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Joe FRATESI *v.* Julian B. FOGLEMAN

CA 00-368 32 S.W.3d 38

Court of Appeals of Arkansas
Division I
Opinion delivered November 29, 2000

David C. Peeples, for appellant.

Rieves & Mayton, by: *Donald A. Forrest*, for appellee.

JOHN B. ROBBINS, Chief Judge. Appellant Joe Fratesi appeals a judgment of the Crittenden County Circuit Court in favor of appellee Julian B. Fogleman for the balance due on two promissory notes, plus interest and attorney's fees. Appellant asserts two points of error on appeal: (1) that the trial court erred in denying appellant's motion to dismiss, and (2) that the trial court erred in granting appellee's motion in limine and denying appellant's proposed jury instructions.

Appellee brought an action, as receiver, to recover unpaid monies due on two promissory notes executed by appellant and Charles Denton. The Crittenden County Probate Court had appointed Fogleman receiver for the estate of Rexford V. Wheeler, deceased, who was trustee of his and his sister's property. Prior to his death, Mr. Wheeler, as trustee for himself and his sister Ms. Waldrep, executed two two-year leases as lessor, under which certain farm lands were leased to appellant and Charles Denton, as lessees, for calendar years 1985 and 1986. Appellant and Denton both signed each lease. At the same time these leases were executed, appellant and Denton also executed promissory notes in amounts of $15,150 and $12,450, which corresponded to the lease payments due under each of the two leases. The parties subsequently agreed to a reduction of the rent and a credit to these promissory notes of $6,900. The notes matured on October 1, 1986, becoming due and payable on that date in the reduced sum of $20,700.

While it was alleged that there was an informal agreement among the parties that appellant and Denton were each only responsible for rent pertaining to the respective portions of the land that each farmed, the promissory notes reflected that appellant and Denton were jointly and severally liable for their payment. Appellant paid what he understood was his portion of the rent, and appellee sought the remainder from Denton, who failed to pay the balance. Appellee then made demand on both appellant and Denton, seeking the remainder of the monies due. Denton subsequently filed bankruptcy and recovery was no longer sought from him.

The balance remaining on the promissory notes was $7,739.25 when suit was filed on October 20, 1988. Appellant moved for dismissal, asserting that the six-month statute of limitations applicable to the statutory landlord's lien on crops, found in Ark. Code Ann. § 18-41-101 (1987), barred any recovery because of appellee's failure to pursue his lien. Appellant argued that appellee's failure to pursue his landlord's lien impaired the collateral, impaired the right to recover against Denton, and thus released appellant from his joint liability on the notes. Appellant alleges that the motion was denied.

Prior to trial, appellee submitted a motion in limine seeking to preclude appellant from introducing evidence on certain matters, including that pertaining to a landlord's lien. On the matter of a

landlord's lien, the court agreed with appellee and granted his motion. The case went on to trial, and appellant, appellant's wife, appellee, and an officer of a bank with whom Mr. Denton conducted loan business testified. Mr. Denton did not testify, having died before trial. At the close of the trial, appellant proffered jury instructions regarding the impairment of collateral securing a negotiable instrument and the statutory landlord's lien, to which appellee objected. The trial court agreed with appellee and they were not used. After deliberations, the jury returned a verdict against appellant in the amount of the unpaid balance, plus interest and attorney's fees. This appeal followed. We affirm.

Denial of Motion to Dismiss

Appellant first argues on appeal that the trial court erred in denying his motion to dismiss. Ordinarily, a motion to dismiss is filed by the defendant prior to filing his answer to the complaint. *See* Ark. R. Civ. P. 12. Here, appellant filed his motion to dismiss a year after he filed his answer. In his motion, he contended that appellee failed to act on a statutory lien in a timely manner such that the statute of limitations barred any action on the debt. Appellant acknowledges that the trial court made no written findings and entered no order denying the motion to dismiss; he instead asserts that the trial court announced an oral denial. There is no abstract of a ruling on this motion, orally or in writing. "It is axiomatic that the record on appeal is limited to what is abstracted, and the burden is clearly placed on the appealing party to provide an abstract sufficient for appellate review." *Anderson v. Holliday*, 65 Ark. App. 165, 171, 986 S.W.2d 116, 119 (1999). It is incumbent upon appellant to call his motion to the trial court's attention and obtain a ruling. *Flake v. Thompson*, 249 Ark. 713, 460 S.W.2d 789 (1970) (failure to obtain ruling on motion to dismiss not considered on appeal). Objections and questions left unresolved are waived and may not be relied upon on appeal. *See Drone v. State*, 303 Ark. 607, 798 S.W.2d 434 (1990); *McDonald v. Wilcox*, 300 Ark. 445, 780 S.W.2d 17 (1989). We do not consider this point on appeal because it is not preserved for our review.

Appellant alternatively argues that the trial court should have considered the pleadings available to it at the time and treated his motion to dismiss as one for summary judgment. Appellant is

correct, for though it appears to be a 12(b)(6) motion, because facts outside the complaint are argued, the trial court could have treated it as a motion for summary judgment pursuant to Ark. R. Civ. P. 56. *See* Ark. R. Civ. P. 12(b). Were we to accept appellant's alternative theory and consider that the motion to dismiss was treated by the trial court as a motion for summary judgment, it would not affect our decision because, first, as discussed above, the abstract does not reflect that the trial court ruled on it, and, second, we would be precluded from reviewing it on appeal because a denial of a motion for summary judgment is not appealable. *See Amalgamated Clothing & Textile Workers Int'l Union v. Earle Indus., Inc.*, 318 Ark. 524, 886 S.W.2d 594 (1994); *Daniels v. Colonial Ins. Co.*, 314 Ark. 49, 857 S.W.2d 162 (1993).

Grant of Motion in Limine/Denial of Proffered Jury Instructions

Appellant's second allegation of error concerns the disallowing of evidence regarding impairment of the collateral, *i.e.*, Denton's crop, and failure to perfect a landlord's lien in those crops, as delineated in Ark. Code Ann. § 4-3-606 (1987) entitled "Impairment of recourse or of collateral."[1] That statute read:

> (1) The holder discharges any party to the instrument to the extent that without such party's consent the holder:
> (a) Without express reservation of rights releases or agrees not to sue any person against whom the party has to the knowledge of the holder a right of recourse or agrees to suspend the right to enforce against such person the instrument or collateral or otherwise discharges such person, except that failure or delay in effecting any required presentment, protest, or notice of dishonor with respect to any such person does not discharge any party as to whom presentment, protest, or notice of dishonor is effective or unnecessary; or
> (b) Unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse.
> (2) By express reservation of rights against a party with a right of recourse the holder preserves:

[1] This section was in effect when this cause of action was instituted but has since been repealed.

(a) All his rights against such party as of the time when the instrument was originally due; and
(b) The right of the party to pay the instrument as of that time; and
(c) All rights of such party to recourse against others.

Consistent with this ruling, the trial court likewise disallowed appellant's proffered jury instructions on a landlord's lien, perfection of that lien, and discharge of debts for failure to act on that lien.

Appellant argues on appeal that the trial court's ruling deprived him of applicable statutory defenses and was an abuse of discretion. Due to this abuse of discretion, appellant argues, the jury was deprived of evidence and instructions that might have led it to find that appellant was released from his obligations under the promissory notes. We disagree.

This statutory defense does not exist in this context for at least two reasons: First, the impairment of collateral provision addressed in § 4-3-606(1)(b) expressly applies to "collateral for the instrument." The "instrument" in the case before us is an unsecured promissory note. There was no collateral given to secure it. Second, the "collateral" referred to in § 4-3-606(1)(b) could not include the landlord's lien because such statutory liens are not covered by the applicable portions of the Uniform Commercial Code.

Chapter 3 of the Uniform Commercial Code as enacted in Arkansas is entitled, "Uniform Commercial Code—Negotiable Instruments." The statutory section that appellant argued that should apply, § 4-3-606, is part of Chapter 3, which has limitations on its applicability. The first subsection of Chapter 3 is § 4-3-103, which mandates that the provisions of Chapter 3 "are subject to the provisions of the chapters on bank deposits and collections (chapter 4 of this title) and secured transactions (chapter 9 of this title)." Chapter 9 is entitled, "Uniform Commercial Code—Secured Transactions." Arkansas Code Annotated section 4-9-102(2) states explicitly that this chapter does not apply to statutory liens except as provided in § 4-9-310, which concerns the priority of statutory liens and purchase money mortgage liens. Further, Arkansas Code Annotated section 4-9-104(b) and (c) state that this chapter does not apply to a landlord's lien or a lien given by statute. This is

precisely what appellant was asking the trial court to do — to invoke a statutory defense that was by the Code's terms clearly excluded.

The trial court did not err in granting appellee's motion in limine. As a result, the issue with regard to the jury instructions becomes moot.

Affirmed.

HART and NEAL, JJ., agree.

SUPERIOR INDUSTRIES *v.* William THOMASTON

CA 00-24 32 S.W.3d 52

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered November 29, 2000

Bassett Law Firm, by: *Curtis Nebben* and *Nicole Weeks Fowler*, for appellant.

Mason Law firm, PLC, by: *G. Chadd Mason*, for appellee.

JOHN B. ROBBINS, Chief Judge. Appellee William Thomaston was employed with appellant Superior Industries from October 1995 until he was terminated on August 25, 1998. He suffered a compensable injury to his shoulder on July 12, 1996, and was compensated by appellant based on a five percent permanent impairment rating. Mr. Thomaston filed for temporary total disability benefits from August 25, 1998, through the date of his shoulder surgery on January 14, 1999, and these benefits were controverted by appellant. Appellant claimed that it had made light-duty employment available to the appellee, but that he was terminated for misconduct and not because of his physical limitations. After a hearing, the Commission awarded the temporary total disability benefits, and Superior Industries now appeals.

For reversal, appellant raises three arguments. First, it argues that the Commission applied an improper legal standard in awarding temporary total disability benefits. Next, it contends that the temporary total disability award was not supported by substantial evidence. Finally, appellant asserts that the Commission also erred in finding that it controverted the appellee's entitlement to the shoulder surgery performed by Dr. Park in January 1999. We find no error and affirm.

When reviewing decisions from 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 affirm if supported by substantial evidence. *Welch's Laundry & Cleaners v. Clark*, 38 Ark. App. 223, 832 S.W.2d 283 (1992). Substantial evidence is that which a reasonable person might accept as adequate to support a conclusion. *City of Fort Smith v. Brooks*, 40 Ark. App. 120, 842 S.W.2d 463 (1992). A decision by the Workers' Compensation Commission should not be reversed unless it is clear that fair-minded persons could not have reached the same conclusions if presented with the same facts. *Silvicraft, Inc. v. Lambert*, 10 Ark. App. 28, 661 S.W.2d 403 (1983).

Mr. Thomaston testified that he is 44 years old and has worked since 1973 as an auto mechanic or in manufacturing. His job with Superior Industries included moving molten metal from a furnace into casting machines. On July 12, 1996, he was performing his job

when he hurt his shoulder. He was diagnosed with a strain and Dr. Moffitt, the company physician, released him to restricted duty. Mr. Thomaston worked a light job using only one arm until November 1996, and then he returned to regular duty.

Mr. Thomaston's symptoms worsened, so he returned to Dr. Moffitt in August 1997. As a result of extreme pain and weakness he was again assigned to light duty. During this time he was taking injections and undergoing physical therapy. Sometime later, he was assigned to an even lighter janitorial job, which included mopping, sweeping, and emptying trash cans.

In April 1998, Mr. Thomaston changed physicians to Dr. Park. A rotator cuff tear was detected, and after conservative treatment failed, surgery was recommended.

Mr. Thomaston acknowledged that, prior to being fired on August 25, 1998, he had been written up by his supervisor five or six times. However, he maintained that due to his deteriorating condition he was physically unable to keep up with his job demands. He stated that with each reprimand his employer would increase his duties and that at times they exceeded his restrictions. Mr. Thomaston testified that the only reason he was terminated was because he could not keep up with his work. After being terminated, he applied for unemployment benefits but was disqualified due to his medical restrictions.

Lance Gaston, appellee's supervisor, testified that the appellee complained about his duties, and that as a result they were changed to accommodate him. Despite these changes, Mr. Thomaston fell behind in his work, and after two suspensions was terminated. At the time of his termination, "he was already on thin ice due to his job performance." Mr. Gaston testified that "the event that made termination inevitable was an incident where [he] called female co-workers 'bitches'."

Appellant's first argument on appeal is that the Commission applied the wrong standard in awarding the temporary total disability benefits. At the hearing, appellant argued that since they provided Mr. Thomaston employment within his restrictions, and because his termination was his own fault due to misconduct, he should not be entitled to any disability benefits. However, the Commission disagreed, stating "the basis for claimant's employment

separation is irrelevant in determining claimant's entitlement to temporary total disability benefits." The appellant submits that this statement is incorrect, and that the Commission should have made a factual determination as to whether Mr. Thomaston was fired for misconduct or fired because he was physically unable to work. If his termination was for misconduct, appellant asserts, his temporary total disability benefits should be reversed.

Arkansas Code Annotated section 11-9-526 (Repl. 1996) provides:

> If any injured employee refuses employment suitable to his capacity offered to or procured for him, he shall not be entitled to any compensation during the continuance of the refusal, unless in the opinion of the Workers' Compensation Commission, the refusal is justifiable.

The appellant argues that we should use the above statute as a basis to deny appellee disability benefits by analogy. Its argument is that, if the employer provides suitable employment and a claimant is disqualified for refusing it, he should also be disqualified for getting fired for his own misconduct.

Appellant's first argument is reasonable and persuasive; however, it does not comport with the stricture of our current law. Arkansas Code Annotated section 11-9-704(b)(3) (Repl. 1996) provides that "any reviewing courts shall construe the provisions of this chapter strictly." Consequently, construing section 11-9-526 strictly, as we must, the controlling fact in this case is that Mr. Thomaston did not refuse employment; he accepted the employment and was later terminated not by his choice, but at the option of this employer. Since no provision enacted by the legislature supports the appellant's position in this case, we are constrained to affirm.

When our General Assembly enacted Act 796 of 1993, it issued the following "Legislative Declaration," codified at Ark. Code Ann. § 11-9-1001 (Repl. 1996):

> The Seventy-Ninth General Assembly realizes that the Arkansas workers' compensation statutes must be revised and amended from time to time. *Unfortunately, many of the changes made by this act were necessary because administrative law judges, the Workers' Compensation Commission, and the Arkansas courts have continually*

> *broadened the scope and eroded the purpose of the workers' compensation statutes of this state.* The Seventy-Ninth General Assembly intends to restate that the major and controlling purpose of workers' compensation is to pay timely temporary and permanent disability benefits to all legitimately injured workers that suffer an injury or disease arising out of and in the course of their employment, to pay reasonable and necessary medical expenses resulting therefrom, and then to return the worker to the work force. *When, and if, the workers' compensation statutes of this state need to be changed, the General Assembly acknowledges its responsibility to do so.* It is the specific intent of the Seventy-Ninth General Assembly to repeal, annul, and hold for naught all prior opinions or decisions of any administrative law judge, the Workers' Compensation Commission, or courts of this state contrary to or in conflict with any provision in this act. *In the future, if such things as the statute of limitations, the standard of review by the Workers' Compensation Commission or courts, the extent to which any physical condition, injury, or disease should be excluded from or added to coverage by the law, or the scope of the workers' compensation statutes need to be liberalized, broadened, or narrowed, those things shall be addressed by the General Assembly and should not be done by administrative law judges, the Workers' Compensation Commission, or the courts.*

(Emphasis added.) If our workers' compensation laws are to be changed or broadened, this should be left to the legislature.

The appellant's second argument is that the temporary total disability award is not supported by substantial evidence. We disagree. Temporary total disability is awarded when the claimant shows he is within his healing period and is totally incapacitated from earning wages. *Arkansas State Highway & Transp. Dep't v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). In this case, Mr. Thomaston was clearly within his healing period when he was terminated, and there was evidence that he was totally incapacitated. He testified that he could not keep up with his light duties and was fired for that reason. Moreover, Dr. Park opined that appellee could work only one-arm duty and later stated that appellee's work activities were the major cause for his need for treatment and that "Mr. Thomaston has not been able to work as a result of his injury." And, although not binding on the Commission, it is significant that Mr. Thomaston was denied unemployment benefits due to a personal disabling injury. There was substantial evidence to support the Commission's disability award.

Appellant's remaining argument is that the Commission erred in ruling that the shoulder surgery was controverted. We affirm the Commission's ruling on this issue also. Dr. Park recommended surgery in June 1998. However, appellant would not authorize the surgery and called for an independent examination. The independent examiner agreed that surgery was appropriate, but did not render his opinion until six months after surgery was first recommended, causing a substantial delay. In the interim, the claimant apparently requested a hearing on the issue, resulting in a pre-hearing conference and issuance of a pre-hearing order. The question of whether or not a claim is controverted is one of fact, to be determined from the circumstances of each particular case. *Buckner v. Spark's Regional Medical Center*, 32 Ark. App. 5, 794 S.W.2d 623 (1990). Under the circumstances of this case, the Commission's finding that the surgery was controverted was not erroneous.

Affirmed.

PITTMAN, STROUD, and NEAL, JJ., agree.

CRABTREE and MEADS, JJ., dissent.

TERRY CRABTREE, Judge, dissenting. I dissent because I find that the Commission applied the wrong standard in awarding the temporary total disability benefits. As correctly pointed out by the majority, the Commission stated that "the basis for claimant's employment separation is irrelevant in determining claimant's entitlement to temporary total disability benefits." I find this statement to be contrary to the law of this state.

I believe that if Mr. Thomaston was terminated by appellee for cause then he is not entitled to benefits. The majority states that strictly construing Ark. Code Ann. § 11-9-526, "the controlling fact in this case is that Mr. Thomaston did not refuse employment; he accepted the employment and was later terminated not by his choice, but at the option of this employer." Section 11-9-526 provides that a claimant who unjustifiably refuses suitable work will not be entitled to benefits. *See ITT/Higbie Mfg. v. Gilliam*, 34 Ark. App. 154, 807 S.W.2d 44 (1993). I see no significant difference between a person unjustifiably refusing suitable employment, and a person accepting suitable employment but then not performing the duties of the job. In effect, the person has refused employment by refusing to satisfactorily perform the job. I believe that a claimant

has unjustifiably refused employment when he or she is offered suitable employment, accepts such employment, and then is subsequently terminated from employment not due to any disability but due to cause.

Under *Arkansas State Highway Dep't v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981), our supreme court stated that "[t]emporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages." "Temporary total disability is not based on the claimant's healing period, but is instead awarded where the claimant is incapacitated because of injury to earn wages she was receiving at the time of the injury." *Johnson v. Rapid Die & Molding*, 46 Ark. App. 244, 878 S.W.2d 790 (1994). If appellee was terminated for cause he was not totally incapacitated due to his injury, as he earned wages until he was terminated for cause. I cannot find that an employer is liable for temporary total disability benefits if the claimant was terminated not based on a compensable injury but for cause. Under Ark. Code Ann. § 11-9-1001 (Repl. 1996), the purpose of the workers' compensation laws is to pay benefits to all legitimately injured employees, and to return the workers to the work force. The purpose is not to give claimants more rights than other employees, which is just what the majority has done. The majority's opinion allows an injured employee who is provided with suitable light-duty employment to do anything he or she desires, not perform the duties of the job, and if the employer terminates the employee for cause the employer may have to pay temporary total disability benefits. Whereas, if a non-injured employee does the same thing as the injured employee they can be terminated for cause without a second-thought. The majority's opinion in effect requires the employer to retain the injured employee when it would terminate the employee for cause if they were not injured, or be faced with the possibility of paying temporary total disability benefits if they do terminate the injured employee. I cannot agree with this.

In the present case, if it was found that appellee was wrongfully terminated then he would satisfy the requirements under § 11-9-526 and *Breshears,* and as such is entitled to benefits. Unfortunately, the Commission did not decide this issue.

For the foregoing reasons, I would reverse and remand this case to the Commission for a finding on the issue of why appellee was terminated.

MEADS, J., agrees.

Steven Daniel ATKINSON *v.* Deborah D. ATKINSON

CA 00-88 32 S.W.3d 41

Court of Appeals of Arkansas
Division I
Opinion delivered November 29, 2000

Bridewell & Bridewell Attorneys, by: *Laurie A. Bridewell*, for appellant.

Ronald L. Griggs, for appellee.

JOSEPHINE LINKER HART, Judge. Steven Daniel Atkinson appeals the divorce decree that awarded appellee primary physical custody of the parties' younger child and approximately two-thirds of the disputed marital property.[1] Appellant argues that the chancellor's findings that it was in the younger child's best interest that his custody be awarded to appellee and that it was equitable to award appellee more than one-half of the marital property were clearly erroneous. We disagree with appellant and affirm.

The parties were married in 1981, and during the early years of the marriage they lived in Georgia, where appellant attended college and worked full-time. Appellee also worked during this period of time as a dental assistant, but she stopped attending college after a year and one-half. In 1986, appellant received his undergraduate degree and the parties' first child was born. Appellant's work required that he travel often, and, consequently, the parties reached an arrangement whereby appellee would stay home with their child and forego full-time employment. This was also the period of time that the marriage became more troubled. The parties nevertheless proceeded to have a second child in 1991, and appellee continued to remain at home while appellant continued to travel as a part of his job. The parties moved to Magnolia, Arkansas, and appellant began working as a national sales manager for Alcoa. Despite his success at work, appellant's marriage still suffered because of his job-related traveling. In fact, during the course of the marriage the parties separated on four occasions despite the parties' consultations with a series of marriage counselors. Nevertheless, the marriage continued to suffer, and during the last two months of the marriage, the parties slept in separate parts of their house.

[1] According to the decree, the parties came to an agreement that governed how some of the personal property of the marriage was to be divided. Of course, only those items of marital property that were not divided by this agreement are addressed in this appeal.

The parties ultimately separated on October 11, 1998, and appellant filed his complaint on October 15, seeking an absolute divorce from appellee on the grounds of general indignities and custody of the parties' two minor children — Dane, who was born October 15, 1986, and Michael, who was born July 4, 1991. Appellee answered by denying that appellant was entitled to a divorce and counterclaimed seeking custody of both children along with an award of child support.

Following the commencement of the divorce proceedings, appellee retained custody of the parties' minor children, and appellant began a relationship with woman who was a coworker and had separated from her husband five days prior to the parties' separation. She did not think her relationship with appellant was morally wrong because the parties were separated. Ultimately, this relationship became sexual, and appellant and this woman on occasion appeared as a couple. Appellant also frequently brought the children to this woman's house and along with her five-year-old daughter, they would often cook, play games, and watch movies late into the evening.

On February 23, 1999, appellant filed a motion to hold appellee in civil contempt of court for violating the chancery court's standing order prohibiting the parties from harassing one another. Appellee answered by denying that she violated the order. The parties settled the issue and jointly approved an agreed order that was filed March 15, 1999, and, *inter alia*, awarded appellant primary physical custody of Dane and appellee primary physical custody of Michael. This was done, according to appellee, with the hope that appellant's influence would help Dane's behavior and raise his grades at school.

Several days thereafter, appellant took both of the children to a party that was attended mainly by his friends and coworkers. The party was at his paramour's house, and although alcohol was consumed by those who were there, those who were present and testified generally agreed that no one at the party consumed an excessive amount of alcohol. While at the party, appellant experienced an allergic reaction that required he be taken to the hospital and stay there overnight. The children, however, remained at the party and were supervised by an unmarried couple while appellant remained in the hospital. Although this couple allegedly did not

have sexual relations while supervising the children, they did sleep together for approximately two hours while the children slept in a different room.

The matter was tried on May 12, 1999, wherein the chancellor considered all the outstanding issues, including those issues raised in appellee's counterclaim that she filed the previous day for an absolute divorce on the grounds of adultery, seeking alimony and an unequal division of the marital property. The chancellor took the matter under consideration, and in a letter opinion, *inter alia*, the court found that it was in Michael's best interest that his custody be awarded to appellee and that it would be equitable to distribute seventy-five percent of the marital property to appellee. This appeal is taken from the order that embodied the chancellor's letter opinion.

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. Custody of Michael

Appellant argues that the finding that it was in Michael's best interest that his custody be awarded to appellee was clearly erroneous because it was contrary to the rule expressed in *Johnston v. Johnston*, 225 Ark. 453, 456, 283 S.W.2d 151, 153 (1955), that

"[u]nless exceptional circumstances are involved, . . . young children should not be separated from each other by dividing their custody."[2] It is true that in Arkansas this rule is considered to be "settled case law . . . ." *Ketron v. Ketron*, 15 Ark. App. 325, 329, 692 S.W.2d 261, 264 (1985) (citing *Vilas v. Vilas*, 184 Ark. 352, 42 S.W.2d 379 (1931)). It is equally true, however, that we have been critical of parties who use this rule as a substitute for a determination of what is in a child's best interest. *See Riddle v. Riddle*, 28 Ark. App. 344, 349-350, 775 S.W.2d 513, 517 (1989). In cases such as this, a party cannot use a finding that it is in one child's best interest that his custody be awarded a certain parent to infer that it is in the best interest of that child's sibling that his custody also be awarded to that same parent. To permit this rule to operate in that manner would be tantamount to allowing child-custody determinations to be based on presumptions,[3] which is plainly contrary to the law.

We hold that the awarding of child custody based solely on the presumption that siblings should be kept together is contrary to Act 278 of 1979, which is codified at Ark. Code Ann. § 9-13-101(a) (Supp. 1999), and states:

> In an action for divorce, the award of custody of the children of the marriage shall be made without regard to the sex of the parent, but *solely in accordance with the welfare and best interests of the children.*

(Emphasis added.) The General Assembly's intention by passing Act 278 is clear — when determining as a part of a divorce action the custody of children of the marriage, the lone criterion is the welfare and best interest of the children. Accordingly, although the value of keeping siblings together is a factor in determining what is in a child's best interest, this rule cannot rise to the level of a presumption that contradicts the statutory standard expressed in Act 278.

We now apply this standard to the facts of this case and conclude in our *de novo* review that although there may be some factors that favor appellant's argument, the chancellor's finding was

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[2] We disagree with appellant's position that *Campbell v. Campbell*, 336 Ark. 379, 985 S.W.2d 724 (1999), is applicable. The issue in *Campbell* was whether the chancellor properly applied the rule expressed in *Jones v. Jones*, 326 Ark. 481, 931 S.W.2d 767 (1997), that the modification of a custody award cannot be based merely on changes in the circumstances in the non-custodian's life.

[3] In fact, Professor Atkinson in his treatise refers to this rule as being a "presumption." *See* 1 Jeff Atkinson, *Modern Child Custody Practice* § 4.17 (1986).

not clearly erroneous.[4] Appellant testified that his children had different personalities, and that Michael and appellee had similar personalities and their relationship was "much better" than the relationship between Dane and appellee. Furthermore, although the children will not live together, the evidence at trial showed that they resided in the same area and attended the same school. Moreover, commensurate with the decreed visitation schedule, the children are scheduled to spend their weekends together. In addition, the evidence at trial demonstrated that appellee is significantly more active in Michael's school life and extra-curricular activities than appellant. We are also, of course, mindful that Michael told the chancellor that he wanted to live with appellee, but are less persuaded by that factor because of Michael's young age.

Our decision is also shaped by both appellant's textbook adulterous relationship[5] and his exposure of Michael to a party of alcohol-consuming attendees along with the fact that Michael was supervised by an unmarried couple who slept together in the same house with Michael. Although these types of conduct are not alone dispositive on the issue of what is in Michael's best interest, we do conclude that it is acceptable to consider such conduct when determining what is in a child's best interest.

II. Unequal Division of Marital Property

Finally, appellant argues that the finding that an unequal division of the marital property would be equitable was clearly erroneous because the chancellor considered the potential inheritance appellant might receive from his parents.[6] In response, appellee

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[4] Appellee did not cross-appeal the chancellor's finding that it was in Dane's best interest that his custody be awarded to appellant. Accordingly, the sole issue with regard to custody concerns the custody of Michael.

[5] Although a husband and wife may not *feel* married when separated, as a matter of law they *are* married, and any voluntary sexual intercourse between a married person and a person other than the offender's spouse constitutes adultery. *See Black's Law Dictionary* 52 (7th ed. 1999).

[6] We are unpersuaded by appellant's reliance upon *McDermott v. McDermott*, 336 Ark. 557, 986 S.W.2d 843 (1999), which is plainly distinguishable from the case at bar. In *McDermott*, our supreme court held that an attorney's contingency fee contracts were "marital property" as defined by Ark. Code Ann. § 9-12-315(b) (Repl. 1998). In this case, however, we are called upon to determine whether on *de novo* review the chancellor's finding that it was equitable to give appellee an unequal share of the marital property as provided by Ark. Code Ann. § 9-12-315(a)(1) (Repl. 1998), was clearly erroneous.

argues that the finding of an unequal division can be based on other factors and, therefore, the chancellor's finding was not clearly erroneous. We agree with appellee and affirm.

Arkansas statutory law provides that:

> (a) At the time a divorce decree is entered:
>
> (1)(A) All marital property shall be distributed one-half (1/2) to each party unless the court finds such a division to be inequitable. In that event the court shall make some other division that the court deems equitable taking into consideration:
>
> (i) The length of the marriage;
>
> (ii) Age, health, and station in life of the parties;
>
> (iii) Occupation of the parties;
>
> (iv) Amount and sources of income;
>
> (v) Vocational skills;
>
> (vi) Employability;
>
> (vii) Estate, liabilities, and needs of each party and opportunity of each for further acquisition of capital assets and income;
>
> (viii) Contribution of each party in acquisition, preservation, or appreciation of marital property, including services as a homemaker; and
>
> (ix) The federal income tax consequences of the court's division of property.
>
> (B) When property is divided pursuant to the foregoing considerations the court must state its basis and reasons for not dividing the marital property equally between the parties, and the basis and reasons should be recited in the order entered in the matter.

Ark. Code Ann. § 9-12-315(a)(1).

In the case at bar, appellant was a vested one-third beneficiary of an undistributed trust worth $250,000, and, according to his mother's testimony, the sole heir — under the terms of her will — to her one-million-dollar estate. In addition, both the decree and record reveal other factors that were introduced into evidence that justified an unequal division of the marital property. The parties were married for more than seventeen years. Moreover, appellee testified she had a part-time job for a local dentist that paid $7.25 per hour, and she had no expectation of better employment in that area. Conversely, appellant's financial situation was far more secure.

As noted, appellant received an undergraduate degree during the course of the marriage, and, according to his employer, for year 1999 appellant's weekly net income as of April, 1999, averaged $1,110.82.

Objectively speaking, the fact that appellant is an only child and potential heir to a one-million-dollar estate coupled with the fact that he was the beneficiary of the aforementioned trust certainly suggests that he has opportunities for further acquisition of capital assets and income that are unavailable to appellee. Nonetheless, we are satisfied that the chancellor's finding was not clearly erroneous considering the length of this marriage, the vast difference in the stations in life of these parties, their respective occupations, the substantial difference in the amounts and sources of the parties' income, and the parties' respective vocational skills and employability.

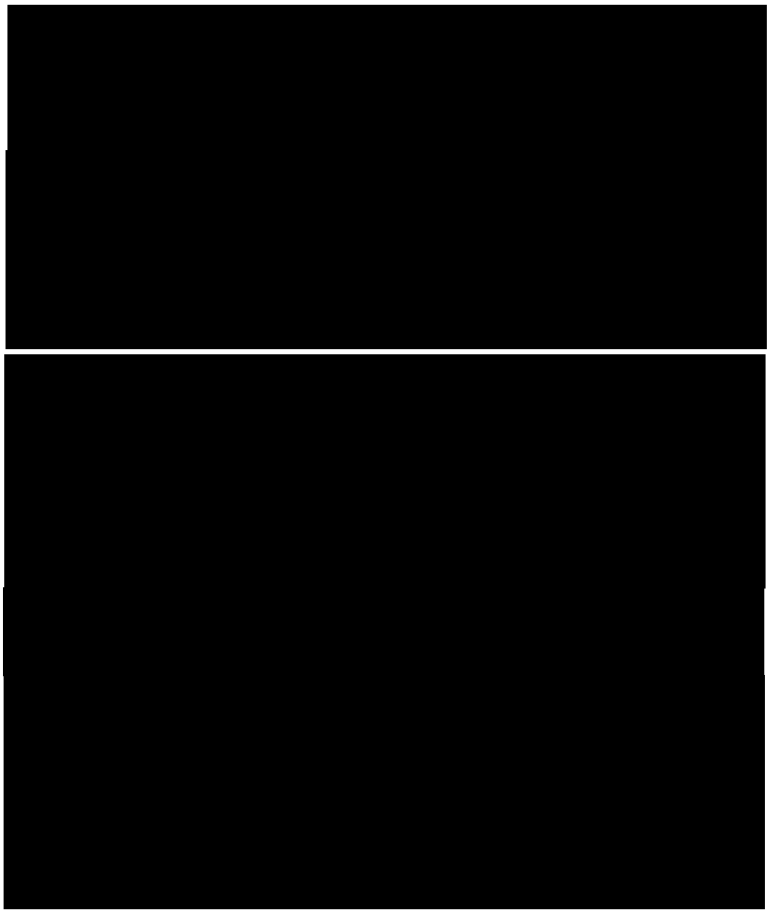
Affirmed.

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

WYNNE PUBLIC SCHOOLS, Darrell Smith,
Gene Boeckman, John Smith, Carol Brown,
Kenneth Witcher, and Robert A. Hayes, Jr.,
Individually and In Their Official Capacities
v. Donna LOCKHART, as Parent and
Next Friend of Dominic Lockhart

CA 00-299 32 S.W.3d 47

Court of Appeals of Arkansas
Division IV
Opinion delivered November 29, 2000



W. Paul Blume, for appellants.

Vandell Bland, Sr., for appellee.

JOHN F. STROUD, JR., Judge. On November 9, 1999, twelve-year-old Dominic Lockhart received a ten-day suspension from the Wynne Public Schools and was recommended for expulsion for the remainder of the 1999-2000 school year. At the conclusion of a hearing on November 22, 1999, the school district's board of education voted unanimously to accept the recommendation. Donna Lockhart, Dominic's mother and appellee in the present case, subsequently filed a petition for a temporary restraining order against Wynne Public Schools, its superintendents, and its board of directors. The trial court took no action on the petition, and the case proceeded to trial on the merits on December 6, 1999. After hearing testimony, the chancellor granted the injunction and ordered that Dominic be reinstated in school. The school district, superintendents, and school board now appeal, contending that the trial court erred in overturning the board's expulsion decision and in reinstating the student. We agree and reverse.

At the hearing conducted by the appellant school board, evidence was presented that there were forty-one disciplinary write-ups for Dominic concerning incidents from the beginning of the school year until November 8, 1999. Most of those incidents were for talking or mumbling. On November 8 Dominic was sent to the office because he disruptively argued with a teacher, insisting that Africa was a country rather than a continent. At some point after he left the office, Dominic went to his band class.

The band teacher, Lynn Sheppard, testified that on November 8, Dominic violated the no-tolerance band rule that no student could laugh at, put down, or criticize another student's ability to play an instrument. During the last five minutes of class, Sheppard

observed Dominic walk to the place where another student, Jessica, was playing the bells; he took a mallet from her and pounded the bells with it. Jessica took the mallet back from Dominic, who did not want to let it go, and the expression on the girl's face was such that Sheppard "could tell something had been said" that Jessica did not like. Dominic walked away, laughing. Because Jessica looked upset and had "brows furrowed," Sheppard asked her if there was a problem. Jessica answered that Dominic had told her she couldn't play the bells very well, that he could play much better than she could, and that he didn't know why she was put on the part. Sheppard testified that Dominic denied saying anything to Jessica, but that another band student, Tyler Rich, verified hearing the remarks.

Sheppard decided to take Dominic and Jessica to the principal's office to get the stories sorted out. In the hallway, Sheppard walked between the two students; the other band students, whom she could not leave alone in the classroom, walked behind. Dominic bolted from the hall to the doorway of the restroom, and Sheppard followed him. As soon as he unzipped his pants and she knew that he was not using the restroom as a way to hide, Sheppard turned around to wait at the entrance. When Dominic left the restroom, he bolted past her and got in line for the drinking fountain. From a distance of five feet, Sheppard told him not to get a drink, and told him that he was supposed to be going to the office. Dominic next attempted to turn down the wrong hallway, but he got stuck in congested pedestrian traffic and came to a standstill. Sheppard approached him from behind and put two fingers in the loop of his backpack.

Sheppard further stated that Dominic moved forward, looked around, and saw that his teacher "had a hold of" his backpack. He dropped the pack to the floor, put his hands against Sheppard's shoulders, and shoved her as hard as he could, causing her keys to fly fifteen feet in the opposite direction and hit a wall. He hit her several times in the upper body, with both open and closed fists. Next, he took a step backward and again clenched a fist. Sheppard averted a blow to her face, put her hands around his elbow, and told him to stop. He flung loose from her, enraged, and told her not to touch him again. After pushing her, Dominic again doubled a fist. Ms. Curtner (unidentified in testimony but apparently a teacher) stepped between them and told Dominic to stop. He screamed at

the top of his lungs for Curtner to "get out of his face" and not to touch him; Curtner quietly told him she was doing neither. Sheppard estimated her weight at about 309 pounds and Dominic's as 125. Sheppard testified that she observed Dominic pick up his backpack after Curtner intervened; he said that he didn't have to put up with "this" and that he was going home. He left through the front doors, and Coach Rich Trail followed him.

Jonathan Simmons, a friend of Dominic's who was in the band room at the time of the incident, also testified before the trial court. His version of events did not vary significantly from that told by Sheppard until the account of the physical encounter in the hallway. Jonathan said that Sheppard grabbed Dominic's arm, that Dominic jerked away, but that there was no punching or slapping. He said that there was only hand fighting, which he described as "I've got your hands, you've got mine, and I'm trying to get loose or you're trying to get loose." Jonathan also said that he had no knowledge of Dominic's hitting Sheppard, but that Dominic argued sometimes and talked too much.

Coach Trail testified that he left the office to help when a teacher ran in saying someone was needed. He saw Dominic "going berserk" in the hallway, "hollering and screaming." Dominic left the building and Trail followed, repeatedly telling him to stop and once telling him that he was going to jail. Trail stopped Dominic by wrapping his arms around him and taking him gently to the ground. Trail said that he used his leg to trip Dominic and got on top of him because he was going to try to leave. Dominic said he would have his father beat up Trail; he also said that he, Dominic, would hit Trail in the face and would kill him.

Darryl Mills, principal of Wynne Junior High School, testified that he didn't usually handle discipline but had at times talked to Dominic to find out what was going on and to see what would help. Dominic and his mother had refused Mills's request that Dominic meet with the school counselor, saying that he had his own counselor. Earlier in the day on the date of the band room incident, Mills had received Dominic's permission to check his backpack (after a teacher reported hearing a "click" while Dominic was in the bathroom). Mills did not see the incident with Sheppard, but he responded to an intercom request for principals to go to the front of the building. He saw Trail on the ground with his right leg

across Dominic's legs. Dominic, who was struggling, said, "Get out of my face"; he told Trail that Dominic's daddy would whip Trail's butt; and he said two or three times, "You let me up from here, and I'll kill you." After Mills told Trail to release Dominic, the boy got up and left the school grounds. Mills testified that Dominic was suspended for disrespect to teachers, refusing to go to the office, and attempting to leave the grounds, and that Mills recommended Dominic's expulsion because of the violence and the threats.

Joseph David Stepp, assistant principal assigned to discipline, testified that he followed Dominic into the restroom one day when Stepp needed to give him a letter and get back to the office. After telling Dominic that they needed to talk, Stepp waited in the part of the bathroom where Dominic was in a stall with the door closed. Dominic was fidgeting with something in the stall the whole time that Stepp was there. Stepp heard a clicking noise and could see that Dominic was holding a black instrument with a cord. Dominic eventually came out of the stall, and Stepp took him to the office, where he asked Mr. Mills to step in. Dominic had batteries in his hand. The principals received Dominic's permission to look in his backpack. They found a hairbrush but found no such item as a radio, which is a prohibited item at the school.

Dominic's mother testified that on November 8, she had gone to school because during the previous week "they had my little boy in and out of the office continuously," but that she got the run-around when she inquired about it. She said that at the beginning of the year she had asked to be notified if Dominic were sent to the office. She said she had started a community awareness group and had been talking to parents and children. She disputed the validity of all but nine of the forty-one warnings and said that she believed her son's teachers and administrators were spending so much time on Dominic "to ruin him." She said that she did not believe that attacking a teacher, hitting the teacher with an open hand or closed fist, and threatening to kill the teacher constituted a reasonable basis to expel a student from school.

The trial court ruled that appellee proved by clear and convincing evidence that appellants abused their discretion in expelling Dominic from school for the remainder of the school year. On the basis of that ruling, appellants were directed to readmit him imme-

diately. The trial court's conclusion, written in a letter opinion that was incorporated into the final order, reads as follows:

> [T]he ten (10) day suspension of the student was clearly an appropriate response to this particular situation and this particular student . . . . The court is convinced that had the child not been tackled and thrown to the ground by Coach Trail, the unfortunate words that the angry and frustrated boy directed toward him would never have been uttered.
>
> The Court is also mindful that Dominic's parents have placed him into counseling to learn to deal with this behavior. The additional discipline of expulsion is a gross abuse of discretion in this instance and not appropriate taking into consideration all factors. It is not the role of the Court to write or rewrite the school's policies, nor does this Court propose to do that. Where there is a policy in place, however, the school's officials must adhere to it. They should also consider employing a bit of common sense. We expect childish, immature, unwise and ill-considered actions from children. As a result, we impose adult supervision on them and we try to teach them better. The best instruction is usually by example. The adults here have almost unanimously missed the mark by a rather wide margin.

Appellants contend that the trial court ignored its proper role in reviewing the school board's decision and substituted its judgment for that of the board, an act which is prohibited by law and which is a flagrant abuse of discretion. As appellants note, Ark. Code Ann. § 6-18-506(c) (Repl. 1999) requires school boards to hold pupils strictly accountable for disorderly conduct in school and on the school grounds. Appellants also rely upon the following observations from *Henderson State University v. Spadoni*, 41 Ark. App. 33, 35, 848 S.W.2d 951, 953 (1993):

> There is a general policy against intervention by the courts in matters best left to school authorities. "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint . . . . By and large, public education in our Nation is committed to the control of state and local authorities." *Goss v. Lopez*, 419 U.S. at 577, citing *Epperson v. Arkansas*, 393 U.S. 97 (1968). The courts have been reluctant to interfere with the authority of local school boards to handle local problems. *Fortman v. Texarkana Sch. Dist.* No. 7, 257 Ark. 130, 514 S.W.2d 720 (1974). A chancery court has no power to interfere with school district boards

in the exercise of their discretion when directing the operation of the schools unless the boards clearly abuse their discretion. *Springdale Bd. of Educ. v. Bowman*, 294 Ark. 66, 740 S.W.2d 909 (1987). The burden is upon those charging such an abuse to prove it by clear and convincing evidence. *Bowman*, 294 Ark. at 71.

Fortman v. Texarkana Sch. Dist. No. 7, supra, which was cited by the *Spadoni* court, gives further guidance on the review of a school board's decision to expel a student:

> The controlling principles are well stated by Professor Bolmeier in "The School in the Legal Structure," 16.17 (2d ed., 1973):
>
> > The legal principle is also firmly established that school authorities may expel or suspend from school any pupil who disobeys a reasonable rule or regulation. School officials are clothed with considerable discretionary authority in determining whether or not a rule has been violated, and, in the event they conclude that a violation has occurred, they also have discretionary authority in determining the nature of the penalty to be imposed - providing it is not arbitrary or unreasonable. When, however, parents challenge the action of school boards as being beyond the bounds of reasonableness, litigation may develop.
> >
> > . . . .
> >
> > The courts look somewhat askance at acts of suspension, and particularly at expulsion, as methods for forcing pupils' conformance to rules and regulations . . . . It should be realized that when a pupil is denied school attendance he is deprived of education designed for his betterment. Of course when a pupil's misconduct or disobedience is of such a grave nature that his presence is disrupting to the school and detrimental to the morale of the student body, suspension, or even expulsion, is likely to be judicially condoned.
>
> The courts have been reluctant to interfere with the authority of local school boards to handle local problems. Our position was well stated in *Safferstone v. Tucker*, 235 Ark. 70, 357 S.W.2d 3 (1962): "In this State a broad discretion is vested in the board of directors of each school district in the matter of directing the operation of the schools and a chancery court has no power to interfere with such boards in the exercise of that discretion unless

> there is a clear abuse of it and the burden is upon those charging such an abuse to prove it by clear and convincing evidence."

257 Ark. at 132-34, 514 S.W.2d at 721.

Appellee contends that the appellant school district failed to follow its own procedural guidelines. Appellee's brief advances the argument that Dominic did not disturb class and that he was disciplined for an infraction that the principal admitted was not an infraction. Our review of the principal's abstracted testimony shows that Mills, under questioning by Dominic's attorney, actually stated, "I'm not sure I would consider it a disturbance from the words you said about seeing another student saying something to a student, walking away and the other student has a furrowed brow. I would have to weigh the entire situation." He further testified that disturbing class could be anything from talking to drumming on his desk, and that Dominic was "using drumsticks." Finally, Mills testified that his recommendation for expulsion was based on "the violence and the threats."

Appellee states that in a juvenile proceeding Dominic was found not guilty of battery charges filed by the teacher, but there is no abstract reflecting the judgment or showing that such an argument was raised at trial. Nor does the abstract show development below of another argument presented by appellee on appeal, that of racial prejudice. The appellate court declines to reach arguments not presented to the trial court below. *Woodend v. Southland Racing Corp.*, 337 Ark. 380, 989 S.W.2d 505 (1999).

Here, the incident in the band room was no more than a classroom violation, and its only bearing on this case is that it was the reason for an escorted trip to the principal's office. We think that the infraction, trivial as it was, did justify the trip to the principal's office. The basis for the expulsion was the violence and threats that occurred in the hallway and on the school grounds. We, therefore, agree with the appellant school board that the trial court interfered with the board's resolution of this unfortunate incident involving Dominic. There was evidence before the board that Dominic hit one teacher several times, threatened a coach with a beating by a parent, and said that if he could get up he would kill the coach. Therefore, we find that the trial court erred in finding that appellee proved by clear and convincing evidence that appel-

lants abused their discretion in expelling Dominic from school for the remainder of the school year.

Reversed.

JENNINGS and BIRD, JJ., agree.

Jack BLAGG, Jr. *v.* STATE of Arkansas

CA CR 00-72 31 S.W.3d 872

Court of Appeals of Arkansas
Division II
Opinion delivered December 6, 2000

Hough & Hough, P.A., by: *Stephen G. Hough*, for appellant.

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

WENDELL L. GRIFFEN, Judge. Jack Blagg, Jr., appeals from his sentences for possession of marijuana with intent to deliver and possession of drug paraphernalia. The Sebastian County Circuit Court ordered him to serve consecutive sentences of thirty years on the possession-of-marijuana charge and fifteen years on the possession-of-drug-paraphernalia charge. His sole argument on appeal is that the trial court erred in relying upon the jury's recommendation that the sentences be served consecutively, rather than using its own discretion in sentencing. We affirm his sentences.

A jury found appellant guilty of possession of marijuana with intent to deliver and possession of drug paraphernalia. During the sentencing phase, the jury submitted a note to the trial judge asking whether the sentences would run consecutively or concurrently. The trial judge read into the record his handwritten response to the jury, which stated, "You may make a recommendation as to whether the sentences run consecutive[ly] or concurrent[ly], but the ultimate decision will be made by [the] Court." Appellant's counsel objected to the court responding in any manner except to inform the jury that it could not consider matters that were not part of the record, and contended that the terms "consecutive" or "concurrent" were not made part of the record by the court or the parties. The court responded that "these are adult jurors and I am sure they have heard the term concurrent or consecutive before this trial started."

The jury recommended that the court sentence appellant to serve consecutive sentences totaling forty-five years. After the trial court sentenced appellant, counsel for appellant made oral motions to set aside the verdict and the sentence, and specifically requested that the trial court use its inherent discretion to correctly sentence appellant pursuant to Arkansas statutes. The trial court denied appellant's motions. Appellant appeals on the sole ground that the trial court erred in not using its discretion in sentencing.[1]

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[1] We note that the State argues that this court should dismiss appellant's appeal for want of jurisdiction, because appellant's record as abstracted does not show the record on appeal was timely lodged. The State clearly errs in making this argument. Appellant filed his

Arkansas Code Annotated section 5-4-403 (Repl. 1997) states in part that "when multiple sentences of imprisonment are imposed on a defendant convicted of more than one offense . . . the sentences shall run concurrently unless the court orders the sentences to run consecutively." Appellant concedes that it is solely within the trial court's discretion whether to sentence a defendant to serve concurrent or consecutive sentences, but argues that the trial court did not exercise its discretion because it deferred to the jury's recommendation. *See Acklin v. State*, 270 Ark. 879, 606 S.W.2d 594 (1980). We hold that the trial court did not fail to exercise its discretion in this case, and did not err in imposing consecutive sentences.

For support, appellant cites *Wing v. State*, 14 Ark. App. 190, 686 S.W.2d 452 (1985), and *Acklin v. State*, *supra*. In *Wing*, the trial judge stated that he thought it was presumptuous to "go against" a jury verdict, that he rarely did so, and stated that if the jury had wished the sentences to run concurrently, it would have so indicated. *See Wing v. State*, *supra*. Based on these comments, the *Wing* court found that the trial judge attempted to implement what he perceived the jury wanted rather than exercise his own discretion in sentencing, and therefore, reversed and remanded for resentencing. *See Wing v. State*, *supra*. In *Acklin*, the trial judge stated: "It's my customary rule to run consecutive sentences imposed by jurors . . . it's just my judgment in the matter that generally that's what the jury intends to do." *Acklin v. State*, 270 Ark. at 881, 606 S.W.2d at 595.

In this case, after the jury had reached its verdict but before the trial judge had imposed the sentence, the following exchange between the court and the jury foreperson took place:

> COURT: I note that in the note that was brought to the clerk concerning whether the sentence would run consecutive[ly] or concurrent[ly], that someone has circled that

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notice of appeal on June 23, 1999. Therefore, in accordance with Arkansas Rule of Appellate Procedure—Civil 5(b), unless appellant received an extension of time to file his transcript, his record was due to be lodged with the Clerk of the Supreme Court on or before Thursday, October 21, 1999. The record was not lodged until January 19, 2000. However, the addendum in appellant's record shows that he filed a motion to extend time to lodge the transcript, and contrary to appellee's assertion, clearly contains a photocopy of the trial court's timely order, issued on October 7, 1999, granting appellant until January 20, 2000, to file the record and transcript. Therefore, appellant's appeal was timely lodged.

> the sentences should run consecutive[ly]. Is that your circling Mr. Rowlett?
>
> ROWLETT: Yes it is, Your Honor.
>
> COURT: Is that the recommendation of all of the jurors?
>
> ROWLETT: Yes, Your Honor.

At this point, appellant's attorney requested that the jurors be polled, and all of the jury members indicated that the sentences be served consecutively. The prosecutor then made the following statement:

> STATE: Your Honor, I think the jury was specific in what it felt it was doing and deliberately made the fifteen years different than the thirty and asked and circled that they be run consecutive[ly]. So I think that it was their wish and their intent that he be sentenced to forty-five years.

It is obvious that the trial judge was well-aware of the prosecutor's and the jury's desire that the sentences run consecutively. However, the appellate court will not presume that the trial judge failed to exercise his discretion. *See Urquhart v. State*, 273 Ark. 486, 621 S.W.2d 218 (1981). Moreover, the fact that the trial court considered the jury's recommendation and the prosecutor's statement does not establish that the trial judge failed to exercise his discretion in sentencing. *See Teague v. State*, 328 Ark. 724, 946 S.W.2d 670 (1997)(holding the trial judge's statement that it was sentencing the defendant "in keeping with the verdict and recommendation of the jury" did not indicate the failure of the court to exercise discretion).

In *Acklin* and *Wing*, the trial judges made statements plainly indicating that they were not exercising their discretion. The instant case is distinguishable. First, the remarks by the trial judges in *Wing* and *Acklin* indicated that those judges not only failed to exercise their discretion in sentencing, but that they *routinely* failed to exercise their discretion in sentencing.[2] By contrast, the trial

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[2] In fact, the supreme court remanded for the exercise of discretion in sentencing due to similar comments made by the same trial judge in *Wing* (in another case by the same name) only a few months after the *Wing* case cited above was delivered. *See Wing v. State*, 286

judge in the instant case made no statements that can be construed to indicate that he did not intend to exercise his discretion in sentencing appellant, or that he routinely failed to do so. Indeed, the trial judge stated that the ultimate decision would be made by the court, thereby indicating his understanding that the jury's recommendation was purely advisory. Therefore, we hold that the trial judge did not fail to exercise his discretion in sentencing appellant, and did not err in sentencing appellant to serve consecutive sentences.

Affirmed.

ROAF and PITTMAN, JJ., agree.

Ark. 494, 696 S.W.2d 311 (1985).

KRISTEN INVESTMENT PROPERTIES, LLC *v.* FAULKNER COUNTY WATERWORKS and SEWER PUBLIC FACILITIES BOARD d/b/a Faulkner County Public Facilities Board, *et al.*

CA 99-1250 32 S.W.3d 60

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered December 6, 2000

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., by: *John K. Baker* and *Marshall S. Ney*, for appellant.

Gill Elrod Ragon Owen Skinner & Sherman, P.A., by: *Heartsill Ragon, III*, and *Roger H. Fitzgibbon, Jr.*, for appellee Beaverfork Volunteer Fire Department, Inc.

WENDELL L. GRIFFEN, Judge. Kristen Investment Properties, LLC ("Kristen" or "appellant"), appeals from the Faulkner County Circuit Court's denial of its request for attorney's fees under the Freedom of Information Act (FOIA). The court granted judgment in favor of appellant and ordered appellee Beaverfork Volunteer Fire Department, Inc. (Beaverfork), a private nonprofit corporation, to produce certain records[1] pursuant to

[1] The court ordered Beaverfork to produce all by-laws of the nonprofit corporation, minutes from all corporate board meetings, minutes from all division and committee meetings including the Executive Committee and Water Supply Division, copies of all written contracts to supply water to residential, commercial, and development customers, copies of all monthly, quarterly, and annual financial reports, and copies of all lists or compilations evidencing water customers of Beaverfork Fire Department, Inc., and/or its Water Supply Division.

appellant's FOIA request. However, the trial court found that Beaverfork was substantially justified in denying appellant's FOIA request and that an award of attorney's fees would be unjust. Therefore, the trial court denied appellant's petition for attorney's fees. We hold that the trial court's findings are clearly erroneous and that the trial court abused its discretion in not awarding attorney's fees. Hence, we reverse and remand for the determination and award of attorney's fees.

Kristen is the developer of Cadron Creek Estates, a residential subdivision within the service area of the Beaverfork Volunteer Fire Department and its water-supply division. Beaverfork is a private nonprofit corporation that operates a water-distribution system and provides fire protection service pursuant to a contractual arrangement with the Beaverfork Fire Protection District in northern Faulkner County. In December 1998, Kristen attempted to apply to Beaverfork for water-service connection to Cadron Creek Estates but was informed that applications were not being granted. Kristen's attorney delivered a letter dated April 15, 1999, to Marvin DeBoer, president of Beaverfork, requesting the records previously cited. In a letter dated April 21, 1999, counsel for Beaverfork informed counsel for Kristen that the requested records would not be disclosed based on Beaverfork's position that it was not covered by the FOIA because it is a nonprofit private corporation "not supported in whole or in part by public funds." Beaverfork's counsel cited *Sebastian County Chapter of American Red Cross v. Weatherford*, 311 Ark. 656, 846 S.W.2d 641 (1993), in the letter and asserted that Beaverfork's only connection to public funding came indirectly through governmental loans (rather than grants) and that such loans did not bring Beaverfork within the FOIA's purview.

Kristen then filed a complaint to compel Beaverfork to produce documents under the FOIA and filed a petition for writ of mandamus seeking to compel Beaverfork to extend water mains and to supply water to Cadron Creek Estates. Following a hearing on June 29, 1999, the trial court entered judgment in favor of Kristen and ordered Beaverfork to produce or permit inspection of the documents requested in Kristen's April 15, 1999 letter. However, the trial court found that Beaverfork was substantially justified in denying the FOIA request and that an award of attorney's fees would be unjust.

The FOIA attorney's fee provision is found at Arkansas Code Annotated Section 25-19-107(d) (Supp. 1999) and states:

> In any action to enforce the rights granted by this chapter, or in any appeal therefrom, the court shall assess against the defendant reasonable attorney fees and other litigation expenses reasonably incurred by a plaintiff who has substantially prevailed unless the court finds that the position of the defendant was substantially justified or that other circumstances make an award of these expenses unjust . . . .

Arkansas enacted the FOIA in 1967. Since that time, our supreme court has broadly construed the FOIA in favor of disclosure. *See McCambridge v. City of Little Rock*, 298 Ark. 219, 766 S.W.2d 909 (1989); *see also Bryant v. Weiss*, 335 Ark. 534, 983 S.W.2d 902 (1998). With that standard in mind, our initial duty is to determine whether the trial court's findings that Beaverfork was "substantially justified" in denying Beaverfork's FOIA request or that other circumstances made an award of attorney's fees "unjust" are clearly erroneous. We do not review a trial court's findings of fact under the abuse-of-discretion standard. Instead, we review findings of fact under the clearly erroneous standard. *See* Ark. R. Civ. P. 52(a). *See also Sebastian County Chapter of American Red Cross v. Weatherford, supra*. We hold that the trial court's findings are clearly erroneous.

While the trial court's order identifies neither what it deemed to be Beaverfork's "substantial justification" for denying appellant's request nor what "other circumstances make an award of attorneys fees unjust," it is clear that Beaverfork's assertion that it was not publicly funded was neither well-founded nor substantial. Our supreme court has consistently held the FOIA applicable to private entities that receive public funds. *See, e.g., City of Fayetteville v. Edmark*, 304 Ark. 480, 830 S.W.2d 275 (1990); *Rehab. Hosp. Servs. Corp. v. Delta-Hills Health Sys., Agency, Inc.*, 285 Ark. 397, 687 S.W.2d 840 (1985); *North Central Ass'n of Colleges & Schools v. Troutt Bros., Inc.*, 261 Ark. 378, 548 S.W.2d 825 (1977).

In *Edmark, supra*, the supreme court held that records retained by private attorneys employed by the city of Fayetteville were subject to FOIA disclosure because the private attorneys had been hired in lieu of the city attorney and were paid with public funds. In *North Central, supra*, our supreme court held that a reporter was improperly excluded from a state meeting of the association, a

private nonprofit corporation that sets educational standards and policies for colleges and secondary schools. The controlling factor underlying the *North Central* court's decision was that more than 90% of the money contributed to the association by Arkansas schools was public money. In *Delta-Hills, supra,* the supreme court held that a private nonprofit corporation created under federal law to assist the Arkansas State Health Planning and Development Agency in the regional review of proposed health care changes was subject to the FOIA because the primary source of funding for the private entity came from the federal government.

Notwithstanding these decisions, Beaverfork contends it was justified in believing that it was not subject to the FOIA because its only connection to public funding is indirect support via state and federal loans. As it did in its letter to appellant denying access to its records, Beaverfork on appeal relies upon *Weatherford, supra.* In that case, the trial court found that the Sebastian County Chapter of the American Red Cross was publicly funded for FOIA purposes by virtue of its one dollar per year, thirty-year lease with the city of Fort Smith. The supreme court reversed, holding that indirect government benefits or subsidies do not constitute "public funds" under the plain and ordinary meaning evidenced by *Black's Law Dictionary* (6th Ed. 1990), which defines public funds as "moneys belonging to government". The *Weatherford* court concluded, "[h]ere, no payment of government moneys was made to the Red Cross and the concomitant application of the FOIA should not transpire." *Id.* at 660, 846 S.W.2d at 645.

Relying on the reasoning employed in *Weatherford,* Beaverfork contends that the $2.9 million in federal and state loans it received constituted only indirect government benefits and therefore, it was not publicly funded for FOIA purposes. However, the trial court here apparently concluded that Beaverfork comes within the purview of the FOIA for a different reason it also performs public safety and utility functions traditionally performed by governmental entities by providing fire protection and water service pursuant to its contractual arrangement with the Beaverfork Fire Protection District, and receives funding from a public source. Beaverfork did not cross-appeal the trial court's judgment in that regard.

Marvin DeBoer, president of the board of the Beaverfork Volunteer Fire Department, Inc., testified that Beaverfork is a pri-

vate nonprofit volunteer fire department comprised of two divisions: the Fire Protection Division and the Water Division. The Beaverfork Fire Protection District ("District") is a creature of state law established by the Faulkner County Quorum Court. Beaverfork has an exclusive contract with the Fire Protection District to provide fire protection and water service to persons within the District. Beaverfork's Water Division is funded by user fees assessed against property within the District and collected by the Faulkner County Assessor's Office. Those assessments are paid to appellee's Fire Protection Division and Water Division, although the revenues and accounting systems for the Fire Protection Division and the Water Division are separate.

DeBoer testified:

> I don't know if it's the County Assessor that does it, but whoever collects money in the County collects the money from everybody within Beaverfork Fire Protection District's geographic area. It's not a private enrollment or membership to pay in the Fire Protection District because the voters voted for that district. In determining what noun to put on it in terms of tax or assessment, I believe it's a service fee.

Thus, Beaverfork knew that the fees received by its Water Division are payments from the Beaverfork Fire Protection District, a plainly public entity, based on assessments made on all property within the district.

The facts in this case are directly on point with the facts in *Edmark, supra.* In *Edmark,* public funds were paid by a municipality to private lawyers as compensation for work that would otherwise have been performed by the city attorney. Here, funds obtained by a public assessment against all land within the Beaverfork Fire Protection District, a public entity, are paid to Beaverfork, a private entity holding an exclusive franchise from the Fire Protection District to provide water service to customers in the District, a service routinely provided by government. DeBoer acknowledged that the payment made by the Fire Protection District "comes from some money collected by the County Assessor." Further, our supreme court's decisions in *North Central, supra,* and *Edmark, supra,* are also directly on point because the funding for operating the Water Division comes from a public source in the form of a levy against property owned within the District. Moreover, we note that the

Arkansas Attorney General has opined that private water associations that are supported in part by public funds and that perform functions normally served by governmental entities are subject to the FOIA. *See* Op. Att'y Gen. # 92-205.

Our courts have consistently held that the intent of the FOIA is to establish the right of the public to be fully apprised of the conduct of public business. *See Edmark* 304 Ark. at 184-85, 801 S.W.2d at 278. Even counsel for Beaverfork acknowledged during closing argument to the trial court that his client is "in a sense, no different from Niblock Law Firm [the private law firm in *Edmark*] in that we've been hired to do a job for a government entity." Beaverfork's denial of appellant's FOIA request in the face of such knowledge regarding the source of its funding and in the face of the foregoing legal authorities constituted arbitrary conduct for which attorney's fees are authorized under the supreme court's decision in *Burke v. Strange*, 335 Ark. 328, 983 S.W.2d 389 (1998).

In *Burke v. Strange*, the supreme court stated that a "trial court need not make a fee award in every Freedom of Information Act case; indeed, the purpose of the fee-shifting provision is to assess fees and costs where public officials have acted arbitrarily or in bad faith in withholding records." *Id.* at 331, 983 S.W.2d at 391. *See also Depoyster v. Cole*, 298 Ark. 203, 766 S.W.2d 606 (1989). We note that a finding of an arbitrary refusal or bad faith is not necessary in order for the trial court to award attorney's fees. *See id.* Further, limiting the award of attorney's fees to only those cases involving a showing of bad faith or arbitrary conduct would be contrary to the liberal interpretation that we are to accord the FOIA and would defeat the intent of the General Assembly in enacting it. *See* Ark. Code Ann. § 25-19-102; *Ragland v. Yeargan*, 288 Ark. 81, 702 S.W.2d 23 (1986). *See also Burke v. Strange*, *supra* (GLAZE, J., dissenting). However, in this case, given that Beaverfork knew it was essentially performing a governmental function for which it received public funding, we have no difficulty concluding that its refusal to produce the records pursuant to appellant's FOIA request was arbitrary to say the least, if not in bad faith.

Given the above authorities, we hold that the trial court's finding that Beaverfork had substantial justification for refusing disclosure of the requested records was clearly erroneous. We further hold that the trial court abused its discretion in denying appellant's

petition for attorney's fees because it had no discretion to deny attorney's fees where the party refusing the request lacked substantial justification for doing so and absent evidence of other circumstances that would make the award of such fees unjust. Accordingly, we reverse and remand with directions that the trial court conduct further proceedings to determine the legal expenses and costs incurred by appellant in obtaining the requested records, including costs incurred on appeal, and order the trial court to award appellant appropriate attorney's fees pursuant to this opinion.

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

STROUD and KOONCE, JJ., dissent.

JOHN F. STROUD, JR., Judge, dissenting. I respectfully dissent from the majority opinion and would affirm the trial court's denial of the award of attorney's fees. The trial court's order contained a paragraph pertaining to the request for attorney's fees, which provided:

> 2. Pursuant to Ark. Code Ann. § 25-19-107(d), and upon a *finding that Beaverfork was substantially justified in denying the April 15, 1999 FOIA request*, an award of attorneys fees would be unjust. Accordingly, no attorneys fees are awarded to Kristen.

(Emphasis added.)

In *Depoyster v. Cole,* 298 Ark. 203, 766 S.W.2d 606 (1989), our supreme court quoted from an article published in 1987*Arkansas Law Notes,* and explained that "[t]*he court need not . . . make a fee award in every FOIA case; indeed, the purpose of the fee-shifting provision is to assess fees and costs where public officials have acted arbitrarily or in bad faith in withholding records.*" *Id.* at 208, 766 S.W.2d at 609 (emphasis in original). The court also stated that "[w]e do not imply by this opinion that an award of litigation expenses under the FOIA will always be defeated in the absence of arbitrary or bad faith conduct on the part of the defendant." *Id.* Our standard of review in these cases is one of abuse of discretion. That is, the decision of whether to award a fee in such cases is a decision within the trial court's discretion and will not be set aside absent an abuse of that discretion. *Burke v. Strange*, 335 Ark. 328, 983 S.W.2d 389 (1998).

The majority opinion concludes, without difficulty, that the refusal to produce records pursuant to the FOIA was "arbitrary to

say the least, if not in bad faith." I cannot reach that conclusion because I disagree with the majority opinion's controlling conclusion that "Beaverfork knew it was essentially performing a governmental function for which it received public funding. . . ." Moreover, the majority opinion's conclusion that the facts in the instant case are so directly on point with the facts in *City of Fayetteville v. Edmark,* 304 Ark. 179, 801 S.W.2d 275 (1990), as to demonstrate that Beaverfork acted arbitrarily in refusing the request for documents is, to me, a stretch at best. In addition, the *Edmark* case did not involve an issue concerning the award of attorney's fees; it only addressed the applicability of the FOIA. Here, the trial court ultimately concluded that the FOIA was applicable, but that the denial of the FOIA request was substantially justified and that an award of attorney's fees would be unjust. Finally, the majority opinion is able to conclude that the trial court abused its discretion. I cannot agree that the trial court abused its discretion in finding that there was substantial justification for denying the FOIA request and that an award of attorney's fees would be unjust.

In short, I find it impossible on the record before us to say that the trial court abused its discretion in the instant case. Therefore, I would affirm.

I am authorized to state that Judge KOONCE joins in this dissenting opinion.

Barbara MATHENY *v.* HEIRS OF Roy OLDFIELD

CA 00-87 32 S.W.3d 491

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

[redacted]

William R. Mayo, for appellant.

Mark R. Johnson and *Larry D. Kissee*, for appellees.

WENDELL L. GRIFFEN, Judge. This case involves an appeal from a will contest. Barbara Matheny appeals from the order of the Sharp County Probate Court admitting an unsigned, undated copy of a will as the valid last will of Roy Oldfield (November will). Appellees purport to be Oldfield's heirs-at-law. Appellant argues that the probate court erred in holding that the November will had been properly executed and revoked another will (October will) that had been admitted to probate. We affirm the probate court's order with respect to its finding that the November will was properly executed and revoked the October will. However, because appellees failed to present any proof that the

original November will was lost or fraudulently destroyed, as required by the Arkansas statute governing the probate of lost wills, the probate court improperly admitted the November will into probate. Therefore, we conclude that Oldfield died intestate, and reverse for a determination of Oldfield's heirs-at-law.

Prior to the latter part of 1997, decedent Roy Oldfield had attorney Mark Johnson draft a will for him. During the latter part of 1997, Oldfield had two other wills drafted by attorneys. A will executed on October 2, 1997, in the law office of Sharron Glaze in Batesville left most of Oldfield's assets to appellant (October will). Another will executed in the law office of Michelle Huff in Hardy left decedent's assets to his nieces and nephews (November will).

Appellant was a long-time acquaintance of Oldfield, who was a friend of appellant's sister-in-law. At Oldfield's request, appellant removed him from a nursing home to live with her and her husband the year before he died. After Oldfield's death on February 9, 1998, appellant filed a petition to probate the October will and be appointed executrix of his estate. Appellees, Oldfield's nieces and nephews, filed a petition to contest the October will, alleging that Oldfield was incompetent to execute a will due to mental incapacity, fraud, undue influence, coercion, and procurement by appellant. Appellees subsequently submitted a will dated July 29, 1990, alleging that will to be the last valid will of Oldfield.

Appellees then filed an amended petition to contest the October 1997 will, alleging they had discovered a copy of another will, purportedly executed in November 1997, which they asserted was Oldfield's last will. During the probate hearing, appellant argued that appellees had not presented sufficient evidence to prove the November will was lost, as required under Arkansas Code Annotated section 28-40-302 (1987). The probate judge found by clear and convincing evidence that the November 1997 will was the last valid will of Oldfield; that the October 1997 will was revoked by the November will; that appellant should be removed as executrix; that the November will was not properly revoked by decedent at the time of his death; and that appellee Richard Oldfield should serve as executor. Appellant appeals from this order. We reject appellant's argument concerning proof of execution of the November will, but agree that the probate court erred in admitting the

November will into probate because appellees failed to meet the proof of a lost will as required under section 28-40-302.

Execution of the November Will

The instrument proffered by appellees was a copy of a will that was unsigned and undated. Three people testified with regard to the circumstances surrounding the execution of the November will: Michelle Huff, who prepared the will, and Tina Hall and Brandi Holloway, who worked for Huff and witnessed the execution of this will. These witnesses testified that as a matter of practice they did not keep a copy of a signed will in their files, and that they put a closing date on the outside of a client's file, referred to as a "will jacket," within a few days to one week of the completion of services requested. Huff and Hall testified that Huff's office prepared only one will for Oldfield. Oldfield's will jacket showed two closure dates: July 28, 1997, and November 17, 1997.

Huff testified that Oldfield requested legal services from her involving revocation of a power of attorney and drafting a will. She testified that she began gathering information from him to draft the will, but he was unable to remember all of the names of his nieces and nephews that he wanted to include in it. She stated that he dropped by the office periodically to provide this information, and wanted the will drafted to leave most of the assets to the executor to distribute. Her office explained to him that they would not draft the will in that manner. Oldfield signed the revocation of power of attorney on June 11, 1997. Oldfield's file was first closed on July 28, 1997, but Huff testified that the will was not executed at that time, and that her office closed his file because they believed he was not going to execute the will she had prepared for him.

Huff sent Oldfield a letter dated July 28, 1997, which instructed him to destroy the will drafted by Johnson and also contained a billing statement. Huff testified that under normal circumstances, instructing a client to destroy his own will, sending him a letter that included a bill, and closing the file would indicate that he had executed a will. However, Huff indicated that Oldfield's case was not "normal" because her office thought he was not going to sign the copy of the will she had drafted.

Huff identified the will submitted by appellees as an unsigned, unexecuted copy of the will she prepared for Oldfield. Oldfield's file had a second closing date of November 17, 1997. Based on the dates on the will jacket and her memory that it was roughly three months from the time he executed the will until he died, she testified that Oldfield executed the will in November 1997.

Tina Hall testified that she remembered witnessing the November will and that Brandi Holloway and Huff were also present. She identified the November will as a copy of the will executed by Oldfield. She stated the will was signed around the time the file was closed on November 17, 1997, and she did not recall seeing Oldfield after he signed his will. She stated that when he left he took his original signed will with him. Hall based her recollection of the November date on the will jacket.

Oldfield sent Huff a letter dated August 20, 1997, requesting that she send him the old will, the revocation of power of attorney and the "new will" she prepared for him.[1] He stated in his letter that if he understood and agreed with the will, he would bring it with him and come to her office to sign it. In response, Huff's office sent Oldfield a letter dated September 8, 1997, enclosing his old will (drafted by Johnson), his old durable power of attorney, the original revocation of the general durable power of attorney, and a copy of the November will. Hall testified that after the September 8 letter was sent to Oldfield, the only remaining document in his file was the unexecuted original of the November will. She stated it was not possible that Oldfield signed his will on July 27, 1997, when the file was closed the first time, because when the file was closed the first time, he had not signed the will, and it did not appear he was going to sign the will. She testified that she only prepared one will for him that left his assets to his nieces and nephews.

Brandi Holloway testified that she, Huff, and Hall witnessed the execution of the November will. She assumed he signed his will on November 17, 1997, because that was the day the file was last closed, and remembered he signed his will the last time he came to Huff's office. Holloway stated that when Oldfield came to execute his will, she retrieved his file from the closed files and there was no signed will in his file. She testified that Oldfield signed his will at

[1] Apparently, the old will was not sent with the billing statement on July 28.

least "a couple of months" after he came in to sign the revocation, because he had questions about having the executor distribute his assets. She initialed the closing date on the will cover, and testified that November 17, 1997, was the date the file was closed for the last time. Holloway indicated it was not customary for them to leave files open for a long time, especially those containing wills. Thus, the November 17, 1997 closing date indicated to her that the will was executed on that day or the previous day.

The proponent of a lost will has the burden of proving the execution of a will and its contents by strong, cogent, and convincing evidence. *See Conkle v. Walker*, 294 Ark. 222, 742 S.W.2d 892 (1988); *Hanna v. Magee*, 189 Ark. 330, 72 S.W.2d 237 (1934). Probate cases are tried *de novo* on appeal, and we do not reverse the findings of the probate judge unless those findings are clearly erroneous. We give due deference to the probate judge's superior position to determine the credibility of the witnesses and the weight to be accorded their testimony. *See Gilbert v. Gilbert*, 47 Ark. App. 37, 883 S.W.2d 859 (1994).

We hold that the probate judge did not err in finding that appellees established the November will was executed after the October will. Appellant maintains that the above testimony is insufficient to establish that the November will was executed after the October will because the witnesses had no independent recollection of the date the will was executed. Appellant attempts to cast doubt on the relevant dates by pointing to the continuing correspondence between Huff and Oldfield after the file was originally closed, and by Oldfield's reference to his "new" will.

However, we note the initial correspondence after the file was closed and Huff's closing letter was sent was initiated by Oldfield, when he requested a copy of his new will. That request, dated August 20, clearly indicates his will had not been signed at that point. Oldfield stated in his letter that if he agreed with the new will, he would bring it to Huff's office and sign it. Huff testified it was not normal procedure to send a client a copy of an unsigned will. The reference to a "new" will was obviously a reference to the will drafted by Huff and not, as appellant attempts to portray, a second will drafted by Huff. Huff and Hall testified that Huff's office drafted only one will for Oldfield. Huff, Hall, and Holloway also testified that it was not office practice to retain a signed will,

because the client takes the executed will with him. Hall and Holloway also testified that the unsigned will was the only document remaining in Oldfield's file, even after the letters and other documents were sent to him in September 1997.

Further, Huff, Hall, and Holloway acknowledged the possibility that the will may have been executed on a date other than the November date on the will jacket, but each reiterated her belief that the will Huff drafted was executed on or near November 17, 1997, based on the closing date on the will jacket. Rather than establishing that the will was executed in July when the file was originally closed, the fact that Oldfield's file was originally closed on the same day a bill was sent to him for services rendered corroborates the witnesses' testimony that they routinely closed their files shortly after representation ended. Huff also remembered that it was roughly three months from the time Oldfield executed the will until he died. He died in February 1998, which is roughly three months after the second closing date on the will jacket.

Finally, appellant testified that Oldfield told her he had destroyed the "papers" he received from Huff. She testified that the day he came in and allegedly told her that he tore up the papers from Huff was *after* the October will had been executed. While the trial court apparently did not believe appellant's testimony that Oldfield destroyed his November will, appellant's testimony otherwise supports that Oldfield went to Huff's office after he obtained the October will.

Based on the above evidence, we hold that the probate judge's finding that the November will was executed after the October will was not clearly erroneous. Arkansas Code Annotated section 28-25-109(a)(1)(1987) provides that a will is revoked by a subsequent will which revokes the prior will expressly or by inconsistency. The November will contains a clause that expressly revokes all prior wills. The legal effect in this case is that the November will revoked the October will.[2]

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[2] We note that appellant seems to assume that if the November will was destroyed, the October will, under which she took, would be revived. However, under Arkansas law, a will that has been revoked can only be revived by re-execution or the execution of another will in which the revoked will is incorporated by reverence. *See* Ark. Code Ann. § 28-25-110. *See also Parker v. Moberly*, 264 Ark. 805, 577 S.W.2d 583 (holding decedent died intestate where a 1976 will revoked a 1973 will, but the 1976 will was subsequently destroyed).

Proof of Lost Will

■ However, we also hold that the probate court erred in admitting the November will into probate because the record is devoid of any evidence that the will survived Oldfield's death. In admitting a copy of the November will into probate, the probate judge implicitly found that the original November will was lost. In an apparent reference to appellant's testimony that Oldfield told her he had destroyed the November will, the probate court found that the November will "was not properly revoked" by Oldfield at the time of his death. We reverse and remand on this point, because our review of the record reveals no proof that the will was in existence at the time of Oldfield's death or that the will was fraudulently destroyed during his lifetime.

Arkansas Code Annotated section 28-40-302 governs the probate of lost wills, and provides:

> No will of any testator shall be allowed to be proved as a lost or destroyed will, unless the provisions are clearly and distinctly proved by at least two (2) witnesses, a correct copy or draft being deemed equivalent to one (1) witness; and
>
> (1) The will is proved to have been in existence at the time of the death of the testator; or
>
> (2) The will is shown to have been fraudulently destroyed in the lifetime of the testator.

The probate court found that the November will was executed after the October will, and therefore, revoked the October will. However, simply because the November will revoked the October will does not mean that the November will was not revoked by a subsequent will or act of the decedent. Under section 28-40-302, the proponent of a lost will must establish the terms of the will *and* that the will was in existence *or* that the will was fraudulently destroyed in the lifetime of the testator.

