training and experience, he knew that illicit drug dealers often use their automobiles to deliver drugs to their customers and often store drugs and paraphernalia. . . in their automobiles." In *United States v. Malin*, 908 F.2d 163 (7th Cir. 1990)*(abrogated on other grounds)*, officers observed marijuana growing in the back yard of the house to be searched; the court ruled that this observation "reasonably yielded the conclusion that marijuana or other evidence of marijuana possession would be found in Malin's house."

Finally, the search cannot be saved by the application of *United States v. Leon,* 468 U.S. 897 (1984). In *Leon,* the Supreme Court stated that the good-faith exception does not apply in four instances, including the instance "where the officer's affidavit is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Leon,* 468 U.S. at 923. The Arkansas Supreme Court and this court have repeatedly refused to apply *Leon* when an affidavit provides only conclusory language, usually in cases involving nighttime searches. *See, e.g., Fouse v. State,* 337 Ark. 13, 989 S.W.2d 146 (1999); *Richardson v. State,* 314 Ark. 512, 863 S.W.2d 572 (1993); *Garner v. State,* 307 Ark. 353, 820 S.W.2d 446 (1991); *State v. Martinez,* 306 Ark. 353, 811 S.W.2d 319 (1991); *Hall v. State,* 302 Ark. 341, 789 S.W.2d 456 (1990); *Langley v. State,* 66 Ark. App. 311, 990 S.W.2d 575 (1999);*Thompson v. State,* 42 Ark. App. 254, 856 S.W.2d 319 (1993); *Carpenter v. State,*

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with, near them, and/or in their residences business records and journals relating to the trafficking and/or furnishing of scheduled drugs...." Agent Dumas continued: "In particular, I know that, where, as here, an individual is demonstrated to be trafficking in drugs, it is not uncommon for there to be evidence of their drug trafficking activities, such as drug records, telephone numbers of suppliers and customers, drug trafficking paraphernalia, drug proceed and/or evidence of transfer, expenditures or investment of drug proceeds kept at the trafficker's residence." Finally, with regard to sums of money in the possession of drug traffickers, Agent Dumas state that in his experience it was common for those involved in the illegal trafficking/furnishing of scheduled drugs to possess and keep with them, near them, and/or at their residences, sums of money...either as a result of scheduled drug sales or for the purpose of purchasing scheduled drugs or facilitating scheduled drugs sales with others. Because such moneys are not usually safely disposed of legitimately (e.g., deposited in a bank or declared as taxable income), it is common for those who traffick illegal scheduled drugs to keep these sums on their person or near the, in a safe location, frequently in their residences, and/or at/near their residences and/or near the same location where they keep their drugs, or maintain drug operations.

36 Ark. App. 211, 821 S.W.2d 51 (1991). Moreover, the majority even acknowledges that *Leon* requires that "sufficient evidence must be presented to allow a magistrate to determine probable cause; his action *cannot merely ratify the bare conclusions of others.*" (Emphasis added.) Thus, it follows that *Leon* should not apply when an affidavit lacks even conclusory language supporting the search. *Leon* does not and should not save the police from the complete and utter failure to state in their affidavit the reason why they believe items subject to seizure may be found in a particular place.

In my mind, this should be an easy case to reverse. The majority's conclusion is deeply disturbing in its breadth and scope. They have effectively eliminated the requirement that law enforcement agencies present facts to support a request for a search warrant to search a person's home. That decision does not bode well for any Arkansan. I dissent.

HART, J., joins.

Jessie COLLINS *v.* Nelia CUNNINGHAM,
Lyda Laneville, Julia Mixon, and Sallie Dievendorf

CA 00-150 29 S.W.3d 764

Court of Appeals of Arkansas
Division IV
Opinion delivered October 25, 2000

Dover & Dixon, P.A., by: *Thomas S. Stone*, for appellant.

Daggett, Van Dover, Donovan & Perry, PLLC, by: *Jesse B. Daggett*, for appellees.

ANDREE LAYTON ROAF, Judge. Jesse Collins appeals from an order of the Lee County Circuit Court granting summary judgment in favor of appellees Nellia Cunningham, Lyday Laneville, Julia Mixon, and Sallie Dievendorf, partners in a farming operation, W.D. Daggett Farms, hereinafter WDDF. In granting summary judgment, the trial court dismissed Collins's counterclaim in which he sought the return of rents that he had paid to lease pasture land. On appeal, Collins argues that the trial court erred in finding that he had to be a third-party beneficiary to the permit between the St. Francis Levee District, the title holder of the land in question that Collins sublet from WDDF, in order to sustain his claim, and asserts that pursuant to the terms of the permit, the sublease made the permit void and WDDF therefore had no legal right to charge and keep his rental payments for the property. We affirm.

The Board of Directors of the St. Frances Levee District is a local cooperating agency created to facilitate the maintenance of flood control works constructed with federal funds along the Mississippi and St. Francis Rivers. In 1936, the Board adopted a "pasturage" system for levy district land maintenance. Under this system, which was reaffirmed in 1964, adjoining landowners are awarded "pasturage right-of-way" contracts to use the levy right-of-ways for pasturing horses or cows in exchange for a nominal, refundable deposit that secured the farmers' obligation to keep the land mowed and bush-hogged. These permits, by their express terms, were personal in nature, reciting that the rights that they granted applied only to the person named as lessee, were not transferable, and that subleasing or assignment of this agreement to others without the written consent of the Lessor rendered the permit "null and void."

WDDF received a ten-year pasturage right-of-way contract on April 20, 1983, for a refundable $200 deposit. The contract concerned a strip of land one mile and three-quarters in length. The preamble of the 1983 contract stated that "adequate measures should be taken to prevent the use of levee pasture as rental property by those holding pasture leases." In 1990, WDDF received a new ten-year contract, entitled "permit," providing for essentially the same terms, but apparently absent the preamble. However, on January 7, 1987, WDDF had begun leasing the land to Collins for $2,500 per year, pursuant to a written five-year lease. When that lease expired, Collins continued to lease the land pursuant to an oral lease of farm land until 1996, at $3,000 per year. The written lease between WDDF and Collins recited that WDDF was the "owner of a lease from the St. Francis Levee Board" and that the Lessee (Collins) "agrees that he is familiar with the terms of said Levee Board lease and that he will keep the levee clipped in compliance therewith and abide by the other provisions of said lease. A violation of that lease shall be deemed as a violation of this lease also."

In 1996, Collins stopped paying rent, and WDDF filed an action against him for unlawful detainer. Collins filed a counterclaim for the return of rent that he had paid to WDDF, asserting that because the sublease rendered the permit null and void, WDDF had no right to the rents that he had paid. Eventually, Collins surrendered possession of the levee district land, but continued to pursue his counterclaim. The levee district was never made a party to this action.

WDDF moved for summary judgment, arguing that Collins had no "standing" to complain about any alleged violation of the lease agreement between WDDF and the levee district. The trial court granted summary judgment, finding in its letter opinion that in order for Collins to maintain a cause of action against WDDF, the permit had to be construed as having been made for the benefit of Collins as a third party and that no such intention could be found in the record.

On appeal, Collins argues that the trial court erred in finding that he must be a third-party beneficiary of the permit between WDDF and St. Francis Levee District to sustain his claim that the permit was void, and therefore WDDF has no legal right to charge and keep his rental payments. He contends that WDDF's right to

the land in question derived solely from the permit, and pursuant to the express terms of the permit, the sublease of the land rendered the permit null and void. Citing *Bush v. Bourland*, 206 Ark. 275, 174 S.W.2d 936 (1943), he asserts that his rights as a subtenant cannot rise any higher than the rights of the principal tenant, and that if the sublease voided the permit, WDDF had no right to charge him rent for the property because it had no interest to convey.

■■ We do not agree that the trial court erred by finding that Collins was not a third-party beneficiary of the agreement between WDDF and the levee district. In *Thomas Mfg. Co. v. Prather*, 65 Ark. 27, 44 S.W. 218 (1898), the supreme court held that in order for a stranger to a contract to sue upon it, there must be "first, an intent by the promisee to secure some benefit to the third party; and, second, some privity between the two; — the promisee and the party to be benefitted, — and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally." *See also West v. Norcross*, 190 Ark. 667, 80 S.W.2d 67 (1935) (holding sharecroppers not entitled to maintain action against their landlord to enjoin him from evicting them on a theory that they were beneficiaries of a cotton-acreage-reduction contract between the landlord and the federal government which provided that the landlord/producer shall permit all tenants to continue occupancy of houses on its farm rent free, where there was no obligation on the sharecroppers to remain on the land and no consideration moving from them); *Hopkins v. Ives*, 263 Ark. 565, 566 S.W.2d 147 (1978)(holding real estate agent not entitled to sue reneging buyer for commission he would have earned if the sale had been consummated, because the contract was not for his benefit). Here there is nothing in the agreements themselves to suggest that the proscription against the use of the levee pasture as rental property was intended to benefit anyone other than the levee district. The "free" pasturage permits were available only to owners of the property immediately adjoining the pasturage areas and were expressly stated to be for a mutual benefit of the levee board, which had a need to properly maintain and mow the levee pasturage, and the adjoining landowners who would then have the free use of additional acreage adjoining their property in return for performing this service. Moreover, Collins's sublease with WDDF

provided that he agreed that he was familiar with the terms of the Levee Board lease.

We are also not persuaded by Collins's argument that the trial court erred in finding that he *must be* a third-party beneficiary in order to take advantage of the language contained in WDDF's permits voiding them upon transfer or assignment. Collins's entire argument hinges on the construction of WDDF's permits as being "void." Collins argues that as a subtenant his rights cannot rise any higher than those of the principal tenant and that because WDDF violated the terms of its permit, the permit was "void." Notably absent from this argument are the reasons why that entitles Collins to recover rents already paid to WDDF for his occupancy of the property. We agree that Collins cannot have any greater rights than WDDF; however, in this case, that right is the right to occupy the property. Furthermore, while WDDF did not have the right to sublease the property, neither did Collins. Collins never directly argues that because WDDF had the use of the pasturage rent-free, then he should also; rather, he contends only, unconvincingly and without citation of authority, that WDDF's permit was "void" and therefore it had no right to charge him rent, despite the fact that there was apparently no action taken by the levee board to cancel the permit and he remained in possession of the property from 1987 through 1996. We do not address an argument in the absence of citation to authority or convincing argument. *Presley v. Presley*, 66 Ark. App. 316, 989 S.W.2d 938 (1999).

Affirmed.

CRABTREE and JENNINGS, JJ., agree.

Jack R. KEARNEY *v.* SHELTER INSURANCE COMPANY

CA 00-162 29 S.W.3d 747

Court of Appeals of Arkansas
Division IV
Opinion delivered October 25, 2000

McCullough Law Firm, by: *Ronald L. Davis, Jr.*, for appellant.

Matthews, Sanders & Sayes, by: *Doralee Idleman Chandler* and *Roy Gene Sanders*, for appellee.

ANDREE LAYTON ROAF, Judge. Jack Kearney appeals from an award of summary judgment to Shelter Insurance Company (Shelter) in a breach-of-contract action. The alleged contract involved Shelter's subrogation claim arising out of a personal injury settlement in which Kearney represented the injured parties. Kearney argues that the trial court erred in granting Shelter's motion for summary judgment because there is a material issue of fact as to (1) whether a contract existed; (2) whether there was consideration to support a contract between him and Shelter; and (3) whether Shelter had any subrogation interest in any settlement reached by Kearney because his clients were not made whole. He also asserts that the ruling was invalid because he did not have notice of the summary-judgment hearing. We agree that this case presented factual issues that should not have been decided on summary judgment, and reverse and remand.

On July 28, 1997, Shandale White was in an automobile accident with a vehicle driven by Jason Lee Vance. White was insured by Shelter. Jaylin Porchay, Jacqueline Porchay, Shantrell Brooks and Dominque Brooks were passengers in White's vehicle. Shelter paid medical expenses on behalf of all four parties in White's car, totaling $3173.55. All of the injured parties retained Kearney to seek compensation from Jason Lee Vance for their injuries. During the course of his representation, Shelter alleges that Kearney agreed to represent Shelter on its subrogation claim against the personal injury settlement. A letter from Kearney to Shelter, dated February 19, 1998, merely stated, "Per your inquiry, my office will protect Shelter's interest in regard to medical payments forwarded in the above matter." Shelter asserts that due to its reliance on Kearney, Shelter did not place Vance's liability carrier on notice of Shelter's payment of medical expenses and its subrogation rights.

Shelter filed a complaint in circuit court against Kearney for breach of contract and, alternatively, asserted damages under the theories of promissory estoppel and/or detrimental reliance. Shelter subsequently moved for summary judgment based on an affidavit from its employee attesting to the facts alleged in its complaint and attached Kearney's February 19 letter. Kearney responded to Shelter's motion for summary judgment on September 23, asserting that (1) Shelter's affidavit did not contain any of the prerequisites for a contract, such as mutual agreement; (2) he had no communication with Shelter's affiant and that she, therefore, could not attest to such a contract; and (3) Shelter had no subrogation interest in any settlement claim because his clients were not made whole. On September 24, 1999, the trial court granted summary judgment to Shelter. Kearney and his attorney were not present to make oral arguments on the summary-judgment motion. After the court granted summary judgment, Kearney filed a motion to stay, a motion for reconsideration, a motion to set aside the judgment, and a motion to strike in which he raised the additional issues of failure of consideration, disputing that any consideration was paid or promised to him by Shelter, and lack of notice. Kearney also requested a hearing, which was denied.

On appeal, Kearney argues that the trial court erred in granting Shelter's motion for summary judgment. He argues that there is a material issue of fact as to whether a contract existed, whether there was consideration to support a contract between him and Shelter, and whether Shelter had any subrogation interest in any settlement reached by Kearney because his clients were not made whole. He also asserts that the ruling was invalid because he did not have notice of the summary-judgment hearing.

Our review of a trial court's granting of summary judgment focuses on whether the evidence presented by the movant leaves a material question of fact unanswered. *Mashburn v. Meeker Sharkey Financial Group, Inc.*, 339 Ark. 411, 5 S.W.3d 469 (1999). The moving party bears the burden of sustaining the motion, and the proof submitted is viewed in a light most favorable to the party resisting the motion. *Id.* The court should approve the granting of the motion only when the state of the evidence as portrayed by the pleadings, affidavits, discovery responses, and admissions on file is such that the nonmoving party is not entitled to a day in court. *Flentje v. First Nat'l Bank Of Wynne*, 340 Ark. 563, 11 S.W.3d 531

(2000). Summary judgment is not proper where evidence, although in no material dispute as to actuality, reveals aspects from which inconsistent hypotheses may reasonably be drawn and reasonable may might differ. *Johnson v. Harrywell Inc.*, 47 Ark. App. 61, 885 S.W.2d 25 (1994). Moreover, it does not automatically follow that the moving party is entitled to summary judgment simply because no affidavits were filed in response to a motion. *Muddiman v. Wall*, 33 Ark. App. 175, 803 S.W.2d 945 (1991). The object of summary-judgment proceedings is not to try the issues, but to determine if there are any issues to be tried; if there is any doubt whatsoever, the motion should be denied. *Flentje, supra.*

Kearney argues that the trial court erred in granting summary judgment because there was a material issue as to whether a contract existed between him and Shelter due to lack of consideration. This argument has merit. In order for a contract to exist, there must be: (a) competent parties; (b) subject matter; (c) legal consideration; (d) mutual agreement; and (e) mutual obligations. *Moss v. Allstate Ins. Co.*, 29 Ark. App. 33, 776 S.W.2d 831 (1989). Consideration is any benefit conferred or agreed to be conferred upon the promisor to which he is not lawfully entitled, or any prejudice suffered or agreed to be suffered by promisor, other than such as he is lawfully bound to suffer. *Bass v. Service Supply Co., Inc.*, 25 Ark. App. 273, 757 S.W.2d 189 (1988).

Kearney's letter of February 19, 1998, indicated only that he agreed to protect Shelter's subrogation interest in the claim. The letter from Kearney is silent as to what he would receive for representing Shelter. Shelter contends on appeal that the consideration provided for creating such a contract of representation is the cost of collection, which is established statutorily by the insurer's right of reimbursement. Ark. Code Ann. § 23-89-207 (Repl. 1992). Our supreme court has defined "cost of collection" as used in the statute to mean expenses such as court costs, costs of service of process, cost of witness fees, costs of depositions, cost of attorney fees, and other similar expenses. *Wenrick v. Crater*, 315 Ark. 361, 868 S.W.2d 60 (1993). *See also State Farm Mut. Automobile Ins. Co. v. Bing*, 305 Ark. 280, 808 S.W.2d 304 (1991); *Daves v. Hartford Accident & Indemnity*, 302 Ark. 242, 788 S.W.2d 733 (1990); *Northwestern Nat'l Ins. Co. v. American States Ins. Co.*, 266 Ark. 432, 585 S.W.2d 925 (1979); *Baker v. State Farm and Casualty Co.*, 34 Ark. App. 59, 805 S.W.2d 665 (1991); and *National Investors Fire & Casualty v. Edwards*,

5 Ark. App. 42, 633 S.W.2d 41 (1982). Hence, Shelter contends, the statute supplies the consideration.

Mutual promises constitute consideration, each for the other. *Freeman v. Freeman*, 20 Ark. App. 12, 722 S.W.2d 877 (1987). While mutual promises will sustain a contract, there is no valid agreement if there is no promise by one party as a consideration for the other's promise. *Eustice v. Meytrott*, 100 Ark. 510, 140 S.W. 590 (1911). Although Kearney's letter of February 19, 1998, indicated that "per your inquiry," he would protect Shelter's subrogation interest in the claim, there is no evidence before the trial court of what, if anything, Shelter promised Kearney in return or whether the parties ever reached an agreement in this regard. Moreover, Shelter never asserted to the trial court that it agreed to any such payment or that a mutual agreement had been reached as to the amount, but rather sued for reimbursement of the full $3,173.55 it paid and received judgment for that amount. Moreover, Kearney asserted, albeit without providing the amounts of the settlements, that his clients were not made whole, and the judgment was entered without any evidence of the amounts of the settlements reached by Kearney.

There remain the alternative theories pled by Shelter of detrimental reliance and promissory estoppel. In *Freeman v. King*, 10 Ark. App. 220, 662 S.W.2d 479 (1984), this court stated the rule with regard to estoppel as follows:

> A party who by his acts, declarations or admissions, or by his failure to act or speak under circumstances where he should do so, either with design or willful disregard of others, induces or misleads another to conduct or dealings which he would not have entered upon, but for such misleading influence, will not be allowed, because of estoppel, afterward to assert his right to the detriment of the person so misled.

Freeman v. King, *supra* (quoting *Bethell v. Bethell*, 268 Ark. 409, 597 S.W.2d 576 (1980)).

In *Van Dyke v. Glover*, 326 Ark. 736, 934 S.W.2d 204 (1996), the supreme court stated:

> The blackletter law on promissory estoppel is found in the Restatement (Second) of Contracts:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Van Dyke v. Glover, supra (quoting *Restatement (Second) of Contracts,* § 90 (1981)).

Whether there has been actual reliance and whether it was reasonable is a question for the trier of fact. *Id.* In this regard, the affidavit submitted by Shelter asserted in material part that it had paid medical expenses on behalf of Kearney's clients in the total amount of $3173.55, that it was entitled to reimbursement out of any settlement or judgment obtained by the injured parties in that amount, that it had entered into an agreement with Kearney whereby he agreed to protect Shelter's interest, and that Kearney had settled the tort claims and failed to pay Shelter its subrogation interest. It then referenced Kearney's attached letter.

Based on this evidence, we reach the same result with respect to the alternate claims of detrimental reliance and promissory estoppel. Kearney's responses and motions for reconsideration and to set aside the judgment are also sufficient to raise material issues of fact concerning whether there was a promise by Kearney upon which Shelter reasonably relied and whether Shelter's remedy should be the amount of its subrogation expenditures.

Because we are reversing and remanding this case for further proceedings, we need not address the remaining issues raised by Kearney concerning lack of notice of the summary-judgment hearing and whether Shelter is entitled to reimbursement if his clients were not made whole by the settlement with the third party.

Reversed and remanded.

BIRD and KOONCE, JJ., agree.

Johnny TAYLOR and Joyce Taylor *v.*
EAGLE RIDGE DEVELOPERS, LLC

CA 00-314 29 S.W.3d 767

Court of Appeals of Arkansas
Division IV
Opinion delivered October 25, 2000

Southern & Allen, by: *Byron S. Southern*, for appellants.

Giroir, Gregory, Holmes & Hoover, PLC, by: *John Kooistra, III*, for appellee.

ANDREE LAYTON ROAF, Judge. Johnny and Joyce Taylor appeal the chancellor's grant of specific performance, which required them to sell a parcel of land to appellee Eagle Ridge Developers, LLC ("Eagle Ridge"), under the theory of detrimental reliance/promissory estoppel. The Taylors raise two issues on appeal: the chancellor erred in finding that there was sufficient evidence to grant Eagle Ridge specific performance and the chancellor's findings were unsupported by a preponderance of the evidence. We affirm.

On May 29, 1998, Eagle Ridge and Johnny and Joyce Taylor entered into three separate agreements regarding a single parcel of land owned by the Taylors: the Taylors sold Eagle Ridge a sixty-foot easement for $5000; an Option Agreement, the Taylors granted Eagle Ridge an option to purchase the remainder of the parcel on or before December 1, 1998, for $95,000, approximately forty-one percent of the total proposed purchase price of $233,000; and the Taylors agreed to complete construction of an unfinished house on the parcel. Eagle Ridge initially sought only to purchase the sixty-foot easement. However, the Taylors refused to sell that portion and required that Eagle Ridge purchase the entire parcel, conditioned upon the Taylors' completion of the home.

In October of 1998, Mrs. Taylor contacted Curtis Thomas, a member and manager of Eagle Ridge. Thomas testified that he met with Mrs. Taylor and she told him that the construction on the home would not be completed by December 1, that the house she and her husband were building across the street would not be completed by that time, and that the Taylors would not have a place to live on December 1. Thomas testified that Mrs. Taylor also told him that her husband's business was not doing well and that she also was concerned that if they were required to move, it would require them to take their son out of school, upsetting him. Thomas stated that Mrs. Taylor requested an extension on the option contract from December 1, 1998, until June of 1999, with the Taylors paying $650 in rent from December 1 through the end of June. He stated that he told Mrs. Taylor that Eagle Ridge would do everything they could to help them and he would get back with her. Mrs. Taylor testified and did not contradict Thomas except to say that she did not say her husband had financial problems.

Thomas testified that he called a meeting with his partners and they drew up an extension agreement to accommodate the Taylors until the end of June for a $750-a-month charge. A meeting was held to discuss the terms of the extension on November 4, 1998, with the Taylors, Thomas and Gary Aday, another managing partner. Thomas and Aday testified that Mr. Taylor said that he did not see a problem with the agreement and he was going hunting for a few days and would get back with them after talking to his attorney. Taylor testified that he did not agree to the extension but did not make any objections known, and he said that he would have his attorney look over it. Taylor agreed that he told Eagle Ridge that he would get back with them.

Between November 4 and December 15, Eagle Ridge did not have contact with the Taylors. Thomas testified that he attempted to contact the Taylors numerous times, but they would not return his messages. Mr. Taylor testified he received a message on November 29, 1998, but that he did not return the call. He stated that he did not agree with the terms of the extension agreement, he never agreed to the extension at the November meeting and he thought that Eagle Ridge had decided to not exercise their option.

Thomas testified that he drove to the Taylors' home on December 15, 1998. Taylor came outside and Thomas told him they needed to complete the agreement. Thomas testified that Taylor stated that there was nothing to complete as Eagle Ridge had not exercised its option by December 1, 1998. On December 23, 1998, Eagle Ridge mailed the Taylors a letter stating that it was exercising the option to purchase the property.

On January 12, 1999, Eagle Ridge filed a cause of action in the Chancery Court of Pulaski County alleging fraud, detrimental reliance/promissory estoppel, and breach of the construction agreement. A trial was held on October 6, 1999. At the conclusion of trial, the chancellor ruled that Eagle Ridge was entitled to a decree of specific performance under the theory of promissory estoppel/detrimental reliance. The Taylors appeal, arguing that the chancellor erred in finding that there was sufficient evidence to grant Eagle Ridge specific performance and that the chancellor's findings were unsupported by a preponderance of the evidence.

The Taylors' first argument is that the chancellor erred in finding there was sufficient evidence to grant specific performance. The chancellor concluded that sufficient evidence existed to show that Eagle Ridge relied on the Taylors' representations and conduct and that the Taylors should be estopped from asserting expiration of the option contract. Chancery cases are reviewed *de novo* on appeal; however, we will not reverse a chancellor's findings of fact unless they are clearly erroneous. *McNamara* v. *Bohn*, 69 Ark. App. 337, 13 S.W.3d 185 (2000).

In reviewing the law of promissory estoppel, our supreme court has held that a promise that the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and that does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise; the remedy granted for breach may be limited as justice requires. *Van Dyke v. Glover*, 326 Ark. 736, 934 S.W.2d 204 (1996) (quoting *Restatement (Second) of Contracts* § 90 (1981)). The general rule is that claims of promissory estoppel are questions for the fact-finder. *See Country Corner Food & Drug, Inc. v. Reiss*, 22 Ark. App. 222, 737 S.W.2d 672 (1987); *Dickson v. Delhi Seed Co.*, 26 Ark. App. 83, 760 S.W.2d 382 (1988). The party claiming estoppel must prove he relied in good faith on the wrongful conduct and has changed his position to his detriment. *Ramsey v. Ramsey*, 43 Ark. App. 91, 861 S.W.2d 313 (1993). Whether there was actual reliance by appellants and whether it was reasonable is also a question for the trier of fact. *Van Dyke, supra.*

The chancellor found that negotiations were instigated by Mrs. Taylor and that Eagle Ridge detrimentally relied on statements made by Mr. and Mrs. Taylor, specifically, Mr. Taylor's statement that he would get back with them on the extension agreement. The chancellor also found that Mr. Taylor knew Eagle Ridge was relying on him regarding that representation. She found that the Taylors did not take any affirmative action at the time of the meeting to voice any objections to the extension agreement that they requested. Partners for Eagle Ridge testified that Mr. Taylor specifically said the extension looked good to him; however, Mr. Taylor refuted that statement. Conflicts in testimony are resolved by the trier of fact. *Argo v. Buck*, 59 Ark. App. 182, 954 S.W.2d 949 (1997). Here, the chancellor exercised her judgment and resolved the conflict in favor of Eagle Ridge. Such resolution

was particularly justifiable in light of the chancellor's finding that Mr. Taylor was "a pretty incredible witness regarding some of his testimony on what happened." Based on the evidence presented and the chancellor's superior opportunity to assess the witnesses, we cannot say that the chancellor's finding of detrimental reliance on the part of Eagle Ridge was clearly erroneous or clearly against the preponderance of the evidence.

The granting of specific performance was appropriate relief under the circumstances as the contract involved the sale of land. Where land or any estate or interest in land is the subject of an agreement, the right to specific performance is absolute. *Stacy v. Lin*, 34 Ark. App. 97, 806 S.W.2d 15 (1991). Whether the court should have ordered specific performance of the sale of the land is a question of fact for the chancellor and this decision under the current facts was not clearly erroneous. *Stacy, supra.* Therefore, sufficient evidence exists to support the chancellor's granting of specific performance.

Next, the Taylors argue that the chancellor's findings were not supported by the preponderance of the evidence. In support of this argument, the Taylors assert that because the contract at issue was for an option to purchase land, any modification must be in writing to comply with the Statute of Frauds. They also argue that an option contract is distinguishable from a land sale contract and this distinction requires a finding that Eagle Ridge forfeited the consideration paid for the option upon its expiration December 1, 1998.

The chancellor found sufficient facts to support detrimental reliance and specifically found that the Taylors waived their right to a forfeiture on December 1 by requesting an extension on the option agreement and then not getting back with Eagle Ridge, knowing that Eagle Ridge was awaiting their response. It is unquestioned that "[e]quity abhors a forfeiture and will seize upon slight circumstances indicating a waiver to avoid or prevent them." *Berry v. Crawford*, 237 Ark. 380, 373 S.W.2d 129 (1963). Although the option contract contained language that time was of the essence, the final effect of the agreement depended on the actual intent of the parties, as evidenced by their acts and conduct. *Id.* Here, the chancellor had before her not simply an option contract, but a series of agreements that clearly evidenced the Taylors' intent

to sell the property and Eagle Ridge's intent to purchase it for $223,000, conditioned upon completion of the unfinished home, and by Eagle Ridge's payment of $95,000 towards this purchase price. Under these circumstances, the Taylors' request for an extension on the contract and representation to Eagle Ridge that they would get back with them resulted in the waiver of their right to forfeiture. Indeed, the chancellor, in reaching her ruling, clearly considered the construction agreement in addition to the option, stating: "This is a court of equity. They [Eagle Ridge] didn't throw away their $95,000. They were relying on the representations made by the Taylors and in attempting to make their [the Taylors'] life a little more easy."

In regards to the statute-of-frauds argument, our supreme court has held that where one has acted to his detriment solely in reliance on an oral agreement, estoppel may be raised to defeat the defense of the statute of frauds. *Van Dyke, supra.* Therefore, this argument has no merit. Likewise the option/contract distinction has no bearing on the outcome of this case. Our supreme court has further held that a party may waive his right to declare a forfeiture of a contract for sale of land without notice, or even if the contract had been an option contract. *Berry, supra.* As previously discussed, the chancellor's finding of detrimental reliance was supported by a preponderance of the evidence. A party who induces another to engage in conduct or dealings he would not have entered into but for such misleading will not be allowed, because of estoppel, to afterward assert his right to the detriment of the person so misled. *Ramsey, supra.* We affirm.

Affirmed.

JENNINGS and CRABTREE, JJ., agree.

MIDWAY AUTO SALES, INC. *v.* Mike CLARKSON

CA 00-254 29 S.W.3d 788

Court of Appeals of Arkansas
Division IV
Opinion delivered November 1, 2000

James O. Strother, for appellant.

Zurborg & Spaulding, P.A., by: *J. David Zurborg*, for appellee.

JOHN B. ROBBINS, Chief Judge. Appellant Midway Auto Sales, Inc., sued appellee Mike Clarkson for breach of title after a 1986 Corvette it had bought from Clarkson was confiscated as a stolen vehicle by the Washington County Sheriff's office. Appellee then filed a third-party complaint against Larry Bowen, who had sold the car to him. At some time before April 1, 1998, Jimmy Haddock purchased the car with an open title from an individual in Oklahoma with a computer-generated check on a nonexistent bank account. On April 1, 1998, Mr. Haddock entered into negotiations to sell the Corvette to Mr. Bowen on an open title in exchange for a pickup truck, a camper trailer, and $1,000 in cash. Before consummating the sale, Mr. Bowen checked with the Oklahoma licensing agency and was informed that the car's title was free of encumbrances. He did not register the car. On June 11, 1998, Mr. Bowen sold the Corvette with the open Oklahoma title to appellee for $5,500. Clarkson also did not register the car. He sold it to Midway for $6,000 with the same open title on July 18, 1998. On July 24, 1998, the Corvette was confiscated by the sheriff's department as a stolen vehicle and was later released to the original seller.

In his letter opinion, the circuit judge said that the original seller had the opportunity to void the sale and the certificate of title so that they did not pass into the hands of bona fide purchasers, which he found Clarkson and Mr. Bowen to be. He recognized the hardship to Midway but stated that Midway must take its recourse against someone other than the bona fide purchasers. Midway has appealed from the order of dismissal.

Midway argues that Clarkson breached his warranty of title because the Corvette was confiscated as a stolen vehicle by the sheriff. According to Ark. Code Ann. § 4-2-312(1)(a) (Repl. 1991),

in a contract for sale, there is a warranty by the seller that the title conveyed is good and its transfer rightful. *See Smith v. Russ*, 70 Ark. App. 23, 13 S.W.3d 920 (2000). Clarkson relies on Ark. Code Ann. § 4-2-403 (Repl. 1991), which recognizes the legal distinction between a sale of stolen goods and a sale of goods procured through fraud. Absent exigent circumstances, one who purchases from a thief acquires no title as against the true owner. *Eureka Springs Sales Co. v. Ward*, 226 Ark. 424, 290 S.W.2d 434 (1956). However, under section 4-2-403, the result is different when property obtained by fraud is conveyed to a bona fide purchaser:

> (1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though:
>
> ....
>
> (b) The delivery was in exchange for a check which is later dishonored; or
>
> ....
>
> (d) The delivery was procured through fraud punishable as larcenous under the criminal law.

This section of the Uniform Commercial Code has been explained as follows:

> Under 2-403, voidable title should be distinguished from void title. A thief, for example, "gets" only void title and without more cannot pass any title to a good faith purchaser. "Voidable title" is a murky concept. The Code does not define the phrase. The comments do not even discuss it. Subsections (1)(a)-(d) of 2-403 clarify the law as to particular transactions which were "troublesome under prior law." Beyond these, we must look to non-Code state law. In general voidable title passes to those who lie in the middle of the spectrum that runs from best faith buyer at one end to robber at the other. These are buyers who commit fraud, or are otherwise guilty of naughty acts (bounced checks), but who conform to the appearance of a voluntary transaction; they would never pull a gun or crawl in through a second story window.

> Presumably these fraudulent buyers get voidable title from their targets, but second story men get only void title because the targets of fraud are themselves more culpable than the targets of burglary.
>
> ....
>
> Subsection (1)(b) of 2-403 deals with a more common occurrence: the "rubber check." Even when Bert Buyer pays Sam Seller with a check that returns to Sam marked "NSF," a good faith purchaser from Bert takes good title.
>
> ....
>
> Subsection (1)(d) of 2-403 provides that even where delivery was procured through criminal fraud, voidable title passes. Thus if Bert acquired goods from Sam with a forged check, a good faith purchaser from Bert would obtain good title.

James J. White and Robert S. Summers, *Uniform Commercial Code* § 3-12 at 187-89 (4th ed. 1995).

In his letter opinion, the circuit judge relied on *Pingleton v. Shepherd*, 219 Ark. 473, 242 S.W.2d 971 (1951), which was decided before the Uniform Commercial Code was enacted. There, it was held that the appellee, who had purchased an automobile in good faith from an individual who had given the appellant a worthless check, had good title. In so holding, the court relied upon a provision of the Uniform Sales Act, Ark. Stat. Ann. § 68-1424, which stated:

> Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title.

The court held that a fraudulent purchase of personal property accompanied with delivery is not void, but only voidable at the election of the seller; until it is avoided by the seller, the buyer has power to make a valid sale of the goods to a bona fide purchaser who has no notice of the fraud. *See also Aclin v. Manhattan Credit Corp.*, 225 Ark. 1028, 287 S.W.2d 451 (1956).

Section 4-2-403 is consistent with the court's decision in *Pingleton v. Shepherd*. Therefore, it follows that: (1) Mr. Haddock obtained a voidable title from the original seller, with whom he

entered into a voluntary transaction of purchase; (2) until the sale was avoided by the original seller, Mr. Haddock had the power to transfer good title to a good-faith purchaser; (3) if Mr. Bowen was a good-faith purchaser, he had good title to convey to Clarkson, who would have conveyed good title to Midway; and, (4) if the title Clarkson conveyed to Midway was good, the warranty of title was not breached. Therefore, the issue is whether Mr. Bowen and Mr. Clarkson were good-faith purchasers.

"Good faith" is defined at Ark. Code Ann. § 4-1-201(19) (Supp. 1999) as "honesty in fact in the conduct or transaction concerned." Generally speaking, whether a party has acted in good faith in a commercial transaction is a question of fact. *Adams v. First State Bank*, 300 Ark. 235, 778 S.W.2d 611 (1989); *Hollis v. Chamberlain*, 243 Ark. 201, 419 S.W.2d 116 (1967). In bench trials, the standard of review on appeal is whether the judge's findings were clearly erroneous or clearly against the preponderance of the evidence. *Smith v. Russ, supra.* Mr. Bowen testified that, before consummating his purchase, he contacted the Oklahoma licensing agency and was informed that the Corvette's title was good. Mr. Clarkson testified that Mr. Bowen related this information to him.

Relying on *Acklin v. Manhattan Credit Corporation, supra,* Midway argues that an individual cannot be a good-faith purchaser unless the vehicle is titled in the name of the seller. There, a certificate of title based upon a bill of sale, issued to the borrower, was held to be sufficient reason to assign innocent third-party status to the lender that had relied upon it. The case does not, however, hold that one cannot be a bona fide purchaser without a certificate of title in the name of the seller. Although it would have been obvious to Midway when it purchased the vehicle, Midway now makes much of the fact that neither Mr. Bowen nor Mr. Clarkson registered the vehicle; however, it has provided no citation to authority holding that this failure will prevent one's buyer from acquiring bona-fide-purchaser status. We hold that the circuit judge's finding that Mr. Clarkson and Mr. Bowen were good-faith purchasers is not clearly erroneous. Accordingly, Clarkson did not breach the warranty of title.

Affirmed.

NEAL, J., agrees.

BIRD, J., concurs.

SAM BIRD, Judge, concurring. I agree with the majority's decision, but only because it appears to be the result mandated by the existing Arkansas case law as set forth in *Pingleton v. Shepherd*, 219 Ark. 473, 242 S.W.2d 971 (1951), and similar cases that discuss the distinction between the status of the title to an automobile that has been acquired by fraud (in which case good title can be passed to subsequent purchasers until such time as the defrauded party successfully voids the transaction) and an automobile that is acquired by theft (in which case neither the thief nor a subsequent purchaser acquires any title to the automobile). Any person who acquires ownership of a motor vehicle in this state is required to register it within ten days[1] with the Department of Motor Vehicles and receive a certificate of title to it. Ark. Code Ann. § 27-14-903(a)(1) (Repl. 1994). Failure to do so is a Class C misdemeanor. Furthermore, the purchaser of a new or used motor vehicle for a consideration of $2,000 or more is required to pay a gross receipts tax on the vehicle at the time of registration. Ark. Code Ann. § 26-53-126 (Repl. 1997). The sale or purchase of a motor vehicle on a so-called open title (a title certificate in which the name of the present seller is not identified as the owner of the automobile) is prima facie evidence that these requirements have not been met.

Because of these registration and sales tax requirements, in my opinion the law of Arkansas, as it relates to the good-faith sale and purchase of motor vehicles, is outmoded, and it should be changed to provide that, except in the case of purchases of motor vehicles *from* authorized automobile dealers, any purchaser acquiring a motor vehicle on an open title is not a bona fide purchaser and can neither acquire nor transfer good title to it. The exception for purchasers from authorized motor vehicle dealers should apply only when such dealer acquired the motor vehicle directly from the person whose name is on the title. Otherwise, no transferee of a motor vehicle on an open title, whether acquired from one who got it by fraud or by theft, should qualify as a bona fide purchaser.

[1] Effective January 1, 2000, the registration deadline was extended to thirty days. Ark. Code Ann. § 27-14-903(a)(1)(Supp. 1999).

The supreme court has held that where a purchaser of personalty knows that the price is inadequate, he is on notice of the infirmity of his seller's title and is, therefore, not a bona fide purchaser for value. *Hollis v. Chamberlin*, 243 Ark. 201, 419 S.W.2d 116 (1967). It seems to me that an even stronger reason exists to deny bona-fide-purchaser status to one who buys a motor vehicle with knowledge that there has been no compliance with either the registration or tax laws that are applicable to the transfers of motor vehicles in this state.

Elmer L. MAYWEATHER *v.*
MANGUM CONTRACTING, INC.

CA 00-218 29 S.W.3d 783

Court of Appeals of Arkansas
Division I and II
Opinion delivered November 1, 2000

Sheila F. Campbell, for appellant.

Barber, McCaskill, Jones & Hale, P.A., by: *Gail Ponder Gaines*, for appellee.

JOSEPHINE LINKER HART, Judge. Appellant, Elmer Mayweather, appeals from the Workers' Compensation Commission's decision finding that he failed to show by a preponderance of the evidence that he sustained an accidental injury arising out of and in the course of his employment with appellee, Mangum Contracting, Inc. We affirm the Commission's decision.

Our standard of review is well-settled. On appeal, we review the evidence in the light most favorable to the Commission's decision and affirm if the decision is supported by substantial evidence. *Frances v. Gaylord Container Corp.*, 341 Ark. 527, 20 S.W.3d 280 (2000). Evidence is substantial if reasonable minds could reach the same conclusion. *Id.* When the Commission denies benefits because the claimant has failed to meet his burden of proof, we affirm the Commission's decision if the decision displays a substantial basis for the denial of relief. *Id.*

To be compensable, an accidental injury must arise out of and in the course of employment. Ark. Code Ann. § 11-9-102(4)(A)(i) (Supp. 1999). Appellant testified that on September 4, 1998, a Friday, he sustained an injury to his back while lifting rebar and that the pain worsened on September 8, 1998, the Tuesday following Labor Day, when he entered the cab of a pickup truck at work and twisted his back. In support of appellant's testimony, appellant's supervisor testified about appellant reporting an injury to his back that occurred while working with rebar; however, the supervisor was unable to recall the date of appellant's report. The Commission, discounting the supervisor's testimony, found that appellant's testimony was not credible and denied benefits because it concluded that his injury did not arise out of and in the course of his employment.

The Commission relied on the testimony of the company owner, who testified that while appellant reported the September 8, 1998, incident, appellant did not report an injury on September 4, 1998, and, contrary to appellant's claim, his employees were not working with rebar that day. The owner also recalled that while reporting the September 8, 1998, incident, appellant had advised him that his back began bothering him at home on the previous Saturday. The owner also testified that appellant reported an injury on September 23, 1998, after working with rebar.

The Commission also noted that when appellant was examined by a physician on September 8, 1998, appellant failed to mention the September 4, 1998, incident in his written report of where and how the accident occurred, instead listing September 8, 1998, as the date of the accident and writing, "Well I had a small ache started Saturday. When I got into our work truck this morning I twisted it the wrong way." In a document dated October 8, 1998, appellant stated that the accident occurred on September 8, 1998, and wrote, "As I was getting up into the work truck I twisted my back in a manner where I injured my disk."

The Commission further noted that in a letter dated October 16, 1998, appellant's attending neurosurgeon reported that appellant's injury occurred "after he had been bending and picking up stainless steel pipe, metal rods and casings all day," and that "[s]hortly after completing this he went to climb into the truck when he felt the pop in his lower back." The certificate of the attending neurosurgeon, dated December 18, 1998, noted that the accident occurred September 8, 1998. In a letter dated December 28, 1998, the neurosurgeon wrote that appellant "relates his pain to a work accident that occurred several weeks ago. In the process of moving a concrete finishing machine, he felt a pop and burning type pain in his low back." In his deposition of April 21, 1999, the neurosurgeon reported that appellant twisted or wrenched his back while using a motor-driven concrete finisher and that he attributed appellant's injury to the use of the finisher.

The Commission concluded as follows:

> The evidence shows that the claimant subsequently stated that he hurt his back lifting rebar on September 4, 1998; that he twisted his back on September 8 after a small ache the previous Saturday; and that he in fact hurt his back while lifting rebar on September

> 23, 1998[,] rather that September 4. The claimant later said that his compensable injury arose from picking up material all day on an unspecified date, and later that the compensable injury resulted from working with a concrete finishing machine. In comparing the varied and multiple accounts of an accidental injury alleged by the claimant with the preponderance of credible evidence of record, we must find that the claimant is not credible. Therefore, we find that the claimant failed to show that he sustained an accidental injury which arose out of and in the course of his employment with the respondent-employer.

Viewing the evidence in the light most favorable to the Commission's decision, the Commission's assertion that appellant's testimony is not credible is a conclusion that reasonable minds could reach. Based on this conclusion, and particularly focusing on appellant's report that his back began hurting on Saturday, September 5, 1998, appellant failed to establish that he sustained an accidental injury that arose out of and in the course of his employment. Thus, we hold that substantial evidence supported the Commission's denial of benefits. *See Frances, supra* (reversing this court and upholding the Commission's denial of benefits where claimant reported incidences other than the accident occurring at work as the cause of his injuries).

Affirmed.

ROBBINS, C.J., and JENNINGS, CRABTREE, and MEADS, JJ., agree.

GRIFFEN, J., dissents.

WENDELL L. GRIFFEN, Judge, dissenting. I cannot agree that we must defer to the Commission's findings in this case in the face of unmistakable proof that the Commission arbitrarily disregarded appellant's supervisor's corroborating testimony about the injury in this claim. While it is the function of the Workers' Compensation Commission, and not the appellate courts, to act as fact-finder in workers' compensation cases, it is the duty of the appellate courts to reverse the Commission's decisions when convinced that fair-minded persons, with the same facts before them, could not have reached the conclusion reached by the Commission. *Moser v. Arkansas Lime Co.*, 40 Ark. App. 113, 846 S.W.2d 188 (1993). This is such a case.

Appellant began working as a concrete finisher for appellee in January 1993. He claimed that on September 4, 1998, he injured his back while picking up pieces of steel known as rebar. He testified that he "felt like a pop" after picking up the rebar, and felt numbness go down his leg. However, he also stated that the injury was "the accumulation of the day's work." He testified that on that same day, he reported the injury to his supervisor, Clarence McDaniel, who told him to report to Thomas Mangum, the owner. Appellant testified that McDaniel was present when he discussed his injury with Mangum, and that Mangum did not make a written report of the injury. He stated that Mangum told him if he got worse over the weekend to go to the emergency room. Appellant stated that he was in pain the remainder of that day, and that his back continued to hurt over the Labor Day weekend. He testified that on September 8, after he clocked into work, he twisted his back as he jumped into the company truck, and his pain subsequently worsened. He stated that he reported this injury to Mangum, who sent appellant to see Doctor James Seale, Jr., on that same day.

Mangum testified that according to his records his employees were grouting a pump on September 4 and no rebar work was done on that date. He stated that appellant first reported the injury to him on September 8 and told him that he had twisted his back and was unable to get out of the truck. Mangum stated that appellant told him his back started hurting him while he was at home the previous Saturday (September 5). He testified that he told appellant that if his back continued to bother him to come back the next day, and he could then go see Dr. Seale. Mangum could not remember if McDaniel was present during this conversation.

He maintained that appellant subsequently reported an injury from rebar work on September 23, 1998, not on September 4. He stated that his wife filled out the injury report. Mangum explained that he did not understand appellant to have indicated when he twisted his back that it occurred on the job because appellant stated that it had been bothering him since Saturday and did not indicate that his injury was work-related.

The Commission expressly found that appellant was not a credible witness, and that he failed to prove that he received an injury on September 4. The Commission asserted that appellant's

alleged September 4 injury was *uncorroborated, in light of Mangum's testimony*. Further, the Commission noted that the first medical report and the majority of the accompanying documents indicate that appellant's back began hurting on September 5. The Commission maintained that the evidence showed appellant's back began aching on Saturday; that he twisted his back on September 8, and that he subsequently stated that he injured his back on September 4 lifting rebar, when in fact he injured his back lifting rebar on September 23. The Commission further noted that the evidence showed appellant provided three different versions of how his injury occurred: he injured it on September 4 lifting rebar, he injured it on September 8 hopping into his work vehicle, and he injured it operating a concrete finishing machine. The Commission found that appellant's "varied and multiple accounts" of his injury were not credible, and found that he failed to show by a preponderance of the evidence that he sustained an accidental injury that arose out of and in the course of his employment with appellee, identifiable by time and place.

The testimony in this case does involve varied accounts about the work appellant performed and when he reported his injury. However, contrary to the Commission's finding, appellant's testimony was not uncorroborated. McDaniel, appellant's supervisor, testified that appellant told him that he injured his back, but McDaniel was unsure about the date or circumstances of his injury. He testified that he knew it was near Labor Day. He testified that he believed they "were tying up steel or messing with some." However, he also stated that "[appellant] told me that day that he twisted his back or something when he hopped up in the vehicle. Then on another occasion he said it was bothering him after he had been tying steel." McDaniel stated that Mangum told appellant if the pain got worse over the weekend to go to the emergency room, but he did not know whether Mangum filled out any paperwork. He testified that he was not present on September 8 when Mr. Mayweather hurt his back in the truck, but he returned to work later that same day. McDaniel stated:

> In September of '98 the first time he had a complaint we were all out on the yard tying steel. That was the first complaint he had about his back and that is the time I told him to report to Mr. Mangum. I believe it was during this same day that I heard the

> conversation about, "Go to the emergency room if you have to go on the weekend."

The only way the Commission could have concluded that appellant's testimony was uncorroborated was by disregarding the testimony from McDaniel.

It is true that appellant's testimony conflicts with Mangum's and that the documentation providing a date of injury lists the accident date as September 8, not September 4. However, the Commission arbitrarily disregarded McDaniel's testimony when it stated that appellant's testimony is uncorroborated and made only one reference to McDaniel's testimony: "Clarence McDaniel, the claimant's supervisor, also testified regarding an injury the claimant reported while tying steel. Mr. McDaniel testified that the claimant told him he had injured his back, but he was unsure of the date or circumstances under which the claimant's back had been hurt." McDaniel's testimony plainly did not end there. McDaniel testified that he knew it was near Labor Day when appellant *first* reported an injury to him. He also testified that he believed the employees "were tying up steel or messing with some." However, he also stated that "[appellant] told me that day that he twisted his back or something when he hopped up in the vehicle. Then on another occasion he said it was bothering him after he had been tying steel." McDaniel confirmed that Mangum told appellant if the pain got worse *over the weekend* to go to the emergency room. That testimony was very crucial. September 4 was the Friday before Labor Day; September 8 was the Tuesday following Labor Day. Further, *McDaniel testified that he was not present on September the 8, when Mr. Mayweather hurt his back in the truck.* He stated:

> In September of '98 *the first time he had a complaint we were all out on the yard tying steel.* That was the first complaint he had about his back and that is the time I told him to report to Mr. Mangum. I believe it was during this same day that I heard the conversation about, "Go to the emergency room if you have to go on the weekend."

(Emphasis added.)

Thus, McDaniel's testimony plainly corroborates appellant's assertion that he first reported his injury from lifting rebar before the Labor Day weekend. While it is the exclusive function of the

Commission to determine witness credibility and resolve conflicting testimony, the Commission is not granted leeway to arbitrarily disregard the testimony of any witness. *See Patterson v. Frito Lay, Inc.*, 66 Ark. App. 159, 992 S.W.2d 130 (1999); *Boyd v. Dana Corp.*, 62 Ark. App. 78, 966 S.W.2d 946 (1998). In this case the Commission arbitrarily disregarded testimony that directly supported the appellant's claim. That arbitrary disregard of testimony produced a biased fact-finding that we have no duty to disregard and a plain duty to overturn.

Obviously, both Mangum and appellant gave self-serving testimony. Appellant had an interest in receiving workers' compensation benefits; Mangum, a self-insured employer, obviously was motivated to avoid liability for benefits. By contrast, McDaniel's testimony was not self-serving and corroborated appellant's account. The Commission made no finding that McDaniel was not credible. In fact, McDaniel was the only impartial witness in the case. McDaniel's testimony corroborated appellant's account and directly contradicted Mangum's testimony. The Commission's disregard of McDaniel's testimony evidences a disquieting yet clear bias in favor of the employer. Given that McDaniel was a supervisor whose testimony corroborated that of appellant and constituted the only testimony from someone without a financial stake in the claim, the Commission's wholesale disregard of his testimony constitutes a flagrant breach of its duty to weigh evidence impartially without according any party the benefit of the doubt. *See* Ark. Code Ann. § 11-9-704(c)(4) (Repl. 1996).

Appellate deference to the Commission in its role as trier of fact does not oblige us to slavishly affirm decisions based on biased fact-finding where the record plainly shows that the Commission has arbitrarily disregarded direct and unimpeached proof about a dispositive factual issue. What was true thousands of years ago holds true today: those who decide legal disputes must be even-handed.[1] Society will understand and forgive imperfect legal outcomes by fair-minded decision makers. But no system of law can or should

[1] "You shall do no injustice in judgment; you shall not be partial to the poor nor defer to the great, but you are to judge your neighbor fairly." *Leviticus* 19:15 (*New American Standard Version*). Six thousand years of human experience has not lessened the truth of this command; rather, our experience has validated it.

endure when people lose faith in the commitment of those who judge to be fair.

I respectfully dissent.

OFFICE of CHILD SUPPORT ENFORCEMENT
v. James M. TYRA

CA 00-122 29 S.W.3d 780

Court of Appeals of Arkansas
Division II
Opinion delivered November 1, 2000

Eugene Hunt, for appellant.

John W. Cone, for appellee.

JOSEPHINE LINKER HART, Judge. The Office of Child Support Enforcement appeals a court order finding that appellee owed $35,868.45 in delinquent child support and directing appellee to make monthly arrearage payments of $225. Appellant contends that the chancellor erred by retroactively abating and reducing the weekly child-support obligation from $126 to $83 when appellee's elder child became eighteen years old and by ordering that the arrearage be satisfied by appellee making monthly installment payments of $225. We disagree with appellant and affirm.

Pursuant to a 1982 divorce decree, Teresa Tyra was awarded custody of the minor children from her marriage to appellee, who was ordered to pay child support. Originally, appellee was ordered to pay $35 per week in child support, but his child-support obligation was increased to $126 per week in April, 1988. Thereafter, appellant petitioned authorities in Louisiana, which is where appellee lived at the time, to enforce the Arkansas child-support order. Louisiana, however, ordered appellee to pay only $260 per month. Thus, from April, 1988, to the hearing in June, 1998 (on appellant's petition to collect delinquent child-support payments), the difference between the Arkansas and Louisiana orders created a sizable child-support arrearage. During this time, both of the parties' minor children reached the age of eighteen years and were graduated from high school. At no time, however, did appellee petition the court to have his child-support obligation reduced. In April,

1998, appellant filed its petition to collect from appellee $47,246.95 in delinquent child-support payments.

At the hearing, the parties essentially argued over $8,646, which represented the difference between what appellant argued appellee owed ($44,514.45[1]) and what appellee argued he owed ($35,868.45). The chancellor agreed with appellee and found that the arrearage owed by appellee was $35,868.45. In doing so the chancellor relied upon appellee's calculations, which allowed appellee credit for a reduction in his child-support obligation from the date his elder child attained the age of eighteen years and was graduated from high school. This appeal is of that order.

On review of this chancery matter, "the whole case is open for review; therefore, all issues raised in the court below are before us for decision, and trial *de novo* on appeal in chancery involves determination of both fact questions and legal issues." *Bradford v. Bradford*, 34 Ark. App. 247, 248, 808 S.W.2d 794, 795 (1991). *See also Ferguson v. Green*, 266 Ark. 556, 564, 587 S.W.2d 18, 23 (1979); *Lewis v. Lewis*, 255 Ark. 583, 502 S.W.2d 505 (1974); *Nolen v. Harden*, 43 Ark. 307 (1884). On *de novo* review, however, we will reverse only on grounds properly argued by an appellant. *See, e.g., Country Gentlemen, Inc. v. Harkey*, 263 Ark. 580, 569 S.W.2d 649 (1978). Moreover, we will affirm the chancellor's findings unless the findings are clearly erroneous. *See* Ark. R. Civ. P. 52(a); *see also Adkinson v. Kilgore*, 62 Ark. App. 247, 970 S.W.2d 327 (1998). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Smith v. Parker*, 67 Ark. App. 221, 224, 998 S.W.2d 1, 3 (1999).

I. Termination of Child-Support Payments by Operation of Law

Appellant first argues that the chancellor erred by finding that "by operation of law, [appellee's] . . . child support obligation automatically reduced as each of the children reached majority and did or should have graduated from high school." Specifically, appel-

[1] Appellant agreed at trial that the original arrearage amount claimed should be reduced by $3,740.

lant argues that the chancellor's order retroactively reduced appellee's child-support obligation and cites *Arkansas Dep't of Human Services, Child Support Enforcement Unit v. Porter,* 306 Ark. 190, 193, 810 S.W.2d 949, 950 (1991)[2], for the proposition that such a decision is in error. In response, appellee argues that the chancellor's order did not retroactively reduce child support; instead, the order established the proper calculation of child-support arrearage he owed by using Ark. Code Ann. § 9-14-237 (Supp. 1999), which states that the duty to pay child support terminates automatically upon the occurrence of certain events. We agree with appellee.

The initial issue is whether the chancellor retroactively reduced appellee's *child-support obligations* or merely calculated the *arrearage* in light of the termination of his child-support obligations by operation of law. Commensurate with the latter view, appellee argues that the chancellor's order is consistent with *James v. James*, 52 Ark. App. 29, 914 S.W.2d 773 (1996), and, thus, he was entitled to a reduction in the arrearage pursuant to Ark. Code Ann. § 9-14-237. That statute provides in pertinent part:

> (a)(1) An obligor's duty to pay child support for a child shall *automatically terminate by operation of law when the child reaches eighteen (18) years of age or should have graduated from high school, whichever is later,* or when the child is emancipated by a court of competent jurisdiction, marries, or dies, unless the court order for child support specifically extends child support after such circumstances.

(Emphasis added.)

In *James*, pursuant to a 1987 divorce decree, the mother was awarded custody of the parties' three minor children, and the father was ordered to pay $450 per month child support. In July, 1992, one of the parties' children turned eighteen, and the father reduced his child-support payments to $360 per month, but did not seek an order from the chancery court allowing for such a reduction until May, 1994. The chancellor, however, relied on a statutory provision that child-support payments are reduced to judgment as they accrue and become due and, accordingly, he awarded the mother a judgment in the amount of $2,160 for the $90 per month for the twenty-four months of reduced child-support payments by the

[2] We are bewildered that appellant would rely on a case that was decided prior to the enactment of Act 326 of 1993 in light of the fact that this Act plainly controls.

father. On appeal, we held, citing Ark. Code Ann. § 9-14-237, that the chancellor erred in awarding child-support arrearage for the child who turned eighteen.[3]

The fallacy with appellant's argument is that it fails to take into consideration Ark. Code Ann. § 9-14-237, and our holding in *James*. In the absence of any argument directly challenging the applicability of those authorities, we are disposed to conclude that the chancellor did not err by calculating a reduced amount of arrearage appellee owed by taking into account those child-support obligations that had terminated by operation of law. *See also Mixon v. Mixon*, 65 Ark. App. 240, 987 S.W.2d 284 (1999). Accordingly, we affirm.

II. Arrearage Payments After Child-Support Obligation Ceases

Appellant's next argument is that the chancellor erred by allowing appellee to satisfy the arrearage he owed by making monthly installment payments in the amount of $225 instead of following the requirements of Ark. Code Ann. § 9-14-235(a) (Repl. 1998), which provides:

> If a child support arrearage or judgment exists at the time when all children entitled to support reach majority, are emancipated, or die, or when the obligor's current duty to pay child support otherwise ceases, the obligor shall continue to pay an amount equal to the court-ordered child support, or an amount to be determined by a court based on the application of guidelines for child support under the family support chart, until such time as the child support arrearage or judgment has been satisfied.

We disagree.

This court in *Lovelace v. Office of Child Support Enforcement*, 59 Ark. App. 235, 238, 955 S.W.2d 915, 916-917 (1997), concluded that a chancellor did not abuse her discretion by ordering a father, who was delinquent in his child-support payments, to make

[3] More precisely, we held in *James* that it was error for the chancellor to award child-support arrearage after August 13, 1993, the effective date of Act 326 of 1993 (which is codified at Ark. Code Ann. § 9-14-237 (Repl. 1998)), because the child at issue had turned eighteen prior to the aforementioned effective date. In the case at bar, however, this is not an issue because both children turned eighteen and were graduated from high school after August 13, 1993.

installment payments in amounts less than that directed by Ark. Code Ann. § 9-14-235, after finding that an order directing payments in a manner contemplated by the statute would create a hardship for the father. Likewise, in this case, the chancellor directed appellee to make payments in amounts less than that contemplated by the statute after appellee requested that the chancellor set the arrearage payments at $225 per month "because of his other financial obligations, including other child support payments." As we have frequently stated, a chancellor "is not entirely precluded from adjusting the amount as deemed warranted under the facts of a particular case, and this court will not disturb the chancellor's decision to do so absent an abuse of discretion." *Lovelace*, 59 Ark. App. at 238, 955 S.W.2d at 916 (citing *Jones v. Jones*, 43 Ark. App. 7, 12, 858 S.W.2d 130 (1993)). We are unconvinced the chancellor abused his discretion in this case and, accordingly, affirm.

Affirmed.

PITTMAN and MEADS, JJ., agree.

HOLYTRENT PROPERTIES, INC. *v.*
VALLEY PARK LIMITED PARTNERSHIP, *et al.*

CA 00-288 32 S.W.3d 27

Court of Appeals of Arkansas
Division I
Opinion delivered November 8, 2000

[redacted]

The Rose Law Firm, A Professional Association, by: *Richard T. Donovan*, for appellant.

Peel Law Firm, by: *Richard L. Peel*, for appellee National Home Centers.

Friday, Eldredge & Clark, by: *R. Christopher Lawson*, for appellee Valley Park Limited Partnership and Wal-Mart Stores, Inc.

JOHN MAUZY PITTMAN, Judge. Appellant Holytrent Properties, Inc., appeals from the chancellor's grant of summary judgment in favor of appellees. We find no error and affirm.

Appellant is the owner of a 5.98-acre commercial tract located in the city of Russellville. The tract consists of a building and a large parking lot. On January 1, 1974, appellant leased the property to appellee Wal-Mart Stores, Inc., for a term of twenty-five years with two ten-year options to renew. Paragraph nineteen of the lease agreement provided that the lessee could sublet "any part of the Leased Premises without the consent of Lessor and with the consent of Lessor . . . may sublet the entire Leased Premises." It further provided that the lessee must, within ten days after the execution and delivery of a sublease, "give notice of the existence and term of the sublease and the name and address of the sublessee."

In 1991, Wal-Mart relocated its store and assigned the lease to appellee Valley Park Limited Partnership. Appellant did not object to the assignment. On December 22, 1992, Valley Park subleased the entire 70,500-square-foot building and a large portion of the surrounding land to appellee National Home Centers. It excepted from the sublease a 145-foot by 220-foot parcel on the southeast corner of the lot. It is undisputed that Valley Park neither obtained appellant's consent to the sublease nor notified appellant of the sublease.

National Home Centers had been a tenant on the subleased property for approximately five-and-one-half years when, on June 23, 1998, Valley Park wrote to appellant exercising its option to extend the lease term. Appellant, having just learned that the leased property was occupied by National Home Centers, replied that Valley Park had sublet the premises in violation of the lease. For this reason and other reasons, appellant considered the option exercise void. It advised that it would seek possession of the premises when the lease expired on December 31, 1998.

On December 24, 1998, appellees filed suit against appellant in Pope County Chancery Court seeking a declaration that Valley Park had properly subleased the premises to National Home Centers and was entitled to exercise the option to extend the lease. Appellant answered that the sublease was invalid and counterclaimed for declaratory judgment to that effect, along with a writ of possession for unlawful detainer. On March 4, 1999, appellant filed a motion for summary judgment on the ground that Valley Park's failure to obtain consent to or give notice of the sublease violated paragraph nineteen of the lease agreement and thus prohibited Valley Park from exercising its option to renew. Appellees responded with their own motion for summary judgment, arguing that, because Valley Park had subleased only a portion of the premises to National Home Center, appellant's consent was not required under paragraph nineteen. They also argued that appellant waived its right to notice of the sublease.

Following a hearing on the cross-motions for summary judgment, the chancellor ruled in favor of appellees. He found that it was not necessary for appellees to obtain appellant's consent to the sublease because the sublease did not include 31,900 square feet (the 145-foot by 220-foot parcel) of the originally leased premises. He

also found that notice of the sublease, as required by paragraph nineteen, was immaterial to the primary lease. Appellant brings its appeal from that ruling.

In summary-judgment cases, we need only decide if the granting of summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered. *Inge v. Walker*, 70 Ark. App. 114, 15 S.W.3d 348 (2000). The burden of sustaining a motion for summary judgment is always the responsibility of the moving party. *Id.* All proof submitted must be viewed in a light most favorable to the party resisting the motion, and any doubts and inferences must be resolved against the moving party. *Id.*

Appellant's first argument on appeal is that the chancellor erred in ruling that Valley Park was not required to obtain its consent to the sublease. The language of the lease contract provides that the lessee may sublet "any part of the Leased Premises" without the consent of the lessor, but must obtain consent to sublet "the entire Leased Premises." Appellant concedes that Valley Park did not sublease the entire premises to National Home Centers because it excepted from the sublease a 145-foot by 220-foot parcel. However, it argues that the excepted parcel is a *de minimis* exclusion, designed to avoid the consent requirement in the lease contract. We agree with the chancellor that, as a matter of law, Valley Park was not required to obtain appellant's consent to the sublease.

The construction and legal effect of a written lease contract are to be determined by the court as a question of law, except where the meaning of the language depends on disputed extrinsic evidence. *See Pults v. City of Springdale*, 23 Ark. App. 182, 745 S.W.2d 144 (1988). When contracting parties express their intention in a written instrument in clear and unambiguous language, it is the court's duty to construe the writing in accordance with the plain meaning of the language employed. *Fryer v. Boyett*, 64 Ark. App. 7, 978 S.W.2d 304 (1998). The parties in this case plainly and unambiguously agreed that appellant's consent to a sublease need not be obtained if the lessee subleases "any part of the Leased Premises." According to appellant, the sublease to National Home Center covered 100% of the building and 88% of the overall property. The proof below showed that the 31,900-square-foot parcel constituted 43% of the frontage along East Main Street. Thus, it is

undisputed that Valley Park subleased only part of the leased premises. While appellant may now consider the contract language susceptible to being taken advantage of, its plain meaning is clear and should not be enlarged by construction. Parties are free to make contracts based on whatever terms and conditions they agree upon, provided the contract is not illegal or tainted with some infirmity such as fraud, overreaching, or the like. *See Hancock v. Tri-State Ins. Co.*, 43 Ark. App. 47, 858 S.W.2d 152 (1993).