■ Upon *de novo* review of the record before us, we cannot affirm the probate court's implicit finding that the November will survived Oldfield's death and was lost. While we defer to the probate judge's assessment of appellant's credibility, we do not agree that Oldfield's failure to revoke or destroy his will as testified by appellant constitutes evidence that the will was in existence at the time of his death. Further, although hinted at by appellees, there is

no proof in the record that the will was fraudulently destroyed before Oldfield died. Absent proof that the November will survived Oldfield's death and was then lost or fraudulently destroyed, and in the face of proof that the November will was properly executed and therefore revoked the October will, we are forced to conclude that there was no will to probate and that Oldfield died intestate. Because the record does not establish the identity of Oldfield's heirs-at-law, we must remand to the probate court for findings in this regard.

Affirmed in part; reversed and remanded in part.

KOONCE and STROUD, JJ., agree.

James E. ELAM *v.*
FIRST UNUM LIFE INSURANCE COMPANY

CA 00-316 32 S.W.3d 486

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

Robert J. Donovan, for appellant.

Watts & Donovan, P.A., by: *David M. Donovan*, for appellee.

TERRY CRABTREE, Judge. In this appeal, we review the circuit judge's grant of summary judgment in favor of appellee First Unum Life Insurance Company. We hold that summary judgment was improper because genuine issues of material fact remain to be determined. Therefore, we reverse and remand.

On January 1, 1994, First Unum issued a disability insurance policy under which appellant James Elam was an insured. The policy provided for payment of benefits to age sixty-five in the event an insured became disabled. On August 8, 1994, First Unum began paying benefits to Elam, who was then age forty-three, as a result of Elam's bipolar disorder. However, benefits were terminated

after twenty-four months on the basis of the following policy limitation:

MENTAL ILLNESS LIMITATION

> Benefits for disability due to mental illness will not exceed 24 months of monthly benefit payments unless the insured meets one of these situations:
>
> [situations not applicable].
>
> 'Mental illness' means mental, nervous or emotional diseases or disorders of any type.

On May 9, 1997, Elam filed suit against First Unum seeking a declaration that he was entitled to further benefits because his bipolar disorder did not fall within the policy's mental illness limitation. He later filed a motion for summary judgment, arguing that the mental illness limitation was not triggered because his bipolar disorder was biological in origin. Attached to his motion were the affidavits of two medical doctors, Bradley C. Diner and Charles Bowden. Dr. Diner stated in his affidavit that bipolar disorder is a biological condition with hereditary predisposition and that an alteration in brain chemistry is responsible for the mood disturbances and altered thought processes that accompany the disorder. Dr. Bowden stated in his affidavit that "there is no longer any reasonable doubt among informed members of the medical community that Bipolar Affective Disorder has a biological origin...."

First Unum responded with its own motion for summary judgment, arguing that the policy unambiguously excluded further benefits for disability due to bipolar disorder. Attached to First Unum's motion were excerpts from the deposition of Dr. Diner and excerpts from the deposition of Dr. Joe Backus, Elam's treating psychiatrist. These depositions were later admitted in their entirety through Elam's response to First Unum's motion. They revealed the following pertinent information:

1. Bipolar disorder is a mental disease which reflects mood swings of mania and depression. It is diagnosed based upon behavior, clinical presentation, psychological testing, and patient history.
2. There is no treatment for bipolar disorder other than drugs. Therapy is used to help educate the patient about the disease and to help him adapt to it.

3. There are no specific diagnostic markers for any mental disorder. They cannot be detected with a brain scan or a blood test.
4. Bipolar disorder is a biologically-based mood disorder. However, the psychiatric community recognizes bipolar disorder as a mental illness. It is typically treated by psychiatrists.

Elam's response to First Unum's motion also contained a supplemental affidavit from Dr. Diner in which the doctor quoted the following from the Diagnostic and Statistical Manual of Mental Disorders:

> Although this volume is titled The Diagnostic and Statistic [sic] Manual of Mental Disorders, the term mental disorder unfortunately implies a distinction between 'mental' disorders and 'physical' disorders that is a reductionistic anachronism of mind/body dualism. [C]ompelling literature documents that there is much 'physical' in 'mental' disorders and [much] 'mental' in 'physical' disorders. The problem raised by the term 'mental' disorders has been much clearer than its solution, and, unfortunately, the term persists in the title of DSM-IV because we have not found an appropriate substitute.

Finally, Elam filed his own affidavit to which he appended numerous articles from the lay press discussing the biological basis of what are traditionally perceived as mental disorders.

Following a hearing, the circuit judge issued an order granting First Unum's motion for summary judgment. He found that the "common, ordinary and lay understanding" of the term "mental illness" as used in the policy encompassed bipolar disorder. Thus, he declared the term unambiguous, and First Unum's mental illness limitation was upheld. Elam appeals from that order.

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). In cases involving interpretation of a clause in an insurance contract, the construction and legal effect of the contract are questions of law unless the meaning of the contract depends on disputed extrinsic evidence. *Smith v. Prudential Prop. & Cas. Co.*, 340 Ark. 335, 10 S.W.3d 846 (2000). An insurance policy is to be construed in its plain, ordinary, and popular sense. *Norris v. State Farm, supra.*

We begin our analysis by discussing the case that touches most closely upon the issue at hand. In *Arkansas Blue Cross & Blue Shield v. Doe*, 22 Ark. App. 89, 733 S.W.2d 429 (1987), Doe was an insured under a group health policy issued by Blue Cross. After she was diagnosed with bipolar disorder, Blue Cross limited her benefits on the basis of a policy provision that restricted coverage for mental, nervous, or psychiatric conditions. Doe filed suit seeking coverage as if her condition were a physical illness. She presented evidence, mostly in the form of medical testimony, that her illness should be classified by cause rather than by symptoms and that the cause of her illness was biological. Blue Cross presented evidence that bipolar disorder should be classified as a mental disorder. The circuit judge, sitting as fact-finder, determined on the conflicting evidence that Doe's condition was physical rather than mental and thus ruled that Blue Cross's coverage restriction did not apply to Doe's bipolar disorder. On appeal, we upheld the judge's finding on the basis that it was not clearly against the preponderance of the evidence, and we gave due regard to his superior ability to judge the credibility of the witnesses.

Appellant argues that *Doe* stands for the proposition that, as a matter of law, a mental illness coverage limitation is not triggered if the insured's disorder is biological in origin. Appellant reads too much into our holding in that case. Our affirmance of the trial judge's decision in *Doe* was made out of deference to his factual findings, based upon the conflicting evidence before him. We did not hold that, as a matter of law, the insured's bipolar disorder was biological in nature and therefore not subject to the coverage limitation. Therefore, *Doe* has a limited application in the case at bar. The issue before us is not whether the evidence supports the trial judge's finding or whether that finding is clearly erroneous but whether the mental illness coverage limitation in First Unum's policy is ambiguous.

Numerous courts have struggled with the issue of whether coverage limitations for mental illness are ambiguous. Some courts have held that policy language that fails to define "mental illness" in a very specific way is inherently ambiguous. *See Lang v. Long Term Disability Plan*, 125 F.3d 794 (9th Cir. 1997) (depression associated with fibromyalgia); *Mongeluzo v. Baxter Travenol Long Term Disability Benefit Plan*, 46 F.3d 938 (9th Cir. 1995) (anxiety and depression); *Patterson v. Hughes Aircraft Co.*, 11 F.3d 948 (9th Cir. 1993) (head-

aches and depression); *Phillips v. Lincoln Nat'l Life Ins.* Co., 978 F.2d 302 (7th Cir. 1992) (encephelopathy); *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534 (9th Cir.), *cert. denied*, 498 U.S. 1013 (1990) (autism); *Dorsk v. Unum Life Ins. Co.*, 8 F. Supp. 2d 19 (D. Maine 1998) (obsessive compulsive disorder); *Gareis v. Benefit Ass'n of Railway Employees Ins. Co.*, 284 Minn. 262, 169 N.W.2d 730 (1969) (nervous system disorder). These courts have tended to view the cause of an illness as a critical consideration in determining whether the illness was mental or physical. Other courts have held that, if the insured's symptoms, as viewed by a lay person, indicate the presence of a mental illness, the coverage limitation is unambiguous. *See Prudential Ins. Co. v. Doe*, 140 F.3d 786 (8th Cir. 1998) (recurrent major affective disorder); *Lynd v. Reliance Standard Life Ins. Co.*, 94 F.3d 979 (5th Cir. 1996) (major depressive disorder); *Stauch v. UnisysCorp.*, 24 F.3d 1054 (8th Cir. 1994) (depression and fatigue); *Brewer v. Lincoln Nat'l Life Ins. Co.*, 921 F.2d 150 (8th Cir. 1990), *cert. denied*, 501 U.S. 1238 (1991) (affective mood disorder); *Equitable Life Assur. Soc. v. Berry,* 212 Cal. App. 3d 832, 260 Cal. Rptr. 819 (1989) (bipolar disorder). Yet, other cases have focused on the treatment given to the insured. If the treatment is of the type associated with a mental illness, the policy limitation applies. *See Blake v. Unionmutual Stock Life Ins. Co.*, 906 F.2d 1525 (11th Cir. 1990) (postpartum depression). If the treatment is of a type associated with physical illness, the policy limitation does not apply. *See Simons v. Blue Cross & Blue Shield of Greater New York*, 144 A.D.2d 28, 536 N.Y.S.2d 431 (1989) (anorexia nervosa).

The evidence presented below by both parties in support of their motions for summary judgment reflects, just as the above-cited cases do, the variation in thought that exists as to whether an illness should be classified as mental or physical. Doctors Diner and Backus stated their belief that bipolar disorder has a biological origin. However, Dr. Diner acknowledged that it is a mental disease and a mood disorder, typically treated by psychiatrists. Dr. Backus acknowledged that the definition of mental illness might be broad enough to include behavioral problems that are neurological or chemical in origin. The Diagnostic and Statistical Manual, while it questions the use of the term "mental disorder" also recognizes that no appropriate substitute has been found for the term.

The differing approaches taken in the above-cited cases and the conflicting thoughts voiced by the medical experts herein illus-

trate the difficulty inherent in attempting to declare a particular disorder either a mental illness or a physical illness as a matter of law. When we are interpreting the term "mental illness" as it is used in health and disability insurance plans, we are dealing with the complexity of the human condition. The number and type of disorders and diseases that may be visited upon human beings are as many and varied as the humans themselves. We are not so simple or dualistic that our minds and bodies work, or disfunction, separately. The manner in which we become sick, the symptoms we exhibit, and the manner in which we are healed often involve the mind, the body, or a combination of both. Further, advances in medicine and the wide dissemination of medical knowledge among the lay public has had the effect of altering perceptions as to what constitutes a mental illness. Thirty-seven years ago, our supreme court was presented with a case in which an insurer denied benefits to an insured with arteriosclerosis on the basis that he was suffering from a mental infirmity. *See Mutual Benefit Health & Acc. Ass'n v. Rowell*, 236 Ark. 771, 368 S.W.2d 272 (1963). We venture to say that, today, it would be beyond question that the insured in that case did not suffer from a mental illness. Perhaps, thirty-seven years from now, an illness that is generally perceived to be a mental illness may likewise be thought of as unquestionably physical.

The question of what constitutes a mental illness is obviously a mutable, evolving concept. We are therefore reluctant to adopt a hard and fast rule, as the Eighth Circuit did in *Brewer, supra*, when it declared that the nature of an illness is determined by its symptoms. Illnesses can seldom be classified so simply. What may be manifested as a mental illness may in fact be a physical, biological disorder. For example, a person suffering from a brain tumor may exhibit the type of behavior normally associated with a severe mental illness. However, there are few persons who would agree, upon learning of the existence of the tumor, that the person was suffering from a mental illness. Alternatively, what may be manifested as a physical illness may in fact be a mental illness. Stomach disorders or headaches may be symptoms of stress or depression. We are likewise wary of adopting a rule that cause alone should determine whether an illness is mental or physical in nature. As Drs. Diner and Backus noted below, chemical or hormone imbalances may cause depression or bipolar disorder. It is also possible that mental disfunction may cause physical disability. For example, paralysis, fatigue, or

other physical conditions may be caused by mental difficulties such as anxiety. Likewise, the type of treatment accorded is seldom conclusive in determining the nature of the illness. A person with a chronic physical condition such as fibromyalgia, Parkinson's disease, autonomic disfunction, or chronic fatigue syndrome may be treated with psychotherapy to help cope with their disease.

The point of the above discussion is to express our conclusion that the term "mental illness" as it is used in First Unum's policy, is susceptible to any number of interpretations. Neither the legal authorities, the medical authorities, nor the public can agree on a particular definition of the term. It may mean, for example, mental illness in the traditional sense of an illness that is evidenced by behavioral problems, or mental illness as determined by symptoms, or mental illness as determined by the precipitating cause. The policy's definition is not helpful. It merely begs the question by essentially defining mental illness as a mental disease or disorder.

■ Based upon these considerations, we hold that the term "mental illness" and its definition are ambiguous in that they are susceptible to more than one reasonable interpretation. *See Keller v. Safeco Ins. Co.*, 317 Ark. 308, 877 S.W.2d 90 (1994). We therefore conclude that summary judgment in favor of First Unum was improper in this case.

■ Ordinarily, if there are varying interpretations to be accorded a provision in an insurance policy, one favoring the insurer and another favoring the insured, the one favoring the insured will be adopted. *See id.* However, we decline to adopt, as a matter of law, appellant's argument that the term "mental illness" must be defined by reference to the cause of the illness. First, the term is not susceptible to any one interpretation, as shown by our previous discussion. Secondly, the "plain, ordinary and popular" meaning of the term and its definition cannot be determined without reference to extrinsic evidence, making it improper for interpretation as a matter of law. *See Smith v. Prudential Prop. & Cas. Co., supra.* Finally, the approach used to interpret the policy must be fluid enough to account for the different thoughts among the medical and lay communities regarding the nature of mental illness and to account for new discoveries and changes in attitude that accompany modern medicine. Considerations such as these necessarily involve a factual finding, and that is what we determine is required

in this case. We therefore reverse and remand to allow a fact-finder to determine whether Elam's disorder is or is not a mental illness.

We realize that our approach may require a determination on virtually a case-by-case basis of whether a particular disorder is a mental illness. However, in the absence of a more specific policy definition, and considering that no one factor may be conclusive in dealing with this question, this is the most satisfactory solution to a very difficult problem.

In light of our remand, we do not reach the question of whether appellant's Hepatitis B and migraine headaches have any bearing on his disability.

Reversed and remanded.

KOONCE and MEADS, JJ., agree.

Kelly KILLOUGH *v.* Larry KILLOUGH

CA 00-306 32 S.W.3d 57

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

Timothy Davis Fox, PLLC, by: *Timothy Davis Fox*, for appellant.

Paul Petty, for appellee.

TERRY CRABTREE, Judge. This is an appeal of a portion of a divorce decree in which the White County Chancery Court granted the appellant, Kelly Killough, a divorce from the appellee, Larry Killough. The parties were married in 1980 and have four minor children. The youngest child was born on August 27, 1996. Appellant was awarded custody of the four minor children. Appellant challenges four parts of the divorce decree on appeal: (1) the trial court's decision not to include the retained earnings of appellee's professional association in its determination of the marital assets; (2) the trial court's ordering of appellant to pay one-half of any additional income taxes owed by appellee's failure to report income; (3) the trial court's prospective reduction of alimony; and (4) the trial court's awarding the appellee, the noncustodial parent, tax deduction for two of the parties' minor children. We find no error and affirm.

This court reviews chancery court decisions de novo on the record, but will not reverse a finding of fact by the chancellor unless it is clearly erroneous. *Davis v. Office of Child Support Enforcement*, 341 Ark. 349, 20 S.W.3d 273 (2000). We give due deference to the chancellor's superior position to determine credibility of the witnesses. *Id.* With respect to the division of property in a divorce case, we will reverse the chancellor's decision only if it is clearly erroneous, or against the preponderance of the evidence. *Thomas v. Thomas*, 68 Ark. App. 196, 4 S.W.3d 517 (1999). 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 conviction that a mistake was committed. *Turner v. Benson*, 59 Ark. App. 108, 953 S.W.2d 596 (1997).

For appellant's first point on appeal she argues that the trial court erred in not including the retained earnings of appellee's professional association in its determination of marital assets. Appellant argues that the evidence below showed that appellee had unreported cash income since the inception of his professional association. Mr. Horton, a CPA, testified that the present value of the monthly retained earnings of the P.A. was $159,000. The trial court rejected this argument. The trial court stated:

> If the Court adopted that theory, the defendant's gross income would be between $50,000 and $60,000 per year for child-support

> purposes. The Court rejects the plaintiff's assertion that the professional association has projected retained earnings of $159,000. Therefore, the Court finds the defendant's gross income to be $80,000 per year.

The trial court's reasoning can be found in the testimony of appellant's witness, Mr. Horton. He testified that there are no retained earnings if the funds are distributed. In this case there is no question that the funds were distributed to the parties and not retained as asserted by appellant. Further, the court added the amounts distributed but not reported to the income of the appellee for purposes of child support. This too was in line with the testimony of Mr. Horton that funds paid out and not reported increase the recipient's income. We cannot find that the decision of the chancellor on this issue was an abuse of discretion.

Second, appellant argues that the trial court erred in requiring her to pay one-half of additional tax liability for appellee's 1997 unreported income. The trial court required appellee to be solely responsible for any penalties or interest on the unreported income. The chancellor has the power to determine tax liability between the parties. *See generally*, *Bagwell v. Bagwell*, 282 Ark. 403, 668 S.W.2d 949 (1984); *McMurtray v. McMurtray*, 275 Ark. 303, 629 S.W.2d 285(1982); *Cox v. Cox*, 17 Ark. App. 93, 704 S.W.2d 171 (1986). At the time of the hearing, the parties were in the process of amending their tax returns to reflect income for 1997. In her argument, the appellant pointed out that the anticipated tax liability was approximately $3,000. The chancellor imposed on the appellee the obligation of paying any interest and penalties for his failure to report some of the income necessitating the amendment. In this case, we find that the chancellor simply required appellant to pay taxes that she would have been responsible for if appellee had timely reported the 1997 income; thus we find no error.

Third, appellant argues that it was an error for the trial court to prospectively reduce her alimony of $1,350 to $600 when her youngest child begins school. The trial court anticipated that at that time appellant will obtain employment since all the children will be in school. Appellant argues that the chancellor has no authority to prospectively reduce her alimony as there has been no actual change in circumstances. She argues that appellee must petition the trial

court for a change in alimony at such time a material change in circumstance occurs.

The appellant testified that she had an associate degree from the University of Central Arkansas. She stated to the court that she had been a top sales producer in her previous employment and that she could sell when she believed in the product. She also testified that she was an intelligent person and could get things done because of her deep level of understanding. According to the appellant, at the time of the hearing, she had not looked into the cost of going back to school. The trial court had before it considerable testimony about the earning ability of the parties and other factors that are considered in the process of establishing child support and made a determination as to present and future alimony.

The award of alimony is a matter resting solely in the chancery court's discretion. *Schumacher v. Schumacher*, 66 Ark. App. 9, 986 S.W.2d 883 (1999). The alimony award must always depend on the facts of the case. *Id.* The chancellor's award of alimony will not be reversed absent an abuse of discretion. *Id.* We cannot say that the trial court abused its discretion on this issue.

Appellant's final point on appeal is that the trial court erred in awarding the appellee, the noncustodial parent, the tax deductions for the two youngest children. We find that under *In Re Administrative Order No. 10: Arkansas Child Support Guidelines*, 331 Ark. 581 (1998), the trial court was within his discretion in this case. Section III(f) of Administrative Order No. 10 states:

> Allocation of dependents for tax purposes belongs to the custodial parent pursuant to the Internal Revenue Code. However, the Court shall have the discretion to grant dependency allocation, or any part of it, to the noncustodial parent if the benefit of the allocation substantially outweighs the benefit to the custodial parent.

We cannot say that the trial court abused its discretion with respect to awarding the appellee the tax deductions for the two younger children. From the evidence, it is apparent that the appellee would benefit substantially more from the allocation than the appellant. The appellant testified that she stayed home as a mom. Her income was substantially lower than the appellee's, but she received a substantial benefit in the form of property, child support, and alimony

from appellee. Accordingly, we find that the trial court was within its discretion in giving the appellee the tax deductions for the two younger children.

Affirmed.

JENNINGS and ROAF, JJ., agree.

Elizabeth HOGAN *v.* Brenda HOLLIDAY

CA 00-42 31 S.W.3d 875

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered December 6, 2000

Wright, Chaney, Berry, Daniel, Hughes & Moore, P.A., by: *Rodney P. Moore*, for appellant.

Taylor King & Associates, by: *Taylor A. King*, for appellee.

ANDREE LAYTON ROAF, JUDGE. Elizabeth Hogan appeals from a circuit court order setting aside a jury verdict that found Hogan negligent in an automobile accident but awarded zero damages. Hogan argues that the circuit court abused its discretion in granting plaintiff/appellee Brenda Holliday a new trial. We affirm.

Hogan and Holliday were involved in a three-car accident in which Hogan rear-ended a truck driven by Randall Wagner, who then struck the rear of Holliday's car. Hogan testified that she was going thirty-five miles per hour and reduced her speed only minimally before she struck Wagner. Although Holliday stated she was not injured at the scene of the accident, she sought medical treatment several weeks after the accident because of persistent headaches, neck and back pain and soreness, commencing the night of the accident. Holliday eventually was seen by Dr. D'Orsay Bryant, an orthopedic surgeon, about four weeks after the accident. Dr. Bryant noted swelling and persistent muscle spasms in Holliday's neck and lower back, and diagnosed a whiplash-type muscular and ligamentous injury. An MRI showed evidence of degenerative disc disease. Dr. Bryant prescribed a conservative treatment regimen, including physical therapy, medication and a TENS unit. Dr. Bryant testified by deposition that a muscle spasm is an objective finding, that a person can not fake a muscle spasm, and that Holliday's degenerative disc disease did not play a significant role in her injury. Holliday incurred medical expenses totaling $7,131 as a result of this treatment.

After the trial of Holliday's negligence action against Hogan, the jury found against Hogan on the issue of negligence but awarded no damages to Holliday. Holliday moved for a new trial, asserting that the damages were grossly inadequate and that the verdict was contrary to the preponderance of the evidence and the

law. The trial court ordered a new trial, finding that the verdict of the jury was clearly contrary to the preponderance of the evidence and should be set aside.

On appeal, Hogan argues that the trial court abused its discretion in granting Holliday a new trial. Hogan contends, in essence, that Holliday's case relied primarily upon her testimony as to her injury and that the jury was entitled to find that she was not injured in the accident. In this regard, Hogan asserts that Holliday's car suffered only minimal damage, she did not receive medical treatment until a month after the accident, she continued to work at a manual-labor job following the accident, and that her muscle spasms could have come from her work activities. Consequently, Hogan asserts, Holliday failed to meet her burden of proving that Hogan's negligence was the proximate cause of her injury and damages. Hogan further contends that the trial court impermissibly shifted the burden to her to prove that Holliday suffered pre-existing or subsequently-caused injuries.

The law affecting the granting of a new trial is well settled. Arkansas Rule of Civil Procedure 59(a) provides that a new trial may be granted, among other reasons, for error in the assessment of the amount of recovery, whether too large or too small, and when the verdict is clearly contrary to the preponderance of the evidence. *Garnett v. Crow*, 70 Ark. App. 97, 14 S.W.3d 531 (2000). The test we apply on review of the granting of a new trial is whether there was a manifest abuse of discretion. *Carr v. Woods,* 294 Ark. 13, 740 S.W.2d 145 (1987); *Eisner v. Fields*, 67 Ark. App. 238, 998 S.W.2d 421 (1999). A manifest abuse of discretion in granting a new trial means discretion improvidently exercised, *i.e.*, exercised thoughtlessly and without due consideration. *Nazarenko v. CTI Trucking Co.*, 313 Ark. 570, 856 S.W.2d 869 (1993). A showing of an abuse of discretion is more difficult when a new trial has been granted because the party opposing the motion will have another opportunity to prevail. *Young v. Honeycutt*, 324 Ark. 120, 919 S.W.2d 216 (1996). Accordingly, he has less basis for a claim of prejudice than does one who has unsuccessfully moved for a new trial. *Carr v. Woods, supra.*

Two cases are relied upon by Hogan as having facts analogous to this case, in that there was an admission or finding of negligence on the part of the defendant, but the jury awarded the

plaintiff no damages. However, in both cases the supreme court affirmed the trial court's denial of a new trial. *See Thigpen v. Polite*, 289 Ark. 514, 712 S.W.2d 910 (1986); *Webb v. Thomas*, 310 Ark. 553, 837 S.W.2d 875 (1992). Consequently, we do not deem these cases to provide authority for reversing the trial court's grant of a new trial. Given that a showing of abuse of discretion is more difficult when a new trial is granted, we cannot say that, based on the record before us, the trial court's granting of a new trial to Holliday was such a manifest abuse of discretion, exercised thoughtlessly and without due consideration, so as to warrant reversal of this case.

Affirmed.

HART, JENNINGS, MEADS, and PITTMAN, JJ., agree.

CRABTREE, J., dissents.

TERRY CRABTREE, Judge, dissenting. The jury heard the testimony of the witnesses, viewed the evidence, and heard arguments in this case. They found that the plaintiff did not suffer damages as a result of the negligence of the defendants. In my opinion, there is more than sufficient evidence to support the verdict. The jury decided the case, and that should be the end of it.

I dissent.

Heather SHORTER *v.* Jerry REEVES and Judy Reeves

CA 99-1270 32 S.W.3d 758

Court of Appeals of Arkansas
Divisions III, IV, and I
Opinion delivered December 6, 2000

Noel F. Bryant, P.A., for appellant.

Ball, Barton & Hoffman, by: *David D. Hoffman*, for appellees.

ANDREE LAYTON ROAF, Judge. Heather Shorter appeals from a probate court order granting appellees Jerry and Judy Reeveses' petition to adopt her seven-year-old daughter, A.R. The Reeveses are the child's paternal grandparents. On appeal, Shorter argues that the trial court erred in 1) finding that she had, for a period of at least one year, failed significantly and without justifiable cause to communicate with the child; 2) finding that she had, for a period of at least one year, failed significantly and without justifiable cause to provide for the care and support of the child; 3) applying the law to factual matters occurring after the filing of the adoption petition; and 4) finding that the adoption was in the best interest of the child.

A.R. was born February 19, 1992, and the Reeveses' son, James, is her natural father. Both Shorter and James Reeves were in the Air Force at the time of A.R.'s birth. At the time of the hearing on this case in March 1999, Shorter had been married three times, although not to Mr. Reeves, and had three children. She had given one child up for adoption, a child born in September of 1995 lived with her second ex-husband, and A.R. had lived with the Reeveses for the past three years. Shorter had been on active duty in the Army since October 1996.

Shorter first turned custody of A.R. over to the Reeveses after she married, left the Air Force and moved to Ohio in 1993, because she was in an abusive environment. A.R. stayed with the Reeveses for one month and was returned to Shorter. In 1994, Shorter and A.R. moved to Colorado. In October 1994, Shorter asked the Reeveses to come pick up A.R. because A.R. was having difficulty adjusting to the move and was being abusive to her younger sister. Shorter maintained biweekly contact with A.R. and sent Christmas and birthday gifts during this period.

In June 1995, the Reeveses returned A.R. to Shorter until A.R. was again returned to them in October of 1995. From October 1995 to June 1997, Shorter maintained phone contact with A.R. ranging from biweekly to monthly. Shorter also sent Christmas and birthday gifts during this period.

Shorter enlisted in the Army in April 1996 after her divorce in December 1995 and several months of part-time jobs. In 1996, Shorter stopped in Pine Bluff, but was not allowed to see A.R. Shorter was in basic training from October 1996 through December 1996. Thereafter, she continued advanced training until April 1997. During this time, Shorter offered to enroll A.R. in medical insurance, but the Reeveses told her that the coverage was not necessary.

Other than phone calls, Shorter's contact with A.R. was infrequent. In April 1997, Shorter spent three or four days with A.R. and thereafter continued the biweekly to monthly phone calls until December 1997. At that time, Shorter had custody of A.R. for two weeks until the end of December 1997. The Reeveses filed a Petition for Adoption on January 21, 1998. Shorter continued her biweekly or monthly calls, saw A.R. for two to three hours in

March 1998, and had custody of A.R. for one week in August 1998.

On March 2, 1999, the trial of this matter was held. On March 25, 1999, the trial court found that A.R.'s father waived his parental rights by affidavit, that A.R.'s appearance should be waived because she had lived in the Reeveses' home more than three years, and was seven years old and enrolled in the first grade. The court also found that A.R. did not have to consent to the adoption because she was under ten years old. Additionally, the court found that Shorter's consent was not required because she had failed to significantly communicate with and provide care and support for A.R. for at least one year. Finally, the trial court found that it was in A.R.'s best interest to allow the Reeveses to adopt her and that Shorter's parental rights should be terminated. Shorter appeals from this decision.

A party seeking to adopt a child without the consent of the natural parent must prove by clear and convincing evidence that the parent failed significantly and without justifiable cause to communicate with the child. *Vier v. Vier*, 62 Ark. App. 89, 968 S.W.2d 657 (1998). We review probate proceedings *de novo*, and the decision of the probate court will not be disturbed unless clearly erroneous, giving due regard to the opportunity and superior position of the trial judge to determine the credibility of the witnesses. *Dale v. Franklin*, 22 Ark. App. 98, 733 S.W.2d 747 (1987).

Shorter first argues that the trial court clearly erred when it found that she failed to maintain contact for the statutorily required one-year term sufficient to overcome the argument that she consent to A.R.'s adoption. A person who wishes to adopt a child without the consent of the parent must prove by clear and convincing evidence that the consent is unnecessary. *King v. Lybrand*, 329 Ark. 163, 946 S.W.2d 946 (1997). A finding that consent is unnecessary on account of a failure to support or communicate with the child is, however, not reversed unless clearly erroneous. *Id.* "We view the issue of justifiable cause as factual but one that largely is determined on the basis of the credibility of the witnesses. This court gives great weight to a trial judge's personal observations when the welfare of young children is involved." *In re Adoption of K.F.H. and K.F.H.*, 311 Ark. 416, 844 S.W.2d 343 (1993).

The one-year period may be any one-year period, and need not immediately precede the filing of the adoption petition. *Pender v. McKee*, 266 Ark. 18, 582 S.W.2d 929 (1979). It is not required that a parent fail "totally" in these obligations in order to fail "significantly" within the meaning of the statutes. *Pender v. McKee, supra.* A "failure to communicate without justifiable cause" is one that is "voluntary, willful, arbitrary, and without adequate excuse." *K.F.H, supra.* It has been held that, for purposes of determining whether a parent willfully deserted his child or intended to maintain his or her parental role, the trial court may consider as a factor the parent's failure to seek enforcement of his or her visitation rights during the relevant one-year period. *Vier, supra; see also Mead v. Roberts,* 702 P.2d 1134 (Or. App. 1985).

In *Vier, supra,* this court found that the trial court did not err in ordering an adoption when the appellant could not dispute the fact that he failed to communicate with his daughter for more than one year. In that case, Vier acknowledged that he had not seen his daughter for more than one year. He also admitted that he did not attempt to have the appellee cited for contempt for denying him access to his daughter, or take other action to see his daughter. Also, the only evidence of contact was six attempted phone calls and one attempted letter. The court found that it was significant that Vier never attempted to effect his visitation through legal intervention, and never apprised the trial court of any alleged interference with his visitation rights until nineteen months after his last visit with his daughter.

In the instant case, the facts are closely analogous. Here, Shorter only communicated with A.R. via telephone on a biweekly or monthly basis for a one year period. The court found it significant that Shorter chose to stay with her ex-husband and attempt to resolve that abusive relationship; that Shorter chose to stay in Colorado, where she had no significant family ties or friends, rather than come and live with A.R.; that Shorter chose to visit other family members rather than to visit with A.R.; and that on numerous occasions when Shorter could have chosen between her work, her new husband or A.R., she always chose the former over A.R. Finally, the court found that Shorter made no attempt to utilize court remedies, as in *Vier,* whenever she felt she was denied visitation.

The court determined that the infrequent phone calls could not constitute significant communication as contemplated by statutory and case law. The final basis for the trial court's ruling was that Shorter was stationed only five hours away, yet she made no attempt to visit A.R. during the one-year period at issue. Based upon these factual determinations, we cannot say that the trial court's decision that Shorter's consent to the adoption was not required was clearly against the preponderance of the evidence.

Shorter also argues that the trial court erred when it mentioned her post-petition conduct as a ground for granting the adoption. Shorter contends that when the trial court ruled from the bench, it committed reversible error by referring to conduct after the petition was filed. She contends that such conduct fell outside the required statutory period. Shorter did not raise this argument to the trial court. Moreover, the adoption order states that Shorter's consent was not required because she failed to communicate with A.R. for one year and was based upon the infrequent telephone communications that Shorter had with A.R. during the relevant period. While it is true that our supreme court has held that the one-year period after which a parent may lose the right to consent must accrue before filing the adoption petition and that the filing of the petition is the cutoff date, *K.F.H., supra*; *Dixon v. Dixon,* 286 Ark. 128, 689 S.W.2d 556 (1985), our supreme court has also ruled that it will not consider any argument raised for the first time on appeal. *Id.*

Shorter also argues that the trial court erred when it found that the adoption was in A.R.'s best interest. In this regard, Shorter argues the court erred by not ordering that an investigation be made by the Department of Human Services or any other licensed agency or person designated by the court, as required by Ark. Code Ann. § 9-9-212(b) (Repl. 1998). However, the investigation may be waived pursuant to the following provision:

> *Hearing on petition — Requirements.*
>
> (c) Unless directed by the court, an investigation and report is not required in cases in which the person to be adopted is an adult. The court may also waive the requirement for an investigation report when . . . the petitioner and the minor are related to each other in the second degree.

Ark. Code Ann. § 9-9-212(b) (Repl. 1998).

Although the trial court did not expressly waive the investigation pursuant to this provision, the trial court indicated that it found that it was in A.R.'s best interest to grant the adoption focusing on the stability A.R. has with the Reeveses. A.R. attends church regularly, is doing well in school and has found many friendships with children her age. More importantly, the Reeveses are A.R.'s grandparents and she has been in their custody for the majority of the past three years. As such, we cannot say that the trial court erred when it found that it was in her best interest to remain with them. Affirmed.

PITTMAN, CRABTREE, GRIFFEN and STROUD, JJ., agree.

HART, MEADS, JENNINGS, and NEAL, JJ., dissent.

MARGARET MEADS, Judge, dissenting. I agree with my colleagues and the trial court that the consent of Heather Shorter to her daughter's adoption is not required. I do not agree, however, that adoption is in A.R.'s best interests, and I would reverse.

It is clear to me from the testimony of both Heather Shorter and Jerry Reeves that A.R. has a genuine, loving relationship with her mother. Despite the instability in Heather's personal life, she tried to protect A.R. by removing her from a stressful home life and asking for the Reeveses' help. Heather testified:

> I was grateful to Mr. and Mrs. Reeves for caring for my daughter. I appreciate it so much, because Jerry and Judy really mean a lot to me. They're really good friends. And the fact they would go out of their way to help me care for my daughter tells me a lot about them. They are great people, and they love my daughter dearly, and so do I. .

Heather also described the two-week Christmas visit with A.R., stating:

> [W]hen I was not working we would go to the park to play ball. We would go to movies and shopping. She related to me just fine. We had no problems.... She would come up to me, give me hugs, and tell me that she loves me and give me kisses.

Finally, Jerry Reeves testified, "A.R. cares about her mama. She sees her mama, and wants to see her."

I believe this evidence shows that A.R. and her mother have developed an ongoing relationship, and I do not think it is in A.R.'s best interests for this relationship to be severed permanently. It does not appear that the trial court took this relationship into account when it granted the petition for adoption.

In adoption proceedings, we review the record *de novo* but will not reverse the probate judge's decision unless it is clearly erroneous or against a preponderance of the evidence, after giving due regard to his opportunity to determine the credibility of the witnesses. Ark. R. Civ. P. 52; *McKee v. Bates*, 10 Ark. App. 51, 661 S.W.2d 415 (1983). 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 made. *Gregg v. Ark. Dep't. of Human Servs.*, 58 Ark. App. 337, 952 S.W.2d 183 (1997).

In my opinion, after reviewing the evidence before us, I am convinced that the trial court erred when it granted this adoption. I would reverse and dismiss the adoption petition.

HART, JENNINGS, and NEAL, JJ., agree.

SCOTT TRUCK and TRACTOR COMPANY of Louisiana, Inc., d/b/a Scott Construction Equipment; and Case Credit Corporation *v.* ALMA TRACTOR & EQUIPMENT, INC.

CA 00-315 35 S.W.3d 815

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

Patton, Haltom, Roberts, McWilliams & Greer, L.L.P., by: *Phillip N. Cockrell* and *Kristi I. McCasland*; and *Cypert, Crouch, Clark & Howell*, by: *Marcus Van Pelt*, for appellants.

Jones, Jackson & Moll, PLC, by: *Mark A. Moll*, for appellees.

JOSEPHINE LINKER HART, Judge. Scott Truck and Tractor Company of Louisiana, Inc., and Case Credit Corporation appeal the trial court's grant of appellee's directed-verdict motion and the denial of appellants' directed-verdict motion, both of which were made at the conclusion of appellants' case. Appellants argue that the trial court erred by (1) determining that their security interest in the disputed chattel was not perfected, (2) denying their directed-verdict motion, and (3) failing to find that appellee was not a buyer in the ordinary course of business. We agree with appellants on their first argument; however, we affirm on the second issue and decline to address the final issue. Accordingly, we affirm in part, reverse in part, and remand.

At the core of this case is the question of whether it was a minor error that was not seriously misleading, commensurate with Ark. Code Ann. § 4-9-402(8) (Supp. 1999), when the name given for the debtor on a financing statement was "M.P.G. Enterprises/Al MacKenzie Const. Mgmt." when in fact the name of the debtor was "M.P.G. Enterprises, Inc." We conclude that it was.

Scott Truck and Tractor Company of Louisiana, d/b/a Scott Construction Equipment (hereinafter "Scott"), was a retail equipment dealer and sold a Case 850 C Crawler-Dozer (hereinafter "dozer") to M.P.G. Enterprises/Al McKenzie Construction Management (hereinafter "M.P.G.") for $33,800 on April 12, 1995. M.P.G. paid $5,000 down and signed a retail installment sales con-

tract and security agreement to secure the balance of $28,800. This contract gave Scott a purchase money security interest in the dozer for the remaining balance. Pursuant to the contract, Scott assigned its right, title, and interest in the contract and its lien on the dozer to Case Credit Corporation (hereinafter "Case"). Scott filed a form UCC-1 with the Benton County Circuit Clerk on April 17, 1995, listing the debtor as "M.P.G. Enterprises/Al McKenzie Constr. Mgmt." and listing the secured parties as Scott and Case. On April 19, 1995, Scott filed a form UCC-1 with the Arkansas Secretary of State, listing the same debtor and secured parties as on the other form UCC-1 filed in Benton County.

The retail installment contract that M.P.G. signed with Scott provided that M.P.G. could not sell or otherwise dispose of the collateral (*i.e.*, the dozer) without permission. Appellee purchased the dozer from M.P.G. in August 1996 as a "trade-in" on other equipment. Appellee thereafter sold the dozer to Arkansas Tractor for $15,000. No money was paid to Scott from either the sale to appellee or the sale to Arkansas Tractor. M.P.G. filed Chapter 11 bankruptcy in September 1996, and the debt to Scott was never satisfied.

Scott sued appellee for conversion of its collateral, contending that the balance owed under its contract with M.P.G. was $17,187.50 and that the fair market value of the collateral was $15,000. The trial court granted a directed verdict for appellee. It found that Scott failed to properly perfect its purchase money security interest; that the correct name of the debtor is M.P.G. Enterprises, Inc.; that by listing the name "M.P.G. Enterprises/Al McKenzie Constr. Mgmt." on its financing statements, Scott did not properly identify the debtor; and that appellee had no notice, either actual or constructive, that either of the appellants claimed a security interest in the collateral.

Upon the conclusion of appellants' case-in-chief and prior to the presentation of appellee's case-in-chief, both parties moved for a directed verdict. The trial court denied appellants' motion by reasoning that the security interest was not properly perfected with the proper name. Consequently, the trial court, using substantially the same reasoning, granted appellee's motion for a direct verdict. From the judgment embodying these rulings comes this appeal.

I. Motions for directed verdict

a. Appellee's granted directed-verdict motion

"In reviewing an order granting a motion for directed verdict, this court considers the evidence in the light most favorable to the party against whom the verdict was directed. . . . [and if] any substantial evidence exists that tends to establish an issue in favor of that party, it is error for the trial court to grant the directed-verdict motion." *Minor v. Failla*, 329 Ark. 274, 281, 946 S.W.2d 954, 957 (1997) (citations omitted). In the case at bar, the trial court determined that appellants listed the debtor's name incorrectly on the financing statement, constituting a lack of evidence to establish a perfected security interest, and, consequently, prevented appellants from prevailing at trial as a matter of law. Appellants argue that the error in the financing statement was a minor error that was not seriously misleading and, therefore, should not defeat their security interest. We agree with appellants and, therefore, reverse and remand.

At issue is whether the debtor's name on the financing statement complied with the Uniform Commercial Code. In the event the debtor's name was not proper, then it must be determined whether that error constituted the type of mistake contemplated by Ark. Code Ann. § 4-9-402(8), which provides:

> A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading.

To reach this determination, we are guided by the following principle:

> The test of whether an error in the debtor's name in a financing statement is a "minor error" that is not "seriously misleading" is whether it would not prevent a reasonable diligent searcher from discovering the financing statement when the search is made under the correct name of the debtor. Each case must be decided on the basis of its own facts.

9 Ronald A. Anderson, *Uniform Commercial Code* § 9-402:38 (3rd ed. 1999).

In the case at bar, it is uncontested that the financing statement contained an error with regard to the debtor's name.

However, we conclude that this error — the differences between "M.P.G. Enterprises, Inc." and "M.P.G. Enterprises/Al McKenzie Constr. Mgmt." — would not prevent a reasonably diligent searcher from discovering the financing statement.[1] Both names begin with the same letter and both names contain "M.P.G. Enterprises." Accordingly, we do not conclude that because the debtor's name was incorrectly listed on the financing statement, appellants were unable to establish that the security interest was perfected.

b. Appellants denied directed-verdict motion

Appellants also argue that the trial court erred by denying their directed-verdict motion. This argument presents an issue that has been raised from time-to-time concerning the peculiarity of the use of directed-verdict motions by parties that have the burden of proof. *See, e.g., Morton v. American Med. Int'l, Inc.*, 286 Ark. 88, 689 S.W.2d 535 (1985). *See also* David Newbern, *Arkansas Civil Practice and Procedure* § 23-13 (2nd ed. 1993) ("While the rule is clearer than the superseded statute that even a party bearing the burden of proof may move for a directed verdict, granting the motion made by the plaintiff continues to be a 'rarity.' "). More importantly, however, appellants' motion appears to have been offered at a time other than that contemplated by Ark. R. Civ. P. 50(a), which provides:

> A party may move for a directed verdict *at the close of the evidence offered by an opponent* and may offer evidence in the event that the motion is not granted, without having reserved the right to do so and to the extent as if the motion had not been made. A party may also move for a directed verdict *at the close of all of the evidence*. . . .

(Emphasis added.) Appellants moved for a directed verdict at the close of the evidence *it* offered, and because the trial ended prior to the presentation of appellee's case-in-chief, appellants obviously did not move for a directed verdict at the close of all the evidence.[2]

We are mindful of *Anderson v. Graham*, 332 Ark. 503, 966 S.W.2d 223 (1998), in which our supreme court considered a plaintiff's directed-verdict motion made before the presentation of the

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[1] We note the requirement set forth in Ark. Code Ann. § 4-9-403(4) (Supp. 1999), that "the filing officer shall index the statement according to the name of the debtor . . . ."

[2] This interpretation of Rule 50(a) is consistent with the general rule that "[a] plaintiff's motion for directed verdict is usually made after the close of the defendant's case, since the court is required to examine all of the evidence in the light most favorable to the nonmoving party in order to make its ruling." 75A AM. JUR. 2D *Trial* § 942 (1991).

defendant's case-in-chief; however, unlike the case at bar, the supreme court in that case was able to review the sufficiency of the evidence in the defendant's case. The distinction is highlighted by the standard of review used in *Anderson* — "our standard of review with respect to the denial of the plaintiff's motion for directed verdict is whether the defendants' case was utterly without a rational basis." *Anderson*, 332 Ark. at 509, 966 S.W.2d at 226. That standard of review is, of course, no help in cases such as this where the defendant has not presented a case.

Accordingly, under the rare facts and circumstances of this case, we conclude that the trial court did not err by denying appellants' directed-verdict motion, and affirm, albeit for a different reason than expressed by the trial court, commensurate with our oft-stated rule that we affirm the judgment of the trial court if the result reached is correct. *See, e.g., R.J. Bob Jones Excavating Contractor, Inc. v. Firemen's Ins. Co. of Newark, New Jersey*, 324 Ark. 282, 289, 920 S.W.2d 483, 487 (1996) (citing *Lawhon Farm Supply, Inc. v. Hayes*, 316 Ark. 69, 870 S.W.2d 729 (1994)).

II. Appellee as a buyer in the ordinary course of business

Finally, appellants argue that the trial court erred by failing to find that appellee had not acquired the status of a buyer in the ordinary course of business. We, however, decline to address the merits of this argument because to do so would require a review of appellee's case-in-chief, which we cannot do because appellee never presented its case.

Affirmed in part, reversed in part, and remanded.

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

Levern JOHNSON *v.*
GUARDIANSHIP OF Rachael Renea RATCLIFF

CA 00-80 34 S.W.3d 749

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered December 13, 2000

Hugh L. Brown, for appellant.

Bachelor, Newell & Oliver, by: *C. Burt Newell*, for appellee.

JOHN E. JENNINGS, Judge. This is an appeal from an order awarding a fee to an attorney hired by a guardian to represent the interests of the guardian's ward, a minor child. For reversal of that order, appellant argues that the guardian did not have the authority to enter into a binding contract for legal services; that the probate court erred in awarding the attorney's fee from the proceeds of a wrongful-death action; and that the fee was excessive. We affirm.

On July 5, 1998, Gwenda Johnson died in a car accident. Her daughter, Rachael Renea Ratcliff, then age two, was also injured, as were other passengers in Ms. Johnson's vehicle. Willie Ray Ratcliff, Rachael's putative father, took custody of her and obtained a temporary order of guardianship from the Garland County Probate Court on July 21, 1998. On July 23, 1998, Mr. Ratcliff, as the guardian for the child, entered into a contingency-fee contract with attorney Burt Newell for representation in connection with the child's claims arising from the car accident.

Gwenda Johnson was also survived by her parents and numerous siblings. Appellant Levern Johnson, her sister, was appointed the administratrix of her estate by the Pulaski County Probate Court. With the court's permission, the estate intervened in a lawsuit in Pulaski County Circuit Court brought by the estates of the deceased and the injured passengers who were riding in

Gwenda Johnson's vehicle. Mr. Ratcliff, as guardian, also intervened to present a claim on behalf of the child because of her injuries. With $115,000.00 in insurance monies, the plaintiffs settled the tort case. The estate of Gwenda Johnson received $38,000.00 for her wrongful death. Rachael was allotted $2,000.00 for her personal injuries.

The parents and siblings of Gwenda Johnson disclaimed any interest in the settlement proceeds. Out of the fund, the attorney for the estate received a fee of $1,500.00 and costs of $62.45. Appellant, as administratrix, was paid $200.00 for her out-of-pocket expenses. As sanctioned by court order, the balance of the money, $36,237.55, was placed into the registry of the Garland County Probate Court for Rachael's benefit. Burt Newell then petitioned the Garland County Probate Court for the payment of his attorney's fee based on the contract entered into with Mr. Ratcliff, the guardian. Appellant filed an objection to this fee request. After a hearing, the probate judge upheld the contingent-fee contract and awarded Mr. Newell the sum of $12,258.22 out of the ward's estate.

The crux of this appeal is appellant's argument that the proceeds from a wrongful-death action are exempt from the claims of attorneys who represent individual beneficiaries of the decedent's estate, and she argues that the probate court erred by awarding the fee out of the ward's estate. She relies on the decision in *Brewer v. Lacefield,* 301 Ark. 358, 784 S.W.2d 156 (1990), as support for her argument. We do not agree that *Brewer* holds that a ward's attorney may never be compensated out of funds held by a guardian that are attributable to a wrongful-death settlement.

In *Brewer,* the deceased was survived by three heirs: his widow, and two children from a former marriage. The widow was appointed administratrix of the deceased's estate, and she hired two attorneys to pursue a wrongful-death action. The children's mother also hired two attorneys to represent their interests in the lawsuit. The attorneys on each side had contingent-fee contracts to receive one-third of the proceeds from the action. From the proceeds available for distribution, the administratrix proposed that the attorneys for the estate receive one-third of the total as their fee, with the remainder, after deducting other expenses, to be divided equally between her and the two children. The children's mother objected to this plan because it made no provision for the payment of fees to

the children's attorneys. She contended that the children's attorneys should be paid out of the funds to be distributed to them and that the attorneys for the estate should receive their contingent fee only out of the sum recovered by the administratrix. The trial court rejected this plan and entered an order in accordance with the proposal made by the administratrix.

In affirming, the supreme court held that a probate court has no jurisdiction to award attorneys' fees for services rendered to individual beneficiaries of a wrongful-death action. The court based its decision on the provisions of the wrongful-death code and the case law interpreting it that it is the duty of the personal representative, not the beneficiaries, to choose counsel to pursue a wrongful-death claim. Contrary to appellant's assertion here, the court did not hold that the proceeds from a wrongful-death action were of a special class exempt from the claims of attorneys who represent the individual beneficiaries. The court merely held that the attorneys for individual beneficiaries were not entitled to consideration when the proceeds from a wrongful-death action are being distributed. As the court said, "the beneficiaries are free to select counsel to see that their interests are protected, however, *they must bear this expense.*" *Id.* at 363 (emphasis supplied). Here, an attorney was employed to represent the interests of the ward. The trial court's decision to approve a fee payable from the ward's estate is not inconsistent with the supreme court's decision in *Brewer.*

Appellant also argues that the fee contract was invalid because Ark. Code Ann. § 28-65-301(a)(3) (1987) provides that a guardian of the person does not have the power to bind the ward or his property, and the guardian in this instance was only the guardian of the minor's person when the contract was negotiated. Appellant also points out that the order appointing Mr. Ratcliff as guardian of the person authorized him to engage the services of an attorney but did not expressly approve the fee contract.

Under Ark. Code Ann. § 28-65-319(a)(1) (1987), a guardian is specifically authorized to employ legal counsel in connection with the discharge of his duties. Moreover, the hiring of an attorney is not listed among those decisions made by a guardian that always requires prior court approval as provided in Ark. Code Ann. § 28-65-302 (Supp. 1999). Even if the guardian acted precipitously, he was subsequently made the guardian of the child's estate, and he

has taken no action to disavow the fee contract but has since reaffirmed it in every respect.

Arkansas Code Annotated section 28-65-319(a)(1) further provides that the court shall fix the fee of the attorney hired by a guardian and that the fee shall be allowed as an item of the expense of administration. The probate court, after a hearing, did review the actions of the guardian and approved them, and in the exercise of its superintending control, the court set the fee. We are therefore not persuaded that the decision must be reversed on this basis.

Appellant's final argument is that the fee awarded to Mr. Newell was excessive. She argues that Mr. Newell did little work on the case and that his claim of one-third of the monies is unconscionable.

Mr. Newell testified that he appeared on behalf of the child in four different courts. In addition, he opened the guardianship and also prepared pleadings connected with the intervention in the tort case. He said that he had monitored the criminal prosecution against the tortfeasor by sitting in court both when she was arraigned and when she entered a guilty plea to a charge of negligent homicide. He also said that he researched the possibility of bringing the tortfeasor's business into the wrongful-death suit. Mr. Newell testified that he coordinated all of the insurance benefits from the accident and that he played an active role in negotiating the terms of the settlement, which he considered favorable. He said that, had the tort case gone to trial, he was prepared to put on proof as to how the child had suffered because of the loss of her mother.

In determining what is a reasonable fee, it is proper to consider the amount and character of the services rendered, the labor, time, and trouble involved, the nature and importance of the litigation or business in which the services are rendered, the amount or value of the property involved in the employment, the skill or experience called for in the performance of the services, and the professional character and standing of the attorneys. *Jones v. Barnett,* 236 Ark. 117, 365 S.W.2d 241 (1963). The probate court was in a position to assess the value of counsel's service to the estate and to properly determine the amount of fees to which counsel should be entitled. *See Winters v. Winters*, 24 Ark. App. 29, 747 S.W.2d 583 (1988). We find no error.

Affirmed.

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

GRIFFEN and CRABTREE, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. I respectfully dissent from the decision to affirm the chancellor's decision allowing an attorney's fee to the lawyer for the guardian of a minor whose mother was killed in a motor vehicle accident based on the amount that the minor received after the personal representative of her mother's estate (appellant) settled a wrongful-death claim. I would reverse the chancellor's decision in light of the supreme court's holding in *Brewer v. Lacefield*, 301 Ark. 358, 784 S.W.2d 156 (1990).

Levern Johnson, appellant, is a sister of Gwenda Johnson, the mother of Rachel Renea Ratcliff, a minor. On or about July 5, 1998, Gwenda Johnson was killed in an automobile accident in Garland County. Rachel Renea Ratcliff was injured in that accident. Willie Ray Ratcliff (Rachel's father) and Gwenda Johnson were not married when the accident occurred. Willie Ray Ratcliff initiated proceedings in Garland County Probate Court to be appointed Rachel's guardian. Meanwhile, Levern Johnson was appointed as the personal representative of the estate of Gwenda Johnson and filed a wrongful-death action on behalf of the estate of Gwenda Johnson. The wrongful-death action culminated in a pretrial compromise settlement whereby the amount for distribution to Rachel Ratcliff equaled $40,000 ($38,000 payable to her from the Estate of Gwenda Johnson and $2,000 payable for her own personal injuries in the accident).

Willie Ray Ratcliff retained separate legal counsel with the approval of the Garland County Probate Court. After Levern Johnson had concluded the settlement of the wrongful-death action, she petitioned the Garland County Probate Court for permission to deposit $36,237.55 with the registry of that court, representing the net amount for distribution to Rachel Ratcliff after costs of administration had been deducted ($200 for the personal representative as fee for services and $1,562.45 to the attorney for the estate as fee and reimbursement for expenses). The Garland County Probate Court granted an order to that effect. Then Willie Ratcliff petitioned the Garland County Probate Court to approve an attorney's

fee payment to C. Burt Newell, his attorney, and Newell filed his petition seeking payment of $12,079.18 as an attorney's fee, plus $179.04 as costs, pursuant to Newell's agreement with Willie Ratcliff. Levern Johnson objected to the claim for attorney's fees, alleging that the settlement resulted from the efforts of other counsel, not Newell, and that Newell allegedly contributed nothing toward obtaining the funds that were ultimately recovered on behalf of Rachel Ratcliff. The probate court granted Newell's petition for an attorney's fee based on his view that the fee agreement between Newell and the guardian was a valid and enforceable contract that the probate court had authorized the guardian to enter. This appeal followed.

The supreme court held in *Brewer v. Lacefield, supra,* that the attorney for a wrongful-death beneficiary is not entitled to fees from wrongful-death proceeds attributable to the beneficiary and that a probate court has no authority to award attorney's fees for services rendered to an individual beneficiary. In that case, a personal representative had engaged counsel to pursue a wrongful-death action which resulted in $114,630.46 being available for distribution. From that amount, the personal representative (widow of the decedent) proposed that her counsel be reimbursed for litigation expenses ($1,916.87) and be paid a fee pursuant to their contingent fee contract ($37,567.45). *See id.* Independent counsel engaged by the decedent's former wife to represent the children of the decedent filed a separate petition for distribution and objected to the personal representative's petition because it made no allowance for attorney's fees to be paid to the children's independent counsel. The probate court entered an order of distribution as proposed by the personal representative, and the former wife of the decedent (Debra Brewer) appealed. *See id.*

The supreme court affirmed that part of the probate court's decision approving the distribution proposed by the personal representative. Chief Justice Holt, writing for the court, emphasized that Ark. Code Ann. § 16-62-102(b) provides that every wrongful-death action shall be brought by and in the name of the personal representative of the decedent, or by the heirs at law if there is no personal representative, and that the wrongful-death code provisions do not create an individual right in any beneficiary to bring suit. *See id.* (citing *Cude v. Cude*, 286 Ark. 383, 691 S.W.2d 866 (1985)). In bringing the wrongful-death action, the personal repre-

sentative only acts as a trustee of conduit, and any proceeds recovered are for the benefit of the beneficiaries and not for the estate. *Dukes v. Dukes*, 233 Ark. 850, 349 S.W.2d 339 (1961). Observing that *Cude* concluded with dicta that a beneficiary may have her own counsel in a wrongful-death case to protect her interests and that the court had declined to address whether such counsel would be entitled to fees on a portion of the recovery (because that issue had not been raised in *Cude*), Chief Justice Holt wrote in *Brewer v. Lacefield*:

> Granted, the beneficiaries may prefer to have independent counsel to protect their interests. However, as long as our code provisions provide that the personal representative is the party to bring the action, that party has the absolute right to choose counsel for that purpose. Should the personal representative or chosen counsel fail to provide adequate representation, application can be made to the probate court to either not approve or disallow the contracts entered into by the representative. In fact, a representative can even be removed if the court finds him or her unsuitable. Ark. Code Ann. 28-48-105 (1987).
>
> *In sum, the beneficiaries are free to select counsel to see that their interests are protected, however, they must bear this expense.*

301 Ark. 363, 784 S.W.2d at 159 (emphasis added).

I see no reason to depart from the *Brewer v. Lacefield* holding merely because the attorney for the beneficiary in this case waited until after the personal representative distributed the amount due the beneficiary to petition the court for attorney's fees. Stated differently, the probate code should not be circumvented by allowing beneficiaries to do indirectly what the probate code and the *Brewer v. Lacefield* holding prohibits them from doing directly.

The record contains no proof that Levern Johnson or the counsel she selected failed to provide adequate representation, nor is there even a suggestion that the guardian of Rachel Rene Ratcliff intimated that the contracts entered into by Levern Johnson with her attorney to settle the wrongful-death action should have been disapproved or disallowed. The probate court's decision to authorize the guardian to retain separate counsel to represent the minor's interest did not amount to a declaration that the personal representative was inadequate. His conclusion that the contract between the guardian and C. Burt Newell was valid and enforceable does not

mean that proceeds recovered for the guardian's ward by the only person legally authorized to represent her in the wrongful-death action are attributable to any effort by Newell.

To the contrary, the record shows that Newell was representing the guardian for a beneficiary whose interest in the wrongful-death action was ably and effectively represented by counsel chosen by the personal representative. If Newell is due a fee, the money should come from the guardian's pocket, not from proceeds recovered for the beneficiary by the personal representative.

The attorney's fee awarded to Newell by the probate court amounts to a third of the amount recovered by the personal representative. The majority opinion refers to Newell's appearances in four different courts. The record does not show that he was involved in any way with the criminal prosecution against Sally Wells, the tortfeasor in the wrongful-death case. He certainly was not engaged as a private prosecutor. There is no proof that he helped the prosecution do anything. While he testified that Wells eventually pled guilty to negligent homicide and that none of the family members from Little Rock appeared at any of the Garland County Circuit Court proceedings related to the prosecution, there is no proof that Newell was anything other than a courtroom spectator.

Further, Newell's involvement in chancery court proceedings related to a dispute between appellee and Rachel's grandparents concerning visitation show that he was really representing appellee's separate interest, not the interest of Rachel. The majority opinion does not explain why the child should bear the expense of that visitation dispute, and appellee has cited no authority for shifting the expense from appellee to her.

The attorney's fee issue highlights the great evil posed by the result reached today. Rachel Ratcliff's legal interests were fully and adequately represented by appellant. That representation resulted in a settlement favoring Rachel. Now the lawyer for Rachel's father will take a third of her recovery because he negotiated an agreement with appellee to provide representation that can charitably be best characterized as duplicative. A less flattering appraisal of that representation would deem it unnecessary and self-serving.

I see no reason to provide judicial encouragement and approval of duplicative, unnecessary, or self-serving lawyering at the expense of this child. By merely hiring a lawyer, Willie Ratcliff now controls two-thirds of his daughter's inheritance from her mother; his lawyer now takes the other third. It is predictable that other lawyers will be encouraged to enter into similar arrangements. Such arrangements are full of opportunities for collusion between wrongful-death beneficiaries and lawyers who do not represent the personal representatives, but who are emboldened by the prospect of taking a third of a wrongful-death recovery they did not work to obtain. We should not sanction such dealings in the name of equity.

For the foregoing reasons, I respectfully dissent and would reverse the decision of the chancellor. Judge CRABTREE has authorized me to state that he joins this opinion.

Tonya BELL *v.* Michael WARDELL

CA 99-1499 34 S.W.3d 745

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

Montgomery, Adams, & Wyatt, PLLC, by: *Orin Eddy Montgomery*, for appellant.

Gordon, Caruth & Virden, P.L.C., by: *Bart F. Virden* and *Jeannie L. Denniston*, for appellee.

SAM BIRD, Judge. Appellant Tonya Bell brings this appeal from the Perry County Circuit Court, Third Division, contending that the court's finding that it is in the best interest of her child that the child's surname be changed from her surname to that of the child's father, appellee Michael Wardell, is clearly erroneous.

Bell and Wardell, teenagers, had a child out of wedlock. The child, RaLyn Danielle Bell, was born December 10, 1998, with severe medical problems. Wardell filed a complaint on December 29, 1998, acknowledging that he was the father of the child, seeking to establish paternity and visitation, and asking that the surname of the child be changed from Bell to Wardell. Bell answered and stated that she also wanted paternity established in accordance with state law and that she did not object to establishing visitation. However, she affirmatively pled that it would not be in the best interest of the minor child to have her surname changed because of the voluminous medical records already established in RaLyn's current surname. Bell also filed a counterclaim for child support.

Wardell testified that he is eighteen years old and lives in Morrilton. He acknowledged that he is RaLyn's father and requested that the court order her name changed from Bell to Wardell "because of the fact that she is my daughter." He agreed to pay child support and medical expenses. He stated, "I very much want a relationship with this child." He acknowledged her special medical needs and stated that he was willing to attend to any of RaLyn's special needs. He and his mother have visitation with RaLyn every Sunday. He stated that he would be joining the Marine Corps and that in his absence he would like for his mother to have visitation with RaLyn.

On cross-examination, he stated that he had his mother's maiden name. In addition, he stated that his mother visits with RaLyn more often than he does. He stated that he has held the baby almost every time he has visited and that he has changed her diaper twice. He also admitted to having a violent temper, having once

pulled a gun on Bell's brother, and to incurring several traffic tickets. He stated that he was working on calming down his temper and that that was one of the reasons he intended to join the Marine Corps.

Diane Wardell, Michael's mother, testified that she thought it was important for RaLyn to establish a relationship with both sides of her family. She stated, "She needs to know her heritage, and where she comes from. She needs to know that we love her also. We have contributed clothes and other things to the child since she was born." She acknowledged that Wardell's birth name is Michael Dale Evans, Jr., but she stated that she changed his surname to her maiden name after she and Wardell's father divorced. She said that in order to do so, she had to prove that there had been three years of no contact with Wardell's father and that his father had not paid any child support. She testified, "When I proved that, I was able to change his name to Wardell because I wanted him to have the name of the people who loved him." In addition, she stated that Wardell had seen his father only six times since he was an infant. She also acknowledged that Wardell had missed several visitation times scheduled with RaLyn because he does not feel comfortable at Bell's home.

After Wardell rested, Bell asked that RaLyn's surname not be changed. She stated that pursuant to *Huffman v. Fisher*, 337 Ark. 58, 987 S.W.2d 269 (1999), Wardell has the burden of proving that it would be in the best interest of the child to have the surname changed, and that Wardell had not met that burden. The trial court stated that it would reserve its ruling.

Bell testified as to RaLyn's extensive medical problems. She also stated that on occasion when Wardell visits RaLyn, he just sits on the couch, not even looking at RaLyn. But she admitted that in the last couple of months he has begun to hold her more often, play with her, and feed her. She also stated that Wardell's mother visits every time he does and that she has spent more time with RaLyn than has Wardell. Bell maintained that when she was pregnant with RaLyn, Wardell was "constantly telling me that he wanted me to move in with him in his mother's home," but she did not want to do so. She stated that after a while, he stopped calling her and helping her with any medical expenses.

As far as the surname being changed, she testified that all of RaLyn's medical bills are in the name of Bell, and that she receives Medicaid and that those benefits are in the name of Bell. She stated that if the court ordered her to change RaLyn's name, she (Bell) would have to change all of the medical records. She stated that she assumed that the change in her name would delay medical treatment, but that no one has told her that was so. In addition, she stated that "[t]here will not be any stigma attached to RaLyn carrying my last name, but it will cause confusion to change her last name."

Based upon the testimony and the results of DNA tests, the chancellor found that Wardell is the father of the child. In addition to setting forth a visitation schedule, the chancellor ordered that Wardell pay child support and past medical expenses, that he provide insurance, and that each party be responsible for one half of the non-insured medical expenses. The order also required that Wardell undergo training that he would need to learn to care for a child with RaLyn's special needs. Finally, the order directed the Division of Vital Records to change the birth certificate to show that Wardell is RaLyn's father and that her surname is Wardell. Bell filed a motion for a new trial, which was denied, and she brings this appeal.

Chancery courts have the power, either by statute or case law, to change a minor's name when it is in the best interest of the minor. *Moon v. Marquez*, 338 Ark. 636, 999 S.W.2d 678 (1999). When a court is determining what surname by which a child should be called, it must consider what is in the best interest of the child. *Huffman v. Fisher, supra.* When making this determination, the court should consider the following factors: the child's preference; the effect of the change of the child's surname on the preservation and development of the child's relationship with each parent; the length of time the child has borne a given name; the degree of community respect associated with the present and proposed surname; the difficulties, harassment, or embarrassment that the child may experience from bearing the present or proposed surname; and the existence of any parental misconduct or neglect. *Huffman v. Fisher, supra.* This list is not exhaustive; rather, these are factors that must be considered. *Huffman v. Fisher, supra.* When reviewing a chancellor's decision with regard to the changing of a surname, this court will not reverse where the chancellor has made a full inquiry

of the implication of the factors and a determination is made with due regard to the best interest of the child. *Huffman v. Fisher, supra.* A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court, on the entire evidence, is left with a definite and firm conviction that a mistake has been committed. *Huffman v. Fisher, supra.* In making this determination, the chancellor assesses the credibility of the witnesses. *Moon v. Marquez, supra.*

Bell brings this appeal, contending that the court's ruling was clearly erroneous because the chancellor decided the issue based upon factors not set forth in *Huffman v. Fisher, supra,* those being that the name should be changed to avoid the stigma of illegitimacy, and that the actions of the unwed father in seeking to take responsibility for his child should be rewarded. Bell claims that neither of these factors have anything to do with the best interest of the child. She argues that the chancellor's letter opinion merely pays "lip service" to the six factors, but manifestly does not consider them. She claims that throughout the hearing, it was assumed, with no proof, that for RaLyn to bear her mother's surname would cause embarrassment and difficulties because it would brand the child as illegitimate. In addition, she claims that the court's decision was in error because it would cause great confusion to change all of RaLyn's medical records. And finally, she argues that the chancellor should not have rewarded Wardell by changing the infant's surname to Wardell to induce Wardell to fulfill his paternal obligations. She argues that, as the moving party, Wardell did not meet his burden of proof and that RaLyn's surname should not have been changed.

In his letter opinion, the chancellor specifically stated that he had reviewed the decision of *Huffman v. Fisher, supra,* and had considered the six factors set forth in that decision. He wrote:

> Because of the young age of the minor child, several of the factors may not be applicable. The child has no preference as to her surname because she is approximately seven months old. The Court has considered whether the change of the child's surname would have any impact on the preservation and development of the child's relationship with each parent. At this state of the child's life, whether her surname is Bell or Wardell would have no effect on her relationship with either parent. The child took the mother's surname at birth, but it is important to note that the father filed a paternity action 19 days after the child's birth seeking an order of

> paternity and a change of name to his surname. The Court finds that the father acted with due haste in filing the paternity complaint, and finds that the length of time the child bore the surname of Bell would have no effect on the child. There's no evidence as to the degree of community respect associated with the present and proposed surnames. In the absence of any such evidence, the Court presumes that both the surnames are suitable. There is no evidence of any parental misconduct or neglect.

The court noted that Bell was opposed to changing RaLyn's surname because her extensive medical records bear the name of Bell and because the change of the name would cause some confusion at hospitals and with health-care providers. He noted, however, that there was no evidence presented that proved that the change of name would create substantial difficulties.

He then wrote:

> The Court has considered the six factors required by *Huffman v. Fisher*, and has also considered the fact that the father promptly filed a paternity action after the child's birth seeking to be named for the father. He stated in his petition that he desired to pay child support and help raise the minor child. The Court finds, based upon these factors, ... it is in the best interest of the minor child that her surname be changed to Wardell.

In denying Bell's motion for a new trial, the chancellor entered an order, again discussing the factors set forth in *Huffman v. Fisher, supra*, and again ordering that RaLyn's surname be changed. Although he acknowledged that a change of the surname on the medical forms would not be convenient, he noted that "inconvenience on the part of the defendant should not be a basis upon which to assign a surname to a minor child."

■ We do not find the chancellor's decision that RaLyn's surname should be changed from Bell to Wardell to be clearly erroneous. The chancellor, in his lengthy letter opinion and his order denying a motion for a new trial, considered the polestar consideration, that being what is in the best interest of the child, as well as the six factors listed in *Huffman v. Fisher, supra*, and other factors he considered pertinent to the case at bar. The chancellor, finding that Wardell wants to be an active participant in the child's life, considered the fact that Wardell filed the paternity action only nineteen days after the child was born, that he offered to pay child

support and medical expenses, and that he and his mother have sought visitation with RaLyn. As stated above, although the court must consider the six factors enumerated in *Huffman v. Fisher, supra,* the court also has the discretion to consider other factors when determining what surname would be in the best interest of the child.

The chancellor stated that some of the factors listed in the *Huffman v. Fisher, supra,* opinion were not relevant to the case at bar, such as the preference of the child for one surname, and the effect of the change of the child's surname on the preservation and development of the child's relationship with each parent. We agree with the chancellor's conclusion that these two factors are simply not relevant in determining whether to change the surname of a seven-month-old child. However, the chancellor's conclusion that these factors were not relevant is not equivalent to a failure to consider them. To the contrary, it is obvious that the chancellor did consider these factors and concluded that they were irrelevant to a determination of the best interests of this child in this case. Bell even concedes in her brief that the chancellor "dealt with the factors" in his letter opinion.

Affirmed.

JENNINGS and STROUD, JJ., agree.

KRISTIE'S KATERING, INC. *v.* Nasser AMERI

CA 99-1374 35 S.W.3d 807

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

[redacted]

[redacted]

Sullivan Law Firm, P.L.L.C., by: *Gary L. Sullivan*, for appellant.

The Bond Law Firm, by: *Will Bond*, for appellee.

SAM BIRD, Judge. Kristie's Katering, Inc., appeals a decision of a Pulaski County jury awarding Nasser Ameri $16,000 for injuries he claimed he sustained at the hands of security guards at one of Kristie's night clubs, the Discovery Club, on July 21, 1996. Kristie's argues that the trial court erred in (1) denying its motion for a new trial because of the misconduct of a juror; (2) requiring the presence of Norman Jones, owner of Kristie's, at trial and permitting him to be a witness when Ameri had failed to timely subpoena Jones; (3) denying Kristie's motion for judgment notwithstanding the verdict because Ameri failed to prove all the elements of his claim of negligence; (4) allowing testimony from the records custodian at UAMS regarding Ameri's medical bills when they were not provided in discovery; and (5) allowing Ameri to use the deposition of witness Abdullah Alkhomairi without first making a finding that Alkhomairi was unavailable as a witness under Ark. R. Evid. 804. Because we find no error as to any of these points, we affirm.

At trial, Ameri testified that he had come to the United States from Yemen in 1987 for an education and graduated from UALR with a degree in computer science. He said he went to the Discovery Club every couple of weeks for an evening of dancing and entertainment. On July 21, 1996, Ameri got to the club around 1 a.m. Although he said he was not drinking, his friend, Saif, was, and Saif got into a verbal confrontation with an oriental man. Ameri said he attempted to separate the men but was unsuccessful. About that time the lights came on, and the disc jockey announced that the club was closing. Ameri testified that as he was leaving, one of the club's security guards grabbed Saif, and another security guard grabbed him from behind with his arm around Ameri's neck. The guard who was holding Ameri choked him while another

guard hit him in the face with his fist, and his nose was broken. Ameri said he incurred medical bills of approximately sixty-three hundred dollars.

Kristie's first argues that the trial court erred in denying its motion for a new trial because of the misconduct of a juror. Kristie's filed a motion for a new trial, to which it attached as an exhibit the affidavit of Norman Jones. Jones stated that when he returned to the Discovery Club the evening the trial concluded, he was told that juror Joan Cunningham's son, who had been thrown out of the club at least twice in the previous twelve months, was in the club discussing the suit against Kristie's. According to the affidavit, Jones was told that Billy Cunningham was boasting that his mom had been on the jury, and that she had voted against Kristie's.

Kristie's asserts that Ms. Cunningham held a grudge against the club for ejecting her son, that the verdict reflected her bias, and that awarding such an excessive amount for damages gave her revenge against the club. Kristie's argues that because Cunningham failed to disclose during voir dire that her son had been ejected from the club twice, and without her vote the jury could not have reached a nine-person verdict, Cunningham was guilty of juror misconduct so egregious that a new trial was warranted.

Arkansas Rules of Civil Procedure 59(a) provides:

> A new trial may be granted to all or any of the parties and on all or part of the claim on the application of the party aggrieved, for any of the following grounds materially affecting the substantial rights of such party: ... (2) misconduct of the jury or prevailing party[.]

See Trimble v. State, 316 Ark. 161, 871 S.W.2d 562 (1994); and *Hacker v. Hall*, 296 Ark. 571, 759 S.W.2d 32 (1988).

■ ■ The matter of granting or denying a new trial lies within the sound judicial discretion of the trial judge whose action will be reversed only upon a clear showing of abuse of that discretion or manifest prejudice to the defendant. *Hicks v. State*, 324 Ark. 450, 921 S.W.2d 604 (1996); *Newberry v. State*, 262 Ark. 334, 557 S.W.2d 864 (1977); *Safely v. State*, 32 Ark. App. 111, 797 S.W.2d 468 (1990). In order to succeed in a motion for new trial, a defendant has the burden of developing and presenting evidence

sufficient to show that a new trial is warranted. *Landreth v. State*, 331 Ark. 12, 960 S.W.2d 434 (1998); *Miller v. State*, 328 Ark. 121, 942 S.W.2d 825 (1997); *Diemer v. Dischler*, 313 Ark. 154, 852 S.W.2d 793 (1993). The moving party must show that the alleged misconduct prejudiced his chances for a fair trial and that he was unaware of this bias until after trial. *Owens v. State*, 300 Ark. 73, 777 S.W.2d 205 (1989); *Hendrix v. State*, 298 Ark. 568, 768 S.W.2d 546 (1989). A juror who knowingly fails to respond to any question during voir dire that would reveal a disqualification on the part of that juror shall be deemed to have answered falsely. *Pineview Farms, Inc. v. Smith Harvestore, Inc.*, 298 Ark. 78, 765 S.W.2d 924 (1989).

Appellant relies heavily on *Zimmerman v. Ashcraft*, 268 Ark. 835, 597 S.W.2d 99 (Ark. App. 1980), in which a new trial was granted because two jurors failed to respond when the court asked the jury panel if they had litigation pending in circuit court or were involved in litigation in which the lawyers for either side were participants. In reality, two of the jurors were parties to cases pending before the court. The court of appeals held that these two jurors "certainly could have been aware they were not answering truthfully," 268 Ark. at 837, 597 S.W.2d at 101, and that even the appearance of juror misconduct is enough to warrant a new trial.

In *Big Rock Stone & Material Co. v. Hoffman*, 233 Ark. 342, 344 S.W.2d 585 (1961), the court held that a juror had no knowledge that a suit had been filed in his behalf by an attorney in the same firm as the attorney for one of the parties, and it was therefore impossible for the pendency of that case to have any effect whatever upon his deliberations and conclusions as a juror.

In *Berry v. St. Paul Fire & Marine Ins. Co.*, 328 Ark. 553, 944 S.W.2d 838 (1997), the Arkansas Supreme Court held that the questions asked during voir dire were confusing, that the juror might not have realized exactly what was being asked, and that the party seeking a new trial had not shown that the information would have necessarily led to the juror being stricken.

■ In the instant case, there is no evidence of Billy Cunningham's age, whether or not he lived with his mother, that Ms. Cunningham knew that her son had been ejected from the appellant's nightclub, or even that she knew he went there. Kristie's Katering has failed to present this court with evidence that would

show that juror Cunningham was a knowingly biased juror. Consequently, we cannot say that the trial court abused its discretion in refusing to grant a new trial.

Next, Kristie's argues that the court committed reversible error by requiring the presence of Norman Jones at trial and by permitting him to be called as a witness by Ameri in his case-in-chief, when he had failed to timely subpoena Jones. Kristie's states that the day before trial its counsel was asked by Ameri's attorney if Jones had been subpoenaed. When told that he had not, Ameri sought leave from the judge to subpoena Jones within two days of trial, as permitted by Ark. R. Civ. P. 45(d). Kristie's objected, and the record does not show that any subpoena was issued for Jones or that any witness fee was tendered. However, according to Kristie's, "the court got involved and more-or-less told defense counsel to have [Jones] in the court room for Plaintiff's use in his case-in-chief." Jones did appear at trial, was called to testify by Ameri, and Jones's testimony constitutes the only evidence of the appellant's negligent hiring and training of security guards. We can find nothing in the record confirming that the judge ordered counsel for Kristie's to have Jones at trial, or that Kristie's objected to Jones testifying when he was called to the witness stand by Ameri. It is appellant's duty to bring us a complete record that demonstrates error. *Pocahontas Fed. Sav. v. J.T. White*, 67 Ark. App. 378, 1 S.W.3d 471 (1999).

Kristie's next argues that the court erred in denying its motion for new trial or judgment notwithstanding the verdict because Ameri's evidence was not sufficient to support a finding that Kristie's had been negligent in failing to meet its duty to provide business invitees a safe environment or in the hiring and training of security guards.

Ameri alleged that he was leaving the club when a black security guard, whom Ameri identified as Lamont Charleston, grabbed him around the neck, and that, while he was being held from behind by Charleston, a white security guard hit him in the face. On cross-examination, Ameri admitted that, about six weeks before the July 21 incident, he had had a dispute with Charleston involving another incident in the parking lot of the Discovery Club, and that Charleston had told him following the earlier dispute that, "I will get you."