Based upon the forgoing, we hold that the chancellor was correct in granting summary judgment on the consent issue.

Appellant argues next that the chancellor erred in ruling as a matter of law that Valley Park's failure to give notice of the sublease was immaterial. Paragraph nineteen of the lease contract provides that the lessee shall, within ten days after execution and delivery of a sublease, give notice to the lessor of the existence and term of the sublease and the name and address of the sublessee. There is no dispute that Valley Park did not notify appellant of the sublease in accordance with paragraph nineteen. There is also no dispute that appellant did not learn of the sublease until 1998.

A lessee may be denied an extension of his lease term if he breaches a *material* covenant of the lease. *See Lutterloh v. Patterson*, 211 Ark. 814, 202 S.W.2d 767 (1947). However, if the lessee's breach is *immaterial*, he may exercise his renewal option. *See, e.g., Fletcher v. Frisbee*, 119 N.H. 555, 404 A.2d 1106 (1979); *Restoration Realty Corp. v. Robero*, 58 N.Y.2d 1089, 449 N.E.2d 705 (1983). The question before us is whether Valley Park's breach of the lease's notice provision was immaterial as a matter of law. We agree with the trial court that it was. As appellee argued below, the lease contract provided that any sublease would be subject to the terms of the original lease and that no sublease would reduce the obligations of the original lessee, Wal-Mart. Indeed, the sublease had been in effect for over five years at the time its existence was discovered by appellant and, during that time, appellant received lease payments just as it had prior to the sublease. Appellant offered no responsive proof that it was deprived of any material benefit, economic or otherwise, as a result of Valley Park's failure to give notice. Thus, based on the evidence before the chancellor on the summary-judgment motions, we cannot say that the notice provision was such

an important consideration to the whole contract that its breach would warrant a repudiation of the contract.

Affirmed.

MEADS and ROAF, JJ., agree.

Donald HUNTER *v.* STATE of Arkansas

CA CR 00-187 32 S.W.3d 33

Court of Appeals of Arkansas
Division II
Opinion delivered November 8, 2000

James Law Firm, by: *William Owen James* and *Steven R. McNeely*, for appellant.

Mark Pryor, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.

JOHN MAUZY PITTMAN, Judge. Officer Jim Tankersley of the Little Rock Police Department warned appellant to stay off school property. Subsequently, on the afternoon of July 2, 1998, Officer Tankersley saw appellant sitting on the steps of an elementary school. As the officer approached appellant, he saw that appellant had a piece of paper in his left hand. Appellant put his left hand behind his back and no longer had the piece of paper in his hand when Officer Tankersley reached him. Officer Tankersley told appellant to put his hands on the wall and patted him down. In so doing he noticed that a piece of paper was protruding from appellant's waistband. Suspecting that the paper might contain narcotics, the officer removed it from appellant's waistband, manipulated it and discovered that it contained several rock-like objects, and then opened it. The paper was found to contain rocks of cocaine. Appellant's motion to suppress introduction of the cocaine as the fruit of an illegal search was denied, and he was convicted of possession of a controlled substance. From that decision, comes this appeal.

Appellant asserts that the trial court erred in not suppressing the cocaine, arguing that the search was unreasonable or, in the alternative, that the officer exceeded the permissible scope of a protective search by opening the piece of paper he removed from appellant's waistband. We think that the second argument has merit, and we reverse and remand on that basis.

In *Minnesota v. Dickerson*, 508 U.S. 366 (1993), the United States Supreme Court discussed what has come to be called the "plain feel" doctrine, stating that:

> Consistent with the Federal Constitution's Fourth Amendment, a police officer may seize nonthreatening contraband detected during a protective pat-down search of a person whom the officer has briefly stopped based on the officer's reasonable conclusion that criminal activity may be afoot with respect to such person, where the officer is justified in believing that the person is armed and presently dangerous to the officer or to others nearby, so long as the officer's search is strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others, because (1) the "plain-view" doctrine - under which police officers may seize an object without a warrant if the officers are lawfully in a position from which they view the object, its incriminating character is immediately apparent, and the officers have a lawful right of access to the object - has an obvious application by analogy to cases in which an officer discovers contraband

> through the sense of touch during an otherwise lawful search; (2) if a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons, and the warrantless seizure of the object if it is contraband is justified by the realization that resort to a neutral magistrate under such circumstances would often be impractical and would do little to promote the objectives of the Fourth Amendment; and (3) a suspect's privacy interests are not advanced by a categorical rule barring the warrantless seizure of contraband plainly detected through the sense of touch, since (a) the sense of touch is capable of revealing the nature of an object with sufficient reliability to support a seizure, (b) even if it were true that the sense of touch is generally less reliable than the sense of sight, such fact suggests only that officers will less often be able to justify seizures of unseen contraband, (c) the Fourth Amendment's requirement that officers have probable cause to believe that an item is contraband before seizing it insures against excessively speculative seizures, and (d) the seizure of an item whose identity is already known occasions no further invasion of privacy.

Dickerson v. Minnesota, 508 U.S. at 366.

We had occasion to apply the holding in *Dickerson* in *Bell v. State*, 68 Ark. App. 288, 7 S.W.3d 343 (1999). We said that:

> In *Dickerson,* the Court suppressed evidence of the respondent's possession of crack cocaine because it was shown that the arresting officer had to manipulate the object in the pocket of the respondent before determining that it was contraband. This manipulation amounted to an illegal search as the identity of the contraband was not apparent.
>
> The present case is analogous to *Dickerson.* [Officer] Raab was justified in frisking the appellant for weapons. When his initial frisk yielded no weapons, the search should have ended. The holding in *Dickerson* does not permit an officer to search a suspect for contraband under the guise of a weapons search. Because it is clear from the facts that Officer Rabb had to manipulate the bulge in Bell's rear pocket to determine that it was contraband, this type of search is contrary to the permissible scope outlined in *Dickerson.*

Bell v. State, 68 Ark. App. at 293-94, 7 S.W.3d at 346.

We think that the facts of the present case are indistinguishable from those of *Bell.* Here, the police officer essentially admitted that he was searching for drugs, and the only reasonable view to take of his activities is that he was "search[ing] a suspect for

contraband under the guise of a weapons search." *Id.* at 294, 7 S.W.3d at 346.

Finally, we note that the officer testified that he thought a razor blade might be concealed in the paper *underneath* the rocky substance. It is true that a protective frisk is justified when the officer has a reasonable suspicion that the detainee is armed. *Leopold v. State*, 15 Ark. App. 292, 692 S.W.2d 780 (1985). However, the frisk must be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs or other hidden instruments for the assault of the police officer. *Id.; see generally Terry v. Ohio*, 392 U.S. 1 (1968). In a similar case, where it was asserted that a police officer was justified in opening a matchbox found in a detainee's pocket because it might have contained a razor blade, we said that:

> [T]he officer went beyond mere protection. We see nothing in the record to suggest that the matchbox taken from appellant's pocket contained a weapon or posed a risk to the officer's safety. Even if this is a high-crime area, without some evidence other than suspicion or a hunch that a matchbox contains a controlled substance, it is patently inappropriate for an officer, under the guise of maintaining his or others' safety, to take a matchbox and open it. This was not a search incident to arrest. A protective search must be no more invasive than is necessary to ensure the officer's safety; looking inside the matchbox ensured no more safety to the officer.

Stewart v. State, 59 Ark. App. 77, 84, 953 S.W.2d 599, 602 (1997), *affirmed on other grounds*, 332 Ark. 138, 964 S.W.2d 793 (1998). We think that it was likewise inappropriate for the officer to open the piece of paper he removed from appellant's waistband under the circumstances of the present case, where there was no evidence to indicate that it might contain a weapon.

Reversed and remanded.

HART and MEADS, JJ, agree.

ESTATE OF Allen BAKER *v.*
COLUMBIA MUTUAL INSURANCE COMPANY

CA 00-367 32 S.W.3d 36

Court of Appeals of Arkansas
Division II
Opinion delivered November 8, 2000

McKenzie, McRae, Vasser & Barber, by: *Joseph P. Graham*, for appellant.

McMillan, Turner, McCorkle & Curry, by: *E. Shane Springs*, for appellee.

JOSEPHINE LINKER HART, Judge. Appellant challenges the trial court's granting of summary judgment in favor of appellee, Columbia Mutual Insurance Company. Appellant's complaint sought to obtain $25,000, the minimum statutory amount for uninsured motorist bodily injury coverage, under a policy issued by appellee to Allen Baker's employer, Kenneth Madlock, doing business as Madlock Auto Glass & Body. Appellant argues that appellee failed to obtain a written rejection of the coverage and that a written rejection is required by state law. Further, appellant argues that even if a written rejection of uninsured motorist bodily injury coverage is not required under state law, there still remained a material issue of fact regarding whether Madlock rejected such insurance coverage. We affirm.

This case was previously before this court in *Columbia Mut. Ins. Co. v. Estate of Baker*, 65 Ark. App. 22, 984 S.W.2d 829 (1999). There, we discussed the relevant facts underlying the case, and we need not repeat them here. In the earlier decision, we remanded this case to the circuit court, noting that a fact question remained regarding whether Madlock rejected the uninsured motorist bodily injury coverage.

On appeal, appellant argues that written rejection of uninsured motorist coverage is required under state law and that appellee failed to present written evidence of Madlock's rejection of that coverage. The relevant statute for rejection of uninsured motorist bodily injury coverage provides, "However, the coverage required to be provided under this section shall not be applicable where any insured named in the policy shall reject the coverage, and this rejection shall continue until withdrawn in writing by the insured." Ark. Code Ann. § 23-89-403(a)(2) (Repl. 1999). While the statute provides that withdrawal of the rejection must be in writing, it does not require that the rejection itself be in writing. If the legislature had intended to require the rejection to be in writing, it could easily have said so. For instance, the legislature required that if an insured purchases uninsured motorist bodily injury coverage, then written rejection of uninsured motorist property damage coverage is required for certain purposes. *See* Ark. Code Ann. § 23-89-404 (Repl. 1999). Also, written rejection of no-fault insurance is

required. *See* Ark. Code Ann. § 23-89-203 (Repl. 1999). Underinsured motorist coverage also speaks in terms of a written rejection. *See* Ark. Code Ann. § 23-89-209(a)(1) (Repl. 1999).

To support its claim that uninsured motorist coverage must be rejected in writing, appellant cites *Shelter Mut. Ins. Co. v. Irvin*, 309 Ark. 331, 334, 831 S.W.2d 135, 137 (1992), where the Arkansas Supreme Court stated that "like no-fault and uninsured coverage situations, insurers shall provide underinsured motorist coverage to the named insured unless such coverage is rejected in writing by the insured." The language relied upon by appellant, however, is *dicta*, as that case involved underinsured motorist coverage. Thus, based on a fair reading of the statute, we decline to hold that written rejection of uninsured motorist bodily injury coverage is required.

Appellant further argues that even if written rejection of uninsured motorist bodily injury coverage is unnecessary, there remained a material issue of fact regarding whether Madlock rejected such coverage. On appeal, the standard of review of a summary judgment is well-settled. Recently our supreme court restated the standard of review in *Welch Foods, Inc. v. Chicago Title Ins. Co.*, 341 Ark. 515, 518, 17 S.W.3d 467, 469 (2000), as follows:

> Our review of a trial court's summary judgment focuses on whether the evidence presented by the movant left a material question of fact unanswered. *Mashburn v. Meeker Sharkey Financial Group, Inc.*, 339 Ark. 411, 5 S.W.3d 469 (1999). The moving party bears the burden of sustaining the motion, and the proof submitted is viewed in a light most favorable to the party resisting the motion. Once the moving party establishes a prima facie entitlement to summary judgment by affidavits or other supporting documents or depositions, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Flentje v. First National Bank of Wynne*, 340 Ark. 563, 11 S.W.3d 531 (2000).

See also Ark. R. Civ. P. 56.

We conclude that there are no remaining material issues of fact. In support of its motion for summary judgment, appellee submitted two affidavits. In one affidavit, Madlock, the insured, stated that he was offered and that he declined uninsured motorist coverage. In the other affidavit, Steve Buelow of Anderson-Frazier Insurance Agency stated that he issued the policy to Madlock and

offered uninsured motorist coverage to him, but that it was declined. Appellant presented to the trial court the deposition of Madlock, but in that deposition, Madlock essentially reiterated what he stated in his affidavit. Given this evidence, we must conclude that no material issue of fact remains; Madlock rejected uninsured motorist bodily injury coverage. Thus, we affirm the trial court's granting of summary judgment in favor of appellee.

Affirmed.

PITTMAN and MEADS, JJ., agree.

ARKANSAS DEPARTMENT of HUMAN SERVICES *v.* Denise THOMAS

CA 00-20 33 S.W.3d 514

Court of Appeals of Arkansas
Division I
Opinion delivered November 8, 2000

D. Franklin Arey, III, Chief Counsel, on brief; *Kathy L. Hall*, on oral argument, for appellant.

Center for Arkansas Legal Services, by: *J. Vernon Walker*, for appellee.

JOHN E. JENNINGS, Judge. In this dependency-neglect proceeding, the Arkansas Department of Human Services ("ADHS") appeals that portion of the juvenile court's order directing that appellee, Denise Thomas's, name be removed from the central registry of child maltreatment. For reversal, ADHS

argues that the juvenile court does not have the authority to order the removal of a name from the central registry. We agree and reverse.

On April 27, 1999, ADHS filed a petition in the Jefferson County Juvenile Court alleging that appellee's ten-year-old daughter, C.T., was dependent-neglected. In the petition and its accompanying affidavit, it was stated that C.T. was being sexually abused by her fourteen-year-old, male cousin and that appellee was failing to protect the child from further abuse by allowing the cousin to stay overnight in their home. At the adjudication hearing held on July 22, 1999, the court dismissed ADHS's petition after learning that C.T. had recanted the allegation that her cousin had been fondling her. Over ADHS's objection, the court also granted appellee's request that her name be removed from the central registry, it having been placed there by ADHS after substantiating child maltreatment for neglect due to appellee's failure to prevent abuse under Ark. Code Ann. § 12-12-503(6)(A) (Repl. 1995).[1] ADHS filed a timely motion for reconsideration in which it again challenged the court's authority to order the removal of appellee's name from the registry. The court did not rule on the motion, and it was deemed denied after thirty days. *See* Ark. R. App. P.—Civil 4. This appeal followed.

Appellant argues that the juvenile court does not have the statutory authority to order the removal of a name from the central registry, as the responsibility for the placement of names on the registry has been vested in it by the legislature and the decision is subject to administrative review. In support of the order, appellee argues that the juvenile court is well-equipped to deal with matters of this kind and that the juvenile court should order removal when there is evidence which justifies that action. We agree that the juvenile court is not the appropriate forum to decide this matter.

■ Amendment 67 to the Arkansas Constitution granted the General Assembly the authority to confer jurisdiction over matters relating to juveniles in what it might deem an appropriate court. Following the passage of Amendment 67, the legislature defined jurisdiction of matters relating to juveniles and bestowed such jurisdiction upon newly created divisions of chancery court. *Arkansas*

[1] This was the applicable statute at the date of the hearing.

Dep't of Human Servs. v. Clark, 304 Ark. 403, 802 S.W.2d 461 (1991). Arkansas Code Annotated § 9-27-306 (Repl. 1998) sets out the limits of the juvenile courts' jurisdiction. It provides that the juvenile courts of this state shall have original, exclusive jurisdiction for proceedings in which a juvenile is alleged to be delinquent or dependent-neglected, those in which a family is alleged to be in need of services, and proceedings involving the termination of parental rights. Juvenile courts also have exclusive jurisdiction over adoptions and guardianships that arise during the pendency of the above-mentioned original proceedings. In addition, the statute provides that the juvenile courts have concurrent jurisdiction with the probate courts for the civil commitment of juveniles, and concurrent jurisdiction with chancery courts over matters pertaining to illegitimate children.

The Department of Human Services is also a creature of statute. *See Ark. Dep't of Human Servs. v. Clark, supra.* The legislature has established the central registry for child maltreatment within the department, Ark. Code Ann. § 12-12-505 (Repl. 1995), and designated it as the agency responsible for investigating reports of suspected maltreatment for purposes of maintaining the registry, Ark. Code Ann. § 12-12-509 (Repl. 1995), and determining whether the allegation is either unsubstantiated or true. Ark. Code Ann. § 12-12-512 (Repl. 1995). If the allegation is found to be true and a report is to be placed in the registry, the subject of the report has the right to request an administrative hearing. Ark. Code Ann. § 12-12-512 (Repl. 1995). Also under this statutory scheme, the subject of the report has the right to appeal an adverse determination to circuit court under the Administrative Procedure Act. Ark. Code Ann. § 25-15-202 (Supp. 1999) & § 25-15-215 (Repl. 1999).

On several occasions, it has been held that a juvenile court has exceeded its statutory authority, even when acting on matters that fall within its assigned jurisdiction. In *Ark. Dep't of Human Servs. v. State,* 319 Ark. 749, 894 S.W.2d 592 (1995), the supreme court considered a juvenile court's order that a delinquent juvenile be placed in a serious offender program within the youth services center. After examining the pertinent statutes, it was held that the juvenile court lacked the authority to specify placement in the program because the legislature had granted the Youth Services Board, not the juvenile court, the authority to determine the particular program or institution suitable for a juvenile committed to a

youth services center. Similarly, in *Ark. Dep't of Human Servs. v. State,* 312 Ark. 481, 850 S.W.2d 847 (1993), the court reversed the juvenile court's order requiring ADHS, as a custodian, to pay a probation fee on behalf of a delinquent juvenile. The court held that neither statute in question authorized a juvenile court to assess a probation fee against a custodian. We reached a similar result in *Ark. Dep't of Human Servs. v. Southerland,* 65 Ark. App. 97, 985 S.W.2d 336 (1999). There we held that the juvenile court was not authorized by statute to require ADHS to provide compensation to a foster parent for a period of time before the foster parent had completed the necessary licensing and certification requirements.

Here, there is no statute that authorizes a juvenile court in a dependency-neglect proceeding to address any matter pertaining to the placement of names in the central registry. Instead, the legislature has committed those decisions to the Department of Human Services and has made them subject to administrative review. Appellee has not availed herself of that process and has thus failed to exhaust her administrative remedies. *See, e.g., City of Dover v. Barton,* 337 Ark. 186, 987 S.W.2d 705 (1999). Appeal would then lie to circuit court. Ark. Code Ann. § 25-15-202 (Supp. 1999) & § 25-15-215 (Repl. 1999). The juvenile court lacked jurisdiction to decide the issue.

Reversed.

HART and GRIFFEN, JJ., agree.

Mason HAMILTON *d/b/a* Swift Flying Service *v.*
GENERAL INSURANCE COMPANY of America

CA 00-46 32 S.W.3d 16

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered November 8, 2000

C. Scott Nance, for appellant.

Clevenger, Angel & Miller, PLLC, by: *T. Scott Clevenger*, for appellee.

OLLY NEAL, Judge. Mason Hamilton d/b/a Swift Flying Service appeals from an order of the Jackson County Circuit Court granting summary judgment in favor of appellee, General Insurance Company of America. On appeal, appellant contends that the appellee failed to make a *prima facie* case showing that it was entitled to summary judgment.

The facts presented in this case reveal that in April of 1995, appellant attempted to take off from a private airstrip in Swifton, Arkansas, but was unable to take flight due to the aircraft's engine failure. The aircraft was later determined to have suffered nearly $70,000 worth of damage to its internal components, including the failure of a compressor blade. At the time of the incident, appellant's aircraft was insured for liability and property damage under an aviation insurance policy issued by the appellee. The insurance policy contained the following pertinent agreements and exclusions:

AIRCRAFT POLICY

> In consideration of the payment of the premium, in reliance upon the statements in the application and declarations made a part hereof, and are subject to all terms of this policy, the Company agrees with the named insured as follows:

A. INSURING AGREEMENTS

. . . .

6. Coverage H—All risks of Physical Damage

To pay for any direct and accidental physical damage to or loss of the aircraft while or not in flight . . . .

. . . .

B. EXCLUSIONS

This policy does not apply:

. . . .

11. As respects to coverages H and I, to . . . damage which is due and confined to wear and tear, deterioration, freezing, mechanical, structural or electrical breakdown or failure. . . .

Appellant subsequently filed a claim with appellee for losses incurred from the aircraft's engine failure. Following an investigation, appellee denied the claim based upon its determination that the internal engine of appellant's aircraft was caused by a mechanical and structural breakdown secondary to wear and tear.

On November 18, 1998, appellant filed an amended complaint alleging that appellee refused to pay his claim for loss, which was covered under the insurance policy issued by appellee. He alleged that substantial damage to the aircraft's engine was created by a foreign object that entered the engine during the aircraft's takeoff. On November 25, 1998, appellee filed an answer to the complaint admitting its issuance of an insurance policy to appellant, which covered the aircraft for any damages, but denied any liability under the policy. On January 27, 1999, appellant filed his answers in response to appellee's set of interrogatories and request for production of documents. In one of his answers, appellant stated that his expert witness, Mr. Jim Mills, would be called to testify regarding the cause of the damage to the aircraft. Appellant stated that Mr. Mills was expected to testify that Mills examined the turbine engine

and the aircraft and was of the opinion that a foreign object caused the damage to the aircraft.

On May 18, 1999, appellee filed a motion for summary judgment alleging that the loss sustained by appellant's aircraft was due to wear and tear, deterioration, and a mechanical and structural breakdown. In support of its motion, appellee included excerpts from appellant's deposition and the affidavit of Weldon E. Garrelts, an aviation consultant who examined the internal engine of the aircraft on behalf of appellee.

In his deposition, appellant stated that a grain of sand was the cause of the damage sustained inside the aircraft's engine, and that after consulting with Mr. Mills, he felt that "there was not any question that a grain of sand, or something of that nature, had been sucked through the wire mesh and struck one of those blades." Appellant testified, however, that he didn't actually observe any foreign object enter into the engine at the time of the incident and that after a visual inspection of the engine, he did not observe any foreign object in the engine itself. Weldon Garrelts stated in his affidavit that based upon his observation and examination of the engine's parts, he found that the engine failure resulted from "a structural or mechanical breakdown of its internal components due to and confined to 'wear and tear' occurring over a period of time, which ultimately led to the failure of a compressor blade." Mr. Garrelts further stated that the damage to appellant's engine was not caused by a foreign object as alleged by appellant.

On June 8, 1999, appellant filed a brief in response to appellee's motion for summary judgment. In his brief, appellant argued that "he had his own opinions as to the cause of the engine failure evidenced in the sworn exhibits in the appellee's brief, and that they formed a general issue of material fact when placed against the appellee's witness's opinions filed in his affidavit." After reviewing all evidence presented, the trial court entered an order on September 30, 1999, granting appellee's summary-judgment motion pursuant to Ark. R. Civ. P. 56.

■ Summary judgment is a remedy that should only be granted when there are no genuine issues of material fact and when the case can be decided as a matter of law. *Alexander v. Flake*, 322 Ark. 239, 910 S.W.2d 190 (1995). Review is limited to examining

the evidentiary items presented below and determining whether the trial court correctly ruled that those items left no material facts disputed. *Id.* The burden of sustaining a motion for summary judgment is always the responsibility of the moving party. *McDonald v. Pettus*, 337 Ark. 265, 988 S.W.2d 9 (1999). All proof submitted must be viewed in a light most favorable to the party resisting the motion, and any doubts and inferences must be resolved against the moving party. *Rankin v. City*, 337 Ark. 599, 990 S.W.2d 535 (1999). When a movant makes a *prima facie* case showing entitlement, the respondent must meet proof with proof by showing that a genuine issue exists as to a material fact. *Wilson v. J. Wade Quinn Co.*, 330 Ark. 306, 952 S.W.2d 167 (1997).

In this case, there is no dispute between the parties in regard to the terms, conditions, and exclusions of the aviation insurance policy issued by appellee, and it is undisputed that the policy was in full force and effect at the time appellant's aircraft was damaged. Thus, it is unnecessary to resort to rules of construction in order to ascertain the meaning of an insurance policy when no ambiguity exists. *Ratliff Enters., Inc. v. American Employers Ins. Co.*, 334 Ark. 547, 975 S.W.2d 837 (1998). We need only decide if the evidentiary items presented to the trial court left no material facts disputed in regard to the cause of the engine failure.

Appellant contends that based upon the statement in his complaint that foreign objects were seen entering the engine immediately before the engine failure and upon his deposition testimony that only a foreign object could have caused the damage to the engine based upon his observations, there remain genuine issues of material fact in relation to the cause of the engine failure. Appellant further relies upon his answer to appellee's interrogatory, in which he stated that his witness, Jim Mills, was expected to testify that Mills examined the aircraft's engine and was of the opinion that a foreign object caused the engine's damage.

However, from each of appellant's responses, there appears to be no evidence presented to rebut appellee's proof that the engine failure was caused by normal wear and tear over an extended period of time. Appellant admitted during his deposition that he did not actually see any foreign objects enter into the engine at the time of take off and he admitted that there were no foreign objects visible in the engine upon his own inspection. Although appellant

seems to rely on Jim Mills's purported opinion that the cause of the engine failure was due to a foreign object, there is no evidence presented showing any sworn testimony by Mr. Mills regarding his expert opinion of the cause of the engine failure. Once the moving party has established a *prima facie* entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Shelton v. Fiser*, 340 Ark. 89, 8 S.W.3d 557 (2000).

The dissent relies on *Adams v. Hudspeth Motors, Inc.*, 266 Ark. 790, 587 S.W.2d 227 (1979). In *Adams*, the appellant who resisted the summary-judgment motion filed *sworn* discovery responses to the motion, even though he did not file counter-affidavits. (Emphasis added.) In this case, however, appellant has filed no sworn or verified discovery responses. Neither appellant's complaint in law following a voluntary dismissal nor his amended complaint in law are properly verified or sworn to before a person authorized to administer oaths. Appellant here appears to rely on:

> 1. His amended complaint in law which is neither sworn to or verified.
>
> 2. His answers to the appellee's interrogatories which are neither sworn to or verified.
>
> 3. Appellant's sworn deposition testimony that *Mr. Mills believed that a foreign object is what damaged the aircraft.* (Emphasis added.) (However, self-serving statements regarding a witness's state of mind or his subjective beliefs are no more than conclusions and are not, therefore, competent summary-judgment evidence. *Flentje v. First National Bank of Wynne*, 340 Ark. 563, 11 S.W.3d 848 (2000)).
>
> 4. Appellant's counsel's statement to the trial court that appellant and several other agricultural pilots are willing to testify that they suffer damage to their props and engines as a result of foreign objects all the time. (However, arguments of counsel are not evidence. *Flenje, supra.*)

Summary judgment is proper where review of the documents filed revealed nothing that would raise an issue of fact. *Rickenbacker v. Wal-Mart Stores, Inc.*, 302 Ark. 119, 788 S.W.2d 474 (1990). Because appellant has failed to meet proof with proof to rebut evidence provided by appellee on the issue of the cause of the

engine's failure, we cannot say that the trial court erred in granting appellee's summary-judgment motion.

Affirmed.

BIRD, KOONCE, and STROUD, JJ., agree.

ROBBINS, C.J., and GRIFFEN, J., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. I would reverse the summary-judgment order because appellant produced facts showing that a genuine issue exists for trial regarding what caused the engine failure and resultant damage to the airplane he operated in his crop-dusting operation. Appellant is a crop duster who attempted to take off from an airstrip in Swifton, Arkansas, when his airplane experienced engine failure. The engine suffered about $70,000 in damage to its internal components, including the compressor blades. Appellant asserted a claim with appellee, the insurer of the plane, and alleged that a foreign object entered the engine during the attempted take-off and caused the engine failure. The appellee engaged Weldon Garrelts, an aviation consultant, to investigate the cause of the accident. Garrelts concluded that the engine failure and resultant damage were not due to a foreign object but resulted from mechanical or structural breakdown secondary to normal wear and tear. The appellee refused to pay benefits under the policy.

After appellant sued alleging that a foreign object entered the engine and caused the damage, appellee answered and denied liability while admitting that it had a policy listing the airplane. The appellee then filed a summary-judgment motion supported by a copy of the insurance policy, excerpts from appellant's deposition, appellant's answers to interrogatories, and Garrelts' affidavit. In response, appellant offered his opinion regarding the engine failure based on his personal observation as stated in his answers to interrogatories that he noticed the airplane propeller picking up a large amount of rocks and propelling them behind the turbine engine seconds before the engine failed. He also named Jim Mills, an aircraft mechanic who repaired the engine and owner of a turbine engine conversion business, as an expert witness whose expected testimony would be that the damage sustained to the engine was caused by a foreign object rather than by normal wear and tear related to use of the aircraft. The trial court granted summary

judgment, apparently persuaded by appellee's argument that the affidavit from Garrelts was not met with proof which established a genuine issue of material fact for trial. Appellee now argues that appellant's failure to produce affidavits countering the opinion from Garrelts left no issue of fact to be tried.

Under Rule 56 of the Arkansas Rules of Civil Procedure, summary judgment is properly granted only where the pleading, depositions, and answers to interrogatories, together with the affidavits if any, show there is no genuine issue as to any material fact remaining, so that the moving party is entitled to judgment as a matter of law. *See Dickson v. Selhi Seed Co.*, 26 Ark. App. 83, 760 S.W.2d 382 (1988). Once the moving party makes a *prima facie* showing of entitlement to summary judgment, the party opposing summary judgment must meet proof with proof by demonstrating that a genuine issue of material fact remains unresolved. *See Pugh v. Griggs*, 327 Ark. 577, 940 S.W.2d 445 (1997). This requires the nonmoving party to set forth in his response specific facts showing there is a genuine issue for trial. *See* Ark. R. Civ. P. 56(e). Thus, summary judgment is inappropriate (1) where facts remain in dispute, or (2) where undisputed facts may lead to differing conclusions as to whether the moving party is entitled to judgment as a matter of law. *See Wallace v Broyles*, 332 Ark. 189, 961 S.W.2d 712 (1998). When reviewing the grant of summary judgment, the appellate court determines whether the evidence presented by the moving party left any material questions of fact unanswered. *See Keller v. Safeco Inc. Co. of America*, 317 Ark. 308, 877 S.W.2d 90 (1994). The evidence is viewed most favorably in light of the nonmoving party, and any doubts or inferences are resolved against the moving party. *See Pyle v. Robinson*, 313 Ark. 692, 858 S.W.2d 662 (1993).

The trial court in this case erroneously treated the summary-judgment motion as analogous to one for a directed verdict. Despite the fact that even counsel for appellee conceded that Mills (the mechanic) would testify that the engine damage could have occurred from a foreign object rather than from normal wear and tear, the trial court granted the appellee's motion for summary judgment after appellee's counsel argued that a "jury would have to be speculating, because there is no evidence that foreign object caused this damage." The trial court then asked counsel for appel-

lant, "You want to put on evidence?" When counsel replied, "Not right not now," the trial court granted the motion.

Appellee, the trial court, and the majority fail to distinguish a summary-judgment motion from a motion for directed verdict. While the granting of either a motion for summary judgment or for directed verdict effectively dismisses a case, the purpose and standard of review governing these motions differ. The purpose of a motion for summary judgment is to determine whether any issues remain to justify a trial on the merits. However, the purpose of a directed verdict under Ark. R. Civ. P 50(a) is to require a party testing the sufficiency of the evidence to first submit the question to the trial court, thereby permitting the court to rule at the conclusion of all the evidence but prior to the verdict, thus preserving the sufficiency of the evidence issue for appeal. *See Pennington v. Rhodes*, 55 Ark. App. 42, 929 S.W.2d 169 (1996). It is not proper, therefore, for either the trial court or for the appellate court to engage in a determination of the sufficiency of the evidence in a motion for summary judgment. Indeed, our supreme court has recently stated:

> If it has not been clear heretofore, we hope this opinion clarifies that, although we follow federal courts' interpretation of the parallel rule, F.R.C.P. 56(c) when possible for the sake of uniformity, we have never gone so far as to say, much less hold, that we will make a "sufficiency of the evidence" determination when a summary judgment motion is at issue. We regard that directed-verdict standard, used in ruling on motions made pursuant to Ark. R. Civ. P. 50, as being somewhat different from the summary judgment standard.

Wallace v. Broyles, supra, at 194-95, 961 S.W.2d at 723.

Our supreme court has specifically denounced the use of the sufficiency of the evidence standard in summary-judgment cases. Substantial evidence is evidence sufficient to compel a conclusion one way or the other and which induces the fact finder to go beyond mere suspicion or conjecture. *See Caplener v. Bluebonnet Milling Co.*, 322 Ark. 751, 911 S.W.2d 586 (1995). The *Caplener* court stated:

> Our use of the term "substantial evidence" in opinions describing the evidence which must be produced in response to a motion for summary judgment was ill advised. . . [T]he standard to be applied in summary judgment cases is whether there is evidence sufficient

> to raise a fact issue, rather than evidence to compel a conclusion on the part of the fact finder.

Id. at 759, 911 S.W.2d at 591.

When viewing the proof in the light most favorable to appellant as the nonmoving party and resolving all doubts or inferences against appellee as the moving party, as we are obliged to do, the documents supporting appellee's motion for summary judgment raised a factual inference that the foreign objects appellant witnessed being sucked into the turbine engine caused damage to the engine. When one also considers that the answers to interrogatories indicated that Mills would testify that the engine damage was caused by foreign object damage rather than normal wear and tear as contended by appellee, it is clear that appellant met proof with proof sufficient to withstand entry of summary judgment on appellee's motion, even if it could not have withstood a challenge to the sufficiency of the evidence in the form of a motion for a directed verdict.

Moreover, the fact that appellant in this case did not submit *sworn* responses, as the appellant did in *Adams,* is not dispositive, or even relevant. The majority cites no authority for the proposition that the nonmoving party must submit *sworn* responses in order to "meet proof with proof." Rule 56(e) provides that the sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached to or served with the affidavit, but the Rule does not require that any other responses must be sworn. Moreover, Rule 56(c) also provides that summary judgment shall be granted where the "pleadings, depositions, answers to interrogatories and admissions on file, *together with the affidavits, if any,* show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." (Emphasis added.) Thus, the plain language of the rule confirms that affidavits, sworn or otherwise, are not required in support of a properly documented motion for summary judgment. Affidavits are not required in support of a response to a motion for summary judgment, and appellant was not required to produce an affidavit from Mills or anyone else. *See Adams v. Hudspeth Motors, Inc.*, 266 Ark. 790, 587 S.W.2d 227 (1979). He merely was obliged to set forth specific facts showing that there is a genuine issue for trial. Here, appellant properly

set forth such facts in his amended complaint, his sworn deposition, and his answers to interrogatories.

Finally, appellee's argument that only evidence admissible at trial is sufficient to create a factual issue for purposes of summary judgment overstates what the supreme court said in *Dixie Ins. Co. v. Joe Works Chevrolet, Inc.*, 298 Ark. 106, 766 S.W.2d 4 (1989). The supreme court actually applied that standard only to facts stated in an affidavit. *See id.* at 109, S.W.2d at 6 (stating, "Facts stated in an affidavit must be admissible in evidence if they are to be relied upon in granting or denying summary judgment.") (*citing Organized Security Life Ins. Co. v. Munyon,* 247 Ark. 449, 446 S.W.2d 233 (1969)).

Arkansas law holds that the object of summary-judgment proceedings is not to try the issues, but to determine if there are any issues to be tried, and if there is any doubt whatsoever, the motion should be denied. *See Walker v. Stephens*, 3 Ark. App. 205, 626 S.W.2d 200 (1981). The trial court incorrectly treated the summary-judgment motion as an opportunity to try the sufficiency of the evidence surrounding the cause of the engine failure. Thus, I would reverse and remand. I am authorized to state that Chief Judge ROBBINS joins in this opinion.

Cheryl Paslay BREWER and Marvin Brewer
v. ARKANSAS DEPARTMENT of HUMAN SERVICES

CA 00-98 43 S.W.3d 196

Court of Appeals of Arkansas
Divisions IV and I
Opinion delivered November 8, 2000
[Substituted Opinion on Grant of Rehearing
delivered April 25, 2001.]

James G. Petty, Jr., for appellant Cheryl Brewer.

J. Leon Johnson, for appellant Marvin Brewer.

Kathy L. Hall, for appellee.

SAM BIRD, Judge. In a previous opinion, *Brewer v. Arkansas Dep't of Human Servs.*, 71 Ark. App. 364, 32 S.W.3d 22

(2000), we considered an appeal from the decision of the White County Chancery Court, Juvenile Division, which found that Logan Brewer is a dependent-neglected child and refused to order reunification services or place Logan in the home of his paternal grandmother. The points of appeal were raised in separate briefs filed by appellants. We reversed only on the point raised individually by Cheryl Brewer, agreeing that the trial court erred in refusing to order reunification services. Appellee, Arkansas Department of Human Services, now has filed a petition for rehearing, in which it makes an argument, supported by persuasive authority, that our original decision was erroneous. After having carefully reconsidered the issue, we agree with ADHS. Therefore, we grant the petition for rehearing and issue this substituted opinion.

Logan was born to Cheryl and Marvin Brewer on August 26, 1999. On August 27, 1999, the Arkansas Department of Human Services (ADHS) filed a petition for emergency custody of the child, alleging that he is dependent-neglected as defined by Ark. Code Ann. § 9-27-303(15) (Supp. 1999). ADHS based its request for emergency custody on the fact that Cheryl's other child had been previously adjudicated dependent-neglected and that no reunification services were ordered. The chancellor granted ADHS's petition, and on September 2, 1999, the chancellor found that there was probable cause for emergency custody to continue until the adjudication hearing scheduled for October 7, 1999.

The adjudication hearing recounted the numerous injuries suffered by Logan's nineteen-month-old sibling, Makila. Makila was airlifted from Searcy to Arkansas Children's Hospital in Little Rock. When she arrived, she was placed on a ventilator but remained in danger of death. Makila presented with a low blood count and a large hematoma on her back that was the likely result of a direct blow to the back. A pediatrician at the hospital noted that Makila had multiple bruises of different ages and stages covering her body. The pediatrician testified that the child had bruises on the tops of her ears, around her eyes, and along her abdomen, legs, and arms. The child also exhibited two black eyes, tiny rectal tears consistent with sexual abuse, and bruising on her labia majora. Makila also suffered from retinal hemorrhages in both eyes, had liver enzymes three to four times normal levels, and required a blood transfusion and intravenous fluids. Based on these observations, the pediatrician ordered that x-rays, bone scans, and a CT scan be performed on the child.

A radiologist testified that the CT scan revealed bleeding around Makila's brain in the subdural space. The scan revealed fresh bleeding on the left side of the brain and evidence of older bleeding on the right side of the brain, indicating repeated trauma. The doctor testified that injuries of the type suffered by Makila were usually only seen in high-speed vehicle accidents and in instances where a child has been shaken. A skeletal survey revealed an old left-femur fracture. A later bone scan revealed that both of the child's ulnas had been fractured. The radiologist testified that the fractures were consistent with fractures a child receives from defending herself from direct blows. The child also suffered a fracture of the left scapula and injuries to her rib cage. The radiologist testified that the injuries to the rib cage were consistent with a child being squeezed while being shaken; the injuries were likely suffered within three to five days of the child's being admitted to the hospital.

Dr. Melinda Markham testified that Cheryl stated that she was not at home when Makila was picked up by the ambulance, but that Cheryl thought the ambulance was called because Makila might have suffered a seizure. According to Dr. Markham, Cheryl stated that she was aware that Marvin had been spanking the child and hitting her about the head. Dr. Markham also stated that Cheryl indicated that she had spanked Makila. Dr. Markham further testified that Cheryl admitted that Marvin had to restrain her from "going after" the child on one occasion and that Cheryl had told Marvin, "We have to stop," on the way to the hospital.

Based on this testimony and photographs showing Makila's condition when she was admitted into the hospital, the court concluded that Cheryl and Marvin were unfit parents and that Logan was a dependent-neglected child. As mentioned previously, the court also refused to order reunification services.

Appellants argue that the trial court erred in basing its finding that Logan is a dependent-neglected child solely on alleged abuse to his sibling. They contend that a finding that a child is dependent-neglected must be based on the treatment of the child at issue. For a second point, appellant Cheryl Brewer argues that the trial court erred in refusing to order reunification services.

The juvenile code requires proof by a preponderance of the evidence in dependency-neglect proceedings. Ark. Code Ann. § 9-27-325(h)(2)(B) (Supp. 1999). We review a chancellor's findings of fact *de novo*, and will not set them aside unless they are clearly

erroneous, giving due regard to the trial court's opportunity to judge the credibility of the witnesses. Ark. R. Civ. P. 52(a). *See also Johnson v. Arkansas Dep't of Human Serv.*, 55 Ark. App. 392, 935 S.W.2d 589 (1996). A finding is clearly erroneous when, although there is evidence to support the finding, after reviewing all of the evidence, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Nichols v. Wray*, 325 Ark. 326, 925 S.W.2d 785 (1996).

A dependent-neglected juvenile is defined as "any juvenile who as a result of abandonment, abuse, sexual abuse, sexual exploitation, neglect, or parental unfitness is at substantial risk of serious harm." Ark. Code Ann. § 9-27-303(15)(A)(Supp. 1999). Arkansas Code Annotated section 9-27-302(2)(B) provides that one purpose of the Juvenile Code is "[t]o protect a juvenile by considering the juvenile's health and safety as the paramount concerns in determining whether or not to remove the juvenile from the custody of his parents or custodians...."

Here we have overwhelming evidence that Logan's sister, Makila, was abused by Cheryl or Marvin, or both. Even if one of the parents could successfully deflect blame for the actual injuries Makila suffered to the other parent, the uncontroverted testimony establishes that her injuries were noticeable and inflicted over a long period of time. Clearly a parent who does not notice such obvious signs of abuse of a child living within his or her home is unfit.

We do not reach appellant's argument that ADHS failed to establish any abuse to Logan. Section 9-27-325(h)(2)(B) explicitly states that a dependent-neglected child is one at risk of serious harm from an unfit parent. Parental unfitness is not necessarily predicated upon the parent's causing some direct injury to the child in question. Such a construction of the law would fly in the face of the General Assembly's expressed purpose of protecting dependent-neglected children and making those children's health and safety the juvenile code's paramount concern. To require Logan to suffer the same fate as his older sister before obtaining the protection of the state would be tragic and cruel.

For her separate point on appeal, Cheryl contends that the court erred in refusing to order reunification services. Arkansas Code Annotated section 9-27-303(35)(C) (Supp. 1999) provides:

> Reasonable efforts to reunite a child with his parent or parents shall not be required in all cases. Specifically, reunification shall not

be required if a court of competent jurisdiction has determined that a parent has:

(i) Subjected the child to aggravated circumstances;

(ii) Committed murder of any child;

(iii) Committed voluntary manslaughter of any child;

(iv) Aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter;

(v) Committed a felony assault that results in serious bodily injury to any child; or

(vi) Had the parental rights involuntarily terminated as to a sibling of a child.

After considering the statute, the trial court concluded that it could refuse to order reunification services pursuant to section (v) after finding that Cheryl had committed a felony assault that resulted in a serious bodily injury to any child. The court ruled that the statute does not require a formal adjudication of Cheryl's guilt by a circuit court as a prerequisite to its refusal to order reunification services. Rather, the court concluded that it, as the Juvenile Division of the White County Chancery Court, qualified as a court of competent jurisdiction and that, as such, it could determine from the evidence before it whether Cheryl had committed felony assault for purposes of Ark. Code Ann. § 9-27-303(35)(C)(v).

Cheryl argues that the statute should be interpreted to mean that before an order for reunification services could be refused by the Juvenile Division, it would be necessary for Cheryl already to have been *convicted* of a felony assault resulting in serious bodily injury to a child. She argues that only a court with adult criminal jurisdiction is competent to adjudicate her guilt of a felony assault, and that since no such adjudication had occurred, the Juvenile Division was required to order reunification services for her.

We agree with the trial court's interpretation of the statute. In doing so, we note that the statute does not require the *conviction* of a parent. Rather, it only provides that reunification services are not required if a court of competent jurisdiction has *determined* that the parent has committed any of the acts set forth in subsections (i)—(vi) of the statute.

The beginning point in interpreting this statute, as with all statutes, is to construe the words just as they read and to give them their ordinary and accepted meaning. *State v. Johnson*, 317 Ark. 226, 876 S.W.2d 577 (1994). The basic rule of statutory construction is to give effect to the intent of the legislature, making use of common sense. *Id.* In attempting to construe legislative intent, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, legislative history, and other appropriate matters that throw light on the matter. *L. H. v. State*, 333 Ark. 613, 973 S.W.2d 477 (1998), citing *Reed v. State*, 330 Ark. 645, 957 S.W.2d 174 (1997).

If the legislature had meant to require an adjudication of guilt and a conviction of the parent for one or more of the offenses mentioned in the statute as a prerequisite to the court's denial of reunification services, it would have said so. Furthermore, as ADHS persuasively argues in its petition for rehearing, in view of the statute's overriding purpose to provide protection to children from abusive parents, the statute cannot be reasonably construed to mean that the Juvenile Division, after determining that a child is dependent-neglected as a result of such abuse, is required to order reunification services with the abusive parent until such time as the parent is tried and convicted of a felony.

We hold that, for the purposes of Ark. Code Ann. § 9-27-303(35)(C), the Juvenile Division is a court with competent jurisdiction to determine whether a parent has committed such acts as would constitute offenses of the type referred to in that section, and that, having made that determination, the trial court did not err in refusing to order reunification services to Cheryl.

For their final point on appeal, Cheryl and Marvin argue that the lower court erred in failing to place Logan in the home of his paternal grandmother, Obera Norman. At the hearing, appellants requested that Logan be placed with his paternal grandmother based on an ADHS home study concluding that Norman's home would be the most stable environment for Logan. An ADHS representative, however, indicated that she had concerns about placing Logan in Norman's home. Specifically, the representative was concerned that Norman did not believe Cheryl and Marvin had abused Makila. The ADHS representative did not think Norman would properly protect Logan from his parents.

At the hearing, Norman testified that if she were ordered to do so, she would not allow her son and Cheryl to visit with Logan.

Norman further indicated, however, that she was of the opinion that Marvin and Cheryl would not hurt their children. She testified that she believed Makila got her injuries while Marvin was attempting to perform CPR.

Here, there was overwhelming medical testimony listing Makila's injuries, testimony that Norman thought those injuries were suffered during a session of CPR, and the opinion of the ADHS representative that Norman would not protect Logan from Cheryl and Marvin. Giving due regard to the trial court's ability to determine credibility, we cannot conclude that the trial court erred in determining that Logan would not be safe with his paternal grandmother.

Affirmed.

PITTMAN, JENNINGS, CRABTREE, and BAKER, JJ., agree.

HART, ROBBINS, NEAL, and ROAF, JJ., concur in part and dissent in part.

OLLY NEAL, Judge, concurring in part; dissenting in part. I concur with the majority's holding with respect to the chancellor's finding that Logan Brewer is a dependent-neglected child and the chancellor's refusal to place Logan in the home of his paternal grandmother. However, I disagree with the majority's holding that a chancery court has jurisdiction to determine that a person has committed a felony assault.

In its substituted opinion, the majority adopts a rule allowing a juvenile judge to determine that a person has committed a criminal act regardless of the fact that the person has been neither convicted of nor charged with violating the criminal law. The juvenile court has jurisdiction over proceedings in which a juvenile is alleged to be dependent-neglected. Ark. Code Ann. § 9-27-306(a)(1) (Repl. 1998). The Arkansas Constitution, however, grants the circuit courts exclusive jurisdiction over felony charges. Ark. Const. art. 7, § 11. *See also State v. Pulaski County Circuit Court*, 326 Ark. 886, 934 S.W.2d 916 (1996).

In the instant action, the Arkansas Department of Human Services (DHS) alleged that appellant had committed a felony assault on her daughter in its request that the court refuse to order reunification services, and in arriving at its decision to refuse to

order the services, the court determined that appellant had in fact committed such a felony.[1] The determination of whether a person has committed a felony is reserved to the circuit courts. Consequently, the chancery court was without jurisdiction to make that determination.

The issue presented in this case is analogous to that addressed by our supreme court in *In the Matter of Estate of F.C.*, 321 Ark. 191, 900 S.W.2d 200 (1995). In that case, the mother of a child filed a petition with the probate court for appointment of an administrator and a petition for paternity, claiming that her child was the illegitimate daughter of the deceased. The mother stated that she filed the petitions for the sole purpose of entitling the child to whatever military and other government benefits she would be entitled to as a result of the deceased being her natural father. In Arkansas, probate courts have jurisdiction over the administration, settlement, and distribution of decedents' estates and the determination of heirship. Ark. Code Ann. § 28-1-204 (1987). Chancery courts, however, have concurrent jurisdiction with the juvenile division of chancery court in cases and matters relating to paternity. Ark. Code Ann. § 9-10-101 (Repl. 1998); Ark. Code Ann. § 16-13-304(b)(9) (Repl. 1999); Ark. Const. amend. 67. The code further provides that an illegitimate child may inherit property from her father in certain circumstances. Ark. Code Ann. § 28-9-209 (1987). One of those circumstances is that a court of competent jurisdiction has established the paternity of the child or has *determined* the legitimacy of the child. *Id.* In *In the Matter of Estate of F.C., supra,* the supreme court held that Ark. Code Ann. § 28-9-209 clearly contemplates that even where the illegitimate child is attempting to inherit property from her father, the probate court cannot establish paternity or

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[1] As stated in the substituted opinion, one of the grounds on which a court can refuse to order reunification services is if a court of competent jurisdiction has determined that the parent subjected the child to aggravated circumstances. Ark. Code Ann. § 9-27-303(35)(c)(1). The term "aggravated circumstances" includes a determination by a judge that there is little likelihood that services to the family will result in successful reunification. Ark. Code Ann. § 9-27-303(48).

In the instant action, Cheryl's statements that on one occasion her boyfriend had to keep her from "going after" Makila and that she told her boyfriend "we have to stop" after Makila was taken to the hospital indicate that she may have been an active participant in the abuse that resulted in Makila's injuries. However, as neither DHS nor the majority raise the argument, a dissenting opinion is not the proper place to consider the alternative theory that the court might have refused to order reunification services because Cheryl subjected Logan to circumstances indicating that those services would have likely been futile by giving birth to him in such close proximity to the time that her other daughter was being physically abused.

determine the legitimacy of the child because it is not a court of competent jurisdiction.

Notably, the language used in the statute at issue in *In the Matter of Estate of F.C.*, is identical to the language at issue in the instant action. The holding in *In the Matter of Estate of F.C.* appears to stand for the proposition that when the phrase "court of competent jurisdiction" is employed in a statute to refer to a particular type of judicial determination, that phrase describes the court traditionally empowered to decide that particular type of issue. Yet, in the instant action, the majority holds that a chancery court may make the determination constitutionally reserved to the circuit courts that a person has committed a crime.

In Arkansas, no offense has been designated "felony assault." Instead, the legislature has labeled aggravated assault as a Class D felony. Ark. Code Ann. § 5-13-204 (Repl. 1997). A person commits an aggravated assault, "if, under circumstances manifesting extreme indifference to the value of human life, he purposely engages in conduct that creates a substantial danger of death or serious physical injury to another person." Ark. Code Ann. § 5-13-204(a). Thus, for the chancellor to have determined that appellant committed a felony assault, it had to determine that appellant purposely engaged in conduct that created a substantial danger of death or serious physical injury to a child under circumstances manifesting extreme indifference to the value of human life.

The substituted opinion recites, "The beginning point in interpreting this statute, as with all statutes, is to construe the words just as they read and to give them their ordinary and accepted meaning. The basic rule of statutory construction is to give effect to the intent of the legislature, making use of common sense." (Internal citations omitted.) The majority goes on to conclude that if the legislature had meant to require a conviction for a felony assault by the circuit courts that it would have said so. The legislature does just that in Ark. Code Ann. § 9-27-341(b)(3)(B)(ix). In addressing the termination of parental rights, the code provides in relevant part that an order terminating parental rights shall be based upon a finding by clear and convincing evidence that:

> (ix)(a) The parent is found by a court of competent jurisdiction to:
>
> (1) Have committed murder or voluntary manslaughter of any child or to have aided or abetted, attempted, conspired, or solicited to commit such murder or voluntary manslaughter;

> (2) Have committed a felony assault that results in serious bodily injury to any child;
>
> (3) Have subjected the child to aggravated circumstances; or
>
> (4) Having had his parental rights involuntarily terminated as to a sibling of the child.

Ark. Code Ann. § 9-27-341(b)(3)(B)(ix)(*a*). The statute continues, "Nothing in this chapter shall be construed to require reunification of a surviving child with a parent who has been *found guilty* of any of the offenses listed in subdivision (b)(3)(B)(ix)(*a*) of this section." Ark. Code Ann. § 9-27-341(b)(3)(B)(ix)(*b*). (Emphasis added.) In determining the intent of the legislature, this court must also look at the whole act and, as far as practicable, give effect to every part, reconciling provisions to make them consistent, harmonious, and sensible. *Brandon v. Arkansas Pub. Serv. Comm'n*, 67 Ark. App. 140, 992 S.W.2d 834 (1999). Here, save use of the words "determined" and "found," the language of section 9-27-303(35)(c) and section 9-27-341((b)(3)(B)(ix)(*a*) is identical, and the legislature makes clear that "found by a court of competent jurisdiction to have committed aggravated assault" means "found guilty." When we view the juvenile code as a whole, common sense, harmony, and consistency dictate that the phrase "court of competent jurisdiction" be given the same interpretation in both sections.

Moreover, had the legislature intended for the refusal to order reunification services to be based solely on a chancery court's determination, it would not have employed the word "felony" with all of its criminal undertones. Rather, the legislature would have simply allowed a chancery court to determine that a person has committed an assault, a civil injury, resulting in a serious bodily injury to a child. Furthermore, if the legislature had intended to authorize the chancery court that was hearing the adjudication or termination petition to determine whether the parent had committed such a felony assault, surely it would have simply referred to "the court" rather than a "court of competent jurisdiction."

The repercussions of allowing the chancery court to determine that a person has committed a felony assault absent a conviction are obvious. What if the parent has been found not guilty of an aggravated assault on a child other than the one that is the subject of a dependent-neglected hearing prior to a chancellor's *determination* that the parent has *committed* a felony assault? Nothing in the substituted opinion or the statute would prevent the refusal to order reunification services in such a situation. Even worse, what if a

circuit court finds a parent not guilty of aggravated assault after the chancellor has refused to order reunification services based on the chancellor's determination that the parent committed the assault? Again, the substituted opinion provides no answer or guidance as to how our courts would rectify such conflicting results.

HART, ROBBINS, and ROAF, JJ., joins.

Jonathan JORDAN, Victor Jordan, and Dennis Smith
v. ATLANTIC CASUALTY INSURANCE COMPANY

CA 00-295 32 S.W.3d 755

Court of Appeals of Arkansas
Division I
Opinion delivered November 8, 2000

The Brad Lowber Hendricks Law Firm, by: *Phyllis B. Eddins*, for appellants.

Huckabay, Munson, Rowlett & Tilley, P.A., by: *Michael Huckabay Jr.* and *Julia L. Busfield*, for appellee.

TERRY CRABTREE, Judge. This appeal arises from a summary-judgment order entered by the Pulaski County Circuit Court in favor of appellee, Atlantic Casualty Insurance Com-

pany. On December 21, 1997, appellants, Jonathan Jordan and Victor Jordan, were involved in a motor vehicle accident with a 1988 Ford Aerostar driven by Dennis Smith. Mr. Smith had a liability insurance policy with appellee. Mr. Smith's insurance policy excluded him from coverage. The insurance policy covered Mr. Smith's sister, Melvinia Seals, as a listed driver. Mr. Smith signed "A Named Driver Exclusion Agreement" which provided that no coverage was given by the insurance policy if the vehicle was operated by Mr. Smith at the time of an accident.

Appellee filed suit for declaratory judgment in Pulaski County Circuit Court asking the court to declare whether there was coverage under the policy. The trial court found that the named-driver exclusion was valid and ruled that there was no coverage on behalf of Mr. Smith. The court further ruled that appellee had no duty to defend the suit filed against Smith in Desha County by the appellants Jonathan Jordan and Victor Jordan. We find no error, and thus affirm.

Arkansas Code Annotated Section 27-22-104, requires that any person who operates a motor vehicle obtain an insurance policy providing liability coverage on the vehicle in a minimum amount of $25,000 per person and $50,000 per accident for bodily injury. Dennis Smith obtained a liability insurance policy on his vehicle and excluded himself from coverage if he was operating the vehicle. Appellants argue that this named-driver exclusion should be held to be void as against public policy as a violation of Ark. Code Ann. § 27-22-104. We find no such violation of public policy.

■ Appellants frame their argument as an issue of first impression. However, we find that the Arkansas Supreme Court has found named-driver exclusions to be valid. *Smith v. Shelter Mut. Ins. Co.*, 327 Ark. 208, 937 S.W.2d 180 (1997); *Shelter Gen. Ins. Co. v. Williams*, 315 Ark. 409, 867 S.W.2d 457 (1993). In fact, this court has held that named-driver exclusions are valid. *Colonia Underwriters Ins. Co. v. Worthen Nat'l Bank*, 53 Ark. App. 106, 919 S.W.2d 515 (1996). It is true that the cases cited have not dealt with the issue of named-driver exclusions where the named insured excluded himself from liability coverage. However, we find no significant differences from the cases decided by the supreme court and the present case.

An insurer may contract with its insured upon whatever terms the parties may agree upon which are not contrary to statute or public policy. *Shelter Gen. Ins. Co., supra.* When reviewing insurance policies, "where the terms of the policies are clear and unambiguous, the policy language controls; absent statutory strictures to the contrary, exclusionary clauses are generally enforced according to their terms." *Smith, supra.* In *Smith,* appellant advanced the argument that a named-driver exclusion was void as violating public policy under Arkansas' compulsory motor-vehicle liability insurance law, Ark. Code Ann. § 27-22-101 *et. seq.* (Repl. 1994). *Smith, supra.* The court in *Smith* rejected appellant's argument and in doing so relied on the legislative intent of the provisions expressed in § 27-22-101(a): "This chapter is not intended in any way to alter or affect the validity of any policy provisions, exclusions, exceptions, or limitations contained in a motor vehicle insurance policy required by this chapter." The legislature has specifically provided that the compulsory insurance law was not intended to affect the validity of policy exclusions. *Smith, supra.*

Applying Ark. Code Ann. § 27-22-101(a) and *Smith* to this case, we find that the named-driver exclusion excluding Mr. Dennis Smith from coverage is valid.

Affirmed.

JENNINGS, J., agrees.

ROAF, J., concurs.

ANDREE LAYTON ROAF, Judge, concurring. On December 12, 1997, Dennis J. Smith, a single man, purchased a policy of liability-only automobile insurance from appellee Atlantic Casualty Insurance Company, to cover his 1988 Ford Aerostar Van. In his application, under "driver information," Smith listed himself and his sister, who was also single. Nevertheless, in the same application, Smith contracted with Atlantic Casualty to exclude himself as driver of the insured vehicle. Nine days later, Smith was involved in an accident while driving the insured vehicle. He was at fault and allegedly caused injuries to the appellants.

After the appellants filed a negligence action against Smith in Desha County, Atlantic Casualty filed this action for declaratory judgment in Pulaski County Circuit Court, asking that the court

find that it had no obligations arising from the December 21, 1997, accident, due to the named-driver exclusion contained in Smith's policy. The trial court agreed and granted Atlantic Casualty's motion for summary judgment.

I concur with the decision to affirm the award of summary judgment, but only because the question of a named-driver-exclusion clause excluding from liability coverage the sole owner of a vehicle, while an issue of first impression in Arkansas, is a matter to be addressed by the General Assembly, not this court. Further, our supreme court has consistently upheld the validity of such provisions, albeit in cases involving facts distinguishable from the present case. *See Smith v. Shelter Mutual Ins. Co.*, 327 Ark. 208, 937 S.W.2d 180 (1997)(upholding a clause in an automobile liability insurance policy that excluded coverage to the minor son), *Cook v. Wausau Underwriters Ins. Co.*, 53 Ark. App. 106, 919 S.W.2d 515 (1996)(upholding a clause in an automobile liability insurance policy that excluded coverage to the spouse of the policy holder).

Arkansas does not have a statute dealing specifically with named-driver exclusions. These provisions are generally authorized by Ark. Code Ann. § 27-22-101(a) (Repl. 1994), which provides that: "This chapter is not intended in any way to alter or affect the validity of any policy provisions, *exclusions*, exceptions, or limitations contained in a motor vehicle insurance policy required by this chapter." (Emphasis added.) The chapter further provides in Ark. Code Ann. § 27-22-104(a)(1), that "It shall be unlawful for any person to operate a motor vehicle within this state unless the vehicle is covered by a certificate of self-insurance under the provisions of § 27-19-107, or by an insurance policy issued by an insurance company authorized to do business in this state."

Our neighbor to the south, Louisiana, has declared named-driver exclusions invalid as to liability coverage for a named insured, in *Williams v. U.S. Agencies Cas. Ins. Co., Inc.*, 758 So.2d 1010 (La. Ct. App. 2000). In *Williams*, the owner and operator of the vehicle, like Smith, was legally at fault in an accident involving the Williamses and, like Smith, had purchased a liability policy with a named-driver exclusion that purported to exclude him from coverage. However, the Louisiana Court of Appeal had far different legislation to work with in reaching its conclusion that such exclu-

sions are invalid. The relevant Louisiana statute, La. R. S. § 32-900(B)(2) provides that all automobile owner's liability policies:

> Shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of such motor vehicle.

The statute further provides that "notwithstanding the provisions of Paragraph (B)(2) of this Section, an insurer and an insured may by written agreement exclude from coverage any named person who is a resident of the same household as the named insured."

The Louisiana Court of Appeal found that the statute "clearly requires" that a policy provide coverage for the named insured. We have no comparable legislation in Arkansas. Consequently, insurance companies doing business in this state are free to issue liability policies such as the one issued to Dennis Smith, in which there is no liability coverage whatsoever from day one on the named owner-operator. Clearly, they may do so without fear of interference from this court.

Demetrius HEARD *v.* STATE of Arkansas

CA CR 00-113 32 S.W.3d 30

Court of Appeals of Arkansas
Division II
Opinion delivered November 8, 2000

James P. Clouette, for appellant.

Mark Pryor, Att'y Gen., by: *Sandy Moll*, Ass't Att'y Gen., for appellee.

MARGARET MEADS, Judge. Appellant, Demetrius Heard, was convicted in a bench trial of delivery of a counterfeit substance and was placed on probation for a period of five years and assessed a $2,500 fine. His sole point on appeal is that there was insufficient evidence to sustain his conviction. Specifically, appellant contends that there was insufficient evidence presented that the substance delivered was a counterfeit substance and that there was insufficient evidence of his accomplice liability. We agree with appellant's argument, and we reverse and dismiss the conviction.

For evidence to be sufficient, there must be substantial evidence to support the verdict. *Mulkey v. State*, 330 Ark. 113, 952 S.W.2d 149 (1997). Evidence is substantial if it is forceful enough to compel a conclusion one way or the other without having to resort to speculation and conjecture. *Id.* In determining whether the evidence is substantial to support a conviction, the appellate court views the evidence in the light most favorable to the appellee, only considering the evidence that supports the guilty verdict. *Akins v. State*, 330 Ark. 228, 955 S.W.2d 483 (1997).

In the present case, the State presented the testimony of one witness, Officer Randy Mauk of the Lonoke Police Department. Mauk testified that on December 19, 1998, he was working undercover with two other individuals, purchasing illegal drugs. They drove up to appellant, who was standing on a street corner, and asked if he had a twenty-dollar rock of cocaine that he would sell to them. Appellant answered, "No." Appellant then looked over to three individuals seated on a park bench and asked if they had any drugs to sell, and Broderick Davis stood up and approached the car. Davis handed Mauk three wrapped rocks of what appeared to be rock cocaine; however, when Mauk returned to the police station and unwrapped the rocks, he found they were only gravel.

Appellant, citing *Daigger & Taylor v. State*, 268 Ark. 249, 595 S.W.2d 653 (1980), and *Bowles v. State*, 265 Ark. 457, 579 S.W.2d 596 (1979), argues that there is insufficient evidence to show that he was an accomplice to the alleged delivery. The State cites *Yent v. State*, 9 Ark. App. 356, 600 S.W.2d 178 (1983), and *Jacobs v. State*,

317 Ark. 454, 878 S.W.2d 734 (1994), on this point and asks that we affirm. Appellant also argues that there is insufficient evidence to show that a counterfeit substance was delivered. We agree with appellant that there was not sufficient evidence to prove that he was Davis's accomplice, and therefore we do not address the issue of whether the State proved that the substance was counterfeit.

Arkansas Code Annotated section 5-2-403(a) (Repl. 1997) provides:

> A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of an offense, he:
>
> (1) Solicits, advises, encourages, or coerces the other person to commit it; or
>
> (2) Aids, agrees to aid, or attempts to aid the other person in planning or committing it; or
>
> (3) Having a legal duty to prevent the commission of the offense, fails to make proper effort to do so.