Ameri's description of the July 21 incident was corroborated through the deposition testimony of Abdullah Alkhomairi, who stated that he knew Ameri, that he was at the Discovery Club on the night of July 21, 1996, that he saw a black security guard grab Ameri from behind by the neck and a white security guard hit Ameri in the face, and that "other security" then came and started hitting on Ameri.

Two witnesses were called for the defense. Lamont Charleston testified that he had been a security guard at the Discovery Club during the period that included July 21, 1996. However, Charleston testified that he did not know Ameri, that he had never before seen Ameri, that he had never been involved in an altercation of any kind involving Ameri, and that he had not had a dispute with Ameri in the parking lot of the Discovery Club about six weeks before July 21, 1996, "because we didn't have any liability on what happened in the parking lot." Charleston testified that incidents involving significant injury and the loss of a lot of blood were "out of the ordinary" at the Discovery Club, and that he would recall the occurrence of such an incident. He said that he did not recall an incident during July of 1996 involving "a big bloody scene," and that he did not recall being involved in an incident where he choked Ameri while another security guard hit Ameri in the nose. Although Charleston indicated that there were frequent occasions requiring security guards to expel unruly patrons from the club, they seldom involved physical altercations. He said that when a patron became unruly to the point of requiring expulsion, two security guards would "walk the person out," with one guard on each side. He said that if a patron "got physical, like throwing punches," the guards would hug them and escort them out.

The other defense witness, Kenneth Brown, testified that during July of 1996 he was employed as a bartender in the dance area of the Discovery Club and was familiar with security at the club. He stated that he had seen Ameri "a time or two" at the club, but that he had never seen Ameri involved in a fight at the club. He said that he was not familiar with any altercation at the Discovery Club that involved massive amounts of blood, and that if such a thing had happened, he would know about it. He did not recall any major physical altercation having occurred at the club during the month of July 1996.

Norman Jones, the president and sole shareholder in Kristie's Katering, testified that he was in charge of security at the club when Ameri was injured and that he hired the security personnel. Jones admitted that he had no formal training program for security guards, no training manuals, materials, or workbooks to inform them of their duties, and no written rules or regulations governing their conduct. However, he said, the security personnel he hired almost always had experience in the field and they all were expected to use common sense in trying to maintain calm at the club.

To establish a *prima facie* case of negligence, a plaintiff must show that damages were sustained, that the defendant breached the standard of care, and that the defendant's actions were the proximate cause of the damages. *Burns v. Boot Scooters, Inc.*, 61 Ark. App. 124, 965 S.W.2d 798 (1998). In determining whether a jury's verdict is supported by substantial evidence, we review the evidence and all reasonable inferences arising therefrom in the light most favorable to the party on whose behalf the judgment was entered. *D.B. Griffen Warehouse, Inc. v. Sanders*, 336 Ark. 456, 986 S.W.2d 836 (1999); *Union Pac. R.R. Co. v. Sharp*, 330 Ark. 174, 952 S.W.2d 658 (1997); *Esry v. Carden*, 328 Ark. 153, 942 S.W.2d 846 (1997).

The evidence at trial was very much in dispute. The jury was not required to believe the testimony of Charleston that he had not been involved in the incident that Ameri described. Both Ameri and Alkhomairi testified in detail to the occurrence of the incident, and the jury would have been justified in finding their testimony to be more credible than that of Charleston. From the medical records, there was no doubt that Ameri sustained serious injuries to his nose on July 21, 1996, and there was no evidence to suggest how Ameri's injuries might have otherwise occurred.

Kristie's also argues that, because Ameri admitted that Charleston's alleged conduct must have been the result of a grudge that arose from an earlier dispute, then Kristie's cannot be held liable to Ameri under the theory of respondeat superior because Charleston was acting in his personal interests and contrary to the interests of his employer. The answer to this argument is threefold. First, if Charleston was acting in satisfaction of his personal grudge, that does not explain why Ameri was struck in the face by the unidentified white security guard and beaten up by other security

guards whom the evidence did not indicate had any reason to harbor a grudge against Ameri. Second, the evidence offered by Ameri and Alkhomairi relating to the incident on July 21, 1996, was clearly sufficient to enable the jury to conclude that both security guards were acting in the course of their employment by Kristie's and in furtherance of Kristie's interests. Even if Charleston did have a personal grudge against Ameri arising from the earlier dispute, the jury was justified in finding, from the evidence of the circumstances surrounding the incident, that Charleston and the other guard were acting in their capacity as security guards and not in satisfaction of Charleston's personal interests. This is particularly true in view of Charleston's complete denial of any knowledge of Ameri or of an occurrence that could have resulted in Ameri's injuries. The jury could well have believed Charleston's testimony that he did not know Ameri, leaving only the alternative that Charleston and the other guard were acting in their capacity as security guards and in the interests of Kristie's. Third, and perhaps most important, Ameri proceeded at trial on the theory that Kristie's was negligent in failing to monitor, properly train, or supervise its security force. In *Sparks Reg'l Med. Ctr. v. Smith*, 63 Ark. App. 131, 976 S.W.2d 396 (1998), we clarified the distinction between the theories of respondeat superior and negligent supervision. There we quoted from 27 Am. Jur. 2d *Employment Relationship* § 472 (1996), which states:

> Employers are subject to direct liability for the negligent hiring, retention, or supervision of their employees when third parties are injured by the tortious acts of such unfit, incompetent, or unsuitable employees. In order to recover, the plaintiff must show that the employer knew, or in the exercise of ordinary care should have known, that its employee's conduct would subject third parties to an unreasonable risk of harm.
>
> This theory is completely separate from the respondeat superior theory of vicarious liability because the cause of action is premised on the wrongful conduct of the employer, such that the employer's negligence was the proximate cause of the plaintiff's injuries.

In *American Automobile Auction, Inc. v. Titsworth*, 292 Ark. 452, 730 S.W.2d 499 (1987), Arkansas adopted the theory of negligent supervision.

We think that the evidence that Kristie's owner provided no formal training, no training manuals, materials or workbooks, and that there existed no written rules or regulations governing the conduct of security guards in ejecting patrons, coupled with the evidence of the frequency of occurrences requiring such action, was sufficient evidence for the jury to conclude that Kristie's was negligent in its failure to provide adequate supervision of the guards.

Next, appellant argues that the court erred in allowing testimony about Ameri's medical bills because they were not provided with copies of the bills in discovery. The record reveals that Kristie's objected to Ameri's calling of a witness from Medical College Physician's Group (MCPG) to introduce copies of medical bills allegedly incurred by Ameri as a result of the July 21 incident. It appears that during discovery, Ameri answered interrogatories in which he revealed that a witness might be called to introduce Ameri's medical *records.* However, when Ameri called a witness from MCPG to introduce Ameri's medical *bills*, Kristie's objected because no witness from MCPG had been identified in response to discovery and because copies of the bills had not been provided in response to a discovery request for proof of Ameri's damages. Kristie's counsel did state that she had been provided with "some vague, unreadable computer printout," and that discovery had revealed that Ameri had incurred an estimated $6,000 in medical expenses, but that she had not received any of the itemized bills Ameri sought to introduce through the MCPG witness. Ameri's counsel responded that he had provided Kristie's counsel with Ameri's medical authorization and copies of all Ameri's medical bills that were available when responding to the discovery. He stated that the MCPG witness had been subpoenaed to bring Ameri's records and that those records included copies of his bills. The judge ruled that he would permit the bills to be admitted and would permit Kristie's counsel to examine them during the lunch hour before the witness testified.

We have long held that the court has wide discretion in matters pertaining to discovery and that we will not reverse a decision absent an abuse of discretion. *Stein v. Lukas*, 308 Ark. 74, 823 S.W.2d 832 (1992). *See also Edwards v. Stills*, 335 Ark. 470, 984 S.W.2d 366 (1998); *Marrow v. State Farm Ins. Co.*, 264 Ark. 227, 570 S.W.2d 607 (1978). Under the circumstances revealed by the record,

we cannot say that the court abused its discretion in overruling Kristie's objection.

Kristie's final argument is that the court erred in allowing into evidence the deposition of Alkhomairi without finding that he was "unavailable" under Ark. R. Evid. 804. Kristie's argues that Ameri did not make a good-faith effort to procure the attendance of Alkhomairi at trial, but it cites only criminal cases that interpreted the meaning of "unavailability" under Ark. R. Evid. 804. Arkansas Rule of Civil Procedure 32(a)(3)(B) provides, "The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of this state, unless the absence of a witness was procured by the party offering the deposition." In his deposition, Alkhomairi testified that he was moving to Colorado, but that if he was notified of the trial date, he would come back to Arkansas for the trial. However, Ameri's counsel informed the court that when he tried to notify Alkhomairi of the trial date by telephone, he was only able to leave a message on an answering machine, and that Alkhomairi had not returned his calls. Ameri's counsel also informed the court that Ameri had spoken to Alkhomairi's roommate who told him that Alkhomairi was incarcerated in Colorado over a dispute with his girlfriend. In permitting Ameri to use Alkhomairi's deposition, the trial court relied on Ark. R. Civ. P. 32(a)(3)(B), and found that Alkhomairi was more than 100 miles away from the place of the trial, based on Ameri's assertion that Alkhomairi had moved to Colorado.

In *National Bank of Commerce v. Quirk*, 323 Ark. 769, 918 S.W.2d 138 (1996), the Arkansas Supreme Court stated that Rule 32 does not distinguish between discovery and evidentiary depositions. The rule has been construed to provide that any party, not only the party who took the deposition, may use the deposition of a witness, whether or not a party, for any purpose at the trial or hearing, if the party demonstrates to the court the existence of one of the conditions specified in Rule 32(a)(3). *Whitney v. Holland Retirement Center*, 323 Ark. 16, 912 S.W.2d 427 (1996). Under the circumstances present here, we cannot say that the judge abused his discretion in allowing the deposition to be used.

Affirmed.

JENNINGS, NEAL, CRABTREE, and ROAF, JJ., agree.

ROBBINS, C.J., dissents.

JOHN B. ROBBINS, Chief Judge dissenting. I respectfully dissent from the opinion delivered by the majority because the jury's verdict was not supported by substantial evidence and thus the trial court erred in failing to grant appellant's motion for judgment notwithstanding the verdict. The majority holds that the evidence supported appellee's contention that his damages were proximately caused by appellant's negligent supervision of its employees. I disagree.

By Mr. Ameri's own testimony, his damages were caused by intentional malice on the part of the security personnel. He testified that, a month and a half prior to being attacked, he inserted himself into a hostile confrontation between Mr. Charleston and an unknown stranger, and that he was a witness against Mr. Charleston. On the night of the prior confrontation Mr. Charleston told Mr. Ameri, "We will get you." According to Mr. Ameri the attack was motivated by revenge. With regard to attending the club, Mr. Ameri stated, " I always feel unsafe in there, because I know they're going to beat me every time."

The appellant's president testified that there was no formal training program and that he did not routinely execute background checks before hiring employees. However, there was absolutely nothing in the record that would indicate that a background check on Mr. Ameri's assailants would have revealed anything to cause appellant to be suspicious of their propensity for violence. Moreover, in my view, no amount of training would likely have prevented this incident. This was not a situation where the security guards acted imprudently in dealing with an altercation. Rather, it was a situation where, by Mr. Ameri's own account, they committed a personal and intentional act of violence, which appellant could not have reasonably expected or prevented.

Nor can I find substantial evidence to support Mr. Ameri's claim that appellant was negligent in failing to provide a safe environment. Citing *Indus. Park Businessmen's Club v. Buck*, 252 Ark. 513, 479 S.W.2d 842 (1972), this court stated:

> The weight of authority supports the view that while a tavern keeper or bar operator is not an insurer of the safety of his patrons, he is under the duty to use reasonable care and vigilance to protect guests or patrons from reasonably forseeable injury, mistreatment or annoyance at the hands of other patrons. Negligence in such a situation may consist of failure to take appropriate action to eject persons of undesirable character from the premises or knowingly permitting irresponsible, vicious or drunken persons to be in and about the premises or failure to maintain order and sobriety in the establishment. Of course the proprietor is not required to protect the patrons of a bar or tavern from unlikely dangers, or improbable harm, but he is required to take affirmative action to maintain order when harm to patrons is reasonably foreseeable, and certainly whenever the circumstances are such as to indicate that the danger of harm to patrons by other patrons should have been anticipated by one reasonably alert.

Burns v. Boot Scooters, Inc., 61 Ark. App. 124, 128, 965 S.W.2d 798, 800 (1998). In the instant case, to hold appellant liable for Mr. Ameri's injuries would be to make it an insurer of its patrons because, based on the evidence presented, the injuries were not caused by appellant's lack of reasonable care. Based on Mr. Ameri's allegations, his remedy was against the employees who attacked him, but not against the employer. I would reverse.

Suzanne H. CRISMON *v.* John S. CRISMON

CA 00-65 34 S.W.3d 763

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered December 13, 2000
[Petition for rehearing denied January 17, 2001.*]

[redacted]

* BIRD and GRIFFEN, JJ., would grant.

Eichenbaum, Liles & Hester, P.A., by: *James H. Penick, III*, for appellant.

Dover & Dixon, P.A., by: *Gary B. Rogers* and *Monte D. Estes*, for appellee.

K. MAX KOONCE, II, Judge. This is an appeal of an order addressing property division in a divorce. The issues on appeal concern the Chancellor's application of a "fair market value" standard for valuing the parties' interest in an ongoing business, and the Chancellor's interpretation of certain terms in a property settlement agreement.

We find no reversible error on either point and, therefore, affirm. The parties to this case were divorced on September 15, 1996. A property settlement agreement was entered at the time of the divorce. At issue is the valuation of the appellee's business, consisting of a partnership with his "good friend," Larry Garland, in two convenience stores and certain commercial property. During the pendency of the divorce, the appellee's fifty-percent stake in the partnership was valued from $462,000 to $829,000 according to a September 1997, financial statement. Earlier personal financial statements prepared by appellee valued his interest at $320,000 on July 16, 1992, $355,000 on October 26, 1993, and $682,000 on October 23, 1997. The appellant attempted to become a partner in the business (pursuant to the property settlement, where she took over all interest in the convenience stores, and the husband retained all interest in his own pension accounts), but Garland refused. The

appellant then filed for relief from the court in the form of a Petition for Determination of Rights and Valuation of Property, seeking one-half of the appellee's partnership interest (and one-half of his pension plan), and seeking to enforce annual income guarantees and distribution of the appellee's bonus. In the Decree of Divorce, a bonus of $7,500 was anticipated, and was ordered to be given entirely to Mrs. Crismon.

At trial, the appellee's partner, Larry Garland, testified that the fair market value of the entire partnership was $350,000 based on his experience and numerous uncertainties inherent in the business. The appellant's expert testified that under a "fair value" standard, the partnership was worth in excess of $1 million, and the appellee's partnership interest was worth $555,000. The expert then applied a "*reasonable marketability discount*" of ten-percent, for a final valuation of the appellee's interest at $500,000. The appellant's expert did not include any discount in her written report. The appellee's expert valued a fifty-percent stake in the partnership at $286,000 based on a cash flow discount rate of fifteen-percent and a marketability discount of twenty-five percent. The court ruled that the value of the property was $365,000 using a twelve-percent discount rate.

In its written order, the court awarded the appellant $182,500, representing one-half of the court's valuation of the partnership interest in the Garland-Crismon business.[1] The court also found that the bonus in dispute had already been distributed, and denied any further relief on that point, or on the issue of the "guaranteed salary" promised in the property settlement. From that order comes this appeal, with appellant arguing for reversal on two points: 1) the court erred in applying a discount in its valuation of the Garland-Crismon partnership, and 2) the court erred as a matter of law in its interpretation of the property settlement.

Chancery cases are reviewed *de novo*, and the chancellor's findings will not be disturbed unless they are clearly erroneous or clearly against the preponderance of the evidence. *O'Neal v. O'Neal*, 55 Ark. App. 57, 929 S.W.2d 725 (1996).

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[1] The court also ordered that the appellant would receive one-half of the appellee's pension, but that determination is not in dispute in this appeal.

Here, after hearing conflicting expert testimony on the value of the appellee's interest in the partnership, the chancellor made a finding of fact that the value of the partnership was $365,000 based on a fair market value standard. It is the province of the trier of fact to determine the credibility of witnesses and resolve conflicting testimony. *Shoptaw v. Shoptaw*, 27 Ark. App. 140, 767 S.W.2d 534 (1987). While there is conflicting argument on whether a "fair value" standard should be borrowed from other jurisdictions' case law on shareholder suits, the Arkansas Supreme Court has explicitly approved the use of the "fair market value" standard for valuing closely held businesses in a marital property division context. *See Layman v. Layman*, 300 Ark. 583, 780 S.W.2d 560 (1989) and *Skokos v. Skokos*, 333 Ark. 396, 968 S.W.2d 26 (1998). Further, the term "fair market value" is used in the marital property statute at Ark. Code Ann. § 9-12-315 (a)(4) (Repl.1999). Based on these authorities, the chancellor's use of a "fair market value" standard is not clearly erroneous.

Implicit in the appellant's first allegation of error is whether the trial court erred in applying the "marketability discount" in the valuation calculation. The appellant argues that controlling Arkansas case law supports her position and directs this court's attention to *Jones v. Jones*, 29 Ark. App. 133, 777 S.W.2d 873 (1989). In *Jones*, this court refused to accept a thirty-two percent reduction in the value of an accounting firm that was based on the firm losing roughly one-third of its customers if one of its partners was forced to sell his interest. Additionally, our court held that there was no evidence that the firm was contemplating selling the one-third interest, and therefore the value of the firm should not be reduced. We also rejected a $6,000 "rounding down" of the estimated value. In the *Jones* decision our court did not specifically reject applying a "marketability" discount to marital property divisions of businesses, but found that the justification for the discount (based on a buy-sell agreement among the partners and the anticipated loss of business if a partner left) was not appropriate under the facts of that case. In the present case, the discount(s) in dispute do not purport to represent future lost business, as in *Jones*, but reflect expenses that would be incurred in marketing and selling the partnership interest. Further, pursuant to our *de novo* review, we did not reverse in the *Jones* case, but simply modified the chancellor's valuations, and affirmed as modified. *Id.*

Finally, the appellant takes issue with the application of two provisions in the settlement agreement. First, the appellant argues that the court erred in failing to award her $7,500 for the appellee's bonus as stated in the decree. The appellee stated in pleadings that he paid $5,400 to appellant, representing the entire bonus paid to him (with the remaining twenty-eight percent being withheld by his employer for taxes). This issue was not addressed in any abstracted testimony from the trial. Without any conflicting proof, it is impossible to say that the trial court erred in accepting that all amounts due to the appellant for the bonus as contemplated in the original decree had been paid.

The second prong of the appellant's second point on appeal involves the trial court's application of language in the property settlement regarding a "guarantee" of an annual income for appellant of $45,000 from a salary from the partnership and from alimony. However, the same paragraph with the "guarantee" language also includes the following: "In no event shall Husband's annual obligation for alimony exceed $31,000." The evidence at trial showed that the appellee had fully complied with his alimony obligation, but that the appellant had not received any salary from the partnership because Garland refused to admit her to the partnership. The appellant argues for a "fair and reasonable" interpretation of the contract "guarantee" and asked the court to order the appellee to make up the difference between the alimony paid and the $45,000 per year "guaranteed." While such a construction may have been equitable under the circumstances, it is not mandated under the property settlement, and is in fact contrary to the explicit maximum cap on the appellee's alimony; therefore, the trial court's refusal to award the requested relief is not erroneous.

Accordingly, we affirm on both points.

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

GRIFFEN concurs in part, and dissents in part.

WENDELL L. GRIFFEN, Judge, concurring in part; dissenting in part. I concur with the majority regarding the chancellor's interpretation of the property settlement agreement. However, I respectfully dissent from the decision to affirm the valuation of the real estate partnership. The chancellor assessed the value of John Crismon's partnership interest in a real-estate partner-

ship at $365,000 and awarded Suzanne Crismon half of that amount, or $182,500. Appellant contends that the chancellor erred by assessing the "fair market" value of the partnership interest. The property settlement agreement incorporated into the parties' divorce decree provided that John Crismon would transfer to Suzanne Crismon his interest in the Crismon Garland real estate partnership, but that if Larry Garland (John Crismon's partner) refused to accept Suzanne Crismon as a partner either party (appellant or appellee) could petition the court to determine the value of the partnership and that John Crismon would pay Suzanne Crismon one half of the value of his interest in the partnership, plus one half of his Levi Straus pension. Because the property settlement agreement called for the court to determine the value of the partnership, I agree with appellant that it was error for the chancellor to use a "fair market value" assessment that included a "marketability discount" that decreased the valuation based on assumed costs of marketing the partnership despite undisputed proof that no sale of the partnership was contemplated.

Of course, the controlling legal authority is Arkansas Code Annotated section 9-12-315 (Repl. 1998) which provides that when a divorce decree is entered, all marital property shall be distributed one-half to each party unless the court finds such division to be inequitable. A chancellor's finding regarding the valuation of a business will not be overturned unless it is clearly erroneous. *Nicholson v. Nicholson*, 11 Ark. App. 299, 669 S.W.2d 514 (1984). The majority affirms by reasoning that Arkansas Code Annotated section 9-12-315 (Repl. 1998), obligated the chancellor to assess the partnership by using a "fair market value" approach as contrasted with a "fair value" determination. *Black's Law Dictionary*, 597 (6th ed. 1990) defines fair market value as "the amount of money which [a] purchaser who is willing but not obligated to buy would pay [an] owner who is willing but not obligated to sell, taking into consideration all uses to which the land is adapted and might in reason be applied." (citing *Arkansas State Highway Comm'n v. DeLaughter*, 250 Ark. 990, 1000, 468 S.W.2d 242, 247 (1971)). On the other hand, the concept of "fair value" in the context of a dissenting stockholder facing a merger of a corporation seems more applicable to the situation in this case. Under that standard, "fair value" is determined by ascertaining all assets and liabilities of the business and the intrinsic value of its stock rather than merely

appraising its market value. *See American Gen. Corp. v. Camp*, 190 A. 225 (Md. 1937).

I believe that the "fair value" approach is more equitable than a "fair market" approach to valuation of the real estate partnership in this instance because of the circumstances surrounding the property and the reasons for appraising its value. The partnership owns two parcels of real property with improvements consisting of a convenience store and Texaco service station located at the southwest corner of Dixon Road and Highway 65 in Little Rock, and an Exxon service station located at the southeast corner of Dixon Road and Highway 65. The businesses lease the improvements from the partnerships, and are now owned by Garland.

Appellee filed discovery responses which valued his half interest in the two Dixon Road properties at $600,000, less his share of debt valued at $138,000, for a net equity of $462,000. Discovery documents revealed that Larry Garland stated the value of the partnership holdings as $1,650,000 in a 1997 personal financial statement, with a net equity of $829,000 for a 50% partnership interest. In 1992, appellee prepared a personal financial statement which valued the properties at $1,250,000, with his 50% net equity valued at approximately $320,000. Another personal financial statement prepared by appellee valued the properties at $1,250,000 in 1993, with his 50% net equity valued at $355,000. After the divorce proceedings began, appellee submitted another personal financial statement to his bank and valued his 50% interest at $700,000, less debt equaling $18,000, for a net equity of $682,000.

Although there was no evidence that the property was to be sold or that a sale was contemplated, the chancellor relied upon expert testimony which set the value of the property based on the $350,000 "fair market value," ascribed by Larry Garland at the hearing and the application of a "marketability discount" factor advanced by appellee's expert witness. That valuation ignores, however, the obvious joint interest shared by Garland and appellee in setting the value low. Garland had already refused to accept appellant as a partner, thereby clearly signaling his preference to remain in the partnership with appellee. The property settlement agreement did not call for the partnership to be sold, but for its value to be determined by the chancellor and for appellee to pay appellant an amount equal to half his partnership interest. By "low balling"

the value of appellee's partnership interest through use of the "fair market value" method and marketability discount in the face of undisputed proof that there was no intention to sell the properties, Garland and appellee essentially collaborated to deny appellant the "fair value" of her half of appellee's interest. Had the partnership agreement called for appellee to sell his interest and then give appellant half the sale price, the "fair market value" approach and marketability discount would be appropriate.

I agree with appellant that whether the chancellor should have applied a marketability discount in valuing the appellee's 50% interest in the partnership based on the notion of assessing its value by using the fair market value approach is a question of law which the chancellor applied incorrectly. The property settlement agreement did not provide for the partnership to be sold in the event Garland refused to accept appellant as his partner. Therefore, I see no reason for using a valuation approach that assumes that the partnership would be sold. Thus, I would reverse and remand with instructions that the partnership's value be assessed without use of the marketability discount employed by the chancellor when she used the "fair market value" standard. As an alternative to affirming the result below, we should at least modify it by correcting the chancellor's error as we did in *Jones v. Jones*, 29 Ark. 133, 777 S.W.2d 873 (1989). There we held that the chancellor erred in reducing the valuation of a husband's accounting firm by 32% based on the alleged accounts the firm would lose upon the sale of his one-third interest due to divorce when there was no evidence that he was selling his interest or contemplating doing so. We should at least follow the same approach here and delete the reduction for the marketability discount where the effect is the same as we rejected in *Jones*, namely to reduce appellant's marital share. Following our approach in *Jones* would result in a property distribution that is consistent with the facts, one that is equitable, and one which lacks the unseemly appearance that appellant's rights under Ark. Code ann. § 9-12-315 are being denied so that appellee and his crony can profit.

Concurring in part; dissenting in part.

Jay B. BRESLAU and Kerri Steele Breslau, Personal Representatives for the Estate of Kaitlyn Nicole Breslau, Deceased, and as the Natural Guardians and Next Friends of Jake Alexander Breslau and Jessica Danielle Breslau *v.* Mitchell S. McALISTER, M.D., and Northwest Arkansas Clinic for Women

CA 00-445 35 S.W.3d 321

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered December 13, 2000

[redacted]

Xollie Duncan, for appellants.

Friday, Eldredge & Clark, by: *Phil Malcom* and *Clifford W. Plunkett*, for appellees.

JOHN F. STROUD, JR., Judge. This is a medical malpractice case. Appellants are the parents of the deceased child, Kaitlyn. They brought this action against appellees, Northwest Arkansas Clinic for Women and its employee, Dr. Mitchell McAlister, alleging that after Kaitlyn's twin, Jessica, was born Dr. McAlister failed to properly monitor Kaitlyn's status, failed to detect Kaitlyn's distress, failed to act on the distress shown, and failed to deliver Kaitlyn by Caesarean section. Kaitlyn was born with severe brain damage, and she died when she was ten months old. The jury returned a verdict for the appellees. We affirm.

For their first point of appeal, appellants contend that the trial court erred in allowing defense counsel to display for the jury quotations from medical treatises and periodicals in an enlarged form. At trial, appellants objected repeatedly to the use of blow-ups and their publication to the jury, including at times an objection to portions of the enlargements being highlighted in yellow. No particular rule of evidence was relied upon in making the objection, and it was not couched in terms of violating the hearsay rule. On appeal, however, appellants rely upon Rule 803(18) of the Arkansas Rules of Evidence as support for their position. Parties are bound

on appeal by the scope and nature of their objections as presented at trial. *Hinkston v. State,* 340 Ark. 530, 10 S.W.3d 906 (2000).

Even if we were to address this issue on its merits, however, we would find that appellants' reliance upon Rule 803(18) is misplaced. Rule 803 lists several exceptions to the hearsay rule. Subsection (18) provides:

> (18) *Learned Treatises.* To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by testimony or admission of the witness or by other expert testimony or by judicial notice. *If admitted, the statements may be read into evidence but may not be received as exhibits.*

(Emphasis added.) The gist of appellants' argument is that the enlarged format of the excerpted portions of the medical treatises and periodicals somehow converted them into "exhibits," even though they were not admitted into evidence nor allowed to go to the jury room with the jury. We disagree. The advisory committee note to Federal Rule of Evidence 803(18), the federal counterpart to Arkansas Rule of Evidence 803(18), explains in pertinent part the purpose of the last sentence of the subsection:

> The rule avoids the danger of misunderstanding and misapplication by limiting the use of treatises as substantive evidence to situations in which an expert is on the stand and available to explain and assist in the application of the treatise if declared. The limitation upon receiving the publication itself physically in evidence, contained in the last sentence, is designed to further this policy.

[redacted] The items challenged by the appellants clearly fall within the category of demonstrative evidence. The admissibility and use of demonstrative evidence is a matter falling within the wide discretion of the trial court. *Edwards v. Stills,* 335 Ark. 470, 984 S.W.2d 366 (1998). We find no abuse of the trial court's discretion in allowing defense counsel to use the medical treatises and periodicals in this fashion.

For their second point of appeal, appellants contend that the trial court abused its discretion when it first ruled that Dr. Robert Arrington's opinion testimony would be excluded and then

changed its decision and ruled that his deposition could be admitted in its entirety. We disagree.

Appellants' one-page argument follows in pertinent part:

> The trial court had ruled on October 1, 1999, prior to the start of the trial on October 4, 1999, that expert opinion testimony of Dr. Arrington would not be permitted because Dr. Arrington had not been named as an expert by the deadline set by the Court. . . . The trial court has wide discretion in imposing sanctions for failure to provide discovery. *See Calandro v. Parkerson,* 333 Ark. 603, 970 S.W.2d 796 (1998) and *Arkansas Rule of Civil Procedure* 37. In this case the trial court imposed deadlines for the naming of expert witnesses. In the hearing on October 1, the trial Court found that because Dr. Arrington had not been named as a witness, neither party would be allowed to use any expert testimony from him but would be allowed to use only that testimony arising as a result of his involvement with Kaitlyn Breslau as a treating physician. It is appellees' contention that this ruling was well within the Court's discretion as described in the above-styled case. The trial court requested and received from both sides, their positions on which portions of Dr. Arrington's deposition should not be received into evidence because of a violation of the court's ruling on expert opinion testimony.
>
> . . . .
>
> Because the Court was aware that appellant intended to use Dr. Arrington's deposition on Tuesday, October 5, the reversal of his original ruling was prejudicial and most especially was prejudicial at that point in time.

Dr. Arrington was the neonatologist who treated Kaitlyn when she was transferred to Arkansas Children's Hospital. Appellants took his evidentiary deposition prior to trial. During the cross-examination by appellees, Dr. Arrington explained that it was his judgment that the injury Kaitlyn suffered "was consistent with something that happened more remote from delivery than the last two hours of labor prior to delivery." He further explained what he meant by questionable intrauterine insult, a term that appeared in the "impression" portion of the medical records:

> We put questionable intrauterine insult because we weren't sure what, what had happened. Intrauterine refers to it happened sometime in utero. . . . That's a general term, intrauterine, meaning that

> we didn't know for sure what happened, but it happened sometime before birth.

Following the deposition, appellants moved *in limine* to strike Dr. Arrington's cross-examination testimony as to the causation and timing of the injury, *i.e.,* that the child's brain damage occurred prior to the mother's labor. They based their motion to strike on the fact that Dr. Arrington was not listed as an expert witness by appellees during discovery, arguing that the failure to do so amounted to a discovery violation. Appellees responded in part that they were not required to disclose him as a witness because they had never expected or intended to call him as a witness prior to his deposition being taken by appellants.

The trial court heard the motion on October 1, 1999, prior to the start of trial on October 4, 1999. The court ruled that any opinions offered by Dr. Arrington, for either party, should be excluded. However, by the first day of trial, October 4, the trial court had read the deposition and had determined:

> It is the Court's opinion that the defense has not turned plaintiffs' fact witness into their expert witness. Defense has the right under the Rules of Evidence and Procedure to wide latitude on cross examination. Defense has the right to cross-examine the witness on the diagnosis. Dr. Arrington states on direct examination that it is before a certain time and then goes into more precise timing. Contrary to what I indicated last Friday based on statements made to me by counsel, it was my intention to strike all kinds of opinion testimony on either side. I find in reality this is fact testimony of what he determined as his diagnosis back at the time he treated the child at Arkansas Children's Hospital.

It is also important to note that Dr. Arrington was held in abeyance in case he was needed to testify live at the trial. Thus, appellants had the opportunity to try to avoid the problems about which they complain on appeal by calling Dr. Arrington as a live witness and reformulating their direct examination of him in an attempt to avoid opening the door for the type of cross-examination that occurred during the deposition. Appellants did not call Dr. Arrington, but rather introduced his deposition testimony into evidence. Moreover, the timing of the trial court's change of position may have been inconvenient for appellants, but the problem could have been addressed by asking for a continuance, which they did

not do. Finally, trial courts are afforded considerable discretion in ruling on such matters, regardless of whether it is viewed as a ruling involving discovery deadlines (*See generally Calandro v. Parkerson,* 333 Ark. 603, 970 S.W.2d 796 (1998)), introduction of evidence (*Arthur v. Zearley,* 337 Ark. 125, 992 S.W.2d 67 (1999)), or proper cross-examination (*Clark v. State,* 246 Ark. 1151, 442 S.W.2d 225 (1969)), and we will not reverse in the absence of a showing of abuse of that discretion. Appellants have not convinced us that the trial court abused its discretion in allowing this deposition testimony.

For their final point of appeal, appellants contend that the "trial court erred in allowing Dr. Bruce Berg to testify outside his area of expertise and to offer expert opinions that were not to a reasonable degree of medical certainty on the issue of whether dead tissue, debris, or blood clots from the placenta *in utero* can travel by fetal circulation to the brain and on the issue whether appellees did or failed to do something in labor and delivery that caused injury to Kaitlyn Breslau." We find no reversible error.

Dr. Berg testified that he is a professor of child neurology and pediatrics; that he is board certified by the American Board of Pediatrics, board certified by the American Board of Psychiatry and Neurology in adult neurology, and board certified by the American Board of Psychiatry and Neurology in neurology with special competence in child neurology; that he authored the book, *Principles of Child Neurology*; and that he is involved in the practice of neonatal neurology at the University of California at San Francisco. He stated that he has training, experience, and education regarding the cause and timing of an injury to a child's brain. He expressed his "opinion within a reasonable degree of medical certainty that the injury to Kaitlyn Breslau's brain occurred before labor had begun," and that it had "nothing to do with the perinatal period, which involves labor and delivery time."

With respect to the issue raised by appellant, the following colloquy occurred at trial:

DEFENSE COUNSEL:	Can you tell the ladies and gentlemen of the jury can something occur *in utero* with fetal circulation that can transmit a clot, debris, lesion to a brain?

PLAINTIFF'S COUNSEL:	Objection on the basis that this opinion is not within Dr. Berg's area of expertise.
DEFENSE COUNSEL:	I think he can talk about neurologically what can occur.
THE COURT:	You need to ask him if he feels qualified in that area to give an opinion on it.
DR. BERG:	It is hard to know what you mean by qualified to comment on how something *in utero* can be transmitted through fetal circulation to a child's brain. I've seen it. Every doctor knows about the anatomy of an infant umbilical cord, so in that regard, yes, I've seen it. Most injuries that would produce asphyxia to a child's brain occur more commonly before delivery.
DEFENSE COUNSEL:	Dr. Berg, do you have an opinion within a reasonable degree of medical certainty or within a reasonable degree of medical probability whether there is anything that my client, Dr. Mitch McAlister, did or allegedly failed to do in the management of Mrs. Breslau's labor and delivery that in your opinion caused injury to Kaitlyn Breslau?
PLAINTIFF'S COUNSEL:	Objection to the lack of foundation that Dr. Berg is qualified to give an opinion in the particular area of labor and delivery.
DEFENSE COUNSEL:	Dr. Berg, do you have an opinion as to whether there was anything done or failed to be done during the time period of labor and delivery that produced and caused the injury to Kaitlyn Breslau's brain?
PLAINTIFF'S COUNSEL:	Same objection, your honor.
DEFENSE COUNSEL:	I'm talking about timing, your Honor.
THE COURT:	I'm going to overrule your objection. He has already told us about his qualifications and experience about the issue of timing, so I am going to overrule it. Go ahead.
DR. BERG:	I did not see anything that should have been done that was not done.

Cross-examination of this witness followed, during which Dr. Berg made it clear that he was not holding himself out to be an obstetrician or gynecologist. Appellant did not move to strike the doctor's testimony following cross-examination. Where a party objects to a witness's testimony for lack of foundation and lack of qualification, but does not move to strike following a cross-examination which develops these issues, any error is waived. *See New Prospect Drilling Co. v. First Commercial Trust,* 332 Ark. 466, 966 S.W.2d 233 (1998).

Moreover, even if we were to address this issue on the merits, the result would be the same. Rule 702 of the Arkansas Rules of Evidence provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Whether to allow a witness to give expert testimony rests largely within the sound discretion of the trial court, and that determination will not be reversed absent an abuse of that discretion. *Swadley v. Krugler,* 67 Ark. App. 297, 999 S.W.2d 209 (1999).

Here, Dr. Berg testified that all medical doctors have expertise concerning the anatomy and function of an umbilical cord, and that the anatomy of an umbilical cord allows debris, dead tissue, and blood clots to be transmitted from the placenta to the infant. Furthermore, he testified that with respect to how something *in utero* can be transmitted through fetal circulation to a child's brain, he actually "had seen it." Finally, with respect to Dr. Berg's testimony that he "did not see anything that should have been done that was not done" during the labor and delivery process to cause Kaitlyn's brain injury, the trial court determined that he was qualified to express this opinion based upon his medical opinion as a neurologist that the brain damage occurred prior to labor and delivery. Appellants' arguments simply have not convinced us that the trial court abused its considerable discretion in allowing Dr. Berg's testimony.

Affirmed.

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

GRIFFEN, J., dissents.

WENDELL L. GRIFFEN, Judge, dissenting. Rule 803(18) of the Arkansas Rules of Evidence states:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (18) *Learned Treatises.* To the extent called to the attention of an expert witness upon cross-examination or relied upon him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by testimony or admission of the witness or by other expert testimony or by judicial notice. *If admitted, the statements may be read into evidence but may not be received as exhibits.* (Emphasis added.)

I would hold that the trial court abused its discretion when it overruled appellants' objection to the appellees use of enlargements of medical treatises and periodicals during direct and cross-examination of expert witnesses. Instead of counsel for appellees merely reading the statements from the treatises into the record when he questioned witnesses, he made enlargements of the statements and displayed them during the examination and cross-examination. Although it is true that the enlargements were not received as exhibits in a formal sense, I see no practical difference between receiving the enlargements as exhibits and what the trial court allowed.

Appellees' argument that the use of an enlarged and emphasized statement from a learned treatise does not differ from use of enlarged deposition testimony during cross-examination is unpersuasive. The rules of evidence allow all prior inconsistent statements to be introduced as substantive evidence, in addition to their use for impeachment. But that applies to prior statements by the witness, not by a third-party non-witness who is neither present nor subject to cross examination. In this case, none of the excerpts involved prior inconsistent statements by the witnesses being questioned when the enlargements were displayed to the jury.

The essence of Rule 803(18) is that statements contained in published treatises, periodicals, or pamphlets which have been established as reliably authoritative may be read into evidence to the extent that those statements are called to the attention of a witness during cross-examination or relied upon by the witness in direct examination. Those statements are not, however, independently

admissible as evidence. But for Rule 803(18), those statements would be deemed hearsay. Rule 803(18) avoids the hearsay problem by allowing them to be read into evidence during questioning but not received for display and publication to the jury. When they are read into evidence as provided by the Rule, the contents of learned treatises merely allow the jury to assess the credibility of a witness whose opinion is either inconsistent with or contradicted by a treatise the witness has acknowledged as authoritative on the subject about which the witness has testified.

But when the statements are published to the jury, the focus turns from the testimony of the witness and shifts to the treatise. In the present case, the jury did not need to see the words that were enlarged and prominently displayed on placards in order to know whether witnesses were presenting consistent or contradictory testimony. The transparent reason for enlarging the excerpts from the treatises was to get the contents of the treatises before the jury as substantive evidence. The fact that the enlargements were not marked with exhibit stickers and formally admitted as evidence does not lessen the impact of publishing and prominently displaying the statements to the jury. The trial court's cautionary statement was inadequate to "unring" the bell after the jury read the statements.

Proof which is addressed directly to the senses of the trier of fact without interposing the testimony of witnesses is generally characterized as visual, real, or demonstrative evidence. 29A AM. JUR. 2d *Evidence* § 934 (1994). The enlargements did not demonstrate anything. They were not presented so that the jury could view a scene. They did not diagram, sketch, or otherwise depict a setting. The enlargements were not medicine or science. They were simply placards upon which magnified words from the treatises and periodicals were displayed. It is inaccurate to characterize the placards the same way that we treat photographs, X-ray pictures, maps, models, motion pictures, and videotapes.

Courts should confine counsel to the terms of the rule by allowing them to read the affected statements into evidence during questioning to demonstrate that witness testimony is either in accord with or contradicts statements found in sources recognized as reliably authoritative. When counsel are allowed to publish statements from learned treatises to the jury in any other fashion, those

statements essentially become proof in themselves. When that happens, what our rules intended to not be hearsay becomes, for all effective purposes, implicitly admitted hearsay.

I respectfully dissent.

ST. PAUL REINSURANCE, INC. *v.* Cheryl Irons GLOVER

CA 00-433 34 S.W.3d 760

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

Matthews, Sanders, Liles & Sayes, by: *Marci Talbot Liles* and *Roy Gene Sanders*, for appellant.

Thomas D. Deen and *Bill R. Holloway*, for appellee.

OLLY NEAL, Judge. This appeal presents our court with the following issue of first impression: whether the Arkansas valued-policy statute, codified at Arkansas Code Annotated § 23-88-101 (Repl. 1999), allows a single insured to recover the face value of two separate insurance policies when there has been a total loss to the covered real property.

The parties have stipulated to the facts relevant to this determination. Cheryl Irons owned a bar and grill in Arkansas City, Arkansas. Effective June 26, 1995, Ms. Irons insured the building in the amount of $105,000.00 and the building's contents in the amount of $25,000.00 with St. Paul Reinsurance Company ("St. Paul"). Effective July 12, 1995, Ms. Irons also insured the building in the amount of $80,000.00 with General Star Indemnity Company ("General Star").

Each of the policies contains identical other-insurance clauses. The other-insurance clauses provide:

OTHER INSURANCE

1. You may have other insurance subject to the same plan, terms, conditions and provisions as the insurance under this Coverage Part. If you do, we will pay our share of the covered loss or damage. Our share is the proportion that the applicable Limit of Insurance Under this Coverage Part bears to the Limits of Insurance of all insurance covering on the same basis.

2. If there is other insurance covering the same loss or damage, other than that described in 1. above, we will pay only for the amount of covered loss or damage in excess of the amount due from that other insurance, whether you can collect on it or not. But we will not pay more than the applicable Limit of Insurance.

On October 25, 1995, Irons's business was totally destroyed by an arson fire. No arrests were ever made with respect to the fire. After the fire, Irons sought payment from both St. Paul and General Star. Both companies claimed that their other-insurance clauses applied and initially paid pro-rata shares of the larger of the two policies. General Star paid $45,405.41 and St. Paul paid $59,594.59 for a total payout of $105,000. In 1997, Irons filed a lawsuit against General Star alleging that General Star owed her the remaining balance of the face value of its policy because of the valued-policy statute. In December 1998, the Desha County Circuit Court granted Irons's motion for summary judgment, ruling that General Star had to pay Irons the balance of the face amount of its policy. General Star did not appeal that ruling.

In 1999, Irons filed the instant action against St. Paul in the Desha County Circuit Court alleging that St. Paul owed the balance of its policy pursuant to the valued-policy statute. The trial court granted Irons's motion for summary judgment, ruling that the existence of other insurance is not relevant to the application of the valued-policy statute and ordering St. Paul to pay the balance of the face amount of its policy. From that ruling comes this appeal.

■ The standard of review in summary-judgment cases is 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; further, the moving party always bears the burden of sustaining a motion for summary judgment; all proof must be viewed in the light most favorable to the resisting party, and any doubts must be resolved against the moving party; 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 no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Ark. R. Civ. P. 56; *Youngman v. State Farm Mut. Auto. Ins. Co.*, 334 Ark. 73, 971 S.W.2d 248 (1998).

The Arkansas valued-policy statute provides:

> In case of a total loss by fire or natural disaster of the property insured, a property insurance policy other than for flood and earthquake insurance shall be held and considered to be a liquidated demand against the company taking the risk for the full amount stated in the policy for the full amount upon which the company charges, collects, or receives a premium.

Ark. Code Ann. § 23-88-101(a).

Our courts have consistently held that the valued-policy statute becomes a part of every insurance policy on real estate as if it were actually written in the policy and that it cannot be evaded by contrary policy stipulations. *See Thurston Nat'l Ins. Co. v. Dowling*, 259 Ark. 597, 535 S.W.2d 63 (1976); *Tedford v. Security State Fire Ins. Co.*, 224 Ark. 1047, 278 S.W.2d 89 (1955); *E. O. Barnett Bros. v. Western Assurance Co.*, 143 Ark. 358, 220 S.W. 465 (1920). In *Tedford,* our supreme court stated that the purpose of the valued-policy statute is "to relieve the insured from the burden of proving the value of his property after its total destruction, and to prevent insurance companies from receiving premiums on overvaluations, and thereafter repudiating their contracts as soon as it becomes in their interest to do so." 224 Ark. at 1050, 278 S.W.2d at 91.

Although our courts have considered the effect of the valued-policy law on numerous occasions, our state courts have never considered a situation in which an insured has obtained more than one policy covering the same property interest. In such a situation, the United States District Court for the Western District of Arkansas ruled that although the Arkansas Supreme Court had not addressed the issue, it did not believe the supreme court would

allow an insured to hide behind the valued-policy statute and obtain what would amount to a double recovery. *See Underwriters at Lloyd's v. Pike*, 812 F. Supp. 146 (W.D. Ark. 1993).

In *Pike*, Farmers Mutual Insurance Company ("FMIC") issued a policy in the amount of $60,000 covering two poultry houses and their contents. One year after Pike obtained coverage from FMIC, he obtained a second policy from Lloyd's of London ("Lloyd's") covering the identical property in the amount of $102,000. One month after Lloyd's provided the second policy, a fire totally destroyed the covered property. After discussing the Arkansas valued-policy statute and cases interpreting its effect, the *Pike* court stated:

> In spite of what those cases say, the court notes from a careful reading of them that they are not on point because none of them involve the insuring with more than one policy one insurable interest by one insured. Instead, in each of those cases, the property owner or one of several property owners, had insured his or her insurable interest in the property and had obtained an insurance policy to cover that interest, and then another individual or entity with a separate insurable interest had also obtained a policy of insurance insuring that different interest. In spite of the all-inclusive language of those cases, this court doubts that the Arkansas Supreme Court, when squarely faced with this issue, would allow what is clearly and blatantly a double recovery of the loss of one insurable interest. To do so would be to allow something akin to a lottery or wager. One property owner with one insurable interest could obtain multiple policies insuring the property at its full value and then wait for (and perhaps hope for) a fire, with all of the attendant temptation to "help the odds."

812 F. Supp. at 150.

Appellant urges that the instant action is identical to *Pike* and that we, like the district court, should not allow Irons a double recovery on one insurable interest. Appellant also cites the federal Wisconsin case, *Wisconsin Screw Co. v. Detroit Fire & Marine Ins. Co.*, 183 F. Supp. 183 (E.D. Wis. 1960). In *Wisconsin Screw Co.*, the plaintiff obtained two different insurance policies for $15,000 each covering the same piece of property. The property covered by the policies was subsequently destroyed by fire, and the value of the warehouse at the time of destruction was $12,264.00. The insured sought to recover a total of $30,000, arguing, as does the insured in

the instant case, that the valued-policy statute required such an outcome. The court ruled that the insured's recovery is limited to the actual loss suffered. The court's decision, however, was based on a Wisconsin statute that provided that when property is covered by more than one policy, the insured is never entitled to recover a sum greater than his actual loss and that the insurers are responsible for their proportionate share of the loss. *See* Wis. Stat. § 203.11 (repealed 1975). The court also noted that absent that statute, the insured would have been entitled to recover the face value of both policies without regard to her actual loss. *See Wisconsin Screw Co*, 183 F. Supp. at 186 (citing *Oshkosh Gas Light Co. v. Germania Fire Ins. Co.*, 37 N.W. 819 (1888)).

At least one other jurisdiction has considered the issue presented in the instant action. *See Millers Mut. Ins. Ass'n v. LaPota*, 197 So.2d 21 (Fla. 1967). In *LaPota*, the plaintiff had two separate insurance policies on a residential building. The policy with Millers Mutual Insurance Association ("Millers Mutual") was for $5,000 and the second policy with a second insurance company was for $6,500. Millers Mutual claimed that a pro rata liability clause in its policy limited its share of the loss to $2,473.91. The court invalidated the pro rata clause and held that the valued-policy statute was fully applicable to an insured with two policies covering his interests. The court stated:

> This is not an unfair scheme, as the insured is stating the limits of his recovery and at the same time the insurer is basing his premium charges on the extent of his maximum exposure. When the total loss occurs neither can contend the value of the destroyed property is any different from what they had previously specified. When multiple policies are permissible, as here, the same principles apply. The aggregate liability is the total of the various values specified and for which an appropriate premium has been paid.

197 So.2d at 24. We think the Florida court properly interpreted the effect of the valued-policy statute.

Appellant contends that such a conclusion is unfair and that allowing Ms. Irons to recover the face amount of both policies is to approve something akin to a lottery or wager. What, asks appellant, would happen if she obtained three or four policies on the property? We recognize, as did our supreme court in *Tedford, supra*, that our law appears to give legal sanction to a wagering contract.

However, the policy of such a law is for the legislature and not for the courts. *Tedford*, 224 Ark. at 151, 278 S.W.2d at 91.

Appellant is not without means of protecting itself from what it considers to be an unfair result. For instance, the insurer could insert language that voids the policy if the insured obtains other insurance. *See, e.g., Roach v. Arkansas Farmers Mut. Fire Ins. Co.*, 216 Ark. 61, 224 S.W.2d 48 (1949) (holding that provisions invalidating insurance policies if the insured obtains additional insurance without the insurer's consent are valid). *See also Arkansas Grain Corp. v. Lloyd's*, 240 Ark. 750, 402 S.W.2d 118 (1966). The insurer may also limit the amount of concurrent insurance the insured may obtain. *See Western Assurance Co. v. White*, 171 Ark. 733, 286 S.W. 804 (1926).

From all the foregoing, it is our view that *Underwriters at Lloyd's v. Pike, supra*, does not give a correct interpretation of the valued-policy statute and that the trial court was correct in entering summary judgment in favor of the insured.

Affirmed.

ROBBINS, C.J., and HART, J., agree.

M.J. MANETH and Marion Maneth *v.*
Nicholas TUCKER

CA 00-326 34 S.W.3d 755

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

Huckabay, Munson, Rowlett & Tilley, P.A., by: *Jim Tilley* and *Julia L. Busfield*, for appellants.

Kelly & Huckabee, by: *Sandy Huckabee*, for appellee.

ANDREE LAYTON ROAF, Judge. This is a negligence case. Appellants M.J. and Marion Maneth have appealed from a judgment entered on a jury verdict against them in favor of appellee Nicholas Tucker, who was injured in a fight with two third parties at appellants' house. Because the trial judge erred in refusing to direct a verdict for the Maneths, we reverse. The Maneths have raised several points on appeal. However, because we reverse on the directed verdict, we need not address their other points.

The Maneths went out of state on Friday, January 10, 1998, leaving at home and unsupervised their eighteen-year-old son, Jeff, and their seventeen-year-old daughter, Darcy. Before leaving, the Maneths gave permission for Jeff to have his golf-team members and for Darcy to have a friend or two over to the house. On Friday night, Tucker, who was eighteen years old, came uninvited to a party at the Maneths' house, as did many other young people. No problems occurred that night, although liquor was consumed. On Saturday, bringing beer, Tucker returned to the Maneths' house without an invitation. Later estimates put the crowd at thirty to fifty people, many of whom were consuming alcoholic beverages. Later that night, Tucker intervened in a quarrel that had erupted between Chris Madding and Bubba Lucas. He grabbed Chris's shirt and accidentally tore it, enraging Chris. Even though Tucker apologized to him, Chris punched Tucker in the face several times, and Chris's fraternity brother, Nick Morris, also hit Tucker. Several of Tucker's teeth were knocked out, and he suffered other facial injuries that required surgery. Chris and Nick were also over the age of majority.

Tucker then sued the Maneths, Chris, and Nick. He alleged that the Maneths were negligent in failing to make their home safe and in the supervision of their children. The Maneths' motions for directed verdict were denied, and the case was submitted to the jury on interrogatories. The Maneths were also unsuccessful in attempting to persuade the circuit judge to give the following jury instruction, AMI 1103:

> In this case, Nicholas Tucker was a licensee upon the premises of Marion and M.J. Maneth.

> An owner of property owes a licensee no duty until his presence on the premises is known or reasonably should be known. Then, the owner owes the licensee only a duty not to cause him injury by willful or wanton conduct. If, however, the owner knows or has reason to know of a condition on the premises which is not open and obvious and which creates an unreasonable harm to licensees, he is under the duty to use ordinary care to make the condition safe or to warn those licensees who do not know or have reason to know of the danger.

The circuit judge did, however, give the following instruction, AMI 604, over the Maneths' objections:

> A person who knows, or reasonably should know, that a child may be affected by his act, failure to act, or conduct is required to anticipate the ordinary behavior of children and to use care commensurate with any danger reasonably to be anticipated under the circumstances. A failure to use this degree of care is negligence.

The jury found the Maneths five percent, Tucker five percent, Chris fifty percent, and Nick forty percent at fault, and set Tucker's damages at $50,000. The trial judge entered judgment for Tucker in the amount of $47,500. Only the Maneths appeal from this judgment.

In their first point on appeal, the Maneths argue that the circuit judge erred in refusing to direct a verdict in their favor. 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, this court affirms 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). 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. *Home Mut. Fire Ins. Co. v. Jones,* 63 Ark. App. 221, 977 S.W.2d 12 (1998). On appeal, only the evidence favorable to the appellee, and all reasonable inferences therefrom, will be considered. *Id.*

To establish a prima facie case in tort, a plaintiff must show that damages were sustained, that the defendant was negligent, and that such negligence was a proximate cause of the damages. *Ouachita Wilderness Inst. v. Mergen,* 329 Ark. 405, 947 S.W.2d 780

(1997). Questions that must be answered in a negligence case are: (1) what duty, if any, the defendant owed the plaintiff; (2) whether that duty was breached; (3) whether it was reasonably foreseeable that such a breach would cause the injury; (4) whether the negligent act caused or was a substantial factor in causing the injury; and (5) whether there was an intervening cause. *Keck v. American Employment Agency, Inc.,* 279 Ark. 294, 652 S.W.2d 2 (1983). Duty is a concept that arises out of the recognition that relations between individuals may impose upon one a legal obligation for the other. *Shannon v. Wilson,* 329 Ark. 143, 947 S.W.2d 349 (1997). The question of what duty, if any, is owed by one person to another is always a question of law. *Heigle v. Miller,* 332 Ark. 315, 965 S.W.2d 116 (1998).

The Maneths assert that Tucker was a social guest, albeit an uninvited one, and that they only owed him the duty that a landowner owes a licensee. We agree. Although Tucker was not invited to the Maneths' house, Jeff and Darcy obviously acquiesced in his attendance at the party. A social guest is a licensee. *Tucker v. Sullivan,* 307 Ark. 440, 821 S.W.2d 470 (1991). The duty owed by a landowner to a licensee is to refrain from wantonly or wilfully causing injury. *Guthrie v. Tyson Foods, Inc.,* 285 Ark. 95, 685 S.W.2d 164 (1985). To constitute willful or wanton conduct there must be a course of action that shows a deliberate intention to harm or that shows utter indifference to, or conscious disregard of, the safety of others. *Lively v. Libbey Memorial Physical Medicine Ctr., Inc.,* 311 Ark. 41, 841 S.W.2d 609 (1992). While the owner of property owes no duty to make the premises safe for licensees, nor is he required to warn them of obvious or patent dangers, there should be a duty to warn such person of hidden dangers known to the owner. *Dorton v. Francisco,* 309 Ark. 472, 833 S.W.2d 362 (1992). The duty to warn does not extend to dangers or risks that the trespasser or licensee should have been expected to recognize. *Id.; King v. Jackson,* 302 Ark. 540, 790 S.W.2d 904 (1990).

Tucker argues that the case involves not only the question of a landowner's duty to a social guest but also the Maneths' legal duty as parents to supervise their children. Tucker concedes that the family-purpose doctrine has not been accepted in Arkansas and that the Arkansas Supreme Court has held that the negligence of a child cannot be imputed to the parent merely because of the parental relationship. *Bieker v. Owens,* 234 Ark. 97, 350 S.W.2d 522 (1961).

However, citing *Bieker, supra,* Tucker asserts that the question is whether the Maneths permitted their children to commit acts that could reasonably be expected to cause injury to another. In *Farm Bureau Mutual Insurance Co. of Arkansas v. Henley*, 275 Ark. 122, 124, 628 S.W.2d 301, 302 (1982), our supreme court discussed the requirements of parents as set forth in *Bieker.* The court stated:

> The issue of negligent supervision was thoroughly discussed in *Bieker v. Owens*, 234 Ark. 97, 350 S.W.2d 522 (1961) where we stated:
>
> Since each human mind and personality is exclusively that of the individual possessing it, it would be unreasonable to place an absolute responsibility for the acts of another on any person. But where the parent (1) has the opportunity and ability to control a minor, and (2) has knowledge of the tendency or proclivity of the minor to commit acts which could normally be expected to cause injury to others, and (3) after having such opportunity, ability and knowledge has failed to exercise reasonable means of controlling the minor or appreciably reduce the likelihood of injury to others because of the minor's acts, the parent should be made to respond to those who have been injured by such acts of the minor....
>
> We then stated that the parent is not liable when there is nothing to show any knowledge by the parent of a line of conduct on the part of the child.

Tucker asserts that the Maneths had notice that at least eleven teenagers would be unsupervised at their home for a party on a weekend; that they knew there were more teenagers at their home than what was originally planned; and that they learned through a phone call to Darcy that the Saturday night party had "gotten out of hand." Tucker asserts that the Maneths had this knowledge prior to his injury and took no steps to protect him and others who were guests that Saturday night. He argues that it was foreseeable that Tucker would be in danger given the numbers of teenagers at the party, the fact that the party was unsupervised, and the fact that alcohol was present at the party. His arguments are unavailing based on the evidence in the record. Under *Bieker*, there is no basis to find the Maneths liable for negligent supervision. The parent is not liable when there is nothing to show any knowledge by the parent of a line of conduct on the part of the child. Here, testimony was uncontradicted that Darcy, the only person under eighteen, had not engaged in throwing parties or even been in any

trouble before. The same is true for her eighteen-year-old brother. There is no evidence that the Maneths had knowledge of the tendency or proclivity of Darcy to commit acts which could normally be expected to cause injury to others. In fact, neither Darcy nor Jeff caused injury to anyone in this case.

The case against the Maneths should not have gone to the jury. There was no evidence of willful or wanton behavior by the Maneths; it was not reasonably foreseeable that their children would host, and Tucker would attend, an out-of-control beer party at their house or that Tucker would get injured in a fight with two other individuals at that party; there was no substantial evidence that the Maneths knew or should have known of the danger to Tucker; and Tucker should have been aware of the likely consequences of intervening in a heated argument involving a young man who had been drinking alcoholic beverages and who, according to Tucker, had a reputation for getting into fights. Because the circuit judge erred in refusing to direct a verdict for the Maneths, we need not address the remaining issues on appeal concerning the erroneous jury instructions.

Reversed and dismissed as to the Maneths.

PITTMAN and GRIFFEN, JJ., agree.

Delton RICE *v.* GEORGIA-PACIFIC CORPORATION

CA 00-97 35 S.W.3d 328

Court of Appeals of Arkansas
Division IV, I, and II
Opinion delivered December 13, 2000

Denver L. Thornton, for appellant.

Mark Alan Peoples, PLC, for appellee Georgia-Pacific Corporation.

David L. Pake, for appellee Second Injury Fund.

ANDREE LAYTON ROAF, Judge. Delton Rice appeals from a Workers' Compensation Commission decision finding that he failed to make a *prima facie* case that he was permanently and totally disabled pursuant to the odd-lot doctrine, and denying liability as to the Second Injury Fund. Rice argues on appeal that he is entitled to permanent disability under the odd-lot doctrine and that the Commission's denials of permanent disability and of liability as to the Second Injury Fund are not supported by substantial evidence. We affirm.

Delton Rice was employed by Georgia-Pacific Corporation (GP) from approximately 1970 to September 1995. Rice suffered an admittedly compensable back injury on May 22, 1992. Rice had several work and non-work related injuries prior to the 1992 injury, in 1975, 1980, 1981, 1988 and 1991. No permanent anatomical rating was assessed for any of these earlier injuries. Rice testified before the Administrative Law Judge (ALJ) that prior to his 1992 injury, he was able to lift, crawl, stand or climb with no restrictions, and was also able to roof houses for supplemental income.

An MRI performed after the 1992 injury reflected a herniated nucleus pulposus at L5-S1. On July 16, 1992, Dr. Stephen Cathey performed a laminectomy and diskectomy. Rice had further surgery on January 20, 1993, to exercise fragments of disc material. Rice continued to have pain but an additional MRI showed no further disc herniation.

In a report dated April 15, 1993, Dr. Cathey stated that Rice had reached maximum medical improvement and returned him to work with a twenty-five pound weight-lifting restriction. Dr. Cathey assessed a fifteen percent (15%) permanent partial impairment rating to the whole person due to residual effects of the disc herniation and nerve-root damage. In assessing the fifteen percent (15%) impairment, Dr. Cathey did not use any of Rice's preexisting degenerative disc disease to render the opinion, though he testified

that he thought there were objective factors to assess a five percent (5%) rating prior to the 1992 injury. Functional capacity and work-hardening assessments indicated that Rice was capable of performing light work. A functional capacity assessment in 1995 recommended Rice for "medium" level work due to his relatively good level of strength.

Rice attempted five times to return to work at GP, performing such jobs as sweeping the floors, emptying the garbage, cleaning up paper and dragging paper weighing as much as five or six hundred pounds. On September 1, 1995, Rice claimed to have suffered severe back pain while dragging paper and did not return to work or seek employment elsewhere after that date. In a letter dated March 11, 1997, Dr. Cathey noted a significant progression of Rice's degenerative disc disease, osteoarthritis, and spondylois, and stated that Rice was "...permanently and totally disabled with regard to his future employment." However, in a July 1, 1998 deposition, Dr. Cathey stated that no objective factors had changed between September 1995 and March 1997, and that Rice's anatomical impairment never changed with regard to the AMA Guidelines but that he understood that factors other than Rice's work-related injury could contribute to his disability status, such as "level of education, other social or economic factors and other variables." On April 16, 1998, Dr. Cathey again maintained that Rice was "totally and permanently disabled."

At the time of the hearing before the ALJ, Rice was forty-eight years of age and had not finished high school. Rice stated that he experiences back and leg pain every day, that walking is a problem, especially on concrete, and that he cannot stand or sit for long periods. He testified he has trouble riding in a car. If he overdoes it one day, he is "laid up" in the house for a day or two. On a typical day, he might put a load of clothes in the washing machine. He might rinse a few dishes if he feels like it or vacuum around the kitchen table. He can ride a riding law mower for fifteen minutes but can't use a push mower. He can hunt and fish every now and then. He can ride a four-wheeler. He can lift thirty to forty pounds. He is on pain medication but testified he tries not to take it unless he has to. He draws Social Security with a comp offset. He testified that he has no plans to obtain his GED and has not thought about going back to work or what he would do if he did return to work.

The ALJ found that the Rice had failed to show that he had been rendered permanently and totally disabled as a result of his 1992 compensable back injury and resulting surgeries; that Rice failed to make a *prima facie* case that he fell within the odd-lot category and failed to establish that he was permanently and totally disabled; that Rice was entitled to an additional fifteen percent (15%) wage-loss disability; that Rice's pre-1992 anatomical impairment, assessed by Dr. Cathey, did not combine with the 1992 compensable back injury to produce Rice's current disability status, and therefore, the Second Injury Fund was not liable for any of the benefits awarded and GP was responsible for the benefits awarded. The Commission affirmed and adopted the ALJ's findings.

[redacted] On appeal, Rice argues that the Commission's decision that he is not permanently and totally disabled under the odd-lot doctrine is not supported by substantial evidence. In reviewing decisions of the Workers' Compensation Commission, this court views the evidence in the light most favorable to the Commission and affirms the decision if it is supported by substantial evidence. *Hooks v. Gaylord Contained Corp.*, 67 Ark. App. 159, 992 S.W.2d 844 (1999). *Barnett v. Allen Canning Co.*, 49 Ark. App. 61, 896 S.W.2d 444 (1995). Substantial evidence is that which a reasonable person might accept as adequate to support a conclusion. *Id.* A decision by the Workers' Compensation Commission should not be reversed unless it is clear that fair-minded persons could not have reached the same conclusions if presented with the same facts. *Id.* Where the Commission denies a claim because of the claimant's failure to meet his burden of proof, the substantial-evidence standard of review requires that we affirm the Commission's decision if its opinion displays a substantial basis for the denial of relief.

[redacted] Disability is defined under Arkansas law as the "incapacity because of compensable injury to earn, in the same or other employment, the wages which the employee was receiving at the time of the injury." Ark. Code Ann. § 11-9-102(5). The wage-loss factor is the extent to which a compensable injury affects a person's ability to earn a livelihood. *Grimes v. North American Foundry*, 42 Ark. App. 137, 856 S.W.2d 309 (1993). Wage-loss disability is to be determined from a consideration of the medical evidence, together with the other elements such as the injured worker's age, education, experience, and other matters affecting wage loss, including the claimant's motivation to return to work. *Mann v. Potlatch Forests,*

Inc., 237 Ark. 8, 371 S.W.2d 9 (1963); *Weyerhaeuser Co. v. McGinnis*, 37 Ark. App. 91, 824 S.W.2d 406 (1992).

Rice asserts that he is permanently and totally disabled pursuant to the odd-lot doctrine. The doctrine was abrogated by Act 796 of 1993 but has continued to be applied to injuries that occurred before the Act's July 1, 1993 effective date. *See, e.g., Nelson v. Timberline International, Inc.*, 57 Ark. App. 34, 942 S.W.2d 668 (1997). Under that doctrine, permanent total disability may be found where a worker, not all together incapacitated, is so handicapped that he will not be employed regularly in any well-known branch of the labor market. *Lewis v. Camelot Hotel*, 35 Ark. App. 212, 816 S.W.2d 632 (1991). The injured worker has the burden of making a *prima facie* showing that his case fits within the odd-lot category. Only if the worker makes a *prima facie* showing does the employer bear the burden of showing that some kind of suitable work is regularly and continuously available to him. *See Nelson, supra.*

Rice worked for GP for twenty-five years, and receives both retirement from GP and social security disability. Rice can hunt and fish and do light housework. He can lift thirty pounds. After his 1992 injury he was assigned a fifteen percent (15%) permanent whole-body impairment in 1993. He attempted to return to work at GP five times, but has not worked for GP or any other employer since September 1, 1995. In a September 18, 1995 report, Dr. Cathey stated that appellant's MRI scan looked better than any of his previous studies in terms of ruling out recurrent lumbar disk herniation or nerve-entrapment syndrome. In 1995, his functional-capacity evaluation recommended him for "medium level work due to his relatively good level of strength." However, Rice testified that he has not attempted to find work since 1995. In 1997, Dr. Cathey stated Rice was permanently and totally disabled, however, this opinion was issued when Rice was applying for social security disability benefits. Moreover, Dr. Cathey also stated that there were no additional objective findings upon which to base Rice's change in status since he last assessed a fifteen percent (15%) rating in 1993, and he clearly considered wage-loss factors other than medical or anatomical factors in issuing this opinion.

The Commission found that there was the lack of a substantial and credible basis for Dr. Cathey's permanent and total

disability rating and therefore found that it should not be accorded much weight. The Commission also found that Rice's present lack of interest and motivation to return to work impeded a full assessment of Rice's capacity to earn wages. Consequently, considering all relevant factors, there is substantial evidence to support the Commission's decision that Rice failed to make a *prima facie* case that he falls within the odd-lot category and failed to prove by a preponderance of the evidence that he is totally incapacitated from earning wages.

Rice also argues that the Commission's finding that the second injury fund has no liability is not supported by substantial evidence. For the Second Injury Fund to be liable under workers' compensation law, the employee must have suffered a compensable injury at his present place of employment, prior to that injury the employee must have had a permanent partial disability or impairment, and the disability or impairment must have combined with the recent compensable injury to produce the current disability status. *Second Injury Fund v. Stephens*, 62 Ark. App. 255, 970 S.W.2d 331 (1998). The Fund is obligated to provide compensation for any disability greater than the disability resulting from the earlier injury and the anatomical impairment caused by the second injury. Ark. Code Ann. § 11-9-525 (Repl.1996); *see also Nelson v. Timberline International, Inc.*, 332 Ark. 165, 964 S.W.2d 357 (1998). The stated public purpose of the establishment of the Fund is to encourage employment of handicapped or disabled workers by assigning liabilities for the wage-loss consequences of a second injury to the Fund. *Id.*

Rice contends that he had a five percent (5%) rating that predated his 1992 injury and that the 1992 injury combined with his chronic, degenerative lumbar disc disease to produce the current disability status. He asserts that he meets these requirements for second injury fund liability. However, Rice contended before the Commission that he did not have a serious back problems before his 1992 injury and he was in "good, healthy shape." Likewise, there is no evidence that Rice was given any anatomical impairment rating for his condition or as a result of his other injuries before the 1992 injury. The Commission found that Rice failed to establish that the Second Injury Fund had any liability; there is substantial evidence to support such a conclusion.

Affirmed.

HART, JENNINGS, KOONCE, CRABTREE, and MEADS, JJ., agree.

BIRD and GRIFFEN, JJ., and ROBBINS, C.J., dissent.

SAM BIRD, Judge, dissenting. Although I agree with the majority's decision that the Second Injury Fund does not have any liability in the case at bar, I respectfully dissent from the majority's decision that appellant Delton Rice failed to present prima facie evidence that he is permanently and totally disabled under the odd-lot doctrine. The majority opinion, along with the Commission, has failed to consider all of the credible evidence and has failed to explain why the opinion of Rice's two treating physicians should be disregarded.

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. *M.M. Cohn v. Haile,* 267 Ark. 734, 589 S.W.2d 600 (Ark. App. 1979). Furthermore, an employee who is injured to the extent that she can perform services that are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist may be classified as totally disabled. *Lewis v. Camelot Hotel,* 35 Ark. App. 212, 816 S.W.2d 632 (1991). Under the odd-lot doctrine, where the claim is for permanent disability based on incapacity to earn, the Commission is required to consider *all* competent evidence relating to the disability, including the claimant's age, education, medical evidence, work experience, and other matters reasonably expected to affect his earning power. *Buford v. Standard Gravel Co.,* 68 Ark. App. 162, 5 S.W.3d 478 (1999).

As the majority noted, Rice worked at Georgia-Pacific for more than twenty-five years. In 1975, he injured his back while lifting rolls of paper. In 1980, he sustained another work-related back injury. In 1981, he sustained a crush-type injury to his chest. In 1988, he suffered low-back pain while lifting a washing machine. In 1990, he was diagnosed with degenerative disc disease. In 1991, he hurt his back while lifting firewood. None of these injuries affected his work capabilities. He testified that prior to his May 1992 injury he was in good, healthy shape, in that he was able to lift, stand, and sit with no restrictions.

However, in May 1992, Rice was unloading a piece of plywood; he picked it up, turned sideways and felt a pinch. An MRI showed that he had a herniated disc. He underwent two surgeries and was assigned an impairment rating of fifteen percent to the body as a whole, had permanent lifting restrictions applied, and was given a rating of five percent for the preexisting degenerative back disease. Rice returned to work, but continued to complain of constant pain. At first, Dr. Cathey released Rice to work, stating that he could perform a medium workload. This was later changed to a light workload.

In finding that Rice did not fall within the odd-lot doctrine, the law judge stated that appellant was able to hunt and fish, perform light housework, and lift thirty to forty pounds. The law judge also noted that Rice has not done any work or made any efforts to be trained to do any other type of work. The Commission affirmed and adopted the law judge's opinion.

In *Buford v. Standard Gravel Co., supra*, the court of appeals reversed a finding by the Commission that the appellant did not fall within the odd-lot doctrine guidelines. Buford had had his larynx crushed and had undergone three back surgeries. He had been restricted from repetitive bending, stooping, and lifting heavy objects. After each injury and each surgery he had returned to work. Then his doctor found that he was permanently and totally disabled. The Commission, in making its decision, emphasized his lack of motivation, his use of beer, his enjoyment of walking to his friend's home, his ability to hunt deer, fish and camp, and his ability to shop with his wife, garden, and mow the yard. Therefore, it denied that he fell under the odd-lot doctrine. This court reversed.

In *Walker Logging v. Paschal*, 36 Ark. App. 247, 821 S.W.2d 786 (1992), the claimant, a man in his late forties, also dropped out of school and never received his GED. He had worked jobs involving heavy manual labor and could neither read nor write. He was injured while working as a timber cutter when a tree fell on him, injuring his right knee. Although his treating physicians never stated that he was permanently and totally disabled, the Commission found that substantial evidence existed to support the finding that the claimant was totally and permanently disabled. We affirmed.

In the instant case, the law judge, Commission, and majority in its opinion have failed to consider all of the evidence presented. Rice testified that he does not have a high-school education; he is forty-seven years old; and, as the law judge correctly noted, he has not received any further training. He performed manual labor for Georgia-Pacific all of his adult working life. He has had several back injuries, undergone two surgeries, continues to complain of constant back pain, and stated that he can sit or stand only for very limited periods of time. He did state that he had hunted deer and gone fishing a few times since his injuries. He testified that he tried returning to work a couple of times. Even though the Commission found that he lacks motivation, he stated that if Georgia-Pacific would offer him a job, he would accept it.

In addition, the law judge, the Commission, and the majority have failed to adequately explain why the testimony of Rice's two physicians, who found that he was permanently and totally disabled, should be disregarded. In November 1994, in a chart note, Dr. Cathey stated, "Considering the fact that the patient had two lumbar disc surgeries and still has significant amount of chronic lower back and right leg pain is difficult for me to see how he will [be] able to return to his previous occupation." On March 11, 1997, Dr. Cathey wrote to Rice summarizing his recent evaluation and stated, "Mr. Rice, in my opinion, your chronic degenerative lumbar disc disease, osteoarthritis, and spondylosis has progressed significantly since your last evaluation in April 1996. Although I realize you have been denied social security benefits in the past, based on today's exam, I believe you to be totally and permanently disabled with regard to future employment." Contrary to the suggestion of the majority, there is nothing in this statement by Dr. Cathey that should cause the inference that Dr. Cathey made his total-and-permanent-disability determination solely for the purpose of supporting Rice's application for Social Security disability benefits. Dr. Cathey reiterated his belief that Rice was permanently and totally disabled on April 16, 1998, when he stated in a clinic note, "Lastly, it is my belief that Mr. Rice *remains* permanently disabled from the effects of his multiple lumbar disc surgeries, the residual nerve damage in his right leg, and his chronic degenerative lumbar disc disease." (Emphasis added.)

Dr. D.L. Toon, Rice's general physician, also stated in a doctor's note, dated May 24, 1995, that Rice was permanently and

totally disabled. Then, in a doctor's note dated June 29, 1995, Dr. Toon again stated that Rice had been a patient of his for many years and that he had determined Rice to be permanently and totally disabled.

Based upon his work experience, his injuries, and the credible opinion of the medical doctors who found him to be permanently and totally disabled, I believe that the Commission erred in finding that Rice had not met his burden in proving that he is permanently and totally disabled, and I would reverse the part of the Commission's opinion finding otherwise.

I am authorized to state that Chief Judge ROBBINS and Judge GRIFFEN join in this dissent.

BYARS CONSTRUCTION COMPANY *v.* Clifton BYARS

CA 00-192 34 S.W.3d 797

Court of Appeals of Arkansas
Division IV
Opinion delivered December 20, 2000

[redacted]

Huckabay, Munson, Rowlett & Tilley, P.A., by: *Carol Lockard Worley* and *Julia Busfield*, for appellant.

Dodds, Kidd, Ryan & Moore, by: *Donald S. Ryan*, for appellee.

JOHN B. ROBBINS, Chief Judge. Appellant Byars Construction Company appeals the award of benefits by the Workers' Compensation Commission to appellee Clifton Byars. Specifically, appellant raises four points on appeal: (1) that the Commission erred in determining that Ark. Code Ann. § 11-9-514(a)(1) and (2) (Repl. 1996) became void in September 1995; (2) that there is no substantial evidence to support the Commission's finding that Dr. Saer was an authorized treating physician through a referral; (3) that there is no substantial evidence to support the Commission's award of additional temporary total disability benefits; and (4) that there is no substantial evidence to support the findings or award of payments in reference to a Department of Human Services lien. We reverse as to points (1), (2), and (4); we affirm as to (3).

On April 19, 1996, appellee, who worked as a carpenter, sustained an admittedly compensable injury to his back, a compression fracture at T7, when the scaffolding upon which he was standing collapsed causing him to strike his back on a ledge. He was treated in Baptist Hospital's emergency room and was released. Thereafter, appellee was treated conservatively by Dr. Yocum and was paid temporary total disability during that period. Dr. Yocum released appellee to return to work as of June 17, 1996.

Appellee suffered recurring and more severe back pain in October 1996, for which he received additional treatment and medication from Dr. Yocum. Appellant sent appellee to Dr. Rutherford, who thought that appellee was embellishing his symptoms with regard to the healing fracture. However, Dr. Rutherford sent appellee for a bone scan. Results from the bone scan substantiated

appellee's complaints, and Dr. Rutherford stated that appellee had indeed not yet healed. Dr. Rutherford continued with conservative treatment through December 23, 1996, when he released him to return to work.

Dr. Yocum released him from his care on January 24, 1997, telling appellee to come back as needed. Dr. Yocum assigned a ten-percent permanent physical impairment rating to the body as a whole, which appellant paid. Dr. Rutherford opined on March 24, 1997, that appellee had reached maximum medical improvement, again releasing appellee from his care.

Because his symptoms persisted, on November 4, 1997, appellee sought on his own initiative the care of orthopedist Dr. Cash. Because Dr. Cash thought that appellee was a candidate for a spinal fusion, he referred appellee to Dr. Saer. In a letter to Dr. Cash from Dr. Saer on January 30, 1998, Dr. Saer thanked Dr. Cash for asking him to evaluate appellee, and stated that he thought the pain was related to the original workplace injury, recommending an exercise program and additional studies at that time. In May 1998, Dr. Saer reviewed the studies performed on appellee and discussed options with appellee, concluding that a posterior stabilization and fusion surgery was a viable option to relieve his pain. The surgery was performed on September 2, 1998. On October 9, 1998, Dr. Saer opined within a reasonable degree of medical certainty that the work injury was the major cause for the need for surgery. Appellee was told by Dr. Saer that he could begin increasing his activities on February 16, 1999. Appellee stated that the surgery improved his physical condition.