In *Bowles, supra*, our supreme court reversed and dismissed appellant's conviction for being an accomplice to the delivery of a controlled substance where the only involvement appellant had concerning the sale was introducing the buyer to the seller. In reversing the conviction, the *Bowles* court quoted from *Henderson v. State*, 255 Ark. 870, 503 S.W.2d 889 (1974):

> There is some apparent conflict in the authorities from other jurisdictions as to whether one who recommends, or directs a purchaser to, a seller of illicit drugs is an accomplice of the seller. In Arkansas, an accomplice, under the statute forbidding conviction of a felony on uncorroborated testimony of an accomplice, is one who could be convicted of the offense of which the defendant is charged. . . . In *Rich v. State*, 176 Ark. 1205, 2 S.W.2d 40, we held, upon the authority of *Wilson v. State*, 124 Ark. 477, 187 S.W. 440, that one who assists a purchaser in buying intoxicating liquors and confines his participation in the transaction exclusively to the buying, not the selling, is not guilty of the offense, and not an accomplice. We have also held that one who was employed as a laborer in the operation of a whiskey still and was an accomplice in its operation and in manufacturing liquor, was not an accomplice of his employer in the possession of the still, because he could not

> be convicted of the crime of possessing a still, either as a principal or accessory. . . . In *Beck v. State*, 141 Ark. 102, 216 S.W. 497, we held that one who acted only as the agent of the buyer of intoxicating liquors and had no other interest in the sale, was not an accomplice of the seller. So long as one acts solely on behalf of the purchaser, he is not an accomplice of the seller. . . . (Citations omitted.)

255 Ark. at 878-79, 503 S.W.2d at 894.

In *Daigger & Taylor, supra*, appellant Taylor was approached by undercover officers attempting to buy LSD, but they were unable to agree on a price. Taylor then took the officers to the Daiggers, who sold LSD to the officers. In reversing Taylor's conviction for delivery of LSD, our supreme court, citing *Bowles*, held that a man who simply introduced the buyer to the seller was not guilty of delivery; the middle man must take a more active part to be a principal or even an accomplice.

The two cases cited by the State are distinguishable from the instant case. In *Yent, supra*, we affirmed appellant's conviction for possession of a controlled substance with intent to deliver, but distinguished the case from *Daigger & Taylor, supra*, stating that the appellant had done much more than introduce the officer to the seller; he had acted as an agent and accomplice of the seller by setting the price, arranging for the meeting, and leading the officer to the meeting place. Similarly, in *Jacobs, supra,* our supreme court held that given appellant's actions during the purchases, it was apparent that he was aiding or attempting to aid in consummating the sales.

Daigger & Taylor, supra, is more analogous to the instant case, where appellant did nothing more than introduce the buyer to the seller. He did not deliver the drugs or accept payment for the drugs, as did the appellant in *Curry v. State*, 258 Ark. 528, 527 S.W.2d 902 (1975), nor did he actively solicit drug sales or benefit financially from such purchases, as did the appellant in *Booker v. State*, 32 Ark. App. 94, 796 S.W.2d 854 (1990). Moreover, he did not set the price, arrange a meeting place for the purchase, make change for the transaction, or comment on the quality of the drugs, as the appellants did in the cases cited by the State. Because appellant was no more than a middle man who merely introduced the undercover officer to the seller, he cannot be considered an accom-

plice and thus cannot be guilty of delivery of a counterfeit substance.

Reversed and dismissed.

ROBBINS, C.J., and CRABTREE, J., agree.

Raymond C. SWEEDEN, *et al.*
v. FARMERS INSURANCE GROUP, *et al.*

CA 99-988 30 S.W.3d 783

Court of Appeals of Arkansas
Division II
Opinion delivered November 15, 2000

Lona McCastlain and *David A. Hodges*, for appellants Raymond C. Sweeden and Ileen P. Sweeden.

Rice, Adams, Beckham & Pulliam, by: *Ben E. Rice*, for appellants Randall A. White, Kenneth White, and Brenda White.

Huckabay, Munson, Rowlett & Tilley, P.A., by: *Julia L. Busfield* and *Bruce Munson*, for appellees.

JOHN MAUZY PITTMAN, Judge. The issues in this appeal concern the extent of liability coverage available under three separate automobile insurance policies, each having per-person bodily injury limits of $100,000. The policies were issued to appellant Kenneth White (and, in the case of one policy, Kenneth White and Kenneth's Auto Sales) by appellees Mid-Century Insurance Company, Farmers Insurance Company, and Farmers Insurance Exchange, all members of the Farmers Insurance Group of Companies. Coverage issues arose in 1996 when an automobile accident occurred between a vehicle driven by appellant Raymond Sweeden and a vehicle driven by Kenneth White's son, Randall. As a result of the accident, Sweeden and his wife, appellant Ileen Sweeden, sued the White family seeking compensation for Raymond's injuries and for Ileen's loss of consortium. Before that suit was resolved, however, the Sweedens filed a complaint for declaratory judgment against appellees claiming that, to obtain redress for their injuries, liability coverage should be available under all three of the Whites' insurance policies. Appellees moved for summary judgment and argued that, as a matter of law, their coverage obligation was limited

to the $100,000 limit of one of the policies. The circuit judge agreed and granted summary judgment in their favor. We affirm.

The accident in which Raymond Sweeden was injured occurred on May 9, 1996. His vehicle was struck from the rear by a 1989 Chevrolet C10 pickup driven by seventeen-year-old Randall White. Following the accident, the Sweedens sued Randall and his parents, Kenneth and Brenda White, alleging that the accident was proximately caused by Randall's negligence. They further alleged that Randall's negligence should be imputed to Kenneth and Brenda White pursuant to Ark. Code Ann. § 27-16-702 (Supp. 1999). That statute provides that the negligence of a minor driver shall be imputed to the person who either signs or is authorized to sign the minor's driver's license application.

As a result of the Sweedens' lawsuit against the Whites, questions arose concerning the extent of liability coverage owed by appellees under the following three policies: 1) a policy issued by Mid-Century Insurance Company to Kenneth White on the 1989 Chevrolet C10 pickup with bodily injury liability limits of $100,000 for each person and $300,000 for each occurrence (hereafter, "the Mid-Century policy"); 2) a policy issued by Farmers Insurance Company to Kenneth White on a 1995 Taurus with bodily injury liability limits of $100,000 for each person and $300,000 for each occurrence (hereafter, "the Taurus policy"); and 3) a commercial garage policy issued by Farmers Insurance Exchange to Kenneth White and Kenneth's Auto Sales with liability limits of $100,000 for each accident (hereafter, "the garage policy"). Appellees acknowledged that $100,000 in coverage was available under the Mid-Century policy, but denied that any further amounts were due under any of the policies.

To resolve the coverage issues, the Sweedens filed the declaratory-judgment complaint that is the subject of this appeal. They sought a declaration that liability coverage was available under all three of the White's policies and that Ileen Sweeden's loss-of-consortium claim should not be included in the per-person bodily injury limits of any one of the policies. In effect, they asserted that up to $400,000 in liability coverage was available under the policies: $300,000 as the total per-person liability limits on the policies, plus another $100,000 for Ileen's loss-of-consortium claim. Kenneth and Brenda White, who were named as defendants in the action along

with the appellee insurance companies, cross-claimed against appellees and agreed with the Sweedens that more than $100,000 in coverage was owed.

On July 25, 1997, appellees filed a motion for summary judgment arguing that, as a matter of law, the total limit of liability coverage available to the White family was $100,000. They contended that: 1) Ileen Sweeden's loss-of-consortium claim was derivative and therefore included in the $100,000 limit of liability for Raymond Sweeden's bodily injury; 2) there was no coverage under the Taurus policy because it excluded coverage for any of Kenneth White's vehicles other than the Taurus; and 3) there was no coverage under either the Taurus policy or the garage policy because they contained "other insurance" clauses that limited coverage to $100,000. Copies of all three policies were attached to the motion. The Sweedens responded to the motion for summary judgment by arguing that: 1) Ileen Sweeden's loss-of-consortium claim was entitled to be treated as a separate bodily injury; and 2) the "other insurance" clauses in the policies were ambiguous and against public policy. The Sweeden's response was adopted by appellants Kenneth and Brenda White.

On November 10, 1997, Circuit Judge Lance Hanshaw denied the motion for summary judgment on the ground that factual issues remained in dispute. Several months later, judgment was entered in the Sweedens' tort case against the White family. The judge found that Randall White was guilty of negligence and that his negligence should be imputed to Kenneth and Brenda White. He awarded $300,000 in damages to Raymond Sweeden and $100,000 to Ileen Sweeden. On February 18, 1999, appellees renewed their motion for summary judgment, asserting the same arguments they had previously made. Following a hearing, Judge Phillip Whiteaker, to whom Judge Hanshaw had transferred the case, granted summary judgment in favor of appellees. The Sweedens and the Whites bring their appeal from that ruling.

In reviewing summary-judgment cases, we determine whether the trial court's grant of summary judgment was appropriate based on whether the evidence presented by the moving party left a material question of fact unanswered. *Norris v. State Farm Fire & Cas. Co.*, 341 Ark. 360, 16 S.W.3d 242 (2000). The moving party always bears the burden of sustaining a motion for summary judg-

ment. *Youngman v. State Farm Mut. Auto. Ins. Co.*, 334 Ark. 73, 971 S.W.2d 248 (1998). All proof must be viewed in the light most favorable to the resisting party, and any doubts must be resolved against the moving party. *Id.* In a case such as this one where there are no disputed facts, our review must focus on the trial court's application of the law to those undisputed facts. *See id.*

The issues in this case involve the construction of language in various insurance policies. A contract is unambiguous and its construction and legal effect are questions of law when its terms are not susceptible to more than one equally reasonable construction. *See Singh v. Riley's, Inc.*, 46 Ark. App. 223, 878 S.W.2d 422 (1994). However, an ambiguity may arise when the language in an insurance policy is susceptible to more than one reasonable interpretation. *See Keller v. Safeco Ins. Co.*, 317 Ark. 308, 877 S.W.2d 90 (1994). Policy language is to be construed in its plain, ordinary, and popular sense. *See Norris v. State Farm, supra.* The terms of an unambiguous insurance policy are not to be rewritten under the rule of strict construction against an insurer to bind an insurer to a risk that is plainly excluded and for which it was not paid. *Shelter Mut. Ins. Co. v. Williams*, 69 Ark. App. 35, 9 S.W.3d 545 (2000).

The first policy language we discuss on appeal is an exclusionary clause contained in the Taurus policy. The policy excludes from liability coverage "bodily injury...arising out of the ownership, maintenance or use of any vehicle other than your insured car which is owned by or furnished or available for regular use by you or a family member." Based on the record before us, the term "your insured car" is defined in the policy for purposes of this issue as the 1995 Taurus. That being the case, we interpret the clause to exclude coverage for bodily injury arising out of the use of any vehicle owned by Kenneth White, other than the Taurus. This type of clause is known as an "owned-but-not-insured" exclusion. *See Clampit v. State Farm Mut. Auto. Ins. Co.*, 309 Ark. 107, 828 S.W.2d 593 (1992) (an underinsured motorist case); *Crawford v. Emcasco Ins. Co.*, 294 Ark. 569, 745 S.W.2d 132 (1988) (an uninsured motorist case). Such clauses preclude recovery for accidents involving a vehicle that is owned by the named insured but that is not insured under the particular policy in question. *See Clampit v. State Farm, supra.* The rationale behind such a clause was noted in *Clampit* as follows:

> If an insurer is required to insure against a risk of an undesignated but owned vehicle, or a different and more dangerous vehicle of which it has no knowledge, it is thereby required to insure against risks of which it is unaware, unable to underwrite and unable to charge a premium therefor.

Id. at 109, 828 S.W.2d at 594.

Here, Kenneth White owned the C10 pickup involved in the accident, but the pickup was not insured under the Taurus policy. Therefore, under the terms of the "owned-but-not-insured" clause, the Taurus policy provides no liability coverage for bodily injury arising out of the use of the C10 pickup.

Having determined that no coverage is owed under the Taurus policy, we address the next set of issues with reference to appellees' coverage obligation under the garage policy. Unlike the Taurus policy, the garage policy has no "owned-but-not-insured" exclusion. In fact, one of the unique features of a garage policy is that, unlike standard automobile liability policies, it does not insure a particular automobile. *See Insured Lloyds Ins. Co. v. Arkansas Truck Parts, Inc.*, 13 Ark. App. 165, 681 S.W.2d 403 (1984). Further, appellees do not argue that Randall White's use of the C10 pickup does not constitute a "garage operation" as defined by the policy. Instead, appellees contend that the garage policy contains "anti-stacking" or "other insurance" language that limits coverage when more than one insurance policy is applicable. The relevant provision reads, in pertinent part, as follows:

> TWO OR MORE COVERAGE FORMS OR POLICIES ISSUED BY US
>
> If this Coverage Form and any other Coverage Form or policy issued to you by us or any company affiliated with us apply to the same 'accident', the aggregate maximum Limit of Insurance under all the Coverage Form [sic] or policies shall not exceed the highest applicable Limit of Insurance under any one Coverage Form or policy.

Appellees argue that, because Mid-Century — the company that issued the C10 — policy and Farmers Insurance Exchange — the company that issued the garage policy — are affiliated, this clause limits their combined coverage obligation to the highest applicable

limit under either policy. Thus, they claim, appellants are prohibited from stacking the two policies to obtain coverage of more than $100,000.

The term "stacking" is used to describe a situation where all available policies are added together to create a larger pool from which the injured party may draw in order to compensate him for his loss where a single policy is not sufficient to make him whole. Neil Chamberlin and J. Stephen Holt, *Why Arkansas Should Overturn Its Anti-Stacking Precedent: A Look At Aggregating Uninsured and Underinsured Motorist Coverage*, 21 UALR L.J. 413 (1999). Insurance companies have often sought, by their policy language, to prevent insureds from stacking coverage. *See id.* Anti-stacking clauses have been upheld by our courts so long as they are not ambiguous. *See generally Smith v. Prudential Prop. & Cas. Ins.*, 340 Ark. 335, 10 S.W.3d 846 (2000); *Youngman v. State Farm Mut. Auto. Ins. Co.*, 334 Ark. 73, 971 S.W.2d 248 (1998); *MFA Mut. Ins. Co. v. Wallace*, 245 Ark. 230, 431 S.W.2d 742 (1968); *Shelter Mut. Ins. Co. v. Williams*, 69 Ark. App. 35, 9 S.W.3d 545 (2000); *Kanning v. Allstate Ins. Cos.*, 67 Ark. App. 135, 992 S.W.2d 831 (1999). The issue of stacking has arisen most often in the context of uninsured or underinsured motorist coverage. In fact, all of the above-cited decisions involve either uninsured or underinsured coverage. This case represents the first time that our courts have addressed the stacking issue with regard to automobile liability insurance. We note however, that stacking of liability coverage has been addressed in other jurisdictions. *See, e.g., Lonergan v. Nationwide Mutual Insurance Co.*, 663 A.2d 480 (Del. Super. 1995), a case with facts very similar to the case at bar. *See also* collected cases at 12 *Couch on Insurance 3d* § 169:109 (1999) and 7A AM. JUR. 2d *Automobile Insurance* § 427 (2d ed. 1997).

The Sweeden appellants and the White appellants raise numerous issues regarding the anti-stacking language in the garage policy. For the sake of clarity and convenience, we will discuss each argument separately.

The Term "Affiliated" As Used in the Garage Policy's "Other Insurance" Clause Is Ambiguous

The garage policy's "other insurance" clause places a limit on the insurance company's coverage obligation in situations where another applicable policy has been "issued to you by us or any company *affiliated* with us." (Emphasis added.) Both the Sweeden appellants and the White appellants argue that the term "affiliated" is ambiguous, *i.e.*, that the insured may not have known that Mid-Century and Farmers Insurance Exchange were affiliated. As we pointed out earlier, an ambiguity may arise in an insurance contract when a term is susceptible to more than one equally reasonable construction. *Keller v. Safeco Ins. Co., supra.* Appellants are unable to demonstrate on appeal a reasonable construction of this particular contract that might have led an insured to believe that Mid-Century and Farmers Insurance Exchange were *not* affiliated. The declarations page of the garage policy lists both Mid-Century and Farmers Insurance Exchange as being members of the Farmers Insurance Group of Companies. Additionally, the Farmers Insurance Group logo appears at various places throughout both policies. Contracts of insurance should receive a practical, reasonable, and fair interpretation consonant with the apparent object and intent of the parties in light of their general object and purpose. *Shelter Mut. Ins. Co. v. Williams, supra.* Further, different clauses in a contract must be read together and construed so that all of its parts harmonize, if that is at all possible. *Boatmen's Ark., Inc. v. Farmer*, 66 Ark. App. 240, 989 S.W.2d 557 (1999).

We also note that, in making this argument, the Sweeden appellants refer to the case of *Yahr v. Garcia*, 177 Mich. App. 705, 442 N.W.2d 749 (1989), which held that an "other insurance" clause involving policies issued by the same company was ambiguous. However, that case was reversed on appeal to the Michigan Supreme Court for the reasons set forth in the dissent in the appeals court case, among them, that the clause was unambiguous. *See Yahr v. Garcia*, 436 Mich. 872, 461 N.W.2d 363 (1990).

In light of all these factors, we decline to reverse the trial judge's grant of summary judgment on the basis of an ambiguity in the word "affiliated."

"Other Insurance" Language in Policies Issued by Affiliated Companies Is Per Se Inapplicable

The Sweeden and White appellants also argue that, because Mid-Century and Farmers Insurance Exchange are affiliated, the "other insurance" clause in the garage policy is inapplicable. As support for their argument, they cite *Woolston v. State Farm Mutual Insurance Co.*, 306 F. Supp. 738 (W.D. Ark. 1969). In *Woolston*, a pedestrian, Jennifer Woolston, was struck and killed by an uninsured motorist. Jennifer's parents owned two policies issued by State Farm, and each of the policies provided $10,000 per person limits on UM coverage. The Woolstons sought coverage under both policies for a total of $20,000. State Farm argued that, due to an "other insurance" clause in their policies, their liability was limited to $10,000. The clause read, in pertinent part that "if the insured has other similar insurance available to him against a loss covered by this coverage, then the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance...." The federal court held that the clause was ambiguous because it did not specifically refer to the fact that "other similar insurance" could be another policy issued by the same company.

The *Woolston* case is easily distinguishable from the case at bar. Here, the "other insurance" clause expressly contemplates the possibility that other applicable insurance has been issued by an affiliated company. Such language makes this case more like *MFA Mutual Insurance Co. v. Wallace, supra*, than *Woolston*. In *MFA v. Wallace*, the insurer issued two separate policies to Wallace on two separate vehicles. MFA resisted Wallace's attempt to stack UM coverage under the two policies based on the following clause:

> Other Automobile Insurance In The Company With respect to any occurrence, accident, death, or loss to which this and any other automobile insurance policy issued to the named insured or spouse by the Company also applies, the total limit of the Company's liability under all such policies shall not exceed the highest applicable limit of liability or benefit amount under any one policy.

This particular language was declared unambiguous by the supreme court in the earlier case of *Varvil v. MFA Mutual Insurance Cos.*, 243 Ark. 692, 421 S.W.2d 346 (1967), which involved an attempt to

stack death benefits under an auto policy. In *Wallace*, the supreme court held that this language was not repugnant to the UM statute requiring that certain minimum coverage be afforded an insured.

The *Woolston* court, in holding that State Farm's "other insurance" clause was ambiguous, distinguished *Wallace* and *Varvil* on the basis that, in those cases, the "other insurance" clause specifically referred to other insurance issued by the same company. The policy language at issue here is very similar to that approved in *Varvil* and *Wallace*, with the exception that it refers to affiliated companies rather than the same company. Having already determined that the term "affiliated" is not ambiguous in this context, we have no difficulty holding that summary judgment was properly granted on this issue.

Before leaving this issue, we distinguish the cases of *Farm Bureau Mutual Insurance Co. v. Barnhill*, 284 Ark. 219, 681 S.W.2d 341 (1984), and *Ross v. United Services Automobile Association*, 320 Ark. 604, 899 S.W.2d 53 (1995), both of which allowed an insured to stack coverages. Both cases involved several vehicles insured under a single policy. In *Barnhill*, the supreme court held that Farm Bureau's "other insurance" clause, which was different than the one at issue here, did not contemplate that the other insurance involved could mean coverages available under the same policy. In *Ross*, the holding was limited to the particular language in the policy (which is not contained in the opinion) which, according to the court, "prohibit[ed] the stacking of *policies*, and not the stacking of *cars* within the policy." Here, appellants are attempting to stack coverages under different policies.

An Ambiguity Exists When The Clause At Issue Is Read In Connection With A Standard "Other Insurance" Clause In The Policy

In addition to the above-quoted "other insurance" clause, the garage policy contained the following clause:

> When this Coverage Form and any other Coverage Form or policy covers on the same basis, either excess or primary, we will pay only our share. Our share is the proportion that the Limit of Insurance of our Coverage Form bears to the total of the limits of all the Coverage Forms and policies covering on the same basis.

The Sweeden appellants argue that this clause, which attempts to prorate the insurer's liability, conflicts with the above-quoted "two or more" clause that sets an overall coverage limit. They rely on the case of *Carlino v. Lumbermens Mutual Casualty Co.*, 74 N.Y.2d 350, 546 N.E.2d 909 (1989). In *Carlino*, it was held that a "two or more" clause like the one here impermissibly reduced the total applicable limits available to an insured. However, the holding was based on a New York insurance regulation that required insurers to ratably contribute when other insurance was involved. Appellants point to no such Arkansas regulation. Thus, we conclude that no inconsistency exists here. The standard "other insurance" clause obviously applies in situations when other applicable policies are issued by a company other than one affiliated with Farmers Insurance Exchange.

Vicarious Liability

The Sweeden appellants argue that the garage policy provides coverage for Kenneth and Brenda White's vicarious liability separate and apart from the coverage provided to Randall White under the C10 policy for his negligence. In effect, they contend that the available policy limits should be increased because more than one insured may be held liable under separate theories of recovery. We disagree with appellants' argument. First, the garage policy provides $100,000 coverage for each "accident." There is no contention that more than one accident occurred in this case. Secondly, the Mid-Century policy provides coverage of $100,000 bodily injury for each person. The policy expressly states that its limit for "each person" is the maximum for bodily injury sustained by any one person in any one occurrence. It further provides that the company will pay no more than the maximum limits regardless of the number of insured persons involved in the occurrence. Thus, the $100,000 limit for "each person" referred to in the policy means $100,000 for each injured person, not for each insured person.

Appellants cite cases from other jurisdictions in support of their argument. *See, e.g., United Servs. Auto. Ass'n v. Crandall*, 95 Nev. 334, 594 P.2d 704 (1979); *Klatt v. Zera*, 11 Wis.2d 415, 105 N.W.2d 776 (1960). However, these cases hold only that an insurer may owe coverage to an insured parent who incurs vicarious liabil-

ity for his child's negligence in driving an automobile. None of the cited cases stands for the proposition that a policy's per-person limits may be increased when more than one insured is liable for damages.

Uninsured/Underinsured Cases Not Applicable

The Sweeden appellants also argue that Arkansas cases that have approved anti-stacking language are inapplicable here because they involve uninsured and underinsured coverage rather than liability coverage. No cogent reason is offered for why this distinction is important. Appellants refer to the fact that our supreme court has said that, to analyze any stacking issue, the court should "Read the Statute and Read the Policy." *See Youngman v. State Farm, supra.* However, they claim that "[w]ithout uninsurance [sic] or underinsurance at issue, there is no statute to read." This is incorrect. The "statute" referred to in the supreme court's maxim is the statute that mandates that liability insurers offer minimum UM or UIM coverage. *See* Ark. Code Ann. §§ 23-89-209 and 23-89-403 (Repl. 1999). As with these types of coverages, Arkansas law also mandates minimum liability coverage. *See* Ark. Code Ann. § 27-19-605 (Repl. 1999). Thus, we see no relevant distinction for purposes of this case.

Garage Policy Issued to Two Separate Entities

The "other insurance" clause at issue in this case aggregates policy limits when another policy has been "*issued to you* by us or any company affiliated with us...." (Emphasis added.) The Sweeden appellants argue that, because the garage policy was issued to two separate entities — Kenneth White and White's Auto Sales — the term "issued to you" is ambiguous. They cite *Aetna Casualty & Surety Co. v. Home Insurance Co.*, 44 Mass. App. 218, 689 N.E.2d 1355 (1998), in which it was held that an "other insurance" clause identical to the one here applied only when the policy was issued to a single owner, not when it was issued to two separate entities. The record as abstracted does not show that appellants made this argument below. We do not address arguments made for the first time on appeal. *Hendricks v. Burton*, 1 Ark. App. 159, 613 S.W.2d 609 (1981). Additionally, appellants make the argument for the first time in their reply brief, which is not permitted. *See Farmers &*

Merchants Bank v. Deason, 25 Ark. App. 152, 752 S.W.2d 777 (1988).

Arkansas Decisions Upholding Anti-Stacking Clauses Should Be Overruled

The White appellants argue that *MFA v. Wallace* and its progeny, which have upheld anti-stacking language in insurance policies, should be overruled. This court is not permitted to overrule cases handed down by our supreme court. *Eisner v. Fields*, 67 Ark. App. 238, 998 S.W.2d 421 (1999). Our attempt to certify the case to the supreme court was denied, no doubt because the court only recently rejected this same argument in *Youngman v. State Farm Automobile Insurance, supra.*

In light of the forgoing, we hold that the anti-stacking language contained in the garage policy was not ambiguous and was applicable to this case. Therefore, appellees' coverage obligation was limited to the highest applicable limits, which would be the $100,000 per-person limits available under the Mid-Century policy.

The only issue that remains is whether Ileen Sweeden's loss-of-consortium claim constitutes a separate "per-person" bodily injury, such that the Mid-Century policy's $300,000 per occurrence limit rather than its $100,000 per-person limit should apply. We hold it does not. The Mid-Century policy provides that any claim for loss of consortium shall be included in the per-person limit. A similar and even less specific (it did not mention loss of consortium) restriction was upheld in *Smith v. State Farm Mutual Automobile Insurance Co.*, 252 Ark. 57, 477 S.W.2d 186 (1972).

Affirmed.

GRIFFEN and ROAF, JJ., agree.

Carla L. LOVE *v.* DIRECTOR,
Arkansas Employment Security Department;
and Brentwood Industries, Inc.

E 99-212 30 S.W.3d 750

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered November 15, 2000

[redacted]

No briefs filed.

JOSEPHINE LINKER HART, Judge. Carla Love appeals a decision of the Arkansas Board of Review ("Board") that reversed the Appeal Tribunal's award of unemployment insurance benefits and concluded that she was disqualified from receiving those benefits because of her misconduct in connection with her work. After her termination, appellant sought benefits and stated that she was in constant contact with Brentwood Industries, Inc. ("Brentwood"), her employer, regarding her hand injuries, that she was excused from work by her treating physician, and that she was informed by appellee that there was no longer any work available for her when both of her hands began bothering her. We affirm.

Appellant was employed by Brentwood from April 30, 1996, until her termination on April 26, 1999. Beginning June 1, 1997, Brentwood's attendance policy, a copy of which appellant acknowledged receiving, provided that if an employee accumulated 6.5 occurrences[1], then he was given a written warning; if he incurred 6.5 additional occurrences in the next six-month period, then he was placed on probation and monitored during the following year; and if he received three more occurrences within six months of the monitoring year, then the employee was subject to termination.

While employed by Brentwood, appellant suffered from work-related carpal tunnel syndrome for which she received uncontroverted workers' compensation benefits, including medical expenses for her October 7, 1998, surgery to her right wrist. Appellant returned to work the following day and was later allowed, under her physician's orders, to perform some light-duty work, including work that involved writing. During the first several days after she

[1] One tardiness equaled one-half occurrence; and one day's absence equaled one occurrence.

returned to work, appellant mainly sat in the conference room because the medications she took apparently prevented her from working. Thereafter, she was provided light-duty work — such as filling glue bottles with her left hand, picking up clothes pins, taking off clothes pins, and some cleaning — but she complained that she was unable to perform those functions. In addition, Brentwood gave her clerical assignments, and during her last week at work, she was cleaning the break room, which included cleaning table-tops and a refrigerator with a wet rag, and removing trash from the parking lot.

Despite these offerings of light-duty work, appellant was excessively absent from work. Specifically, she was absent the following days: on the 19th and part of the 26th of August, 1998; on the 11th, 19th, and 26th of September, 1998; on the 6th, 19th, and 26th through 28th of October, 1998; on the 3rd, 8th, 9th, 28th, 30th and 31st of December, 1998; on the 4th through 30th of January, 1999; on the 1st through 3rd, and part of the 8th of February, 1999; and on the 6th and 19th of April, 1999. Despite her numerous absences, appellant offered only one note from her doctor that plainly excused her from work, but the note only excused her from work for two weeks.

The Board noted in its decision that appellant "acknowledged in her testimony that she was aware the employer required medical substantiation of the need to miss work and of her failure to provide such substantiation." In particular, the Board found that appellant was reminded

> that her employer did not have medical documentation substantiating her need to be off work, although [a] . . . letter written in December 1998 was apparently written after the claimant had obtained [the] . . . excuse for two of the weeks of work she missed in December but before the employer's personnel manager learned of that. Even after receiving the December letter, [appellant] . . . missed most of January 1999, and the first medical statement she provided was dated mid-month and was not an excuse from work but a restatement of her ability to perform light duty work. It was [appellant's] . . . responsibility to provide medical documentation needed to support her time off work.

Finally, despite receiving a written warning and a three-day suspension for excessive absences in December, 1998, the Board found

that appellant admitted she was absent from work all day on April 19, 1999, because of vehicle problems notwithstanding the fact that her vehicle was repaired mid-way through her shift. The Board, accordingly, concluded that appellant's failure to provide timely medical documentation supporting the overwhelming majority of her absences and her absence on April 19 constituted misconduct that justified a denial of unemployment compensation benefits pursuant to Ark. Code Ann. § 11-10-514 (Repl. 1996). From that decision, comes this appeal.

As we recently stated in *Barb's 3-D Demo Serv. v. Director*, 69 Ark. App. 350, 354, 13 S.W.3d 206, 208 (2000) (citations omitted), our scope of appellate review in cases such as this is limited:

> On appeal, the findings of the Board of Review are conclusive if they are supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. We review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board's findings. Even when there is evidence upon which the Board might have reached a different decision, the scope of judicial review is limited to a determination of whether the Board could reasonably reach its decision upon the evidence before it.

The evidence when viewed through this narrow scope of review demonstrates that appellant knew of Brentwood's attendance policy, knew that she was required to provide medical documentation to substantiate her absences, and failed to provide the requisite information to Brentwood. The statutory authority on which the Board relied is Ark. Code Ann. § 11-10-514(a), which provides that "an individual shall be disqualified for benefits if he was discharged from his last work for misconduct in connection with the work." The seminal decision concerning "misconduct" as used in this statute is *Nibco, Inc. v. Metcalf*, 1 Ark. App. 114, 118, 613 S.W.2d 612, 614 (1981), where we announced the following definition of the term:

> [M]isconduct involves: (1) disregard of the employer's interests, (2) violation of the employer's rules, (3) disregard of the standards of behavior which the employer has a right to expect of his employees, and (4) disregard of the employee's duties and obligations to his employer.

> To constitute misconduct, however, the definitions require more than mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies, ordinary negligence in isolated instances, or good faith error in judgment or discretion. There must be an intentional or deliberate violation, a willful or wanton disregard, or carelessness or negligence of such degree or recurrence as to manifest wrongful intent or evil design.

See also Niece v. Director, 67 Ark. App. 109, 112, 992 S.W.2d 169, 171 (1999).

In the case at bar, we conclude that Brentwood had a legitimate interest in information concerning when and if injured employees were excused from work by their treating physicians. Certainly such information was needed to properly plan for labor requirements. The intentional or deliberate failure to furnish such information was a willful disregard of the employer's interest and of the standards of behavior that it had a right to expect of its employees. There was no substantial evidence in this case to support a finding that the failure to furnish this information was not intentional or deliberate. The decision of the Board of Review is, therefore, affirmed.

Affirmed.

ROBBINS, C.J., and JENNINGS, CRABTREE, and MEADS, JJ., agree.

GRIFFEN, J., dissents.

WENDELL L. GRIFFEN, Judge, dissenting. I cannot agree to affirm the Board of Review's decision denying benefits in this unemployment case upon the finding that the claimant was discharged for misconduct connected with her work. Rather, I would reverse and remand with instructions that the Board of Review award benefits.

Arkansas Code Annotated Section 11-10-514(a)(2)(Supp. 1999) requires that in all cases of discharge for absenteeism, ". . . the reasons for the absenteeism shall be taken into consideration for purposes of determining whether the absenteeism constitutes misconduct." We have frequently stated that to constitute misconduct, there must be more than mere inefficiency, unsatisfactory conduct,

failure in good performance as the result of inability or incapacity, inadvertencies, ordinary negligence in isolated instances, or good-faith error in judgment or discretion; there must be an intentional or deliberate violation, a willful or wanton disregard, or carelessness or negligence of such degree or recurrence as to manifest wrongful intent or evil design. *See Carraro v. Dir.*, 54 Ark. App. 210, 924 S.W.2d 819 (1996).

Carla Love suffered a work-related injury (carpal tunnel syndrome) that caused her to miss a considerable amount of work. While the Board of Review did not "consider the absences due to the work-related injuries, in and of themselves, to be willful acts against the employer's best interests as would constitute misconduct connected with the work within the meaning of the law, as they were matters beyond the claimant's control," the Board denied Love's unemployment claim because she failed to provide medical statements excusing her from work. The claimant provided medical statements indicating that she needed light-duty work. The employer had light-duty work available that the claimant did not believe she could perform. She also missed part of her work day on April 19, 1999, due to vehicle problems.

The record fully shows that the employer terminated the claimant after she was unable to do "light duty" work that was plainly inconsistent with the restrictions imposed by her attending doctor. The claimant underwent a carpal tunnel release procedure on her right hand on October 7, 1998, and returned to work the following day. Although her doctor consistently indicated that she was not to be assigned to work involving repetitive use of her hands, the employer's "light duty" assignments required the claimant to fill glue bottles, pick up clothespins, and engage in filing, tasks which involved repetitive hand movements. Filling the glue bottles required claimant to unscrew the bottle tops, pour glue into the bottles using a spigot, and rescrew the bottle tops.

Despite the fact that the employer had a workers' compensation insurance representative to monitor the claim and interact with the attending doctor concerning work assignments and whether the claimant was authorized to be off work, the record does not show that the insurance representative did so. Rather, the record shows that the employer deliberately continued assigning the claimant to such "light duty" work involving repetitive hand movements even

after her left hand developed symptoms and despite the fact that the attending doctor's written statements indicated that she should have such work if it involved "*NO repetitive use of hands. Otherwise, cannot work.*" Even after the claimant inquired about getting a leave of absence, the employer would not accommodate her.

Our duty to affirm the Board of Review when its decisions are supported by substantial evidence does not compel us to ignore how the employer in this case disregarded restrictions outlined by the claimant's attending physician despite knowing that the claimant was unable to work unless the restrictions were followed. The employer then terminated the claimant for missing work and refused to pay unemployment benefits. I cannot join the view that the claimant willfully or wantonly acted in disregard of the employer's interest where the employer's conduct put her health at risk. Thus, I would reverse the Board of Review and remand the claim so that benefits can be awarded.

I respectfully dissent.

Rufus Antonio BOX *v.* STATE of Arkansas

CA 99-1242 30 S.W.3d 754

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered November 15, 2000

Scott S. Freydl, for appellant.

Mark Pryor, Att'y Gen., by: *C. Joseph Cordi, Jr.*, Ass't Att'y Gen., for appellee.

JOHN E. JENNINGS, Judge. The appellant, Rufus Antonio Box, was charged by information in circuit court with the offenses of residential burglary, rape, and terroristic threatening in the first degree. He was sixteen years old at the time the offenses were allegedly committed and when the information was filed. This is an interlocutory appeal from an order denying appellant's motion to transfer these charges to juvenile court.

Appellant urges two points for reversal. He argues: (1) that the trial court erred in denying the motion due to the State's failure to offer any evidence concerning the seriousness of the offenses with which he was charged; and (2) that the trial court erred by failing to make written findings to support its decision. We find no error and affirm.

The trial court held a hearing on appellant's motion to transfer. It was brief, consisting primarily of argument of counsel, although the State did introduce into evidence exhibits showing appellant's past criminal record both in juvenile and circuit court. In its order denying the motion, the court stated its reasons as "the seriousness of the offense, that this offense is a repetitive pattern of

violence towards persons, the prior history, mental maturity and character traits" of the appellant.

Appellant first argues that the trial court erred in retaining jurisdiction because the State failed to present any evidence concerning the seriousness of the offenses as required by the decision in *Thompson v. State,* 330 Ark. 746, 957 S.W.2d 1 (1997). We find no error.

To determine whether a case should be transferred to juvenile court, the following factors are to be considered:

> (1) The seriousness of the offense, and whether violence was employed by the juvenile in the commission of the offense;
>
> (2) Whether the offense is part of a repetitive pattern of adjudicated offenses which would lead to the determination that the juvenile is beyond rehabilitation under existing rehabilitation programs, as evidenced by past efforts to treat and rehabilitate the juvenile and the response to such efforts; and
>
> (3) The prior history, character traits, mental maturity, and any other factor which reflects upon the juvenile's prospects for rehabilitation.

Ark. Code Ann. § 9-27-318(e) (Repl. 1998). In reviewing a transfer-denial decision, we do not overturn the circuit court unless the decision is clearly erroneous. *Brown v. State,* 330 Ark. 603, 954 S.W.2d 273 (1997).

In *Thompson v. State, supra,* the supreme court held that the State could no longer rely upon the allegations contained in the information alone to establish the seriousness of the offenses. The court said that a "meaningful hearing" was required in which some evidence was to be presented to substantiate the serious and violent nature of the charges. Even so, a circuit court does not have to give equal weight to each of the three statutory factors; nor does evidence have to be presented regarding each factor. *Heagerty v. State,* 335 Ark. 520, 983 S.W.2d 908 (1998).

Here, in addition to the seriousness and violent nature of the charges, the trial court also found the current charges to be part of a repetitive pattern of adjudicated offenses of increasing violence towards persons. The record shows that appellant was adjudicated a delinquent juvenile in 1995. A docket entry from that case dated

November 6, 1997, reflects that appellant had "been in and out of detention in Hot Springs." Another entry, dated August 17, 1998, states that he was "in adult criminal detention in Hot Springs." In February of 1999, just four months prior to the filing of the present charges, appellant was found guilty as an adult on multiple charges of second-degree battery, arson, criminal mischief in the second degree, and aggravated assault on an employee of a correctional facility. Thus, there is evidence in the record to show that the charges were part of a repetitive pattern of offenses, that past efforts at rehabilitation had proved unsuccessful, and that the pattern of offenses had become increasingly more serious. We cannot say that the trial court's decision is clearly erroneous. *See Sanford v. State*, 331 Ark. 334, 962 S.W.2d 335 (1998); *Brown v. State, supra; Sebastian v. State,* 318 Ark. 494, 885 S.W.2d 882 (1994).

Appellant's next argument is based on the provision in Act 1192 of 1999, which amended Ark. Code Ann. § 9-27-318(g) (Supp. 1999) to require that the court "shall make written findings" in making the decision either to retain or transfer the case to juvenile court. Appellant argues that the amendment was in effect at the time of the hearing and that the trial court erred by failing to make written findings. Appellant, however, did not raise this issue in the trial court.

In our view, this provision can be likened to Ark. Code Ann. § 5-4-310(b)(5) (Repl. 1997), which requires that a court "shall furnish a written statement of the evidence relied upon and the reasons for revoking suspension or probation." It has been held that this right, like any other procedural right, can be waived by the failure to object. *Brandon v. State*, 300 Ark. 32, 776 S.W.2d 345 (1989); *Lockett v. State*, 271 Ark. 860, 611 S.W.2d 500 (1981); *Hawkins v. State*, 270 Ark. 1016, 607 S.W.2d 400 (Ark. App. 1980). We see no reason to apply a different rule here. A timely request or objection would have enabled the trial court to rule on the issue of whether the amendment applied and to correct whatever deficiency there may have been in the order. *See Hawkins v. State, supra.* Additionally, in *Butler v. State*, 324 Ark. 476, 922 S.W.2d 685 (1996), the appellant argued that the trial court was required to make written findings of fact to support its decision to deny a transfer to juvenile court as a matter of due process, based on the decision in *Kent v. United States*, 383 U.S. 541 (1966). The supreme court declined to address the issue because there had been no

objection made below, noting that even constitutional issues will not be heard for the first time on appeal. Thus, we conclude that appellant's failure to object precludes consideration of this point on appeal.

Affirmed.

ROBBINS, C.J., HART, CRABTREE, and MEADS, JJ., agree.

GRIFFEN, J., dissents.

WENDELL L. GRIFFEN, Judge, dissenting. I respectfully dissent from the majority opinion because I believe Arkansas Code Annotated section 9-27-318(g), as amended in 1999, requires the trial court to enter written findings. Therefore, I would reverse and remand the case with instructions to do so.

By Act 1192 of 1999, the General Assembly substantially changed the juvenile code and statutes governing juvenile jurisdiction and proceedings. Act 1192 contained no emergency clause and became effective on July 30, 1999. One statute affected by the 1999 changes is Arkansas Code Annotated section 9-27-318, which governs the procedure for transferring cases between circuit and juvenile courts. Subsection (g) mandates that when a court makes a decision to retain or transfer a case, the court *shall* make written findings and consider ten enumerated factors.[1] If the court finds that

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[1] Section 9-27-318 lists the factors as follows:

> (1) the seriousness of the alleged offense and whether the protection of society requires prosecution as an extended juvenile jurisdiction offender or in circuit court; (2) whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner; (3) whether the offense was against a person or property, with greater weight being given to offenses against persons, especially if personal injury resulted; (4) the culpability of the juvenile, including the level of planning and participation in the alleged offense; (5) the previous history of the juvenile, including whether the juvenile had been adjudicated a juvenile offender and, if so, whether the offenses were against persons or property, and any other previous history of antisocial behavior or patterns of physical violence; (6) the sophistication or maturity of the juvenile as determined by consideration of the juvenile's home, environment, emotional attitude, pattern of living, or desire to be treated like an adult; (7) whether there are facilities or programs available to the court which are likely to rehabilitate the juvenile prior to the expiration of the court's jurisdiction; (8) whether the juvenile acted alone or was part of a group in the commission of the alleged offense; (9) written reports an other materials relating to the juvenile's mental, physical, educational and social history; and (10) any other factors deemed relevant by the court.

Ark. Code Ann. § 9-27-318 (Supp. 1999).

clear and convincing evidence supports trying a juvenile as an adult, it must enter an order to that effect.

In an analogous situation, Rule 33.1, which governs motions for directed verdict and motions for dismissal was amended, effective immediately, in 1999. This court held in *Trammell v. State*, 70 Ark. App. 210, 214, 16 S.W.3d 564, 567 (2000) that even though the incident leading to the proceeding occurred before the effective date of the amendment, the fact that the amendment did not criminalize conduct that was previously noncriminal, increase the severity or harshness of the offense, or deprive the juvenile of an available defense, mandated that the trial court follow the rule in effect at the time of the proceeding. In *Trammell*, the defense failed to renew its motion for directed verdict at the close of a bench trial as required by the amended version of Rule 33.1, which had been in effect less than thirty days before the proceeding took place.

Although the majority disagrees, I am firmly convinced that we should follow our decision and rationale in *Trammel*. Section 9-27-318, as amended, was in effect at the time of the proceeding, even though the incident giving rise to the proceeding took place prior to the act becoming effective. Also, section 9-27-318 is entirely procedural in nature. The fact that the amendment does not criminalize conduct that was previously legal, does not increase the severity or harshness of punishment for the offense, and does not deprive a juvenile of a previously available defense mandates that the trial court follow the rule in effect at the time of the proceeding.

In the instant case, appellant was charged with committing the offenses of rape, residential burglary and terroristic threatening on June 3, 1999, less than sixty days before the amended version of section 9-27-318 took effect. However, the transfer hearing took place on August 23, 1999, after the amended version of section 9-27-318 became effective. Thus, section 9-27-318, as amended in 1999, applies to the instant case.

The majority correctly observes that although Arkansas Code Annotated section 5-4-310(b)(5) (Repl. 1997) requires a trial court to prepare and furnish a written statement of the evidence relied upon to the defendant, our court has affirmed probation revocations when the appellant failed to show prejudice as a result of the

trial court's failure to provide a written statement. *See Phillips v. State*, 25 Ark. App. 102, 752 S.W.2d 301 (1988). We observed in *Phillips* that one of the reasons for the written statement was to allow a defendant to know the precise basis for the trial court's decision in order for the defendant to assert an intelligent appeal. *See id.*, 752 S.W.2d 301.

Probation revocations are materially different from deciding to transfer from circuit court to juvenile court. Probation revocations put into execution a sentence for which a person's guilt has already been determined. That person, by definition, has been tried and convicted as an adult. But Arkansas Code Annotated section 9-27-318(g), which mandates a trial court to make written findings when deciding whether to retain or transfer jurisdiction, addresses the more fundamental question of where the charges will be adjudicated and whether the accused will be tried as a juvenile or as an adult. The accused in this situation cannot possibly know why the court decided as it did absent written findings mandated by the statute. That is a far cry from a probation revocation where the conduct upon which the revocation is based will often have an underlying criminal charge for which the accused may have been convicted. And even where that is not the case, probation revocation proceedings are themselves a trial on the merits of the allegations of the probation revocation petition. This is not true in transfer decisions.

At the close of the hearing in the instant matter, the trial judge announced he would issue a ruling on the motion to transfer. The ruling was issued in the form of a written order, which is the subject of this appeal. As the present case indicates, a trial judge deciding a transfer case will often announce that a ruling on the motion will be issued at a later time. Thus, the accused cannot know whether the judge will comply with the statutory requirement for written findings until the court issues the ruling. Once the ruling is issued, the only recourse available to the accused is an appeal. Thus, I disagree with the State that appellant failed to preserve his argument that the trial court failed to comply with section 9-27-318.

The order entered by the trial court summarily states "[c]oncurrent jurisdiction (*sic*) exists because Defendant is at least 16 years of age and the charged (*sic*) is a felony. This court has

considered the seriousness of the offense, that this offense is a repetitive pattern of violence towards persons, the prior battery, mental maturity and character traits." Because the order does not make specific findings of fact, we can only guess whether the trial court considered the statutory factors.

Sarah ELLISON *v.* THERMA TRU;
Liberty Mutual Insurance Company;
and Second Injury Fund

CA 00-126 30 S.W.3d 769

Court of Appeals of Arkansas
Divisions I, II, and III
Opinion delivered November 15, 2000

Walker, Shock, Harp & Hill, P.L.L.C., by: *Eddie H. Walker, Jr.*, for appellant.

Ledbetter, Cogbill, Arnold & Harrison, L.L.P., by: *E. Diane Graham*, for appellee Therma Tru.

SAM BIRD, Judge. In this second appeal to this court, the appellant, Sarah Ellison, contends that the Commission erred by determining that she had not proven by a preponderance of the evidence that she is permanently and totally disabled and could be categorized as falling under the odd-lot doctrine. Because substantial evidence exists to support the Commission's decision, we affirm.

At the hearing before the administrative law judge, Ellison testified that she had experienced two non-work-related injuries to her back, in 1987 and 1989. She began working for Therma Tru in 1979, and her job required her to "pull loads of door stiles across the floor onto my machine." She suffered a compensable injury in 1991 while she was employed with Therma Tru and was pulling a

load of door stiles when she felt a "pop" in her back. She suffered recurrences of her injury in 1992 and 1993. The injury was accepted as compensable by Therma Tru, which paid indemnity and medical benefits. Ellison then claimed that she was permanently and totally disabled.

Ellison testified that she was terminated from Therma Tru on June 30, 1993, after her second recurrence "because her pain became so severe" that she could not cope with it. She testified that she has not worked since, and that she has not applied for any other jobs, but that she has asked to return to Therma Tru but was refused. After she was terminated, she presented to Dr. Stephen Heim, an orthopaedic surgeon. She stated that she is in constant pain and cannot sit or stand for a long period of time. She admitted that she did not see a doctor for her back condition in 1994, 1995, or 1996, and that she had not attended or scheduled any follow-up appointments with Dr. Heim since February 1997 because, she stated, Dr. Heim seemed to think there was nothing he could do to help her.

She also states that she had experienced respiratory and breathing problems in the past, as early as 1983, having been diagnosed with bronchitis and other respiratory problems. An inhaler was prescribed for her in 1988 by Dr. Sasser. She has smoked for approximately thirty years and has been told by doctors several times that she should quit. She said that she missed work in 1991 for her respiratory breathing problems, and that her problems had worsened. She stated, "I don't have much breath. Just any little thing and I'm out of breath. ... Moving around or strenuous things cause me to run short of breath. Just trying to walk or anything." She stated that she is able to go grocery shopping, cook, and do laundry, but that she has to stop, sit down, and take a breath.

She stated that the effects of her back injuries, coupled with her respiratory problems, do not allow her to work. She testified, "If I had a job that I could just sit and use my hands I could do it if it were not for my respiratory problem. But if I'm going to be moving around or anything strenuous I could not do it with my respiratory [problems], neither with my back. I think I can do sedentary work."

She contends that she was permanently and totally disabled due to the combined effects of the 1991 injury and the 1992 and 1993 recurrences and her preexisting condition of chronic obstructive pulmonary disease. The Second Injury Fund was joined as a party, and it denied any liability for benefits, while Therma Tru denied that Ellison is permanently and totally disabled.

Medical evidence presented to the administrative law judge included reports from Dr. Harford, whose notes reflected that Ellison had suffered a back injury at work on May 8, 1991, which caused her severe pain resulting in numbness and tingling into her left leg and foot. She was released to return to work on October 31, with specific instructions not to push any carts by herself. Ellison returned to Dr. Harford on December 7, 1992, stating that she had reinjured her back pulling carts, but that someone was helping her pull carts. He wrote, "She is just a small frail lady and I do not think she is going to manage to continue working in this type of work without injuring herself on a frequent basis." On January 21, 1993, Dr. Harford stated that Ellison was markedly improved, and he released her from his care but instructed her to never again push carts. On July 21, 1993, Dr. Harford stated that Ellison needed to change occupations; that she is not able to do factory work.

Dr. Stephen Anthony Heim, an orthopaedic surgeon, testified by deposition that Ellison was diagnosed with having a herniated disc in 1991, but that she did not require surgery. He stated that she was temporarily totally disabled on August 12, 1993. On August 20, he assigned her a 6% impairment rating. In doing so he stated that it would be difficult to divide the 6% impairment rating because it would be hard to determine how much of it is due to Ellison's underlying back condition and how much of it is due to her job-related injury in 1991. When he first saw her, Dr. Heim instructed her not to do any lifting or twisting and to return to him on September 25. Ellison did not keep her appointment. However, Ellison returned to him in 1997, after her attorney informed her that she needed to have another check-up.

In his deposition Dr. Heim stated:

> If Ms. Ellison's condition has not significantly improved since August 12, 1993, I would recommend that she use proper lifting techniques. I would ask her to keep her muscles in good condition and I would ask her to possibly occasionally wear a back brace

> when she is doing things that are of high activity in nature. I would ask her to refrain from any repetitive bending at the waist and any lifting heavy loads. I would say 25 pounds or above from ground level. There is no medical reason for an employer not to allow Ms. Ellison to work within these restrictions.

Additionally, in a report dated February 6, 1997, Dr. Heim stated that Ellison was not a good candidate for vigorous activity that requires a lot of bending, stooping, and lifting. He stated, "She could have a sedentary job."

Various medical notes were also introduced showing that Ellison had seen several doctors who had diagnosed her with upper respiratory problems, including emphysema, chronic obstructive pulmonary disease, and recurrent acute bronchitis. In addition, several of the doctors had recommended that she stop smoking, but all the medical notes indicated that she had not done so. On October 11, 1993, Dr. Sills noted in his records that Ellison "had been given a note stating that she is unable to work due to her severe chronic obstructive pulmonary disease and back pain."

A pulmonary function report prepared by Dr. David R. Nichols was also introduced into evidence. Although not abstracted by Ellison in her second appeal to this court, the report was relied upon by the Commission. The report stated that Ellison had a mild obstructive pulmonary impairment and that the degree of functional impairment was found to be moderate.

Based upon evidence adduced at the hearing, the Commission determined that Ellison had a one-percent permanent impairment and a two-percent wage loss, and it absolved the Second Injury Fund of any liability. This court reversed the Commission and remanded the case, stating that the Second Injury Fund did have some liability in the case; that the Commission should have applied the law as it existed in 1991, rather than Act 796 of 1993; and we instructed the Commission to consider the applicability of the odd-lot doctrine to Ellison. *See Ellison v. Therma Tru*, 66 Ark. App. 286, 989 S.W.2d 987 (1999).

Following our remand, the Commission delivered an opinion finding that the odd-lot doctrine was not applicable to Ellison because she had not proven that she was permanently and totally

disabled. It also found that she has a wage-loss disability of 8% to the body as a whole. The Commission stated that, at the time of the hearing, Ellison was 61 years old, that she had a 10th grade education, and that the majority of her work had included tasks involving labor-intensive activity in an industrial setting. In its opinion, the Commission considered Ellison's testimony that she has constant pain in her back that does not allow her to sit or stand for long periods of time. She said that she has respiratory problems, and that those problems, coupled with her back injury, would not allow her to continue to work.

However, the Commission found that she had not introduced any credible evidence from a physician or from a vocational counselor that she is totally disabled. The Commission, instead, relied upon testimony from Dr. Heim, the only physician that had treated her since 1993, who found that even though she was not a good candidate for vigorous activity that requires a lot of bending, stooping, and lifting, she was improving slightly and that she could maintain a sedentary job. The Commission also took note of Dr. Harford's opinion that Ellison was going to need to find another line of work.

In addition, the Commission chose specifically not to believe Ellison's testimony that her respiratory condition had recently deteriorated because medical evidence had shown the opposite. It relied upon a physician's testimony that Ellison had a *mild* obstructive pulmonary impairment with a *moderate* degree of functional impairment.

The Commission then wrote:

> In light of Dr. Nichols' conclusion in 1994 that the claimant had a mild obstructive pulmonary impairment with a moderate degree of functional impairment, and in light of Dr. Heim's assessment in 1997 that the claimant could return to sedentary work, we are not persuaded by the claimant's testimony that no employer would hire her in her condition. The claimant has acknowledged that she has not sought any employment from her employer (other than from the respondent) since she last worked in 1993. In light of the medical reports of Dr. Nichols and Dr. Heim, we are not persuaded by the claimant's testimony that she has presented a prima facie case that she fits within the odd lot category.

The Commission then ordered the Second Injury Fund to pay Ellison an 8% impairment to her wage-earning capacity and Therma Tru to pay for the 1% anatomical impairment rating to the body as a whole.[1] Ellison brings this appeal contending that the Commission erred in finding that she is not permanently and totally disabled and that the odd-lot doctrine is not applicable.

On appellate review, we view the evidence in the light most favorable to the findings of the Commission and give the testimony its strongest probative force in favor of the action of the Commission. *Patterson v. Arkansas Dep't of Health,* 70 Ark. App. 182, 15 S.W.3d 701 (2000); *Buford v. Standard Gravel Co.*, 68 Ark. App. 162, 5 S.W.3d 478 (1999). Our standard of review on appeal is whether the Commission's decision is supported by substantial evidence. *Patterson v. Arkansas Dep't of Health, supra; Buford v. Standard Gravel Co., supra.* Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.*Patterson v. Arkansas Dep't of Health, supra*; *Buford v. Standard Gravel Co., supra.* We do not reverse a decision of the Commission unless we are convinced that fair-minded persons with the same facts before them could not have arrived at the conclusion reached. *Patterson v. Arkansas Dep't of Health, supra; Buford v. Standard Gravel Co., supra.* In cases where the Commission's denial of relief is based upon the claimant's failure to prove entitlement by a preponderance of the evidence, the substantial-evidence standard of review requires us to affirm the Commission's action if its opinion displays a substantial basis for the denial of relief. *Patterson v. Arkansas Dep't of Health, supra.*

Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. *Arkansas Dep't of Health v. Williams*, 43 Ark. App. 169, 863 S.W.2d 583 (1993). We defer to the Commission's findings on what testimony it deems to be credible. *Id.* When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. *Id.* The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and

[1] Neither the Second Injury Fund nor Therma Tru cross-appealed the Commission's award, leaving the only issue on appeal whether Ellison is permanently and totally disabled under the odd-lot doctrine.

translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Jordan v. Tyson Foods, Inc.*, 51 Ark. App. 100, 911 S.W.2d 593 (1995).

The rules of appellate review in workers' compensation cases insulate the Commission from judicial review and properly so, as it is a specialist in the area and this court is not. *Buford v. Standard Gravel Co., supra.* However, a total insulation would obviously render the appellate court's function in reviewing these cases meaningless. *Buford v. Standard Gravel Co., supra.*

The odd-lot doctrine provides benefits for an employee who is injured to the extent that he can only perform services that are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist and he may be classified as totally disabled. *Patterson v. Arkansas Dep't of Health, supra.* The doctrine applies to employees who are able to work only a small amount; the fact that they can work some does not preclude them from being considered totally disabled if their overall job prospects are negligible. *Patterson v. Arkansas Dep't of Health, supra.* An injured worker who relies upon that doctrine has the burden of making a prima facie showing of being in the odd-lot category based upon the factors of permanent impairment, age, mental capacity, education, and training. *Patterson v. Arkansas Dep't of Health, supra.* If the worker does so, the employer then has the burden of showing some kind of suitable work is regularly and continuously available to him. *Patterson v. Arkansas Dep't of Health, supra.* In considering factors that may affect an employee's future earning capacity, this court considers the claimant's motivation to return to work, since a lack of interest or a negative attitude impedes our assessment of the claimant's loss of earning capacity. *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984). In addition, although a claimant's failure to participate in rehabilitation services does not bar his claim, the failure may impede a full assessment of his wage-earning loss by the Commission. *Nicholas v. Hempstead County Memorial Hosp.*, 9 Ark. App. 261, 658 S.W.2d 408 (1983). Section 24 of Act 796 of 1993, codified at Ark. Code Ann. § 11-9-522(e) (Repl. 1996), abolished the odd-lot doctrine for injuries occurring after July 1, 1993. However, because Ellison's injuries occurred in 1991, with recurrences in 1992 and 1993, the doctrine is applicable to her case.

Ellison argues on appeal that the Commission erred in not finding that she is permanently and totally disabled because, on remand, the Commission again adopted the restrictive view of disability consistent with Act 796 of 1993, rather than applying the law in effect in 1991. She argues that her work opportunities are restricted due to her age, her past work experience, and the fact that she cannot stand or sit for long periods of time. In addition, she discounts Dr. Heim's medical opinion that she could maintain a sedentary job because, she contends, Dr. Heim only took into account her orthopaedic problems, and not her respiratory problems. She also states that the Commission's decision is contrary to Dr. Sills's opinion that Ellison was unable to work due to her severe respiratory problems and back pain. As evidence that the Commission applied a "restrictive interpretation of the law," Ellison points to the fact that she was awarded only an 8% wage-loss disability.

In addition, she argues that in order to prevent her from being classified under the odd-lot doctrine, Therma Tru has the burden of going forward with evidence by showing that some kind of suitable work is regularly and continuously available to her.

We disagree with Ellison, and find that there is substantial evidence to support the Commission's findings. Although she testified that she is unable to maintain a job due to her back condition combined with her respiratory condition, testimony was presented from Dr. Heim that she is improving and that she could maintain a sedentary job. Ellison also stated during her testimony that she thought she "could do sedentary work."

Even though Dr. Sills stated that, as of 1993, Ellison was unable to work due to severe congestive obstructive pulmonary disease, Dr. Nichols stated in 1994 that she had mild obstructive pulmonary impairment resulting in a moderate degree of functional impairment . The Commission specifically relied upon Dr. Nichols's testimony in rendering its decision.

■■ As we have stated, questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. *Arkansas Dep't of Health v. Williams, supra.* We defer to the Commission's findings on what testimony it deems to be credible. *Arkansas Dep't of Health v.*

Williams, supra. When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. When the Commission chooses to accept the testimony of one physician over another in such cases, we are powerless to reverse that decision. *Patterson v. Arkansas Dep't of Health, supra.* Here, the Commission chose to believe Dr. Heim's testimony that Ellison could do sedentary work. In addition, she stated that she could. Therefore, we find that there is substantial evidence to support the Commission's opinion that Ellison did not make a prima-facie case that she is permanently and totally disabled and, therefore, does not fall within the odd-lot doctrine.

In addition, we reject Ellison's argument that she should be considered to be permanently and totally disabled under the odd-lot doctrine because Therma Tru did not present evidence that sedentary work is available. The burden did not shift to Therma Tru to show work that was readily and consistently available and within Ellison's capabilities because, as the Commission found,Ellison never made a prima facie case that she was permanently and totally disabled. *See Patterson v. Arkansas Dep't of Health, supra; Buford v. Standard Gravel Co., supra.*

The dissenting judges disagree with the Commission's conclusion that Ellison failed to make a prima-facie case that she fell within the odd-lot doctrine, and they suggest that the Commission improperly considered the credibility of witnesses and the preponderance of the evidence in reaching that conclusion. No doubt, there is room to disagree with the Commission's opinion, but this court's duty on review is to determine whether there is any substantial evidence in the record that supports the findings of the Commission. In doing so, we are not to substitute our judgment concerning matters of credibility for that of the Commission and the Commission is the trier of fact. *Riverside Furniture Co. v. Loyd,* 42 Ark. App. 1, 852 S.W.2d 147 (1993); *Jackson Cookie Co. v. Fausett,* 17 Ark. App. 76, 703 S.W.2d 468 (1986). While it is also true, as the dissent suggests, that the issue of whether the appellant made a prima-facie showing that she fell under the odd-lot doctrine is a question of law, it is equally true that the Commission cannot answer that question in a vacuum. The Commission must first determine the facts to which the law is to be applied, and when the facts are in dispute, the Commission must determine what evidence is credible and in which party's favor the evidence preponderates.

Riverside Furniture Co. v. Loyd, supra; Jackson Cookie Company v. Fausett, supra.

The *Werbe v. Holt*, 217 Ark. 198, 229 S.W.2d 225 (1950), and *Brock v. Bates*, 227 Ark. 173, 297 S.W.2d 938 (1957), cases cited in the dissenting opinion are simply not applicable to the case at bar. First, they are not workers' compensation cases. Second, they involve the interpretation of a now-nonexistent statute that formerly provided for a demurrer to the evidence in chancery and probate cases. *Werbe* and *Brock* stand for nothing more than what was formerly a well-established rule that in passing upon demurrers to the evidence in chancery and probate cases, the trial court was required to give the evidence its strongest probative force in favor of the plaintiff and to rule against the plaintiff only when the plaintiff's evidence, when so considered, fails to make a prima-facie case.

The dissent has cited no authority to support its contention that, in workers' compensation cases, the Commission cannot consider the credibility of witnesses and the weight of the evidence in determining whether a claimant has presented a prima-facie case that he falls within the odd-lot doctrine. Even in *Buford v. Standard Gravel Co.*, 68 Ark. App. 162, 5 S.W.3d 478 (1999), relied on by the dissent, we recognized the obligation of the Commission to consider *all* competent evidence relating to a claimant's disability in determining the applicability of the odd-lot doctrine. Also, in Ellison's first appeal to this court, when we remanded the case to the Commission to consider the application of the odd-lot doctrine, we instructed the Commission to consider all competent evidence relating to her incapacity, including the age, education, medical evidence, work experience, and other matters reasonably expected to affect the claimant's earning power. *See Ellison v. Therma-Tru, supra.* Nor does the dissent cite authority to support its position that the Commission may consider only the evidence that is favorable to the claimant.

Finally, the dissent suggests, again without citation to any authority, that this court, in reviewing the Commission's finding that Ellison did not prove that she fell within the odd-lot doctrine, cannot apply the substantial-evidence standard of review. Ironically, in every odd-lot case cited by the dissenting opinion in support of its position that Ellison met the requirements for odd-lot consideration, the substantial-evidence standard of review was applied by this

court.[2]

Affirmed.

HART, KOONCE, STROUD, MEADS, and ROAF, JJ., agree.

ROBBINS, C.J., and GRIFFEN and NEAL, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. I would reverse this decision and remand to the Workers' Compensation Commission with directions that appellant be awarded permanent and total disability benefits. First, the Commission erred as a matter of law when it held that appellant failed to make a *prima facie* case under the odd-lot doctrine. Second, the Commission improperly undertook a credibility assessment and weighed the preponderance of the evidence in deciding that appellant had not made a *prima facie* case under the odd-lot doctrine. Finally, nothing authorizes this court to review the Commission's errant decision on whether appellant made a *prima facie* showing under the odd-lot doctrine a pure question of law using a substantial evidence standard of review applicable to the Commission's findings of fact. Therefore, I must dissent.