It is undisputed that appellee had received notice of the procedures to follow if he wanted to change physicians and that he had not requested a change of physician when he went to Drs. Cash or Saer. Appellant contested payment for Dr. Saer's treatment and surgery, alleging that Dr. Saer was not an authorized treating physician, that therefore the surgery was unauthorized, and that any temporary total disability associated with the surgery was not compensable.

After a hearing before the Administrative Law Judge, the ALJ agreed that the treatment was unauthorized and found that appellee was responsible for those costs; found that the Department of

Human Services' lien on benefits was extinguished and held for naught; and found that appellee was entitled to additional temporary total disability commencing upon the date of surgery and ending on February 16, 1999, regardless of whether the treatment was from an authorized physician.

Both appellant and appellee appealed to the Commission, which affirmed in part and reversed in part the ALJ's decision, making the following findings: (1) that the managed care system as established in September 1995 effectively voided the statutory provision found in Ark. Code Ann. § 11-9-514(a)(1) and (2) (Repl. 1996), and that because there was no evidence that appellant had contracted with a certified managed care entity, appellee could chose any physician for reasonable and necessary treatment; (2) that Dr. Saer's treatment was the result of a referral from an authorized treating physician, Dr. Cash, and was therefore not a change of physician; (3) that whether treatment is authorized is irrelevant to an award of temporary total disability, and thus appellant was liable for that period of temporary disability associated with the reasonable and necessary surgery; and (4) that appellant was to reimburse the Department of Human Services for any monies expended on behalf of appellee. This appeal resulted.

The standard of review with regard to appeals from the Workers' Compensation Commission has been oft-stated. In determining the sufficiency of the evidence to sustain the findings of the Workers' Compensation Commission, the appellate court reviews the evidence in the light most favorable to the Commission's findings and affirms if the findings are supported by substantial evidence. *Woodall v. Hunnicutt Constr.*, 67 Ark. App. 196, 994 S.W.2d 490 (1999). The question is not whether the evidence would have supported findings contrary to the ones made by the Commission; there may be substantial evidence to support the Commission's decision even though we might have reached a different conclusion if we sat as the trier of fact or heard the case de novo. *Id.* Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Weldon v. Pierce Bros. Constr.*, 54 Ark. App. 344, 925 S.W.2d 179 (1996). We will not reverse a decision of the Commission unless we are convinced that fair-minded persons with the same facts before them could not have reached the conclusion arrived at by the Commission. *Id.; see also*

Maverick Transp. v. Buzzard, 69 Ark. App. 128, 10 S.W.3d 467 (2000).

First, appellant argues that appellee did not follow the change-of-physician rules and that the Commission erred in concluding otherwise. Arkansas Code Annotated section 11-9-514 (Repl. 1996), entitled "Medical services and supplies-Change of physician," set forth the applicable law, stating at subsection (a):

> (a)(1) If the employee selects a physician, the Workers' Compensation Commission shall not authorize a change of physician unless the employee first establishes to the satisfaction of the commission that there is a compelling reason or circumstance justifying a change.
>
> (2)(A) If the employer selects a physician, the claimant may petition the commission one (1) time only for a change of physician, and if the commission approves the change with or without a hearing, the commission shall determine the second physician and shall not be bound by recommendations of claimant or respondent.
>
> (B) However, if the change desired by the claimant is to a chiropractic physician, optometrist, or podiatrist, the claimant may make the change by giving advance written notification to the employer or carrier.
>
> (3) Following establishment of an Arkansas managed care system as provided in § 11-9-508, subdivisions (a)(1) and (2) of this section shall become null and void, and thereafter:
>
> (A)(i) The employer shall have the right to select the initial primary care physician from among those associated with managed care entities certified by the commission as provided in § 11-9-508.
>
> (ii) The claimant employee, however, may petition the Commission one (1) time only for a change of physician, who must also either be associated with a managed care entity treating physician of the employee who maintains the employee's medical records and with whom the employee has a bona fide doctor-patient relationship demonstrated by a history or regular treatment prior to the onset of the compensable injury, but only if the primary care physician agrees to refer the employee to a certified managed care entity for any specialized treatment, including physical therapy, and

> only if such primary care physician agrees to comply with all the rules, terms, and conditions regarding services performed by the managed care entity initially chosen by the employer.
>
> (B) A petition for change of physician shall be expedited by the commission.

The Commission found that subsections (a)(1) and (2) of this statute became null and void in September 1995 pursuant to subsection (a)(3), when an Arkansas managed care system was established. The Commission then concluded that because there was no evidence in the record to indicate that appellant had contracted with a certified managed care entity, there were no restrictions on a claimant changing physicians and appellee was free to select any physician that he wanted. The Commission cited as support one of its earlier decisions, *Savage v. City of Little Rock,* Workers' Compensation Commission E708648 (October 7, 1999). While we do not recognize Commission opinions as controlling precedent in our review of workers' compensation cases, an administrative agency's interpretation of a statute and its own rules will not be overturned unless it is clearly wrong. See *Arkansas Dep't of Human Servs. v. Hillsboro Mannor Nursing Home,* Inc., 304 Ark. 476, 803 S.W.2d 891 (1991).

Workers' Compensation Rule 33 was promulgated by the Commission and became effective on July 1, 1994. This rule provided for implementation of a voluntary managed care system. In *Savage* the Commission took notice of the list of managed care organizations that on September 1, 1995, it had certified pursuant to Ark. Code Ann. § 11-9-508(d) and its Rule 33. The Commission construed the applicable statute, rule and certification list and concluded that an Arkansas managed care system was established in September 1, 1995, and, consequently, Ark. Code Ann. § 11-9-514(a)(1) and (2) became null and void at that time. We do not find that its interpretation is clearly wrong.

However, the Commission's next conclusion, that because there was no evidence in the record to indicate that appellant had contracted with a certified managed care entity, the appellee was free to select any physician that he wanted, is contrary to the statute. Obviously, section 11-9-514(a)(3), as enacted and effective when appellee was injured in 1996 and when he sought medical treatment from Dr. Cash in 1997 and received treatment from Dr. Saer in

1998, had a loophole, because the statute did not address how a claimant was to go about changing physicians if his employer had not contracted with a managed care organization. This loophole was corrected by Act 1167 of 1999, which added subsection (iii) to 11-9-514(a)(3). Because of this loophole, the Commission held that appellee was not subject to any change of physician requirements and could seek services wherever he desired. The Commission erred as a matter of law.

The Commission failed to take into account Ark. Code Ann. § 11-9-514(b), which immediately follows the provisions discussed above dealing with the selection and change of physicians:

> (b) Treatment or services furnished or prescribed by any physician other than the ones selected according to the foregoing, except emergency treatment, shall be at the claimant's expense.

Therefore, even if section 11-9-514(a) failed to address the situation, as exists here where (1) and (2) have become null and void yet the employer has not contracted with a managed care organization, subsection (b) appears to fill this void by precluding any change of physician, except emergency treatment, or else the new physician's services will be at the claimant's expense. We are obliged to strictly construe and apply the workers' compensation act. Ark. Code Ann. § 11-9-704(c)(3). The Commission erred in holding to the contrary, and we must reverse on this point. Appellee is responsible for payment of the medical services rendered by Dr. Saer.

In addition, the Commission found that appellant agreed to the medical treatment provided by Dr. Cash; therefore, Dr. Cash's referral to Dr. Saer converted Dr. Saer into an authorized treating physician rendering the change-of-physician rules inapplicable. We hold that no substantial evidence supports that finding. We agree that the change-of-physician statute is inapplicable if an authorized treating physician refers the claimant to another doctor for examination or treatment. *Amer. Greetings Corp. v. Garey*, 61 Ark. App. 18, 963 S.W.2d 613 (1998). However, appellant did not "pre-approve" the treatment rendered by Dr. Cash, and there is no evidence of record that Dr. Cash's treatment was ever paid by appellant.

At the hearing before the ALJ, counsel for appellant stated, "Respondents contend that with regard to change of physicians, the

Claimant has been *treated* by several board-certified physicians, including Dr. Yocum and Dr. Rutherford and *Dr. Cash*.... It is the Respondents' position that a change of physician is not reasonable and necessary." That comment does not constitute an acknowledgment that appellant paid or accepted Dr. Cash's treatment. Moreover, the Commission's conclusion that appellant acquiesced in any findings made by the ALJ is simply unfounded because appellant appealed the entirety of the ALJ's opinion.

We agree with the appellant that it fully argued that appellee sought the care of Dr. Cash on his own initiative after he had been released from the care of his authorized treating physicians. Furthermore, appellant's counsel examined appellee and elicited admissions that he sought out this care from Dr. Cash without requesting a change of physician; that he did so because he did not "like" Drs. Rutherford or Yocum; and that the diagnostic testing that Dr. Saer desired to have completed was offered by the providers under the authorized treating physicians, which appellee refused. No substantial evidence supports the finding that Dr. Cash was an authorized treating physician.

Because we are reversing the first two issues on appeal, causing the costs of Dr. Saer's treatment and surgery to be borne by appellee, the issue with regard to the reimbursement of the Department of Human Services for its Medicaid-benefits lien is moot.

As to temporary total disability (TTD), the Commission and the ALJ decided that appellee was in his healing period and entitled to those benefits from the date of the surgery on September 2, 1998, through February 16, 1999, when he had reached maximum medical improvement, whether or not the treatment was authorized. Temporary total disability is that period within the healing period in which a claimant suffers a total incapacity to earn wages. *Georgia-Pacific v. Carteri*, 62 Ark. App. 162, 969 S.W.2d 677 (1998). The healing period is that period for healing of an injury which continues until the claimant is as far restored as the permanent character of the injury will permit. *Id.*

Appellant argues that this treatment was not reasonable and necessary and that it was unauthorized. Therefore, it is appellant's position that it is not responsible for payment of any associated TTD for that treatment. We disagree. Although we have already

decided that the treatment was unauthorized, that does not end the inquiry. The Commission found that the treatment of Dr. Saer was both reasonable and necessary. We hold that there is substantial evidence to indicate that this surgery was reasonable and necessary. Dr. Yocum, an authorized treating physician, agreed that Dr. Saer's desire to do additional work-ups and treatment was reasonable and necessary as demonstrated by Dr. Yocum's letter of April 16, 1998, to appellant's counsel stating that "the studies suggested by Dr. Saer are indicated and that further treatment is indicated." Indeed, it is undisputed that appellant offered to perform the recommended studies and that appellee refused to see those physicians for that purpose. There is no evidence of record that contradicts either Dr. Saer's opinion that the major cause of the need for surgery was his work-related accident or appellee's testimony that this surgery significantly improved his physical condition. While appellee is responsible for paying for Dr. Saer's treatment and surgery, appellant is responsible for the time that appellee remained in his healing period and was totally incapacitated from earning wages, all stemming from a work-related event.

We reverse and remand for entry of an opinion consistent with ours.

BIRD and NEAL, JJ., agree.

Altis HOLLIMAN and Judy Holliman *v.* Delbert LILES, Barbara Liles, and the City of Quitman

CA 00-131 35 S.W.3d 369

Court of Appeals of Arkansas
Division II
Opinion delivered December 20, 2000

Henry & Henry, by: *Clifford J. Henry*, for appellant.

Anne Orsi Smith, for appellees Delbert & Barbara Liles.

J. Russell Green, for appellee City of Quitman.

JOHN MAUZY PITTMAN, Judge. This is an appeal from an order of the Cleburne County Chancery Court dismissing appellants' petition challenging the validity of an ordinance passed by the Quitman city council that closed the south ten feet of Mulberry Street. Appellants Altis Holliman and Judy Holliman own block 12, which abuts the northern boundary of Mulberry Street, and appellees Delbert Liles and Barbara Liles own block thirteen, which abuts its southern boundary. On February 8, 1999, appellees filed a petition with the city council requesting that the south ten feet of the street be vacated and abandoned. The city council held a public hearing on March 8, 1999, at which appellant Altis Holliman appeared to voice his objections to appellees' petition. The city council granted appellees' petition that day.

On June 18, 1999, appellants filed this action against appellees and the City of Quitman to nullify the ordinance, claiming that the city council had failed to follow the dictates of Ark. Code Ann. §§ 14-301-301 through 14-301-306 (1987). Arkansas Code Annotated section 14-301-301 (1987) provides authority for cities of the first and second class to vacate platted, filed of record, and dedicated public streets and alleys when the street or alley has not been used by the public for a period of five years. Quitman is a city of the second class. Arkansas Code Annotated section 14-301-303 (1987) provides that no street or alley, or any portion thereof, shall be abandoned or vacated unless the written consent of "the owners of all lots abutting on the street or alley, or the portion thereof, to be vacated" has been filed with the city council. It is undisputed that appellants did not give their consent. The statute of limitations set forth in Ark. Code Ann. § 14-301-305(a) (1987) provides that the city council's ordinance shall be conclusive unless suit to reject it is brought in chancery court within thirty days after its passage.

Appellees moved to dismiss the complaint on the ground that it was barred by the statute of limitations. The chancellor then held

a hearing and listened to a tape of the city council meeting. He dismissed the complaint because appellants failed to file the action within the thirty-day statute of limitations. He also found that the city council was not required to obtain appellants' permission to vacate that portion of the street because their property does not abut it. He further rejected appellants' argument that the city council had taken no proof that this portion of the street had not been used for at least five years, stating:

> My review of the tape of the March 8, 1999 public hearing and City Council meeting indicates the Councilmen were very familiar with the streets of Quitman, having measured most of them. This, coupled with the reading of the ordinance, convinces me they were fully aware of the fact Mulberry Street was not an open street. Mr. Holliman even discussed his willingness to use his men and equipment to put in the road bed.

Because the chancellor based his decision on evidence submitted in addition to the pleadings, the order dismissing this case was in essence a summary judgment. When matters outside the pleadings are presented and not excluded by the trial court in connection with an Ark. R. Civ. P. 12(b) motion, the motion is treated as one for summary judgment under Ark. R. Civ. P. 56. *McQuay v. Guntharp,* 331 Ark. 466, 963 S.W.2d 583 (1998). Summary judgment should be granted only when it is clear that there are no disputed issues of material fact. *Porter v. Harshfield,* 329 Ark. 130, 948 S.W.2d 83 (1997). All evidence must be viewed in the light most favorable to the party resisting the motion; he is also entitled to have all doubts and inferences resolved in his favor. *Id.* Summary judgment is inappropriate when facts remain in dispute or when 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 the evidence leaves room for a reasonable difference of opinion, summary judgment is not appropriate. *See Martin v. Arthur,* 339 Ark. 149, 3 S.W.3d 684 (1999). 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).

Appellants argue that the chancellor erred in finding that their consent was not required because their property does not abut the portion of Mulberry Street to be vacated; in finding that appellees were not required to assert in their petition that the street had not been used for five years; in finding that the city council members were aware that the street was not open; and in finding that this action is barred by the statute of limitations.

We disagree with appellants' contention that appellees were required to state in their petition that the street, or the portion thereof, to be abandoned had not been used by the public for five years. The statutes do not require such a statement.

However, we agree with appellants that, if the statutory conditions were not met when the city council passed the ordinance, the thirty-day statute of limitations does not apply. *Jones v. American Home Life Ins. Co.,* 293 Ark. 330, 738 S.W.2d 387 (1987). *See also Stephens v. City of Springdale,* 233 Ark. 865, 350 S.W.2d 182 (1961). This conclusion is based upon the fact that municipalities are statutory creatures and, as such, have only the power bestowed upon them by statute or the Arkansas Constitution. *See Jones v. American Home Life Ins. Co, supra.* A city's governing board cannot give away a city's streets without the consent of abutting owners or without statutory authority; any attempt to do so is ultra vires. *Freeze v. Jones,* 260 Ark. 193, 539 S.W.2d 425 (1976). Any substantial doubt about the existence of a power in a municipal corporation must be resolved against it. *Stilley v. Henson,* 342 Ark. 346, 28 S.W.3d 274 (2000). Therefore, we cannot say whether the statute of limitations barred this action unless we can determine, as a matter of law, that all of the requirements of the statutory process were met.

One requirement is that the street has not been used by the public for at least five years. Although one could infer from the transcript of the city council meeting that this portion of the street was not in use at the time that the ordinance was passed, no evidence was presented to the city council or to the chancellor that the period of non-use had lasted for five years before the ordinance was passed. Therefore, this issue should have been tried.

Further, we do not agree with the chancellor that, as a matter of law, appellants' property does not abut the portion of the

street to be vacated. Although the statute does not define the term "abutting," the supreme court's decision in *Roberts v. Pace,* 230 Ark. 280, 322 S.W.2d 75 (1959), provides guidance on this issue. In that case, the appellants' property did not actually touch the portion of the alley the city board had closed, but the closing of a part of the alley adversely affected the use of their property. The supreme court held that, because of this adverse effect, the appellants were abutting property owners whose written consent was required before the alley could be closed:

> It is the contention of appellees that it was necessary only to have the written consent of all the property owners abutting the *portion* of the alley affected. For the purpose of this opinion it may be conceded that all other requirements of the pertinent statutes were satisfied in this case....
>
> We think however appellees make the mistake of assuming that they have closed only a portion of the alley and not all of it. It is too obvious for argument that from a practical standpoint, and particularly as regards appellants' right of ingress and egress, the entire alley will be closed if both ends are closed. We express no opinion as to what our holding would be if the south end of the alley was not closed.
>
> If we consider, as we do, that the entire alley will be closed under Ordinance No. 2239 and the trial court's ruling, then appellees must fail because all the abutting property owners have not given their written consent, a prerequisite required by the statute.

230 Ark. at 283-84, 322 S.W.2d at 77.

Here, it seems obvious that, although appellants' ingress and egress will not be blocked, the portion of the street abutting their property has been narrowed, which they claim will have an adverse effect on the use of their property. *Roberts v. Pace* does not hold as a matter of law that a property owner's ingress and egress must be blocked before he will be deemed to have the status of an abutting property owner whose consent is required. Instead, the basis of the supreme court's decision in that case was the extent of the adverse effect that the abandonment would have on the parties challenging it, which was a factual determination. Accordingly, whether appellants are the owners of abutting property was an issue of material fact that should have been tried, and the chancellor erred in dismissing appellants' complaint.

Reversed and remanded.

JENNINGS and NEAL, JJ., agree.

Ambrossial Odell ROSE and Percy Deshon Johnson *v.* STATE of Arkansas

CA CR 00-227 35 S.W.3d 365

Court of Appeals of Arkansas
Division II
Opinion delivered December 20, 2000

Danny R. Williams, for appellants.

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

JOHN MAUZY PITTMAN, Judge. The appellants in this criminal case were charged with aggravated robbery and theft of property. After a jury trial, they were convicted of those offenses and sentenced to ten years' imprisonment. From that decision, comes this appeal.

For reversal, appellants contend that the trial court erred in denying their motion for a directed verdict; in denying their motion to dismiss the charges against them on speedy-trial grounds; in granting the State's motion *in limine* to bar testimony concerning the possible guilt of other persons; in rejecting as untimely appellants' *Batson* objection to the State's apparent racial motivation in peremptorily striking black jurors; in refusing to allow appellants to exclude a certain juror by peremptory challenge; and in refusing to submit the question of a witness's accomplice status to the jury. We reverse and remand.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. Consequently, we must first address this issue because the Double Jeopardy Clause precludes a second trial when a judgment of conviction is reversed for insufficient evidence. *Harris v. State*, 284 Ark. 247, 681 S.W.2d 334 (1984), *citing Burks v.*

United States, 437 U.S. 1 (1978). We disregard any alleged trial errors in determining the sufficiency question, because to do otherwise would result in avoidance of the sufficiency argument by remanding for retrial on other grounds. *Harris, supra.*

In reviewing the denial of a motion for a directed verdict, we view the evidence in the light most favorable to the State, considering only the evidence that supports the verdict, and affirm if there is substantial evidence to support the verdict. *Harris v. State*, 331 Ark. 353, 961 S.W.2d 737 (1998). Evidence, whether direct or circumstantial, is substantial if it is of sufficient force that it would compel a conclusion one way or the other without recourse to speculation and conjecture. *Id.*

In the present case, appellants' challenge to the sufficiency of the evidence is premised on their assertion that the State failed to corroborate the testimony of Torris Early, who was found by the trial court to be an accomplice as a matter of law. A conviction cannot be had in any case of felony upon the testimony of an accomplice unless the accomplice's testimony is corroborated by other evidence tending to connect the defendant with the commission of the offense. Ark. Code Ann. § 16-89-111(e)(1) (1987). The corroboration is not sufficient if it merely shows that the offense was committed and the circumstances thereof. *Id.* The test for determining the sufficiency of corroborating evidence is whether, if the testimony of the accomplice were totally eliminated from the case, the other evidence independently establishes the crime and tends to connect the accused with its commission. *Meeks v. State*, 317 Ark. 411, 878 S.W.2d 403 (1994).

Viewing the evidence, as we must, in the light most favorable to the State, the record reflects that, at approximately 11:30 p.m. on September 17, 1998, men wearing bandanas entered the Stax convenience store where Steven Satterfield was employed. One man was armed with a shotgun, and the other two men wielded pistols. One of the robbers demanded money from the cash register; three shots were fired in the store as Mr. Satterfield gathered the money, but no one was injured. As the three men fled the store, a man who had witnessed the robbery called 911 and reported that the robbers escaped in a white Hyundai vehicle. Soon thereafter, Torris Early was apprehended near the scene of the robbery driving a vehicle matching the description given by the witness. Early gave a state-

ment implicating the appellants and another man, Benjamin Adams. At trial, Early testified that he drove with the other three men to the convenience store and drove the get-away car after the other men committed the robbery.

Early's testimony was corroborated by that of Joseph Hargro, who testified that he was at Early's apartment on the night in question. Hargo stated that appellant Rose was armed with a shotgun, that Adams and appellant Johnson had pistols, and that they said that they were going to rob the Stax convenience store. Circumstantial evidence may be used to support accomplice testimony and, although it, too, must be substantial, the corroborating evidence need not be so substantial in and of itself to sustain a conviction. *Marta v. State*, 336 Ark. 67, 983 S.W.2d 924 (1999). We think that Mr. Satterfield's testimony corroborated Early's testimony by establishing the commission of the crime, and that Hargro's testimony provides substantial corroboration of Early's testimony by tending to connect appellants with the crime's commission. Consequently, we hold that the trial court did not err in denying appellants' motion for a directed verdict.

Next, appellants contend that the trial court erred in denying their motion to dismiss the charges against them on speedy-trial grounds. Arkansas Rules of Criminal Procedure 28.1(c) and 28.2(a) require the State to bring a defendant to trial within twelve months from the date the charge is filed in circuit court or, if the defendant has been lawfully set at liberty pending trial, from the date of arrest. When the defendant has shown that a trial is or will be held outside the applicable speedy-trial period, the State must show that the delay was the result of the defendant's conduct or was otherwise justified. *Scott v. State*, 337 Ark. 320, 989 S.W.2d 891 (1999). Delays resulting from continuances given at the request of the defendant are excluded from the period for a speedy trial. *Id.*

In the present case, appellants' argument hinges on the exclusion of a period for which appellants' prior trial counsel requested and obtained a continuance on the ground that she had inadequate time to prepare. Appellants' present attorney concedes that this continuance was granted at appellants' request, but argues that the trial judge continued the case for a longer period than was reasonably necessary, and that the continuance should in any event not have been granted because appellants' prior attorney failed to

show good cause for the delay. We cannot address this contention, however, because there was no objection to the asserted errors at the time appellants' requested continuance was granted. A defendant may not complain belatedly when a timely objection could have averted error, and we will not reverse an order tolling the speedy-trial period in the absence of an objection giving the trial court the opportunity to rule on the exclusion of the time period. *Burrell v. State*, 65 Ark. App. 272, 986 S.W.2d 141 (1999). Here, the time to object was at the time the trial court granted the requested continuance and ruled that the time would be chargeable to appellants, not in the subsequent speedy-trial motion, and this issue is therefore not preserved for appellate review. *See Dean v. State*, 339 Ark. 105, 3 S.W.3d 328 (1999).

Appellants next assert that the trial judge erred in granting the State's motion *in limine* to bar testimony concerning the possible guilt of a third person. The trial court ruled that appellants could not elicit any testimony to show that another person was guilty of the crime unless they could present evidence linking that third person to the actual perpetration of the crime. *See generally Rychtarik v. State*, 334 Ark. 492, 976 S.W.2d 374 (1998). At a bench conference, appellants' attorney asserted that there was certain circumstantial evidence linking Joseph Hargro to the perpetration of crime, including Hargro's departure from Early's apartment and brief detention following the robbery. However, although the trial court ruled that he would, at a more convenient time, permit a proffer of the circumstantial evidence that appellants could present on this issue, appellants failed to make a proffer. Because the sum and substance of the circumstantial evidence appellants would have offered regarding Hargro's asserted guilt is not apparent from the record, and because we are reversing and remanding for retrial on another point, we express no opinion on this issue.

Appellants further contend that the trial court erred in summarily rejecting their *Batson* challenge as untimely. We agree. The record shows that there were only four blacks in the venire. After the State struck the third of three blacks who were impaneled, appellants objected on the basis of *Batson v. Kentucky*, 476 U.S. 79 (1986), where the United States Supreme Court held that an appellant's conviction must be reversed if he establishes a *prima facie* case of purposeful discrimination in the State's employment of peremptory

strikes and the prosecutor does not come forward with a race-neutral explanation for his action.

The trial judge in the present case ruled that appellants' objection was untimely because they did not object when the first black juror was struck, and refused to require the State to offer a racially-neutral explanation for the strikes. The State concedes that the trial judge erred on this point, and that a *Batson* objection is timely so long as it is made before the jury is sworn. *See Heard v. State*, 322 Ark. 553, 910 S.W.2d 663 (1995). However, the State argues that this error was harmless because appellants' objection was based solely on the number of blacks struck, and that a movant cannot establish a *prima facie* case of discrimination on the basis of mere numbers alone. We disagree. The manner in which a defendant can make out a *prima facie case* under *Batson* is explained in *MacKintrush v. State*, 334 Ark. 390, 398, 978 S.W.2d 293, 296 (footnote omitted) (1998):

> The strike's opponent must present facts, at this initial step, to raise an inference of purposeful discrimination. According to the *Batson* decision, that is done by showing (1) that the strike's opponent is a member of an identifiable racial group, (2) that the strike is part of a jury-selection process or pattern designed to discriminate, and (3) that the strike was used to exclude jurors because of their race. In deciding whether a *prima facie* case has been made, the trial court should consider all relevant circumstances. Should the trial court determine that a *prima facie* case has been made, the inquiry proceeds to Step Two. However, if the determination by the trial court is to the contrary, that ends the inquiry.

We think that appellants met this burden by establishing that the prosecution struck three out of four blacks in the jury pool, and that the trial court therefore should have gone on to step two, in which the prosecution is required to provide a racially neutral explanation for the strikes. The facts of this case do not involve mere numbers. Although the fact that the State struck three blacks by peremptory challenge is arguably meaningless in isolation, in the present case those numbers are put into the context of percentages drawn from a statistical base large enough to be meaningful. The trial judge conceded that three of the four available blacks, *i.e.*, seventy-five percent of the potential black jurors and one hundred percent of the blacks actually impaneled, had been peremptorily struck by the State at the time the objection was made. We think

that this clearly constitutes a "relevant circumstance" that should have been considered by the trial judge, and we therefore cannot agree that the error was harmless.

Our resolution of the foregoing issue renders moot appellants' contention that the trial court erred in refusing to allow them to exclude a certain juror by peremptory challenge. Likewise, we need not address appellants' argument concerning the trial court's refusal to submit the question of Joseph Hargro's accomplice status to the jury because, in the absence of an offer of proof or proffer of the circumstantial evidence that appellants assert they were unable to introduce, the question is not ripe for decision at this time.

Reversed and remanded.

GRIFFEN and ROAF, JJ., agree.

Judy Ann BEARDEN *v.*
ARKANSAS DEPARTMENT of HUMAN SERVICES

CA 00-206 35 S.W.3d 360

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered December 20, 2000
[Petition for rehearing denied January 24, 2001.]

[redacted]

Robert L. Herzfeld, Jr., for appellant.

Kathy L. Hall, for appellee.

JOSEPHINE LINKER HART, Judge. The Arkansas Juvenile Code of 1989 provides that an indigent parent must be afforded the right to the assistance of counsel in proceedings to terminate parental rights.[1] *See* Ark. Code Ann. § 9-27-316(h) (Supp. 1999). Before us is the question of whether an indigent

[1] We note that the United States Supreme Court held in *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981), that there is no presumptive due process right to counsel for indigent parents in termination-of-parental-rights proceedings.

parent who has been appointed counsel in a proceeding to terminate his parental rights pursuant to Ark. Code Ann. § 9-27-341 (Supp. 1999), has a right to proceed without counsel. Stated differently, at issue is whether the law forces an indigent parent in a proceeding to terminate parental rights to keep a court-appointed attorney when he insists that he wants to conduct his own defense. We conclude that the law does not do so and, therefore, reverse and remand.

The Arkansas Department of Human Services (DHS), on November 26, 1997, petitioned the juvenile court for emergency custody of Judy Ann Bearden's younger child, then several days later petitioned the court seeking custody of her elder child. The underlying claim made by DHS was that Bearden had a history of cocaine use and had no financial resources, and that her young daughter, who was born prematurely on November 12, had special needs that Bearden was unable to satisfy. At the probable cause hearing, the chancellor appointed an attorney to represent Bearden, but at the trial on the termination petition, she stated that she desired to represent herself. The chancellor briefly inquired as to the reason for her request, but ultimately required that she be represented by her court-appointed attorney.[2]

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[2] The colloquy was as follows:

COURT: I appointed Mr. Herzfeld to represent you, Ms. Bearden.

BEARDEN: Yeah, I know that.

COURT: And he's talked to you, I know at least, several times. Has he explained to you what the purpose of this hearing is?

BEARDEN: Yes, he did.

COURT: He indicated to me just moments ago that he thought you weren't interested in him representing you, is that true?

BEARDEN: Yes, it is, but I really don't know what to do, to be honest with you. I've never heard anything or seen anything like this in my life.

COURT: I know. That's why I appointed Mr. Herzfeld to represent you. I mean, I certainly won't force him to if you are going to insist that he not.

BEARDEN: I think I would rather represent myself.

COURT: Okay. You just got through telling me you didn't have any idea what was going on here and you've never been involved in anything like this in your life.

BEARDEN: I said I've never seen or heard of a case like this before where . . . .

COURT: Why wouldn't you want Mr. Herzfeld to represent you? He's a licensed attorney who does know what's going on.

BEARDEN: He does, I know. I do, too. I know what's going on, too, sir.

At the conclusion of the trial, the chancellor granted DHS's petition to terminate Bearden's parental rights. On appeal, Bearden argues that the chancellor erred by denying her the right to represent herself and by finding that by clear and convincing evidence her parental rights should be terminated. We do not address appellant's second point on appeal inasmuch as we reverse and remand on the first issue.

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 . . . 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).

I. Right to waive assistance of counsel

The pertinent part of Act 1227 of 1997, as codified at Ark. Code Ann. § 9-27-316(h)(2) (Supp. 1999), states:

> Upon request by a parent or guardian and a determination by the court of indigence, the court shall appoint counsel for the parent or guardian in all proceedings to remove custody or terminate parental rights of a juvenile.

A similar right to the assistance of counsel is afforded juveniles pursuant to Ark. Code Ann. § 9-27-316(a)-(b), although the right can be waived by a detailed process as provided in Ark. Code Ann. § 9-27-317 (Supp. 1999). There is, however, no similar statutory process for an indigent parent to waive his right to counsel expressed in Ark. Code Ann. § 9-27-316(h). Consequently, we are faced with what Cardozo might refer to as a "gap" in the statute. We, therefore, "as the interpreter for the community of its sense of the law and order must supply omissions, correct uncertainties, and

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COURT: Well, you don't want him to represent you? I'm going to order that he represent you anyway.

harmonize results with justice through a method of free decision...." Benjamin N. Cardozo, *The Nature of the Judicial Process* 16 (1921). Accordingly, we conclude that an indigent parent who has been appointed an attorney has the right to waive the assistance of legal counsel in termination cases such as this, and therefore, we reverse.

■ We first look to the words used by the Arkansas General Assembly. A plain reading of Ark. Code Ann. § 9-27-316, requires that a two-fold process occur prior to the appointment of a legal counsel — a request by the parent and a finding of indigence. It is the first requirement that is of greater interest to us. This requirement demonstrates that the General Assembly intended that the indigent parent have some role or power with regard to the decision of whether legal counsel would be appointed for him. Moreover, there is no indication that the General Assembly intended that this power would be limited in some manner or would expire at some point in time. In our view, within the scope of this power must exist the ability to reject the assistance of counsel.

■ A second consideration is that the right to waive counsel is consistent with common sense and avoids an absurd result. *See Green v. Mills*, 339 Ark. 200, 205, 4 S.W.3d 493, 496 (1999) ("[T]his court does not engage in interpretations that defy common sense and produce absurd results."). The General Assembly intended to place a burden on the State by forcing it to bear the cost of the indigent parent's legal representation in parental termination cases such as this. To force an indigent parent to accept legal representation in termination proceedings when there is an expressed desire to decline such an offer, would transform their *right* into a *burden*. There is a conspicuous lack of authority to justify a determination that the General Assembly intended to hinder a parent that way.

Finally, this view harmonizes the right to waive counsel with similar rights in analogous cases. In *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938), the United States Supreme Court recognized that the Sixth Amendment right to the assistance of counsel included the corresponding right to waive the assistance of counsel.[3] Further-

[3] Contrary to appellant's argument, *Johnson*, in our view, provides a more useful analogy to the case at bar than *Faretta v. California*, 422 U.S. 806 (1975). In *Johnson*, the

more, a number of jurisdictions have accepted, in cases similar to the case at bar, a right to waive counsel in one form or another. *See In re G.L.H.*, 614 N.W.2d 718 (Minn. 2000) (affirming trial court's determination that parent had waived statutory right to counsel in action brought by county to terminate parental rights); *In re Heller*, 669 A.2d 25 (Del. 1995) (holding that there was no procedural due process violation to allow mother to waive right to counsel and proceed *pro se* in a termination of parental rights case brought by Delaware); *In re K.D.H.*, 871 S.W.2d 651 (Mo. Ct. App. 1994) (affirming trial court's determination that by her actions a mother had waived her right to counsel in parental termination case because she failed to cooperate with her court-appointed attorney); *Keen v. Marion County Dep't of Public Welfare*, 523 N.E.2d 452 (Ind. Ct. App. 1988) (affirming trial court's determination that parent had waived the right to assistance of counsel in parental termination case brought by county); *In re Myers*, 58 Or. App. 622, 650 P.2d 113 (1982) (affirming trial court's determination that father knowingly waived right to counsel in parental termination case brought by Oregon).

II. Right of self-representation

■ We next address the question of whether Bearden possessed an independent right of self-representation. In our view, this right does not arise automatically from the right to waive the assistance of counsel; on the contrary, it must be independently established.

■ Although neither the Arkansas Constitution nor our state statutes specifically provide for a general right of self-representation for all purposes, we conclude that in Arkansas an individual possesses such a right.[4] In criminal trials, a defendant is entitled to

Supreme Court referred to the applicable positive law that established a right to counsel — the Sixth Amendment — and acknowledged that there was a corresponding right to waive the assistance of counsel in federal court. Similarly, in the case at bar we are called upon to determine whether under the applicable positive law that establishes a right to counsel — Ark. Code Ann. § 9-27-316 — a party has a corresponding right to waive that right in an Arkansas court. The issue in *Faretta*, however, was whether the Constitution forbids a State from forcing a lawyer upon a criminal defendant, which is an entirely different issue.

[4] This problem does not exist under federal law because the long-standing right of self-representation in federal courts is codified at 28 U.S.C. § 1654 (1982), which provides that "[i]n all courts of the United States the parties may plead and conduct their own cases

represent himself commensurate with *Barnes v. State*, 285 Ark. 565, 568, 528 S.W.2d 370, 373 (1975) ("Our own cases have clearly recognized the right of a defendant under our constitution to conduct his own defense in a criminal trial . . . if he elects to do so.")[5] Likewise, our state law extends the same right to parties in civil cases, as evidenced by our rules of civil procedure that contemplate parties exercising the right of self-representation. *See* Ark. R. Civ. P. 11 ("A party who is not represented by an attorney shall sign his pleading, motion, or other paper . . . ."). *See also Arkansas Bar Ass'n v. Union Nat'l Bank*, 224 Ark. 48, 51, 273 S.W.2d 408, 410 (1954) ("It is generally conceded that an individual who is not a licensed attorney can appear in the courts in what is commonly conceded to be practicing law provided he does so for himself...."); *Stewart v. Hall*, 198 Ark. 493, 495, 129 S.W.2d 238, 239 (1939) ("Litigants have a right to represent themselves...."). The right of self-representation, however, is not extended to all parties in Arkansas courts. For example, it is well-settled that *most* corporations must be represented by an attorney in court proceedings. *See, e.g., Jordan v. Thomas*, 332 Ark. 268, 269, 964 S.W.2d 399, 400 (1998).

Few in the legal community would doubt that in most cases such as this, a trained attorney would provide an indigent parent with a better defense against the State's efforts to terminate parental rights than a *pro se* defendant. Nevertheless, we do not question the wisdom of such a decision inasmuch as it is not our decision to make. To defend against such efforts is profoundly personal; after all, it is the parent who faces the potential severing of the natural parent-child relationship. To impose an attorney on such a person will undoubtedly intensify his belief that the law plots against him. Moreover, we are mindful that it is possible that an indigent parent could present a more effective defense than that which would be made by a court-appointed attorney.

■■ Although we conclude that an indigent parent who has been appointed counsel does have a right of self-representation in cases such as this, we do not hold that this right is absolute. We are compelled to balance this right against the best interests of the child,

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personally or by counsel . . . ."

[5] We recognize, of course, that commensurate with *Faretta v. California*, 422 U.S. 806 (1975), a state is forbidden under the Fourteenth Amendment from forcing a lawyer upon a criminal defendant.

who faces the potential loss of the relationship with a natural parent. However, the interests of the children in this case were represented by an attorney ad litem appointed by the chancellor, commensurate with Ark. Code Ann. § 9-27-316(f). Accordingly, we remand this matter for further action not inconsistent with this opinion.

Reversed and remanded.

PITTMAN and STROUD, JJ., agree.

GRIFFEN, J., concurs.

KOONCE and MEADS, JJ., dissent.

MARGARET MEADS, Judge, dissenting. I cannot agree with the majority to reverse this case.

In the first place, neither *Faretta v. California,* 422 U.S. 806 (1975) (holding that a defendant in a state criminal trial has an independent constitutional right of self-representation and that he may proceed to represent himself without counsel when he voluntarily and intelligently elects to do so), nor *Lassiter v. Dept. of Soc. Servs. of Durham County, North Carolina,* 452 U.S. 18 (1981) (holding that an indigent litigant's right to appointed counsel has been recognized to exist only where she may be deprived of her physical liberty; that the Constitution does not require the appointment of counsel for indigent parents in every parental-status termination proceeding; and that the decision whether due process calls for the appointment of counsel is to be answered in the first instance by the trial court, subject to appellate review), which are relied upon by appellant, offers any authority for the proposition that one has a right to a *pro se* defense in termination-of-parental-rights cases. Further, appellant has offered no authority for her argument that the right to have or waive counsel in termination cases is analogous to the right to have or waive counsel in criminal matters. We have repeatedly admonished appellants that we will not do their research for them, and that we will affirm when an appellant's argument is neither supported by legal authority nor apparent without further research. *Hopper v. Garner,* 328 Ark. 516, 944 S.W.2d 540 (1997).

Further, Arkansas has no statutorily created right of self-repre-

sentation as does federal law. *See* 28 U.S.C. § 1654 (West 1994).[1] Arkansas Code Annotated section 9-27-316(h) (Supp. 1999), which creates the right to appointed counsel for indigent parents in termination cases, does not provide a waiver of this right. Had the legislature intended to provide for waiver, it could have done so. *See* Ark. Code Ann. § 9-27-317(a) (Supp. 1999) (providing for waiver of the right to counsel at a delinquency or family-in-need-of-services hearing). Whether such a right to waiver would be wise in termination-of-parental-rights proceedings and whether an indigent parent has a right to proceed *pro se* in termination proceedings is a matter for the legislature, especially in light of the welfare of the children involved.[2]

For these reasons, I respectfully dissent. I am authorized to state that Judge KOONCE joins.

[1] In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, they are permitted to manage and conduct causes therein.

[2] Termination-of-parental-rights cases involve not only the parent, but a consideration of the best interests of the children involved. The parent is not the only person who stands to lose something. Thus, there are other third-party rights to be considered.

Anna Mae BAKER *v.* RADIOLOGY ASSOCIATES, P.A.; George Norton, M.D.; and Robert Laakman, M.D.

CA 00-229 35 S.W.3d 354

Court of Appeals of Arkansas
Division IV
Opinion delivered December 20, 2000

McHenry & McHenry Law Firm, by: *Donna McHenry* and *Robert McHenry*, for appellant.

Friday, Eldredge & Clark, by: *Laura Hensley Smith* and *Jason B. Hendren*, for appellees.

JOHN E. JENNINGS, Judge. Anna Mae Baker appeals from an order of summary judgment in which the trial court ruled that her malpractice complaint was barred by the statute of limitations. She seeks reversal on the ground that her claims fall within the "continuous course of treatment" rule that tolls the statute of limitations. We disagree and affirm.

Appellant began having annual screening mammograms at appellee Radiology Associates in 1988. She had mammograms there on March 24, 1988; August 29, 1990; September 20, 1991; October 28, 1992; November 10, 1993; November 7, 1994; October 26, 1995;

December 5, 1996; and January 22, 1998. As pertinent to this appeal, Dr. James Campbell read the mammograms of November 1994, compared them to the 1993 mammograms, and found no abnormality. Appellant's October 1995 mammograms were read by appellee Dr. George Norton, who also compared them to those done the previous year. He reported no abnormality, although he did note bilateral "benign-appearing calcifications" in his report. The December 1996 mammograms were read by appellee Dr. Robert Laakman, who found no abnormality after viewing the current studies and comparing them to those made the year before. He did report that there was a "focal area of asymmetric density in the upper outer aspect of the left breast which is unchanged in appearance," and he also noted "benign-appearing calcifications."

On January 22, 1998, appellant returned to Radiology Associates for mammograms, which were read by a different doctor. After comparing them to the 1996 mammograms, he detected an irregularity, and appellant subsequently had an ultrasound. The radiologist found a mass in the upper outer quadrant of the left breast that was consistent with carcinoma. Appellant then had a biopsy performed and was diagnosed with breast cancer. Appellant underwent

two radical mastectomies and had twenty lymph nodes removed. The cancer was found to have spread to eighteen of the lymph nodes.

On July 28, 1999, appellant filed suit against Dr. Norton, Dr. Laakman, and Radiology Associates as the doctors' employer, for medical malpractice in connection with the reading of her 1995 and 1996 mammograms.[1]Appellees filed motions for summary judgment, contending that the claims made against them were barred by the statute of limitations. In response, appellant maintained that her complaint was timely under the continuous course of treatment doctrine. She contended that under this doctrine her cause of action against appellees did not accrue until the date of her last treatment, January 22, 1998, when her final mammogram was read. She filed the affidavit of Dr. Robert Dunn, who stated that the standard of care requires that previous mammograms be reviewed with current mammograms to determine what is normal for the individual and to detect if a change has occurred within the breast. Dr. Dunn also expressed his opinion that a suspicious lesion was apparent on appellant's 1994, 1995, and 1996 mammograms and that the doctors' failure to inquire into the nature of the lesion fell below the standard of care. Appellant also filed an affidavit detailing her lengthy relationship with Radiology Associates.

The trial court ruled that the continuous-course-of-treatment exception did not apply to the facts of this case; that the two-year limitations period began to run on the date each mammogram was allegedly misread; and that her opportunity to bring suit against Dr. Norton and Dr. Laakman expired on October 26, 1997, and December 5, 1998, respectively. The court granted the motion for summary judgment because the complaint was not filed until July 28, 1999.

■■ Summary judgment should be granted only when it is clear that there are no disputed issues of material fact. *Porter v. Harshfield,* 329 Ark. 130, 948 S.W.2d 83 (1997). The burden of sustaining a motion for summary judgment is always the responsibility of the moving party. *Tullock v. Eck,* 311 Ark. 564, 845 S.W.2d 517 (1993). All proof submitted must be viewed in the light most

[1] Appellant originally included a claim against Dr. James Campbell for his reading of her 1994 mammograms, but she subsequently dismissed her complaint against him.

favorable to the nonmoving party, and any doubts or inferences must be resolved against the moving party. *Pastchol v. St. Paul Fire & Marine Co.,* 326 Ark. 140, 929 S.W.2d 713 (1996).

The statute of limitations for medical malpractice actions is found in Ark. Code Ann. § 16-114-203 (Supp. 1999), which provides in relevant part: "(a) Except as otherwise provided in this section, all actions for medical injury shall be commenced within two (2) years after the cause of action accrues. (b) *The date of the accrual of the cause of action shall be the date of the wrongful act complained of and no other time."* (Emphasis added.) The supreme court has consistently interpreted the limitation in § 16-114-203 strictly, commencing the two-year period from the date of the act of alleged malpractice. *Green v. National Health Labs., Inc.,* 316 Ark. 5, 870 S.W.2d 707 (1994). For example, the supreme court refused to accept either the "discovery of the injury" rule or the "continuing tort" theory in *Williams v. Edmondson,* 257 Ark. 837, 250 S.W.2d 260 (1975), a case that involved an allegation of negligence in connection with the reading of an x-ray. The court again rejected the continuing-tort theory in *Owen v. Wilson,* 260 Ark. 21, 537 S.W.2d 543 (1976), where a foreign object was left in the plaintiff's body after surgery. In both cases, the court observed that a single act of negligence was claimed and held that the statute of limitations was not tolled because the alleged wrong was completed at the time the physician acted or failed to act. The same reasoning was applied in holding that the plaintiff's case was time-barred in *Treat v. Kreutzer,* 290 Ark. 532, 720 S.W.2d 716 (1986), where the claim was filed some twelve years after a tissue biopsy was allegedly misread.

With this background, in *Lane v. Lane,* 295 Ark. 671, 752 S.W.2d 25 (1988), the supreme court adopted the "continuous course of treatment" doctrine as defined in 1 David Louisell and Harold Williams, *Medical Malpractice* § 13.08 (1982):

> [I]f the treatment by the doctor is a continuing course and the patient's illness, injury or condition is of such a nature as to impose on the doctor a duty of continuing treatment and care, the statute does not commence running until treatment by the doctor for the particular disease or condition involved has terminated unless during treatment the patient learns or should learn of negligence, in which case the statute runs from the time of discovery, actual or constructive.

295 Ark. at 673-74, 752 S.W.2d at 26-27. The court stated that this doctrine becomes relevant when the medical negligence consists of a series of negligent acts, or a continuing course of improper treatment. The court found the basis for the doctrine to be sound in that it promotes fairness to a plaintiff who undergoes a series of treatments and who might be unable to identify the precise treatment that produced the injury and in that it prevents a patient from having to interrupt the physician's treatment to file suit. In its decision, however, the court discussed its opinions in *Owen v. Wilson, supra,* and *Treat v. Kreutzer, supra,* and emphasized that "continuous treatment" was distinguishable from the "continuing tort" theory, which is based on a single act of negligence:

> In *Owen* and *Treat,* the appellants argued that a single negligent act of a physician, a misdiagnosis for example, was a continuing wrong and the statute of limitations would not begin to run until the error was discovered, on the premise that the effect of the wrong was continuous. We declined to adopt that theory, holding the cause of action to accrue at the time of the wrongful act, reasoning that the proposed theory, a public policy issue, should be addressed by the legislature.
>
> To hold otherwise would mean in effect that we would apply the "discovery of the injury rule" to our malpractice statute, which would change the time of the accrual of a cause of action from the time of the act to the date of discovery of the injury. This is contrary to the legislative intent plainly expressed in our statute. The limitation begins to run from the "date of the wrongful act complained of and no other time." Ark. Code Ann. § 16-114-203 (1987).

In *Lane,* the plaintiff was treated for migraine headaches over the course of eighteen years, and she contended that the treatment caused scarring and drug addition. The court held that the facts fit squarely within the continuous-treatment doctrine and found her complaint to be timely, since it was filed within two years from the date the treatment ended.

The supreme court has found the continuous-treatment rule applicable in only one other case. In *Taylor v. Phillips,* 304 Ark. 285, 801 S.W.2d 303 (1990), the plaintiff broke his jaw, for which the doctor performed surgery on September 8, 1987, and placed the jaw in a brace that was screwed into the bone parts. The plaintiff continued to see the doctor for follow-up visits and to address

complaints associated with his jaw until December 8, 1987, when the doctor's partner observed that the bones in the plaintiff's jaw were not healing properly. The next day, the doctors consulted with each other and agreed that further surgery was indicated. The plaintiff sued his doctor on October 16, 1989. The court stated:

> In this case, Taylor was clearly under a continuing course of treatment by Phillips, and so the statute did not begin to run until Taylor's treatment terminated on December 9, 1987, Taylor still had the brace screwed into his jaw bones on December 9 when Phillips and his partner agreed that Taylor needed further surgery on his jaw. Taylor's complaint was filed on October 16, 1989, well within the statute of limitations.

304 Ark. at 289, 801 S.W.2d at 305.

Since then, and consistent with its rejection of the continuing-tort theory, the supreme court has found the doctrine inapplicable to claims based on single, isolated acts of negligence. *See Raynor v. Kyser,* 338 Ark. 366, 993 S.W.2d 913 (1999); *Wright v. Sharma,* 330 Ark. 704, 956 S.W.2d 191 (1997); *Pastchol v. St. Paul Fire & Marine Ins. Co.,* 326 Ark. 140, 929 S.W.2d 713 (1996); and *Tullock v. Eck,* 311 Ark. 564, 845 S.W.2d 517 (1993). First in *Tullock v. Eck, supra,* the plaintiff was known to have an undiagnosed mass in her breast. In 1990, she was diagnosed with breast cancer that was found to be estrogen dependent. She sued her doctor who had prescribed an estrogen supplement in November of 1987, for which refills were available until May of 1989. The supreme court stated that a patient's continued ingestion of medicine prescribed by a physician was not enough to establish an ongoing course of treatment for the purpose of applying the continuous-treatment doctrine, and it held that the cause of action accrued on the date the prescription was written.

In *Pastchol v. St. Paul Fire & Marine Ins. Co.,* 326 Ark. 140, 929 S.W.2d 713 (1996), the patient was to have surgery to repair a perforated ulcer. While he was receiving anesthesia, but before the surgery had begun, the patient vomited and aspirated the contents of his stomach into his lungs. It was alleged that the patient's lungs were severely damaged and that the aspiration of the stomach contents into his lungs was the result of negligent conduct. The patient subsequently died, and it was argued that the statute of limitations should be reckoned from the date of the patient's death under the

continuous-treatment rule because the patient continued to receive medical care until he died, even though there was no claim that the post-surgery treatment was improper. The supreme court disagreed, holding that the doctrine was not designed to extend the statute of limitations in cases where only a single, isolated act of negligence is alleged. The court found the allegations made in the complaint comparable to those found in *Tullock v. Eck, supra,* where the plaintiff was able to identify the single act of negligence in prescribing estrogen, and distinguishable from the decision in *Taylor v. Phillips, supra,* where the injury stemmed, not from one act, but from the entire series of treatmentsfor the plaintiff's broken jaw.

In *Wright v. Sharma,* 330 Ark. 704, 956 S.W.2d 191 (1997), the plaintiff filed suit because he was subjected to an unnecessary surgery. The court found that the doctrine did not apply, because "[o]nly one negligent act is alleged, and that is the allegedly unnecessary surgery, which had continuing effects."

Finally, in *Raynor v. Kyser,* 338 Ark. 366, 993 S.W.2d 913 (1999), the plaintiff had seen the doctor in January of 1985 for chronic sinusitis and nasal polyps, which the doctor removed. The plaintiff returned to the doctor in August 1988 and July 1990 for removal of polyps and papillomas, and she saw the doctor for a last follow-up visit in March 1991. The doctor requested that the plaintiff return in six months. However, she failed to return even though she received at least two courtesy letters from the doctor reminding her to do so. She returned on October 18, 1994, and was scheduled for surgery one week later for chronic obstructive rhino sinusitis; during the surgery, several polyps were removed. She returned for a follow-up visit in November 1994. In March 1995, the doctor ordered an MRI for the plaintiff, after her internist sent her back to the doctor because she was complaining of blurred vision. The MRI revealed a large malignant inverted papilloma in the maxillary sinus cavity. The plaintiff filed suit against the doctor on February 27, 1997. In affirming the grant of summary judgment based on the statute of limitations, the supreme court stated:

> The instant facts are distinguishable from *Lane* and *Taylor.* In both cases where we have applied the continuous treatment theory to toll the statute, the patient has received active, ongoing medical care and attention beyond the time of a specific negligent act or

> series of acts — that is, something more than the mere continuation of the physician-patient relationship. In the case at bar, active treatment of an existing patient condition ceased following Raynor's postoperative visit in November 1994. Dr. Kyser's act of setting a future office visit six months later did not constitute the requisite continuous treatment needed to toll the statute. We have stated one policy rationale for the continuous treatment doctrine is to prevent the patient from having to interrupt the physician's treatment to bring suit. *Tullock v. Eck,* 311 Ark. 564, 845 S.W.2d 517 (1993). Where there is no more physician-patient interaction occurring other than the scheduling of future visits, the policy is satisfied as there is no interruption of "treatment for the malady which was the object of the treatment...." *Tullock,* 311 at 570. Were we to hold otherwise, we would no doubt come perilously close to embracing continuous-tort theory, which we have heretofore consistently rejected.

338 Ark. at 372-373, 993 S.W.2d at 916.

The case at bar is not one where the plaintiff is unable to identify any one treatment that produced the injury. Instead, the wrongs complained of are separate and distinct. Appellant contends that Dr. Norton committed malpractice in reading her mammograms on October 26, 1995, and that Dr. Laakman negligently misread her mammograms on December 5, 1996. The continuous-treatment doctrine does not apply to single, isolated acts of alleged negligence. To set this case apart from that rule, appellant contends that the doctrine should apply because current mammograms are viewed in conjunction with previous mammograms to determine if a change has occurred. We find this distinction unpersuasive under the circumstances of this case.

In *Noack v. Symenow,* 518 N.Y.S.2d 495 (N.Y. App. Div. 1987), it was held that where radiologists maintain no contact with a patient aside from the performance of a diagnosis, and the diagnosis is imparted directly to the treating physician, the performance of each diagnosis is complete and discrete and does not constitute continuous treatment, despite the fact that on successive occasions the radiologists compared prior studies with the most recent ones. The same conclusion was reached in *White v. Bridgeport Radiology Associates,* 1993 WL 407861 (Conn. Super.) There the court remarked that a comparison of test results suggests adherence to appropriate diagnostic procedure, not a change in the level or

nature of trust and confidence between patient and radiologist. The case cited by appellant, *Garcia-Alano v. Guttman Breast Diagnostic Institute, Inc.,* 188 A.D.2d 262, 590 N.Y.S.2d 453 (1992), is distinguishable. The plaintiff was being actively monitored for a growth and discoloration on her breast, and her subsequent visits and mammograms were all related to that initial finding. The court found that the series of examinations related to the suspicious area established a continuous course of treatment, as opposed to isolated breast examinations.

Appellant concedes that the mammograms were conducted for screening purposes only. As far as we can tell from the record, the reports made by the radiologists were sent to appellant's gynecologist, but there is no indication that the radiologists were engaged in any active consultation with the gynecologist or in the ongoing treatment of appellant for any specific condition. We hold that the trial court did not err in concluding that the continuous course of treatment did not apply to the diagnoses rendered by the radiologists in this case. We also affirm the decision as to Radiology Associates. When an employee has been released or dismissed, and the employer has been sued solely on a theory of vicarious liability, any liability of the employer is likewise eliminated. *Hartford Ins. Co. v. Mullinax*, 336 Ark. 335, 984 S.W.2d 812 (1999).

Affirmed.

BIRD and STROUD, JJ., agree.

Russell D. HANEY *v.* William PHILLIPS

CA 00-365 35 S.W.3d 373

Court of Appeals of Arkansas
Division II
Opinion delivered December 20, 2000

The Madden Law Firm, by: *John M. Holstine*, for appellant.

W. Michael Powell, for appellee.

JOHN E. JENNINGS, Judge. This is an appeal from an order dismissing appellant's complaint to foreclose a mortgage. For reversal, appellant contends that the trial court erred in ruling that he had made an election of remedies because he had previously obtained a personal judgment on the underlying debt and that the trial court erred in ruling that the discharge of the debt in bankruptcy barred him from proceeding in foreclosure. We agree with both arguments and reverse and remand..

The facts of this case are undisputed. In September 1996, appellant, Russell Haney, loaned $5,000.00 to appellee, William Phillips. The debt was secured by a second mortgage that was filed of record. Appellee defaulted in his payments on the loan, and appellant obtained a personal judgment by default against appellee in municipal court. Thereafter, appellee filed a petition in bankruptcy, but the case was dismissed. Appellant then filed this action in foreclosure, which was stayed when appellee again filed for bankruptcy. In the bankruptcy, appellant's money judgment against appellee was discharged. This foreclosure action went forward after the bankruptcy case was concluded, and appellee filed a motion to dismiss arguing that appellant had made an election of remedies by obtaining the personal judgment and that the mortgage lien did not survive the bankruptcy. The trial court granted appellee's motion to dismiss, and this appeal followed.

As his first argument, appellant challenges the trial court's ruling that he had made an election of remedies because he had previously obtained a judgment on the debt. The argument has merit. The general rule, in the absence of a statute to the contrary, is that a creditor whose debt is secured by a mortgage may pursue his remedy in personam for the debt, or his remedy in rem to subject the mortgaged property to its payment. 55 AM. JUR.2d *Mortgages* § 522 (1996). In addition, a mortgagee may ordinarily pursue all of his remedies at once, or he may pursue them successively. *Id.* State courts have uniformly held that holders of notes secured by a mortgage can both sue the maker of the note and also foreclose on the property, regardless of which action they pursue first, without offending the election-of-remedies doctrine. *Szego v. Anyanwutaku,* 651 A.2d 315 (D.C. App. 1994); *see also Kepler v. Slade,* 896 P.2d 482 (N.M. 1995). Arkansas law is consistent with these general rules.

The election-of-remedies doctrine bars more than one recovery on *inconsistent* remedies. *Wilson v. Fullerton,* 332 Ark. 111, 964 S.W.2d 208 (1998)(emphasis supplied). The general rule as to election of remedies is that, where a party has a right to choose one of two or more appropriate but inconsistent remedies, and with full knowledge of all the facts and of his rights he makes a deliberate choice of one, then he is bound by his election and cannot resort to the other remedy. *Coats v. Gardner,* 333 Ark. 581, 970 S.W.2d 802 (1998). The election-of-remedies doctrine applies to remedies, not causes of action. *Jones v. Ray,* 54 Ark. App. 336, 925 S.W.2d 805 (1996). There is no requirement that a plaintiff choose only one cause of action. *Cater v. Cater,* 311 Ark. 627, 846 S.W.2d 173 (1993).

In *Bank of Eudora v. Ross,* 168 Ark. 754, 271 S.W.703 (1925), it was argued that a party could not obtain a personal judgment in a foreclosure suit until after the report of sale showing that the amount realized from the sale was not sufficient to extinguish the debt. The supreme court disagreed, noting that the two remedies were not inconsistent. The court said that, while the plaintiff is entitled to only one satisfaction, he is entitled to pursue each available concurrent remedies not inconsistent with each other. *See also Vaughan v. Screeton,* 181 Ark. 511, 27 S.W.2d 789 (1930).

In *Davis v. Lawhon*, 186 Ark. 51, 52 S.W.2d 887 (1932), a creditor had filed both a liquidated claim against the deceased debtor's estate, as well as foreclosure suit in chancery court. The probate court disallowed the claim against the estate because of the pendency of the lawsuit in chancery, and the creditor was denied a writ of mandamus in circuit court to compel the probate court to act. On appeal from the denial of the writ, the supreme court again recognized that the two remedies were not inconsistent and held that where one has cumulative and consistent remedies, he may pursue all or one of them, although he is entitled to but one satisfaction. The court observed:

> Where the law furnishes a party with two or more concurrent and consistent remedies, he may prosecute one or all until satisfaction is had; but a satisfaction of one is a satisfaction of all. He may select and adopt one as better adapted than the others to work out his purpose, but his choice is not compulsory or final.

Id. at 56.

Again, in *Driver v. Driver*, 200 Ark. 500, 139 S.W.2d 401 (1940), the court noted that the holder of a note secured by a mortgage had the right to enforce payment by either obtaining judgment against the maker of the note and suing out an execution for collection, or he could foreclose on the mortgage. Quoting from an earlier opinion, the court observed that a "mortgagee need not exhaust security before resorting to other remedies with right, however, to only one satisfaction." *See Vaughan v. Screeton, supra.*

The remedies appellant sought were not inconsistent. Under the law, he was entitled to pursue either one of them, or both in succession, until the debt was satisfied. The trial court erred in concluding that the foreclosure suit was barred under the election-of-remedies doctrine.

Appellant next argues that the trial court erred in concluding that appellant was barred by the discharge in bankruptcy from proceeding with the action in foreclosure. This argument also has merit.

It is a long-established principle that, unless avoided in the bankruptcy proceeding, valid liens will be preserved notwithstanding the discharge of the debtor. *In re Dickinson,* 24 B.R. 547

(Bankr. S.D. Cal. 1982). This is so because the discharge extinguishes only the personal liability of the debtor. *Long v. Bullard,* 117 U.S. 617 (1886). Codifying the rule of *Long v. Bullard, id.,* the Bankruptcy Code now provides that a creditor's right to foreclose on the mortgage survives or passes through the bankruptcy. 11 U.S.C. § 522; *Johnson v. Home State Bank,* 501 U.S. 78 (1991). In Arkansas, a mortgage lien attaches when it is recorded. Ark. Code Ann. § 18-40-102 (1987). Since a discharge in bankruptcy does not defeat such a lien, the trial court erred in granting the motion to dismiss merely because the underlying debt was discharged in bankruptcy. *See Clark v. Bank of Bentonville,* 308 Ark. 241, 824 S.W.2d 358 (1992).

We reverse and remand for proceedings consistent with this opinion.

Reversed and remanded.

PITTMAN and ROAF, JJ., agree.

Michael PYLE *v.* Brian SAYERS

CA 99-1502 34 S.W.3d 786

Court of Appeals of Arkansas
Divisions I, II, and III
Opinion delivered December 20, 2000

Shackleford, Phillips, Wineland & Ratcliff, P.A., for appellant.

John D. Lightfoot, P.L.L.C., for appellee.

JOHN E. JENNINGS, Judge. This case is a will contest, with issues concerning undue influence and mental capacity. Mabel Hammond was seventy-five years old in the summer of 1998. On May 12, 1998, she was admitted to the hospital in El Dorado. She was seen by Dr. Barry Moore, who diagnosed her as suffering from (1) depression, (2) dementia, possibly Alzheimer's disease, and (3) weight loss, possibly due to cancer. Dr. Moore determined by history that Mrs. Hammond had suffered several strokes in the past.

On May 18, Mrs. Hammond was admitted to Oak Ridge Nursing Home in El Dorado. On June 8 she executed the will in question at the nursing home. The will left her entire estate to her husband, W.A. Hammond. If her husband predeceased her, her jewelry was left to her great-niece Karen Sayers, and a great-grand-niece, Sarah Sayers, with the residue of her estate to go to a great-nephew, Brian Sayers, and his wife, Rhonda Sayers, in equal shares. Approximately two weeks later W.A. Hammond died of cancer at home.

Mrs. Hammond left Oak Ridge Nursing Home on June 15. She died at home on June 25. Brian Sayers, the appellee here, filed a petition in Union County Probate Court to probate Mrs. Hammond's will. The petition was opposed by the appellant, Michael Pyle, on his own behalf as Mrs. Hammond's nephew and heir at law, and as guardian for his mother, Mary Pyle, the testatrix's sister.[1]

Following a hearing, the probate judge issued an extensive letter opinion finding the will to be valid. On appeal, Mr. Pyle argues (1) the trial court erred in not requiring the will's proponents to overcome the rebuttable presumption of undue influence and lack of mental capacity and (2) the trial court's decision on these issues was clearly erroneous. We affirm.

Appellant's first argument is:

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[1] Mary Pyle did not testify at trial and there was evidence that it may have been as long as twenty years since she and Mabel Hammond had seen each other.

> The court charged the appellee with the duty of presenting proof of lack of undue influence and presence of testamentary capacity beyond a reasonable doubt. However, the true duty of the proponent is to overcome a presumption that the testatrix did not have testamentary capacity and was not [*sic*] unduly influenced by their proponent of the will by presenting proof beyond a reasonable doubt.

This is a distinction without a difference. The trial court held, the appellee concedes, and we agree, that the will was procured by the beneficiary within the meaning of the law. When a beneficiary procures a will, there is a rebuttable presumption of undue influence and a lack of capacity. *See Looney v. Estate of Wade*, 310 Ark. 708, 839 S.W.2d 531 (1992).

As the appellant correctly states, questions of testamentary capacity and undue influence are so interwoven in any case where these questions are raised that the court necessarily considers them together. *See Rose v. Dunn*, 284 Ark. 42, 679 S.W.2d 180 (1984); *Greenwood v. Wilson*, 267 Ark. 68, 588 S.W.2d 701 (1979); *Short v. Stephenson*, 238 Ark. 1048, 386 Ark. 501 (1965).

In *Hiler v. Cude*, 248 Ark. 1065, 455 S.W.2d 891 (1970), the supreme court said:

> We adhere to the rule that the burden of proving mental incompetency, undue influence and fraud which will defeat a will is upon the party contesting it. We hold this burden, in the sense of the ultimate risk of nonpersuasion, never shifts from the contestant. This does not, however, conflict with the rule concerning the burden of going forward with the evidence or burden of evidence.

In *Rose v. Dunn*, 284 Ark. 42, 679 Ark. 180 (1984), the court said that "the presumption of undue influence in the case of a beneficiary who procures the making of a will does not shift the ultimate burden of proof." In *Hodges v. Cannon*, 68 Ark. App. 170, 5 S.W.3d 89 (1999), we explained:

> In the case of a beneficiary of a will who procures the making of the will, a rebuttable presumption of undue influence arises, which places on the beneficiary the burden of going forward with evidence that would permit a rational fact-finder to conclude, beyond a reasonable doubt, that the will is not the product of insufficient mental capacity or undue influence. *Looney v. Estate of Wade*, 310 Ark. 708, 839 S.W.2d 531 (1992); *Edwards v. Vaught*, 284 Ark. 262,

681 S.W.2d 322 (1984); and *Rose v. Dunn*, 284 Ark. 42, 679 S.W.2d 180 (1984).

In both his letter opinion and final order, the probate judge stated that the will's proponents bore the burden of proof on both issues beyond a reasonable doubt. The trial court did not err in this regard.

Appellant's final argument is that the evidence does not support the trial court's finding that Mrs. Hammond had the mental capacity to execute the will and that she was not subjected to undue influences. We hold that the probate judge's decision was not clearly erroneous.

The Standard of Review

We will reverse a probate court's determination on the questions of mental capacity and undue influence only if they are clearly erroneous, giving due deference to the superior position of the trial judge to determine the credibility of the witnesses and the weight to be accorded their testimony. *See Reddoch v. Blair*, 285 Ark. 446, 688 S.W.2d 286 (1985). While our review must take into consideration that the will's proponent bore the burden of proof, or the burden of going forward with the evidence, beyond a reasonable doubt, the question on appeal is not whether we have such a doubt. The situation is analogous to an appeal in a criminal case: the burden of proof is beyond a reasonable doubt, but our standard of review is whether the jury verdict is supported by substantial evidence.

Substantive Law on Mental Capacity

Every person of sound mind and disposing memory has the untrammeled right to dispose of his or her property by will as he or she pleases. *See Puryear v. Puryear*, 192 Ark. 692, 94 S.W.2d 695 (1936). If the maker of a will has sufficient mental capacity to retain in his memory, without prompting, the extent and condition of his property, and to comprehend how he is disposing of it, and to whom, and upon what consideration, then he possesses sufficient mental capacity to execute such an instrument. *Richard v. Smith*, 235 Ark. 752, 361 Ark. 741 (1962). Sufficient mental ability to exercise

a reasonable judgment concerning these matters in protecting *his own interest in dealing with another* is all the law requires. *Id.* With respect to the ability to know the extent and condition of the property to be disposed and to whom it is being given, and to appreciate the desserts and relations to the testator of others against whom he discriminates or excludes from participation in his estate, it is unnecessary that he actually has this knowledge. *See Huffaker v. Beers*, 95 Ark. 158, 128 S.W. 1040 (1910). It is sufficient if he has the mental capacity to understand the effect of his will as executed. *Puryear, supra.* If a person has such mental capacity then, in the absence of fraud, duress, or undue influence, mental weakness, whether produced by old age or through physical infirmities, will not invalidate an instrument executed by him. *Richard, supra; McCulloch v. Campbell*, 49 Ark. 367, 5 S.W. 590 (1887). A testator's old age, physical incapacity, and partial eclipse of mind will not invalidate a will if he has the requisite testamentary capacity when the will is executed. *Hodges v. Cannon*, 68 Ark. App. 170, 5 S.W.3d 89 (1999). A testatrix does not lack testamentary capacity merely because old age has impaired her mental faculties. *See Noland v. Noland*, 330 Ark. 660, 956 S.W.2d 173 (1997).

Undue Influence

The influence that the law condemns is not the legitimate influence which springs from natural affection, but the malign influence which results from fear, coercion, or any other cause that deprives the testator of his free agency in the disposition of her property. *Orr v. Love*, 225 Ark. 505, 283 S.W.2d 667 (1955). With respect to a will obtained by influence, it is not unlawful for a person, by honest intercession and persuasion, to procure a will in favor of himself, or another person. *McDaniel v. Crosby*, 19 Ark. 533 (1858). Whether the disposition was a natural one is a relevant inquiry. *See Boggianna v. Anderson*, 78 Ark. 420, 94 S.W. 51 (1906). The influence of children over parents is legitimate so long as they do not extend a positive dictation and control over the mind of the testator. *Greenwood v. Wilson,* 267 Ark. 68, 588 S.W.2d 701 (1979). Cases involving undue influence will frequently depend on the credibility of witnesses. *Higgs v. Estate of Higgs*, 48 Ark. App. 148, 892 S.W.2d 284 (1995).

The Facts

Karen Richards testified that she was Brian Sayers' sister and Mabel Hammond's great-niece. She testified that she and Brian moved in with Mrs. Hammond when she was twelve and Brian was eight or nine. She visited her in the nursing home two weeks before her death and testified that Mrs. Hammond recognized her. She also recognized Karen Richards's son, Jace, although she had not seen him in five years.

Mrs. Richards testified that Mrs. Hammond was physically withered and had not been eating right. She testified that Mrs. Hammond's mental capacity was about the same as it had been five years previously although she was very tired and did not speak as much. She testified that her great-aunt was closer to Brian than any of them because he had come to her house at a younger age than the rest. Mrs. Richards was a psychiatric registered nurse and testified that she thought Mrs. Hammond was of sound mind.

Edwin Gogo was a registered nurse at Oak Ridge Nursing Home. He testified that she was oriented to herself and some family members. He said that Mrs. Hammond always told him that Brian Sayers was her son. He testified that Mrs. Hammond was only disoriented at nighttime and described that as the "sundown syndrome."

Donna Rainey was the social services director at Oak Ridge Nursing Home. She testified that Mrs. Hammond was very frail and weak. She said that Mrs. Hammond's husband had been taking care of her at home and that they were both sick. She testified that Mrs. Hammond realized they were both terminally ill and said that she did not think she could stay at home and watch him die.

Mrs. Rainey testified that Mrs. Hammond knew what she wanted and that she was "very clear in those regards." She testified that Brian was there everyday. She said, "I think Mrs. Hammond knew her own mind as far as what she wanted." She testified that Mrs. Hammond called Brian Sayers her son.

Diane Beeson was a LPN at Oak Ridge Nursing Home. She testified that Mrs. Hammond was alert and knew herself and family. She said that Mrs. Hammond knew she was in the hospital and nursing home, but she did not know where.

Angela Oles was a supervising registered nurse at Oak Ridge Nursing Home. She testified that Mrs. Hammond was a terminal-stage, medicare patient who had a poor appetite. She testified that at the time Mrs. Hammond signed a living will proxy, she knew what she was doing. She also testified that Mrs. Hammond always referred to Brian Sayers as her son.

Charles L. Massey was a licensed practical nurse at Oak Ridge Nursing Home. He testified that Mrs. Hammond was a thin, frail little lady. He testified that when Brian Sayers would come into her room she would smile.

Jennifer Hughes was employed at Dr. Rick Brown's office and was asked by Lily Gregory, a co-worker, to witness Mrs. Hammond's will. She testified that she did not get the impression that anything was being forced upon Mrs. Hammond. She testified that Brian Sayers read the will aloud to her and that she asked certain questions about how the will was drafted. Mrs. Hughes testified that she was satisfied of Mrs. Hammond's competence when she signed and witnessed the will and that in her opinion Mrs. Hammond understood what she was signing.

Lily Ann Gregory testified that she also worked for Dr. Brown in El Dorado and that she had known Mr. and Mrs. Hammond over a period of approximately twenty years. She testified that she had heard Mrs. Hammond refer to Brian as her child and she would not be surprised that if, in the nursing home, Mrs. Hammond referred to him that way. She testified that Mrs. Hammond recognized her when she came into the room although she had not seen her for a couple of years. She testified that she had no question as to Mrs. Hammond's competence at the moment she initialed and signed the will.

Mary Breshears testified that she had known Mabel Hammond since 1982 and that she had referred to Brian Sayers as her son. She testified that she never detected anything that concerned her about the soundness of her mind during her stay in the nursing home.

Brian Sayers testified that Mabel Hammond was his great-aunt and that he had come to live with her in the fourth grade and had lived with her ever since. He believed he had been adopted by her. He testified that she said some things that caused him to ask her if she wanted a will, and she said that she did. He testified that there

was no doubt in his mind that the will was understood by her and expressed her wishes. He testified:

> I am not going to say that auntie wasn't very frail, and not all of the time was she quite as sharp as she always was. But never at one time can I remember did auntie not know what was going on, what was being talked to her, or what we were discussing.

He testified that she had no other heirs who had made contact with her in the last ten or twenty years that he could remember.

Dr. Barry Moore testified that Brian Sayers was taking care of Mrs. Hammond daily. He expressed his opinion "to a reasonable degree of medical certainty" as to whether Mrs. Hammond would have had sufficient mental capacity on the day of the execution of the will to understand without prompting the natural "recipients" of her bounty. He said that she lacked such capacity. He testified that it was his understanding that a person must be "oriented to time, place and person."

What the nursing home personnel meant when they said Mrs. Hammond was "confused as to time and place" is clearly explained in Mr. Gogo's testimony. He said, "If I were in front of Mrs. Hammond now and asked her the time and she said twelve noon and the time was actually 11:15 a.m. I would have entered that as confused as to exact time. If a family member had asked her if she knew where she was, and she said she is in the nursing home, I can say she is disoriented as to the exact place."

The dissent finds the single reference to Mrs. Hammond's "children" in the will to be quite significant. It seems reasonable to assume, however, that Mrs. Hammond believed the will referred to her stepchildren. The dissent also places great weight on the use of the word "trustee" in the will but neglects to say that the word only appears in the phrase "executor and trustee." The probate judge did not find this language to be of any great importance, nor do we.

The testimony offered by the proponent and the other witnesses of the will is sufficient, if believed, to establish that Mrs. Hammond was competent to execute the will and that the will was not the product of undue influence. The trial court was entitled to credit the testimony of these witnesses. The court's decision is not clearly erroneous.

Affirmed.

PITTMAN, HART, BIRD, and KOONCE, JJ., agree.

GRIFFEN, STROUD, NEAL, and CRABTREE, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. Today the majority affirms a decision that the chief beneficiary of a will who procured it rebutted the longstanding legal presumption of undue influence by proving beyond a reasonable doubt that the testator possessed the requisite testamentary capacity when she signed the will and that she was not acting under undue influence in the face of a probate court decision that disregarded undue influence altogether. Although the testator was childless, the majority affirms a decision that there is no reasonable doubt about her testamentary capacity after she signed a will calling for her husband to make "adequate provision for my children after my death." The will refers six times to "my . . . Trustee;" however, the proponent presented no proof that a trust ever existed or that the testator ever contemplated creating a trust. The record shows that the testator was survived by a sister; yet, the same testimony from the proponent that the majority relies upon to affirm shows that the testator thought her stepchildren would inherit her estate if she died without a will and that she never acted as if she knew who were her natural heirs. I firmly believe that the chancellor erred when he found that appellee, the proponent of the will, proved beyond a reasonable doubt that the testator had the mental capacity to execute a will and that she was not acting under undue influence. I respectfully dissent.

Background Facts and Burden of Proof

In the spring of 1998, seventy-five-year-old Mabel Hammond and her husband, W. A. Hammond, were in failing health. W. A. Hammond was dying of cancer. He had been caring for his wife and managing their household affairs for several years because Mabel Hammond had not been able to care for herself. She suffered from senile dementia, possible Alzheimer's disease, severe weight loss, depression, a bad cough (later diagnosed as related to her previously undiagnosed condition of lung cancer which had metastasized to her liver and was terminal), and disorientation. On May 12, 1998, W.A. Hammond arranged for Mabel Hammond to be

admitted to Union Medical Center in El Dorado, Arkansas, where she was treated by Dr. Barry L. Moore from May 12 to May 18, 1998. After she was discharged from the hospital, Mabel Hammond was admitted to Oak Ridge Nursing Home where she resided until discharged to her home on June 15, 1998.

On June 8, 1998, Mabel Hammond signed a will that left the majority of her estate to her great-nephew, appellee Brian Sayers, if her husband did not survive her. Her husband died the following day (June 9, 1998). Mabel Hammond died on June 25, 1998, (two weeks later). She never had children, but was survived by a sister, Mary Pyle. Michael Pyle, appellant, is the guardian of the personal estate of Mary Pyle, his mother. After appellee presented the purported will to the Union County Probate Court on July 1, 1998, appellant objected to the will on three grounds: (1) that the will was procured by appellee; (2) or that the will was the result of undue influence; and (3) that Mabel Hammond lacked the testamentary capacity to execute a will.

The probate court conducted a trial on May 5 and 6, 1999, concerning the will contest. On June 1, 1999, the probate judge entered an order admitting the will to probate. The second paragraph of that order reads:

> This is a will contest, specifically whether the testatrix Mabel Hammond had the requisite mental capacity and was not acting under undue influence on June 8, 1998 when she executed a will. *The issue here is mental capacity as the facts do not indicate any undue influence.* (Emphasis added.)