Because appellant proved that she is unable to engage in sustained effort involving sitting, standing, walking, or lifting due to her compensable injury and other health condition, her advanced age, education, and other vocational history, the Commission should have held as a matter of law that appellant is *prima facie* within the odd-lot category of disabled workers and that the burden shifted to the employer to show evidence of suitable work that is regularly and continuously available to her. We have reversed the

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[2] *Patterson v. Arkansas Dep't of Health*, 70 Ark. App. 182, 15 S.W.3d 701 (2000)("we review the evidence and all inferences deducible therefrom in the light most favorable to the findings of the Commission and affirm that decision if it is supported by *substantial evidence.*"); *Buford v. Standard Gravel Co.*, 68 Ark. App. 162, 5 S.W.3d 478 (1999) ("Our standard of review on appeal is whether the decision of the Commission is supported by *substantial evidence.*"); *Moser v. Arkansas Lime Co.*, 40 Ark. App. 108, 842 Ark. 456 (1992) ("the *substantial evidence* standard of review requires us to affirm if the Commission's opinion displays a substantial basis for the denial of relief."); *M.M. Cohn Co. et al. v. Pauline Haile*, 267 Ark. 734, 589 S.W.2d 600 (Ark. App. 1979) ("We hold there is *substantial evidence* this claimant is totally disabled."); *Walker Logging v. Paschal*, 36 Ark. App 247, 821 S.W.2d 786 (1992) ("When reviewing a decision of the Workers' Compensation Commission, we must view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission and affirm that decision if it is supported by *substantial evidence.*").

Commission and remanded with directions to award permanent and total disability benefits in similar situations where employers failed to produce proof of suitable work after injured workers presented evidence that the effects of their injuries combined with age, education, and vocational history put them in the odd-lot category of disabled workers. *See Patterson v. Arkansas Dep't. of Health*, 70 Ark. App. 182, 15 S.W.3d 701 (2000); *Buford v. Standard Gravel Co.*, 68 Ark. App. 162, 5 S.W.3d 478 (1999); *Moser v. Arkansas Lime Co.*, 40 Ark. App. 108, 842 S.W.2d 456 (1992).

Moreover, a half century of Arkansas law holds that it is reversible error to undertake credibility assessments or weighing of the evidence in deciding whether a party has presented *prima facie* evidence. *See Brock v. Bates*, 227 Ark. 173, 297 S.W.2d 938 (1957); *see also Werbe v. Holt*, 217 Ark. 198, 229 S.W.2d 225 (1950). The Commission was plainly wrong to ignore this body of law, and the majority is wrong when it treats the Commission's error as a credibility issue subject to the substantial evidence standard of review.

Appellant was sixty-one years of age when she testified before the Commission in her claim for permanent total disability benefits; she is now sixty-five. She has a tenth-grade education. Appellant suffers from chronic obstructive pulmonary disease, residual effects from her May 8, 1991, work-related back injury, and undisputed back problems that pre-dated the compensable injury. Despite these difficulties, appellant continued working for Therma Tru until 1993 when a company physician removed her from her job. She testified at the hearing that she is willing to attempt sedentary work even though she does not know what sedentary work means. There is no evidence in the record about employment that a person of her limited physical ability, education, and vocational history can regularly perform. Although physicians have recommended that appellant pursue sedentary work and she testified that she was willing to do sedentary work, appellant testified she cannot engage in sustained walking, standing, or other effort without experiencing breathing difficulty due to her respiratory disease. Even sedentary workers such as lawyers and judges must be able to sit for sustained periods of time. Appellant also testified that constant back pain prevents her from sitting, standing, or walking for sustained periods of time. Appellant introduced proof that she cannot do so. Hence, it is astounding that the majority now affirms the Commission's

bizarre decision that appellant failed to make a *prima facie* case under the odd-lot doctrine.

Act 796 of 1993 abolished the odd-lot doctrine for permanent disability claims in Arkansas based on injuries that occurred after July 1, 1993 (*see* Ark. Code Ann. § 11-9-522(e) (Repl. 1996)); however, the doctrine was alive and fully applicable to appellant's disability claim stemming from her 1991 compensable injury and its recurrences.[1] Until the General Assembly abolished the odd-lot doctrine by Act 796 of 1993, Arkansas had long recognized that one need not be utterly and abjectly helpless to be deemed totally disabled. Rather, our decisions hold that the odd-lot doctrine refers to employees who are able to work only a small amount; the fact that they can work some does not preclude them from being considered totally disabled if their overall job prospects are negligible. *See M.M. Cohn v. Haile*, 267 Ark. 734, 589 S.W.2d 600 (Ark. App. 1979). We have also held that when the overall evidence places a worker *prima facie* within the odd-lot category, the employer bears the burden of proving the existence of suitable work that is regularly and continuously available to the worker. *See Walker Logging v. Paschal*, 36 Ark. App. 247, 821 S.W.2d 786 (1992). *See also M.M. Cohn, supra.*

As stated in *Larson's Workers' Compensation Law* treatise:

> Under the odd-lot doctrine, which is accepted in virtually every jurisdiction, total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market. The essence of the test is the probable dependability with which claimant can sell his or her services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above crippling handicaps.

Id. at § 83.01. Larson traced the origin of the term "odd-lot" to the King's Bench case of *Cardiff Corp. v. Hall*, 1 K.B. 1009 (1911),

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[1] The odd-lot doctrine is accepted in "virtually every jurisdiction" according to *Larson's Workers' Compensation Law* treatise. *See Larson's* at § 83.01. Arkansas workers are now among the rare exceptions to whom the doctrine no longer applies, thanks to Act 796 of 1993

where Judge Moulton addressed the rationale for the phrase and its bearing on the issue of total disability as follows:

> [T]here are cases in which the onus of shewing that suitable work can in fact be obtained does fall upon the employer who claims that the incapacity of the workman is only partial. If the accident has left the workman so injured that he is incapable of becoming an ordinary workman of average capacity in any well known branch of the labour market—if in other words the capacities for work left to him fit him only for special uses and do not, so to speak, make his powers of labour a merchantable article in some of the well known lines of the labour market, I think it is incumbent upon the employer to shew that such special employment can in fact be obtained by him. If I might be allowed to use such an undignified phrase, I should say that if the accident leaves the workman's labour in the position of an 'odd lot' in the labour market, the employer must shew that a customer can be found who will take it . . .

Id. at 1 K.B. 1020-21.

Judge Benjamin Cardozo (who later became an associate justice of the U. S. Supreme Court) adeptly described the plight faced by such a disabled worker in *Jordan v. Decorative Co.*, 230 N.Y. 522, 130 N.E. 634 (1921), as follows:

> He [the disabled worker] was an unskilled or common laborer. He coupled his request for employment with notice that the labor must be light. The applicant imposing such conditions is quickly put aside for more versatile competitors. Business has little patience with the suitor for ease and favor. He is the "odd lot" man, the "nondescript in the labor market." Work, if he gets it, is likely to be casual and intermittent. . . . Rebuff, if suffered, might reasonably be ascribed to the narrow opportunities that await the sick and the halt.

Id., at 525, 130 N.E. at 635-36.

In *M.M. Cohn, supra,* Judge David Newbern wrote that the "odd lot doctrine refers to employees who are able to work only a small amount. The fact they can work some does not preclude them from being considered totally disabled if their overall job prospects are negligible." *See M.M. Cohn,* 267 Ark. at 736, 589 S.W.2d at 602. In that case our court affirmed an award of permanent and total disability benefits a woman sixty-two years of age,

who suffered a shoulder fracture in a workplace fall, which left her unable to do anything but limited work.

In *Walker Logging, supra,* we affirmed the Commission's award of permanent and total disability benefits under the odd-lot doctrine to a man in his late forties whose right knee was injured when a tree fell on him while he worked as a timber cutter. In that case, the Commission held that based upon the claimant's mental capacity, age, education, work experience, and physical impairment and limitations, he established a *prima facie* case that he fell within the odd-lot category, which shifted to the employer the burden of producing evidence that some kind of suitable work was regularly and continuously available to him.

Last year we reversed and remanded for award of permanent total disability benefits a case where the Commission denied a claim asserted by a forty year-old worker who had fifteen percent permanent anatomical impairment from two back surgeries, was unable to speak above a whisper due to a crushed larnyx suffered in a prior workplace accident for a different employer, and who was a high school graduate. *See Buford v. Standard Gravel Co.*, 68 Ark. 162, 5 S.W.3d 478 (1999). In that case, the Commission was unimpressed with the appellant's credibility and motivation to return to work based on proof that he drank beer, enjoyed deer hunting, fishing, and camping, and his ability to shop with his wife, garden, and mow his lawn. We rejected the Commission's analysis and reasoned as follows:

> When Buford's age, education, work experience, and medical restrictions are considered together, Buford made a clear and convincing prima facie case that he was totally and permanently disabled by his throat injury and his three back injuries. The burden then shifted to the employer to show that work is readily and consistently available within appellant's restrictions in his hometown of El Dorado, Arkansas. The employer failed to meet that burden . . . The Commission should have awarded Buford permanent and total disability benefits. We reverse and remand for it to enter the order.

Id. at 169-70, 5 S.W.3d 483-84.

Earlier this year, we reversed the Commission in another odd-lot case and remanded so that permanent total disability benefits could be awarded to a forty-seven year old registered nurse who

worked in an administrative position for the Arkansas Department of Health when she suffered a back injury after reaching across her desk to plug in a surge protector. *See Patterson v. Arkansas Dep't. of Health*, 70 Ark. App. 182, 15 S.W.3d 701 (2000). Patterson eventually underwent five spinal surgeries, developed the painful condition of arachnoiditis in the lower thecal sac, developed a cerebrospinal fluid leak, and suffered from migraine headaches, Sjogren's syndrome, depression, and other conditions. Due to these medical problems, she testified that she spent most of the day in bed because of pain, generally spent the morning sitting in a recliner, and was unable to walk any distance. The Commission found that she had not been rendered permanently and totally disabled, stating:

> Even though she is severely limited by her physical condition and the effects of the medication related to her compensable injury, she has been able to undertake limited employment by being on call, being available to give advice over the telephone, and by doing paperwork, employment which is not constant in its demands on the claimant's time, but which is not full time and are [sic] not widely available with other employers.

Id. at 191, 15 S.W.3d at 707. The appellant argued on appeal that the Commission erred because the odd-lot doctrine applied to her 1991 injury. We agreed, and reversed and remanded for an award of permanent total disability benefits, stating:

> [W]e think it significant that the . . . ALJ's opinion states that appellant has performed some employment which is not constant in its demands on the claimant's time, but which is not full-time and is not widely available with other employers. This language substantially tracks the language required for a finding of total disability under the odd-lot doctrine.
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> Considering appellant's obvious physical impairment, work experience, and medical evidence, we hold that appellant made a prima facie case that she was totally and permanently disabled as a result of her five surgeries necessitated by her compensable injury, and the burden shifted to appellee to show that work is readily and consistently available within appellant's capabilities. Appellee did not meet this burden, and indeed the law judge recognized that any work appellant performed was not full-time and not readily available with other employers. The Commission should have awarded appellant permanent and total disability benefits; therefore, we reverse and remand for an award of benefits.

Id., 15 S.W.3d 708.

We also reversed the Commission in a previous opinion after the Commission refused to analyze this case under the odd-lot doctrine.[2] *See Ellison v. Therma Tru*, 66 Ark. App. 286, 989 S.W.2d 987 (1999). When the Commission considered the case on remand from our previous decision, it did not determine if the employer met its burden of producing evidence of employment that is regularly and continuously available in the labor market within appellant's limited capacity in light of our decisions applying the odd-lot doctrine. Instead, the Commission held that appellant failed to make a *prima facie* showing that she falls in the odd-lot category.

The Commission announced its decision regarding appellant's claim for permanent and total disability benefits as follows:

> We find that the record fails to establish by a preponderance of the credible evidence that the claimant is totally disabled *or that she has established a prima facie case that she falls within the odd lot (sic) category. In reaching this conclusion, we initially note that the claimant has failed to present any evidence from a physician or from a vocational counselor indicating that the claimant is currently totally incapacitated from working or indicating that the claimant is injured to such an extent that any employment services she can perform are so limited in quality, dependability, or quantity that a reasonably stable market does not exist for her services.* To the contrary, the only physician to examine the claimant since 1993 was Dr. Heim. Dr. Heim indicated on February 6, 1997, that the claimant's back-related symptoms were slightly improved from 1993, and Dr. Heim opined that the claimant could have a sedentary job. Dr. Heim did not schedule any follow-up appointments, but indicated that he would see the claimant on an as-needed basis if her symptoms worsened.
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> With regard to the claimant's respiratory condition, and her testimony that her condition had worsened over the last two to three years, and more so over the last two to three months, the claimant

[2] Our previous opinion also reversed the Commission because it improperly determined appellant's anatomical impairment based on applying the "major cause" analysis of Act 796, specifically Ark. Code Ann. § 11-9-102(F)(1987), and omitted consideration of appellant's obstructive pulmonary disease, which had been fully corroborated by the medical evidence and uncontradicted by any other proof. To that extent, the Commission's decisions in this case demonstrate a troubling tendency to employ Act 796 reasoning even where the record abundantly shows that Act 796 has no bearing whatsoever.

> has failed to present any medical evidence to corroborate her testimony that her respiratory condition had, in fact, recently deteriorated. As the Court noted, Dr. Sills' records indicate that he gave the claimant a note on October 11, 1993, stating that she was unable to work due to her *severe* COPD and back pain. However, the claimant subsequently underwent pulmonary function testing on January 10, 1994, performed by Dr. David Nichols. His interpretation was *mild* obstructive pulmonary impairment with a *moderate* degree of functional impairment. *In light of Dr. Nichols' conclusion in 1994 that the claimant had a mild obstructive pulmonary impairment with a moderate degree of functional impairment, and in light of Dr. Heim's assessment in 1997 that the claimant* could *return to sedentary work, we are not persuaded that no employer would hire her in her condition. The claimant has acknowledged that she has not sought any employment from any employer (other than from the respondent) since she last worked in 1993. In light of the medical reports of Dr. Nichols and Dr. Heim, we are not persuaded by the claimant's testimony that she has presented a prima facie case that she falls within the odd lot category.*

(Emphasis added.)

The Commission's opinion in the instant appeal does not suggest how its evaluation of the opinions by Dr. Nichols and Dr. Heim nullified the appellant's testimony that she cannot engage in sustained walking, standing, sitting, or other effort due to her back pain and respiratory condition. Nor does the Commission's opinion favor us with clues about how a worker in her sixties with a tenth-grade education and lifelong history of manual labor might not suffer a competitive disadvantage for employment when she suffers from a disabling back injury and respiratory condition, even if those conditions are considered "mild" or "moderate." Arkansas law does not require undisputed medical testimony to establish that a claimant has sustained a substantial decrease in her capacity to compete for employment in the open market. One need only read our recent nine-judge decision in *Patterson, supra,* to understand that even in the face of conflicting medical evidence and proof that a disabled worker can perform sedentary work, we decide, *as a matter of law,* whether the worker's impairment, work experience, age, education, and other factors affecting disability constitute a *prima facie* case for application of the odd-lot doctrine.

Therma Tru could have rebutted appellant's *prima facie* case by simply producing evidence of regularly and continuously available sedentary work in the labor market. But Therma Tru failed to do

so. Like the employers in *Buford* and *Patterson, supra,* Therma Tru failed to produce any proof of regularly and continuously available sedentary work in the labor market for someone in appellant's condition. Thus, the Commission should have awarded permanent total disability benefits to appellant consistent with the long line of Arkansas cases that apply the odd-lot doctrine. The Commission's refusal to do so after we reversed it for failing to apply the odd-lot doctrine to the case manifests a calculated intent to avoid applying the odd-lot doctrine at all, as if Act 796 of 1993 had retroactive effect, despite our previous decision holding that an Act 796 analysis had no place in determining the outcome of this 1991 claim.

Odd-lot category determinations are no different from other situations involving *prima facie* evidence. *Black's Law Dictionary* defines *prima facie* evidence as "evidence good and sufficient on its face; [s]uch evidence as, *in the judgment of the law,* is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or defense, and which if not rebutted or contradicted, will remain sufficient." BLACK'S LAW DICTIONARY 1190 (6th ed. 1990) (emphasis added). *See also Inge v. Walker,* 70 Ark. App. 114, 15 S.W.3d 348 (2000). The case of *Swink v. Giffin,* 333 Ark. 400, 970 S.W.2d 207 (1998), shows that it is reversible error for a trier of fact to weigh the evidence in determining whether a party has established a *prima facie* case. In that case, a chancellor granted a defense motion to dismiss at the close of the plaintiff's case. In addressing the chancellor's decision, Justice David Newbern wrote:

> The question, generally, is whether the plaintiffs presented a prima facie case, just as in jury trials where a verdict may be in prospect. Our holding is that the dismissal was premature, and thus we reverse and remand the case. . .
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> . . .
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> While we understand that the Chancellor's action was based on her assessment of the credibility of the testimony presented by the plaintiffs, it was error for her to have made that assessment prior to the conclusion of the evidentiary portion of the trial. In a long line of cases, beginning with *Werbe v. Holt,* 217 Ark. 198, 229 S.W.2d 225 (1950), we have held that a chancellor's duty in the circumstance presented here is to review the defense motion for dismissal at the conclusion of the plaintiffs' case by deciding whether, if it were a jury trial, the evidence would be sufficient to present to the jury. . . .

> In *Neely v. Jones*, 232 Ark. 411, 337 S.W.2d 872 (1960), we recited the same rule as in the *Werbe* case. . . Justice George Rose Smith wrote for a unanimous court:
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> > "Ever since the decision in *Werbe v. Holt* [citation omitted], we have consistently held that a demurrer to the plaintiff's evidence should be sustained only if that proof, viewed in its most favorable light, would present no question of fact for a jury if the case were being tried at law. In such a case the chancellor *does not exercise fact-finding powers that involve determining questions of credibility* or of the preponderance of the evidence. *Brock v. Bates*, 227 Ark. 173, 297 S.W.2d 938 (1957). [Emphasis supplied.]
>
> *Neely v. Jones*, 234 Ark. 812, 813, 354 S.W.2d 726, 727 (1962). Other cases in which we have reached the same result include *Minton v. McGowan*, 253 Ark. 945, 490 S.W.2d 136 (1973); *Pults v. Pults*, 236 Ark 434, 367 S.W.2d 120 (1963); and *Wood v. Brown*, 235 Ark. 500, 361 S.W.2d 67 (1962).

333 Ark. at 403-04, 970 S.W.2d at 208-09 (emphasis in original).

Thus, for a half century Arkansas law has recognized that whether a party has presented *prima facie* evidence is not a question of fact to be determined by either the preponderance of the evidence or by assessing credibility. Yet the Commission expressly committed that error, as demonstrated by its statement that "*we are not persuaded by the claimant's testimony that she has presented a prima facie case that she falls within the odd lot category.*"

I refuse to stand Arkansas law on its head and compound the Commission's blatant error by incorrectly applying a substantial evidence standard of review to a plain question of law. Whether a party presents *prima facie* evidence of a proposition is an issue of legal sufficiency, not a matter of credibility or persuasiveness. In this case the relevant inquiry is whether the proof was legally sufficient to establish that appellant is in the odd-lot category of disabled workers, meaning that she cannot obtain and hold regular and continuous employment unless extraordinary good will, sympathy, or other similar special circumstances operate in her favor. The Commission recounted the proof about appellant's compensable back injury, respiratory disease, limited education, manual labor work history, and the fact that those conditions affected appellant to the point that Therma Tru's doctor directed that she discontinue trying to

work. Appellant has testified that she is unable to work. She plainly made a *prima facie* showing of being in the odd-lot category. Our decisions in *Patterson, Buford,* and *Arkansas Lime Co., supra,* and a host of other odd-lot cases, when coupled with other appellate decisions holding that credibility and persuasiveness are not proper matters to be considered in deciding if a party has made a *prima facie* case, deserve more deference than the spurious reasoning employed by the Commission in this case.

What is equally disquieting is that the majority has analyzed the Commission's decision on whether appellant made a *prima facie* case under the substantial evidence standard of review, the standard we use to review the Commission's findings of fact. *Werbe* and the other decisions previously cited show that whether a party has made a *prima facie* case is a question of law; we review those rulings to determine if the law regarding legal sufficiency was properly applied, not whether the ultimate decision reached by the trier of fact is supported by substantial evidence. The majority does not burden its opinion with supporting authority for its unprecedented conclusion with good reason; no such authority can be found anywhere else in American jurisprudence.

The Commission was wrong when it assessed appellant's credibility to determine whether she made a *prima facie* showing of being in the odd-lot category of disabled workers. The Commission was wrong when it denied appellant's claim for permanent total disability benefits despite the employer's failure or refusal to prove that a single job existed for someone with appellant's physical restrictions, tenth grade education, and history of performing only manual labor. The majority is wrong to turn its back on the entire history of Arkansas case law regarding the odd-lot doctrine and the equally authoritative record of our case law showing that it is reversible error to assess credibility and weigh the evidence in determining whether a party has made a *prima facie* case. Therefore, I respectfully dissent and hope the Arkansas Supreme Court will grant review and reverse the Commission's unfair result and misguided reasoning.

I am authorized to state that ROBBINS, C.J., and NEAL, J., join this opinion.

Betty COX *v.* KLIPSCH & ASSOCIATES
and Liberty Mutual Insurance Company

CA 00-329 30 S.W.3d 764

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered November 15, 2000

William F. Magee, for appellant.

Shackleford, Phillips, Wineland & Ratcliff, P.A., for appellees.

OLLY NEAL, Judge. Appellant Betty Cox appeals from a decision of the Arkansas Workers' Compensation Commission finding that she failed to prove by a preponderance of the evidence that she was entitled to surgical treatment performed by Dr. Robert Abraham, and that the percutaneous diskectomy performed by Dr. Abraham was reasonable or necessary in relation to appellant's compensable injury. On appeal, appellant argues that the evidence does not support the Commission's findings.

Appellant sustained a compensable back injury on September 26, 1991, while employed with appellee, Klipsch & Associates. Appellant injured her back while pushing stereo speakers that had jammed on an assembly line. On March 10, 1995, a hearing was held before the administrative law judge (ALJ) to determine appellant's entitlement to wage-loss disability benefits. Following the hearing, the ALJ found that appellant suffered a five percent physi-

cal impairment rating to the body as a whole and was entitled to a ten percent wage-loss disability. In its opinion and order filed October 31, 1995, the full Commission affirmed the decision of the ALJ. The Commission found that the evidence established that appellant suffered from "a small degree of degenerative disc disease which became symptomatic as a result of the work-related injury," but found that "there [was] no evidence of a herniated nucleus pulposus or of any nerve root involvement." Appellant appealed, and we, in an unpublished opinion, affirmed the decision of the Commission in *Cox v. Klipsch & Assoc.*, CA 96-160, slip op. (Ark. App. November 6, 1996).

Appellant was initially treated for her compensable injury under the care of Dr. Steven Clark from the period of September 27, 1991, through at least October 31, 1991. Dr. Clark diagnosed appellant with lumbar strain and treated appellant's symptoms with steroid injections, back adjustments, and anti-inflammatory injections. Dr. Clark released appellant to perform light duty work on October 7, 1991. Appellant continued to work until July of 1992, at which time she quit due to complaints of severe headaches which she contributed to steroid injections or chemicals used by the appellee. In February 1992, appellant began receiving conservative treatment from appellee's designated medical provider, Dr. George Finley, a family practitioner.

In January 1993, appellant saw Dr. Norris Knight, an orthopedic physician. Under Dr. Knight's care, appellant underwent an MRI and CT of her lumbar spine. Dr. Knight's examination of appellant revealed a full range of motion and no neurological deficits. An x-ray revealed minor scoliosis and minor degenerative disc disease. On May 18, 1993, Dr. Knight diagnosed appellant with degenerative disc disease at L-4 and L-5 with mild posterior bulging of the L-4 disc. Appellant was last seen by Dr. Knight on June 8, 1993, when he opined that appellant was not an operative candidate because she "has no clear extrinsic or root compression."

On June 15, 1993, pursuant to Act 444 of 1983, appellant served advance written notice to appellee stating her request to change to a chiropractic physician. After apparent approval of the change by appellee, Dr. David Volentine became appellant's primary physician in June of 1993. On September 30, 1993, appellant was evaluated by Dr. Jim Moore, a Little Rock neurosurgeon. Dr.

Moore's medical report dated September 30, 1993, reflected the following:

> The studies reviewed, the MRI shows only a very slight amount of disk prominence with some minimal degeneration. Apparently, Dr. Knight, proceeded with the myelogram and CT in view of her persisted complaints. The myelogram itself as reviewed does show quite of a bit of bulge or prominence at the L4-5 level, however unfortunately flexion extension films were not done, and I would suspect that this patient likely would have effacement or flattening of bulge if flexion had been done, as I do not see much at all if anything on the contrasted CT that was brought along with her today along with the other studies for review, however, the radiologist does suggest that there is some bulging present here, but certainly it is quite minimal.

Dr. Moore agreed with Dr. Knight that appellant was not a candidate for any surgical treatment and opined that appellant was at the end of her healing period.

Thereafter, appellant was referred by Dr. Volentine to Dr. Robert Abraham, who examined appellant on October 18, 1993. Dr. Abraham reported that a lumbar MRI revealed "diffuse bulging disc at L4-5" and assessed appellant with right lumbar radiculopathy. He further reported that appellant "may be helped by percutaneous diskectomy." On December 15, 1993, Dr. Abraham gave appellant a pre-operative diagnosis of right L4-5 herniated nucleus pulposus. On that same date, appellant underwent a percutaneous diskectomy with percutaneous discogram under the care of Dr. Abraham. Dr. Abraham treated appellant through June 1994. During that time, Dr. Abraham recommended that appellant receive physical therapy for a trial period under the care of Dr. Volentine. However, at that time, Dr. Volentine had failing health, and, therefore, appellant was referred to Dr. Chris Primeaux, a Hope chiropractic physician. Appellant received chiropractic treatment from Dr. Primeaux through at least March 6, 1995.

In 1998, appellant sought additional benefits for surgical treatment she received under the care of Dr. Abraham. Appellant contended that the treatment she received by Dr. Abraham was reasonable, necessary, and related to her compensable injury. Following a hearing held February 17, 1999, the ALJ agreed and awarded all

reasonably and necessary medical benefits related to the compensable injury, including treatment under the care of Dr. Abraham.

In reversing the ALJ, the Commission found that the treatment rendered by Dr. Abraham, especially the percutaneous diskectomy performed by Dr. Abraham, was neither reasonable, necessary, nor related to the compensable injury. It found that the surgery performed by Dr. Abraham was of questionable benefit to appellant and that none of appellant's treating physicians, except Dr. Abraham, recommended surgery for appellant's 1991 lumbar strain injury.

In a workers' compensation appeal, the appellate court views the evidence in a light most favorable to the Workers' Compensation Commission's decision and upholds that decision if it is supported by substantial evidence. *Maxey v. Tyson Foods, Inc.*, 341 Ark. 306, 18 S.W.3d 328 (2000). Substantial evidence is that evidence which a reasonable person might accept as adequate to support a conclusion. *Campbell v. Randal Tyler Ford Mercury*, 70 Ark. App. 35, 13 S.W.3d 916 (2000). The appellate court will not reverse the Commission's decision unless it is convinced that fair-minded persons with the same facts before them could not have reached the conclusions arrived at by the Commission. *Woodall v. Hunnicutt Constr.*, 340 Ark. 377, 12 S.W.3d 630 (2000). The determination of the credibility and weight to be given a witness's testimony is within the sole province of the Workers' Compensation Commission. *American Greetings Corp. v. Garey*, 61 Ark. App. 18, 963 S.W.2d 613 (1998). The authority of the Workers' Compensation Commission to resolve conflicting evidence also extends to medical testimony. *Maverick Transp. v. Buzzard*, 69 Ark. App. 128, 10 S.W.3d 467 (2000). The Commission is entitled to review the basis for a doctor's opinion in deciding the weight and credibility of the opinion and medical evidence. *Id.*

Arkansas Code Annotated section 11-9-508(a) (Repl. 1996) requires employers to provide such medical services as may be reasonably necessary in connection with the employee's injury. *American Greetings Corp. v. Garey, supra.* Whether a medical procedure or device is reasonable and necessary treatment is a question of fact to be decided by the Commission. *Air Compressor Equipment v. Sword*, 69 Ark. App. 162, 11 S.W.3d 1 (2000).

For reversal, appellant contends that the Commission's decision is not supported by substantial evidence. Specifically, she argues that the evidence was insufficient to find that her treatment under Dr. Robert Abraham was not reasonable and necessary with respect to her compensable injury. We do not agree.

The full Commission noted in its October 31, 1995, order and opinion, that "the evidence establishes that [appellant] suffers from a small degree of degenerative disc disease which became symptomatic as a result of the work-related injury," and that "there is no evidence of a herniated nucleus pulposus or of any nerve root involvement." This evidence is directly contrary to Dr. Abraham's preoperative diagnosis of right L4-5 herniated nucleus pulposus on December 15, 1993, which the Commission was entitled to weigh. Subsequent to Dr. Moore's evaluation of appellant in September of 1993, Dr. Moore agreed with Dr. Knight that appellant was not a surgical candidate, and opined that appellant was at the end of her healing period. Despite the opinions of Drs. Moore and Knight, Dr. Abraham evaluated appellant on October 18, 1993, and gave an assessment of right lumbar radiculopathy, which "may be helped" by percutaneous diskectomy. Following the surgery, Dr. Abraham stated that appellant was "doing about the same" and that she still had pain "in the lower lumbar region bilaterally." Dr. Abraham opined in a letter dated April 27, 1994, that "the patient's [claimant's] healing period in my estimation should have plateaued at approximately September 1992." Furthermore, the Commission noted that following the additional surgery, appellant testified that she was unable to return to work, but was able to stand on Thanksgiving to prepare a pot of sweet potatoes. However, the Commission stated that appellant claimed to be permanently and totally disabled, contradicting her contention that she benefitted from the surgery. Postsurgical improvement is a proper consideration in determining whether surgery was reasonable and necessary. *Winslow v. D & B Mech. Contrs.*, 69 Ark. App. 285, 13 S.W.3d 180 (2000). Based on this record where no postsurgical improvement took place and where the Commission gave little weight to Dr. Abraham's opinion, we cannot say that the Commission erred in finding that appellant's surgical treatment by Dr. Abraham was not reasonable and necessary in relation to her compensable injury.

Affirmed.

PITTMAN, BIRD, and KOONCE, JJ., agree.

STROUD, and ROAF, JJ., dissent.

JOHN F. STROUD, JR., Judge, dissenting. In finding that the treatment and surgery rendered by Dr. Abraham was neither reasonable, necessary, nor related to appellant's compensable injury, the Workers' Compensation Commission found that his opinion regarding her need for such care was entitled to less weight than the opinions of Dr. Knight and Dr. Moore stating that she was not a surgical candidate. Those two doctors, however, examined appellant in June and September 1993, before Dr. Abraham saw her in October of that year, and, as the dissenting commissioner noted, their opinions appear to be based on their interpretation of diagnostic studies as failing to show clear, operable abnormalities. When Dr. Abraham examined appellant on October 18, 1993, he confirmed that she had a bulging disc at L4-5. He counseled her and gave her literature on a proposed discogram and percutaneous diskectomy. On December 8, 1993, he wrote that "Ms. Cox may indeed benefit from a percutaneous diskectomy in that she has a bulging disc at the L4-5 region." Dr. Abraham performed the diskectomy on December 15, 1993.

Dr. Moore did not dispute Dr. Abraham's preoperative and postoperative diagnoses of a "right L4-5 HNP (contained)." Furthermore, Dr. Moore's letter to appellee's attorney in 1998 stated that "[p]ercutaneous diskectomy is recognized as an effective treatment for contained discs of the lumbar spine" and has "an approximate 79% success rate."

As stated above, the Commission found that Dr. Abraham's opinion was entitled to less weight than those of Dr. Knight and Dr. Moore. If all three doctors had been stating their opinions as to whether or not claimant was a surgical candidate, I would not be writing this dissent. The Commission clearly has the right to determine the weight to give differing medical opinions with regard to the same set of facts. I do not view the medical testimony as inapposite, but simply as different opinions rendered at different times. Appellant correctly notes that the issue before the Commission was not whether she was a candidate for surgery at a future date, an issue addressed by Doctors Moore and Knight, but whether the surgery later rendered by Dr. Abraham was reasonable and necessary, which I view as a different decision. In light of the medical evidence, including the advantage of Dr. Abraham's post-

operative diagnosis, I do not think that reasonable minds could conclude that the surgery was not reasonable and necessary.

Postsurgical improvement is a proper consideration in determining whether surgery was reasonable and necessary. *Winslow v. D & B Mech. Contrs.*, 69 Ark. App. 285, 13 S.W.3d 180 (2000). In *Winslow*, which the majority cites, the claimant stated that he did not benefit from a surgery, and even the surgeon who performed the procedure believed that it would not be effective; this court affirmed the Commission's finding that the surgery was not reasonably necessary for treatment of the compensable injury. Here, the situation is quite different. Appellant's surgeon suggested the surgery as an effective means of relieving her symptoms, and a doctor who had not thought her to be a surgical candidate admitted that not only was the surgery appropriate for the diagnosis rendered by her surgeon but that it was known to be effective in seventy-nine percent of the cases.