The same opinion also contained the following statement:

> The evidence is not controverted that Brian Sayers procured the will and benefits from its provisions. The law in Arkansas is clear that when a will is valid on its face an opponent of the will must prove by a preponderance of the evidence that the testator either lacked the mental capacity to execute a will or did so under undue influence. However, if the proponent of the will procured the will and benefits from the will then the burden of proving the will is on the proponent. The burden of proof is under those circumstances beyond a reasonable doubt.

It has long been the law in Arkansas that a party challenging the validity of a will must typically prove *by a preponderance of the*

evidence that the testator lacked the requisite mental capacity or that the testator was the victim of undue influence when the will was executed. *See Greenwood v. Wilson*, 267 Ark. 68, 588 S.W.2d 701 (1979); *Sullivant v. Sullivant*, 236 Ark. 95, 364 S.W.2d 665 (1963); *Orr v. Love*, 225 Ark. 505, 283 S.W.2d 667 (1955). *See also Oliver v. Griffe*, 8 Ark. App. 152, 649 S.W.2d 192, (1983). However, it is equally settled that when the person benefitting from the will also engages in drafting or procuring the will, a rebuttable presumption of undue influence arises and creates a burden for the proponent of the will to prove *beyond a reasonable doubt that the testator had both the testamentary capacity as well as the freedom from undue influence to execute a valid will. See Smith v. Welch, et al.*, 268 Ark. 510, 597 S.W.2d 593 (1980); *Short v. Stephenson*, 238 Ark. 1048, 386 S.W.2d 501 (1965); *Orr v. Love, supra*, ; *McDaniel v. Crosby*, 19 Ark. 533 (1858). *See also Oliver v. Griffe, supra.* Our supreme court has often stated that the questions of testamentary capacity and undue influence are so interwoven in any case where these questions are raised that the court necessarily considers them together, for in one case where the mind of the testator is strong and alert the facts constituting undue influence would be required to be felt stronger than in another case where the mind of the testator was impaired either by some inherent defect or by the consequences of disease or advancing age. *Short v. Stephenson, supra.*

It is true that "every person of sound mind and disposing memory has the untrammeled right to dispose of [her] property by will as [she] pleases." *See Puryear v. Puryear*, 192 Ark. 692, 694 S.W.2d 695, 696 (1936). This means that if the maker of a will has sufficient mental capacity to retain in her memory, without prompting, the extent and condition of her property and to comprehend how she is disposing of it, to whom, and upon what consideration, then she possesses sufficient mental capacity to execute the will. *Richard v. Smith*, 235 Ark. 752, 361 S.W.2d 741 (1962). And our supreme court has frequently observed that the relevant inquiry is not the mental capacity of the testator before or after a challenged will is signed, but rather the level of capacity at the time the will was signed. *See Noland v. Noland*, 330 Ark. 660, 956 S.W. 2d 173 (1997); *Daley v. Boroughs*, 310 Ark. 274, 835 S.W.2d 858 (1992); *Hiler v. Cude*, 248 Ark. 1065, 455 S.W.2d 891 (1970).

As for undue influence, our supreme court stated in *Orr v. Love*, *supra*, as follows:

> The influence which the law condemns is not the legitimate influence which springs from natural affection, but the malign influence which results from fear, coercion or any other cause that deprives the testator of his free agency in the disposition of his property.

225 Ark at 510, 283 S.W.2d at 670. *See also In re Estate of Davidson*, 310 Ark. 639, 839 S.W.2d 214 (1992).

Although the majority cites the supreme court's decision in *Noland*, *supra*, along with other decisions holding that one who procures a will has the burden of proving *beyond a reasonable doubt* that the testator executed the will while possessed of requisite mental capacity and without undue influence, it ignores clear wording in both the *Noland* majority and dissenting opinions that the *burden of proof* shifts to the procurer to overcome the rebuttable presumption of undue influence that arises whenever one benefits from the procurement. *Noland* involved a challenge to a chancellor's decision that the appellants procured a testamentary trust and related warranty deed from Wesley E. Noland, deceased, and failed to prove beyond a reasonable doubt that Noland possessed the requisite mental capacity and acted without undue influence when he created the Wesley E. Noland Irrevocable Trust and conveyed his one-third interest in a family farm to it. Justice Brown, writing for the majority in *Noland*, stated:

> Because we reverse this case on the basis of Wesley Noland's mental capacity and free agency, we need not address the issue of whether the burden of proof was improperly shifted to the appellants. We assume for purposes of this analysis, as the trial court found, that at least one of the appellants, Jerry Noland, procured the Wesley E. Noland Trust and that the appellants all benefitted from this procurement. *With this assumption, a presumption that the trust was the result of undue influence arises under our caselaw and the burden of proof then shifts to the proponents of the trust to prove beyond a reasonable doubt that Wesley Noland had both the mental capacity and freedom of will to render the trust legally valid.*

330 Ark. at 664, 956 S.W.2d at 175 (citations omitted) (emphasis added). After analyzing the proof on the issue of mental capacity, Justice Brown's opinion in *Noland*introduced the undue influence analysis with the following statement: "We next turn to the issue of

whether the appellants met their *burden of proof* concerning Wesley Noland's free agency. . . ." (Emphasis added.)

Justice Imber, writing for the three dissenting justices in *Noland*, introduced her opinion as follows:

> While the majority does not decide whether the trial court correctly shifted the burden to the trust's proponent, it nonetheless concludes that if the burden of proof did shift, the trial court was clearly erroneous in finding that the proponent failed to meet his burden to prove Wesley Noland's mental capacity beyond a reasonable doubt. . . .
>
> Assuming for purposes of capacity analysis, as does the majority, that Jerry Noland procured and benefitted from the 1991 trust instrument, *the burden shifted to him to prove beyond a reasonable doubt that Wesley Noland possessed the requisite testamentary capacity. This shifting burden marks a significant departure from what is required from a proponent in a "typical" will-contest case. . . .*

330 Ark. at 673, 956 S.W.2d at 180, (Imber, J., dissenting) (emphasis added).

Noland was not the first time our supreme court declared that the burden of proof shifts to the proponent of a procured will to rebut the presumption of undue influence by proof beyond a reasonable doubt that the testator possessed the requisite mental capacity to make a will and was free from undue influence. In *Greenwood v. Wilson*, 267 Ark. 68, 588 S.W.2d 701 (1979), the court held that a proponent of a will who is a beneficiary and who drafted the will or caused it to be drafted must prove beyond a reasonable doubt that it was not the result of undue influence and that the testator had the mental capacity to make it. Similarly, in *Smith v. Welch*, 268 Ark. 510, 597 S.W.2d 593 (1980), the court again held that when a beneficiary procures the making of a will, he bears the burden of showing beyond a reasonable doubt that the testator had both mental capacity and such freedom of will and actions as are required to render the will legally valid. *See also Looney v. Estate of Wade*, 310 Ark. 708, 839 S.W.2d 531 (1992). Given the consistent and plain meaning of these supreme court decisions, the majority is mistaken in concluding that the burden of proof did not shift to the appellee regarding the testator's mental capacity and freedom from undue influence.

The probate court correctly observed that the uncontroverted proof is that Brian Sayers procured Mabel Hammond's will and benefitted from its provisions. Specifically, the will bequeathed Hammond's estate to her husband if he survived her, and provided that if W.A. Hammond predeceased her, then all the estate was bequeathed to Brian Sayers and his wife, Rhonda Sayers, except for jewelry specifically bequeathed to Sarah Sayers (the daughter of Brian Sayers), and Karen Sayers (his older sister).

The probate court recognized that appellee, as proponent of the will under which he was a clear beneficiary, had the burden of proving that Mabel Hammond had the mental capacity to execute the will and that she was not acting under undue influence. The idea that the burden of proof does not shift in the case of a procured bequest makes no logical sense when one considers the quantum of proof required to overcome the rebuttable presumption that arises in will contests. *How could a challenger of a procured will ever prove by a preponderance of the evidence that the will resulted from undue influence when the proponent and procurer of the will has established by proof beyond a reasonable doubt that no undue influence was exercised and that the testator signed the will while possessed of the requisite mental capacity?*

Undue Influence

But the probate court erred when it analyzed the will contest as only involving mental capacity because "the facts do not indicate any undue influence." Undue influence was presumed under long-standing Arkansas caselaw. It is undisputed that Brian Sayers procured the will and benefitted from it. He selected a lawyer (John D. Lightfoot of El Dorado) to prepare the will. Sayers met with Lightfoot privately and dictated the provisions of the will that disinherited Hammond's sister, called for contingent bequests to Hammond's nonexistent children, referred to a Trustee of a nonexistent trust, and provided for Sayers, his wife, daughter, and sister to be the beneficiaries of Hammond's estate in the event that Hammond's husband predeceased her.

Lightfoot never interviewed Mabel Hammond, never prepared a draft for her review, never discussed the drafted will with her to determine whether she understood it or had questions about it, and never had any other contact with her about the will Sayers directed

him to prepare. Instead, Lightfoot prepared the will and delivered it to Sayers. Sayers obtained the witnesses to the will, presented the will to Hammond, and directed the will execution process. He also directed Lightfoot to prepare a power of attorney and living will.

The record simply does not contain proof beyond a reasonable doubt that Hammond freely and independently disinherited her sister. In fact, Brian Sayers admitted on cross examination that Hammond incorrectly believed that her stepchildren would inherit her estate if her husband predeceased her and she then died intestate. Sayers took no effort to correct Hammond's misapprehension; instead, he specifically directed Lightfoot to prepare a will calling for Hammond's estate to pass to him and his family members rather than to her sister (appellant's mother) if Hammond's husband predeceased her.

The majority opinion attempts to evade this glaring defect by reviewing the testimony offered by Sayers and his witnesses in reaching the following conclusion: "The testimony offered by the proponent and the other witnesses of the will is sufficient, if believed, to establish that Mrs. Hammond was competent to execute the will and that the will was not the product of undue influence." However, none of that testimony explained why a childless woman decided to sign a will that provided for her estate to pass to her children if her husband predeceased her. Sayers admitted during his testimony that although he lived with Hammond and her husband from his early childhood, Hammond knew she had not adopted him. Sayers admitted that it was his understanding and Hammond's understanding that "if Uncle Willie were to die and she didn't have a will, and this is what we discussed together, is that Bill and Margaret Ann (Hammond's stepchildren) would receive the bounty of the estate."

The fact that Mabel Hammond signed a will that referred to "my children" when she knew — or should have known — that she was childless and had not adopted appellee cannot be reasoned away by suggesting that Hammond "believed the will referred to her stepchildren." Appellee testified that Hammond's purpose for making the will was to *prevent* her stepchildren from inheriting her estate.

The will contains six references to a trustee. No trust was created by the will. The will makes no reference to a trust otherwise. There is no proof in the record that Mabel Hammond had a trust and no proof explaining why Mabel Hammond signed the will despite such language.

Sayers plainly did not satisfy the heavy burden of overcoming the rebuttable presumption of undue influence by proof beyond a reasonable doubt, the most stringent evidentiary standard in American jurisprudence. Hence, the probate court erred when it summarily dismissed the undue influence issue by stating, "*The issue here is mental capacity as the facts do not indicate any undue influence.*"

Mental Capacity

Sayers testified that Hammond feared that if she did not have a will, her stepchildren would inherit her estate if her husband predeceased her.[1] In fact, Hammond was survived by a sister, appellant's mother, who would have inherited her estate had she died intestate. Certainly a reasonable doubt exists about Hammond's mental capacity based on testimony that shows Hammond did not even realize her sister was a natural object of her bounty. Hammond's failure to even question the reference to nonexistent children, combined with appellee's testimony that she never indicated knowing that her sister was her natural heir and that she was consciously excluding her from her estate, create serious doubt that decedent recognized the natural claimants to her estate. No evidence contradicts Dr. Moore's testimony that Hammond had been unable to

[1] Appellee testified as follows: "Well, it was my understanding—I mean I can't presume, but I mean, my understanding that if, and her understanding that if Uncle Willie [the testator's husband] were to die, and she didn't have, you know a will, and this is what we discussed together, is that Bill and Margaret Ann [the testator's stepchildren] would receive the bounty of her estate."

Q: So she did not know that actually if she didn't have a will that her estate would go to Mary Ann Griffith Pyle, Michael Pyle's mother?

A: She never mentioned them, not one time.

Q: So there was never a discussion about who her natural heirs would be?

A: Uh-huh.

Q: Is that a yes?

A: Yes.

manage her affairs for three years before her death and that the household and financial affairs were handled by her husband due to Hammond's severe dementia. Brian Sayers admitted that Hammond did not know her assets.

When this proof is considered alongside Dr. Barry Moore's testimony and that from other witnesses, it is even more difficult to defend the conclusion that Sayers proved beyond a reasonable doubt that Hammond possessed the requisite mental capacity when she signed the will. Dr. Moore opined that Hammond suffered from severe dementia. Dr. Moore testified that although Hammond was alert each time he spoke with her during her hospitalization and on the one occasion he observed her at the nursing home after her hospital discharge, she did not realize where she was during the hospitalization and was not oriented as to time and date. He never observed Hammond when she demonstrated "an island of clarity" in her mental faculties. Dr. Moore testified that Hammond's husband had informed him that Hammond had been unable to take care of her affairs and household affairs for approximately three years before she was hospitalized in May 1998.

Despite Dr. Moore's testimony that he knew of no instance when a person with such longstanding dementia as Hammond suffered suddenly improved to the point she could handle her affairs, and despite the fact that the record contains no contrary evidence from a physician, the probate court and majority refer to testimony by nursing home workers who attended Hammond in support of the result reached below and affirmed today. While I agree that we ordinarily defer to probate judges concerning witness credibility and the weight to be accorded testimony, that deference does not detract from our responsibility to conduct a *de novo* review of the record to determine if the probate court decision is clearly erroneous. *See Noland, supra.*

In this regard, the record shows that the nursing home personnel who testified about Hammond's mental condition consistently documented that she was confused as to time and place. Hammond always told the nursing home staff that Brian Sayers was her son, not her great-nephew. None of the witnesses offered any testimony showing that Hammond had sufficient mental capacity to retain in her memory, without prompting, the extent and condition of her property and to comprehend how she wanted to dispose of it, to

whom, and upon what consideration. *See Richard v. Smith, supra.* Given these realities, the probate court's decision that appellee met his burden of proving beyond a reasonable doubt that Hammond had the requisite testamentary capacity is clearly erroneous.

Legal Ethics

Sadly, this case demonstrates how cavalier a lawyer can be when dealing with legal affairs affecting the elderly. Rule 1.1 of the Model Rules of Professional Conduct provides that a lawyer shall provide competent representation to a client and that competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. Rule 1.2 (a) provides that a lawyer shall abide by a client's decision concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued. Rule 1.4(b) states that a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. The attorney who drafted this will owed these duties to Mabel Hammond, not Brian Sayers. Yet, by his own admission, counsel never met Hammond, spoke with her about the will, or otherwise dealt with her concerning what is now affirmed as her last will and testament. Even if I shared the view of this case held by the majority, I cannot condone or otherwise excuse the way counsel handled this serious transaction.

I respectfully dissent, and am authorized to state that Judges STROUD, NEAL, and CRABTREE join in this opinion.

Pamela Tatrice HARRIS *v.* STATE of Arkansas

CA CR 00-438 35 S.W.3d 819

Court of Appeals of Arkansas
Division IV
Opinion delivered December 20, 2000

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

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

SAM BIRD, Judge. Appellant Pamela Tatrice Harris brings this appeal from the Pulaski County Circuit Court in which she was found guilty of aggravated assault. In addition, based upon the conviction, the court revoked Harris's 1998 probation on the charge of second-degree battery. She brings this appeal in which she challenges the sufficiency of the evidence used to convict her on the aggravated-assault charge. Her attorney also contends that there are no meritorious grounds that would support an appeal of the revocation of her probation. We affirm the aggravated-assault conviction and the revocation of Harris's probation.

Harris was charged with aggravated-assault after it was alleged that she threatened Monica Utsey and Tamea Utsey with a firearm, creating a substantial danger of death or serious physical injury. Harris waived her right to a jury trial, and at the bench trial, Monica Utsey testified that on March 31, 1999, she was working at Perfect Touch, a beauty salon in the Pike Plaza Shopping Center, washing her sister, Tamea Utsey's, hair. She said Tamea's boyfriend had told them that Harris and her friend, Kelly, were outside, and that Harris had a gun and was looking for Tamea. Utsey and her sister left the beauty shop to confront them. Monica called the police before going outside. She said that they spoke and that "we were not going to turn our backs on our enemies. My sister had just got into it with them earlier," referring to an earlier argument between Harris and Tamea concerning a mutual boyfriend. After they spoke, Harris pulled a gun on them. Someone standing near Harris grabbed the gun out of her hand, and the girls began fighting. Monica described the gun that Harris pulled on them as a silver-colored gun with a black handle. Monica testified that she was standing approximately four or five feet from Harris at the time. Although she testified that she was shocked and felt in danger after Harris had pulled the gun on her, Monica stated that Harris did not do anything that would have made her think that she was cocking the weapon.

Karl Sorrells of the North Little Rock Police Department testified that he was called to a disturbance at the Pike Plaza Shopping Center on March 31, 1999. He said that he had been advised that a gun was involved, that Monica and Tamea both described the gun as chrome-plated, and that Monica had described it as having a black handle. He said that the gun was found, without a magazine,

in Harris's car and that he observed Officer Ford take the gun into custody. The gun, which had a serial number of 434476 and was a Larson .38 caliber, was turned over to the desk officer, who, in turn, turned it over to the property officer. Sorrells testified that the gun had been in the possession of the North Little Rock Police Department, and that he had retrieved it from the property room on the morning of the trial. He said that he broke the seal on the box and that the serial number on the gun was 434476. The gun was then admitted into evidence. He testified that neither Monica nor Tamea asserted that Harris had made any threatening remark when she pointed the gun at them. Monica and Tamea simply stated that Harris had pointed at gun at them.

The State rested, and Harris moved for a directed verdict, contending that neither Monica or Tamea were in substantial danger because, as Officer Sorrells testified, the gun was not loaded, it had not been cocked, and Harris had not made any threatening statements to either Monica or Tamea. Therefore, Harris argued, the State had failed to prove that there was a substantial danger of death or serious physical injury. The court denied the motion. After Harris rested, she renewed her directed-verdict motion, and the court denied the motion.

The court then found her guilty, and it stated,

> I think that clearly it is aggravated assault. I mean, she went in a hostile mood, goes to this lady's place of business, has no reason to be there, other than she is coming to confront this lady. The lady goes out. She points a gun at her. This is certainly putting her in great, feeling of great panic and distress. The gun was found in her presence, in her car, and clearly she had a gun out there that day and she threatened this lady.

The court sentenced Harris to five years in the Arkansas Department of Correction. It also revoked her probation and imposed a sentence of five years, making the sentences run consecutively.

Aggravated-Assault Conviction

Harris brings this appeal challenging the sufficiency of the evidence used to convict her of aggravated assault. We consider a sufficiency-of-the-evidence argument first in order to preserve an Harris's right to freedom from double jeopardy. *King v. State*, 338

Ark. 591, 999 S.W.2d 183 (1999). A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Johnson v. State*, 326 Ark. 3, 929 S.W.2d 707 (1996); *Penn v. State*, 319 Ark. 739, 894 S.W.2d 597 (1995); *Bennett v. State*, 308 Ark. 393, 825 S.W.2d 560 (1992), *cert. denied*, 514 U.S. 1018 (1995); *Miller v. State*, 68 Ark. App. 332, 6 S.W.3d 812 (1999); *Pettigrew v. State*, 64 Ark. App. 339, 984 S.W.2d 72 (1998). When a defendant challenges the sufficiency of the evidence, we consider only the evidence that supports the verdict. *Stipes v. State*, 315 Ark. 719, 870 S.W.2d 388 (1994);*Moore v. State*, 315 Ark. 131, 864 S.W.2d 863 (1993). We also view the evidence in the light most favorable to the State. *Bailey v. State*, 334 Ark. 43, 972 S.W.2d 239 (1998); *Dixon v. State*, 310 Ark. 460, 839 S.W.2d 173 (1992). The test is whether there is substantial evidence to support the verdict. *Miller v. State*, *supra*; *Jameson v. State*, 333 Ark. 128, 970 S.W.2d 785 (1998). Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or another. *Ward v. State*, 64 Ark. App. 120, 981 S.W.2d 96 (1998); *Jenkins v. State*, 60 Ark. App. 122, 959 S.W.2d 427 (1998). Resolution of conflicts in testimony and assessment of the credibility of witnesses is for the fact-finder. *Mann v. State*, 291 Ark. 4, 722 S.W.2d 266 (1987); *Stone v. State*, 290 Ark. 204, 718 S.W.2d 102 (1986). Furthermore, the trial court is not required to believe any witness's testimony, especially that of the accused, since he is the person most interested in the outcome of the case. *Ross v. State*, 300 Ark. 369, 779 S.W.2d 161 (1989); *Huff v. State*, 289 Ark. 404, 711 S.W.2d 801 (1986).

Harris argues that the court erred in finding her guilty of the charge because there was neither evidence that she had attempted to fire the gun nor that she had made any threatening remarks to Tamea or Monica. In addition, she argues that when the police officer found the gun, it did not have a magazine. As authority for her argument, Harris cites *Wooten v. State*, 32 Ark. App. 198, 799 S.W.2d 560 (1990), for the proposition that a person does not commit aggravated assault merely by showing the use of a deadly weapon and the creation of apprehension on the part of the victim. In addition, she argues that because the gun was not loaded, she did not create any danger. She cites *Johnson v. State*, 132 Ark. 128, 200 S.W. 982 (1918), for the argument that the mere act of drawing a gun, if accompanied by threats evidencing an intention to use the gun on the person threatened constitutes an assault.

She argues that based upon *Wooten* and *Johnson, supra*, this court should reduce her conviction to assault in the third degree, pursuant to Ark. Code Ann. § 5-13-207 (Repl. 1997).

Arkansas Code Annotated section 5-13-204(a) (Repl. 1997) states:

> A person commits 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.

There is sufficient evidence to uphold Harris's conviction. In *Holloway v. State*, 18 Ark. App. 136, 711 S.W.2d 484 (1986), the appellant was convicted of aggravated assault after he approached two women in a car, asked them for a ride and, when they refused, he pointed a gun in the window of the car. He appealed his conviction, arguing that State failed to prove that the gun he used was loaded. The court wrote:

> In the first place, there was no direct evidence that the gun used in the assault was loaded. The statute defining aggravated assault requires that the accused engage in conduct "that creates a substantial danger of death or serious physical injury to another person." The commentary to the statute states that it is unique to the Arkansas Criminal Code. It is not based upon the use of a deadly weapon or the creation of fear, but requires the creation of substantial danger. However, we think the jury could have found, under the evidence in this case, that an aggravated assault was committed even though there was no direct evidence that the gun was loaded. In a recent case, the Supreme Court of the United States said:
>
>> In addition, the display of a gun instills fear in the average citizen; as a consequence, it creates an immediate danger that a violent response will ensue. Finally, a gun can cause harm when used as a bludgeon.

Holloway v. State, 18 Ark. App. 136, 140, 711 S.W.2d 484, 486 (1986), *overruled on other grounds, Doby v. State*, 290 Ark. 408, 720 S.W.2d 694 (1986), (*citing McLaughlin v. United States*, 106 S. Ct. 1677 (1986)). Furthermore, the court held in *Ball v. State*, 192 Ark. 858, 859, 95 S.W.2d 632, 633 (1936), that "If one present[s] a loaded pistol at another, threatening to shoot him, and being sufficiently near for the shot to take effect, it is an assault. Under such circumstances, the pistol is presumed to have been loaded, and if it

were not, this must be shown in the defense," (quoting from *Keefe v. State,* 19 Ark. 190 (1857)).

In the case at bar, Harris, after a previous argument with Tamea, pointed a gun at Tamea and Monica. As in *Holloway v. State, supra,* Harris did not verbally threaten the girls, but, as this court has noted, the fact that a gun was pointed at someone is enough to create a substantial danger of death or serious physical injury to another person.

Revocation of Probation

Appellant's brief also contained an argument that an appeal of Harris's probation revocation lacked merit. This portion of the brief referred to everything in the record that might arguably support an appeal, together with a list of objections made by Harris and ruled on by the court, a record of all motions and requests made by Harris and denied by the court, and a statement of the reasons why counsel considers there to be nothing in the record that will support the appeal.

The State concurred that Harris's counsel had complied with Rule 4-3(j) and that the appeal has no merit. However, the State also noted that Harris apparently was not informed of her right to file a pro se statement of points on appeal as required by Ark. Sup. Ct. R. 4-3(j)(2) when a no-merit brief is filed, but implies that such notification is not necessary where counsel is not seeking leave to withdraw as appellant's counsel. Defense counsel has not sought leave to withdraw as Harris's counsel because she argues in her brief that there is a meritorious defense to Harris's conviction on the aggravated-assault charge. Therefore, defense counsel agrees with the State that she is not required to inform Harris of her right to file a pro se statement of points on appeal since she is not requesting to be relieved as counsel. Harris's counsel maintains that although the directed-verdict motion challenged the sufficiency of the evidence to support Harris's conviction on the felony charge of aggravated assault, she did not specifically argue that the evidence was insufficient to establish that Harris had committed a misdemeanor. Since a misdemeanor conviction is all that is required to justify the court's revocation of Harris's probation, defense counsel has filed a "no-merit" brief with respect to the revocation of Harris's probation.

Although our supreme court has held that "[I]n order to file a 'no-merit' brief, the petitioner's attorney must file a motion for permission to withdraw as counsel ... ," *Blue v. State,* 287 Ark. 345, 698 S.W.2d 302 (1985), we think it is not inconsistent with *Blue* to require that when, as in the case at bar, two cases are considered simultaneously by the trial court, one of which results in an appeal that defense counsel considers to be meritorious, and one of which results in an appeal that defense counsel considers to be without merit, the purpose and spirit of Rule 4-3(j) is best served by requiring that appellant be notified of her right to file points on appeal with respect to the "no-merit" case, notwithstanding that defense counsel has not moved to withdraw from representation of the appellant in both cases. Consequently, we directed the clerk of this court to furnish Harris with a copy of the brief and to provide notification to Harris of her right to file a written statement of points in accordance with Rule 4-3(j)(2). A copy of the brief and the required notification was provided to appellant on November 14, 2000, and Harris has not filed a statement of points on appeal.

To revoke probation, the burden is on the State to prove the violation of a condition of probation by a preponderance of the evidence. *Wade v. State,* 64 Ark. App. 108, 983 S.W.2d 147 (1998). On appellate review, the trial court's findings will be upheld unless they are clearly against a preponderance of the evidence. *Id.* Because, as noted above, there is sufficient evidence to affirm Harris's aggravated-assault charge, there is sufficient evidence to find that she violated the terms of her probation.

In addition to the court finding sufficient evidence to revoke Harris's probation, there were other adverse rulings during the trial and the probation-revocation proceedings.

In cross-examining Monica Utsey about the incident, Harris's attorney inquired whether Harris's friend was "attacked and beat[en] down to the ground" by Tamea's sister. The State objected, and Harris's attorney rephrased the question. We have a long-established rule that absent a showing of prejudice, this court will not reverse. *Hall v. State,* 306 Ark. 329, 812 S.W.2d 688 (1991). Because the State rephrased the question and Harris neither objected to the rephrasing of the question nor the answer, we cannot determine that she was prejudiced by the court's ruling.

There were several hearsay objections during the proceedings. Before addressing these objections, we note that certain

rules of evidence, including the hearsay rule, are not applicable in revocation proceedings as they would be in a trial. *Miner v. State*, 342 Ark. 283, 28 S.W.3d 280 (2000). Therefore, even if the court had violated a rule of evidence, it would not necessarily warrant a meritorious appeal. However, even if the rules of evidence applied in Harris's revocation proceedings, the court did not err in its rulings that were adverse to Harris. Arkansas Rule of Evidence 801 defines hearsay as: a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

One objection occurred when Harris's attorney asked Utsey why she and her sister left the beauty salon and went outside the day of the incident. Utsey stated that she did so because someone had told her that Harris was outside. Harris objected, stating that Utsey's answer was hearsay. The court overruled the objection, stating that the evidence was not admitted for the truth of the matter asserted, that Harris was outside, but rather to show why Utsey went outside. We agree.

Another hearsay objection occurred when the State asked Utsey what she had earlier begun to testify to regarding Tamea's boyfriend, and Harris objected, contending that the answer called for hearsay. The State did not restate the question, and Utsey did not answer it. Thus, no prejudice occurred, barring any complaint by Harris on appeal. *Hall v. State, supra.*

The final hearsay objection occurred when the police officer began to testify that he seized the gun based upon the description given to him by Monica and Tamea. Harris objected, contending that the officer's testimony constituted hearsay. The court overruled her motion, stating that the question posed did not call for hearsay, rather it was meant to elicit information to explain why the officer seized the gun. We agree that the testimony was not offered for the truth of the matter asserted, and therefore, does not constitute hearsay.

Also during Utsey's testimony, after she was asked twice why she went outside the beauty salon, Harris objected, stating that the question had been asked and answered. However, the State argued there was information that had not been conveyed, and the court overruled Harris's objection. At that point, Utsey stated that she went outside not only because Harris was outside, as she had previously stated, but also that she did not want to fight with Harris

inside the beauty shop because the shop was crowded. Thus, the State was seeking to offer testimony not yet presented; therefore, the court was correct in its ruling.

The last adverse ruling occurred when the State sought to introduce the gun retrieved into evidence. The supreme court has held that if every link in the chain of custody of the gun was not connected, the purpose in establishing a chain of custody is to prevent the introduction of evidence that has been tampered with or is not authentic. *Crisco v. State*, 328 Ark. 388, 943 S.W.2d 582, *supp. op. on reh'g*, 945 S.W.2d 383 (1997). The trial court need only be satisfied that the evidence presented is genuine and that there is a reasonable probability that the evidence has not been tampered with. *Bowen v. State*, 322 Ark. 483, 911 S.W.2d 555 (1995), *cert. denied*, 517 U.S. 1226 (1996).

Harris objected to the introduction of the gun, stating that a proper foundation had not been laid. The court sustained the objections. However, after the officer, through whose testimony the State sought to introduce the gun, testified that he had seen another officer write down the serial number of the gun, log the gun in the property room, that he retrieved the gun from the property room under that same number and brought it to court, the court allowed the gun into evidence. Because that constitutes a sufficient chain of custody, we cannot say that the court erred in allowing it into evidence.

There were no other rulings adverse to the appellant. Therefore, from our review of the record and briefs presented, we find there has been full compliance with the requirements of Rule 4-3(j) of the Rules of the Arkansas Supreme Court and the Court of Appeals and that this appeal is without merit.

Affirmed.

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

Tracy Donell SIMMONS *v.* STATE of Arkansas

CA CR 99-1468 34 S.W.3d 768

Court of Appeals of Arkansas
Divisions IV, I, and II
Opinion delivered December 20, 2000
[Petition for rehearing denied January 24, 2001.*]

Boyd & Buie, by *M. Christina Boyd* and *Rufus T. Buie, III*, for appellant.

Mark Pryor, Att'y Gen., by: *David R. Raupp*, Sr. Ass't Att'y Gen., for appellee.

SAM BIRD, Judge. Tracy Donnell Simmons brings this appeal from the Arkansas County Circuit Court's denial of his motion to suppress controlled substances found on his person and in his car. He contends that the trial court erred in refusing to

* HART, BAKER, and ROAF, JJ., would grant.

grant his motion to suppress evidence because the search of his person and car were without probable cause and a valid warrant and, thus, a violation of his Fourth Amendment right to be free from unreasonable searches and seizures. Following the court's denial of his motion to suppress, Simmons entered a plea of guilty to a charge of possession of marijuana with intent to deliver and was sentenced to a term of sixty months in the Arkansas Department of Correction. In entering his guilty plea, Simmons apparently attempted to preserve his right to appeal from the trial court's order denying his motion to suppress evidence pursuant to the provisions of Ark. R. Crim. P. 24.3. However, because we cannot find that Simmons has complied with the requirements of that rule, we dismiss the appeal because we lack jurisdiction to hear it.

The abstract submitted by Simmons reveals that after the court denied Simmons's motion to suppress, the prosecuting attorney, on May 25, 1999, made a written "Sentence Recommendation" stating that "[i]n accordance with the Plea Agreement between the Prosecuting Attorney and the defendant's attorney, the defendant agrees to plead guilty to the charges now pending against him in this case" and that upon the entry of such plea, the State would recommend to the court a sentence of sixty months confinement in the Arkansas Department of Correction. Other recommendations by the prosecuting attorney were that the "charges nol prossed in CR-98-168 will not be refiled as long defendant obeys all laws."

On May 27, 1999, the court held a sentencing hearing, at which Simmons pled guilty to possession of marijuana with intent to deliver. At that hearing, the following exchange took place between the court, Simmons, and defense counsel:

THE COURT:	Let's see, you are Tracy Donnell Simmons?
SIMMONS:	Yes.
THE COURT:	And, Mr. Simmons, you know you are charged with possession of marijuana with intent to deliver, which is a "C" felony, and carries a range of punishment of four to ten years?
SIMMONS:	Yes, sir.
THE COURT:	And you are entitled to a jury trial?
SIMMONS:	Right.
THE COURT:	I believe we were set for one this morning?

DEFENSE ATTORNEY:	Yes, your honor.
THE COURT:	It's my understanding, Mr. Simmons, that you want to give up your right to a jury trial and change your plea to guilty?
SIMMONS:	Yes, sir.
THE COURT:	In exchange for a plea of guilty, the State has agreed to recommend a sentence of sixty months in the Department of Correction.
SIMMONS:	Yes, sir.
THE COURT:	And that CR-980168 will be, or it already has been nolle prossed?
DEFENSE ATTORNEY:	It was nolle prossed. It will not be refiled.
THE COURT:	It will not be re-filed as part of the — as long as you are — stay out of trouble. And you have gone over the guilty plea statement with Ms. Boyd?
SIMMONS:	Excuse me?
THE COURT:	You have gone over this statement, this guilty plea statement, with Ms. Boyd?
SIMMONS:	Yes, sir.
THE COURT:	Do you understand it?
SIMMONS:	Yes, sir.
THE COURT:	Do you have any questions at all about it?
SIMMONS:	No, sir.
THE COURT:	Is this your signature?
SIMMONS:	Yes, sir.
THE COURT:	And other than this sixty months, has anybody promised you anything, or threatened you with anything in order to get you to change your plea?
SIMMONS:	No, sir.
THE COURT:	And are you guilty?
SIMMONS:	Yes, sir.

. . .

THE COURT:	All right, thank you Mr. Simmons.

DEFENSE ATTORNEY:	Your honor, we have additional I spoke with Mr. Dittrich on, and that was a plea. We had also discussed that he is reserving his right to appeal the denial of the Motion to Suppress Pursuant to Rule 28 (*sic*).
THE COURT:	This is a conditional plea?
MS. BOYD:	Yes, Your Honor.
THE COURT:	All right.

The "Guilty Plea Statement" referred to by the trial court consists of two pages, and was signed by Simmons and his attorney on May 27, 1999. The statement sets forth various rights that are waived upon the entry of a guilty plea, including a waiver of "[t]he right to appeal from the verdict and judgment, challenging all issues of fact and law," and, "The right to challenge the legality of my arrest, and the admissibility and consideration of evidence which may be presented against me."

Attached to the "Guilty Plea Statement" and labeled as page 3 is the May 25, 1999, "Sentence Recommendation," signed by the prosecuting attorney, Robert Dittrich. At the bottom of the page constituting the prosecuting attorney's sentence recommendation, is a handwritten statement of unknown origin[1] stating: "Conditional plea-re suppression — No objection to boot camp. No further charges to be filed. May appeal suppression pursuant to Rule 28 [sic] of Arkansas Rules of Criminal Procedure."

The court's "Judgment and Commitment Order" appears to have been dated and signed by the judge on May 28, 1999, filed with the clerk on June 2, 1999, and Simmons filed his notice of appeal on July 1, 1999. On July 2, 1999, the court entered an order finding that Simmons had entered a conditional plea of guilty, reserving the right to appeal from the court's denial of his motion to suppress.

After Simmons filed his appeal, the State moved to dismiss it, stating that Simmons had failed to preserve it because he had not complied with the strict requirements of Ark. R. Crim. P. 24.3(b). This court denied the State's motion. Thereafter, the State sought

[1] The handwritten statement at the bottom of the sentence recommendation is in two different handwritings, both of which are obviously different from the handwriting of the person who filled in the handwritten portions of the sentence recommendation.

review of our denial of its motion in the Arkansas Supreme Court, but that court declined to consider the State's request for review, holding that "From the pleadings, it appears that there is a dispute as to whether appellee perfected a conditional plea of guilty in order to preserve his right to appeal. The court of appeals' decision to deny the motion to dismiss will permit that court to review that question as it considers the merits of the appeal." *See Simmons v. State*, 341 Ark. 251, 15 S.W.3d 344 (2000).

In the jurisdictional statement of its brief, the State again asserts that Simmons has failed to strictly comply with the requirements of Ark. R. Crim. P. 24.3. First, the State argues that because Simmons's abstract does not detail the pleadings upon which he claims that a written reservation of the right to appeal was made, but refers only to the circuit court's post-plea order and to the plea hearing, this court should dismiss the appeal for abstracting deficiencies. In the alternative, the State also argues that the transcript does not contain an adequate written reservation as required by the rule. It argues that Simmons's signature on the guilty-plea statement, which acknowledges his waiver of his right to appeal, is in direct conflict with the handwritten note at the bottom of the sentence recommendation that refers to his reservation of his right to appeal.

We agree with the State that Simmons has failed to comply with the requirements of Ark. R. Crim. P. 24.3 and that his appeal must be dismissed for lack of jurisdiction.

Arkansas Rule of Criminal Procedure 24.3(b) states:

> With the approval of the court and the consent of the prosecuting attorney, a defendant may enter a conditional plea of guilty or nolo contendre [contendere], reserving in writing the right, on appeal from the judgment, to review of an adverse determination of a pretrial motion to suppress evidence. If the defendant prevails on appeal, he shall be allowed to withdraw his plea.

The supreme court has interpreted Ark. R. Crim. P. 24.3(b) to require strict compliance with the writing requirement in order for the appellate court to obtain jurisdiction. *Green v. State*, 334 Ark. 484, 978 S.W.2d 300 (1998). Absent compliance with the express terms of Rule 24.3(b), this court acquires no jurisdiction to hear an appeal, even when there has been an attempt at trial to

enter a conditional plea. *Ray v. State*, 328 Ark. 176, 941 S.W.2d 427 (1997).

We hold that Simmons has failed to strictly comply with the requirements of Rule 24.3 in two respects. First, there is no indication that the prosecuting attorney has consented to the conditional plea, as required by Ark. R. Crim. P. 24.3. Except for the extraneous handwriting of unknown origin that appears beneath the prosecuting attorney's signature at the bottom of his sentence recommendation, there is nothing in the sentence recommendation to indicate that a conditional plea was a part of that recommendation. Clearly, the trial judge, who had a copy of the sentence recommendation and guilty plea statement before at the time of sentencing, was not aware that Simmons's plea was conditional until he was so apprised by defense counsel after Simmons had entered his plea, giving rise to the strong probability that the handwriting of unknown origin at the bottom of the sentence recommendation was not placed there until during or after the sentencing hearing. There is no indication that the prosecuting attorney was in attendance at the sentencing hearing. In fact, the exchange between the court and counsel during the sentencing hearing, quoted at length above, clearly implies that the prosecuting attorney was not there.

The second problem with Simmons's attempted conditional plea is that his "Guilty Plea Statement" explicitly contradicts the notion that his plea is conditional and that he reserved the right to challenge the court's disposition of his motion to suppress. *See Green v. State, supra.* As already noted, the guilty plea statement provides expressly that he waives the right to challenge on appeal the admissibility and consideration of evidence which may be presented against him, and the right to appeal from the judgment entered against him. The waiver of these rights is directly contradictory to the purported reservation of the right to challenge the trial court's denial of a motion to suppress evidence.

The dissent suggests that our decision to dismiss Simmons's appeal is based on the fact that "... Simmons's attorney and the prosecutor used a preprinted form, not specifically designed for memorializing a defendant's conditional plea, and entered handwritten notations to indicate that the plea was conditional." The dissent's characterization is inaccurate for three reasons. First, there is nothing in the record to indicate that the prosecuting attorney

participated *at all* in the use of *any form* that was intended to memorialize Simmons's plea as a conditional one under Rule 24.3. Second, the form that *was* used contains language that directly conflicts with Simmons's contention that his plea was conditional. And third, the handwritten notations that were added at the bottom of the "Guilty Plea Statement" in an attempt to make Simmons's plea appear to be conditional were not only missing from the form when it was presented to the trial court at the time the guilty plea was entered, but the handwritten notations bear no resemblance to the handwriting of the person who filled out the "Sentence Recommendation" that the prosecuting attorney signed two days before Simmons entered his guilty plea, giving rise to a strong inference that the notations were placed on the form without the knowledge or consent of the prosecuting attorney.

Appeal dismissed.

ROBBINS, C.J., and JENNINGS, KOONCE, GRIFFEN, CRABTREE, and MEADS, JJ., agree.

ROAF and HART, JJ., dissent.

ANDREE LAYTON ROAF, Judge, dissenting. I would reach the merits of this appeal and reverse and remand because the trial court erred in refusing to suppress the marijuana found in this illegal search. The majority has dismissed this appeal because they believe that Tracy Simmons has failed to strictly comply with the rule governing conditional guilty pleas, Ark. R. Crim. P. 24.3.[1] They impose this draconian penalty simply because Simmons's attorney and the prosecutor used a preprinted form, not specifically designed for memorializing a defendant's conditional plea, and entered hand-written notations to indicate that the plea was conditional. The majority also suggests that the prosecutor may not have known about or agreed to the conditional plea until after the fact. Be that as it may, Simmons's abstract, although sketchy on this point, does reflect that a conditional plea was timely entered, and

[1] This court has already denied the State's motion to dismiss this appeal, on March 15, 2000, months prior to submission of the case. Rather than seek rehearing of our decision, the State attempted to have the supreme court review our denial of its motion, however the supreme court refused to do so. *See Simmons v. State*, 341 Ark. 251, 15 S.W.3d 344 (2000). In this instance our denial apparently does not bar the panel from addressing this jurisdictional issue on submission of the case, without regard to whether the State had unsuccessfully pursued an earlier motion to dismiss

the record bears this out. We should address the merits of this case[2].

At Simmons's suppression hearing, Stuttgart police officer Joe Griffin testified that on the evening in question he observed Simmons sitting alone in a vehicle that was parked on the wrong side of the street outside the Sugartown Lounge. Simmons was talking to a pedestrian, who quickly left and entered the Lounge as Griffin approached. On prompting by the State, Griffin stated that he was "aware" of Simmons.[3] According to Griffin, after the individual ran off, Simmons drove from the scene "in a very fast manner," pulling out into oncoming traffic, not stopping at a stop sign, "driving very reckless and very fast." Griffin claimed that at the time, he knew that Simmons was driving on a suspended Texas driver's license and that he had previously issued Simmons a citation for it. According to Griffin, he turned on his blue lights and siren, but Simmons refused to pull over. Simmons again went through a stop sign and then stopped at the Corner Inn Caf and attempted to go inside. Griffin stopped Simmons and brought him back to his vehicle.

According to Griffin, at that time, he had not yet placed Simmons under arrest, but proceeded to run his license, "to make sure it was, uh, still suspended." When Griffin received verification that the license was still suspended, he placed Simmons under arrest, according to the "policy" of the Stuttgart Police Department. Before taking him back to the patrol car, Griffin patted down Simmons and discovered several small bags of "suspected marijuana" in the pocket of Simmons's blue jeans. When he performed

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[2] We are required to put form over substance when determining whether there has been compliance with Rule 24.3(b). In *Tabor v. State*, 326 Ark. 51, 930 S.W.2d 319 (1996), the supreme court unequivocally stated this court cannot breathe life into a flawed appeal from a conditional guilty plea where no jurisdiction is vested. In a subsequent case, however, the supreme court did not preclude Tabor's efforts to appeal the trial court's denial of his motion to suppress. In *Tabor v. State*, 333 Ark. 429, 432, 971 S.W.2d 227, 229 (1998), the court stated: "Following this court's dismissal of the appeal, Appellant successfully petitioned the trial court to withdraw his guilty pleas pursuant to A.R.Cr.P. Rule 26.1. He then entered a conditional plea to the same charges on January 10, 1997, this time reserving in writing his right to appeal the trial court's ruling on his motion to suppress in compliance with Rule 24.3."

[3]

Q. Did you — did you know Mr. Simmons?

A. [No verbal response.]

Q. Had you seen Mr. Simmons before?

A. Uh, yes, sir, I was aware of Mr. Simmons.

an "inventory search" for the wrecker service, Griffin found a larger bag of marijuana and several "blunts." At the detention facility, another small bag of marijuana was found in Simmons's t-shirt pocket.

On cross-examination, Griffin admitted that he had only seven months' experience at the time of the arrest, and was aware that he was operating in a high-drug-trafficking area. He also admitted that he did not see Simmons's face when he approached his vehicle, however, he was "absolutely sure" who it was because Simmons "is a large gentleman, with a large profile," and he was "aware" of Simmons's vehicle. However, it was brought out that despite the confidence he expressed in his trial testimony, Officer Griffin's report stated that when he approached Simmons's vehicle, he knew it to be occupied by an "unknown black male." When asked about discrepancies between his hearing testimony and his report, Griffin admitted that some of what was in the report was incorrect, but "not all of it." Griffin admitted that he did not record in his report the fact that Simmons's license was revoked or that Simmons was under arrest when he performed the pat-down search. Griffin also insisted that even though his report stated that he noticed a bulge in Simmons's hip pocket when Simmons was reaching for his license in his back pocket and subsequently performed a *Terry* frisk, Simmons was under arrest before he searched him. Griffin admitted that Simmons was very cooperative in surrendering his license and was not combative at any time and that he noticed nothing that would make him believe that Simmons was armed. He also admitted that during his pat-down of the bulge, he felt it to be "soft in nature," and admitted that a weapon would not be soft.

The trial judge denied Simmons's suppression motion, stating:

> I will deny the Motion to Suppress. This *Dickerson* case is distinguishable. It says that it was discovered only after squeezing, sliding, and otherwise manipulating the contents of the pocket and it was a pocket that the officer already knew did not contain a weapon. It does not sound like it would fit here. Thank y'all.

Simmons argues that Officer Griffin lacked reasonable suspicion to stop his vehicle. He contends that as Officer Griffin approached, he did not have reasonable suspicion of criminal activity, as required by Rule 3.1 of the Arkansas Rules of Criminal Procedure. He challenges Griffin's trial testimony about recognizing

Simmons, both because the officer never saw Simmons's face and because Officer Griffin's report stated that he was an "unknown black male." He further argues that Officer Griffin's report does not mention any of the traffic offenses that Griffin testified about at trial. Citing *Camp v. State*, 26 Ark. App. 299, 764 S.W.2d 463 (1989), Simmons argues that a random stop of a driver violates the Fourth Amendment. This argument has merit.

When this court reviews a trial court's denial of a motion to suppress, it makes an independent determination based on the totality of the circumstances, but will only reverse if the trial court's decision was clearly against the preponderance of the evidence. *Hill v. State*, 64 Ark. App. 31, 977 S.W.2d 234 (1998). Rule 3.1 of the Arkansas Rules of Criminal Procedure states:

> A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer acting under this rule may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint, or arrested and charged with an offense.

A "reasonable suspicion" is defined as "a suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion." Ark. R. Crim. P. 2.1.

First, while Officer Griffin may well not have had reasonable suspicion when he first approached Simmons's vehicle, if the officer's trial testimony is to be believed, reasonable suspicion accrued when he recognized Simmons as a person whom he had recently cited for driving on a suspended driver's license and when Simmons committed the various traffic offenses that he allegedly committed when he left the area. Of course it is *possible* that when

Simmons saw Officer Griffin approach in a marked police car that had not yet activated its blue lights or siren, his technique for avoiding arrest was to drive away recklessly at a high rate of speed, sail through two stop signs, and attempt to go into a night club. However, if these traffic offenses were committed, Officer Griffin had reasonable suspicion to make the stop and arrest. A law-enforcement officer may arrest a person without a warrant if the officer has reasonable cause to believe that the person has committed any violation of the law in the officer's presence. Ark. R. Crim. P. 4.1(a)(iii). The question therefore is simply whether Officer Griffin's credibility is assailable on appeal.

It is so well settled as to be axiomatic that the credibility of the witness in this instance was for the trial court to weigh and assess. *See, e.g., State v. McFadden*, 327 Ark. 16, 938 S.W.2d 797 (1997). However, in *Findley v. State*, 300 Ark. 265, 778 S.W.2d 624 (1989), the supreme court stated: "while we concede the trial judge is better able to assess credibility, we review the proceedings below independently of the trial court and base our conclusions on the totality of the circumstances."

In this regard, Officer Griffin's report stated that the subject he approached was "an unknown black male," not someone he had cited for driving with a suspended license shortly before the encounter. The report also stated that he did a pat-down search prior to formal arrest, which conflicts with his hearing testimony. Moreover, the scope of the search as described by Officer Griffin, i.e., a pat-down of Simmons's outer clothing is consistent with a *Terry* frisk, not a full search incident to arrest. The fact that more marijuana was found when Simmons was searched at the detention center further corroborates the cursory nature of the pat-down search. In this instance, the officer's testimony in court was so diametrically opposed in every material part to two written reports prepared immediately following Simmons's arrest as to lead to the inescapable conclusion that the trial testimony lacked credibility.

Simmons's remaining arguments hinge on whether he was under arrest when Griffin patted him down. Simmons argues that under *Terry v. Ohio*, 392 U.S. 1 (1968), and its progeny, Officer Griffin was not justified in performing a *Terry* frisk because the officer did not articulate any basis for his belief that he was presently armed and dangerous. He contends that Griffin's trial testimony was

that Simmons was cooperative and not combative, and he did not observe anything that he believed to be a weapon. Simmons acknowledges that Officer Griffin testified that he noticed a "bulge" in Simmons's pants pocket and that the bulge prompted the search; however, Griffin did not indicate that he suspected that the bulge was a weapon. Simmons also argues that even if Officer Griffin was justified in his performance of a *Terry* frisk, the scope of the search exceeded the permissible limits set forth in *Terry* and *Minnesota v. Dickerson,* 508 U.S. 366 (1993), because the purpose of the frisk is not to discover evidence, but to allow the officer to pursue the investigation without fear of violence. Simmons acknowledges that the "plain-feel" doctrine allows an officer to seize items that he readily identifies as contraband; however, Officer Griffin admitted that he was not able to identify the "bulge" as contraband until he removed it from the pocket.

The standard for justifying a *Terry* frisk is whether a reasonably prudent man in the circumstances would believe that his safety or the safety of others was in danger. *Kearse v. State,* 65 Ark. App. 144, 986 S.W.2d 423 (1999). However, Simmons either was, or was not, under arrest when Officer Griffin conducted the pat-down search, depending on which version of the events is correct. Officer Griffin's trial testimony was that Simmons was already under arrest when he performed the pat-down. The rules in *Terry* simply do not apply to a search incident to arrest. *See, e.g., Blockman v. State,* 69 Ark. App. 192, 11 S.W.3d 562 (2000). By the same token, if the seizure of the marijuana was conducted pursuant to a search incident to arrest, *Terry* and the plain-feel doctrine are also not implicated. However, Officer Griffin's in-court testimony differs markedly from his written reports on this important factual matter, and Simmons's arguments consequently have merit. This case should be reversed.

I respectfully dissent.

HART, J., joins only with regard to whether the issue was preserved for appellate review.

Alvin STIGER *v.* STATE LINE TIRE SERVICE and Federated Insurance Company

CA 99-1426 35 S.W.3d 335

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

[redacted]

Paul E. Reeves, for appellant.

Dunn, Nutter, Morgan & Shaw, by: *Nelson V. Shaw*, for appellee.

SAM BIRD, Judge. Alvin Stiger appeals a decision of the Workers' Compensation Commission in which he was awarded temporary total disability benefits, but denied additional

benefits under Ark. Code Ann. § 11-9-505 (Repl. 1996), which provides for additional benefits to an employee when an employer willfully discriminates against the employee because he has filed a claim for workers' compensation benefits. On appeal, Stiger argues that the Commission unconstitutionally denied him his right of due process by substituting its own credibility determination for that of the administrative law judge, by improperly speculating on the *motives* of a witness rather than the *testimony* of the witness, and by overturning the initial findings of the administrative law judge regarding credibility.

At the hearing, Stiger testified that he began working for appellee State Line Tire Service in February 1998. He broke his hand on April 6 when he was removing the springs on an R.V. motor home. He sought medical attention and was eventually referred to Dr. Jeffrey T. DeHaan, an orthopedic surgeon, who put his hand in a cast and prohibited him from returning to work. Stiger's hand remained in a cast for five weeks, and he then received physical therapy for two weeks. The parties stipulated that temporary total disability was paid from May 15, 1998, to June 25, 1998. Stiger was released to return to work on June 29th. After his doctor's appointment on June 23, he returned to State Line and gave Ronella Fett, the company's bookkeeper, a document stating that he had been released to work. He testified that he informed Ronella Fett that he would be returning to work on Monday, June 29th.

Stiger testified that during the time he was off work, Wendell Fett, the owner and general manager of State Line, called him and asked him to return to work. Stiger told Fett that he was in physical therapy and would return when he was finished. Stiger said that Fett replied that the best therapy he could seek would be pulling on wrenches.

Stiger testified that shortly before 7 a.m. on the morning of June 29, he called Wendell Fett to make sure that he could go to work, and that Wendell Fett told him that he was not needed. He admitted on cross-examination that he never received any documentation that he had been fired, nor did he file for unemployment benefits.

Betty Reel, a supervisor for State Line, testified that Stiger had worked under her supervision, and that, after Stiger injured his hand, his job responsibilities were performed by J.T., a mechanic for State Line. She stated that as a supervisor she had the authority to terminate employees, but that she neither terminated Stiger nor recommended that he be terminated. She said that while Stiger was off work recuperating from his hand injury she spoke with him on a couple of occasions and inquired how his hand was healing and when he would be able to return to work. She also testified that Wendell Fett, the owner and general manager of State Line, usually informed her when he terminated someone so she could begin looking for a replacement. She stated that at no time did Wendell Fett inform her that he had fired Stiger.

Ronella Fett testified that she handled Stiger's workers' compensation claim and that nothing in the business records showed that Stiger had been fired; they indicated that his status was "pending. ... I have him as an employee that was on workman's comp and he failed to return to work after he was released." Further, she stated that when someone is fired, or quits, that status is reflected on the computer payroll sheet. Stiger's payroll sheet at the time of the hearing did not reflect that he had been terminated; it was, instead, left blank. She said, "I have not been told that he has been terminated or let go or anything. Until I hear that, I don't put anything in there." She also stated that before an employee is terminated, "they will come into the office with Wendell [Fett] and their immediate supervisor and they will discuss the problem and then they will be fired." She maintained that no one had been hired to replace Stiger before he was released to return to work, and that if someone had been, she would have known about it as she would have entered that into the payroll records. She said that State Line did not hire a replacement for Stiger until September 1998.

Wendell Fett testified that when Stiger injured his hand at work, the injury was accepted as being job related. He stated that during the time that Stiger was unable to work they needed his help, so someone from State Line kept in contact with the nurse who was managing Stiger's case so they would know when he would be able to return to work. Wendell Fett stated that he has two supervisors who have the authority to hire and fire employees, but neither he nor either supervisor told Stiger not to return to work.

Wendell Fett also testified that Stiger called him around the end of June to tell him that he had been released by the doctor and wanted to know if he could come back to work. Wendell Fett said that he told Stiger to come in the following day and they would discuss it, meaning that he needed to find out just how much Stiger was capable of working, but Stiger never showed up. Wendell Fett said that Stiger was a good employee and he had no reason to fire him. On cross-examination, Wendell Fett admitted that when an employee is hurt on the job, the company's insurance premiums increase. Wendell Fett also admitted contacting Stiger when Stiger was still in physical therapy and asking him if he would consider returning to work on a part-time basis, performing light-duty work. He did not deny that he told Stiger the best therapy he could get would be by pulling on some wrenches. He also stated that when Stiger was released to return to work, he had not replaced him as the brakeman. He stated, "If I have a man that is capable of doing brake work, it costs me money not to have him there." He testified that he was not in the office the day Stiger brought the note in releasing him to return to work, and that another employee had told Stiger to call him.

The administrative law judge found that Stiger was entitled to temporary total disability benefits from April 14 to June 29, 1998; that State Line had willfully terminated Stiger for filing his workers' compensation claim, which violated Ark. Code Ann. § 11-9-107 (Repl. 1996), and he fined State Line $7,000 and directed that it be paid into the Second Injury Trust Fund. However, the law judge did not award Stiger any additional benefits under Ark. Code Ann. § 11-9-505, which requires the offending employer to pay the employee the difference between the benefits he received and the average weekly wages he lost during the period the employer did not allow him to return to work. State Line appealed to the full Commission arguing that substantial evidence did not support the law judge's finding that it had willfully terminated Stiger. Stiger filed a cross-appeal contending that the law judge had misinterpreted Ark. Code Ann. § 11-9-505.

In an opinion dated September 16, 1999, the Commission affirmed the law judge's finding that Stiger was entitled to temporary total disability benefits from the date of his injury until June 29, 1998. However, the Commission denied benefits under § 11-9-505, holding that Stiger was not willfully terminated from State

Line, that State Line had not violated Ark. Code Ann. § 11-9-107, and that Stiger had voluntarily left State Line. Stiger then filed a notice of appeal and a motion for reconsideration on the ground that the Commission denied his right to due process by overruling the specific findings of the law judge and substituting its own findings on the credibility of the witnesses when it did not personally observe the witnesses. The Commission denied Stiger's motion for reconsideration in an order dated November 16, 1999, and he brings this appeal from both the September 16, 1999 order and the November 16, 1999 order.

In a lengthy opinion denying Stiger's motion for reconsideration, the Commission conceded that its credibility determination was at odds with the credibility determination of the law judge. However, it stated that its statutorily mandated de novo review of the record, including its consideration of credibility issues, does not result in any denial of due process even though the Commission makes credibility findings without personally hearing and observing the live testimony of the witnesses.

Stiger's first argument on appeal is the same argument that he made in his motion for reconsideration: that the Commission erred and violated his right to due process by substituting its own credibility determinations for that of the law judge. Stiger contends that even though "the commission has the ability and duty to conduct a de novo review, it is improper for the commission to pass on intangible issues not in the record and determine credibility when such a determination has already been made by the Administrative Law Judge." He contends that since the law judge had found that Wendell Fett was not credible, the Commission cannot make the finding that Fett *was* credible. Stiger also contends that the Commission denied him the right of due process when it improperly speculated on the *motives* of a testifying witness instead of reviewing only the *testimony transcribed.*

Arkansas Code Annotated section 11-9-207 (Repl. 1996) grants to the Commission the power and the duty to determine all claims for compensation. In addition, the statute gives the Commission the authority to appoint administrative law judges to conduct hearings and investigations and make whatever orders, decisions, and determinations are required by a rule or order of the Commission. *See* Ark. Code Ann. § 11-9-205 (Repl. 1996). Arkansas Code

Annotated section 11-9-704 (Repl. 1996) establishes the procedures for filing a claim for compensation with the Commission, and subsection (b)(1) allows the Commission to make or cause to be made such investigations as it considers necessary in respect to the claim, and to order a hearing on the claim. After a decision has been made with respect to the claim, § 11-9-704(b)(6) (Repl. 1996) provides that, upon proper application, the decision of the administrative law judge shall be reviewed by the full Commission. Section 11-9-704(b)(6)(A) provides that, "the full commission shall review the evidence or, if deemed advisable, hear the parties, their representatives, and witnesses, and shall make awards, together with its rulings of law, ..." Section (7) permits the Commission to remand any case to a single member of the Commission or to an administrative law judge for the purpose of taking additional evidence. That evidence shall then be delivered to the Commission and shall be taken into consideration before rendering any decision. Arkansas Code Annotated section 11-9-704(c)(2) requires that when deciding any issue, the law judges and the Commission shall determine, on the basis of the record as a whole, whether the party having the burden of proof on the issue has established it by a preponderance of the evidence. In determining whether a party has met its burden of proof on an issue, administrative law judges and the Commission shall weigh the evidence impartially and without giving the benefit of the doubt to any party. *See* Ark. Code Ann. § 11-9-704(c)(4). The legislature has also established a procedure for a review of awards by the Commission and by the court of appeals. *See* Ark. Code Ann. § 11-9-711 (Repl. 1996).

■■ Statutes are presumed to be constitutional and the burden of proving otherwise is placed upon the party challenging the legislation. *Golden v. Westark Community College*, 333 Ark. 41, 969 S.W.2d 154 (1998). All doubts are resolved in favor of a statute's constitutionality. *Id.* The U.S. Supreme Court has identified three factors to be considered when determining what type of due process is warranted. These factors, which were adopted by our court in *Quinn v. Webb Wheel Prods.*, 59 Ark. App. 272, 957 S.W.2d 187 (1997), are: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional procedural safeguards, and (3) the government's inter-

est, including the fiscal and administrative burdens that additional or substituted procedures would entail. *Id.*

The Arkansas Supreme Court and the Court of Appeals have followed long-established rules when reviewing decisions of the Commission. We will affirm the findings of the Commission if they are supported by substantial evidence. *See Scarbrough v. Cherokee Enters.*, 306 Ark. 641, 816 S.W.2d 876 (1991). Substantial evidence is that evidence a reasonable person might accept as adequate to support a conclusion. *Douglas Tobacco Prods. Co. v. Gerald*, 68 Ark. App. 304, 8 S.W.3d 39 (1999). A decision of the Commission will not be reversed unless it is determined that fair-minded persons could not have reached the same conclusions if presented with the same facts. *Id.*

Neither the Workers' Compensation Act nor Arkansas case law contains a requirement that the Commission personally hear the testimony of any witness, and nothing in the statutes precludes the Commission from accepting or rejecting any finding made by the law judge, including findings pertaining to the credibility of witnesses. At issue in this case is whether a claimant's right of due process is violated by a law that allows the Commission to make credibility determinations, regardless of whether the Commission has personally taken live testimony, thus rejecting the credibility assessments made by the law judge, who was the one who actually observed the witnesses.

The standard of review by which the appellate court considers appeals from the Workers' Compensation Commission was challenged and upheld by the Arkansas Supreme Court. *Scarbrough v. Cherokee Enters., supra.* In that case, Scarbrough urged the court to adopt a new standard of review in workers' compensation cases in which the appellate court would require a finding that the Commission's decision is supported not just by "substantial evidence," but by "substantial evidence on the record as a whole." If the court should adopt that standard of review, the appellate court would be allowed to consider the entire record compiled by the administrative law judge rather than reviewing only the findings of the Commission. The court rejected that argument and concluded:

> [W]e feel the constraint of stare decisis, especially when dealing with legislative intent in the interpretation of a statute. Section 11-9-711(b)(4) requires the Court to affirm the Commission's deci-

> sion if it is supported by substantial evidence. This Court and the Court of Appeals have interpreted substantial evidence consistently over the past fifty years. The General Assembly is presumed to have known of our decisions. ... If we were to reinterpret the term "substantial evidence" at this point to include "on the record as a whole," we would be overruling precedent without a compelling reason appearing in this case.

306 Ark. at 644-45, 816 S.W.2d at 876.

Although the court said that an argument that a claimant's right to due process might be persuasive, it "save[d] for another day the question of whether a constitutional violation may result when the Workers' Compensation Commission and a reviewing court are permitted to ignore the findings of an Administrative Law Judge, the only adjudicator to see and hear the witnesses." 306 Ark. at 642, 816 S.W.2d at 876.

This issue was addressed in 1989 in a masterful concurring opinion of the late Judge James Cooper to a denial of a petition for rehearing, *see Johnson v. Hux*, 28 Ark. App. 187, 772 S.W.2d 362 (1989). Judge Cooper thought the issue of the appellant's denial of due process in that case was preserved for appeal. After reviewing the Arkansas procedure, the foreign case law cited by the appellant, and the opinion expressed in 3 A. Larson, *The Law of Workmen's Compensation*, he concluded:

> The procedure used by the Commission must be fundamentally fair and due process requires a hearing before one's rights are adjudged, *Duggan v. Potlatch Forests, Inc.*, 92 Idaho 262, 441 P.2d 172 (1968), and the hearing and review by the Commission must be conducted according to the prescribed statutory law and in a reasonable manner. *Pollard v. Krispy Waffle # 1*, 63 N.C.App. 354, 304 S.E.2d 762 (1983). Where a claimant is given appropriate notice and opportunity to be heard, it does not constitute a denial of due process for the Commission to make findings of credibility without the benefit of live testimony. *Id.; see also Eastham v. Whirlpool Corp.*, 524 N.E.2d 23 (Ind. App. 3rd Dist, 1988). In *Bowman Transportation v. Arkansas-Best Freight*, 419 U.S. 281, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974), the United States Supreme Court held that, in matters of credibility, an agency is not bound by the findings of its hearing examiners.
>
> In Arkansas, it is the Commission's duty to make findings of fact and to assess the credibility of witnesses. In exercising this

> duty, the Commission may hear the parties, their representatives and witnesses, Ark. Code Ann. § 11-9-704(b)(6) (1987), permit the introduction of additional evidence, Ark. Code Ann. § 11-9-705(c); study briefs in pending cases; Rules of the Commission, Rule 18; or hear oral arguments if requested by either the parties or the Commission; Rules of the Commission, Rule 17. Clearly the legislature and the Commission have provided statutes and Rules which provide a claimant with several opportunities to be heard without harming the purpose of speedy recovery. I believe that the procedure used in Arkansas does not violate due process.

This issue was also addressed, although not in a due-process context, in *Dedmon v. Dillard Dep't Stores, Inc.*, 3 Ark. App. 108, 623 S.W.2d 207 (1981), where we said:

> First, it is said that since the pivotal issue here is credibility and only the administrative law judge saw and observed the witnesses, it is his findings of fact which we should test by the substantial evidence rule. This is not the first time this argument has been made. In *Ark. Coal Co. v. Steele*, 237 Ark. 727, 375 S.W.2d 673 (1964), the court rejected the argument relying upon two previous decisions and two sections of the Workers' Compensation Act. One section of the Act relied upon is now Ark. Stat. Ann. 81-1325 (b) (Supp. 1981) [now Ark. Code Ann. 11-9-711(b)(3)(A) and (B) (Repl. 1996)] and provides:
>
> > Upon appeal to the Court of Appeals no additional evidence shall be heard and, in the absence of fraud, the findings of fact made by the Commission, within its power, shall be conclusive and binding upon said Court and shall be given the same force and effect as in cases heretofore decided by the Supreme Court of Arkansas[.]
>
> The other statutory section relied upon is now Ark. Stat. Ann. 81-1323 (b) (Repl. 1976) [now Ark. Code Ann. § 11-9-704(b)(6)(A) (Repl. 1996)], the pertinent part of which provides that on appeal to the full commission it "shall review the evidence or, if deemed advisable, hear the parties, their representatives, and witnesses, and shall make awards, . . ."
>
> In relying upon the above sections the court in *Ark. Coal Co. v. Steele*, pointed out that it had said in *Moss v. El Dorado Drilling Co.*, 237 Ark. 80, 371 S.W.2d 528 (1963) that "it is the duty of the Commission to make a finding according to a preponderance of the evidence and not whether there is any substantial evidence to support the finding of the referee." And the court in *Ark. Coal Co.*

> *v. Steele* also pointed out that in *Potlatch Forests, Inc. v. Smith*, 237 Ark. 468, 374 S.W.2d 166 (1964), it had rejected the contention that where no additional testimony is presented to the commission the referee is the sole and exclusive judge of the evidence and credibility of the witnesses because he was in position to see and consider the manner and demeanor of each witness who testified.

Although the sections relied upon by *Dedmon* have been rewritten, their meaning remains the same. Arkansas Statutes Annotated section 81-1325 is now Ark. Code Ann. § 11-9-711(b)(3)(A) & (B), and it provides:

> Upon appeal to the court, no additional evidence shall be heard.
>
> In the absence of fraud, the findings of fact made by the commission, within its power, shall be conclusive and binding upon the court and shall be given the same force and effect as in cases heretofore decided by the Supreme Court, except subject to review as in subdivision (b)(4) of this section.

Arkansas Statutes Annotated section 81-1323(b) is now Ark. Code Ann. § 11-9-704(b)(6)(A) and it states:

> If an application for review is filed in the office of the commission within thirty (30) days from the date of the receipt of the award, the full commission shall review the evidence, or, if deemed advisable, hear the parties, their representatives, and witnesses, and shall make awards, together with its rulings of law, and filed same in like manner as specified in the foregoing.

The United States Supreme Court in *United States v. Raddatz*, 447 U.S. 667 (1980), has addressed the issue of whether a district court's de novo determination of credibility findings violates due-process rights even though a magistrate, not the district court, heard and observed the live testimony. Raddatz contended that the review procedures established by a provision of the Federal Magistrates Act, 28 U.S.C. § 636(b)(1), permitting the district court judge to make a de novo determination of contested credibility assessments without personally hearing the live testimony, violated his due-process rights under the Fifth Amendment to the United States Constitution. In other words, he contended that "[t]he one who decides must hear." At one point the Court analogized the district court's authority to review the magistrate's decision to that of an adminis-

trative agency reviewing the decision of a hearing officer. Thus, we are justified in applying the principles stated in *Raddatz* to the argument in this case. In holding that Raddatz's constitutional right of due process had not been violated by the district court not personally observing the witnesses, the Court stated:

> We conclude that the due process rights claimed here are adequately protected by § 636(b)(1). While the district court judge alone acts as the ultimate decision maker, the statute grants the judge the broad discretion to accept, reject, or modify the magistrate's proposed findings. That broad discretion includes hearing the witnesses live to resolve conflicting credibility claims. Finally, we conclude that the statutory scheme includes sufficient procedures to alert the district court whether to exercise its discretion to conduct a hearing and view the witnesses itself.

447 U.S. at 680-81.

■ The Supreme Court cautioned in *Raddatz*, "To be sure, courts must always be sensitive to the problems of making credibility determinations on the cold record." 447 U.S. at 679. By allowing the Commission to "review the evidence or, if deemed advisable, hear the parties, their representatives, and witnesses," Ark. Code Ann. § 11-9-704(b)(6)(A) (Repl. 1996) adequately protects a claimant's due-process rights. When the Commission reviews a cold record, demeanor is merely one factor to be considered in credibility determinations. Numerous other factors must be included in the Commission's analysis of a case and reaching its decision, including the plausibility of the witness's testimony, the consistency of the witness's testimony with the other evidence and testimony, the interest of the witness in the outcome of the case, and the witness's bias, prejudice, or motives. The flexibility permitted the Commission adequately protects the claimant's right of due process of law.

■ Finally, Stiger argues that substantial evidence does not support the Commission's decision that the employer did not violate Ark. Code Ann. § 11-9-107. When the Workers' Compensation Commission denies coverage of a claim finding that the claimant has failed to meet his burden of proof, the substantial-evidence standard of review requires this court to affirm the Commission's decision if its opinion displays a substantial basis for the denial of relief. *Cooper v. Hiland Diary*, 69 Ark. App. 200, 11 S.W.3d 5

(2000). When determining the sufficiency of the evidence to sustain the findings of the Commission, we review the evidence in the light most favorable to the Commission's findings and affirm if they are supported by substantial evidence. *Id.* Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* The question before this court is not whether the evidence would have supported findings contrary to the ones made by the Commission; there may be substantial evidence to support the Commission's decision even though we might have reached a different conclusion if we sat as the trier of fact or heard the case de novo. *Id.*

Arkansas Code Annotated section 11-9-107 provides:

> (a)(1) Any employer who willfully discriminates in regard to the hiring or tenure of work or any term or condition of work of any individual on account of the individual's claim for benefits under this chapter, or who in any manner obstructs or impedes the filing of claims for benefits under this chapter, shall be subject to a fine of up to ten thousand dollars ($10,000) as determined by the Workers' Compensation Commission.
>
> ....
>
> (b)(1) In addition, the prevailing party shall be entitled to recover costs and a reasonable attorney's fee payable from the fine.

Stiger argues that this case turns upon his credibility and that of Fett because the conversation between them on the morning that Stiger called Fett has been given two different interpretations. Stiger testified that Fett told him that he was no longer needed and that he had been replaced, whereas Fett stated that he told Stiger to come in the next morning to discuss his work schedule. However, there was also testimony that Stiger had not been terminated. Ronella Fett testified that she was the bookkeeper in charge of payroll and she did not have any documentation that Stiger had been fired. His case file simply reflected that he had been injured, paid workers' compensation benefits, and had not returned to work when he was released by his doctor. Stiger's supervisor testified that she had the authority to hire and fire personnel, and that, to her knowledge, Stiger had not been fired. She said if Stiger had been terminated, Fett would have told her to begin looking for a replacement. There was also testimony that Stiger's position was not filled

until September 1998. That constitutes substantial evidence to affirm the Commission's finding that State Line did not willfully terminate Stiger.

Affirmed.

JENNINGS, NEAL, and MEADS, JJ., agree.

ROBBINS, C.J., and GRIFFEN, J., concur.

JOHN B. ROBBINS, Chief Judge, concurring. The process afforded workers' compensation claimants in Arkansas appears to ensure due process under the Arkansas and United States Constitutions. While I agree with the result reached in this case, I write separately to discuss the standard of review articulated in appeals from the Workers' Compensation Commission. A conclusion on witness credibility is a finding of fact. *See* 8 Arthur Larson, *Larson's Workers' Compensation Law*, § 130.05[1][b] (2000). Thus, there must be substantial evidence to support this factual finding like any other finding of fact. Some Arkansas cases, however, fail to accurately articulate, or at least completely articulate, the proper standard of review and instead summarily state that the appellate courts are bound by any credibility determination made by the Commission, leaving no room for reversal of the Commission's credibility determinations.

To the contrary, Arkansas Code Annotated section 11-9-711 (Repl. 1996), which governs our standard of review of the Commission's decisions, expressly authorizes this court to reverse findings of fact that are not supported by substantial evidence. This statute states in pertinent part:

> (b) Award or Order of Commission—Appeal.
> (1) A compensation order or award of the commission shall become final unless a party to the dispute shall, within thirty (30) days from receipt by him of the order or award, file notice of appeal to the Arkansas Court of Appeals, which is designated as the forum for judicial review of those orders and awards.
>
> . . . .
>
> (2) Appeals from the commission to the court shall be allowed as in other civil actions and shall take precedence over all other civil cases appealed to the court.

(3)(A) Upon appeal to the court, no additional evidence shall be heard.

(B) In the absence of fraud, the *findings of fact* made by the commission, within its powers, *shall be conclusive and binding* upon the court and shall be given the same force and effect as in cases heretofore decided by the Supreme Court, *except subject to review as in subdivision (b)(4) of this section.*

(4) The court shall review only questions of law and may modify, reverse, remand for rehearing, or set aside the order or award, upon any of the following grounds, and no other:

(A) That the commission acted without or in excess of its powers;

(B) That the order was procured by fraud;

(C) That the facts found by the commission do not support the order or award; or

(D) That the order or award was not supported by substantial evidence of record.

(Emphasis added.) Subsections (b)(4)(C) and (b)(4)(D) clearly mandate that in reviewing the questions of law, if the facts do not support the decision, or if there is not substantial evidence to support the decision, then we must reverse. These are simply two avenues with a common destination — that is, to perform a review that has some meaning by reviewing the facts upon which a decision is made.

The standard of review is reflected in case law as well. We will affirm the Commission if its findings are supported by substantial evidence. *Burlington Indus. v. Pickett*, 336 Ark. 515, 988 S.W.2d 3 (1999). Substantial evidence is that evidence a reasonable person might accept as adequate to support a conclusion. *Williams v. Prostaff Temporaries*, 336 Ark. 510, 988 S.W.2d 1 (1999). A decision of the Commission will not be reversed unless it is determined that fair-minded persons could not have reached the same conclusions if presented with the same facts. *White v. Georgia-Pacific Corp.*, 339 Ark. 474, 6 S.W.3d 98 (1999).

Moreover, both the supreme court and our court have said that the determination of the credibility of the witnesses and the weight to be given their testimonies are matters exclusively within the province of the Commission. *See, e.g., Ester v. Nat'l Home Centers, Inc.*, 335 Ark. 356, 981 S.W.2d 91 (1998); *Continental Express v. Harris*, 61 Ark. App. 198, 965 S.W.2d 811 (1998). However, this does not mean that the Commission's decisions are totally insulated from judicial review. *Jordan v. J. C. Penney Co.*, 57 Ark.

App. 174, 944 S.W.2d 547 (1997). Nor does it mean that the Commission may arbitrarily disregard the testimony of any witness. *Boyd v. Dana Corp.*, 62 Ark. App. 78, 966 S.W.2d 946 (1998). Thus, given that a credibility determination is a finding of fact that must be supported by substantial evidence, there appears to be an inherent contradiction in the authorities governing review of the Commission's credibility determinations. This contradiction is readily resolved by simply clarifying that the substantial evidence standard of review, as authorized in section 11-9-711(b)(4)(C) and (D), includes credibility determinations made by the Commission.

If we are prepared to stand behind the constitutionality of the Commission's ability to discern credibility on a "cold record," then we should be equally prepared to apply the substantial evidence standard of review to the Commission's finding of fact on credibility of witnesses, instead of simply declaring that we are "bound" by it, as we did in *Daniels v. Affiliated Foods Southwest*, 70 Ark. App. 319, 17 S.W.3d 817 (2000), *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998), *Express Human Resources III v. Terry*, 61 Ark. App. 258, 968 S.W.2d 630 (1998), and *Linthicum v. Mar-Bax Shirt Co.*, 23 Ark. App. 26, 741 S.W.2d 275 (1987), to name a few. What is missing from these cases is a statement of the statutory authorization providing for appellate review of the facts supporting the Commission's decision, which we recognized in *Boyd v. Dana Corp.*, *supra*. What is also missing from these cases is the statement that we are bound by the Commission's credibility determinations only where they are supported by substantial evidence.

Other factors, such as plausibility of the witness's testimony, the consistency of the testimony with the other evidence, the interest of the witness in the outcome of the case, and the bias, prejudice, or motives of the witness, must play a part in the Commission's analysis. *See Universal Camera Corp. v. Nat'l Labor Relations Bd.*, 340 U.S. 474 (1951). Observations of demeanor or appearance are often denoted as "testimonial inferences," whereas those inferences drawn from the substance of the testimony or the evidence are often called "derivative inferences." *See Kroger Co. v. Morris*, 415 S.E.2d 879 (Va. 1992). Our supreme court has recognized that the Commission may rely on the administrative law judge's observations and comments concerning the claimant's demeanor, conduct, appearance, or reactions at the hearing. *See Wade v. Mr. C. Cavenaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989). The appellate courts can likewise take into consideration those same factors and infer-

ences, when reflected in the record, in determining whether substantial evidence supports the Commission's finding on credibility.

We should restate this standard of review to more accurately describe the review we are required to give, and to ensure a common-sense, fair, and even-handed application of it.

In this case, the Commission's decision displays a substantial basis for the conclusion on credibility, and the majority opinion reflects consideration of the relevant factors bearing on that factual conclusion, and therefore I concur. I am authorized to state that Judge GRIFFEN joins in this concurrence.

Jerry TRIGG *v.* DIRECTOR

E 00-34 34 S.W.3d 783

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered December 20, 2000

Appellant, pro se.

Alan Pruitt, for appellee.

OLLY NEAL, Judge. Jerry Trigg (appellant) appeals the Board of Review decision that determined appellant liable to repay $1,155.00 under Ark. Code Ann. § 11-10-532 (b)(1997). The Board of Review made this determination based upon a finding that appellant received benefits to which he was not entitled, and that it would not violate equity and good conscience to require repayment. We affirm.

The relevant facts are as follows. The appellant received $1,155 of unemployment insurance benefits for the period of May 1, 1999, through June 19, 1999. He was later disqualified for that period by a decision of the Appeal Tribunal. This decision was not appealed and became final. At the time of the hearing on the repayment question appellant was unemployed. His wife was earning $30 per week. Their monthly expenses for necessities were approximately $1,000. They owned their own home. They also owned a 1993 Buick Regal and a 1992 Nissan pickup, both paid-in-full. They had about $14,000 in savings.

On appeal, the findings of fact of the Board of Review are conclusive if they are supported by substantial evidence. *Hunt v. Director*, 57 Ark. App. 152, 942 S.W.2d 873 (1997). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* Our review is limited to a determination of whether the Board could reasonably reach its decision upon the evidence before it. *Id.* 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).

The relevant code section, Ark. Code Ann. § 11-10-532 (b)(1)(1997), is as follows:

> (A) If the director finds that any person has received any amount as benefits under this chapter to which he was not entitled by reasons other than fraud, willful misrepresentation, or willful non-disclosure of facts, the person shall be liable to repay the amount of the fund.
>
> (B) In lieu of requiring the repayment, the director may recover the amount by deduction from fifty percent (50%) of any future benefits payable to the person under this chapter unless the director finds that the overpayment was received without fault on the part of the recipient and that *its recovery would be against equity and good conscience* (Emphasis added.)

In *Pritchett v. Director of Labor*, 5 Ark. App. 194, 634 S.W.2d 397 (1982), we said:

> If appellant has been paid benefits to which she was not entitled, due process requires that her liability to repay the amount so received must be determined after she has been afforded the opportunity of a hearing after proper notice, upon issues set out in [applicable Arkansas Code Section] (citations omitted).

Here appellant does not claim that he has not been afforded a hearing on the issues set out in Ark. Code Ann. § 11-10-532 (b)(1), he simply disagrees with the findings resulting from that hearing.

The appellant does not contest the determination of overpayment but contends that he should not be required to repay the amount received because of that portion of the above provision that allows repayment to be excused if the director finds that the overpayment was received "without fault on the part of the recipient and its recovery would be against equity and good conscience."

The appeals referee held, and the Board agreed, that the claimant was paid benefits to which he was not entitled because of a disqualification to receive benefits for a certain period. The reason for the disqualification is not specifically stated in either the referee's or the board's decision. "The sole issue on appeal is whether recovery of the $1,155 by the Employment Security Division would be against equity and good conscience."

The Arkansas Supreme Court has held that a recipient may be required to repay unemployment benefits erroneously received even if the claimant is not at fault. *Whitford v. Daniels*, 263 Ark. 222, 563 S.W.2d 469 (1978). The *Whitford* case indicated that one factor in determining equity and good conscience is the financial condition of the claimant. The claimant in *Whitford* was required to make repayment based on his testimony that he had a $4,000 savings account.

On appellate review of the application of the law to the facts in this case we affirm the Board of Review.

BIRD, KOONCE, and STROUD, JJ., agree.

ROBBINS, C.J., and GRIFFEN, J., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. I respectfully dissent from the decision to affirm the Board of Review's decision upholding recovery of $1,155 in unemployment benefits overpaid to this appellant through no fault of his own in the face of clear, undisputed, and compelling proof that recovery would be against equity and good conscience. Appellant was overpaid $1,155 in unemployment benefits covering the period from 1 May through 19 June 1999 through no fault of his own. He is totally unemployed and disabled. His wife earns $30 weekly. Their household expenses for necessities exceed $1000 each month. They own their home and have savings of approximately $14,000.

Arkansas Code Annotated Section 11-10-532(b)(1)(A) (Supp. 1999) provides that if the director of the Arkansas Employment

Security Department finds that a person has received benefits to which he was not entitled by reasons other than fraud, willful misrepresentation, or willful nondisclosure of facts, the person shall be liable to repay the amount. Sub-section (B) states that on and after July 1, 1999, the director, in lieu of requiring repayment, may recover the amount by deduction of any future benefits payable to the person "unless the director finds that the overpayment was received without fault on the part of the recipient *and that its recovery would be against equity and good conscience.*" (Emphasis added) Any person held liable for repayment is subject to having any state income tax refund to which he may be entitled intercepted. *See* Ark. Code. Ann. § 11-10-532(c) (Supp. 1999).

Appellant needs every penny of his savings for subsistence. If he somehow is entitled to a state income tax refund, he needs every penny to help his household survive. He should not be forced to mortgage his house, sell his car, or take what amounts to more than a month of his living expenses out of his savings when the government plainly has the power to excuse repayment due to his desperate situation.

I would take a very different view if the facts were not so clear and compelling. We are not dealing with someone who is working or likely to return to work so as to be able to repay the overpayment or obtain additional earnings from which the overpayment may be recovered. The fact that appellant was not entitled to the overpayment is beside the point. The statute contemplates this very scenario whereby a person overpaid unemployment benefits without fault on his part may be excused by the director on a finding that recovery of the overpayment would be against equity and good conscience.

I see nothing equitable or conscionable about extracting overpaid benefits from a disabled unemployed worker whose household expenses exceed $1,000 each month and who is trying to survive on $30 weekly that his wife earns. Therefore, I would reverse the Board of Review.

Chief Judge ROBBINS has authorized me to state that he joins this opinion.

Broderick Labrent JONES *v.* STATE of Arkansas

CA CR 99-1119 35 S.W.3d 345

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

Beverly C. Claunch, for appellant.

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

MARGARET MEADS, Judge. Appellant, Broderick Jones, was convicted by an Izard County jury of attempted capital murder, battery in the second degree, and two counts of terroristic threatening in the first degree. He was sentenced to thirty years on the attempted capital murder charge, six years on the battery charge, and six years on each of the terroristic threatening charges, with the sentences to run consecutively. On appeal, he contends that there is insufficient evidence to support all of the convictions, and that the trial court erred in allowing evidence of a prior offense to be admitted into evidence.

At the time of the offenses, appellant was incarcerated in the North Central Unit of the Arkansas Department of Correction in Calico Rock, Arkansas, serving time for murder in the second degree. Former inmate Ronnie Howard testified that on October 29, 1997, appellant came into one of the prison classrooms and said he was going to "show those guys" he was not weak. Appellant then kicked a table leg from a computer table, grabbed the table leg, proceeded to the office, and struck Officer William Waters twice on the head. John Hill, an instructor/administrator who was in the office at the time, testified that Waters screamed he was paralyzed and could not see, and it appeared to him that Waters was badly

injured. Appellant continued into the room with the table leg over his shoulder, ready to swing it like "a baseball bat or a chopping axe." Holding an office chair with the legs pointed in front of him, Hill advanced toward appellant; appellant then retreated into the hall where he was confronted by Joe Grabowski, another instructor at the prison. Grabowski testified that appellant was holding the table leg high in the air "like a Louisville Slugger" and appeared to be agitated and angry. Grabowski ordered appellant to put the table leg down, and appellant told him, "Stay away from me, bitch." Hill also heard appellant say, "I'll kill you, bitch." As appellant retreated down the hallway toward a door leading outside, Officers Goggans and Lively came through the door. According to Grabowski, appellant swung the table leg and hit Goggans in the side of the face "like somebody that was trying to smash a watermelon, bust a pumpkin wide open." Appellant was eventually subdued with pepper spray.

■ Appellant contends there is insufficient evidence to support any of his convictions. We disagree. 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 beyond suspicion and conjecture. *Id.* In determining whether the evidence is substantial to support a conviction, this 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).

Appellant first argues that there is insufficient evidence to support his conviction for attempted capital murder. A person commits capital murder if, with the premeditated and deliberated purpose of causing the death of any law enforcement officer, jailer, or prison official, when such person is acting in the line of duty, he causes the death of any person. Ark. Code Ann. § 5-10-101(a)(3) (Repl. 1997). A person attempts to commit an offense if he "purposely engages in conduct that constitutes a substantial step in a course of conduct intended to culminate in the commission of an offense whether or not the attendant circumstances are as he believes them to be." Ark. Code Ann. § 5-3-201(a)(2) (Repl. 1997).

■ In his brief, appellant argues that not only did the State fail to prove that he acted with the premeditated and deliberated pur-

pose necessary to be convicted of attempted capital murder, but also that there was no evidence Waters's injuries were life-threatening. The only one of these arguments preserved for appeal is that appellant did not have the necessary intent to be convicted of attempted capital murder, because that was the only argument made in appellant's motions for directed verdict at trial. Our law is well settled that we will not consider an argument raised for the first time on appeal and that a party is bound by the scope and nature of the arguments made at trial. *Pyle v. State*, 340 Ark. 53, 8 S.W.3d 491 (2000).

Appellant argues that his actions do not support the finding of premeditated and deliberated purpose because he acted impulsively and on the spur of the moment, and he struck Waters only twice. He contends that if it had been his intent to end Waters's life, he would have struck additional blows instead of retreating.

[redacted] A person's intent or state of mind at the time of an offense is seldom apparent. *Tarentino v. State*, 302 Ark. 55, 786 S.W.2d 584 (1990). One's intent or purpose, being a state of mind, can seldom be positively known to others, so it ordinarily cannot be shown by the facts and circumstances in evidence. *Kendrick v. State*, 37 Ark. App. 95, 823 S.W.2d 931 (1992). Since intent cannot ordinarily be proven by direct evidence, the jurors are allowed to draw upon their common knowledge and experience to infer intent from the circumstances. *Robinson v. State*, 293 Ark. 243, 737 S.W.2d 153 (1987). Because of the difficulty in ascertaining a person's intent, a presumption exists that a person intends the natural and probable consequences of his acts. *Tarentino*, *supra*. The intent to commit the offense may be inferred from the defendant's conduct and the surrounding circumstances. *Durham v. State*, 320 Ark. 689, 899 S.W.2d 470 (1995). Premeditation need not exist for a particular length of time; it may be formed in an instant. *Bangs v. State*, 338 Ark. 515, 998 S.W.2d 738 (1999).

[redacted] Here, there was evidence that Officer Waters served on a committee that disciplined appellant only two days before the incident and that appellant was unhappy with the outcome. The jury could infer that appellant formed his premeditated intent at that time, and the first time he was able to act upon that intent was two days later, when he grabbed the leg from the computer table and used it as a club, striking Waters in the head. Thus, there is suffi-

cient evidence from which a jury could conclude that appellant's attack was premeditated and deliberate.

Appellant also argues that there is insufficient evidence to support his conviction of second-degree battery on Officer Goggans. He contends the State failed to demonstrate that he acted knowingly and with the purpose of causing injury to Officer Goggans. A person commits the offense of battery in the second degree if he intentionally or knowingly without legal justification causes physical injury to one he knows to be an employee of a correctional facility while such person is acting in the line of duty. Ark. Code Ann. § 5-13-202(a)(4)(A) (Repl. 1997). A person acts "knowingly" with respect to his conduct or the attendant circumstances when he is aware that his conduct is of that nature or that such circumstances exist. Ark. Code Ann. § 5-2-202(2) (Repl. 1997).

Appellant's argument is without merit. Appellant armed himself with a table leg as he went down the hall. When he approached a doorway, Officers Goggans and Lively entered the door and confronted him. Appellant swung the table leg at Goggans, striking him in the face. Goggans testified that the blow was very painful, and it was so strong that he almost blacked out. He stated that the marks on his face from the blow lasted a day and that he had a knot on his jawbone that was still tender. Grabowski testified that appellant swung the table leg at Goggans like he was trying to smash a watermelon or pumpkin. Clearly, there is sufficient evidence to support the finding that appellant knowingly struck Goggans in the face and intended to cause injury.

Next, appellant contends that there is insufficient evidence to support the two convictions for first-degree terroristic threatening. These convictions pertained to John Hill and Joe Grabowski, both of whom were teachers at the prison school. A person commits terroristic threatening in the first degree if with the purpose of terrorizing another person, he threatens to cause physical injury or property damage to a teacher or other school employee acting in the line of duty. Ark. Code Ann. § 5-13-301(a)(1)(B) (Repl. 1997).

Appellant contends that the State failed to show that he acted with the purpose of terrorizing Hill and Grabowski. In support of this argument, he asserts that he never advanced on Hill or Grabowski, rather they advanced on him. We disagree. Hill and

Grabowski made no movement toward appellant until his attack on Officer Waters. Both men testified that after this attack, appellant continued to hold the table leg in a raised position. Appellant indeed struck Goggans when Goggans approached him. Hill heard appellant say, "I'll kill you bitch," and Grabowski heard him say, "Stay away from me, bitch." There is sufficient evidence from which the jury could infer that appellant had the purpose to terrorize Hill and Grabowski and that he threatened physical injury to both men.

Finally, appellant contends the trial court erred in allowing evidence of a prior conviction into evidence. At the time of these offenses, appellant was serving a prison term for second-degree murder for beating a man to death with a baseball bat. Appellant argued at trial that evidence of the prior conviction was not admissible under Rule 404(b) of the Arkansas Rules of Evidence because the purpose was to show his bad character. He further argued that even if the prior conviction was admissible under Rule 404(b), it was nevertheless inadmissible under Ark. R. Evid. 403 because any probative value would be substantially outweighed by the danger of unfair prejudice. The State contended the prior conviction was admissible to show motive. The trial court determined that the evidence was highly probative of the issue of appellant's intent, plan, motive, or absence of mistake or accident, and that the probative value outweighed any danger of unfair prejudice. After allowing evidence of appellant's second-degree murder conviction to be placed in evidence, the trial judge read a limiting instruction to the jury stating that evidence of other crimes could not be considered to prove appellant's character and that he acted in conformity therewith, but that the evidence was offered as evidence of motive, opportunity, intent, plan, or knowledge.

Evidence offered under Rule 404(b) must be independently relevant, thus 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. *Gaines v. State*, 340 Ark. 99, 8 S.W.3d 547 (2000). The admission or rejection of evidence under Rule 404(b) is committed to the sound discretion of the trial court, and we will not reverse absent a showing of manifest abuse. *Id.* We have long recognized that the list of exceptions to inadmissibility under Rule 404(b) is not an exclusive list but represents examples where such crimes, wrongs, or acts would be

relevant and admissible. *Regalado v. State*, 331 Ark. 326, 961 S.W.2d 729 (1998).

The trial judge did not abuse his discretion in admitting evidence of appellant's second-degree murder conviction. In the earlier case, appellant committed murder by striking a man on the head with a baseball bat; in the present case, appellant attempted to commit capital murder by using a table leg swung like a baseball bat to strike Waters in the head. This evidence provides independent relevance of the fact that appellant knew a club such as a baseball bat or table leg could cause death, and that he planned to use the same type of weapon to kill Waters as he did to kill his first victim. *See, e.g., McGehee v. State*, 338 Ark. 152, 992 S.W.2d 110 (1999) (finding that similarities between earlier beating of another person and killing of victim was sufficient for admission under Rule 404(b)).

The dissent contends, citing *Alford v. State*, 223 Ark. 330, 226 S.W.2d 804 (1954), a rape case, that appellant's prior bad act is not admissible. The portion of the opinion cited by the dissent concerns "guilty knowledge," which was certainly present in this case. The dissent asserts that it is "commonly known by any adult that a blow to the head can kill." This broad assertion does not withstand scrutiny. Not every blow to a person's head is deadly; otherwise, the sports of boxing and football would not exist. However, in this particular case, the appellant had specialized knowledge from previous experience that hitting a person over the head with an object similar in shape, size, and composition to a baseball bat could cause death. He knew this because he had previously caused death in such a manner using such an object. The dissent's attempt to distinguish the prior act is weak at best.

Appellant also contends that under Rule 403, the admission of his prior conviction substantially prejudiced the jury against him because he was assessed the maximum term of imprisonment, even though the victim's injury was only "a tear in his scalp [that] did not result in any permanent disability." 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. *McGehee v. State, supra.* Although the prior conviction may have been prejudicial to appellant, the probative value of that conviction is not substantially outweighed by the danger of unfair prejudice to appellant. The jury

already knew, from the circumstances surrounding the case, that appellant was in prison for some type of crime, and the evidence at trial was overwhelming that appellant committed the acts with which he was charged. Simply because appellant did not succeed in killing Waters does not lessen the severity of the crime. It is appellant's burden to demonstrate prejudice, and he has failed to show that his sentence was based upon anything other than the evidence presented on the charges for which he was tried.

Affirmed.

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

HART and ROAF, JJ., dissent.

ANDREE LAYTON ROAF, Judge, dissenting. I would reverse and remand for a new trial Jones's conviction for attempted capital murder because the trial court erred in allowing evidence of Jones's prior offense to be admitted during the guilt phase of his jury trial. His trial was rendered grossly unfair by the admission of this minimally relevant at best, but highly prejudicial evidence.

The facts underlying the conviction are largely not in dispute. Jones was serving time at Calico Rock for second-degree murder when he attacked members of the corrections staff with a table leg, resulting in four convictions, including one for attempted capital murder. The conduct underlying that charge involved Jones striking one of the corrections officers, William Waters, once in the head and once in the shoulder with the table leg. Despite the severity of the attack, the State apparently believes, and I agree, that the requisite culpable mental state to commit attempted capital murder was not readily apparent from the circumstances. The State therefore sought to prove this intent through the introduction of details of Jones's prior second-degree murder conviction, which involved his causing the death of an acquaintance by striking him in the head with a baseball bat. When the State sought to introduce this evidence, Jones preserved both Ark. R. Evid. 404(b) and 403 arguments for appeal.

It is axiomatic that evidence of prior misconduct is not admissible to show that the person on trial is a bad person and is therefore

more likely to have committed the act in question. The presumption of innocence does not allow for the proposition "he did it before, therefore he must have done it again," or in this case, *tried* to do it again.

Rule 404(b) states:

> 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.

Ark. R. Evid. 404(b). The test for establishing motive, intent, or plan as a Rule 404(b) exception is whether the evidence of the other act has independent relevance. *Haire v. State*, 340 Ark. 11, 8 S.W.3d 468 (2000). Evidence is indisputably relevant if it proves a material point and is not introduced solely to prove that the defendant is a bad person. *Id.* The decision to admit evidence under a Rule 404(b) exception is discretionary with the trial court. *Id.*

At first blush, the probative value of the prior murder conviction appears to be substantial. The table leg was similar in size and shape to a baseball bat, and in both cases, Jones aimed at the victims' head. However, the probative value of the prior offense cannot exist in a vacuum; it must relate to a specific element of the charged crime. In this case it can relate only to the intent element, since very different results and different crimes ensued in the two incidents. Otherwise, the prior conviction would clearly be characterized as an attempt to inform the jury of Jones's propensity to engage in the same kind of conduct.

The requisite intent element for the applicable capital murder offense is that the perpetrator act with premeditated and deliberated purpose to cause death. Ark. Code Ann. § 5-10-101(a)(3) (Repl. 1997) states in pertinent part:

> (a) A person commits capital murder if:
>
> . . .
>
> (3) With the premeditated and deliberated purpose of causing the death of any . . . jailer, prison official . . . when such person is acting in the line of duty, he causes the death of any person.

However, Jones's prior conviction was for second-degree murder. The intent element of second-degree murder requires that the perpetrator act knowingly in causing death under conditions manifesting extreme indifference to human life or purposely with regard to causing serious physical injury.

In pertinent part, Ark. Code Ann. § 5-10-103 (Repl. 1997) states:

> (a) A person commits murder in the second degree if:
>
> (1) He knowingly causes the death of another person under circumstances manifesting extreme indifference to the value of human life; or
>
> (2) With the purpose of causing serious physical injury to another person, he causes the death of any person.

Accordingly, the only logical inference that can be drawn regarding Jones's intent was that he was acting "knowingly" or "purposely" to cause serious physical injury. Knowingly is defined by Ark. Code Ann. § 5-2-202(2) (Repl. 1997) as: "A person acts knowingly with respect to his conduct or the attendant circumstances when he is aware that his conduct is of that nature or that such circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result." This is clearly insufficient to satisfy the culpable mental state of the applicable portion of our capital murder statute.

As far as the purposeful intent in our second-degree murder statute, it is also insufficient to satisfy the culpable mental state for the applicable portion of our capital murder statute. While it is true that the intent element for both capital murder and second-degree murder may be satisfied by purposeful conduct, defined by Ark. Code Ann. § 5-2-202(1) as: "A person acts purposely with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result," the object of the purposeful conduct is markedly different. As noted above, the purposeful conduct in capital murder is to cause the death of a prison official or jailer, whereas the purposeful conduct in second-degree murder is to cause "serious physical injury." In short, evidence of prior conduct where Jones acted knowingly or purposely with respect to causing serious physical injury cannot

constitute proof that similar conduct is an attempt to purposefully cause the death of a person. Where the evidence of a prior bad act is not clearly probative of a substantial element of the charged offense, it is error to admit it. *See State v. Robtoy*, 653 P.2d 284 (Wash. 1982).

With regard to relevance, at trial, the State argued that the prior conviction was probative primarily of Jones's "motive." On appeal, the State now contends that the prior conviction established that Jones "understood what he was doing and the potential consequences of his conduct," and was relevant due to the "similarity of the methods employed," and Jones's "first-hand knowledge" of the damage that could result from such conduct. The majority apparently agrees, at least in part, with the State's argument on appeal and opines that the evidence provided independent relevance that Jones "knew" a club could cause death and "planned" to use a similar weapon to kill Waters. The majority cites to *McGehee v. State, supra*, as authority for this proposition.

However, there is a big problem with holding that the prior conviction is admissible to show Jones's knowledge. First, the prior crimes and bad acts admitted in *McGehee* were found by the trial court to be part of the circumstances leading up to and explaining the crime for which McGehee was being tried. The supreme court agreed and stated that "our court has repeatedly held that all the circumstances surrounding a particular crime may be shown, even if the circumstances would constitute a separate criminal act or acts, when the criminal acts are intermingled and contemporaneous with one another." 338 Ark. at 169, 992 S.W.2d at 120. Clearly Jones's prior conviction cannot, by any stretch of the imagination, fall within this category of "knowledge," and *MeGehee* does not provide any authority whatsoever for its admission during his trial.

Secondly, the "knowledge" referred to in Rule 404(b) is not general facts and information, but rather "guilty knowledge." In *Alford v. State*, 223 Ark. 330, 266 S.W.2d 804 (1954), an opinion that has been cited more than fifty times for its discussion of prior bad acts evidence, Justice George Rose Smith stated:

> Perhaps the most frequent resort to evidence of recent similar offenses occurs in the cases involving guilty knowledge. In such cases good faith would be a defense to the charge; the vital issue is whether the defendant knew his conduct to be wrongful. For

> example, it is not a crime to pass a forged check in the belief that it is genuine, but the same conduct is criminal when done with knowledge that the instrument is bogus. Since it is highly improbable that an innocent man would repeatedly come into possession of forged checks, proof of recent similar offenses bears directly on the issue of guilty knowledge. In this category fall cases involving forgery, counterfeiting, false pretenses, knowledge that an establishment is a gambling house, and many other situations.

(Citations omitted.) Testimony concerning Jones's prior conviction clearly does not fall within this category of admissible prior bad act evidence. Moreover, it is commonly known by any adult that a blow to the head can kill, and therefore, Jones's prior conviction falls squarely within the class of prior acts that ought not be admissible in a fair trial; a prior rape is not admissible to show a defendant "knows" how to rape, and a prior burglary is not admissible to show that a defendant "knows" how to commit burglary. *See* Teresa S. Ozias, Comment, *Bad Acts in Oregon: OEC 404(3)*, 25 Willamette L. Rev. 829 (1989).

The evidence in this case also does not fall within the *"modus operandi"* exception. Prior crimes involving similar methods or *modus operandi* are admissible as an exception to Rule 404(b) only where the *identity* of the perpetrator is at issue and the method itself is unique. *See, e.g., Tarkington v. State*, 250 Ark. 972, 469 S.W.2d 93 (1971). As to Jones's "plan," to the extent he "planned" an attack, he surely carried it out; whether he intended a murder is the question. The prior conviction can again be said only to impermissibly communicate to the jury that "he did it before; therefore he must have intended to do it again," without having relevance to any element of the crime charged.

Furthermore, assuming, arguendo, that the evidence is relevant, and passes 404(b) muster, it can only be admissible if the evidence passes the balancing test in Ark. R. Evid. 403, which provides that relevant evidence may be excluded if the probative value is *substantially* outweighed by, among other things, the danger of unfair prejudice. The Advisory Committee Note to Rule 403 explains that "unfair prejudice" within the context of the rule means "an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." Obviously, evidence concerning Jones's conviction for a prior murder is extremely prejudicial, particularly where Jones has once again taken

up a similar weapon to commit a battery. I submit that the prejudice clearly outweighs whatever probative value the prior conviction may have had in this case. In sum, the only element of the crime that it could possibly pertain to is intent, and it should not even survive a careful 404(b) analysis if its purpose was to show "knowledge," similar method, or plan, as it clearly had no relevance regarding motive. Moreover, even if Jones's prior conviction had some probative value to prove motive, which I certainly do not concede, there was ample evidence of Jones's motive in the testimony about his anger at being disciplined and his desire to secure a transfer away from Calico Rock. The existence of this other evidence affords the probative value of the conviction substantially less weight, and therefore does not allow it to survive a 403(b) balancing. *See Golden v. State*, 10 Ark. App. 362, 664 S.W.2d 496 (1984).

The State's real message to the jury was "He did it before, so he tried to do it again." The jurors were not confused; they receive this kind of message loud and clear. Because this evidence should not have been admitted, no instruction could cure this prejudice. *See Alford v. State, supra.* As Justice George Rose Smith stated in *Alford*, "[T]he issue goes to the very heart of fairness and justice in criminal trials; we cannot conscientiously sustain a verdict that may have been influenced by such prejudicial testimony." I would reverse and remand for a new trial of the attempted capital murder charge.

HART, J., joins.

Karl Anthony GUYDON *v.* STATE of Arkansas

CA CR 99-1042 34 S.W.3d 804

Court of Appeals of Arkansas
Divisions I, II, and III
Opinion delivered December 20, 2000

James P. Clouette, for appellant.

Mark Pryor, Att'y Gen., by: *David R. Raupp*, Ass't Att'y Gen., for appellee.

ANDREE LAYTON ROAF, Judge. Karl Anthony Guydon was convicted by a jury of two counts of delivery of a controlled substance (crack cocaine), and was sentenced to twelve years on each count, to be served concurrently. Guydon's sole point on appeal is that the trial court erred in allowing the introduction of the controlled substances because there was a discrepancy in the weights, and the State failed to prove a proper chain of custody. We agree, and reverse and remand for new trial.

On June 4, 1998, Ron Messer, a Little Rock police officer working undercover, went to Guydon's residence and made two separate purchases of what was allegedly crack cocaine for $20 each. Messer testified that he turned the off-white, rock-like substance over to Investigator Scott Leger. Leger testified that when Messer gave the substances to him, he weighed them, placed them in sealed property envelopes, and initialed the envelopes and transported them to the crime lab in Little Rock. He further testified that State's Exhibit 1 weighed three-tenths of a gram and State's Exhibit 2 weighed two-tenths of a gram, that he did not transport the drugs to the crime lab until June 18, and that they were in a personal-property locker until that time. Kathy Shanks, a chemist with the Arkansas State Crime Lab, testified that she did the analysis on the two exhibits, which she described as two hard, off-white, rock-like substances. She identified her initials and laboratory case number and the date and time that she performed the analysis, and testified that Exhibit 1 weighed a total of 0.1828 grams, that Exhibit 2 weighed 0.1183 grams, and that both tested positive for cocaine base and benzocaine.

At that time the State moved to introduce the two exhibits, and Guydon's counsel requested permission to voir dire the witness. During voir dire, Shanks testified in pertinent part that: the exhibits were tested on October 26, 1998; identified two other workers who received the evidence and brought it to her; stated she did not know who placed it in the secured locker, if it was in a sealed condition, or if proper lab protocol was followed and stated only that it was sealed when she received it.

Guydon's counsel then objected to the admission of the exhibits based on the substantial difference in the testimony of Officer Leger and Ms. Shanks regarding the weight of the drugs, and the fact that at least two persons in the chain of custody were not there

to testify. In response the State contended that there was no evidence of tampering and that there had been substantial compliance with the chain of custody. The trial court overruled Guydon's objection and admitted the two exhibits into evidence.

We first address the State's contention that Guydon has failed to preserve this issue for appeal because he failed to make his chain-of-custody objection until the physical evidence was offered into evidence and after the crime lab chemist had testified that the substances were cocaine. Guydon objected immediately after the chemist's testimony revealed the weight discrepancy and the break in the chain of custody. Our Supreme Court has said that such an objection must be made at the time the evidence in question is offered. *See Pryor v. State,* 314 Ark. 212, 861 S.W.2d 544 (1993). Consequently, the issue is preserved and we must address the merits.

The purpose of the chain of custody is to prevent the introduction of evidence which is not authentic. *Gomez v. State,* 305 Ark. 496, 809 S.W.2d 809 (1991). To prove its authenticity, the State must demonstrate a reasonable probability that the evidence has not been altered in any significant manner. *Id.* It is not necessary that every possibility of tampering be eliminated; it is only necessary that the trial court, in its discretion, is satisfied that the evidence presented is genuine, and in reasonable probability, has not been tampered with. *Dixon v. State,* 310 Ark. 460, 839 S.W.2d 173 (1992). Any minor discrepancies are for the trial court to weigh and, absent some evidence of tampering, the trial court is accorded discretion, and its ruling in this regard will not be reversed on appeal absent an abuse of discretion. *Holbird v. State,* 301 Ark. 382, 784 S.W.2d 171 (1990).

Here, we cannot say that the difference between 0.3 and 0.1828 grams, or between 0.2 and 0.1183 grams is insignificant or minor, any more than a discrepancy between 30 and 18 grams or between 20 and 11 grams would be considered minor. Moreover, although small quantities of contraband are involved in this case, our criminal statutes pertaining to illegal contraband provide that such small amounts are a basis for imposing years of penitentiary time; surely a reasonably accurate weight determination cannot be said to be simply a "minor" matter.

We find this case analogous to *Crisco v. State*, 328 Ark. 388, 943 S.W.2d 582 (1997), in which the supreme court held that the trial court abused its discretion by receiving into evidence contraband that was not properly authenticated due to a marked difference in the description provided by an undercover officer and a crime lab chemist. The supreme court held that because there was a significant possibility that the evidence tested was not the same as that purchased by the officer, the State was required to do more to establish the authenticity than to simply trace the route of the envelope containing the substance. Although the discrepancy in *Crisco* involved color and texture, and this case involves only weights, we conclude that the underlying rationale expressed in *Crisco* holds true in this case. Here, there was a marked difference in the two weights testified to by the officer and the chemist, and no attempt made by the State to establish the authenticity of the drug tested other than by tracing the route of the envelope.

■ In sum, there are several factors, not simply the weight discrepancy standing alone, that combine to mandate reversal of this case. First, the supreme court has said that the proof of chain of custody for interchangeable items like drugs or blood needs to be more conclusive. *Id.*; *Lee v. State*, 326 Ark. 229, 931 S.W.2d 433 (1996). Second, the discrepancies in the weights involved in this case are significant enough to raise an inference of at least the possibility of tampering. Third, the discrepancy is unexplained by the State. Fourth, all persons who handled the evidence were not present to testify.

Surely, neither the trial court nor this court should attempt to play chemist, and fill in the missing explanation for the discrepancy in this case, any more than the supreme court did in *Crisco*. Of course, the State is not precluded by this holding from attempting to properly authenticate these exhibits on retrial of this case.

Reversed and remanded.

GRIFFEN, HART, JENNINGS, and NEAL, JJ., agree.

MEADS, CRABTREE, PITTMAN, and BIRD, JJ., dissent.

MARGARET MEADS, Judge, dissenting. I respectfully dissent from the decision reached by the majority in this case. Evidentiary matters regarding the admissibility of evidence are

left to the sound discretion of the trial court, and rulings in this regard will not be reversed absent an abuse of discretion. *Harris v. State*, 322 Ark. 167, 907 S.W.2d 729 (1995). Interchangeable items, such as blood or drugs, require a more conclusive chain of custody. *See Gardner v. State*, 296 Ark. 41, 754 S.W.2d 518 (1988). However, while the purpose of establishing a chain of custody is to prevent the introduction of evidence that is not authentic or that has been tampered with, it is not incumbent upon the State to exclude every possibility of tampering; the State must only prove to the trial court's satisfaction that in all reasonable probability the evidence has not been tampered with. *White v. State*, 330 Ark. 813, 958 S.W.2d 519 (1997).

The majority finds this case analogous to *Crisco v. State*, 328 Ark. 388, 943 S.W.2d 582 (1997); however, I believe *Crisco* is distinguishable. In *Crisco*, the undercover officer described the substance he seized as "an off-white powder substance," whereas the chemist described it as "a tan, rock-like substance." Because the drug was readily interchangeable, the court concluded there was a significant possibility that the evidence tested was not the evidence seized and held that the trial court abused its discretion by admitting the evidence. Here, the only discrepancy in testimony concerned the weight of the substance, which was negligible. The difference in testimony regarding the weight of Exhibit 1 was only .1172 gram, and the difference regarding Exhibit 2 was a mere .0817 gram. These discrepancies could be the result of more sophisticated scales in a crime lab, as opposed to scales used in a field test. Minor uncertainties in the proof of chain of custody are matters to be argued by counsel and weighed by the jury, but they do not render evidence inadmissible as a matter of law. *Gardner v. State, supra.*

While a greater discrepancy may require a different conclusion, to my mind, in this case, the difference between the weights of the two exhibits is insubstantial and insignificant. I cannot say that the trial judge abused his discretion in allowing the evidence to be admitted, and I would affirm.

I am authorized to say that Judges CRABTREE, BIRD, and PITTMAN agree.

Alicia MINTON *v.*
ARKANSAS DEPARTMENT of HUMAN SERVICES

CA 00-544 34 S.W.3d 776

Court of Appeals of Arkansas
Division II
Opinion delivered December 20, 2000

Nicole L. Baker, Deputy Public Defender, for appellant.

Kathy L. Hall, for appellee.

ANDREE LAYTON ROAF, Judge. Alicia Minton appeals a Benton County Chancery Court decree that terminated her parental rights in her daughter M.M, a two-year-old child who had been taken into and remained in the custody of the Department of Human Services (DHS) since shortly after she was born. Minton argues that the court erred in finding that DHS proved by

clear and convincing evidence that her parental rights should be terminated. We reverse.

M.M. was born prematurely on December 2, 1997, at St. Mary's Hospital in Rogers and was immediately transferred to Arkansas Children's Hospital in Little Rock, where she remained for approximately two months. On February 6, 1998, DHS filed a petition for emergency custody, alleging that M.M. was dependent neglected. Attached to the petition was an affidavit stating that Minton had admitted to a DHS employee that the baby was unwanted and that she had used drugs extensively during her pregnancy in an effort to abort the child; Minton had visited the child at the hospital only once despite an offer of Medicaid transportation assistance; Minton refused to go to the hospital and "live-in" for three days and learn how to care for M.M. after discharge; and Minton failed to even contact the hospital regarding instruction on how to care for M.M.'s special medical needs. Probable cause was found to place M.M. in DHS custody.

Pursuant to a March 31, 1998, adjudication hearing, the chancellor found that Minton had failed to make arrangements to pick up M.M. from the hospital, had little contact with M.M. while she was hospitalized in Little Rock, had not learned how to care for M.M.'s special medical needs, and had used drugs while she was pregnant with M.M. The chancellor ordered Minton to attend all of M.M.'s medical appointments, obtain stable housing and employment and housing, visit M.M., obtain a drug and alcohol assessment, attend parenting classes, and pay $25 per week child support.

Minton had made little progress by the time that a permanency planning hearing was held on March 23, 1999. Subsequently, based on Minton's failure to comply with the case plan, DHS petitioned for termination of her parental rights, alleging that M.M. had remained outside of Minton's home for a period in excess of twelve months and that Minton had willfully failed to provide significant material support in accordance with her means and had failed to maintain meaningful contact with M.M. The petition also alleged that despite offers of appropriate family services, Minton had failed to correct the conditions which caused removal and that reunification was contrary to M.M.'s health, safety, or welfare.

At the June 1, 1999, termination hearing, DHS presented testimony concerning the history of the case and Minton's failure to comply with the case plan. However, DHS employees also testified that since the March 23, 1999, permanency planing hearing, Minton had obtained the required alcohol and drug assessment, begun attending visitation on a regular basis, attended twelve of fifteen of M.M.'s scheduled therapy appointments and medical appointments, and secured stable employment. Minton had not, however, attended parenting classes, maintained a stable residence, or paid child support.

At the conclusion of the hearing, the chancellor found that DHS did not have an appropriate Permanency Placement Plan in place, and therefore, he was precluded by statute from considering the parental-rights-termination petition. Nonetheless, the chancellor found that there was sufficient clear and convincing evidence to terminate Minton's parental rights in that she "failed to materially support the child; she's failed to attend the child, and take care of its basic needs." The chancellor then stated that he would "abate" a termination order pending the filing of an appropriate Permanency Placement Plan with the court, and he continued the case for ninety days. The chancellor also ordered DHS to continue reunification efforts, correct problems with DHS's telephone system so that Minton would have a dependable way of contacting DHS, and make a determination of whether M.M. had bonded with Minton. Minton was ordered to stay in contact with DHS and make as many of M.M.'s medical appointments as possible. Addressing Minton, the chancellor stated:

> Ms. Minton, I just have to say to you, just as clearly as I can, that I have entered an Order Terminating your Parental Rights. But I am abating that Order. Not because you have shown me an exemplary change in your circumstances, over the last six or eight months, but mostly because I don't believe the Department has established a sufficient Permanency Plan for this child. And that gives you the opportunity to show me that, in fact, I should never enter the Termination Order. So you're on a short rope, ma'am. The way to get from where you are to where you need to be is very short, and it's going to take some hard work to get there. And it's going to take some sacrifices. I don't know wether you can do those, or not. I'm not sure whether any single married mother who started out in a hole as deep as the one you were in, can get there. But I

> believe that under the circumstances, this is what the law provides. And so that is the Ruling of this court.

After the judge completed his ruling, DHS asserted that they had an adoptive home interested in M.M., although the family had never met her, and asked the court if it wanted them to pursue placement with this family during the ninety-day abatement. The chancellor replied:

> I am just saying that you have to have a specific plan. How you execute it, what steps you take, how far down that plan you get, this law doesn't talk about that. It talks about a specific plan for permanency. So if you have that at some point, then we'll come back. In many ways, this ruling today merely delays the inevitable decision that's going to have to be made.

The foregoing ruling apparently was interpreted differently by the parties. Minton understandably believed that she had been given an opportunity to demonstrate that she could comply with the case plan and ultimately secure custody of M.M. DHS, however, acted as though it had been given the authority and direction to move ahead with placement of M.M. in a permanent adoptive home.

DHS promptly moved M.M. from the therapeutic foster home she was in into a permanent adoptive home, and filed a motion to lift the abatement. On July 19, 1999, the chancellor signed an order lifting the abatement, then reinstated it after an August 30, 1999, hearing in which he admitted that he had lifted the abatement without reviewing the abated order.

One week later, on September 7, 1999, the review hearing that had been scheduled pursuant to the abated order was held. DHS employee Leann Spruell testified that when the abatement was lifted, she attempted to schedule Minton for a "last visit" with M.M., and Minton became furious. However, when the abatement was reinstated DHS resumed services. Spruell admitted that Minton had secured an apartment, a steady job, had attended parenting classes, had not tested positive for drugs, and in short stated that "everything has been done as far as complying with the case plan."

Darlene Vinyard, the adoption specialist from DHS, testified that M.M. was adjusting well to her new adoptive home and stated that the family was willing to adopt M.M. as soon as the six-month waiting period was complete. Vinyard also stated that she observed

three of Minton's visits with M.M., which seemed to be "pleasant," but she expressed concerns with Minton's expectations for M.M. in light of the child's developmental delays and the inadequacy of Minton's "support system." Chris Rodriguez, a DHS probationary trainee, testified and was critical of Minton's parenting skills based on her observations of a single visit.

Minton testified that she had complied with the case plan in every respect and continued to attend visits and medical appointments even though it required that she be away from her job. Minton claimed that she had not been informed about the abatement being lifted, and her visitations had been disrupted by DHS. Minton asserted that she had bonded with M.M., that she would be able to manage working and caring for both M.M. and her other child, and that she was retiring her court fines and consequently expected to be able to get her driver's license back in the near future.

At the conclusion of the hearing, M.M.'s attorney ad litem noted that Minton had complied with the case plan and stated that he believed that Minton was sincere. He then moved that the court allow reunification. The chancellor noted how much progress Minton had made and decided to "further abate" the termination order. He then ordered DHS to begin a plan immediately to reintegrate M.M. into Minton's home, within sixty days, with increased visitation and "more and more efforts . . . made to make sure that Alicia Minton is capable of caring and tending to this child, while this process continues." The chancellor again admonished Minton that M.M. remained in DHS custody and that "the Order of Termination has not been set aside [but] merely abated." He then set a review hearing for December 7, 1999, ordered DHS to provide "intensive services to reunify this child with the mother within sixty days, and thereafter, have a thirty-day trial placement, if appropriate."

On November 15, 1999, however, a hearing was granted pursuant to a motion filed by Minton because the trial placement, ordered in the September 7 hearing, had not taken place. M.M.'s attorney ad litem confirmed that trial placement had not taken place and recommended that the court order the trial placement to begin. The prospective adoptive parents also appeared at the hearing with an attorney and moved to intervene in the case. While the

chancellor denied their intervention motion, he allowed their attorney to participate in the hearing.

Minton testified about DHS's interference with her reunification efforts, including objecting to her using the Jones Center for parenting classes, canceling or interrupting scheduled visits with M.M., and preventing her overnight visitation by having her arrested for an outstanding traffic warrant on the day of her first scheduled overnight visit, and aborting the second scheduled overnight visit because criminal-record investigation forms had not been completed by friends and family and because a guest was present in her home.

DHS employees admitted to making the call that resulted in Minton's arrest, denied disapproving the parenting classes, and opined that Minton had not made "any progress" in self-sufficiency because she had an enormous amount of debt. However, they "applauded" Minton's having kicked her drug habit and securing a residence and steady employment. DHS admitted removing M.M. from Minton's home because a guest was present and testified that Minton had allowed M.M., who had a history of respiratory problems, to be around smoke because they observed a guest at a birthday party at Minton's home smoking outside and smoke was "drifting" toward the child. M.M.'s foster mother testified that Minton had approximately forty visits with M.M. since she was placed in her home and that M.M. seemed insecure after the visits. However, she admitted that it took M.M. several weeks to "settle down" after being placed in her home.

The chancellor ruled from the bench he was persuaded that DHS had interfered with the placement of M.M. with Minton. He stated that he wanted a determination of whether or not M.M. "is capable of being re-bonded with her mother," and that was not provided. He ordered DHS to, within the next five days, provide a case worker that had not been associated with the case, who would be supervised by someone who also was not associated with the case. The attorney ad litem recommended that the trial placement begin, and the chancellor ordered that Minton get the necessary paperwork submitted for day care vouchers and Medicaid coverage.

The next hearing in this case was held a month later, on December 20, 1999, in which the issue to be determined was

whether Minton had shown that she bonded with M.M. and if not, whether she was likely to be bonded at any time in the near future. DHS employees, who observed Minton's visits and the single overnight visit with M.M. during the period, in essence testified that during the visits, M.M. behaved as if she wanted to leave, said the word "go," came to them, clung to their legs, and cried for "Mommy and Daddy" when she became tired. They acknowledged that they had failed to complete the bonding assessment in part because the DHS employee responsible for arranging the assessment had been on vacation for a week. Minton testified that M.M. comes to her, calls her "Mommy," and denied that there were any problems with the visits. Regarding the bonding assessment, Minton stated that she had difficulty in making an appointment because she could not afford to miss any more work. At the close of the testimony, the chancellor announced that it was his conclusion that Minton had not bonded with M.M. and vice versa. He found that the best interests of M.M. dictated that Minton's parental rights be terminated and that M.M. be freed for adoption. Minton appeals from this decision.

On appeal, Minton argues that the trial court erred by ruling that DHS proved by clear and convincing evidence that her parental rights to M.M. should be terminated. Minton asserts that pursuant to Ark. Code Ann. § 9-27-341 (Repl. 1999), there were two grounds applicable to her case that would justify termination of her parental rights: her failure to correct the conditions that caused the removal despite a meaningful effort by DHS to rehabilitate the home, and her failure to provide significant material support in accordance with her means. She contends that the chancellor erred in finding clear and convincing evidence to support either ground.

Regarding her failure to correct the conditions that caused the removal of M.M. from her custody, she argues that the chancellor erred in entering an order terminating her parental rights because she had met and continued to meet the "various and ever-changing requirements" placed on her by DHS, and because he found that DHS had deliberately interfered with his September 7, 1999, order directing DHS to implement a plan to reunify her with her child. She concedes that she made "little progress" toward meeting the requirements for reunification during the first several months of the case; however, she asserts that in February of 1999 she began to demonstrate her commitment to reunification by securing a stable

residence, maintaining regular employment, completing a drug and alcohol assessment, submitting to random drug screens, attending most of M.M.'s physical therapy sessions and medical appointments, cooperating in taking parenting classes, and consistently exercising her visitation. Accordingly, she contends that DHS did not meet its burden of proving by clear and convincing evidence that despite a meaningful effort by DHS to rehabilitate her home and correct those conditions which caused removal, the conditions had not been remedied. Further, citing Ark. Code Ann. § 9-27-341(a), she argues that termination of parental rights should be used only when the evidence shows that the child could not be returned to the parent within a reasonable period of time, and the evidence showed that she had taken steps to have M.M. returned to her in a short amount of time. She contends that one of the only barriers was her lack of transportation for medical appointments, and she was remedying that situation. Minton asserts that as of the termination hearing, M.M. had not been placed in an adoptive home and that a DHS worker testified that any potential adoptive home would require a slow integration process before M.M. could be placed there.

Minton argues further that, subsequent to the termination hearing, the actions of DHS call into question their intention to provide "meaningful" efforts at reunifying her with her daughter. She notes that DHS discontinued rehabilitative services shortly after it filed its motion to reconsider that resulted in the chancellor lifting his abatement of the termination order, a motion that the chancellor stated "clearly was not an accurate statement of the case." Moreover, Minton contends that, in September, DHS essentially prevented her two scheduled overnight visits, and the court actually found that DHS had interfered with the placement. She argues that the observations of the DHS personnel regarding how M.M. responded to her does not constitute clear and convincing evidence that she and M.M. had not bonded because DHS denied her the trial placement she needed in order to establish the bond.

Regarding the second possible ground for termination, her willful failure to provide significant material support in accordance with her means, which she acknowledges was cited by the termination order, Minton notes that Ark. Code Ann. § 9-27-341(b)(2)(B), the applicable subsection of the statute setting forth this ground also requires the failure to "maintain meaningful contact" with her

child. She urges this court to read this subsection as not setting forth alternative grounds but rather a two-prong requirement. Minton contends that was the approach taken by the supreme court in *Crawford v. Arkansas Dep't of Hum. Servs.*, 330 Ark. 152, 951 S.W.2d 310 (1997), when it considered the two parts of the subsection together. She contends that otherwise, a parent in a dependency-neglect case could see her parental rights terminated simply because of her poverty. Minton also argues that while she did not pay the court-ordered support, she did bring M.M. gifts and clothes, and she maintained a residence where M.M. could live and made payments on her court fines so that she could provide transportation for her daughter. She also stated that she was paying support for two children in Arizona and for much of the case, her financial situation was "dire." We find these arguments persuasive.

Any party seeking to terminate the parental relationship bears the heavy burden to prove by clear and convincing evidence that the parent has significantly and without just cause failed to communicate with or support the child as required by law or decree. *Bush v. Dietz,* 284 Ark. 191, 680 S.W.2d 704 (1984) (decision under prior law). Adoption proceedings are in derogation of the natural rights of parents, and statutes permitting such are to be construed in a light favoring continuation of the rights of natural parents. *Id.*

In pertinent part, Ark. Code Ann. § 9-27-341 provides for termination of parental rights on one or more of the following grounds:

> (A) 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 to rehabilitate the home and correct the conditions which caused removal, those conditions have not been remedied by the parent. It is not necessary that the twelve-month period referenced in this subdivision (b)(2)(A) immediately precede the filing of the petition for termination of parental rights, or that it be for twelve (12) consecutive months;
>
> (B) The juvenile has lived outside the home of the parent for a period of twelve (12) months, and the parent has willfully failed to provide significant material support in accordance with the parent's means or to maintain meaningful contact with the juvenile. To find willful failure to maintain meaningful contact, it must

> be shown that the parent was not prevented from visiting or having contact with the juvenile by the juvenile's custodian or any other person, taking into consideration the distance of the juvenile's placement from the parent's home. Material support consists of either financial contributions or food, shelter, clothing, or other necessities where such contribution has been requested by the juvenile's custodian or ordered by a court of competent jurisdiction. It is not necessary that the twelve-month period referenced in this subdivision (b)(2)(B) immediately precede the filing of the petition for termination of parental rights, or that it be for twelve (12) consecutive months;

When the burden of proving a disputed fact in chancery court is by clear and convincing evidence, the inquiry on appeal is whether the chancery court's finding that the disputed fact was proven by clear and convincing evidence is clearly erroneous. *Anderson v. Douglas*, 310 Ark. 633, 839 S.W.2d 196 (1992). Clear and convincing evidence is defined as "that degree of proof which will produce in the fact finder a firm conviction as to the allegation sought to be established." *Id.* In making such determination, this court must give due regard to the opportunity of the trial court to judge the credibility of the witnesses. *Id.*

First and foremost, we are mindful of the fact that Ark. Code Ann. § 9-27-341, by its express language vests a chancellor with discretion to decide whether or not to terminate parental rights, stating: "The court *may* consider a petition to terminate parental rights . . . ." (Emphasis added.) Accordingly, the mere existence of potential grounds for termination does not require a chancellor to terminate parental rights. That decision must be guided by a determination of whether or not reunification can be accomplished within a reasonable time so as to provide permanency and stability in a child's life. *See* Ark. Code Ann. § 9-27-341(a). Here the chancellor, in the exercise of his discretion, essentially gave Minton a final chance to comply with the case plan. At that time, it is apparent that M.M. was going to be moved from her therapeutic foster home, so there was not a permanency issue at that point. Consequently, disposition of this case does not hinge on what occurred prior to the chancellor offering Minton this second chance.

DHS contends that this case is affirmable based on Minton's failure to materially support M.M. Minton concedes that she never

paid the court-ordered support, and the construction of Ark. Code Ann. § 9-27-341 that she urges this court to adopt is contrary to the plain wording of the statute. Furthermore, Minton's resort to *Crawford v. Arkansas Dep't of Hum. Servs., supra,* does not compel a different result. While the supreme court in *Crawford* at one point mistakenly substitutes "and" for the "or" in the statute, in that case, the parent whose rights were terminated had failed both to maintain contact and to support his children. The supreme court did not hold that both failures were necessary. Also, the appellant in *Crawford*claimed that he provided clothing for his children, and the supreme court did not find that it constituted sufficient support.

However, we cannot find that there is appreciable evidence that Minton had the ability to pay even a nominal amount of support even after she stopped abusing drugs and started working at regular employment. Consequently, we find it hard to conclude that Minton willfully refused to pay the support. Indeed, according to DHS, one of the reasons that it opposed returning M.M. to Minton was that it concluded that Minton's indebtedness prevented her from achieving self-sufficiency.

Finally, the chancellor's requirement that there be a determination of whether or not Minton and M.M. had "bonded" is simply unreasonable given the circumstances of this case. Minton was allowed only a single overnight visit; M.M.'s foster mother acknowledged that M.M. required two or three weeks for "settling in," and DHS steadfastly opposed giving Minton that kind of time. Moreover, the sparse anecdotal evidence offered by persons who confessed to having no expertise in determining the capacity of M.M. for bonding with her mother does not satisfy the clear-and-convincing-evidence standard. Consequently, we hold that the chancellor's ultimate conclusion that M.M., a toddler, had not and was unlikely to bond with Minton is clearly erroneous.

Reversed and remanded.

PITTMAN and GRIFFEN, JJ., agree.

Stephen GOODWIN *v.* PHILLIPS PETROLEUM COMPANY

CA 00-578 37 S.W.3d 644

Court of Appeals of Arkansas
Division I
Opinion delivered January 24, 2001

[redacted]

Mary Thomason, for appellant.

Friday, Eldredge & Clark, by: *Betty J. Demory*, for appellee.

JOSEPHINE LINKER HART, Judge. Appellant, Stephen Goodwin, appeals from a decision of the Workers' Compensation Commission. For reversal, he argues that the Commission erroneously denied him temporary total disability benefits from 1993 to 1998, permanent total disability benefits, and an attorney fee. We conclude that appellant's first argument was not preserved for appel-

late review. Further, we affirm the Commission's decision regarding its denial of total disability benefits. However, we reverse its denial of an attorney fee.

The parties stipulated before the administrative law judge (ALJ) that appellant suffered compensable back injuries on January 24, 1991, and February 3, 1991, and stipulated that appellee paid temporary total disability benefits from September 4, 1992, through February 11, 1998. The parties agreed to litigate appellant's entitlement to vocational rehabilitation benefits, permanent disability benefits, and an attorney fee.

Before the ALJ, appellant argued that he was permanently and totally disabled as a result of his compensable injury or, alternatively, that his percentage of permanent disability exceeded his ten-percent impairment rating. In either event, he claimed that he was entitled to rehabilitation benefits and, in addition, that because his claim for permanent disability benefits was controverted, he was entitled to an attorney fee. On the other hand, appellee contended that appellant was neither permanently and totally disabled as a result of his compensable injuries nor entitled to permanent disability benefits in excess of his ten-percent impairment rating. Appellee acknowledged that appellant underwent a laminectomy on October 8, 1992, but contended that he reached the end of his healing period for his compensable injury on June 10, 1993. However, appellee inadvertently continued to pay temporary total disability benefits until February 11, 1998. Appellee sought reimbursement from appellant for the overpayment of temporary total disability benefits or, alternatively, credit against any future benefits awarded.

The ALJ concluded that appellant failed to prove entitlement to vocational rehabilitation benefits. However, he found that appellant suffered a ten-percent permanent impairment rating to the body as a whole and, in addition, suffered a fifteen-percent wage loss disability. The ALJ also concluded that appellant reached the end of his healing period on June 10, 1993, but determined that it would be unconscionable to require reimbursement for the overpayment of temporary total disability benefits. Nevertheless, the ALJ found that appellee was entitled to a credit for the overpayment of temporary total disability benefits against the award of permanent disability benefits. Finally, the ALJ noted that appellee had paid no disability benefits since February 11, 1998. The ALJ concluded that although appellee did not contest its responsibility for appel-

lant's ten-percent anatomical impairment, appellee failed to pay in accordance with the rating, and this constituted a controversion of permanent disability benefits entitling appellant to an attorney fee based on the award of permanent disability benefits.

Both parties sought a review of the ALJ's decision by the Commission. Appellant appealed the ALJ's denial of his claim that he was permanently and totally disabled and entitled to permanent and total disability benefits. Appellee appealed the award of an attorney fee. The Commission affirmed the ALJ's decision that appellant was not permanently and totally disabled, but reversed the award of an attorney fee based on the award of permanent partial disability.

On appeal, this court will affirm when the Commission's decision is supported by substantial evidence. *Tucker v. Roberts-McNutt, Inc.*, 342 Ark. 511, 517, 29 S.W.3d 706, 709 (2000). "Where the Commission denies benefits because the claimant has failed to meet his burden of proof, the substantial evidence standard of review requires us to affirm if the Commission's decision displays a substantial basis for the denial of relief." *Id.* "A substantial basis exists if a fair-minded person could reach the same conclusion when considering the same facts." *Id.*

For his first issue on appeal, appellant argues that the Commission erred in allowing appellee a credit for the overpayment of temporary total benefits after June 10, 1993. While the ALJ ruled on this issue, the argument was not presented to the Commission. Thus, the Commission did not address this issue. "It was the appellant's responsibility to obtain a ruling on this issue by the Commission," and "[a] question not passed upon below presents no question for decision here." *See W.W.C. Bingo v. Zwierzynski*, 53 Ark. App. 288, 294, 921 S.W.2d 954, 958 (1996). Consequently, this issue was not preserved for appellate review.

For his second issue, appellant contends that the Commission erred in failing to find him totally and permanently disabled under the odd-lot doctrine. Appellant notes that he has no vocational training and "has had a series of maladies since the injury." Appellant states that his work capabilities are severely limited and must include only sedentary, light work. In finding that appellant did not fall under the odd-lot doctrine, the Commission found that appellant "is not entitled to permanent and total disability benefits arising out of his workers' compensation injury, because he is not

totally incapacitated from working due to his injury and because the other problems he has were not the result of his treatment for the compensable injury."

The odd-lot doctrine was abolished by Act 796 of 1993, codified at Ark. Code Ann. § 11-9-522(e) (Supp. 1999). However, because appellant's injuries occurred prior to 1993, the doctrine is applicable to his case. *See Ellison v. Therma Tru*, 71 Ark. App. 410, 418, 30 S.W.3d 769, 774 (2000). "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." *Id.* A claimant must make a *prima facie* showing of being in the odd-lot category based upon the factors of permanent impairment, age, mental capacity, education, and training. If the claimant makes such a showing, the employer then has the burden of showing that some kind of suitable work is regularly and continuously available to him. *Id.*

We note the following history. Appellant was born February 5, 1965, so he celebrated his twenty-sixth birthday on the day of his second back injury. During his deposition, Dr. Ronald Williams testified that he first treated appellant in April of 1992 and then performed a laminectomy and discectomy on appellant in October of 1992. Further, Williams opined that in June of 1993, appellant reached his maximum medical improvement. Williams assessed appellant's permanent impairment rating at ten-percent to the body as a whole. He continued to see appellant periodically from 1993 until July 7, 1998, and opined that after 1993 appellant's condition remained stable. Doctor Richard Davis, a family practitioner who saw appellant for various maladies from the date of injury until May 1998, testified that appellant came to see him in January of 1993 with stomach pains. He noted that appellant had problems with reflux, recurrent weight loss, and anorexia. Davis opined that some of the reflux problem could have been aggravated by medications he was taking for his back. Further, although unrelated to his back condition, Davis noted that appellant recently had problems with partial kidney failure and high calcium levels and was diagnosed with a condition called sarcoidosis.[1]

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[1] A chronic disease of unknown cause that is characterized by the formation of nodules resembling true tubercles, especially in the lymph nodes, lungs, bones, and skin. WEBSTER'S NEW COMPLETE MEDICAL DICTIONARY 614-15 (1996).

Davis noted that he had opined in a letter dated July 16, 1993, that appellant was unable to return to his prior occupation, but could return to work so long as the work fit within the restrictions that had been outlined in a functional capacity assessment of May, 1993. Appellant had functional capacity assessments in 1993 and 1996. The functional capacity assessment in 1993 provided that appellant was capable of medium-duty work, which enabled him to perform just over ninety-percent of all jobs. The 1996 assessment established that appellant could perform jobs requiring light physical demands, which enabled him to perform six out of ten available jobs. Davis also stated that the condition of appellant's back had remained unchanged since June of 1993.

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 that he may be classified as totally disabled. This standard implies a causation element that requires that the injury and not some subsequent and unrelated condition caused the claimant's inability to perform services. At the time appellant reached his maximum medical improvement, he was a twenty-eight-year-old high school graduate who could, according to the functional capacity assessment, perform, at a minimum, six out of every ten available jobs on the market. Given this evidence, appellant was not totally and permanently disabled under the odd-lot doctrine.

Our conclusion that the odd-lot doctrine implies causation is buttressed by the following general observations. At the time of appellant's compensable back injuries, the Commission took into account "such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his future earning capacity." Ark. Code Ann. § 11-9-522(b) (1987). "Disability" was defined as an "incapacity because of injury to earn, in the same or any employment, the wages which the employee was receiving at the time of the injury." Ark. Code Ann. § 11-9-102(5) (1987). "Injury" was defined as an "accidental injury arising out of and in the course of employment ...." Ark. Code Ann. § 11-9-102(4) (1987). Under this statutory rubric, it was anticipated that a claimant could receive partial disability benefits in excess of the employee's percentage of permanent physical impairment so long as the disability was caused by an injury arising out of and in the course of employment. Under a similar analysis, the New Mexico Court of Appeals concluded that given the legislature's limitation of an employer's liability by requiring proof of causation, it was

improper to include a claimant's unrelated post-injury disease in determining disability because it would eliminate the requirement of causation. *See Clavery v. Zia, Co.*, 104 N.M. 321, 720 P.2d 1262 (N.M. Ct. App. 1986)(involving a compensable injury to the claimant's back and a subsequent diagnosis of breast cancer).

Here, the only evidence even suggesting a causal connection between appellant's current problems and his compensable back injury was testimony that his reflux could have been aggravated by some of the medications that he was taking for his back. The Commission, however, concluded that the medical evidence was insufficient to establish that his gastrointestinal problems were caused by the treatment for his back injury or that his gastrointestinal problems caused his incapacity to earn wages. Determination of the existence of a causal connection is a question of fact for the Commission. *Carter v. Flintrol, Inc.*, 19 Ark. App. 317, 720 S.W.2d 337 (1986). While appellant was also diagnosed with partial kidney failure and high calcium levels and was diagnosed with sarcoidosis, Dr. Davis testified that those conditions were unrelated to his back injury.

It is antithetical to the structure of the workers' compensation statutes as they existed in 1993 to award compensation when appellant's current disability is the result of an unrelated post-injury condition and not in some manner caused by his compensable injury. *See also* 82 Am. Jur. 2d. *Workers' Compensation* § 381 (1992)("[A]n employee partially incapacitated by reason of a compensable injury is not entitled to collect for total incapacity because of an intervening unrelated injury."). Were it otherwise, we would be faced with the prospect of awarding total and permanent disability benefits even though the reasons for the disability were unrelated to and occurred long after appellant's compensable injury.

Thirdly, appellant argues that the Commission erred by denying him an attorney fee based on the award of a ten-percent physical impairment rating. We disagree with the Commission's analysis. "[W]henever the [C]ommission finds that a claim has been controverted, in whole or in part, the [C]ommission shall direct that fees for legal services be paid to the attorney for the claimant," and "[t]he fees shall be allowed only on the amount of compensation controverted and awarded." Ark. Code Ann. § 11-9-715(a)(2)(B) (Repl. 1996). As noted in *Cleek v. Great S. Metals*, 335 Ark. 342, 345, 981 S.W.2d 529, 531 (1998), "[i]f the fundamental purposes of

attorney's fees statutes such as § 11-9-715 are to be achieved, it must be considered that their real object is to place the burden of litigation expenses upon the party which made it necessary."

The Commission concluded that appellee, by prevailing on its request for a credit, was justified in not paying appellant an attorney fee on appellant's ten-percent permanent impairment rating because the credit exceeded its liability for payment of benefits. However, the granting of a credit does not diminish the fact that appellee controverted and did not pay permanent disability benefits. Thus, appellant was required to employ counsel. *See Cleek, supra.* We reverse for an award of an attorney fee.

Affirmed in part; reversed and remanded in part.

BIRD and GRIFFEN, JJ., agree.

Alvin Ray WHITE *v.*
GREGG AGRICULTURAL ENTERPRISES

CA 99-1124 37 S.W.3d 649

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered January 24, 2001

Frederick S. "Rick" Spencer, for appellant.

Ledbetter, Cogbill, Arnold & Harrison, LLP, by: *E. Diane Graham* and *Rebecca D. Hattabaugh*, for appellee Gregg Agricultural Enterprises.

Terry Pence, for appellee Second Injury Fund.

SAM BIRD, Judge. This appeal is before this court for a second time. Appellee Gregg Agricultural Enterprises (hereinafter Gregg Farms) originally appealed a finding by the Commission that the appellant, Alvin Ray White, was entitled to a permanent anatomical rating of 26 percent. In the first appeal, we held that we could not reach the merits of White's argument because the Commission had failed to make sufficient findings of fact in support of its conclusion. We remanded with directions to the Commission to include an explanation of why it disregarded White's previous injury in Texas and its effect on White's current disability. *See Doug Gregg Farms v. Alvin R. White*, CA97-1424 *slip op.*, (Ark. App. May 27, 1998). Following our remand, the administrative law judge rendered findings and reached the same result. The law judge found that White's 13 percent impairment to the body as a whole, in combination with his 14 percent loss of cervical range of motion, resulted in a 26 percent disability to the body as a whole. Gregg again appealed to the full Commission. The Commission then considered at length the medical evidence relating to the Texas injury and concluded that White had not proven that he sustained any new loss of cervical motion, instead of the 14 percent,

and that he had sustained only an additional 2 percent impairment rating (instead of 13 percent). White brings this appeal.

This case had been the subject of two hearings before the administrative law judge. The first hearing involved only the issues of compensability and temporary total disability. At the hearing on those issues, White testified that his first workers' compensation injury, a pinched nerve in his shoulder, occurred in 1978, while he was working as a heavy-duty mechanic in Texas, and that he suffered another compensable injury to his back in November 1988. The 1988 injury led to a fusion surgery at C5-6, C6-7 in 1989. White testified that he settled his claim for workers' compensation for approximately $45,000. On cross-examination, he denied being told by his treating physician for the 1988 injury, Dr. Stockton, that he was precluded from returning to work.

White began working part time for Gregg Farms in October 1991, at first on a part-time basis to see if he could handle the work. In February 1992, he began working full time. He testified that the job included a lot of bending and stooping. He said that prior to working for Gregg Farms, he was not having any trouble with his neck nor was he on any medication. On cross-examination, he testified that he saw a doctor approximately eight months before going to work for Gregg Farms. He also stated that he had attempted to see a doctor for follow up from his surgery, but could not get the paperwork from Texas straightened out in order to do so. He said that he began to experience pain, similar to pain he had experienced from his previous injuries, in December 1992, and he would occasionally wear a neck brace, which had been prescribed for him after his neck injury in 1988. He presented to Dr. Foster in April 1993. He stated that Dr. Foster's office billed his Texas compensation carrier for some of the bills. He said he worked at Gregg Farms until approximately two weeks before he had surgery in June 1993. After his surgery, Dr. Foster assigned White a 13 percent impairment rating. White also testified that Dr. Foster considered it to be a new injury. White testified that his fusion surgery was successful, and he returned to light-duty work for Gregg Farms on December 17, 1993, and worked a little more than one month before he was terminated. He applied for temporary total disability and medical benefits from May 25, 1993 through December 17, 1993. Gregg Farms denied all liability.

Doug Gregg, owner of Doug Gregg Farms, testified that when he hired White in late 1991, he was aware of White's back and neck problems. He said that White began to complain about pain in his back and neck shortly after he began working full-time, and that White attributed the pain to a previous injury. He also stated that he remembered White wearing a neck brace shortly after he began working full time, in the spring of 1993. Gregg testified that at no time did White ever report that he had sustained a work-related injury. The first time Gregg realized that White was claiming workers' compensation benefits was when he received a letter from White's attorney. In that letter, White's attorney wrote: "At the time of the injury, Alvin Ray White was working on a truck on a creeper straining with a bar and injured his back. Copy of the letter from the orthopedic surgeon confirming a compensable injury is attached." The description of the injury matched the injury White received in Texas.

Gregg also testified that after he terminated White for leaving the job without notifying him or their immediate supervisor, White mentioned that he had fallen on the job and that he needed to fill out a workers' compensation form in order to report the injury. Gregg argued that White was not entitled to such benefits because White's injury was a recurrence of a previous injury for which he was compensated under Texas workers' compensation law.

On March 25, 1994, the law judge issued an opinion in that case awarding White temporary total disability from May 25 until December 17, 1993, medical benefits, and attorney's fees.

The law judge wrote:

> Claimant testified that he was virtually asymptomatic when he went to work for Gregg and that his disabling condition came on gradually over time. I conclude that this is not a case where claimant remained symptomatic for a period of time following his first surgery and then sustained a recurrence of the initial injury. Dr. Foster's testimony that claimant's permanent impairment has increased by 13 percent is also evidence that claimant sustained a new injury or aggravation causing distinct, new, anatomical deficits rather than a simple recurrence of a previous condition.

Gregg appealed to the full Commission, and White cross-appealed. The Commission affirmed and adopted the law judge's opinion, and this order was not further appealed by either party.

In a subsequent hearing, White sought compensation for permanent disability. At that hearing, the specific issue was whether White was entitled to a permanent anatomical impairment rating, which is the issue of this appeal. Gregg denied liability for any of White's anatomical impairment, arguing that "all anatomical impairment is a result of White's preexisting or prior injury that occurred in 1988."

At that hearing, White testified again to when he began working for Gregg Farms and when his aggravation started. He also testified to the complications experienced after his June 10, 1993, surgery, which included having trouble turning his neck and sitting for a long period of time. He stated that he has continual pain. He stated that despite his problems, he returned to work in June 1994 and is working full time at Micro Plastics in Flippin. On cross-examination, White denied informing one of his doctors that he had been in constant pain since his injury in 1988. White also denied seeing any medical reports that classified him as totally and permanently disabled as a result of the Texas injury.

Dr. Robert Foster testified in a deposition that he first saw White in April 1993. He said White presented to him, complaining of persistent neck pain, headaches, and occasional pain in his arms. Dr. Foster's x-rays of White revealed pseudoarthrosis at C5-6. Dr. Foster attributed the fusion failure at C5-6 to White's smoking and the fact that White underwent two-level fusion surgery, as opposed to a one level.

When asked if the job at Gregg Farms caused White's pseudoarthrosis, Foster replied "No." However, Foster also stated that if he had been White's treating physician in Texas, he would have told White "that if you engage in any type of heavy work or activity, it may become symptomatic enough that you require surgery." He also rated him with a 13 percent impairment rating representing his previous surgeries as well as his previous fusions. He stated that he would not have been able to give him an impairment rating after his surgery in Texas because, at that time, White was not medically maximized in that he did not completely fuse.

He stated that the job at Gregg Farms made White symptomatic in that it caused him more pain, "[h]e had already stated that he had pain." On May 27, 1996, Dr. Foster then included an additional 14 percent rating for loss of range of motion, making a combined anatomical rating of 26 percent.

The administrative law judge issued an opinion stating that White had proven by a preponderance of the evidence that he was entitled to a 26 percent permanent impairment rating as assigned by Dr. Foster. In addition, the law judge found that White had sustained a gradual onset injury while working for Gregg Farms.

Gregg Farms appealed to the full Commission, which affirmed and adopted the findings and the opinion of the law judge. Gregg Farms then appealed to this court, at which time this court remanded the case to the Commission, who in turn remanded it to the administrative law judge to make further findings of fact.

As stated above, upon remand, the administrative law judge again found that White had proven by a preponderance of the evidence that he was entitled to the 26 percent permanent impairment rating as assigned by Dr. Foster. The administrative law judge failed to make findings of fact regarding Dr. Stockton's opinion that appellee was permanently and totally disabled due to the failure of the fusion at C5-6.

The Commission reversed the law judge. It agreed that White has experienced a gradual onset injury that resulted in disability in May 1993. It cited the medical records resulting from his Texas injury that stated that White could neither get and keep employment nor engage in any substantial gainful activity. It found that White had sustained a compensable aggravation of his preexisting injury, causing him to undergo a second fusion at the C5-6 level.

In addition, the Commission repeated that Dr. Foster had stated "unequivocally" in his deposition that the 13 percent anatomical impairment rating included everything that had been done to White, including the previous fusion surgery in 1989 as well as the re-fusion performed in 1993. It noted that the record reflected that the 13 percent anatomical impairment rating assigned by Dr. Foster was based upon and took into consideration White's preexisting condition. Furthermore, as explained by Dr. Foster, 11 percent of the 13 percent was attributed to the original two-level

fusion surgery made necessary by the Texas injury. Therefore, Dr. Foster only assigned, and the AMA Guidelines only allowed, an additional 2 percent impairment rating for the second surgical procedure to repeat the fusion that was required as a result of the compensable aggravation.

In addition, the Commission found that White had not proven by a preponderance of the evidence that he was entitled to a 14 percent permanent impairment rating for loss of range of motion. It found that although the record revealed that White did suffer a loss of range of motion after undergoing his first surgical procedure, there was insufficient evidence to determine the extent of his motion in his cervical spine prior to and subsequent to the 1993 repeated fusion. It did not dispute that White suffered a loss of range of motion, but found that it was unable to determine how much of that loss preexisted his compensable injury. Therefore, the Commission reversed the law judge's award of 26 percent and awarded White a 2 percent impairment rating. White brings this appeal.

Law of the case

In the first hearing in this case, determining whether White had sustained a compensable injury in the course and scope of his employment, the administrative law judge made a factual finding that White had not remained symptomatic for a period of time following his first surgery and then sustained a recurrence of the initial injury. For his first point on appeal, White argues that that finding became the law of the case because it was affirmed and adopted and not appealed to this court. He argues that if the Commission is allowed to reverse itself after a final order — that being the order determining whether White was entitled to temporary total disability — it would give a party "two bites at the apple instead of just one." We do not agree with this argument.

The issue of permanent impairment rating was never before the law judge at the first hearing. The only issue presented by White at that hearing concerned the issue of temporary total disability. In fact, White's counsel stated to the law judge at the first hearing the issue being considered was that of temporary total disability and that the parties were not arguing the issue of permanent impairment rating.

Before the hearing on the issue of temporary total disability the following exchange took place:

> LAW JUDGE: ... Now, are we trying the permanent impairment or —
>
> MR. SPENCER (*attorney for White*): No, Your Honor. Diane (counsel for Gregg) and I talked yesterday, and I wanted to add that as an issue, but Diane has some other things she had to do before that becomes an issue. This will probably clearly be Second Fund case since he did have a previous workers' comp. injury.
>
> LAW JUDGE: Okay.
>
> MR. SPENCER: However, you know, we are able to introduce by agreement the reports that were just received from Doctor Foster which indicates another 13 percent in addition to what he already had.

Res judicata applies where there has been a final adjudication on the merits of the issue by a court of competent jurisdiction on all matters litigated and those matters necessarily within the issue that might have been litigated. *Castleberry v. Elite Lamp Company*, 69 Ark. App. 359, 13 S.W.3d 211 (2000). The doctrine of *res judicata* is applicable to decisions by the Commission. *Castleberry v. Elite Lamp Company, supra.* The doctrine of res judicata applies only to final orders or adjudications. *White v. Air Systems, Inc.*, 33 Ark. App. 56, 800 S.W.2d 726 (1990). The filing of a petition for review with the full Commission within thirty days prevents the order of the administrative law judge from becoming final. *White v. Air Systems, supra.* The key question regarding the application of *res judicata* is whether the party against whom the earlier decision is being asserted had a full and fair opportunity to litigate the issue in question. *Castleberry v. Elite Lamp Company, supra.*

Whatever is before the supreme court and disposed of in the exercise of its jurisdiction must be considered settled, and the lower court must carry that judgment into execution according to its mandate. *Bussell v. Georgia Pacific Corp.*, 64 Ark. App. 194, 981 S.W.2d 98 (1998). The trial court, and by analogy the Commission, has no power to change or extend the mandate of the appellate court. *Bussell v. Georgia, supra.* In *Bussell v. Georgia*, we stated:

> Whatever was before the Court, and is disposed of, is considered as finally settled. The inferior court is bound by the judgment

> or decree as the law of the case, and must carry it into execution according to the mandate. The inferior court cannot vary it, or judicially examine it for any other purpose than execution. It can give no other or further relief as to any matter decided by the Supreme Court even where there is error apparent; or in any manner intermeddle with it further than to execute the mandate and settle such matters as have been remanded, not adjudicated by the Supreme Court. ... The principles above stated are, we think, conclusively established by the authority of adjudged cases. And any further departure from them would inevitably mar the harmony of the whole judiciary system, bring its parts into conflict, and produce therein disorganization, disorder, and incalculable mischief and confusion. Besides, any rule allowing the inferior courts to disregard the adjudications of the Supreme Court, or to refuse or omit to carry them into execution would be repugnant to the principles established by the constitution, and therefore void.

64 Ark. App. at 199-200, 981 S.W.2d at 100 (quoting *Fortenberry v. Frazier*, 5 Ark. 200, 202 (1843)).

The Commission cannot change its findings of fact on remand. *Lunsford v. Rich Mountain Elec. Coop.*, 38 Ark. App. 188, 832 S.W.2d 291 (1992). Matters decided on prior appeal are the law of the case and govern our actions on the present appeal to the extent that we would be bound by them even if we were now inclined to say that we were wrong in those decisions. *Lunsford v. Rich Mountain Elec. Coop., supra.* The supreme court has long adhered to the rule that when a case has been decided by it and, after remand, returned to it on a second appeal, nothing is before it for adjudication except those proceedings had subsequent to its mandate. *Ouachita Hospital v. Marshall*, 2 Ark. App. 273, 621 S.W.2d 7 (1991).

White seems to argue that the Commission and this court are bound by the findings made by the administrative law judge after the hearing on whether White had suffered a compensable injury. We disagree. What this court is reviewing is whether White is entitled to permanent disability benefits based upon an assigned anatomical impairment rating. That issue was not before the administrative law at the first hearing (and, thus, not before the Commission), and both parties agreed that the issue of any permanent impairment would be taken up at a later hearing. Furthermore, Dr. Foster's deposition testimony in which he discussed how

he arrived at White's 13 percent anatomical impairment rating was not even taken until after the first hearing. It was not until after the 13 percent impairment rating was assigned and the deposition taken that Foster assigned an additional 14 percent impairment rating for loss of range of motion.

Further, we are not bound by the Commission's findings in the first appeal to this court on the issue of permanent disability benefits because we instructed the Commission to take into account more testimony, testimony that we thought was relevant to the outcome of the case, that the Commission had not considered in making its original determination. In our remand, we told the Commission to consider White's previous injury, his pain from that injury, and Dr. Stockton's analysis of White's condition. That is exactly what the Commission has done.