Arkansas Code Annotated § 11-9-508 (Repl. 1996) requires the employer to promptly provide for an injured employee such medical and surgical services as may be reasonably necessary in connection with the injury received. In my view, a person is entitled to have a fair chance for an improved life after an injury suffered in the work place even though the result may be short of recovery that allows a return to work. I revile the majority's view that surgery giving the patient the ability to again cook in her kitchen is insignificant. The fact that postoperative improvement was slight should not trump a finding that the percutaneous diskectomy was reasonably necessary for her disc problem. For the very same reasons, appellant's subsequent claim of permanent and total disability does not conflict with her testimony regarding some improvement.

I would find that there is no substantial basis in the medical records or the testimony for the Commission's decision that treatment rendered by Dr. Abraham, including surgery performed, was not reasonable and necessary.

I am authorized to say that Judge ROAF joins me in this dissent.

Wanda MALONE *v.* ARKANSAS DEPARTMENT of HUMAN SERVICES

CA 00-207 30 S.W.3d 758

Court of Appeals of Arkansas
Division III
Opinion delivered November 15, 2000

Anne Orsi Smith, P.A., for appellant.

Kathy L. Hall, for appellee.

Stasia D. Burk, attorney ad litem.

WENDELL L. GRIFFEN, Judge. Wanda Malone appeals from the order of the Pulaski County Chancery Court terminating her parental rights with respect to her three children. She argues that a) the chancellor erred in terminating her parental rights because she was in jail and unable to comply with reunification orders, and b) the goal of adoption cannot be achieved because the parental rights of her children's fathers were not terminated. We disagree, hold that the chancellor's order was not clearly erroneous, and affirm.

The Arkansas Department of Human Services (ADHS) opened a case on appellant's family on September 16, 1997, when

her one-year-old son was found alone in a parking lot. Appellant had been in jail for two months and had left her two daughters and son in the care of her boyfriend. The ADHS did not remove the children at that time and lost contact with the family.

In January 1998, Dora Watson, paternal grandmother of appellant's youngest daughter, informed ADHS that appellant's daughters were living with her. The girls indicated to ADHS that they did not want to live with their mother because she was using drugs and made them steal. On May 9, 1998, appellant and her boyfriend were arrested for shoplifting, possession of drugs, and endangerment of her son.

The ADHS filed a petition to have appellant's children adjudicated dependent-neglected, alleging that appellant was in jail, that her son had been unsupervised on two occasions, and that her daughters stated they did not want to live with her because she was using drugs and made them steal. Based on appellant's admission to a long-term dependency on crack cocaine and her testimony that she was due to enter a drug rehabilitation facility, plus evidence that appellant neglected the children's physical and emotional needs, the chancery court determined that they were dependent-neglected and that it was in their best interests to remove them from appellant's custody.

The chancery court also ordered the following reunification services: 1) appellant was to complete the S.T.E.P. program; 2) appellant was to submit to regular drug screens and refrain from using any illegal drugs; and 3) appellant and her boyfriend were to complete parenting classes. Appellant was allowed two hours of supervised visitation three times per week at Mrs. Watson's home. The girls were ordered to be assessed for counseling, and Mrs. Watson was ordered to participate with them if counseling was deemed necessary. The chancery court conducted periodic review hearings from November 1998 through May 1999. The chancellor consistently ordered appellant to continue with the foregoing conditions, and to provide a stable home environment.

The court later conducted a permanency planning and a termination hearing. The chancellor heard evidence at the termination hearing that appellant had been convicted of the drug charges and the charge of endangering her son. She received a six-year sentence on the drug charges, and was ordered to spend at least six

additional months in a drug rehabilitation program upon her release. At the time of the termination hearing, she was waiting to be transferred to prison to serve her sentence on the felony possession charges.

At the termination hearing, appellant testified that the January 1998 theft charge occurred because she was stealing for her children. She denied forcing her children to steal. She stated that she had not used drugs since September 1998. She admitted that she did not comply with the court orders for even the brief period of time she was not incarcerated, but she stated that parenting classes were not offered to her in jail and when she was out of jail, none were scheduled. She claimed that she did not know who her caseworker was or how to get in touch with anyone to receive services.

Her daughters testified that they did not want to live with her and they wanted to live with Mrs. Watson. Both girls indicated they understood that the purpose of the hearing was to terminate appellant's rights with respect to them. Appellant's younger daughter testified:

> I don't think my mom can take care of us right now because she's in jail. She went to a rehab and didn't stay. And she got back out and done the same thing she was doing. Even if she got out of jail and went rehab, I still wouldn't stay with her. She's still going to be the same person and she's still going to be doing drugs.

She further testified, "I always remember her using drugs. There was never a time when she didn't use drugs." However she indicated that she desired to see appellant "if she's not using drugs." Appellant's older daughter testified that she did not want to stay with her mother, and that things were "still good" at Mrs. Watson's home. She testified that appellant made her steal cigarettes when she was in the fifth grade. She also stated her desire to see her mother if she remained drug-free.

The chancery court found that clear and convincing evidence warranted termination of appellant's parental rights. The court found that appellant had not complied with its orders, had not rehabilitated her home, and had not corrected the circumstances that caused her children to be removed. The chancellor noted that appellant had been in and out of jail during the pendency of this case, but did not comply with the court orders even for the brief

time when she was not in jail. The chancellor further noted that appellant had entered a drug rehabilitation program, but did not complete it because she had to return to jail. Finally, the chancellor noted that though she did exercise visitation even while in jail, appellant did not complete parenting classes. Although the State had also petitioned the court for termination of the fathers' rights, the court did not terminate any of their respective rights. However, the court noted that ADHS had an appropriate plan for the children to be adopted, and set adoption as the case plan goal. Appellant appeals from this order.

Appellant argues that it is unrealistic to punish an incarcerated parent for not availing herself of services ordered by the court that are not available to her in jail. She cites *Crawford v. Dep't of Humans Servs.*, 330 Ark. 152, 951 S.W.2d 310 (1997), for the proposition that imprisonment is not conclusive on the termination issue. She also relies upon *Thompson v. Arkansas Dep't of Human Servs.*, 59 Ark. App. 141, 954 S.W.2d 292 (1997). In affirming the termination of the appellant's parental rights in *Thompson*, we observed that the parent had been sentenced to serve forty years in prison and was not likely to be released from jail until after the children were grown. The *Thompson* court found that this sentence constituted a "substantial period of the children's lives" under Arkansas Code Annotated section 9-27-341(b)(2)(F) (Supp. 1999). Appellant maintains that her situation is distinguishable from the parent's situation in *Thompson* because she maintained frequent contact with her children and gave her tax refund to help support them even though she had not been ordered to pay child support.

Appellant also argues that termination of her parental rights will not further the goal of adoption because the fathers' rights were not terminated. She claims that terminating her rights serves no purpose except to keep the children in foster care or Mrs. Watson's care indefinitely, and maintains that termination was not necessary to keep the children in Mrs. Watson's care.

■ The primary consideration in termination of parental rights cases is the best interest of the child. *See* Ark. Code Ann. § 9-27-102 (Repl. 1998) & § 9-27-341 (Supp. 1998). The termination statute under which appellant's parental rights were terminated is section 9-27-341, which allows a chancery court to enter an order terminating parental rights if the court determines by clear and convincing evidence that it is in the best interest of the child, the

child has been adjudicated dependent-neglected, and the child has remained out of the home for twelve months.

■ The burden on the party seeking to terminate the parental relationship is a heavy one under Arkansas law. First, the supreme court has held that "[o]ur caselaw is clear that termination of parental rights in an extreme remedy . . . [that] will not be enforced to the detriment or destruction of the health and well-being of the child." *Gregg v. Arkansas Dep't of Human Servs.*, 58 Ark. App. 337, 340 952 S.W.2d 183, 184 (1997) (citing *Corley v. Arkansas Dep't of Human Servs.*, 46 Ark. App. 265, 267, 878 S.W.2d 430, 431 (1994)). Second, the governing statute requires that the party seeking to terminate the parental relationship demonstrate its position by clear and convincing evidence. *See* Ark. Code Ann. § 9-27-341 (Supp. 1998). Under Arkansas law, "clear and convincing evidence is that degree of proof which will produce in the fact finder a firm conviction as to the allegation to be established." *See Anderson v. Douglas*, 310 Ark. 633, 637, 839 S.W.2d 196, 198 (1992).

■ We have stated that "[w]hen the burden of proving a disputed fact in chancery court is by 'clear and convincing evidence,' the question we must answer on appeal is whether the chancellor's finding that the disputed fact was proved by clear and convincing evidence is clearly erroneous." *Thompson v. Arkansas Dep't of Human Servs.*, 59 Ark. App 141, 146, 954 S.W.2d 292, 294 (1997) (citing *Beeson v. Arkansas Dep't of Human Servs.*, 37 Ark. App. 12, 14, 823 S.W.2d 912, 913 (1992)). In determining whether a finding is clearly erroneous, we give due deference to the opportunity of the chancellor to judge the credibility of the witnesses. *See Anderson v. Douglas, supra.*

■ We hold that the chancellor did not err in terminating appellant's parental rights. Appellant was in and out of jail during the pendency of this case. Granted, the mere fact that she was incarcerated at the time of the termination hearing is not dispositive of the termination issue. *See Crawford v. State, supra.* However, our supreme court has stated that a parent's imprisonment does not toll a parent's responsibilities toward her children. *See Zgleszewski v. Zgleszewski*, 260 Ark. 629, 542 S.W.2d 765 (1976). As the children's attorney *ad litem* argues, tolling a parents' obligations to comply with reunification orders while they are in jail would be contrary to the goal of the juvenile code to provide permanency for the children.

The appropriate inquiry where a parent has been ordered to comply with a court's reunification orders and is incarcerated is whether the parent utilized those resources available to maintain a close relationship with the children. *See Zgleszewski v. Zgleszewski, supra.* In this case, appellant exercised visitation with her children and sent them letters when she was incarcerated. She also gave them $200 from an income tax return. Further, there was no finding in the record that she ever failed a drug screen, and she testified that she completed a ten-day drug treatment program.

However, the record is replete with evidence that appellant chose to put her own interests above those of her children. The ADHS offered appellant parenting classes and lay therapy services in an effort to assist her. When appellant did not comply with these services, she was placed on a waiting list, and the agencies offering her services unsuccessfully attempted to contact her. The chancery court and the ADHS worked with appellant over a period of fourteen months in an effort to reunify the family. Appellant complied with some of the court's orders, but she did not successfully complete drug treatment and did not maintain a stable home. She was dropped from the S.T.E.P. program for noncompliance, and admitted that she used crack cocaine after she was arrested on the possession and endangerment charges.

Appellant apparently made no attempt to comply with the court's orders even when she was not incarcerated. She does not argue that the evidence was insufficient to terminate her parental rights and concedes that she did not correct the conditions that caused the children's removal. She remained out of jail or rehabilitation for only twenty-four days during the pendency of this case, and admitted that she did not comply with the court orders for even that brief period of time. She claimed she did not know whom to contact in order to receive services and admitted that she did not call ADHS to get this information. Yet, prior to the children's removal from her home, appellant called ADHS and asked that the children be placed with Mrs. Watson. Therefore, her argument that she did not know whom to contact in order to receive services is unpersuasive.

Appellant not only failed to comply with the court's orders, she also directly disobeyed them. She took the children from Mrs. Watson's home on more than one occasion, without Mrs. Watson's permission and in violation of the court's order that super-

vised visitation was to be conducted at Mrs. Watson's home. On one occasion, appellant kept her son for three days before the police located him and returned him to Mrs. Watson.

Further, the testimony supports that appellants' children are thriving under Mrs. Watson's care. She appears to have provided the children a stable home environment. Mrs. Watson has been diligent with regard to attending counseling sessions with the children, and the children's various caseworkers testified as to the improvement in the children's demeanor. Appellant' s oldest daughter had been diagnosed with Tourette's syndrome and was receiving appropriate care. Her son, who suffers from developmental delays, was also receiving appropriate care. Her daughters testified that their grades were improving, and they wanted to live with Mrs. Watson. The children's improvement while in foster care is an appropriate factor for the chancery court to consider when determining whether parental rights should be terminated. *See Crawford v. Dep't of Human Servs., supra.*

In addition, while the fact that appellant is a repeat offender is not dispositive, the chancellor was allowed to consider the fact that she was arrested on numerous charges within a nineteen-month period, while she was under court orders to maintain a stable home and avoid taking drugs. She was sentenced to serve a maximum of six years in prison, followed by a six-month stay in a rehabilitation facility upon her release. In affirming termination of parental rights in *Crawford v. State, supra*, the court cited the fact that the parent could be incarcerated for up to four more years, and would not be able to care for his children during that time. Although appellant's sentence is much shorter than the appellant's sentence in *Thompson v. Arkansas Dep't of Human Servs., supra*, that case is inapposite in this respect because the parent's rights in that case were terminated under a different section of the statute that provides a separate ground for termination based on a substantial prison sentence.

However, the chancery court did not terminate appellant's rights because she had been in jail. Her parental rights were terminated because the statutory requirements for termination were met by clear and convincing evidence. The children had been adjudicated dependent-neglected; the children had been out of the home for twelve months; and ADHS made a meaningful effort to rehabilitate the home and correct the conditions that caused removal.

Finally, appellant's *conduct that led to her incarceration*, in addition to her conduct while she was not incarcerated, convinced the chancellor that appellant failed to remedy the conditions that caused her children to be removed from her home. *See* Ark. Code Ann. § 9-27-341(b)(3).

Based on the foregoing evidence, we hold that the chancellor's order was not clearly erroneous. As the chancellor stated in his order:

> It is no one's fault but Ms. Malone's that she has criminal problems that have caused her to be locked up and that have caused her to now be on her way to prison. She has chosen a lifestyle of drugs and criminal activity over being a fit and proper parent who can properly provide for the needs of her children. She is not a fit and proper parent for these children. These children need a parent who can make appropriate decisions in her own life so that she can provide guidance, direction, and control in their lives.

We are not persuaded by appellant's argument that termination of her parental rights will not further the goal of adoption. First, appellant did not raise this argument below. Second, section 9-27-341(c)(2)(A)(i) provides that termination of the parental relationship does not affect the relationship between the other parent and the child/children. Therefore, appellant does not have standing to raise this issue.

Moreover, appellant's argument seems to be premised on the erroneous assertion that the chancery court would not be able to authorize an adoption because the fathers' rights had not been terminated. This is simply not true; the fathers may give their consent to adoption, or the chancery court may find that the fathers are unreasonably withholding their consent. *See* Ark. Code Ann. § 9-9-220; *see also Lindsey v. Ketchum*, 10 Ark. App. 128, 661 S.W.2d 453 (1983). Therefore, the goal of adoption is not unrealistic.

Affirmed.

KOONCE and STROUD, JJ., agree.

Tiffany Amelia DINKINS *v.*
ARKANSAS DEPARTMENT of HUMAN SERVICES

CA 00-385 34 S.W.3d 366

Court of Appeals of Arkansas
Division II
Opinion delivered November 22, 2000
[Petition for rehearing denied January 17, 2001.]

Floyd J. Taylor, Jr., for appellant.

Kathy L. Hall, for appellee.

JOSEPHINE LINKER HART, Judge. Tiffany Dinkins appeals a court order that terminates her parental rights pursuant to Ark. Code Ann. § 9-27-341 (Supp. 1999). She argues that the chancellor's finding that she failed to correct the conditions that caused the children's removal are clearly erroneous and that he erroneously concluded that she failed to provide significant material support for her children. We agree with appellant and reverse and remand.

On March 24, 1997, Dinkins was nine-months pregnant and applied for assistance from the Arkansas Department of Human Services (DHS). At this time a DHS agent, Juanita Turner, noticed a facial bruise on the right cheek and right ear of appellant's four-year-old daughter, K.D., who stated she was hit by Dinkins. On the following day, Turner conducted a two-hour at-home interview with Dinkins, who was living in a two-bedroom trailer with her eighty-year-old godmother and her three children — K.M., aged twenty-two months; K.R.D., aged three; and K.D. Turner reported

that the trailer was disheveled — two garbage cans overflowing with dirty diapers and garbage; pots, pans, and dishes with food cluttering the stove, sink, and counter areas; a strong odor of soured food emanating from the kitchen; clothes on the floor of every room; dried pieces of food and other debris embedded in the carpet of every room; empty beverage cans on the bedroom floor; and dressers overflowing with clothes. During the visit, K.M.'s feces-filled diaper was not changed and K.D. revealed numerous multi-colored bruises on her neck, face, right ear, arms, and legs along with scratch marks under her chin. Turner further observed a red welt on the palm of K.D.'s hand that she said was caused when Dinkins stuck her with a tweezer. K.D. and K.R.D. said that Dinkins slapped them in the face and hit them with a stick.

The children were taken to Mainline Health Systems by Turner for an examination on March 26. At this time, Turner noticed that K.D. and K.R.D. had bruises on the left side of their chests that were, according to them, caused by Dinkins hitting them with a belt. K.R.D. also stated that she was hit in the face by a shoe thrown at her by Dinkins.

Based on the living conditions along with the fact that Dinkins's first prenatal visit for her pregnancy was several days earlier and her only means of support was her godmother, Turner concluded that the juveniles were in substantial danger of continued maltreatment. An *ex parte* juvenile court order removed the children from Dinkins's custody, and thereafter another order found probable cause of dependency/neglect and ordered DHS to retain custody of the children. Although the juvenile court's adjudication order left the children in DHS's custody, it allowed Dinkins to visit the children in a manner prescribed by DHS. The court further found that the goal of the case was reunification commensurate with the objectives and tasks contained in DHS's case plan, and required Dinkins to attend mental health counseling and complete parenting classes. Finally, the court, pursuant to Ark. Code Ann. § 9-27-346 (Repl. 1998), declared that Dinkins did not have the ability to pay child support although she had an obligation to do so.

During the following two years, the children remained in DHS's custody, and the case was reviewed nine times.[1] Except for

[1] The first seven reviews were conducted by a different chancellor than the chancellor

the July 8, 1999, order following the final review, every order found that the goal of the case would be reunification. The court further found that Dinkins had substantially complied with the orders of the court and DHS's case plan in orders dated November 5, 1997; April 13, 1998; October 7, 1998; December 15, 1998; and April 27, 1999. In fact, the chancellor found that her progress was so substantial that he ordered DHS to allow unsupervised, at-home visitation following the December 15, 1998, hearing, and, thereafter, DHS consequently granted her at-home visitation with the children every weekend.[2]

This case took a markedly different tone during the final two review hearings.[3] DHS in its February 18, 1999, court report recommended that if Dinkins remained in compliance with court orders and the case plan, then it would recommend at the March 1, 1999, hearing that she be given at-home visitation with the children for thirty days. However, at the hearing, the chancellor refused to allow the children to have any unsupervised visitation after reviewing six photographs taken by a housing authority agent that showed Dinkins's home in a generally messy condition such as clothes strewn on furniture and dishes in the kitchen sink and, according to him, potentially dangerous because cleaning solutions were on a kitchen counter. The record, however, was silent as to whether the bottle-tops of these items were properly fastened. Nevertheless, the chancellor's dissatisfaction was apparently so strong that he abolished the weekend visitation that DHS had arranged pursuant to a previous court order.

Approximately three months later, DHS petitioned the court to terminate Dinkins's parental rights despite the fact that little had changed since its previous effort to obtain the court's permission to give Dinkins at-home visitation with her children for thirty days.[4]

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whose decision is the subject of this appeal.

[2] Although DHS petitioned to terminate Dinkins's parental rights in October, 1998, it did so because it understood that it was required to do so pursuant to the federal Adoption and Safe Families Act of 1997; however, DHS later voluntarily dismissed the petition because it claimed that new federal regulations did not require it to pursue the termination of Dinkins's parental rights. At that time, the goal of the case became reunification once again.

[3] The second chancellor presided over these hearings.

[4] In fact, this petition was basically identical to the earlier petition DHS withdrew. The only apparent additions to this petition were allegations that appellant's parental rights in two other children were terminated in New York and that the fathers of the children in DHS's custody had not been a part of the children's lives since DHS acquired custody.

The last review hearing was conducted on May 11, 1999. At that hearing, the chancellor found that there was overwhelming evidence that the goal of the case should be termination of parental rights. At the hearing on the termination petition on August 5, 1999, Vickie Gibbs, a family service worker; Turner, the DHS agent; Mark Wargo, a psychological examiner from Delta Counseling Associates; Dinkins; and K.D., one of Dinkins's children, testified.

Gibbs testified that the children had remained in foster care for over two years and that from the beginning the goal had been reunification. Pursuant to the case plan, Dinkins was responsible for maintaining a clean house, completing counseling, and otherwise cooperating with DHS. She testified that Dinkins acquired an apartment from the housing authority in Crossett, and in the beginning she kept the apartment clean, but later it became inappropriate for children. She was convinced that the apartment was unsafe because of photographs of the apartment depicting a bottle of bleach on the counter along with detergent that the children could reach, a sink filled with dishes, a water-filled bucket on the floor, piles of clothes throughout the house, and a table covered with items. She specifically expressed the opinion that the mop bucket and the bleach were safety hazards, and further testified that Dinkins had been given an eviction notice as a result of these conditions along with her failure to timely pay rent.

Dinkins also had approximately four different jobs during the time the children were in DHS's care, according to Gibbs. Although she admitted that Dinkins had been financially able to feed and clothe her children, Gibbs opined that Dinkins did not have enough money to support the children in DHS's care and the two children at home.[5] She also admitted that she could not give a documented example in which Dinkins did not cooperate with DHS, and that earlier that year she recommended that the children be placed back in Dinkins's home.

Turner testified that the problems Dinkins had in getting her children back were her failure to control her anger; the continued

[5] We note that the record is devoid of any evidence that DHS attempted to collect child support from the children's fathers and to make the collection of such support a part of the case plan.

physical abuse, as exemplified by K.D.'s burn; and her messy house. She agreed with Gibbs that the photographs depicted safety hazards, such as an iron with its cord hanging off of the side of an ironing board, and that the photographs of the messy apartment were the sole basis for her recommendation that Dinkins's parental rights be terminated. Turner further acknowledged that although K.R.D. told her that Dinkins had caused a mark on her left arm by pinching her, she did not report it as an incident of abuse. Additionally, she testified that K.D. had a quarter-sized burn on her throat, but K.D. did not realize having it, Dinkins denied causing it, and Turner did not seek medical care for it.

Mark Wargo, a psychological examiner from Delta Counseling Associates, testified that he had been Dinkins's primary therapist for approximately two years and counseled her regarding child abuse, anger management, and parenting. He opined that her anger management had progressed slowly, but noticeably; and that during their counseling sessions, she would bring the children that lived with her and appeared to be someone who cared for her children. He noticed that she used the lessons he taught her to deal with her children, and testified that he recommended to the court in a letter that the children in DHS's care be returned to Dinkins for a trial-visit to determine if she had progressed as a result of the counseling.

Mr. Wargo testified that parenting skills were the focus of the therapy, and understood that Dinkins had not in the past corrected her children properly, but he never observed any maltreatment or abuse. Dinkins, however, admitted to him that she struck her daughter across the ear on an earlier occasion and that she had punished her children by slapping them, but she denied using her fist or burning her daughter.

Dinkins then testified that she did not want to lose her children and admitted that she once had a problem with anger, which was not an easy thing for her to admit. She admitted that she needed help and that was the reason she had been for the most part consistent with attending her counseling sessions. She testified that she never refused a visitation with her children, and that whatever visits she did miss were the result of misunderstandings.

She testified that she was told that she needed to find a place to live, and she began living in an apartment in Crosset in October,

1997, and admitted that she received several eviction notices while living in that apartment. She explained that the reason she received one of the notices was because she paid her monthly rent of one dollar on Monday when the rent was due on the previous Sunday. Moreover, she explained that the reason her rent payments had been late on several occasions was because she had to travel to the housing authority office to pay the rent. She also acknowledged that she understood that she would be evicted if she received one more notice, but stated there had been no violations since the March 10 hearing and she passed the monthly pest-control inspections.

Dinkins admitted that her apartment occasionally was messy, but stated that not all of the bedrooms in her apartment are used for sleeping — such as the room in which she keeps a lot of clothes and the iron and ironing board. Additionally, she testified that she had been ironing the day the housing authority took the pictures.

Dinkins, however, denied burning K.D., and stated that pinching was not an acceptable form of punishment. She, however, admitted that two or three years in the past she had caused a bruise on her daughter's face, but believed that her anger-management classes had helped her. She also testified that she had completed parenting classes and that she had made efforts to collect child support for the children. Finally, she testified that her children's shots were current and that she had no problem feeding her children.

Although she admitted that she had multiple jobs during the past several years, she stated that she had been fired from only one job (Georgia Pacific, because she was accused of using the phone too much), and resigned from her remaining jobs because of pay, conflicts with school, or inability to get a baby sitter for late-night work. She testified that she had recently begun work at the hospital and would work there as needed. She stated that she did not have either a telephone or vehicle, but she could get around town with rides from friends and could call for emergency assistance by using a neighbor's telephone.

Turner then testified again in rebuttal. She testified that on March 12, K.D. asked her to deliver a note to Dinkins stating that

she wanted her mother to stop pinching her. Instead of delivering the note, Turner kept it.

K.D. then testified that she did not know how she got the burn, and that her statement that her mother caused the burn was untrue.

The chancellor on August 5, 1999, granted the petition terminating Dinkins's parental rights and found, *inter alia,* that by clear and convincing evidence it was contrary to the children's best interest that they be returned to her custody; that the children had resided outside her home for more than two years; that despite DHS's meaningful rehabilitation efforts, she had failed to correct the conditions that caused the children's removal; and that for more than twelve months she had failed to materially support her children. From that order comes this appeal.

Cases such as this are reviewed *de novo* on appeal, *Wade v. Arkansas Dep't of Human Servs.*, 337 Ark. 353, 356, 990 S.W.2d 509, 511 (1999), but the scope of that review is limited, as our supreme court recently explained in *Ullom v. Arkansas Dep't of Human Servs.*, 340 Ark. 615, 621, 12 S.W.3d 204, 208 (2000):

> The facts warranting termination of parental rights must be proven by clear and convincing evidence. In reviewing the trial court's evaluation of the evidence, we will not reverse unless the court's finding of clear and convincing evidence is clearly erroneous. *Baker v. Arkansas Dep't. of Human Servs.*, 340 Ark. 42, 8 S.W.3d 499 (2000). Clear and convincing evidence is that degree of proof which will produce in the factfinder a firm conviction regarding the allegation sought to be established.

See also M.T. v. Arkansas Dept. of Human Servs., 58 Ark. App. 302, 305, 952 S.W.2d 177, 178 (1997); Ark. R. Civ. P. 52 (findings affirmed unless clearly erroneous). Lastly, "[a] finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *Wade*, 337 Ark. at 356, 990 S.W.2d at 511.

I. Findings Clearly Erroneous Because Not Based on Clear and Convincing Evidence

The controverted grounds on which the chancellor ordered the termination of parental rights are found in Ark. Code Ann. § 9-27-341(b)(3)(B)(i)(a), which provides that after finding by clear and convincing evidence that it is in a juvenile's best interest, a juvenile court can terminate a parent's parental rights if the following is also proved by clear and convincing evidence:

> That a juvenile has been adjudicated by the court to be dependent-neglected and has continued out of the home for twelve (12) months, and, despite a meaningful effort by the Department of Human Services to rehabilitate the home and correct the conditions which caused removal, those conditions have not been remedied by the parent.

Although Dinkins concedes that the children have been adjudicated dependent-neglected and that they have resided outside her home for more than twelve months, she argues that the chancellor's finding that she failed to correct the conditions that caused the children's removal is clearly erroneous because it is not based on clear and convincing evidence. We agree.

The conditions that caused the children's removal were the multiple injuries to the children caused by Dinkins, the cramped and unsanitary conditions of the trailer in which she was living, and her lack of self-sufficiency. DHS's witnesses, however, testified at the termination hearing that since the children were removed, Dinkins has maintained her four-bedroom apartment for over a year-and-a-half, that there were several occasions in which the apartment was sufficiently tidy, that she has been able to otherwise provide for her other children's needs on her own, and the only times there has been an issue of potential abuse was the unreported pinch-mark and the mysterious burn-mark.

■ We are guided by the principle that "when the issue is one involving the termination of parental rights, there is a heavy burden placed upon the party seeking to terminate the relationship." *Ullom*, 340 Ark. at 621, 12 S.W.3d at 208 (citing *J.T. v. Arkansas Dep't of Human Servs.*, 329 Ark. 243, 947 S.W.2d 761 (1997)). Moreover, "[w]hile the rights of the natural parents are not to be passed over lightly, they must give way to the best interests of the children

when *clear and convincing evidence* shows the natural parents are incapable of providing for the reasonable care for their children." *Moore v. Arkansas Dep't of Human Servs.*, 69 Ark. App. 1, 6, 9 S.W.3d 531, 535 (2000) (emphasis added).

Upon reviewing the entire evidence, we are left with a definite and firm conviction that DHS has not demonstrated by clear and convincing evidence that Dinkins failed to correct the conditions that caused the children's removal. The abstract plainly demonstrates that Dinkins acquired and maintained an apartment that is substantially more spacious than the trailer in which she and the children lived at the time DHS took custody of the children, and that with private employment and some public assistance she has been able to provide the necessities for both herself and the two younger children who resided with her. Furthermore, although Dinkins's apartment is messy from time-to-time, and there is arguably the occasional presence of a latent risk, there is a lack of *clear and convincing evidence* that intolerably unsanitary conditions that pose patent health risks such as exposure to pails filed with diapers soiled with human waste, odor of soured food, etc. — existed in her apartment where she resided for one and one-half years.[6] Finally, not only is it unclear whether Dinkins caused either the single instance of a pinch mark or the single instance of a quarter-sized burn mark on which DHS based its claim of continued abuse, both of these instance are certainly unlike the injuries that led to the children being placed in DHS's custody, which resulted in DHS seeking medical care for the children.[7] We, therefore, reverse and

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[6] In *Donna S. v. Arkansas Dep't of Human Servs.*, 61 Ark. App. 235, 966 S.W.2d 919 (1998), we affirmed the termination of parental rights because, in part, the parent failed to keep the living conditions clean, but the constant maintenance of clean living conditions was critical in that case because the child suffered from sickle-cell anemia, which rendered him constantly at risk for contracting life-threatening infections, and an eating disorder, which required that he be fed with an apparatus that had to be kept clean.

[7] Orders terminating parental rights have been affirmed on appeal when there has been a finding of significant abuse by a parent after a child has been placed in DHS's custody. *See Ullom*, 340 Ark. 622, 12 S.W.3d 209 (twenty-one-day-old child's initial abuse was a spiral fracture to her arm, and her subsequent abuse by a parent after DHS acquired custody resulted in bruising to both sides of her face and occurred on the very next occasion in which the parents were alone with her); *M.T.*, 58 Ark. App. at 305, 952 S.W.2d at 178-179 (seven-week-old child's initial abuse was a skull fracture caused by parent's boyfriend, and his subsequent abuse was his mother's failure to treat infected blisters on his feet and occurred after his mother had regained custody of him from DHS).

Orders terminating parental rights have also been affirmed on appeal when there was no

remand.

II. Appellant Did Not Fail to Provide Significant Material Support

Dinkins's final point on appeal is that the chancellor erroneously concluded that she failed to provide significant material support. In its response appeal brief, DHS stated:

> Appellant is correct when she asserts that . . . [DHS] did not request contributions from her and that there was no order to pay child support issued by the court. . . . However, this is not fatal to the trial court's decision to terminate Appellant's parental rights. The trial court had reason to terminate Appellant's parental rights pursuant to the reasons addressed in POINT I on appeal. When a court reaches the right decision, albeit for the wrong reason, it should be affirmed. . . .

Plainly, DHS relied on our affirming this case on the first issue, but for the reasons stated above we have reversed and remanded on that issue. Furthermore, DHS is correct that Dinkins has not violated an order to provide child support because no such order existed. Accordingly, we also reverse and remand on this issue.

Reversed and remanded.

JENNINGS and MEADS, JJ., agree.

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attempt to reunify the parent with the child following a finding of significant physical abuse. *See Moore v. Arkansas Dep't of Human Servs.*, 333 Ark. 288, 289-290, 969 S.W.2d 186, 187 (1998) (father criminally convicted and his parental rights terminated after his five months old son stopped breathing and an emergency room examination revealed that both of the his son's legs were broken, and his son had a linear skull fracture, bilateral rib fractures, and a healed fracture of the upper arm); *Gregg v. Arkansas Dep't of Human Servs.*, 58 Ark. App. 337, 952 S.W.2d 183 (1997) (parents' parental rights terminated after hospital examination revealed their child had multiple fractures of the collarbones, legs, forearms, and ribs).

[redacted]