In addition, one of the factors to be considered in determining the applicability of the doctrine of *res judicata* is whether the party against whom the earlier decision is being asserted had a full and fair opportunity to litigate the issue in question. *Castleberry v. Elite Lamp Company, supra.* In the case at bar, the Second Injury Fund[1] was not made a party to the case until the second hearing before the administrative law judge involving whether White was entitled to a permanent anatomical rating of 26 percent.

Substantial evidence

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. *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. *Buford v. Standard Gravel Co., supra.* Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Buford v. Standard Gravel Co., supra.* We do not reverse a decision of the Commission unless we are convinced

[1] Second Injury Fund was a party to the case before the administrative law judge on the issue of temporary total disability. However, neither party appealed the finding by the law judge absolving the Second Injury Fund of liability, so we do not consider it to be a party on appeal. It did file a brief, but none of the parties argue Second Injury Fund's liability in this case on appeal.

that fair-minded persons with the same facts before them could not have arrived at the conclusion reached. *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. *Moser v. Arkansas Lime. Co.*, 40 Ark. App. 108, 842 S.W.2d 456 (1992), *supp. op. on denial of rehearing*, 40 Ark. App. 108, 846 S.W.2d 188 (1993).

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. *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. *Arkansas Dep't of Health v. Williams, supra.* The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and 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).

It is undisputed that White suffered a compensable injury in 1988 in Texas and that he underwent a two-level fusion at C5-6 and C6-7. It is also undisputed that the fusion at C5-6 did not succeed. In addition, there was testimony that Dr. Stockton, the treating physician in Texas, found that White was permanently and totally disabled. White went to work for Doug Gregg Farms in October 1991, and in December 1992, began experiencing pain. Both the Commission and the law judge relied upon Dr. Foster's testimony that White suffered from pseudoarthrosis.

The Commission correctly noted that in his deposition testimony, Dr. Foster unequivocally explained that the 13 percent anatomical impairment rating included everything that had been done to the claimant, including his previous two-level fusion surgery in 1989 and the repeated fusion in 1993. In a letter to White's attorney, Dr. Foster stated that based upon AMA Guidelines, White's impairment rating was 13 percent to his cervical spine as a whole. Dr. Foster wrote, "This is based on an anatomical impair-

ment rating since the patient has had three spinal surgeries for this level." As mentioned previously, 11 percent of the 13 percent was based upon and took into consideration White's preexisting condition, and, therefore, the Commission determined that only 2 percent was attributable to White's 1993 surgery, which was required as a result of the compensable aggravation he sustained from working at Doug Gregg Farms.

Even though Dr. Foster assigned White a 14 percent impairment rating to the cervical spine, he was unable to apportion this loss of range of motion to White's 1989 two-level fusion surgery or the re-fusion surgery in 1993, or a combination of both. In fact, in his deposition testimony, he admitted that he never tested White in order to assign him a 14 percent impairment rating. The Commission found that White had suffered a loss of range of motion, but it simply said that White had not proven that the entire 14 percent was due to the aggravation he sustained from working at Doug Gregg Farms or the surgery in 1993 that the aggravation precipitated. It found that:

> Dr. Foster merely arrived at the 14 percent functional impairment rating for loss of range of motion by comparing claimant's post-surgical motion with that of a normal person. .... Therefore, it is mere speculation that the entire 14 percent resulted from claimant's compensable injury. Without medical evidence establishing a baseline range of motion after claimant's first surgical procedure, we cannot determine the extent, if any, of claimant's loss of range of motion as a result of his compensable injury.

Based upon the foregoing, we affirm.

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

ROAF, J., concurs.

GRIFFEN, J., dissents.

ANDREE LAYTON ROAF, Judge, concurring. I agree with the majority that this case should be affirmed on all points. With regard to the issue on which this court is in disagreement, whether Alvin Ray White is entitled to an award for more than the two percent anatomical rating sustained during his employment with the appellee, it needs to be clearly said that we must affirm on this issue for the simple reason that the case involves

only anatomical impairment. There is no evidence of any wage loss award by the Commission in the record before us, nor even any discussion of wage loss in the Commission's opinion.

As pointed out by the majority, all of the 26 percent disability awarded to White by the Commission in its first opinion was based on an anatomical rating, of which a portion was sustained during White's previous employment in Texas, and a portion sustained during White's employment with the Appellee. After this court reversed, on remand, the Commission found that there was insufficient evidence to support 14 percent of this rating, and that only two percent of the proven 13 percent anatomical impairment was sustained during his employment with appellee Gregg Agricultural Enterprises. I agree that there is substantial evidence to support these findings. Consequently, under these facts, there is no issue of apportionment and no Second Injury Trust Fund liability because the fund is liable only for wage-loss benefits, not anatomical loss. Most importantly, there can be no liability to either Gregg Agricultural Enterprises or the Second Injury Trust Fund for the anatomical loss suffered by White in his previous employment.

In *Weaver v. Tyson Foods,* 31 Ark. App. 147, 790 S.W.2d 442 (1990), this court affirmed a decision in which the Commission found that a preexisting 15 percent anatomical impairment combined with the new 5 percent anatomical impairment rating to result in an additional 30 percent wage loss disability for a total award of 50 percent, and that there was thus Second Injury Trust Fund liability. However, the Commission further found that the second employer was only responsible for the 5 percent anatomical impairment Weaver sustained while under its employ, and that the Second Injury Trust Fund was entitled to a credit for the preexisting 15 percent impairment. On appeal, Weaver objected to the credit allowed to the Second Injury Trust Fund. In affirming the Commission's decision, this court stated:

> When it is determined that through the combination of a preexisting condition and a current compensable injury the claimant has sustained a disability *greater than would have resulted from either of them alone*, the statute provides that the claimant shall be fully compensated for his current disability. But the statute does not provide that the Second Injury Fund shall compensate the claimant for his preexisting condition. There are several obvious reasons for this. If the preexisting condition was the result of a compensable injury,

> the claimant has presumably already been fully compensated for it. But if the preexisting condition was from a nonwork-related injury, a congenital defect or disease process, it is not covered by the workers' compensation law and neither the employer nor the Second Injury Fund is liable. To hold otherwise would make workers' compensation general disability insurance.

(Emphasis added.) Moreover, in *Nelson v. Timberline Int'l, Inc.*, 332 Ark. 165, 964 S.W.2d 357 (1998), this court stated that the legislature clearly intended that "any employer who employs a handicapped or disabled worker is responsible only for such actual anatomical impairment as may result from the last injury, and the Second Injury Trust Fund is obligated to provide compensation for any greater disability that may result from a combination of injuries."

Unlike in *Weaver*, this case has no wage-loss component. Clearly, there can be no combination of a preexisting condition and a current compensable injury which results in a disability greater than would have resulted from either of them alone when, as in the instant case, there is *no additional award of wage loss*, and it matters not whether the current injury is characterized as an "aggravation" of a preexisting condition as asserted by the dissent, or a new injury.

This is simple math; the current employer, Gregg Agricultural Enterprises, is liable only for the 2 percent anatomical impairment sustained by White while in its employ, and no one is liable for payment on account of the preexisting 11 percent anatomical loss. It has already been paid for by White's previous employer.

WENDELL L. GRIFFEN, Judge, dissenting. Once again, the Workers' Compensation Commission has improperly employed an Act 796 analysis to a claim that is governed by pre-Act law. Its decision awarding a 2% anatomical impairment in this case results from the same flawed "major cause" analysis that we reversed in *Ellison v. Therma Tru*, 66 Ark. App. 286, 989 S.W.2d 927 (1999). In addition, the Commission failed to follow the law pertaining to aggravation of preexisting conditions as stated in *Bearden Lumber Co. v. Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983), and other cases arising under the law that existed in 1992. Furthermore, the Commission either forgot or simply refused to apply the law on apportionment that has governed workers' compensation claims involving successive disabilities and impairments for four decades,

which has long been part of our Second Injury Fund statute, Arkansas Code Annotated § 11-9-525 (Repl. 1996). Because I disagree with the majority decision affirming what I consider to be a plain and recurring error, I must respectfully dissent.

I. Major-Cause Analysis

Like the worker in *Ellison, supra*, Alvin Ray White had preexisting conditions that were aggravated by a subsequent compensable injury. The record shows that the preexisting problems with White's cervical spine, although asymptomatic when White's current claim arose, were aggravated by the work-related injury sustained in the last employment with appellee resulting in a combined permanent anatomical impairment of 27% to the body as a whole. As was true in *Ellison, supra*, the Commission's employment of a "major cause" analysis is not explicit in the present case. Nowhere does the Commission use the term "major cause" or otherwise intimate that Act 796 reasoning is employed.

Nonetheless, it is implicit that the Commission used a major cause analysis by its refusal to include White's impairment attributable to his preexisting condition and thereby limiting his benefits to a 2% anatomical impairment, as is shown by the following excerpt from its opinion:

> As explained by the Court of Appeals in its opinion remanding our prior award of 26% impairment we must determine whether the 26% impairment rating assigned by Dr. Foster is causally related to claimant's aggravation of his pre-existing condition while taking into consideration claimant's pre-existing condition. The record reflects that the 13% anatomical impairment rating assigned by Dr. Foster is based upon and takes into consideration claimant's pre-existing condition. As explained by Dr. Foster 11% of the 13% rating is based upon the original two level fusion surgery. The AMA Guides only allow and Dr. Foster only assigned an additional 2% for the second surgical procedure to re-do the fusion which was required as a result of the compensable aggravation. *Accordingly, we cannot find that respondent is responsible for the impairment which directly attributable to claimant's first fusion surgery which took place prior to claimant's compensable injury. Respondent is not liable for claimant's original compensable injury for which he received compensation benefits in Texas as well as a lump sum settlement. Using the AMA Guides, we find that claimant did sustain and has proven entitlement to a 2% anatomical impairment rating to the body as a whole. This impairment is*

directly related to claimant's compensable injury with respondent for which he underwent a second surgical procedure to refuse the C5-6 level.

With regard to the functional impairment rating assigned for claimant's loss of motion, we cannot find that claimant has proven by a preponderance of the evidence entitlement to any permanent impairment due to loss of range of motion based upon the evidence presented. The record reveals that claimant did suffer a loss of range of motion after undergoing his first surgical procedure. This is confirmed not only in the reports from claimant's Texas physicians but also in Dr. Foster's first examination of the claimant noting a loss of range of motion in the cervical spine. While there may have been some motion in the cervical spine due to the first fusion which failed, there is insufficient evidence in the record to determine the extent of claimant's motion in his cervical spine prior to and subsequent to the 1993 re-do fusion which was required as a result of claimant's compensable injury. Dr. Foster candidly admitted in his deposition that there is no way to determine based upon the evidence before him the degree of claimant's decreased range of motion following the 1989 fusion, at the time of the 1992 compensable injury, or at the time Dr. Foster first examined claimant prior to performing the repeat fusion in June of 1993. Although the medical evidence does reveal that claimant presently has a loss of range of motion as a result of the two cervical fusion surgeries combined, we are unable to determine how much of that loss predated claimant's compensable injury. Dr. Foster merely arrived at the 14% functional impairment rating for loss of range of motion by comparing claimant's post-surgical motion with that of a normal person. Clearly, claimant's cervical spine was not normal after his first surgical fusion. Therefore, it is mere speculation that the entire 14% resulted from claimant's compensable injury. Without medical evidence establishing a baseline range of motion after claimant's first surgical procedure, we cannot determine the extent, if any, of claimant's loss of range of motion as a result of his compensable injury. Accordingly, we find that claimant has failed to prove by a preponderance of the evidence to an increase in his physical impairment rating based upon a loss of range of motion. Any finding based on loss of range of motion would be based upon speculation. Conjecture and speculation, even if plausible, cannot take the place of proof. [Citations omitted, emphasis added.]

Our decision last year in *Ellison*, *supra*, invalidated similar reasoning. *See* 66 Ark. App. at 291-92, 989 S.W.2d at 930. While *Ellison* involved a dispute over the extent of a worker's loss of capacity to earn wages and this case involves a dispute over the employer's liability for the extent of Alvin White's successive permanent impairments, the rationale we employed in *Ellison* is properly applicable now.

II. Aggravation

Not only did the Commission erroneously apply a major cause analysis to a pre-Act claim, it also failed to apply the law pertaining to aggravations in effect when White was injured. As in *Ellison*, the Commission in this case recognized that the medical evidence abundantly demonstrated the functional impairment for which Alvin White seeks to be compensated. As in *Ellison*, Arkansas law at the time of White's 1992 injury did not limit permanent disability benefits "for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment" as currently prescribed by Ark. Code Ann. § 11-9-102(5)(F)(ii)(b). Rather, the law in effect when White suffered the compensable injury for which benefits are sought in this case provided that the employer "takes the employee as he finds him" so that employment circumstances that aggravate preexisting conditions are compensable. *See Public Employee Claims Div. v. Tiner*, 37 Ark. App. 23, 822 S.W.2d 2d 400 (1992); *see also, Wade v. Mr. C. Cavenaugh's*, 25 Ark. App. 237, 756 S.W.2d 923 (1988); *Little v. Delta Rice Mill, Inc.*, 11 Ark. App. 114, 667 S.W.2d 373 (1984); *McGeorge Constr. Co. v. Taylor*, 234 Ark. 1, 350 S.W.2d 313 (1961); *McGregor & Pickett v. Arrington*, 206 Ark. 921, 175 S.W.2d 210 (1943).

Dr. Foster issued a report dated February 9, 1994, in which he assigned a 13% permanent anatomical impairment rating because White had undergone three spinal surgeries. Dr. Foster explicitly stated that the 13% impairment assessment "*is based on an anatomical impairment rating since the patient has had three spinal surgeries for this level. This impairment rating stands regardless of any previous impairment rating.*" In other words, regardless of previous assessments of White's impairment, Dr. Foster opined that the *AMA Guidelines to Evaluation of Permanent Impairment* prescribed a 13% rating because White had sustained three surgeries to the area of his cervical spine involved in this claim. There is no question that the 1993 surgery performed by Dr. Foster was necessitated by White's injury while employed by the last employer.[1]

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[1] This is ascertainable despite the less than helpful abstract submitted by appellant, which failed to include the medical records from appellant's Texas workers' compensation injury as well as numerous other medical records that would have shed more light on the issues before us.

Hence, this employer is liable for the consequences flowing from White's injury, including his 13% impairment that he now has suffered due to three surgical insults to the affected area of his cervical spine, as well as his loss of range of motion. This result is compelled by the holding in *Bèarden Lumber Co. v. Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983), where our court cited Professor Larson's treatise on workers' compensation law as follows:

> In § 95.12 Larson stated the rule applicable to second medical complication cases which are "work-related" as follows:
>
> > *If the second injury takes the form merely of a recurrence of the first, and if the second incident does not contribute even slightly to the causation of the disabling condition, the insurer on the risk at the time of the original injury remains liable. . . . On the other hand, if the second incident contributes independently to the injury, the second insurer is solely liable, even if the injury would have been less severe in the absence of the prior condition, and even if the prior injury contributed to the major part of the final condition. This is consistent with the general principle of the compensability of the aggravation of a preexisting condition.*

Id. at 73, 664 S.W.2d at 325 (emphasis added). The Commission's decision in this case is remarkably similar to the one we reversed in *Ellison*. Pursuant to *Bearden Lumber Co., supra*, we should give it the same treatment.

III. Apportionment

The problem presented by this case really arises from the Commission's unchallenged failure to apportion White's permanent impairment attributable to his last employment and the aggregate impairment attributable to that injury and his workers' compensation injury in Texas. The answer to this problem is based on law that Arkansas courts enunciated thirty-two years before Act 796 was enacted, in *McDaniel v. Hilyard Drilling Co.*, 233 Ark. 142, 343 S.W.2d 416 (1961), and that later made its way into our workers' compensation statute as part of the Second Injury Fund law, found at Arkansas Code Annotated § 11-9-525 (Repl. 1996).[2]

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[2] The supreme court again applied the apportionment principle announced in *Hilyard* when it decided *Wilson Hargett Const. Co. v. Holmes*, 235 Ark. 698, 361 S.W.2d 634 (1962). Arkansas eventually made the *Hilyard* standard part of our workers' compensation

McDaniel involved a workers' compensation claim by a man who suffered a back injury on February 7, 1958, when he fell from a water truck. The only controversy was the amount of permanent partial disability due the worker. The employer argued that the worker was only entitled to 10% permanent partial disability due to the aggravation of the worker's preexisting deformity of his back. Medical evidence established that the worker's permanent partial disability was 20% to the body, with 10% attributable to the preexisting deformity that produced no symptoms before the work injury, and 10% attributable to the work injury. The Arkansas Supreme Court reversed a circuit court's decision that affirmed the Commission's award of 10% permanent partial disability benefits. In its decision, the supreme court addressed the apportionment issue for the first time as follows, quoting Section 59 of Volume 2, *Larson's Workmen's Compensation Law*:

> "Nothing is better established in compensation law than the rule that when industrial injury precipitates disability from a latent prior condition, such as heart disease, cancer, back weakness and the like, the entire disability is compensable, and except in three states having special statutes on aggravation of disease, *no attempt is made to weigh the relative contribution of the accident and the pre-existing condition to the final disability. Apportionment does not apply in such cases, nor in any case in which the prior condition was not a disability in the compensation sense . . . To be apportionable then, an impairment must have been independently producing some degree of disability before the accident, and must be continuing to operate as a source of disability after the accident.*"
>
> We agree with the logic of the general rule relative to apportionment as set forth above from Larson, and inasmuch as this is a case of first impression in Arkansas, we adopt it as our own.
>
> Arkansas is not one of the three states referred to by Dean Larson as "having special statutes on aggravation of disease."

Id. at 233 Ark. 147-148, 343 S.W.2d at 419 (emphasis added). Thus, apportionment is only proper where an impairment indepen-

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statute at Arkansas Statutes Annotated § 81-1313(f)(2)(ii) (Repl. 1960 and Supp. 1969). The supreme court applied the statute to a claim of successive disabilities in *Davis v. Stearns-Rogers Const. Co.*, 248 Ark. 344, 451 S.W.2d 469 (1970).

dently produces some degree of disability before the accident, and continues to operate as a source of disability after the accident.

In *Chicago Mill & Lbr. Co. v. Greer*, 270 Ark. 672, 606 S.W.2d 72 (1980), the supreme court held that the apportionment statute was amended by Act 253 of 1979 to provide that the Second Injury Fund would be liable for any disability above that attributable to the last employer. In *Harrison Furniture et al. v. Chrobak*, 2 Ark. App. 364, 620 S.W.2d 955 (1981), our court reversed and remanded a case to the Commission so that a worker's disability could be apportioned between his employer and the Second Injury Fund for disability resulting from a prior injury where the prior injury consisted of a withered left hand, arm and leg attributable to a congenital condition.[3]

Thus, it is plain that the supreme court had firmly established the law when Alvin White's claim arose that where a worker suffered from a preexisting impairment or disability and sustained a subsequent work-related injury that increased that impairment or disability, the second employer was only responsible for that portion of the disability or impairment created by the second accident. *See International Paper Co. v. Remley*, 256 Ark. 7, 505 S.W.2d 219 (1974). Had the Commission properly applied the apportionment law, it would have held the Second Injury Fund liable for all impairment beyond that attributable to the last injury.

It is undisputed in this case that White's preexisting impairment to his cervical spine independently produced disability before the last injury. Dr. Foster's testimony was uncontradicted that the preexisting impairment continued and was aggravated by the last injury. Hence, the apportionment principle should have governed this case. However, the Second Injury Fund was absolved from liability.

Neither party has appealed the Commission's decision that absolved the Second Injury Fund from liability. Apparently, White chose to challenge the Commission's decision by arguing that it

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[3] In *Death and Permanent Total Disability Trust Fund v. Whirlpool Corp.*, 39 Ark. App. 62, 837 S.W.2d 293 (1992), Judge James Cooper of our court observed that the apportionment statute was omitted "improperly or erroneously" from the Arkansas Code of 1987 but remained in effect pursuant to Ark. Code Ann. § 1-2-103(b) (1987). It is now part of our law at Arkansas Code Annotated § 11-9-525(b)(1)-(4) (Repl. 1996).

violated the law of the case. I agree with the majority that this challenge is unwarranted because, as the majority opinion correctly observes, the extent of White's permanent impairment was not adjudicated when this claim was previously litigated.

If the Second Injury Fund had not been absolved of its liability, the burden would have been on appellee and the Second Injury Fund, not appellant, to prove what portion of his impairment was due to his second injury. But the Commission's decision absolving the Fund of liability must now mean that the employer is "solely liable" for the *combined effect* of White's preexisting condition and his injury sustained while in its employment, and not merely that portion of his impairment that is due to his second injury. Because the Commission resorted to the "major cause" analysis of Act 796 rather than the proper legal standard prescribed by *Bearden Lumber Co. v. Bond, supra,* when it absolved the Fund from liability, I do not understand why the majority now affirms the Commission's failure to hold the employer "solely liable" for White's combined permanent impairment produced after his preexisting condition was unquestionably aggravated by the subsequent compensable injury.

It is true that Dr. Foster could not apportion White's functional loss of range of motion between his Texas work injuries and the injury sustained in the last employment. But Dr. Foster plainly testified that the last injury aggravated White's preexisting condition. Hence, there is no evidentiary justification for denying White workers' compensation benefits for the combined effect of the successive impairments. Arkansas law governing this claim plainly made the last employer "solely liable" for the full extent of the injury suffered in its employment *even if that injury and its effect would have been less severe had no previous injury and disability occurred. See Bearden Lumber Co. v. Bond, supra.* Moreover, a previous determination of total disability and the fact that he received workers' compensation benefits did not make White less entitled to compensation for combined disabilities or impairments after he later managed to return to work. *See Davis v. Stearn-Rogers Const. Co., supra.*[4]

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[4] The *Davis* court stated:

> The capacities of a human being cannot be arbitrarily and finally divided and written off by percentages. *The fact that a man has once received compensation as for 50 percent of total disability does not mean that ever after he is in the eyes of compensation law but half a man, so that he can never again receive a compensation*

I would reverse the Commission's 2% permanent partial disability award and remand the case to the Commission with instructions that it enter an award against the employer for 27% permanent anatomical impairment (13% based on Dr. Foster's 1994 report plus the 14% impairment for loss of range of motion), and for such additional proceedings as may be necessary.

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> *award going beyond the other 50 percent of total.* After having received his prior payments, he may, in future years, be able to resume gainful employment. In the words of the Colorado court, he may have resumed employment as a 'working unit'. If so, there is no reason why a disability which would bring anyone else total permanent disability benefits should yield him only half as much.

Id., 248 Ark. at 347-49, 451 S.W. 2d at 471-72 (emphasis added).

Lane, Muse, Arman & Pullen, by: *Shannon Muse Carroll*, for appellant.

Rieves & Mayton, by: *Eric Newkirk*, for appellees.

ANDREE LAYTON ROAF, Judge. Waylon Cooper appeals from a decision of the Workers' Compensation Commission denying him benefits for a hernia. On appeal, he argues that the Commission erred in failing to find that his injury occurred on April 13, 1998, rather than two days earlier. We reverse and remand for an award of benefits.

Cooper worked as a laborer for the McBurney Corporation, a construction company. During the course of his employment, he suffered physical problems on April 11, 1998, and April 13, 1998. Cooper claimed that the first problem was merely a stomach muscle strain and that the second one was the hernia that ultimately required surgery to repair. McBurney denied that the hernia was compensable, and on April 16, 1999, Cooper brought his case before an Administrative Law Judge (ALJ) for a hearing.

Co-worker William R. Cross testified by deposition that he was working with Cooper on April 11, 1998, and that Cooper told him that night that he had "strained his back or stomach or something." However, he stated that Cooper worked a full twelve-hour shift that night. Cross also testified that he worked with Cooper the next night when they made a "pour" of a cement-like refract material and that the process required that Cooper pick up hundred-pound bags and empty them into a trough where Cross mixed them. Cross stated that the process was constant, but Cooper had three to five minutes of rest between bags.

According to Cross, in the early morning hours of that shift, on April 13, 1998, Cooper complained that he was injured and that when he tried to urinate, his injury bothered him. Although the pour that night had to be repeated, Cooper did not help out to any significant degree because of his injury. Cross stated that Cooper's father, who was his supervisor, allowed Cooper to avoid strenuous activity that night, but eventually Cooper "just had to quit." Cross, who stated that he was Cooper's roommate at the time, testified that after work, Cooper took a shower and noticed a lump in his groin area. Cross claimed that Cooper showed him the lump. According to Cross, he told Cooper that he might have a hernia after he complained that he felt a burning pain upon urination. Cross further testified that Cooper returned to work the next night, but did not do any strenuous work for the rest of the night. Regarding the work performed on the evening of April 11, 1998, which involved "pulling two or three hundred pound tubes," he opined that it was as strenuous as the work performed during the pour.

Cooper, who was twenty-one years old and stood 6'1"tall and weighed 235 pounds, testified that he injured himself on April 13, 1998, while he was lifting the bags of refract. He claimed that he felt a burning sensation in his right groin that got progressively

worse. Cooper claimed that by his lunch break, he could not eat because his stomach was upset, and he did not do any more heavy lifting for the rest of his shift. He confirmed that he told Cross that he was experiencing pain when he tried to go to the bathroom. He also claimed that he sustained his injury on Monday night/Tuesday morning, informed his supervisor on Tuesday afternoon, April 14, 1998, at 3:30, and afterwards sat in the tool trailer for most of his shift. Cooper stated that his mother set up an appointment with a Dr. Rushing later that day. After Dr. Rushing unsuccessfully attempted to push the hernia back in, he referred Cooper to a Dr. Bowden, who was also unsuccessful with that treatment. Dr. Bowden repaired the hernia with surgery on April 30, 1998.

Regarding his April 11, 1998, injury, Cooper stated that the pain was above his belt line, and it was a "stretching" pain. By comparison, the pain for his second injury was "like a burn," and then it "just carried up to like a gut-twisting pain up in [his] stomach."

On cross-examination, Cooper admitted that he signed an AR-C form that stated that his injury occurred when he was "pulling and setting 20 foot tubes." He also admitted that he gave insurance adjuster Melissa Griffin a recorded statement in which he told her about the injury he suffered on April 11, 1998. However, he emphatically denied changing the date of his injury to bring his visit to a physician within the seventy-two hours required by statute to make his injury compensable. He reiterated that he had no swelling until he went to work on Monday night. Cooper also stated that he first began to experience the "burning" pain when he was picking up a bag of refract.

The medical exhibits included an office note from Dr. K. Rushing that stated that Cooper related that he felt like he pulled a stomach muscle "pushing some tubes," and "a couple of days later" felt "a little bit more pain," and "felt like he had some swelling in the groin." Dr. Rushing's diagnosis was a right inguinal hernia. Dr. Bowden's office note stated that "patient states that he first noticed discomfort in his right groin Saturday, 4/11/98, after lifting at work. The following Monday he noticed a bulge in his right groin. Felt a mass in his right scrotum." Dr. Bowden agreed with Dr. Rushing's diagnosis of a right inguinal hernia, but also suspected a "possible associated cord lipoma." Dr. Rushing scheduled surgery for the next day, but canceled it when McBurney Corpora-

tion's workers' compensation carrier called and said that they would not pay for the surgery. Later, Dr. Rushing performed a successful surgical repair of the hernia.

Also included in the record as an exhibit for McBurney Corporation was the statement that Cooper gave to Melissa Griffin. Cooper stated:

> I noticed the pain Saturday night when we were pulling out tubes. It just bothered me every so often. I didn't think it was nothing serious. I kept working. Monday night was when I knew there was a problem but I realized Saturday night was when it started. . . . There were people around me that I was working with when the accident occurred on Saturday night. I can't really can't recall if I said something because I thought it was like a little pulled muscle or something in my stomach and I wasn't going to act like a wimp. So I just kept working. . . . When I was working there it did not make me stop even just for second. It did not make me stop what I was doing and realized I was having pain on Saturday night because it didn't bother me. But [I stopped working] a little bit Monday night when it started hurting bad.

Cooper also stated that he felt a "strain" when he was lifting the tubes.

The ALJ found that Cooper's hernia was compensable and awarded benefits. In awarding benefits, the ALJ acknowledged that there was evidence of an injury on April 11, 1998, however, he reasoned that the symptoms on that date did not qualify as a compensable hernia, whereas the injury of April 13, 1998, did. The Commission reversed in a plurality decision. In a lengthy main opinion, Commissioner Wilson found that April 11, 1998, was when the hernia occurred, but that it failed to satisfy the requirements of Ark. Code Ann. § 11-9-523 (Repl. 1996), in that Cooper did not prove that he suffered severe pain, did not immediately cease work, did not notify his employer of the injury within forty-eight hours, and did not visit a physician within seventy-two hours. Wilson, opined, however, that if the hernia had been sustained on April 13, 1998, all of the criteria required by section 11-9-523 would have been met. Commissioner Coffman concurred, finding that the greater weight of the credible evidence established that Cooper's hernia occurred on or before April 11, 1998. He specifically mentioned that date as being listed on Cooper's AR-C, Cooper's first recorded statement, Dr. Rushing's April 15, 1998 report, and Dr. Bowden's April 30, 1998, report.

Cooper argues that the Commission erred in finding that his April 11, 1998, injury was the hernia that he ultimately needed surgery to repair. He contends that he met all of the requirements of Ark. Code Ann. § 11-9-523 (Repl. 1996), for finding that his April 13, 1998, injury was compensable, and that while he may have experienced a pull in his stomach on April 11, 1998, it does not follow that the hernia that he experienced on April 13, 1998, is rendered noncompensable because of it. We find this argument persuasive.

Compensability of work-related hernias are governed by Ark. Code Ann. § 11-9-523 (Repl. 1996), which provides in pertinent part:

> (a) In all cases of claims for hernia, it shall be shown to the satisfaction of the Workers' Compensation Commission:
>
> (1) That the occurrence of the hernia immediately followed as the result of sudden effort, severe strain, or the application of force directly to the abdominal wall;
>
> (2) That there was severe pain in the hernial region;
>
> (3) That the pain caused the employee to cease work immediately;
>
> (4) That notice of the occurrence was given to the employer within forty-eight (48) hours thereafter; and
>
> (5) That the physical distress following the occurrence of the hernia was such as to require the attendance of a licensed physician within seventy-two (72) hours after the occurrence.

An "inguinal hernia" is defined as "a hernia in which a loop of intestine enters the inguinal canal, sometimes filling in a male the entire scrotal sac." *Mosby's Med. & Nursing Dictionary* 558 (Violet A. Breckbill et al., eds. C.V. Mosby Co. 1983).

In reviewing workers' compensation cases on appeal, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirm if those findings are supported by substantial evidence. *Boyd v. Dana Corp.*, 62 Ark. App. 78, 966 S.W.2d 946 (1998); *Min-Ark. Pallet Co. v. Lindsey*, 58 Ark. App. 309, 950 S.W.2d 468 (1997). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* The issue 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 its decision. *Id.*

■ ■ We agree with the Commission's finding that Cooper did not suffer a compensable hernia on April 11, 1998. We also agree that Cooper's April 13, 1998, injury satisfied all of the statutory requirements for compensability. However, we cannot say that reasonable minds could conclude, from the evidence before the Commission, that Cooper suffered his inguinal hernia on April 11 rather than April 13. Cooper merely related to his two treating physicians and to the insurance adjuster the sequence of events that occurred and the symptoms that he experienced on the two dates. The documentation produced from these three sources agrees in all material respects and is consistent with Cooper's testimony at his hearing. Both physicians simply recorded the history provided by Cooper and diagnosed an inguinal hernia without stating on what date the hernia had occurred. Although Cooper initially reported his injury as occurring on April 11, we find this fact to be of no moment; this situation is analogous to our decision in *Price v. Little Rock Packaging Co.*, 42 Ark. App. 238, 856 S.W.2d 317 (1993), in which we reversed the Commission's denial of benefits for a hernia where the claimant initially attributed severe groin pain that he felt while lifting paper at work to a fall that he suffered two months earlier and, like Cooper, had listed the earlier date as the date of the injury on his claim form. We are mindful of the fact that Price's treating physicians testified to a high degree of medical certainty that the hernia occurred when he felt the groin pain, and not two months earlier, and we do not have equivalent medical evidence in this case. Nevertheless, because the evidence is clear that Cooper suffered the severe groin pain and other related symptoms only on April 13, and because, even as we give it its greatest probative force, Cooper's report of the earlier incident does not establish either medically or factually that his hernia occurred on that date, we hold that the Commission erred in failing to find Cooper's hernia compensable and refusing to award benefits.

Reversed and remanded for award of benefits.

HART, ROBBINS, NEAL, GRIFFEN, and CRABTREE, JJ., agree.

JENNINGS, PITTMAN, JJ., and STROUD, C.J., dissent.

JOHN E. JENNINGS, Judge, dissenting. The critical issue in this case is whether Mr. Cooper's hernia occurred on April 11 or April 13. This question is one of fact. Our standard of review requires that we affirm the Commission's decision on questions of fact if they are supported by substantial evidence. *Oliver v. Guardsmark*, 68 Ark. App. 24, 3 S.W.3d 336 (1999). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Min-Ark Pallet Co. v. Lindsey,* 58 Ark. App. 309, 950 S.W.2d 468 (1997). On appellate review, we must 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. *Buford v. Standard Gravel Co.*, 68 Ark. App. 162, 5 S.W.3d 478 (1999). 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 its decision. *Oliver v. Guardsmark, supra.*

The Commission's opinion noted that Dr. Rushing's notes state that Mr. Cooper "felt like he pulled a muscle in the stomach and then a couple of days later was picking up some 100-pound bags and felt a little bit more pain and then just a few days before coming into the office felt like he had some swelling in the groin." Mr. Cooper testified:

> I told — Ms. Griffin — she asked me when I first got hurt, and I knew that Saturday night I had gotten hurt, and I hadn't seen a doctor and had no idea what was wrong with me or what. I figured it was a hernia. So, I told her about the Saturday night incident so I could get the right diagnosis from a doctor, have — you know, I wanted to be up front and truthful about the whole thing, so I told her about the pain Saturday night, too, — that would help the doctors out or anything like that. I told her about that just to tell her everything.

The claim form Mr. Cooper filed listed April 11 as the date of the injury. In his first recorded statement given to the insurance adjustor, Mr. Cooper indicated that April 11 was the date of his injury and that he began experiencing pain in his stomach on that date and that the pain got progressively worse. Finally, Dr. Bowden's April 30 office notes indicate that Mr. Cooper first noticed a discomfort in his right groin on April 11.

Obviously, there is no way of knowing, with absolute certainty, precisely when Mr. Cooper's hernia occurred. But based on the statements of the claimant himself and the history given to his doctors, reasonable minds could surely conclude that the hernia occurred on April 11. I respectfully dissent.

STROUD, C.J., and PITTMAN, J., join in this dissent.

Michael SALEM *v.* LANE PROCESSING TRUST;
John E. Peterson, Jr.; Edward H. Covell; and
Walter W. Minger, as Trustee of the
Lane Processing Trust

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Court of Appeals of Arkansas
Division IV
Opinion delivered January 31, 2001

Skokos, Bequette, & Billingsly, P.A., by: *Jay Bequette*, for appellant.

Wright, Lindsey, & Jennings LLP, by: *Judy Simmons Henry, Roger D. Rowe, & Justin T. Allen*, for appellees.

LARRY D. VAUGHT, Judge. This is an appeal from the Pulaski County Chancery Court's denial of appellant Michael Salem's motion for access to the records of the Lane Processing Trust (hereafter, "the Trust"). Appellant is the nephew of Clift and Dorothy Lane (hereafter, "the Lanes"), the former owners of a number of companies known together as "The Lane Processing Companies" (hereafter, "the Lane Companies"). Appellant is a former employee of the Lane Companies. In 1985, the Lane Companies were in default of a bankruptcy plan of reorganization, and the Lanes were facing personal liability for a debt of over $50 million. To avoid liquidation of the Lane Companies, the Lanes voluntarily transferred the stock of the Lane Companies (which was worthless) to appellees, John Peterson, Jr., Edward Covell, and Walter Minger. Appellees agreed to assume the positions of senior officers and directors of the Lane Companies. Appellees then created the Trust and voluntarily transferred their stock in the Lane Companies to the Trust for the benefit of themselves and the other employees. The express terms of the Declaration of Trust gave appellees sole and absolute discretion as to distribution of the proceeds of the Trust. It stated:

> The Trustees shall hold, administer, invest and reinvest the Trust Fund, collect the income therefrom and, after deducting from said income all charges and expenses properly chargeable thereto, shall, at any time and from time to time, pay or apply to or for the use and benefit of any one or more (whether all or less than all) of the members of the group consisting of the Beneficiaries living at the time of each such payment or application so much (even to the extent of the whole) of the net income and/or principal of the Trust Fund, in such amounts and proportions, equal or unequal (to the exclusion of any one or more of the persons included in said group) as the Trustees, in their sole and absolute discretion, shall deem advisable.

Appellees successfully avoided liquidation of the Lane Companies and, in 1986, sold the stock to Tyson Foods. Tyson agreed to satisfy the Lane Companies' debt and to pay the Trust approximately $35 million over the next ten years.

Soon after the sale to Tyson, the Lanes sued appellees. In 1990, after the litigation was concluded in appellees' favor, appellees distributed about $24 million to former employees of the Lane Companies with the approval of the Pulaski County Chancery Court. Fifty-percent of this amount went to former hourly and salaried employees, 18% was paid to five former officers, and 32% was distributed to appellees. Appellant received over $60,000 in this distribution. After this, appellees distributed the balance of the Trust to the former officers and themselves, making no payments to the former hourly and salaried employees. Through the accounting firm Arthur Anderson LLP, appellees secured audits of the Trust in 1990 and 1996 and provided copies of the resulting reports to appellant.

In 1998, appellant reopened the 1990 distribution case by filing a motion for access to the records of the Trust, requesting an order

> Requiring Respondents to make available to Movant for inspection and copying all records evidencing or relating in any way to all monies and properties received and disbursed by Respondents, all investments made by Respondents, all income collected by Respondents in the administration of the Trust, all charges for compensation made by Respondents against the Trust property from the inception of the Trust to date, and all documents relating in any form or fashion to the operation of the Trust[.]

Appellees resisted the motion on the ground that appellant's request was unreasonably broad.

In her remarks at the conclusion of the hearing, the chancellor noted the Lanes' history of vexatious lawsuits and libel against appellees and said that she assumed that appellant might be acting in concert with them. She explained her decision to deny his motion as follows:

> I don't think there's any general right of a beneficiary for a trust to demand to examine every record that the trust has ever had... It just doesn't work that way.... Even though ... a beneficiary has certain rights ... I think the request is not reasonable. [F]rom Mr.

> Salem's own responses, it's clear to me that he is unable to articulate why he wants any information and what he wants.... I think it reasonable to assume he's not particularly interested in vindicating his own rights under the trust, he's interested in continuing a long pattern that has been established of second-guessing everything that these people have done.... [S]imply the failure to make a reasonable request is some indication that you don't have a permissible purpose for seeking it. [Y]a'll have asked for ... access to every trust record since the inception of the trust, and my answer to that is no.... I don't want ... to indicate that I do not believe that a trust beneficiary has the right to a general accounting because I do, but I don't think that's what [has] been asked for in this case.... I do believe that the letters from [appellees' counsel], while they included a lot of background information about all the bad things that had been done in the past, still didn't refuse.... I do believe that the responses that were made of the trustee, which was ... tell us reasonably what you want and we will respond to that is an adequate response.... [T]he position ... taken by Mr. Salem thereafter which is, I want to come over and see everything you have from the beginning of the trust to the end of the trust isn't reasonable.

On appeal, appellant continues to maintain that he is entitled to unlimited access to the records, but states that he is willing to accept "at a minimum ... all check registers for all accounts maintained by the Trust, along with correspondence or documents to or from the Trustees, including communications with counsel for the Trust and the Trustees, in order to learn about the operations and administration of the Trust."

Comment c to section 173 of the *Restatement (Second) of Trusts* (1959) provides:

> Although the terms of the trust may regulate the amount of information which the trustee must give and the frequency with which it must be given, the beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust.

The appellant has failed to articulate any right he possesses under the Declaration of Trust that requires any records be released to him. He certainly has not justified the unlimited access as requested in his petition. Similarly, the Restatement provides that access is required to prevent or redress a breach of trust. Appellant argues that a breach can only be determined by examining the records, but Arkansas law presumes a trustee has acted in good faith and places the burden of proof upon those who question his actions

and seek to establish a breach of trust. *Gregory v. Moose*, 266 Ark. 926, 590 S.W.2d 665 (Ark. App. 1979).

The chancellor found appellant's request for access to these records was unreasonable. Generally, what is reasonable is a question of fact. *See Taylor v. Eagle Ridge Developers, LLC*, 71 Ark. App. 309, 29 S.W.3d 767 (2000). Although we review chancery cases *de novo*, we will not reverse a chancellor's finding of fact unless it is clearly erroneous. *Id.* In light of these considerations, we cannot say that the chancellor erred in denying appellant's motion.

Affirmed.

STROUD, C.J., and BIRD, J., agree.

John Henry HOPPER and Betty J. Hopper *v.*
Tom DANIEL; Mrs. Tom Daniel, *his wife*;
Ed Daniel; Mrs. Ed Daniel, *his wife*;
Debra Puckett, *a single person*;
James C. Taylor; Mrs. James C. Taylor,
his wife; Ann Murray, *unremarried widow*
of Garner Murray, deceased;
Pat Murray; Mrs. Pat Murray, *his wife*;
Bertha Pearl Murray Keys, *a widow*;
Kathleen Kluis, *a single person*;
Unknown Heirs of Augustus Hopper
and Martha M. Hopper, *deceased*

CA 00-464 38 S.W.3d 370

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered February 7, 2001

Harrell & Lindsey, P.A., by: *Searcy W. Harrell, Jr.*, for appellants.

Terry Sullivan, for appellees Mr. and Mrs. Tom Daniel and Mr. and Mrs. Ed Daniel.

Farrar, Reis, Rowe, Nicolosi & Williams, by: *Adam Williams*, for appellees Mr. and Mrs. Larry Keys.

JOHN F. STROUD, JR., Chief Judge. This appeal involves a quiet-title action, with an alternative prayer for partition, that was brought by appellants John Henry Hopper and his wife Betty J. Hopper. John Hopper is a grandson of Augustus and Martha Hopper, who acquired title to a combined total of 120 acres in Yell County, the property in question, in the 1800s. Appellant Hopper's father, Lawrence, was one of seven children born to Augustus and Martha. In his action, appellant John Hopper contended that his father had adversely possessed the property from the time of Martha's death in 1947 until his own death in 1975; that he, appellant Hopper, continued in adverse possession after acquiring the quitclaim deed from his father; and that, through tacking, there had been fifty years of adverse possession.

Appellees are those heirs of Lawrence's siblings from whom appellant John Hopper was not able to acquire quitclaim deeds covering their inherited interests in the property. Appellees' interests in the property are divided as follows: 1/6 is held by "the Daniel heirs;" 1/6 by Larry Keys' widow, Bertha Pearl Murray Keys; 1/6 by heirs who were never located but were served by publication; and 1/36 by heirs who were served with process but defaulted. The chancellor held that appellant Hopper had not sustained his burden of proving that he was entitled to the property in question under the doctrine of adverse possession. Consequently, the chancellor ordered partition of the property. In addition, the chancellor limited his award of attorney's fees for the work of appellants' attorney on the partition action to $2,000. We affirm.

In order to understand the issues involved in this case, we analyze it in historical context. Augustus Hopper died in 1902 and Martha Hopper died in 1947, having never remarried. Their seven children survived them, but one child subsequently died without children. Of the six remaining children of Augustus and Martha, five moved away from Yell County, with two remaining in Arkansas, and three moving to Oklahoma, New Mexico, and California. The only child of Augustus and Martha that remained on the farm in Yell County was appellant John Hopper's father, Lawrence. Lawrence cared for Martha until her death in 1947, and he continued to live on the farm until his own death in 1975. Prior to his death, he executed a quitclaim deed covering the property in ques-

tion to appellant John Hopper, his only surviving heir. He also left all of his property to appellant John Hopper by his will.

In 1996, appellant John Hopper had the title to the 120 acres examined and discovered that his father never held record title to the property because he never acquired title from his parents, Augustus and Martha. The survivor of the two, Martha, who held record title, died intestate. Accordingly, appellant began trying to acquire quitclaim deeds from those heirs of his father's siblings that he could locate. As a result of those efforts, he acquired title to a 34/72 interest in the 120 acres, and then brought the instant action against appellees. He now raises four points of appeal: 1) the court erred in excluding testimony about a lost letter, 2) the court erred in finding that the appellant must give "actual notice" to co-tenants in order to obtain title by adverse possession, 3) the court's decision was against the preponderance of the evidence, and 4) the court abused its discretion when it only awarded appellant a $2,000 attorney's fee.

1) The court erred in excluding testimony about a lost letter.

The trial court sustained an objection to testimony by appellant John Hopper to the effect that shortly after his father died in 1975, he received a letter from Ed Daniel that suggested the land be appraised and sold and divided; that he never heard further from Mr. Daniel or any other member of the family; and that his refusal to comply with Daniel's request supported his position that Ed Daniel had notice that he was holding the property adversely. Appellant testified that he gave the letter to his father's attorney and never saw it again; that Ed Daniel is now deceased; and that some of Ed Daniels's heirs are defendants [appellees] in this case. We find no error in the court's refusal to allow the testimony.

■ Appellant John Hopper's recollection of the contents of the 1975 letter constituted hearsay evidence, which was properly excluded under Rule 802 of the Arkansas Rules of Evidence. Appellant contends that the original letter was either lost, destroyed, or not obtainable, and therefore should have been admissible pursuant to Ark. Rule Evid. 1004, which provides that an original is not required in certain circumstances. We disagree. First, appellant's testimony did not establish that the original was lost or otherwise unobtainable, just that he gave it to his father's lawyer and never saw it again. Second, subsection 4 of Rule 1004 provides that "The

original is not required, and other evidence of the contents of a writing, . . . is admissible if: . . . [t]he writing, . . . is not closely related to a controlling issue." Here, the presence or absence of notice to the other co-tenants was a controlling issue. The trial court did not err in excluding the testimony.

2) The court erred in finding that the appellant must give "actual notice" to co-tenants in order to obtain title by adverse possession.

The third and fourth numbered paragraphs of the April 15, 1998, decree issued by the chancellor in this case provide:

> 3. The Court does not feel that the Plaintiff has sustained his burden of proof to show that he is entitled to the subject property under the doctrine of adverse possession. It is undisputed that the Plaintiff, John Henry Hopper, is a co-tenant with the Defendants *and case law is clear that when there is a family relation between co-tenants that a stronger evidence of adverse possession is required when a tenant in common attempts to turn his occupancy into adverse possession and he must show knowledge of the adverse claim or his intentions to so hold against the other co-tenants. I do not find that this has been done in the instant case.*
>
> 4. It is undisputed that the Plaintiff owns property in his own right adjacent to the property he is claiming by adverse possession. As the Court recalls the Plaintiff's testimony was that he did not know the boundary line between the two farms and there was no evidence regarding the accounting prepared by the Plaintiff, regarding his income and profits on the farm, as to differentiate between the activities of the Plaintiff on his own farm and the property in question. *The Court further finds no evidence of any actual notice that the Plaintiff gave to the Defendants and their predecessors in title which would merit the Plaintiff prevailing on his argument of adverse possession.* Consequently, the Plaintiffs claim as to ownership of the subject property, under the doctrine of adverse possession, is denied and dismissed.

(Emphasis added.) Appellants contend that the chancellor erred in finding that they were required to give "actual notice" to the other co-tenants in order to obtain title by adverse possession. We do not believe the chancellor so found.

Although paragraphs two and three are perhaps inartfully written, we believe that when they are read together, it is clear that the chancellor did not base his decision solely on appellants' failure to give actual notice to the other co-tenants. Rather, in the third paragraph, the chancellor explained that stronger evidence of

adverse possession is required when there is a family relation among the co-tenants, and that "when a tenant in common attempts to turn his occupancy into adverse possession he must show knowledge of the adverse claim *or* his intentions to so hold against the other co-tenants." (Emphasis added.) That is, we believe that the chancellor's sentence in this regard can be interpreted to say that a co-tenant who is attempting to show that his occupancy of the property has changed to that of adverse possession must show *either* that the other co-tenants had actual knowledge of the adverse claim *or* that his intentions to so hold were sufficiently conveyed to the other co-tenants by his actions. The chancellor concluded the paragraph by stating that he did "not find that this has been done in the instant case." Then, in the fourth paragraph, the chancellor finds in pertinent part that there was "no evidence of any *actual notice* that the Plaintiff gave to the Defendants and their predecessors in title which would merit the Plaintiff prevailing on his argument of adverse possession." (Emphasis added.) In short, we find that the chancellor applied the proper law in making his determination as to whether appellants had established adverse possession of the property in question, and did not limit his determination solely to whether appellant had given "actual notice" of his claim of adverse possession to the other co-tenants.

3) The court's decision was against the preponderance of the evidence.

The possession of one tenant in common is the possession of all. *Mitchell v. Hammons,* 31 Ark. App. 180, 792 S.W.2d 333 (1990). A tenant in common is presumed to hold in recognition of the rights of his co-tenants. *Id.* It has been said that the presumption continues until an actual ouster is shown. *Id.* Since possession by a co-tenant is not ordinarily adverse to other co-tenants, each having an equal right to possession, a co-tenant must give actual notice to other co-tenants that his possession is adverse to their interests or commit sufficient acts of hostility so that their knowledge of his adverse claim may be presumed. *Id.* In order for the possession of one tenant in common to be adverse to that of his co-tenants, knowledge of his adverse claim must be brought home to him directly or by such notorious acts of an unequivocal character that notice may be presumed. *Id.* The statutory period of time for an adverse-possession claim does not begin to run until such knowledge has been brought home to the other co-tenants. *Id.* There is no hard and fast rule by which the sufficiency of an adverse

claim may be determined; courts generally look to the totality of the circumstances and consider such factors as the relationship of the parties, their reasonable access to the property, kinship, and innumerable other factors to determine if nonpossessory co-tenants have been given sufficient warning that the status of a co-tenant in possession has shifted from mutuality to hostility. *Id.* When a tenant in common seeks to oust or dispossess the other tenants and turn his occupancy into adverse possession and thus acquire the entire estate by lapse of time under the statute of limitations, he must show when knowledge of such adverse claim or of his intention to so hold was brought home to them, for it is only from that time that his holding will be adverse. *Id.* When there is a family relation between co-tenants, stronger evidence of adverse possession is required. *Id.*

In making their argument under this point, appellants rely upon the cases of *Morgan v. Morgan,* 15 Ark. App. 35, 688 S.W.2d 953 (1985), and *Ueltzen v. Roe,* 242 Ark. 17, 411 S.W.2d 894 (1967). They summarize the evidence in the instant case that they contend supports the factors set forth in *Morgan* and *Ueltzen* that may be considered in determining whether a person's conduct constitutes sufficient notice that he or she is claiming property by adverse possession. However, as in *Mitchell v. Hammons,* 31 Ark. App. 180, 792 S.W.2d 333 (1990), and in *Wood v. Wood,* 51 Ark. App. 47, 908 S.W.2d 96 (1995), the facts of the instant case are distinguishable from *Morgan* and *Ueltzen, supra,* because, here, the out-of-possession co-tenants did not regularly visit the property in question, nor did they have actual knowledge of any improvements claimed by appellants.

Moreover, appellant's testimony that the property was assessed in his name does not satisfy the requirements of *Mitchell* or *Woods, supra.* The recordation of a quitclaim deed from his father would normally cause such a change of assessment because tax assessors do not purport to determine record title. Thereafter, the payment of taxes, sale of timber, appearance before a board of equalization to attempt a reduction in property taxes, or a lease of the land or minerals (short of a drilling title opinion prior to the drilling of a well) all routinely flow from the tax assessment and do not bring home to an out-of-state co-tenant knowledge of hostile acts.

4) The court abused its discretion when it only awarded appellant a $2,000 attorney's fee.

For their last point, appellants contend that the chancellor abused his discretion in limiting the attorney's fee award to $2,000 because 43.75 hours "related solely to the partition part of this case [and] [m]ost of the time was related to trying to locate these heirs . . . [a]ll of whom were missing." We find no abuse of discretion.

Arkansas Code Annotated section 18-60-419 (1987), provides in pertinent part:

> (b) Where judgment is rendered by a court of this state for partition of realty in kind, or for the sale of realty and partition of the proceeds of the sale, the court in assessing a reasonable fee to be allowed the attorney bringing the action *shall consider only those services performed by the attorney requesting a fee which are of common benefit to all parties. The court shall assess no fee for services which benefit only one (1) party, such as services necessary for the preparation and trial of contested issues of title* or services for which payment has been made by the agreement of the parties.

(Emphasis added.) In his letter opinion, the chancellor explained:

> An examination of the case in its entirety reflects that the [appellants] have at all times tried this case as a quiet title case or, in the alternative have attempted to establish title to the property in question through adverse possession, which would result in the property in question being vested totally in [appellants]. This would obviously be of no benefit to any of the other heirs in the case as they would receive nothing.

In addition to the above explanation, we note that the time spent in searching for the missing heirs was as necessary for the quiet-title and adverse-possession actions as it was for the alternate prayer for partition. In short, our review of the record supports the chancellor's assessment, and we do not find that the chancellor's limitation of the award was arbitrary or groundless.

Affirmed.

HART, JENNINGS, ROBBINS, and NEAL, JJ., agree.

BIRD, J., dissents.

SAM BIRD, Judge, dissenting. I respectfully dissent from the opinion affirming the chancellor's decision in this case. I cannot agree that the chancellor applied the proper law and that he did not limit his determination solely to finding whether appellees were required to have "actual knowledge" of appellants' adverse claim. Further, I would hold that limiting fees for appellants' attorney to $2000 was an abuse of the chancellor's discretion and was contrary to law.

The majority has concluded that, although the chancellor's order was "inartfully written," he apparently intended to say that he denied Hopper's claim of adverse possession *both* because there was "no evidence of any actual notice" that Hopper gave to the appellees and their predecessors in title to merit Hopper's prevailing on his claim of adverse possession, *and* because Hopper's acts of hostility were insufficient to put appellees on notice that he was claiming title to the land by adverse possession. While I believe that the majority is generous in its description of the chancellor's decree as inartful, I believe that the majority has been even more generous in its interpretation of what the chancellor meant. It is clear to me that the chancellor based his decision to deny Hopper's claim of adverse possession solely upon the premise that actual notice of his claim was required to be given, but was not. However, without regard for whether the chancellor based his decision upon both the lack of actual notice and the insufficiency of his acts of hostility, I believe that the chancellor's finding that Hopper's acts of hostility were insufficient is clearly erroneous.

While I recognize the heavy burden on a tenant in common to prove adverse possession against other blood-related tenants in common, the law does not render such a claim impossible. Notwithstanding the majority's strained interpretation of the chancellor's decree, the chancellor held that because Hopper failed to prove *actual* notice to the other tenants in common, his claim of adverse possession failed. However, the cases do not hold that for a tenant in common to prevail on a claim of adverse possession against a blood-related tenant in common, the plaintiff must give actual notice of his claim. As the majority observes, to prevail on a claim of adverse possession, a plaintiff tenant in common must *either* give actual notice of his claim *or* "commit sufficient acts of hostility so that their knowledge of his adverse possession is presumed." *Dillard v. Pickler,* 68 Ark. App. 256, 6 S.W.3d 128 (1999); *see also Hirsch v. Patterson,* 269 Ark. 532, 601 S.W.2d 879 (1980); *Ueltzen v. Roe,* 242

Ark. 17, 411 S.W.2d 894 (1967); *McGuire v. Wallis*, 231 Ark. 506, 330 S.W.2d 714 (1960); *Wood v. Wood*, 51 Ark. App 47, 908 S.W.2d 96 (1995); and *Welder v. Wiggs*, 31 Ark. App. 163, 790 S.W.2d 913 (1990). Furthermore, in *Welder v. Wiggs, supra*, we held both that a landowner (who, admittedly, was not a blood relative of the adverse claimant) had a duty to keep herself informed as to the adverse occupancy of her property, and that actual notice to an uninformed tenant of a claim of adverse possession is not essential to the success of the claimant. I am aware of no legal authority, nor can I perceive of any logical reason, why a blood-related tenant in common should be relieved from the same duty. In the case at bar, there is no evidence that any of the appellees knew or sought to discover whether they had any claim to an interest in the land here involved until Hopper's action was initiated. More importantly, there is no evidence that any of the appellees or their predecessors in title inquired, over a period of more than fifty years, whether they had any liabilities for the taxes, assessments, or other expenses that necessarily accompany the ownership of an interest in land in this state.

In the case at bar, Hopper lived on the land with his father from the time he was born in 1923 until he graduated from high school in 1941. He then went off to college, but his studies were interrupted by three years in the Navy during World War II. After the war, he completed his education and spent a career teaching and working until he retired in 1979. Hopper's father, Lawrence, was in sole actual possession of the land from 1947, when his mother died, until his death in 1975. During that time, Lawrence exercised all incidents of ownership over the land, including possession, tax payments, receiving rents and profits, and the construction and maintenance of improvements. Lawrence's sole income during his lifetime was derived from the land. Hopper acquired his title in the land by quitclaim deed from Lawrence sometime prior to 1975. From that time forward, Hopper was in sole possession of the land; the land was assessed only in his name; he paid all the taxes and assessments on the land (even appearing before the equalization board to get the taxes reduced); he retained all the rents and profits from the land (including proceeds from rental, oil and gas leases, and timber sales); he made permanent improvements by clearing land and planting pine trees; and he was believed by his neighbors to be the sole owner, and generally treated the land as his own because he justifiably believed that he was.

We have held that the acts of ownership exercised by one claiming to be the owner of land are ordinarily sufficient if they are of such a nature one would exercise over his own land and would not exercise over the land of another. *Dillard v. Pickler, supra.* If the above-described acts by Lawrence and Hopper are not sufficient acts of hostility from which knowledge of an adverse claim can be presumed, I do not know of any evidence that would qualify.

While Hopper justifiably believed himself to be the sole owner of the land for almost twenty-five years, the appellees had no knowledge whatsoever and made no attempt to inquire whether they had an interest in the land. In *Welder v. Wiggs, supra,* we held that where one claimed title to land under color of title, he need not give notice of his adverse claim to others residing in distant places about whose existence, whereabouts, or claims he is unaware. The majority opinion does not explain how one in possession of land, believing himself to be the sole owner thereof, gives actual notice of a claim of adverse possession to putative tenants in common about whom he is unaware. Another impractical result of the majority's decision is pointed out by appellant: he notes that an undivided one-sixth interest in the land is subject to the claim or claims of heirs whose identities and whereabouts are still unknown, and whose interest(s) in the proceeds from the partition sale will eventually escheat to the state because Hopper has not provided these unknown persons with actual notice.

On the issue of attorney's fees, I also believe that the chancellor's award was an abuse of discretion and contrary to the law. After the chancellor decided that Hopper had failed in his attempt to establish his claim of adverse possession, he granted Hopper's alternative prayer for partition of the land involved. Arkansas Code Annotated section 18-16-419(a) (1987) requires the court in land-partition cases to award a reasonable fee to the attorney bringing the suit. Section 18-16-419(b) provides that in assessing such a fee, the court shall consider only services of the attorney that are of common benefit to all parties.

At the hearing on the attorney's fee, Searcy W. Harrell Jr. stated that he spent 43.75 hours on the partition portion of the case. An examination of the pleadings alone reveals the vast amount of work that must have been involved in reconstructing the Hopper family tree and in obtaining actual or constructive service of process on them. Without stating any reason other than that "it becomes a

real problem to determine when the plaintiff's attorney quit working for his client and began working for the owners," the chancellor awarded only a $2,000 fee. This statement by the chancellor illustrates his misunderstanding of Ark. Code Ann. § 18-60-419(b), which permits compensation to the attorney bringing the suit for services that are of common benefit to all parties. Harrell was expected and required by ethical considerations to represent only the interests of his client. It is when the attorney's pursuit of his client's interests results in a common benefit to all the parties that the attorney bringing the suit is entitled to be compensated for those services from the proceeds of the partition sale. The fact that Hopper also benefitted from Harrell's services, along with the other co-tenants, is not a permissible reason to deny compensation to the attorney for those services.

In concluding that the record supports the chancellor's fee award, the majority opinion notes that "the time spent in searching for the missing heirs was as necessary for the quiet-title action and adverse-possession action as it was for the alternate prayer for partition." This statement indicates that the majority suffers from the same misunderstanding of the meaning of section 18-60-419(b) as did the chancellor. The very fact that Harrell's services were necessary for both the primary and alternative branches of the lawsuit is what justifies a fee for those services to the attorney bringing the partition action. Under the majority's theory, appellees' attorneys may benefit from Harrell's work that inured to their benefit without paying anything for it. This is what is sought to be prevented by section 18-60-419.

For his 43.75 hours devoted to services that inured to the common benefit of all the parties to this action, Mr. Harrell should be paid at least $5,000 from the proceeds of the partition sale. One hundred twenty-five dollars per hour is not an unreasonable rate of compensation for an attorney admitted to the bar in 1964.

Malchijah Jake MOSES *v.* STATE of Arkansas

CA CR 00-119 39 S.W.3d 459

Court of Appeals of Arkansas
Division IV
Opinion delivered February 7, 2001

Alvin Schay, for appellant.

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

JOHN F. STROUD, JR., Chief Judge. Appellant, Malchijah "Jake" Moses, was convicted of stalking in the first degree and sentenced to serve a period of eleven years in the Arkansas Department of Correction. He contends that the trial court erred in denying his motions: (1) for directed verdict, and (2) to dismiss the stalking charge based on double jeopardy. We affirm.

Appellant and his wife, Cheryl Moses, separated in August 1998. After the separation, appellant began making numerous telephone calls to Ms. Moses at all hours of the day and night. The calls grew so frequent that Ms. Moses purchased caller identification and would not answer the telephone when she knew it was him.

On the morning of December 15, 1998, appellant telephoned Ms. Moses at 2:30 a.m. Although she told him that she would not talk to him at that time of the morning, he called again at 3:30 a.m. and 6:15 a.m. Appellant called Ms. Moses's mother, Karen Rutledge, at 8:15 a.m., making accusations such as she was keeping Ms. Moses from talking to him. At approximately 8:25 that morning, appellant called Ms. Moses at work and told her that her son Jonathan would die. Based upon this occurrence, a municipal judge issued a no-contact order in favor of Ms. Moses against appellant on that same date; however, the order was not served on appellant until two days later. Appellant was ultimately convicted of terroristic threatening in municipal court based upon this December 15, 1998, conversation with Ms. Moses wherein he said Jonathan would die.

On December 22, 1998, appellant called Ms. Moses and Ms. Rutledge and told them that he had reported Ms. Moses to the Department of Human Services for abusing their daughter, Tara. He also left numerous messages on Ms. Moses's answering machine over the course of that day. In those messages, appellant told Ms. Moses to either talk to him or "that's it"; he told her "don't ever be a mother to my children"; and that he loved his children, he would do anything to protect them, and that she would not stand between him and his children. In his message at 11:06 p.m., appellant told Ms. Moses to call him before it was "too late."

Appellant was to have visitation with his three-year-old twins on the morning of December 23, but he called Ms. Moses at 7:30 that morning and told her he did not feel well. Actually, appellant drove to Hot Springs to purchase a gun and ammunition. The clerk who sold the gun to him was so concerned by his demeanor that he contacted the sheriffs' offices in Garland County and Clark County. Shortly thereafter, Ms. Moses was informed by the acting chief of police of Arkadelphia that he had information that appellant had purchased a gun and ammunition that day in Hot Springs in contravention of the no-contact order. The police set up a watch, and appellant was stopped upon returning to Arkadelphia.

A .22 caliber pistol and a box of ammunition was found in his vehicle, at which time he was arrested.

For his first point, appellant argues that the trial court erred in denying his motion for directed verdict on the charge of stalking in the first degree. A motion for directed verdict is treated as a challenge to the sufficiency of the evidence. *Dodson v. State*, 341 Ark. 41, 14 S.W.3d 489 (2000). In reviewing a motion for directed verdict, the evidence is viewed in the light most favorable to the State, and a conviction will be affirmed if there is substantial evidence to support it. *Id.* Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resort to speculation and conjecture. *Id.*

Arkansas Code Annotated section 5-71-229(a)(1)(A) (Repl. 1997) provides:

> (a)(1) A person commits stalking in the first degree if he purposely engages in a course of conduct that harasses another person and makes a terroristic threat with the intent of placing that person in imminent fear for the death or serious bodily injury of his or her immediate family and he:
>
> > (A) Does so in contravention of an order of protection consistent with the Domestic Abuse Act of 1991, § 9-15-101 *et seq.*, or a no contact order as set out in subdivision (a)(2)(A) of this section, protecting the same victim or victims, or any other order issued by any court protecting the same victim or victims;

"Course of conduct" is defined as "a pattern of conduct composed of two (2) or more acts separated by at least thirty-six (36) hours, but occurring within one year." Ark. Code Ann. § 5-71-229(d)(1)(A).

Appellant specifically argues that the State failed to show that there was a thirty-six hour period between his acts of harassment toward Ms. Moses after the no-contact order was issued, and that there was no evidence of a terroristic threat. Appellant reads the statute as requiring that the acts constituting the course of conduct all occur after the order of protection or no-contact order has been issued. Therefore, he contends that the only conduct that can be considered are those acts that occurred after he received the no-contact order on December 17; that the only harassing conduct

after that time was on December 22 and 23; and that the conduct on those days was not separated by at least thirty-six hours. We disagree.

There have been no cases decided by this court or our supreme court interpreting the statute for stalking in the first degree. However, appellant's argument would require that a person first be subjected to conduct warranting an order of protection or an order of no contact and then endure at least two more acts separated by at least thirty-six hours before charges of stalking in the first degree could be filed. This court will not interpret a statute, even a criminal one, so strictly as to reach an absurd conclusion that is contrary to legislative intent. *Jackson v. State*, 336 Ark. 530, 986 S.W.2d 405 (1999).

Clearly, appellant's course of harassing conduct toward Ms. Moses began after they separated in August. Ms. Moses testified that appellant called her so many times that she would no longer answer the telephone if she knew it was him calling. This conduct, coupled with appellant's actions on December 22 and 23, clearly constitutes a harassing course of conduct as contemplated by the statute.

Appellant also argues that other than his threat against Ms. Moses's son Jonathan on December 15, he made no terroristic threat. However, Ms. Moses testified that in one of his messages from December 22 on her answering machine, appellant told her to call him before it was "too late." Although she said that she initially interpreted this comment to mean that he intended to kill himself, after she thought about the statement and the other messages he had left for her, she believed he was threatening to do something to her if she did not call him, and she was afraid for her life and the lives of her children and mother. There is sufficient evidence of a terroristic threat to sustain appellant's conviction for stalking in the first degree.

Appellant lastly argues that the trial court erred in denying his motion to dismiss the stalking charges based upon the contention that it constituted double jeopardy. He maintains that his conviction in municipal court of terroristic threatening prevented it from being used a second time to convict him of stalking in the first degree. He also argues that stalking in the first degree is defined as a continuing course of conduct under Ark. Code Ann. § 5-1-

110(a)(5) (Repl. 1997), and because the terroristic threat for which he had already had been convicted arose from the same impulse that caused him to make threats against Ms. Moses, he cannot now be prosecuted for stalking in the first degree as well. Appellant's arguments are misplaced.

In *Muhammad v. State*, 67 Ark. App. 262, 998 S.W.2d 763 (1999), this court determined the following standard of review to be applied on appeal of a double jeopardy issue:

> [W]e hold that on review of a double jeopardy issue, where the issue is a question of law, we review the question *de novo*, as we do on review of any question of law, and simply apply the applicable law. If the double jeopardy issue involves a question of fact or a mixed question of law and fact, then we conduct a *de novo* review but give deference to the trial court's credibility determination of the evidence and do not reverse factual findings unless they are clearly erroneous.

67 Ark. App. at 265, 998 S.W.2d at 764 (citations omitted).

Appellant's conviction for stalking in the first degree did not place him in double jeopardy based upon his previous conviction for terroristic threatening. The record of this case does not establish that the conduct for which appellant was convicted of terroristic threatening, the December 15 threat that Jonathan would die, was the terroristic threat used to convict him of stalking in the first degree. Appellant's December 22 message for Ms. Moses stating that she had better call him before it was "too late," which she understood to be a threat toward her, was a sufficient basis for the terroristic threat required by the stalking in the first degree statute.

Appellant also argues that stalking in the first degree is defined as a continuing course of conduct under Ark. Code Ann. § 5-1-110 (a)(5), and that the municipal court conviction for terroristic threatening was embodied in the continuing course of conduct required to convict him for stalking in the first degree. The statute provides:

> (a) When the same conduct of a defendant may establish the commission of more than one (1) offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one (1) offense if:
>
> . . .

> (5) The conduct constitutes an offense defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses.

Although stalking in the first degree does require repetitive acts, appellant's argument in this case is not persuasive. As previously explained, the elements of the crime of stalking in the first degree were sufficiently established and proved in this case without resort to the threat that resulted in the municipal court conviction for terroristic threatening, and thus the basis for the conviction of stalking in the first degree resulted in only one conviction.

Affirmed.

BIRD and VAUGHT, JJ., agree.

Marillee MORELAND *v.* Robert J. HORTMAN

CA 00-527 39 S.W.3d 23

Court of Appeals of Arkansas
Division III
Opinion delivered February 7, 2001

Frances Morris Finley, for appellant.

No response.

JOSEPHINE LINKER HART, Judge. In this case, appellant, Marilee Moreland, argues that it was improper for the chancellor to consolidate the child-support case involving her child by her former spouse, appellee, Robert J. Hortman, with a child-support case involving appellee's child by another woman. Further, appellant argues that the chancellor erred in determining appellee's child-support payment for her child by considering appellant as having two dependents. Finally, she argues that the chancellor erred in finding a change of circumstances supporting a reduction in child support. We reverse and remand.

Appellee is the father of five children born to three different women. Appellee was married to appellant and had two children, Robbie J. Hortman, now emancipated, and Christina A. Hortman. Appellant and appellee were divorced in 1985. Appellee then married Petheia Hortman and had one child, Chelseia Hortman. They divorced in 1992. Appellee then married Julie D. Hortman, who bore him two children.

In an order filed December 1, 1997, the chancellor ordered appellee to pay to appellant child support in the amount of $1,680 for her two children based on the chancellor's finding that appellee's net monthly income was $8,000, having been reduced from $8,903.97 by credits for current and future increases in child support for his child by Petheia Hortman. [1] The child-support amount was to be reduced to $1,200 a month when their older child graduated from high school in June 1998. The chancellor also found that appellee was in arrears in the amount of $5,320 for past due child support and $4,738.36 for unreimbursed medical expenses. He was ordered to pay the arrearages in twenty-four

[1] The child of Petheia Hortman was receiving $225 in child support by court order and $150 of unordered support.

equal monthly installments of $419.09. On July 6, 1998, following a hearing on appellant's petition for a contempt citation, appellee stipulated to an arrearage of $6,526.63, and he was ordered to pay an additional amount of $100 a month in arrearages. Appellee's total payments, including arrearages, was $1,719.09.

On April 30, 1999, appellee initiated an action by filing a motion to consolidate his case for the support of appellant's child with a child-support case for his child by Petheia Hortman. Appellee's current wife was also named as a necessary third party. Appellee's petition sought reduction of his child-support obligation for his child by appellant and his child by Petheia Hortman by counting the children in his current household and distributing in equal portions the amount of support for five children. Appellee also alleged that there had been a substantial change in circumstances in that he now has two additional children by his current wife, that he had incurred large medical bills concerning the birth of one of those children, and that he had suffered a decrease in income. Petheia Hortman, who, prior to this petition, received an increase in child support to $714 per month, argued that appellant's child-support obligations should be based on two children, her child and the unemancipated child of appellant. Appellant objected to the consolidation, arguing that for the court to apply the chart based on all of appellee's dependents would be improper under Arkansas case law.

In her order filed November 10, 1999, the chancellor granted appellee's request that the cases be consolidated for the purpose of determining child support and considered both appellee's child by appellant and appellee's child by Petheia Hortman as before the court. She further concluded that there had been a change in appellant's income due to the loss of a car allowance and other compensation and that the child-support award should be reduced "based upon [appellee's] net monthly income of $6,854." The chancellor refused to consider children in appellant's household with his current wife and referred to Administrative Order No. 10 (2000) for the amount of child support to be paid for two dependents. The chancellor then took this amount and divided it equally between the two children.[2]

[2] Because appellee's income exceeded the amount on the chart in Administrative Order No. 10, in reaching a specific amount of child support, the chancellor used a

Appellant first contends that the trial court erred in consolidating the case involving the determination of the amount of child support for appellant's child with the case involving the determination of the amount of child support for Petheia Hortman's child. Under a separate point, appellant further contends that under the Administrative Order No. 10 (2000), appellee's dependents should not be counted together for the purposes of determining the amount of child support. We agree that the chancellor erred in both matters.

"When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delays." Ark. R. Civ. P. 42(a) (2000). A court's decision to consolidate cases will not be reversed absent a showing of abuse of the court's discretion. *See Pennington v. Harvest Foods, Inc.*, 326 Ark. 704, 716, 934 S.W.2d 485, 491 (1996).

Here, appellee initiated a petition to consolidate the cases when there was no pending litigation in either case. In conjunction with this petition, he further sought to reduce the child support he paid to appellant. "[A] statute or per curiam order of the Arkansas Supreme Court that is in effect at the time of the hearing on the request for modification of child support is the applicable law pertaining to the modification." *Heflin v. Bell*, 52 Ark. App. 201, 204, 916 S.W.2d 769, 770 (1996). Thus, we apply Administrative Order No. 10 (2000).

As is apparent from that order, the method of application of the administrative order is not to count the total number of the

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combination of the chart and the percentages provided for in Section III(b) of the order. The proper procedure, however, would have been to ignore the chart and use only the percentages. Section III(b), provides that "[w]hen the payor's income exceeds that shown on the chart, use the following percentages of the payor's weekly or monthly income... to set and establish a sum certain dollar amount of support...." Here, appellee's income exceeded the chart, so the chancellor should have disregarded the chart and multiplied the appellee's income by the requisite percentage provided in Section III(b). While previous versions of the guidelines were more specific in advising disregard of the chart, *see In re: Guidelines for Child Support*, 314 Ark. Ark. 644, 646, 863 S.W.2d 291, 294 (1993); *In re Guidelines for Child Support Enforcement*, 305 Ark. 613, 614-15 (1991), we have no reason to conclude that this practice was changed by the omission of this language.

payor's dependents and divide the amount of child support recommended by the administrative order by the number of dependents. Rather, in determining income as defined by Section II, the order provides that "[p]resently paid support for other dependents by Court order," is deducted from the payor's income. Furthermore, under the considerations for deviation from the administrative order under Section V(b)(7), the court may consider "[t]he support required and given by a payor for dependent children, even in the absence of a court order." Moreover, we have previously noted in other cases that the amount set forth in the family support chart in the administrative order should be applied to the child that is before the court, and in applying the family support chart, it is improper for the chancellor to have determined the amount of child support to be paid based on the payor's total number of dependents and then divide that amount by the total number of dependents. *See Arkansas Dep't of Human Servs. v. Forte*, 46 Ark. App. 115, 877 S.W.2d 949 (1994); *Waldon v. Waldon*, 34 Ark. App. 118, 123-24, 806 S.W.2d 387, 390 (1991).

■ Even if we considered it proper to consolidate the two cases, we note that the two children were members of separate households. To be considered as the chancellor ordered is to treat two separate households with one child each as though there was only one household with two children. Thus, the manner in which the chancellor applied the administrative order was contrary to the language of the administrative order, as well as *Forte* and *Waldon*. We reverse the chancellor on this point.

■ We further hold that the chancellor abused her discretion in consolidating the two cases. While both cases involved appellee's dependents, as previously discussed, the administrative order prescribes that the child-support amount should be based on the formula set forth in the order, with appropriate reductions in support because of other support obligations being considered in the manner set forth in Sections II and V of the order. Given that the administrative order mandates the separate evaluation of appellant's support obligation for each child, with that evaluation necessarily considering different circumstances, the child-support amount to be paid by appellee to appellant and to Petheia Hortman thus involved separate questions of law and fact. Thus, we also reverse the chancellor on this point.

Appellant also raises a third issue, arguing that appellee did not show a change of circumstances requiring a modification of the child-support amounts. The chancellor, in finding a change of circumstances, found that appellee's income had been reduced by the loss of a car allowance and the loss of income from another business. A modification in the amount of child support to be paid must be based upon a change in circumstances, and the party seeking the modification has the burden of showing a change in circumstances sufficient to require modification. *See Payton v. Wright*, 63 Ark. App. 33, 36, 972 S.W.2d 953, 955 (1998). We note that a reduction in income may give rise to a change of circumstances. *See* Ark. Code Ann. § 9-14-107(a) (Repl. 1998)(providing that "[a] change in gross income of the payor in an amount equal to or more than twenty percent (20%) or more than one hundred dollars ($100) per month shall constitute a material change of circumstances sufficient to petition the court for review and adjustment of the child support obligated amount according to the family support chart after appropriate deductions"); *see also* Ark. Code Ann. § 9-14-107(c) (Repl. 1998). We note that there is nothing in the 1997 order or this record which discusses appellee's gross income, which makes a determination of appellee's gross income problematic. *See Ritchey v. Frazier*, 57 Ark. App. 92, 95, 940 S.W.2d 892, 893 (1997)(holding that "[s]ince the record contains no evidence demonstrating appellee's income as of the time of the agreed order, we cannot say that the chancellor's decision that appellant failed to show that appellee's income had increased since the entry of that order is clearly erroneous"). However, given the chancellor's improper joinder of the two cases and the consequent errors in applying the administrative order to determine appellee's income, we reverse the chancellor on this point as well. Appellee, in his discretion, may make further requests for modification of child support once the cases are severed, and the chancellor should determine if there was a reduction in appellee's income, and if so, whether there is a material change in circumstances sufficient to modify child-support amounts and then use the administrative order in determining that amount. *See Heflin v. Bell*, 52 Ark. App. 201, 206, 916 S.W.2d 769, 771-72 (1996)(holding that "the specified change in the payor's income does not necessarily support the determination but merely constitutes a material change of circumstances sufficient to allow the petition to the court for its review and adjustment of child support").

Reversed and remanded.

JENNINGS and CRABTREE, JJ., agree.

Timothy L. EPPS *v.* STATE of Arkansas

CA CR 99-869 38 S.W.3d 899

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered February 7, 2001

Witt Law Firm, P.C., by: *Ernie Witt*, for appellant.

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

JOHN E. JENNINGS, Judge. On July 13, 1998, appellant entered pleas of nolo contendere to the charges of terroristic threatening and arson. The trial court suspended imposition of sentence for a period of five years. On September 9, 1998, the State filed a petition to revoke Epps's suspended sentence on the grounds that he had committed the offenses of sexual abuse and third-degree domestic battery a few days earlier. After a hearing, the court revoked Epps's suspended sentence and sentenced him to six years in the Arkansas Department of Correction, with four years suspended.

On appeal to this court appellant argues that the trial judge erred in refusing to consider certain evidence, erred in refusing to permit a proffer, and erred in repeatedly interrupting appellant's counsel during his examination of witnesses. We affirm.

Appellant's first point relates to a tape-recorded interview he gave to the police. The tape itself was admitted into evidence without objection. The following then transpired:

> THE COURT: It'll be played then. How long is it?
>
> DEFENSE COUNSEL: About 30 or 40 minutes.
>
> THE COURT: Do I have to see the whole thing?
>
> PROSECUTING ATTORNEY: I hope not. You can stop it when you're bored. I guess.
>
> PROSECUTING ATTORNEY (To the Witness): You've seen the tape and you were at the interview. What does the defendant say, first about the domestic battery?
>
> DEFENSE ATTORNEY: Your Honor, I am going to let the tape speak for itself.
>
> THE COURT: I'm not going to watch that tape unless somebody makes me watch it.

After further testimony by the officer on the witness stand, there was the following colloquy:

> DEFENSE COUNSEL: That's not what was said. You're going to have to watch the tape.
>
> THE COURT: I am not going to watch that tape unless you make me watch it, [Counsel].
>
> DEFENSE COUNSEL: I've watched the tape and that statement is not in the tape.
>
> THE COURT: You can test him on cross-examination.

And finally:

> THE COURT: Now, [Counsel], don't argue with him about what's on the tape.
>
> MR. TAYLOR: Well, I'm trying to keep the Court from having to watch it.
>
> THE COURT: Either play the thing or accept his answers.

Appellant argues that it was error for the court to refuse to consider the tape of the interview which had already been admitted

into evidence. We do not agree that the court refused to consider the evidence. The trial judge clearly preferred to have the substance of the tape covered by direct and cross-examination of the interviewing officer, and the judge had some discretion in this regard. *See* Rule 611(a) of the Arkansas Rules of Evidence. Beyond that, it is clear from what the judge said that he would have viewed the tape himself had counsel for the appellant insisted.[1] Having not insisted that the trial judge view the tape, appellant is in no position to complain now on appeal.

Appellant's second argument is that the trial court erred in refusing to permit him to make a proffer when counsel asked a question and the State's objection was sustained. The short answer to this contention is that the trial court told appellant's counsel that he could make the proffer later. The trial judge has general superintending control over the conduct of trials and specifically has discretion as to the manner in which a proffer is made. *See* Rule 103(b) of the Arkansas Rules of Evidence. We see no impropriety in the court's directing that the proffer be made later. Appellant never raised the matter later. We hold that the court's ruling was not error.

Finally, appellant contends that the trial judge erred in interrupting his attorney during both direct and cross-examination by making evidentiary rulings without an objection from the State. It has been generally held that the trial judge has the authority to exclude improper evidence even in the absence of an objection. *Commonwealth v. Haley*, 363 Mass. 513, 296 N.E.2d 207 (1973); *South Atlantic S.S. Co. of Delaware v. Munkacsy*, 37 Del. 580, 187 A. 600 (1936); *United States v. Wright*, 542 F.2d 975 (7th Cir. 1976); *Strong, McCormick on Evidence*, 5th Ed. § 55 at 247; 75 Am. Jur. 2nd Trial § 272; *see also The American Workmen v. Ledden*, 196 Ark. 902, 120 S.W.2d 346 (1938).

In *Haley*, *supra,* the Massachusetts Supreme Court said:

> A good judge must have firmness. Sitting with a jury, he should so conduct the trial that the case will go to the jury, so far as his lawful powers permit, free from irrelevant considerations and appeals to prejudice and emotion. As a former justice of our court once said: 'The judge who discharges the functions of his office

[1] Present counsel was not the attorney at the revocation hearing.

> is . . . the directing and controlling mind at the trial, and not a mere functionary to preserve order and lend ceremonial dignity to the proceedings.' It is true, now as in Lord Bacon's day, that 'an over-speaking judge is no well-tuned cymbal,' and that 'It is no grace to a judge first to find that which he might have heard in due time from the bar.' A judge who takes a case that he does not understand out of the hands of competent counsel who do understand it, is a nuisance. The judge must never become or appear to be a partisan.
>
> But a judge need take no vow of silence. He is there to see that justice is done or at least to see that the jury have a fair chance to do justice. . . . The judge ought not to let the jury be diverted from the real issue. The skill of counsel must not be allowed to mislead the jury by raising false issues or by appeals to emotion and prejudice. . . . It is not always easy for a judge to see his duty clearly. But a first-rate trial judge will find and tread the narrow path that lies between meddlesomeness on the one hand and ineffectiveness and impotence on the other.

Quoting from Lummus, *The Trial Judge*, 19-21 (1937).

In *Skiver v. State*, 37 Ark. App. 146, 151, 826 S.W.2d 309 (1992), Chief Judge George Cracraft, speaking for this court, said:

> [W]hile we may agree with appellant that it is improper for a trial judge to needlessly inject himself into the trial, the judge is not merely the chairman of a trial, who must remain mute until a party calls upon him for a ruling; instead he has some responsibility for the proper conduct of the trial and achievement of justice.
>
> Although it is a safer practice for a court to defer action on admission of evidence until a proper objection is made by the party interested in having it excluded, the court is not bound to hear and determine the case on improper evidence. In the exercise of its discretion to control and regulate the conduct of the trial, the court may, on its own motion, exclude or strike evidence which is wholly incompetent or inadmissible for any purpose, even though no objection is made to such evidence. It is the responsibility of the trial judge to maintain an appropriate balance in the performance of his role of impartiality, and a clear transgression of the proper bounds must be demonstrated before an appellate court is justified in reversing a judgment because the trial judge injected himself into the trial. (Citations omitted.)

We have carefully examined the instances in which the trial court made comments or rulings during the appellant's examination of witnesses. Once the trial court cautioned counsel against making his closing argument during the questioning of a witness. Several times the court expressed bewilderment as to the point of the questioning, without actually making a ruling. Most of the court's sua sponte rulings on evidence were to exclude a certain line of questioning as irrelevant. In each instance it appears that the court's ruling was correct — the evidence was irrelevant. While it is true that courts have zealously protected the defendant's right to cross-examine witnesses, there is no right to cross-examine witnesses about irrelevant matters.

While we agree that the trial court exhibited some impatience during the hearing, we find no indication of bias. Although this was a bench trial, even in a trial before a jury the trial court has some authority to exclude evidence absent an objection. The court's rulings appear to have been correct. We hold that the trial court committed no reversible error.

Affirmed.

HART, BAKER, CRABTREE, and ROBBINS, JJ., agree.

GRIFFEN, J., dissents.

WENDELL L. GRIFFEN, Judge, dissenting. I respectfully dissent from the decision affirming the trial judge's refusal to watch a videotape of appellant's custodial interrogation in order to resolve a factual dispute surrounding trial testimony offered by the interviewing officer concerning what appellant supposedly said during the interrogation. The videotape had already been introduced into evidence in the bench trial. The relevant colloquy between the trial judge and appellant's trial counsel is accurately recounted in the majority opinion, which concludes that the trial judge did not refuse to consider the evidence but merely

> preferred to have the substance of the tape covered by direct and cross-examination of the interviewing officer, and the judge had some discretion in this regard. . . . Beyond that, it is clear from what the judge said that he would have viewed the tape itself had the appellant insisted. Having not insisted that the trial judge view the tape, appellant is in no position to complain now on appeal.

Whether the appellant made the statement during the custodial interrogation that was attributed to him by the testifying police officer was an issue of fact that should have been resolved by the trier of fact watching the videotape. The tape had been admitted into evidence. Appellant's trial counsel told the trial judge, "You're going to have to watch the tape." The trial judge then said, "I am not going to watch that tape unless you make me watch it." Trial counsel had no power to compel the trial judge to view the videotape. His only recourse was to appeal the court's refusal to do so.

I am deeply concerned that we are affirming the refusal of a trial judge in a bench trial to view direct evidence bearing on a disputed issue of fact in a criminal trial. Thus, I respectfully dissent.

Jose BARRIENTOS *v.* STATE of Arkansas

CA CR 00-279 39 S.W.3d 17

Court of Appeals of Arkansas
Division IV
Opinion delivered February 7, 2001

Hampton, Larkowski & Benca, by: *Mark F. Hampton* and *Patrick J. Benca*, for appellant.

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

SAM BIRD, Judge. Jose Barrientos was convicted by the trial court, sitting as trier of fact, of possession of methamphetamine with intent, for which he was sentenced to twenty years in the Arkansas Department of Correction. He raises five points on appeal: (1) that the police officer had no probable cause to stop his vehicle; (2) that even if the officer had probable cause to stop his vehicle, the stop exceeded the duration and scope of a proper investigation; (3) that the officer's drug dog was not sufficiently reliable to establish probable cause to search, and that the officer's use of "handler cues" was instrumental in getting the dog to "alert" at the rear of appellant's vehicle; (4) that the State did not meet its burden of proving by clear and positive evidence that appellant consented to the search of his vehicle, thus rendering the search unlawful; and (5) that the evidence was insufficient to show that appellant was aware the illegal drugs were in his vehicle. We find merit in Barrientos's first argument, and we reverse and remand.

The court below conducted a hearing on a motion by Barrientos to suppress methamphetamine that had been found in a hidden compartment of the gas tank in his car. The State presented evidence that on August 25, 1997, Barrientos was traveling cross-country on I-40 with Cruz Frias, who is his sister-in-law, and a child, Carol Barrientos. At about 2:30 a.m. he drove past Officers Joe Taylor and Chuck Townsend, who were parked in the median while working drug interdiction for the Conway Police Depart-

ment and patrolling with Taylor's drug dog, Prissy. Taylor testified that the officers followed Barrientos for almost five miles. During that time they noticed that the California license plate on his car did not expire until October of 1998, which Taylor thought to be unusual because that date was still fourteen months away and because all of the license plates that he had encountered during the past ten years had a one-year expiration date. He said that it occurred to him that the expiration date might be a mistake or that it might have been deliberately put there to "mislead" about the true expiration date of the vehicle. However, before stopping the car, he had the license checked; he learned that the expiration date was valid, that the vehicle was properly registered in California to a man named Jerry Lichtenberger, and that the car had not been reported stolen. Officer Taylor testified that as they followed Barrientos, he observed that the car was traveling in the right-hand lane and that it was weaving between the lines in its own lane. He said that he decided to stop Barrientos's car because he thought that the driver might be sleepy.

Taylor said that Barrientos's driver's license and the papers on the car were all in order, that Barrientos said that he had just bought the car from a man named Jerry with a "funny last name," but that Barrientos did not have any papers to show that a transaction had occurred between Jerry and himself. Taylor said that he asked Barrientos how long he had been driving and Barrientos answered that he had just started driving at the last town they passed through, but that he was unable to recall the name of that town. When Taylor asked him where he was coming from and where he was going, Barrientos replied that he was coming from California, that he was looking for antique cars to fix up and sell, and that he was going to the next state. Taylor testified that Barrientos was unable to name the next state. Taylor also testified that Barrientos said that he and his passengers had left Los Angeles on Saturday afternoon about 4:00 p.m., which Taylor estimated had been approximately thirty-nine hours earlier, and that this made Taylor suspicious because he did not think that Barrientos could have stopped and looked at many junk cars and driven from California to Conway in that length of time. Taylor said he also thought it was very odd that Barrientos would be looking for junk cars in a Lincoln Town Car that did not have a trailer hitch.

Officer Taylor testified that he then got Prissy out of the patrol car and walked her around Barrientos's car. He said that Prissy alerted at the right-rear tire of Barrientos's car, and when they circled the car again, she alerted on the trunk.

After conducting a search of the interior and trunk of the car and finding nothing, Taylor looked under the car and observed what appeared to be new straps and fresh undercoating on the gas tank. He then crawled beneath the car and tapped on the gas tank. He said that the tank sounded hollow on one side but solid on the other. Taylor said that he told Barrientos that he and his passengers were free to leave but that he was impounding the car to investigate further. Taylor said he gave Barrientos and his passengers the option of leaving afoot, driving the car to a location where the car would be searched, or being driven somewhere by Taylor. Barrientos and his passengers chose to stay with the car. They went to an old wrecker shop on Highway 64 where officers jacked up the car and removed the gas tank. Inside the gas tank was a false compartment that contained what laboratory tests later determined to be approximately twenty-two pounds of methamphetamine.

On this evidence the trial judge denied Barrientos's motion to suppress. Pursuant to an agreement that the evidence taken during the suppression hearing would also serve as evidence for a bench trial, the State's case on the merits was later concluded with the introduction of evidence relating to the state crime laboratory's analysis of the contraband that had been discovered in Barrientos's car. Barrientos rested without calling witnesses. Thereafter, the court announced his finding that Barrientos was guilty.

Barrientos's first argument on appeal is that Officer Taylor did not have probable cause to stop his car, and that the judge erred in refusing to suppress the evidence that, because of the unconstitutional stop, was fruit of the poisonous tree. When reviewing a trial court's ruling on a motion to suppress, we make an independent determination based upon the totality of the circumstances and reverse only if the ruling is clearly erroneous or against the preponderance of the evidence. *State v. Rufus*, 338 Ark. 305, 993 S.W.2d 490 (1999); *Fouse v. State*, 337 Ark. 13, 989 S.W.2d 146 (1999); *Langford v. State*, 332 Ark. 54, 962 S.W.2d 358 (1998). In making this determination, we view the evidence in the light most favorable to the appellee. *Fouse*, *supra*; *Langford*, *supra*.

A police officer may conduct a traffic stop and detain a motorist only where the officer has probable cause to believe that a traffic violation has occurred. The relevant inquiry is whether the officer had probable cause to believe that a traffic violation was being committed or had occurred. *Travis v. State*, 331 Ark. 7, 959 S.W.2d 32 (1998); *Burris v. State*, 330 Ark. 66, 954 S.W.2d 209 (1997); *Kimery v. State*, 63 Ark. App. 52, 973 S.W.2d 836 (1998). Probable cause exists when the facts and circumstances within an officer's knowledge are sufficient to permit a person of reasonable caution to believe that an offense has been committed by the person suspected. *Hudson v. State*, 316 Ark. 360, 872 S.W.2d 68 (1994); *Johnson v. State*, 299 Ark. 223, 772 S.W.2d 322 (1989). In assessing the existence of probable cause, our review is liberal rather than strict. *Brunson v. State*, 327 Ark. 567, 940 S.W.2d 440 (1997). All that is required is that the officer had probable cause to believe that a traffic violation had occurred; whether the defendant is actually guilty of the traffic violation is for a jury or a court to decide, and not an officer on the scene. *Burris, supra*; *State v. Jones*, 310 Ark. 585, 839 S.W.2d 184 (1992).

In *United States v. Miller*, 146 F.3d 274 (5th Cir. 1998), a deputy sheriff began to follow Miller's motor home near Amarillo, Texas, because it had no front license plate. From behind he could tell it had a temporary Colorado license plate. The deputy stopped Miller because, as he followed the motor home, he noticed that the left turn signal was on and that the motor home proceeded through an intersection, but neither turned left nor changed lanes. The Texas traffic code contained no provision prohibiting the driver of a motor vehicle that was displaying a turn signal from proceeding through an intersection without turning or changing lanes. Thus, the court found that there was no objective basis for probable cause to justify the deputy's stop of Miller's motor home.

Barrientos, contending that Officer Taylor had no probable cause to make the traffic stop, relies on Officer Taylor's admission that before he stopped the car he knew it was properly registered in California to Jerry Lichtenberger and was not stolen. Taylor also testified that he observed the vehicle weaving within its lane of traffic only, and that he knew this was not a traffic violation. Taylor's testimony was verified by Officer Townsend.

The State contends that the stop was lawful because Officer Taylor testified that he knew that a driver is supposed to "maintain a

straight direction of travel." Noting that Arkansas Code Annotated section 27-51-104(b)(6) (Repl. 1997) makes it unlawful for an individual to operate a vehicle "in such a manner which would cause a failure to maintain control," the State submits that weaving within one's own lane constitutes failing to maintain control. We disagree, as the State offers no convincing authority for its argument.

The State notes that an officer's stop of the defendant was upheld in *Piercefield v. State*, 316 Ark. 128, 871 S.W.2d 348 (1994). Piercefield was riding a motorcycle that was weaving between the centerline of the road and the shoulder, the hour was late, and the arresting officer was concerned that the driver might be driving while intoxicated. That case does not support the State's argument that a car weaving between the boundaries of its designated lane on a multi-lane highway, combined with an officer's concern that the driver might be sleepy, constitutes probable cause to stop.

The State also submits that Officer Taylor believed that the California tags were illegal and that his belief amounted to probable cause. That is a disingenuous argument because Officer Taylor admitted during his testimony at the suppression hearing that before stopping Barrientos's car, he had already checked and found the expiration date on the license to be valid. Furthermore, the State ignores the trial court's finding when ruling on the motion to suppress that Officer Taylor had already determined that the tags on the vehicle were in order and that, upon stopping Barrientos's car, he also had obtained paperwork to verify the information about the vehicle's ownership and registration and had satisfied himself that the vehicle was not stolen and the tags were not fictitious.

The trial court, although reaching the conclusion that probable cause existed for the stop of Barrientos's vehicle, described the evidence supporting probable cause as being "extremely thin." We hold that there was no basis for the court's finding of probable cause to stop Barrientos's vehicle, and that the court therefore erred in refusing to grant the motion to suppress. Consequently, we remand this case to the trial court with directions to suppress the evidence flowing from the unconstitutional stop. In view of our holding that there was no probable cause to make the stop, we need not consider the second, third, or fourth points, as they are concerned with the stop and resulting search.

Although we hold that the trial court's failure to grant the motion to suppress evidence was trial error, we must also consider Barrientos's challenge to the sufficiency of the evidence in order to satisfy the constitutional requirments regarding double jeopardy. *See Harris v. State*, 284 Ark. 247, 681 S.W.2d 334 (1984). When reversal is sought both on the grounds of the insufficiency of the evidence and for other errors that may have occurred at trial, we may not reverse and remand for "trial error" without first having considered the sufficiency of the evidence. *Lanes v. State*, 53 Ark. App. 266, 922 S.W.2d 349 (1996) citing *Burks v. United States*, 437 U.S. 1 (1978), and *Harris v. State, supra.* When the sufficiency of the evidence is challenged on appeal, we review the evidence in the light most favorable to the appellee, considering only the evidence that tends to support the verdict, including, however, the evidence that was erroneously admitted. *Ladwig v. State*, 328 Ark. 241, 943 S.W.2d 571 (1997); *Wilson v. State*, 320 Ark. 707, 898 S.W.2d 469 (1995); *Thomas v. State*, 312 Ark. 158, 847 S.W.2d 695 (1993); *Lanes v. State, supra.* The evidence, whether direct or circumstantial, must be of sufficient force that it will, with reasonable and material certainty and precision, compel a conclusion one way or another. *Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995). We do not weigh the evidence on one side against the other; we simply determine whether the evidence in support of the verdict is substantial. *Tisdale v. State*, 311 Ark. 220, 843 S.W.2d 803 (1992); *Salley v. State*, 303 Ark. 278, 796 S.W.2d 335 (1990). Neither do we pass on the credibility of the witnesses. That duty is left to the trier of fact. *Mann v. State*, 291 Ark 4, 722 S.W.2d 266 (1987).

In support of his argument that the evidence was insufficient to support his conviction, Barrientos relies on *United States v. Pace*, 922 F.2d 451 (8th Cir. 1990). Philip Pace was stopped for speeding near Springfield, Missouri, in the early morning hours; he had no driver's license or vehicle registration; and he appeared nervous. A computer check revealed that Pace's driver's license had been suspended and that the car was not owned by either Pace or Thomas Mason, the other occupant of the car. Both occupants consented to a search of the vehicle, which led to the discovery of two duffel bags in the floor board of the back seat and a duffel bag and suitcase in the cargo area of the station wagon containing almost 200 pounds of what appeared to be cocaine.

The view of the cargo area was concealed from the rest of the vehicle. Pace's travel bag was in the back seat, having been placed there by Mason. Pace had been in the car for a day and a half, and had been asleep in the front seat when he was not driving. There was no evidence that Pace, who had been hired by Mason to assist in driving the station wagon from Los Angeles to Chicago, knew what was inside the duffel bags or suitcase. On appeal from Pace's conviction for possession of cocaine with intention to distribute, the Eighth Circuit Court of Appeals reversed and dismissed, holding that, in the absence of evidence that Pace knew the contents of Mason's duffel bags and suitcase, the evidence was insufficient to justify a reasonable inference that Pace knew he was driving a car full of cocaine.

Here, the trial court found *Pace* to be distinguishable, stating that *Pace* might apply to Ms. Frias (the other adult occupant of his car) if she were being tried for possession of the methamphetamine. The trial court noted that since Barrientos admitted that he had recently purchased the car from a man named Jerry with a "funny last name," the court would have to conclude either that Barrientos was working in conjunction with Jerry Lichtenberger to transport and distribute the drug or that Barrientos was the innocent purchaser of a vehicle from a man who had forgotten that there were twenty pounds of methamphetamine in the gas tank, a scenario the court found implausible. In light of the testimony, as summarized above, and the laboratory analysis of the twenty-two pounds of methamphetamine found inside the gas tank of the car driven by Barrientos, we hold that there was substantial evidence to support the conclusion and that the trial court did not err in denying Barrientos's motion for directed verdict[1].

Reversed and remanded for further proceedings consistent with this opinion.

STROUD, C.J., and JENNINGS, J., agree.

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[1] The State argues that Barrientos did not preserve his sufficiency of the evidence argument because of a lack of specificity in his motion for directed verdict, but we find that the motion was sufficiently specific to preserve the argument as Barrientos made it clear that his motion was based upon United States v. Pace, 922 F.2d 451 (8th Cir. 1990).

Phetaphay SYAKHASONE *v.* STATE of Arkansas

CA CR 00-496 39 S.W.3d 5

Court of Appeals of Arkansas
Division II
Opinion delivered February 7, 2001

Eddie N. Christian, Jr., for appellant.

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

WENDELL L. GRIFFEN, Judge. Phetaphay Syakhasone appeals a decision denying his motion to suppress evidence seized during a search of his residence on February 17, 1998. Pursuant to Rule 24.3(b) of the Arkansas Rules of Criminal Procedure, appellant entered a conditional plea of *nolo contendre* to possession of cocaine with intent to deliver and received a sentence of forty-two months' imprisonment, with an additional one hundred thirty-eight months suspended. Appellant now argues that the Fort Smith police officers failed to adhere to the "knock and announce" rule before executing the search; that it was unreasonable for an officer to believe that the person who looked out the window identified them as law enforcement officers; and that the circumstances surrounding the search do not warrant an exception to the rule. We agree that the officers failed to abide by the knock-and-announce rule and that exigent circumstances did not exist to

warrant the officers' conduct. Therefore, we reverse the conviction and remand for further proceedings.

On February 17, 1998, the Fort Smith Police Department obtained a warrant to search the residence located at 4709 North 36th Street in Fort Smith, Arkansas, for narcotics. The residence was owned by appellant who lived there with his fiancee and infant son. The warrant was based on an affidavit provided by Detective Michael Bates of the Fort Smith Police Department who learned from a confidential informant that crack cocaine was being sold at the residence. The affidavit alleged that the informant made a controlled buy of crack cocaine under the supervision of the police. The search warrant stated that the "items are in danger of being removed from said premises or being destroyed as the items are small and are easily capable of being removed or destroyed. Also, the items are being sold and thereby removed from the residence." The search warrant did not contain a no-knock provision.

At approximately 9:55 p.m., the police executed the warrant. Five officers approached the front entrance of the residence with their guns drawn. The officers were dressed in black; four officers wore raid jackets and vests with the word "POLICE" on the front, and one officer wore a police uniform. An officer later identified as detective William Ohm carried a "battering ram," to force the door open if necessary.

As the officers approached the house, Bates noticed someone open a curtain, look in the direction of the officers, and pull the curtain back. Bates testified that based on his observation, he yelled for the other officers to hurry because he was concerned for their safety. After the officers hurriedly went to the entrance, Bates opened the screen door and told detective Ohm to hit the door. As Ohm pulled the battering ram, Bates knocked and announced "police." The door was forced open within two to five seconds.

Once inside, the officers discovered Chris Stevens, an overnight guest of appellant's, in the living room, hiding by the couch. Appellant's girlfriend was in the southwest bedroom with their child. As a result of the search, the officers confiscated several different packages of rock cocaine, a nine-millimeter gun, and several hundred dollars. Appellant was not present but was later arrested at work.

The trial court heard testimony from four of the officers during the suppression hearing. Detective Bates testified that the confidential informant did not mention weapons or that the people inside the residence were dangerous. Bates also testified that the criminal check he ran on appellant was negative and that the warrant did not authorize a search for weapons. However, both Bates and Detective Charles Kerr testified that they chose to enter the home by force out of concern that the residence contained weapons. Bates testified that his anxiety heightened when Stevens looked out the curtains because the officers did not know if there were any weapons in the house. Kerr echoed the concerns of Bates, and testified that a safety hazard always existed when officers lose the element of surprise. Kerr testified that whenever the officers in his department felt that anything had occurred during the execution of a search warrant that heightened the prospect of danger, the officers would not wait for consent prior to gaining entry. Kerr also told the court that it was typical to find guns when executing most search warrants, and that officer safety was a major concern in search executions because people may retrieve a gun. Kerr testified that Bates did not alert the officers that the person in the window had a weapon; however the officers hurried to get to the door for safety. He also testified that the area was well lit and that there were lights on in the house.

The court also heard testimony from Officer Donnie Ware, who testified that he saw someone in the window, and that five or six seconds lapsed between the time the officers announced their presence and the time the officers rammed the door. Detective Ohm, the person holding the battering ram, testified that there may have been a two to three second delay between the police announcing their presence and Ohm hitting the door.

After hearing the testimony, the trial court found that the police failed to comply with the knock and announce rule. However, it determined that exigent circumstances gave the police reasonable suspicion that an unannounced entry was warranted. The court pointed to the fact that the officers were dressed in identifiable law enforcement attire such that it was reasonable for Bates to believe that Stevens had identified them as police officers, and found that the disposable nature of crack cocaine warranted forceful entry into appellant's home. This appeal followed.

First, appellant contends that it was unreasonable for Bates to believe that Stevens identified the five men approaching the residence as law enforcement officers. Second, he argues that even if it were reasonable for Bates to believe that Stevens identified the officers, no exigent circumstances existed to warrant forceful entry into the home. The State responds that the officers complied with the knock and announce rule and, alternatively, that exigent circumstances justified forceful entry. After applying the instant circumstances to the controlling law, we hold that even if it was reasonable for Bates to believe that Stevens identified the men as law enforcement officers, the record fails to demonstrate that the officers had particular knowledge to necessitate forceful entry.

When reviewing a trial court's denial of a motion to suppress, this court makes an independent determination based on the totality of the circumstances. *See Tabor v. State*, 333 Ark. 429, 971 S.W.2d 227 (1998). We will only reverse the trial court if its ruling is clearly against the preponderance of the evidence. *See id.*

Knock and Announce

The Fourth Amendment protects an individual's legitimate expectation of privacy against unreasonable searches and seizures.[1] *See Wilson v. Arkansas*, 514 U.S. 927 (1995). When an appellant owns or is in possession of the property searched, he has standing to challenge the legality of the search. *See Mazepink v. State*, 336 Ark. 171, 987 S.W.2d 648 (1999).

The United States Supreme Court announced in *Wilson* that the common-law rule of knock and announce constitutes a portion of the Fourth Amendment reasonableness inquiry. The Court traced the knock and announce principle from early English common law to modern times beginning with the early rule that "when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execu-

[1] The text of the Fourth Amendment is as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be search, and the persons or things to be seized.

U.S. Const. amend. IV.

tion of the K[ing]'s process, if otherwise he cannot enter," and noting that the rule was qualified by the statement that "before he breaks it, he ought to signify the cause of his coming, and to make request to open doors . . . , for the law without a default in the owner abhors the destruction or breaking of any house." *See Wilson, supra* (quoting *Semayne's Case*, 5 Co. Rep. 91a, 77 Eng. Rep. 194, 195-96 (K.B. 1603)). The Court noted that both the rule and its qualifier were accepted by many prominent founding-era commentators, including Sir Matthew Hale, William Hawkins, and Sir William Blackstone.

■ The principle later became part of early American common law when many states, in conjunction with ratification of the Fourth Amendment, enacted constitutional provisions or statutes that incorporated English common law. *See Wilson, supra.* The Court observed that knock and announce was never treated as a blanket rule and that the courts inherently recognized the application of certain circumstances that justified an exception. *See, e.g., Read v. Case*, 4 Conn. 166, 170 (1822) (holding that notice not required when spirit of rule was not violated by plaintiff's resolution to resist by physical force, if necessary); *Allen v. Martin*, 10 Wend. 300, 304 (N.Y. Sup. Ct. 1833) (holding that officer justified in not announcing in circumstance involving a prisoner's escape and retreat into prisoner's home); *People v. Maddox*, 46 Cal. 2d 301, 305-306, 294 P.2d 6, 9 (1956) (holding that knock and announce not necessary where police have reasonable belief that evidence likely to be destroyed if presence known).

Although the principle was accepted by American courts, it was not until *Wilson* that knock and announce was held to be a part of the reasonableness inquiry contemplated under the Fourth Amendment. *See Wilson, supra.* In *Wilson*, the Supreme Court reasoned that one of the reasons to require law enforcement officers to announce their presence and authority is to prevent destruction to property. *See Wilson, supra.* Therefore, it concluded that in some situations an officer's unannounced entry into a home may be unreasonable.

■ The Court again addressed the knock-and-announce principle in *Richards v. Wisconsin*, 520 U.S. 385 (1997), when it struck down a blanket rule of the Wisconsin supreme court that allowed police executing felony drug search warrants to enter

premises without knocking and announcing their presence. In rejecting the Wisconsin rule, the Court explained that "if a *per se* exception were allowed for each category of criminal investigation that included a considerable — albeit hypothetical — risk of danger to officers or destruction of evidence, the knock-and-announce element of the Fourth Amendment's reasonableness requirement would be meaningless." *See id.* at 394. The Court expanded its holding in *Wilson* and stated that police seeking to justify a "no-knock" entry must meet the following test:

> [T]he police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.

Id. at 394 (citations omitted).

The Court chose the lower standard of reasonable suspicion rather than probable cause in order to strike a proper balance between the valid concerns of law enforcement officials who execute search warrants and the privacy interests of individuals who are affected by 'no-knock' entries. It cautioned that even though a knock and announce challenge involves a lower standard of proof, the police are required to show reasonable suspicion whenever the reasonableness of an unannounced entry is at issue. The Court held that trial courts facing the issue of whether an unannounced entry is reasonable should apply the *Richards* test to the facts and circumstances of the particular entry to determine if the entry is justifiable.

Our supreme court later held in *Mazepink v. State* that the requirement for police to knock and announce is not merely perfunctory. *See Mazepink*, 336 Ark. 171, 182-83, 987 S.W.2d 648, 653 (1999). Once police officers knock on the door and announce their presence and the authority for their business, the officers must wait a reasonable length of time to afford the occupant a chance to comply with their demand before the officers may enter by force. Although an exact waiting period has not been established, the *Mazepink* court held that a time interval of two to three seconds was not sufficient to establish that officers in that case were constructively denied entry into the home by the occupants.

Turning to this case, the trial court found that the officers did not comply with the knock and announce guidelines. Detective Bates testified that his announcement of "police, warrant," and the ramming of the door was simultaneous because he told Detective Ohm to hurry up and get to the door. He further testified that Detective Ohm's report, which indicated that the police were yelling "police, warrant," at the same time Ohm was ramming the door was probably accurate. Detective Ohm testified that he did not hit the door simultaneously as Bates was knocking, but that it could have been as few as two to three seconds after Bates yelled "police, search warrant" that he hit the door. Based on the analysis in *Mazepink*, the trial court correctly concluded that the officers failed to comply with knock-and-announce standards when they rammed their way into appellant's residence within three seconds after announcing their presence.

Exigent Circumstances

Appellant also argues that the officers did not demonstrate exigent circumstances to justify forced entry into his home after waiting less than five seconds after they announced their presence. The State responds that the officers had an articulated and fact-based belief that evidence would be destroyed or that they would be in danger if they announced their presence.

Mazepink involved a similar fact pattern to the case at bar. In *Mazepink*, the Fort Smith police department knocked and announced their presence at appellant's home. After a two to three second interval, the police used a battering ram to force their entry into the home. The officer in charge of executing the search warrant testified that he heard no suspicious noises emerging from the residence; that he had no reason to believe anyone inside the residence might be attempting to escape or destroy evidence; and that he had no reason to believe that there were guns or weapons inside the residence or that any of the occupants had violent tendencies. In conducting its analysis, our supreme court noted that the fact that one of the occupants was caught by the police while attempting to hide drugs was not relevant; rather, what mattered in determining the reasonableness of the officers' conduct was the officers' knowledge at the time of the entry. The court further observed that the fact that the confidential informant stated that drugs were located in the home, combined with the officers' testi-

mony that in their general experience of executing search warrants suspects attempt to destroy the evidence once they are aware that the police are present, without more, was not sufficient to determine exigent circumstances.

Appellant argues that it was unreasonable for Bates to believe that Stevens was aware of the officers' presence. He points to undisputed testimony that the warrant was executed at 9:55 p.m.; that there was no porch light on; and that the police were wearing black vests with the word "POLICE" on the front. However, the trial court determined that the testimony was clear that the officers were dressed in identifiable law enforcement attire, and two officers stated that they saw someone look out the curtain at them. Credibility issues are reserved for the finder of fact, and the trial court's conclusion that it was reasonable for the officers to believe that Stevens was aware of their presence was not clearly erroneous.

However, the testimony of the officers did not demonstrate any exigent circumstances to justify their forced entry after a two to three second wait. Although the trial court found that exigent circumstances existed to warrant forced entry because of the disposable nature of the crack cocaine, the record does not reveal that any of the officers demonstrated a reasonable suspicion that evidence was likely to be destroyed as justification for a forced entry into the home. Indeed, there is no mention of the likelihood of destruction of evidence in any of the testimony adduced at trial as the reason for the forced entry, let alone reference to facts supporting such a suspicion. The officers' testimony simply was that they entered the house by force because of their heightened concern for safety and the possibility that whoever saw them through the window might use a weapon.

Even though the officers testified they were concerned about safety, their concerns were based on their general experiences rather than anything objective surrounding appellant's case. For instance, Detective Bates testified that because Stevens had seen the officers, he was concerned that there were weapons inside the house. However, Bates admitted that his confidential informant did not mention weapons and that neither the affidavit nor the search warrant mentioned weapons. Also, the warrant did not authorize a search for weapons. Bates also testified that the confidential informant did not give him any reason to believe that anyone inside

the residence would be dangerous. Detective Kerr echoed that testimony and testified that it always became a safety hazard when "they see us coming and we don't get the element of surprise because they can go for a gun. With most of the warrants we do find guns."

Clearly, the police disregarded the knock and announce requirement because of a generalized concern rather than particularized facts connected to appellant's situation. Reasonable suspicion has consistently been defined as a suspicion based upon facts or circumstances that give rise to more than a bare, imaginary, or purely conjectural suspicion. *See State v. Bell*, 329 Ark. 422, 948 S.W.2d 557 (1997); *Hammonds v. State*, 327 Ark. 520, 940 S.W.2d 424 (1997). Allowing the police to force their entry of private dwellings based on anything less than reasonable suspicion would make the Fourth Amendment protection from unreasonable searches turn on unsubstantiated anxieties, baseless suspicions, and even stereotypes and prejudice. As the Supreme Court stated in *Richards v. Wisconsin*, *supra*, "if a *per se* exception were allowed for each category of criminal investigation that included a considerable — albeit hypothetical — risk of danger to officers or destruction of evidence, the knock and announce element of the Fourth Amendment's reasonableness requirement would be meaningless."

Reversed and remanded.

ROAF, J., agrees.

PITTMAN, J., concurs.

Kathy S. RABB *v.* STATE of Arkansas

CA CR 00-153 39 S.W.3d 11

Court of Appeals of Arkansas
Division IV
Opinion delivered February 7, 2001

[redacted]

Honey & Honey, P.A., for appellant.

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

LARRY D. VAUGHT, Judge. Appellant Kathy S. Rabb brings this appeal from her conviction on three drug-related charges: 1) possession of a controlled substance (methamphetamine) with intent to deliver; 2) conspiracy to deliver a controlled substance; and 3) simultaneous possession of a firearm and a controlled substance. She was sentenced to a total of thirty-one years' imprisonment in the Arkansas Department of Correction. Appellant now asks us to reverse, contending that there was insufficient evidence to support her convictions and because the trial court violated Rule 401 and 402 of the Arkansas Rules of Evidence during her trial. We affirm the first two convictions and reverse and dismiss the simultaneous-possession conviction.

In October of 1998, police in Orange County, California, arrested appellant's estranged husband, Edward Rabb, on the charge of possession of methamphetamine with intent to deliver. The arrest followed a search of his property that yielded six pounds of methamphetamine, approximately $60,000 in cash, one pound of marijuana, and several documents detailing an active drug-trafficking enterprise. The documents led police to Monticello, Arkansas, and ultimately to appellant. Police officers from California flew to

Arkansas on October 28, 1998, and enlisted the assistance of the Monticello Police Department to obtain a valid Arkansas search warrant. On October 29, 1998, Orange County officers executed their search of appellant's residence at 507 North Church in Monticello. The search revealed $4,000 in cash and $14,000 in appellant's bank account, but no drugs.

On November 13, 1998, the Orange County officers returned to Arkansas and obtained another valid Arkansas warrant to search appellant's residence for any items they may have missed during the initial search. The second search uncovered approximately six ounces of methamphetamine, postal scales, an unloaded .22 caliber rifle, over 200 syringes, documents detailing an active drug-trafficking enterprise, and over $350,000 in cash. Based on the evidence collected, appellant was charged with possession of methamphetamine with intent to deliver (under the enhancement statute regarding distribution-near-certain-facilities), simultaneous possession of drugs and firearms, conspiracy to deliver methamphetamine, and use of a communication facility to commit a felony. The trial judge directed a verdict in appellant's favor on the use of a communication facility to commit a felony, and the jury found her guilty of the four remaining charges.

Appellant alleges that the trial court erred in refusing to direct verdicts based on insufficient evidence to support three of her four convictions. When we review a challenge to the sufficiency of the evidence, we will affirm the conviction if there is substantial evidence to support it, when viewed in the light most favorable to the State. *See, e.g., Gilbert v. State,* 341 Ark. 601, 19 S.W.3d 595 (2000). Sufficient evidence, whether direct or circumstantial, is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or another, without resort to speculation or conjecture. *See, e.g., Dodson v. State,* 341 Ark. 41, 14 S.W.3d 487 (2000); *Wilson v. State,* 332 Ark. 7, 962 S.W.2d 805 (1998). Only evidence supporting the verdict will be considered. *Carmichael v. State,* 340 Ark. 598, 12 S.W.3d 225 (2000). 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. *See, e.g., Wilson v. State,* 322 Ark. 7, 962 S.W.2d 805 (1998).

Possession of a Controlled Substance with Intent to Deliver

The appellant first argues that the State failed to prove that she possessed a controlled substance with the intent to deliver. Arkansas Code Annotated section 5-64-401(a) (Repl. 1997) provides that "it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver a controlled substance." While there is no argument that the State proved that appellant possessed a large amount of methamphetamine, she argues that no evidence was presented to indicate her intentions toward the controlled substance. Therefore, appellant reasons, the State failed to meet its burden with regard to the second prong of Ark. Code Ann. § 5-64-401(a). However, possession of more than two hundred milligrams of methamphetamine gives rise to a presumption of intent to deliver.[1] *See* Ark. Code Ann. § 5-64-401(d); *Owens v. State,* 325 Ark. 110, 926 S.W.2d 650 (1996); *Sanchez v. State*, 288 Ark. 513, 707 S.W.2d 310 (1986).

The record reveals the following pertinent facts. On November 13, 1998, a second warrant was issued allowing a search of appellant's residence. There is no dispute that appellant is the sole and primary resident of the home that was searched. Authorities recovered three packets that were later revealed to contain methamphetamine. One packet contained six separate plastic bags, all with a rock-like substance inside. The two remaining packets also contained a rock-like substance. A chemical analysis was done on each packet and each analysis was positive for methamphetamine. The total weight of all three exhibits was 190.034 grams, over six ounces. This evidence was introduced at trial through Dominick P. Derado, a deputy sheriff with the Orange County Sheriff's Department who participated in the search, and Michael Stage, a forensic drug chemist with the State Crime Lab. The State offered substantial proof of appellant's intent toward the methamphetamine, since the amount recovered from appellant's home far exceeded the two hundred milligram threshold required to establish a presumption of intent to deliver. The physical evidence alone is sufficient for us to affirm appellant's conviction of

[1] Methamphetamine is not specifically listed in § 5-64-401(d) (Repl. 1997). However, there is a general provision for a controlled substance falling into the category of a "stimulant drug." The presumption of intent to deliver will attach to a "stimulant drug" if the quantity possessed is in excess of 200 milligrams.

possession of a controlled substance with the intent to deliver. *See Owens v. State*, 325 Ark. 110, 926 S.W.2d 650.

Conspiracy to Deliver a Controlled Substance

Next, appellant argues that the State failed to provide substantial evidence that she engaged in a conspiracy to deliver methamphetamine. Arkansas Code Annotated section 5-64-401(a) prohibits a person from delivering a controlled substance. "Delivery" is defined as the "actual, constructive, or attempted transfer from one (1) person to another of a controlled substance or counterfeit substance in exchange for money or anything of value, whether or not there is an agency relationship[.]" Ark. Code Ann. § 5-64-101(f) (Repl. 1997). Arkansas Code Annotated section 5-3-401 (Repl. 1997) provides that:

> A person conspires to commit an offense if with the purpose of promoting or facilitating the commission of any criminal offense:
>
> (1) He agrees with another person or other persons:
>
> (A) That one (1) or more of them will engage in conduct that constitutes that offense; or
>
> (B) That he will aid in the planning or commission of that criminal offense; and
>
> (2) He or another person with whom he conspires does any overt act in pursuance of the conspiracy.

In order to sustain a conviction, proof is required that defendant entered into an agreement with another person to commit the crime of delivery of methamphetamine and that one of them did at least a minimal act in furtherance of that agreement. *See Jones v. State,* 45 Ark. App. 28, 33, 871 S.W.2d 403, 406 (1994). The State may prove a conspiracy with circumstantial evidence and inferences drawn from the conspirators' conduct. *See Henry v. State*, 309 Ark. 1, 8, 828 S.W.2d 346, 350 (1992).

The record reflects that on November 13, 1998, a search of appellant's home uncovered over six ounces of methamphetamine, postal scales, over 200 syringes, numerous plastic bags, and over $350,000 hidden throughout the residence. In addition to the physical evidence recovered from her home, evidence was presented

that appellant made several trips to visit her estranged husband, Edward Rabb, in California; that during a six-month period most of her long distance calls were to California; and that appellant was the likely author of several letters recovered from the home of Mr. Rabb. The letters outlined plans for the execution of a successful drug-trafficking scheme. Specifically, the letters instructed that drug dogs could not smell through Vaseline, mentioned ways to effectively hide currency, and offered an accounting of numerous cash financial transactions.

Appellant argues that the frequent contact with her estranged husband centered around their daughter, Starr, and the "State failed to present evidence of a substantial nature of an agreement between the Rabbs to commit any crimes against the State of Arkansas." We disagree. It is rare that direct evidence of a conspiracy, due to the very nature of a criminal conspiracy, is readily available for presentation to a jury. *See Lee v. State*, 27 Ark. App. 198, 770 S.W.2d 148 (1989). Thus, in *Purifoy v. State,* 307 Ark. 482, 822 S.W.2d 374 (1991), the supreme court held that concert of action to commit an unlawful act may be shown by circumstantial evidence, without direct proof of a conspiracy.

There is sufficient evidence contained in the record to show that appellant, acting "with the purpose of promoting or facilitating the commission" of delivery of methamphetamine, agreed with Mr. Rabb (1) that one or more of them would engage in conduct that constitutes delivery of methamphetamine, or (2) that appellant would "aid in the planning or commission" of the offense and that numerous "overt acts" (including possession of a large amount of methamphetamine, sending the letters, and hiding over $350,000) were committed in pursuance of the conspiracy. *See Williams v. State*, 328 Ark. 487, 944 S.W.2d 822 (1997).

Simultaneous Possession

In her third sufficiency-of-the-evidence challenge, appellant argues that the trial court erred in refusing to direct a verdict on the simultaneous possession charge. Arkansas Code Annotated section 5-74-106 (Repl. 1997) provides that no person shall unlawfully commit a felony violation of section 5-64-401 (Repl. 1997) (manufacturing, delivering, or possessing with intent to manufacture or deliver a controlled substance) or unlawfully attempt, solicit, or

conspire to commit a felony violation of section 5-64-401 while in possession of a firearm. Ark. Code Ann. § 5-74-106(a)(1). Additionally, Arkansas Code Annotated section 5-74-106(d) provides that it is a defense that "the defendant was in his home and the firearm was not readily accessible for use."

In *Gilbert v. State*, 341 Ark. 601, 19 S.W.3d 595 (2000), the supreme court articulated the elements required to sustain a simultaneous possession conviction. The proof must show that appellant possessed a firearm, *Darrough v. State*, 322 Ark. 251, 908 S.W.2d 325 (1995), and that a connection existed between the firearm and the controlled substance. *Johnson v. State*, 333 Ark. 673, 972 S.W.2d 935 (1998). Appellant argues that the State failed to prove a connection between the firearm and the controlled substance, and she also raises the statutory defense that the "defendant was in [her] home and the firearm was not readily accessible for use." *Id.*; *see also* Ark. Code Ann. § 5-74-106(d).

A .22 caliber rifle was recovered from the kitchen of appellant's residence. A ceramic dog with over $100,000 hidden inside was also recovered from the kitchen. The large amount of methamphetamine and cash found in the house is sufficient to establish the nexus between the controlled substance and the firearm, satisfying the two elements of Ark. Code Ann. § 5-74-106(a)(1). There is no dispute that appellant was in her home and that the gun was in plain view (not in a closet or otherwise hidden). There is nothing in the record to indicate that the gun was loaded or that any ammunition was recovered during the search of appellant's home.

Our code does not define the phrase "readily accessible for use," but our supreme court addressed the issue in *Manning v. State,* 330 Ark. 699, 956 S.W.2d 184 (1997). In *Manning,* two firearms were found, one loaded and one unloaded. Both were secreted in a closet, wrapped in a ski mask. The supreme court sustained the conviction upon finding that the *loaded* gun was within the defendant's easy reach, and therefore was, readily accessible for use.

We construe the phrase "readily accessible for use" to mean "for use" as a firearm. An unloaded weapon with no ammunition available is not usable as a firearm. In this case, the rifle was not loaded and no ammunition was recovered. Therefore, the weapon was not readily accessible for use as a firearm. Appellant's

conviction for simultaneous possession of a controlled substance and a firearm is reversed and dismissed.

Violation of Rule 401 and 402 of the Arkansas Rules of Evidence

For appellant's second point on appeal, she argues that the trial court erred when it allowed the introduction of several writings that were discovered at her husband's home in California. The writings were used by the State as part of its proof in the conspiracy charge. The State's handwriting expert testified that there were "strong indications" that the handwriting was by appellant and that it was a "virtual impossibility" that someone other than appellant had produced the writings in question. The expert also testified that the writings were of a common authorship.

However, none of the questioned writings were included in appellant's abstract. The failure of appellant to abstract a critical document precludes this court from considering issues concerning it. *See Jackson v. State*, 316 Ark. 509, 872 S.W.2d, 400 (1994); *Turner v. State*, 59 Ark. App. 249, 956 S.W.2d 870 (1997). The record on appeal is confined to what is abstracted. *See Moncrief v. State*, 325 Ark. 173, 925 S.W.2d 777 (1996); *Carter v. State*, 326 Ark. 497, 932 S.W.2d 324 (1996). It is the duty of an appellant to abstract such parts of the record as are material to the points argued in her brief. Ark. Sup. Ct. R. 4-3(g); *Carter, supra.* Appellant's failure to abstract the material portions of the record preclude consideration of the merits of this argument.

Affirmed in part; reversed and dismissed in part.

STROUD, C.J., and BIRD, J. agree.

Abrom STEWART *v.* Joe STEWART

CA 99-1402 37 S.W.3d 667

Court of Appeals of Arkansas
Division IV
Opinion delivered February 14, 2001

Lessmeister Law Firm, by: *James J. Lessmeister,* for appellant.

Mickey Buchanan, for appellee.

JOHN F. STROUD, JR., Chief Judge. This is an appeal from the Sevier County Chancery Court, which found that there was clear and convincing evidence of the making and performance of an oral contract for the sale of real property and which granted specific performance. We cannot say that the chancellor was clearly erroneous, and we affirm.

The parties in this case are brothers who were partners in two real estate deals. Joe Stewart, appellee, purchased "the Coulter house" in 1983 for $27,000. He was the sole owner of the Coulter house until he sold a one-half interest to Abrom Stewart, appellant, on January 27, 1984. Appellee alleges that the parties reached an agreement in September 1995 wherein appellant would sell his half of the Coulter house back to appellee. Appellee said the agreement was that he paid appellant a $2,000 cash down payment and appel-

lant was to finance the balance at eight percent interest over a three-year period which, made the monthly payments approximately $313. According to appellee, the agreement was made in the office of an attorney whom the parties used to handle some of their business, including the Coulter house. The parties also equally owned an apartment building together called the Rabb Apartments. While there is no issue on appeal regarding the apartments, they are mentioned frequently because some of the finances for both properties were commingled.

The Coulter house burned in May 1997, and the insurance policy in effect at the time of the fire was in appellee's name only. Appellee received over $80,000 from the insurance company. At the time of the fire, appellee had not completed the payments under the alleged contract. He said that he still owed appellant $8,000, and he transferred this amount to appellant's bank account from the insurance proceeds. Appellant refused to give appellee a deed for his half of the property and denied that there ever was a contract. Appellee sued for specific performance. Appellant counterclaimed for $41,175, which was half of the insurance proceeds, and for $9,000 for waste that he alleges appellee committed in regards to the apartments the parties held jointly. After a hearing on the issues, the trial court ordered appellant to convey his half interest in the property to Joe Stewart within thirty days.

Appellant raises two issues on appeal. He argues that there was neither payment nor possession by Joe Stewart to take the alleged oral contract outside the statute of frauds, and that, as tenants in common, Joe Stewart had a fiduciary duty to pay him half of the insurance proceeds.

Appellant argues four subpoints under the first issue: (1) that there was no written document; (2) that there was no clear and convincing evidence of payment of the alleged contract price of $12,000; (3) that money paid to Abrom Stewart was not reflective of the alleged terms of the oral contract; and (4) that Joe Stewart did not have possession evincing the birth of a new estate.

The statute of frauds in Arkansas is found at Arkansas Code Annotated section 4-59-101(a)(4) (Supp. 1999), and in pertinent part provides:

> Unless the agreement, promise, or contract, or some memorandum or note thereof, upon which an action is brought is made in

> writing and signed by the party to be charged therewith, or signed by some other person properly authorized by the person sought to be charged, no action shall be brought to charge any: ... (4) Person, upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them....

To take an oral contract out of the statute of frauds, the making of the oral contract and its performance must be proved by clear and convincing evidence. *Dolphin v. Wilson*, 328 Ark. 1, 942 S.W.2d 815 (1997). However, a requirement that the evidence be clear and convincing does not mean that the evidence be uncontradicted. *Johnston v. Curtis*, 70 Ark. App. 195, 16 S.W.3d 283 (2000). 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. *Jablonski v. Jablonski*, 71 Ark. App. 33, 25 S.W.3d 433 (2000). Partial performance of a contract by payment of a part of the purchase price and placing a buyer in possession of land pursuant to an agreement of sale and purchase is sufficient to take the contract out of the statute of frauds. *Dolphin, supra. Dolphin* differs from the case at bar because the only evidence in that case primarily consisted of the competing testimony of the parties. *Id.*

We review chancery cases *de novo* on the record, but we do not reverse a finding of fact by the chancellor unless it is clearly erroneous. *Norman v. Norman*, 342 Ark. 493, 30 S.W.3d 83 (2000). 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. *Id.*

Here, appellant argues that there is no written document and no evidence that appellee paid the $12,000. Appellant testified that he obtained his interest in the Coulter house and Rabb Apartments by deed, and that he assisted his brother Joe by putting $5,000 down on the Coulter house. He said that appellee lived in the house along with his girlfriend and her children; that in return for staying in the house, appellee agreed to maintain the upkeep on the house as well as the insurance and taxes; and that the 1983 purchase price of the house was $27,000 but that it had a market value excluding the land of $30,000. He argues that there is no promissory note and

no mortgage, no deed, and no written memorandum, and that therefore the alleged sale violates the statute of frauds. In order for a memorandum to satisfy the statute of frauds, appellant argues that it must provide all the essential terms of the agreement, that a description of the land is an essential element, and that the land cannot be identified by oral testimony.

Appellee called Bill Hodge, the attorney who handled mutual affairs for the parties, to testify as to the existence of the oral contract. Mr. Hodge testified that he did represent the parties in a mortgage foreclosure on the Rabb Apartments and that the parties also owned the Coulter property. Mr. Hodge said that he collected the rent from the tenants of the Rabb Apartments for the Stewart brothers and would send them checks after all expenses were paid on the apartments. He testified as follows regarding the Coulter property:

> [T]hey were in the office and told me that they had made a deal with each other that Joe was buying Abrom's half interest in the Coulter place, and they had been out to see a local realtor named Glen Hannigan, who is now deceased.... and she had gone to look at the Coulter House for them and had given them her idea of what the property was worth, and they had agreed on a total value of the property, I believe it was $24,000.
>
> So Joe was gonna pay Abrom $12,000, and on the time that they came to see me about that, Joe had either already paid Abrom $2,000 of it leaving a $10,000 balance or they had made arrangements to pay. I'm not sure whether he had actually paid Abrom yet or not, but for some, but $2,000 of the 12 was satisfied, and they were gonna pay out the other $10,000....
>
> That's a photocopy of a yellow legal pad sheet of notes that I made during that meeting that I was just describing when Joe and Abrom Stewart came into my office and told me about the deal they made for Joe to buy Abrom's half of the coulter property.... It says, "$24,000," and then in parenthesis right after that, $12,000, and then underneath I wrote, "W.D. and MTGE" which is my personal notation for deed and mortgage, and then under that, I wrote "UNDIV period," and the "fraction one-half," and over. [UNDIV] for the undivided one-half interest which is what was being sold, and then over to the right hand side I've got 8%, which is the interest rate that they had told me they had agreed to for the pay-out, and then it says, "313 times 36," and then right below that, parenthesis, "three paid now," close parenthesis, "October,

> November, December," and then there's a line, and then under that I wrote, "Abrom dash wife," with a question mark and a couple of lines under it....
>
> Well, I told them that we'd need to do a deed and a mortgage to take care of this pay-out that they told me about, and I didn't know Abrom's wife's name and I asked him, I said, "I'll need to put your wife's name on here," and when I told him that he and Joe together, and I honestly can't recall now exactly who said specifically what, but the gist of it was, and I think Abrom said to me, "Well, I'm gonna have to get back to you on that." And there was a comment by Abrom or Joe, and I can't tell you which one made the comment, that Abrom was having woman troubles, and I believe that might have been the phrase used or maybe wife troubles, I don't know, but some kind of domestic problem, and for that reason he didn't want to give me the wife's name to use to prepare that deed at that time.... I made notes on that note pad of the amount; that $313 was an amount that I got out of the amortization table I had in my desk drawer ... $313 is what it takes to amortize a $10,000 obligation at 8% interest over whatever period that was, I can't recall now what it was.

Mr. Hodge stated that appellee would send the payments to him and he would in turn either apply the payments to expenses on the Rabb Apartments or send them to appellant. Mr. Hodge stated that he received three payments from appellee but that he sent only two to appellant and applied the third to expenses for the Rabb Apartments.

Appellant denied that the signatures on the backs of the above checks were his, but he admitted that the social security number on them was his. He also said that he was not in DeQueen on the day those checks were cashed. Mr. Hodge admitted that he was not familiar enough with Abrom Stewart's signature to say that the signatures on the backs of the checks were actually appellant's. However, Mr. Hodge also testified that he had written checks to Abrom Stewart from his trust account for the Rabb Apartments, and that the back sides of the canceled checks were signed "Abrom Stewart" and contained Abrom Stewart's social security number.

Mr. Hodge testified that he quit making payments to Abrom Stewart well before the house burned, even though Joe Stewart would bring the payments to him. He said he put the money into his trust account but after the first couple of payments they were running low on tenants in the apartments and also had some

extraordinarily high expenses. Mr. Hodge said he had no indication that there was any problem between Joe and Abrom during this time. He said that after the house burned Joe Stewart collected the insurance and it was then that the brothers got into their dispute. Mr. Hodge admitted that he did not see Joe give Abrom the $2,000, that there is no note or mortgage, and that sometimes clients do not follow through with agreements. He said the Stewarts never hired him to prepare the necessary papers for the Coulter house, but they just told him about their deal. Mr. Hodge said that both parties asked him to handle it, and that had he finished the deal he would have sent both of them a bill. He said they asked him to do the work but he never got to do it because they never gave him the information to complete the work. He specifically said that appellant told him he would get back with him regarding his wife. Mr. Hodge said that both parties provided him with the amounts and the interest rate. He admitted that he did not consult appellant in advance about applying the Coulter house payments to the Rabb Apartment expenses.

He said that appellant was with appellee when they told him about the appraisal and that he got the information regarding the $24,000 and the $12,000 from Joe and Abrom. He said that prior to the fire, appellant never questioned him about the purpose of the $313 payments.

Appellant said that when he bought the Coulter house with his brother, he did so as an investment and he made a $5,000 down payment on it and in 1987 a balloon payment became due and he paid $7,000 on that and his brother paid $3,000. He said he never discussed selling his interest in the house with his brother. He said they discussed selling the Rabb Apartments, and during those discussions they addressed the value of the Coulter house but they did not arrive at a figure. Appellant said he never met with a real estate lady nor did he speak with anyone about an appraisal.

Appellant admitted he went with his brother to Mr. Hodge's office on September 18, 1995, but he said that they did not discuss selling the Coulter house. Mr. Hodge said that at one time he did ask his brother if his girlfriend might be interested in buying his half of the property but that the discussion did not lead to anything. Appellant said he signed a document authorizing the sale of the Rabb Apartments for $12,000 or $16,000 and that was the purpose of going to Mr. Hodge's office that day with appellee. Appellant

insisted that he never told Mr. Hodge that he wanted him to draw up a document of any kind for the sale of the Coulter house. Appellant said the reason appellee gave him the $8,000 was because he owed appellant the money for insurance and taxes paid and for down payments and balloon payments. When asked if he had anything in writing signed by appellee stating that he owed him the money, appellant testified that he did not, and that appellee figured the $8,000 on his own. Appellant said he has no idea how appellee arrived at the figure. He further testified that there never was a contract for the sale of the Coulter house and that appellee never gave him a $2,000 down payment. He also said that he filed for divorce in 1991, that he is not yet divorced, and that there was nothing that happened in 1995 that would have caused him to have a conversation about his wife. Appellant said he never received any payments for the sale of the Coulter house and he did not know anything about it until Mr. Hodge sent him an itemized letter showing payments received from appellee. Appellant testified that Mr. Hodge sent the letter at his request after the house burned and that it was in response to appellant's inquiry about the insurance money. In support of his argument that appellee owed him the $8,000, appellant produced receipts and canceled checks for payment of insurance, taxes, and expenses for either the Coulter house or the apartments, and he claimed that appellee owed him for these expenses. Appellant also produced a handwritten note that he said appellee sent him. The note read, "Here's your statement that came in July and the $8,000.00 deposit I made on August 8. Your statement also show[s] the interest your account is earning." The note was signed "Joe."

Appellant testified that he knows he did not cash the checks that Mr. Hodge testified he sent because the checks were cashed in DeQueen, Arkansas, on December 15, 1995, and that he was not in DeQueen on that day. He testified that the signatures are forgeries. Appellant also said he was with his other brother that day in Shreveport, and he produced a receipt dated December 15, 1995, as proof that he paid for car repairs he had done in Shreveport that day. Appellant's wife's name is also on that particular credit card but appellant said she has not had access to his credit card since 1981 when they separated. Appellant said it is possible for him to be in DeQueen and Shreveport on the same day but he said, "[A]t the time my brother picked me up and the time I picked up my - I stayed with him all day - at the time that he dropped me off to pick

up my car, it was impossible for me to come to DeQueen and be back and do what I done." He admitted that there have been several times when he was in both DeQueen and Shreveport on the same day. Appellant testified that when they bought the Coulter house the mortgage payments were $350 and the Coulter house was paid for by the Rabb Apartments, but he failed to offer any evidence of this or any evidence that he himself made any of the payments.

On the issue of whether appellant cashed the two checks from Mr. Hodge in DeQueen, the parties' other brother, Robert Stewart, testified that he cannot specifically say that appellant was with him in Shreveport on December 15, 1995, but that they were together the day appellant had his car fixed. He also testified that appellee told him prior to the fire that appellant was going to sell him his one-half interest in the Coulter house.

Appellee testified that the mortgage payments on the Coulter house were $356 monthly and that he made all the payments for five years except for the $7,000 appellant paid on the balloon payment. Appellee said he paid $3,200 on the balloon payment. Appellee testified that appellant told him he wanted to sell him his interest in the Coulter house because he and his wife were separated and he did not want her to have anything. He said it is not true that the Rabb Apartments paid the note on the Coulter house. Appellee said he agreed to buy appellant's half-interest so they went to see Bill Hodge. He said he had the house appraised and discussed it with appellant prior to their meeting with Mr. Hodge. Appellee said he told appellant that the appraiser said she could put it on the market for $24,000 but it would probably sell for $21,000. Appellee said appellant's response was that he wanted to get $24,000 for it. During the meeting with Mr. Hodge the parties told him the house appraised for $24,000. Appellee said they explained to Mr. Hodge that appellee paid $2,000 down and that appellant would carry the note for the $10,000 balance. Appellee said Mr. Hodge calculated the note and interest and told them the payments would be $313 per month. Appellee said appellant agreed to the price and that Mr. Hodge made notes of the meeting. Appellee said that Mr. Hodge sent some payments to appellant and applied the rest to the Rabb Apartments. He also said Mr. Hodge explained to him that he would keep a record of the payments and that appellee would have to reimburse appellant for half the money applied to the Rabb

Apartments for expenses since appellee was a joint owner of the apartments. Appellee said he notified his brother within forty-eight hours of the fire at the Coulter house and that they discussed paying off the balance of the $10,000 appellee owed appellant. Appellee said he went to Washington for the Fourth of July to visit appellant and appellant said, "Well, you got the money now. Pay me off." Appellee said he explained to appellant that he had to wait until the insurance check cleared and that he transferred the money to appellant's account shortly thereafter. Appellee said the $8,000 was for the balance of the money he owed appellant on the Coulter house but appellant refused to give him a deed. He said appellant's checks were for his share of the insurance and taxes only and that he did not borrow any money from appellant. Appellee testified that check number 1009 for $540, which appellant says was for insurance and taxes on the Coulter house, was actually paying appellee for a lottery ticket he had won and that appellant agreed to cash for him. Appellee said he cashed the check but when he saw the canceled check it had "insurance" written in the memo section. He said appellant never told him he owed him anything on the Rabb Apartments. Appellee said he also paid notes on the apartments and he worked on the apartments and that he cut the yard, trimmed the trees, and repaired the apartments but was never paid a quarter for it. Appellee said he did not forge any checks on Abrom Stewart and that he paid just as much in taxes as appellant claims he paid.

Appellee stated that all of his documents burned in the fire. Appellee said he sent the payments owed to appellant to Mr. Hodge at appellant's request. Appellee testified that at the time he was making payments to appellant on the Coulter house he was also repairing things, and that he paid some odd amounts because he was paying for the repairs out of his pocket. He testified that the insurance was in his name because he insured it when he was the sole owner and that when appellant became a joint owner, he continued making the insurance payments and he did not change the insurance papers to reflect appellant as an owner. Appellant testified that after the fire the insurance paid approximately $82,000, including $25,000 for the contents and $57,000 for the house. He said the contents belonged to his girlfriend, Betty Boyles, so he gave her the $25,000. Appellant said he agreed to pay his brother $12,000 for his half interest and he actually paid him $12,700 including a $2,000 down payment, $2,700 in payments to Mr. Hodge and $8,000 from the insurance.

In the instant case, in addition to the conflicting testimony of the parties, there was testimony by Mr. Hodge, the attorney who said he met with the parties in his office to discuss the agreement between the parties for the sale of the Coulter house. Mr. Hodge also testified that appellant agreed to sell his share to appellee for $12,000; that the parties said appellee had already taken care of the $2,000 down payment; that appellant would carry the note for the $10,000 balance, payable over thirty-six months at eight percent interest; and that the monthly note would be $313. Mr. Hodge also testified that prior to the fire, appellee had sent him some of the monthly payments and that he in turn had sent some of those payments to appellant and applied the rest to expenses on the Rabb Apartments.

There was also testimony from both appellee and Mr. Hodge that appellant told Mr. Hodge he was having domestic problems and would get back to Mr. Hodge with information regarding his wife so Mr. Hodge could prepare the necessary paperwork. On our review of the record, we cannot say that the chancellor was clearly erroneous in finding that the total amount agreed upon was paid.

We now turn to the issue of whether there was possession enough to satisfy that requirement for removing an oral contract from the statute of frauds. Appellant relies on *Lynn v. Martin*, 166 Ark. 296 (1924), in which our supreme court held that possession, to have the effect of taking the case out of the statute, must be exclusive, evincing the birth of a new estate, and distinguished from the continuation of an old one, and must not be referable to an antecedent right. The supreme court addressed this issue again in *James v. Medford*, 256 Ark. 1002, 512 S.W.2d 545 (1974), wherein it held that when one is placed in possession, as that term is used when applied to taking a contract outside the restrictions of the statute of frauds, it means such possession as would permit the exclusion of others.

The facts in the instant case show that appellee lived in the house with his girlfriend and her children continuously from a time prior to the alleged contract until the house burned in 1997. There is no question that appellee did not move out and move back into the house at the time of the agreement. However, although appellee's presence in the house was continuous, as the chancellor pointed out, there is no evidence that appellant made demands on

appellee to remove himself or his girlfriend from the home at any time. Moreover, the court found that appellant did make an oral contract, so appellant had knowledge that appellee claimed ownership of the house and was living in the house under that claim.

> Since the basis of the doctrine of part performance is fraud or inequitable conduct on the part of the person sought to be charged on the oral contract, it is well settled that the acts or part performance by the plaintiff, in order to entitle him to the enforcement of an oral contract, must have been performed with the knowledge and consent or acquiescence of the defendant.

73 AM. JUR. 2D *Statute of Frauds* § 410 (citations omitted).

In the instant case, the trial court found that the appellant had actual notice that his brother was living in the house under a claim of full ownership because appellant made an oral contract for the sale of the property and appellant accepted the payments.

> It is said that if the purchaser came in as a tenant, he must show by unequivocal proof that the tenancy was abandoned, and that his possession as a tenant was changed into that of a purchaser under the specific contract he is seeking to enforce. Indeed, it has been stated that to refer his continued possession to the oral contract of sale, the tenant must make a formal surrender of his possession under the lease and resume possession under the contract of purchase. Most of the courts, however, support the view that reentry is not necessary to show a change from possession as tenant to possession as purchaser, where there are other acts showing the change in the nature of the possession. All the circumstances which tend to characterize the continued possession are to be considered with reference to whether possession is in reliance on the contract.
>
> Among other acts and circumstances which are deemed to refer the continuation of the pre-existing possession to the contract of purchase, the making of substantial, permanent, and valuable improvements, or payment of or upon the purchase price, or both the making of such improvements and the payment of purchase money, have been held to show a change in the nature of the pre-existing possession and to refer it to the contract of purchase. The fact that the purchaser is already in possession of the land or a part thereof when the contract is made does not deprive such acts of part performance of their efficacy.

73 AM. JUR. 2D *Statute of Frauds* § 416 (citations omitted).

Although Arkansas law follows the rule that the possession must evince a new estate, based on the facts in this case we cannot say that the chancellor was clearly erroneous in making the following findings:

> The Court is in a position to view the witnesses along with the introduction of evidence and exhibits and must make determination of the credibility of the witnesses....
>
> Based upon the demeanor of the Defendant, his testimony, his version of the facts, and his lack of explanation of the receipt of several thousand dollars, denial of receipt of checks having his endorsement, and other inconsistencies in his testimony, the Court finds that he is not a credible witness.
>
> The Court finds by clear and convincing evidence that there was a making of an oral contract and of its performance. The Court is fully convinced that there was a contract made between the parties for the sale of the Defendant's one-half interest in the Coulter property to his brother and that the Defendant fully expected his brother to make payment of same. The contract would have been reduced to writing in the form of a note and mortgage had it not been for the Defendant's request to wait on same due to problems with his wife. He cannot now be heard to complain of lack of writing caused by his own delay. The Court finds that full consideration has been paid by the Plaintiff, Joe Stewart, and that he took possession of the Coulter property upon making and purchase of the property in the form and nature expected of one who has complete ownership of property....

The facts relevant to this issue show that an agreement was made for appellee to buy appellant's share, that appellee made all payments under this agreement, and that the only reason a note and mortgage were not prepared was because appellant asked Mr. Hodge not to prepare the documents. Based on the chancellor's findings, appellant made the oral contract and therefore had knowledge that appellee was living there under claim of full ownership. Now that the house has burned and the insurance company has paid appellee substantially more than what the parties agreed was the value of the house, appellant wants half the insurance proceeds. Under these facts, we cannot say that the chancellor was clearly erroneous in finding that there was a binding contract.

Appellant's second issue is that, as tenants in common, Joe Stewart had a fiduciary duty to pay him half of the insurance

proceeds. We do not reach this issue because we affirm the trial court on the first issue.

Affirmed.

BIRD and VAUGHT, JJ., agree.

Carl PETTIT *v.* ALLSTATE INSURANCE COMPANY

CA 00-330 37 S.W.3d 675

Court of Appeals of Arkansas
Division III
Opinion delivered February 14, 2001

Stephen Bennett, for appellant.

Huckabay, Munson, Rowlett & Tilley, by: *John E. Moore*, for appellee.

JOSEPHINE LINKER HART, Judge. Carl Pettit appeals the dismissal of his complaint against appellee for uninsured motorist benefits. For reversal, he argues that the trial court erroneously concluded that the driver of the vehicle that struck him was not as a matter of law an uninsured motorist as defined by the insurance policy at issue.[1] We disagree with appellant and affirm.

The parties entered into an agreement whereby appellee agreed to provide appellant with $15,000 of coverage for each occurrence of property damage caused by an uninsured auto, the definition of which included "a motor vehicle for which the insurer denies coverage . . . ." Thereafter, appellant was involved in a motor vehicle accident when he was struck by a third party. The third party's insurance carrier, however, determined that its insured was not "legally liable" for the property damage and, accordingly, denied benefits. Thereafter, appellant filed a claim with appellee seeking uninsured motorist benefits; however, appellee also denied appellant's claim. Consequently, appellant brought a declaratory judgment action against appellee seeking both a finding that appellee was liable under the terms of the insurance agreement and damages. Coupled with appellant's complaint was a request for an admission by appellee that an attached document was a true and accurate copy of the insurance policy.

[1] Appellant also argues that the trial court erred by denying his motion for summary judgment; however, the order from which this appeal is taken only addresses appellee's motion to dismiss. Accordingly, we will only consider whether the trial court erred in granting appellee's motion.

In response, appellee both admitted that the attached document was a true and accurate copy of the insurance policy and moved to dismiss the complaint, arguing that appellant had failed to state facts sufficient to state a cause of action. Appellant replied by moving for summary judgment, relying in part on appellee's admission that the document was an accurate copy of the policy. At the hearing on the competing motions, the trial court granted appellee's dismissal motion, reasoning that the denial by a third party's insurer that its insured was not *liable* did not constitute a denial of *coverage*, and therefore, the third party did not fit within the policy's definition of an uninsured motorist. From the order embodying this decision comes this appeal.

We consider this an appeal of an order granting a motion for summary judgment commensurate with Ark. R. Civ. P. 12(b), which provides in pertinent part that:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . . .

In this case, the trial court was presented with and relied on a matter outside the pleadings — the insurance policy — when it considered appellee's motion to dismiss for failure to state facts sufficient to state a cause of action.[2] Because we consider the appealed order to be in the nature of a summary judgment, we review it commensurate with our oft-stated standard of review of such judgments:

> 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. The moving party bears the burden of sustaining the motion, and the proof submitted is viewed in a

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[2] This point is self-evident after reviewing the findings contained in the order that is the subject of this appeal, which stated:

> The Court, after hearing arguments of counsel, reviewing the pleadings *and other matters*, finds the motor vehicle being driven by Chrispeian Keith was not an "uninsured auto" *as defined by Allstate Insurance policy* and therefore no coverage is owned under Allstate Insurance Company's policy of insurance with Carl Pettit.

(Emphasis added.) These words demonstrate that the trial court relied on the insurance policy, which was not found in the pleadings and became a part of the record in the case by appellee's response to appellant's request for admission.

> 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.

Welch Foods, Inc. v. Chicago Title Ins. Co., 341 Ark. 515, 518, 17 S.W.3d 467, 469 (2000) (citations omitted). *See also* Ark. R. Civ. P. 56.

Appellant argues that the trial court's decision was contrary to *Home Ins. Co. v. Williams*, 252 Ark. 1012, 482 S.W.2d 626 (1972), in which our supreme court rejected the argument made by an uninsured-motorist-coverage provider that an alleged tortfeasor was not an uninsured motorist. The facts of *Williams*, however, are distinguishable from the case at bar. Although it is true that the relevant insurance provision in *Williams* is similar to the provision in this case,[3] it is also true that our supreme court in that case noted that "[t]he driver of the car and its owner testified that their individual liability insurance carrier disclaimed *coverage*." *Williams*, 252 Ark. at 1015, 482 S.W.2d at 629 (emphasis added). Accordingly, it is our view that the trial court's decision is consistent with, not contrary to, *Williams*, and, as such, we conclude that appellee has successfully demonstrated that there are no genuine issues of material fact and is entitled to a judgment as a matter of law.

Affirmed.

JENNINGS and CRABTREE, JJ., agree.

[3] "The insurance policy provides, inter alia, that a vehicle is uninsured if 'with respect to which there is a bodily injury liability bond or insurance policy applicable at the time of the accident but the company writing the same denies coverage thereunder . . . .' " *Williams*, 252 Ark. at 1015, 482 S.W.2d at 629.

James M. BOHANAN *v.* STATE of Arkansas

CA CR 00-77 38 S.W.3d 902

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered February 14, 2001
[Petition for rehearing denied March 21, 2001.]

Claire Borengasser, Deputy Public Defender, for appellant.

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

JOHN B. ROBBINS, Judge. Appellant James M. Bohanan was convicted by a jury of driving while intoxicated. He was fined $500.00 and ordered to serve one day in jail, with credit for time served. Mr. Bohanan now appeals, arguing that his conviction is not supported by sufficient evidence. He also raises three evidentiary issues. We affirm.

When an appellant challenges the sufficiency of the evidence, we review the sufficiency argument prior to a review of any alleged trial errors. *Jenkins v. State*, 60 Ark. App. 1, 959 S.W.2d 57 (1997). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* Substantial evidence is evidence forceful enough to compel a conclusion with reasonable certainty, without resort to conjecture. *Breedlove v. State*, 62 Ark. App. 219, 970 S.W.2d 313 (1998). We review the evidence in the light most favorable to the State, considering only the evidence that tends to support the verdict. *Jenkins v. State, supra.*

Deputy Steven Cox of the Sebastian County Sheriff's Department testified for the State. Deputy Cox stated that he was patrolling on December 15, 1998, at about 11:00 p.m. when he found a blue sedan parked in a driveway off of Highway 252. The driveway was the entrance to the premises of a logging company, and the vehicle was parked in front of a locked gate. Deputy Cox parked directly behind the sedan to check on the welfare of anyone who might be in it.

Upon approaching the vehicle with his flashlight, Deputy Cox observed Mr. Bohanan lying in the front seat, sleeping, with a jacket over him. He testified, "He was laying down in the front seat as if he had sat down behind the driver's side of the vehicle and just laid over." Deputy Cox also noticed a plastic bag containing several empty beer cans on the floorboard. After knocking on the window for several minutes, Deputy Cox was finally able to awaken Mr. Bohanan. Mr. Bohanan asked for permission to relieve himself, and he was permitted to do so.

Deputy Cox questioned Mr. Bohanan about who he was, what he was doing there, and whether he had been drinking. Mr. Bohanan said that he had been in Fort Smith drinking beer and shooting pool. Deputy Cox noticed that Mr. Bohanan was staggering, had slurred speech, and smelled of alcohol. He attempted to administer sobriety tests, but appellant refused, stating "there is no use taking it, I would make a fool of myself." At that point, Mr. Bohanan was arrested and taken to the police station, where he refused a Breathalyzer test. According to Deputy Cox, the keys were in the ignition at the time of the arrest.

Karen Whitted testified for the defense. She stated that she was a close friend of Mr. Bohanan's and that she was with him in Fort Smith while he was shooting pool. She explained that she was driving his car back to Waldron and that he was a passenger. She stated that, on the way home, they got into an argument so she turned into a driveway. She testified that she took his car keys and left him there in the car, and rode home with her sister, who was following in a separate car.

On rebuttal, Officer Arlis Spearman was permitted to testify about why he called Deputy Cox to the area where appellant's car was located. Officer Spearman stated, "I was sitting at the car wash at Highway 71 and 252 when some people stopped and advised me that there was a blue four door passenger car driving erratically."

Lieutenant Gary O'Brien also testified on rebuttal. He explained how items are inventoried after an arrest. He then reviewed Mr. Bohanan's inventory list, which included a set of car keys.

Mr. Bohanan first argues that the verdict was not supported by substantial evidence. Arkansas Code Annotated section 5-65-103 (Repl. 1997) provides that it is unlawful for any person who is intoxicated to operate or be in actual control of a motor vehicle. A vehicle's operability is relevant to the issue of actual physical control; it is possible for a vehicle to be so incapable of operation that subsequent control of it would fall outside the purview of the statute. *Hodge v. State*, 27 Ark. App. 93, 766 S.W.2d 619 (1989). Mr. Bohanan does not argue that there was insufficient evidence of his intoxication. Rather, he argues that there was insufficient proof that he was in control of the vehicle. He notes that he was not seen driving the vehicle and submits that there was

no evidence showing that the car was even operable, as the police apparently never tried to start the car. Appellant asserts that, because the State failed to prove that he had driven the car, or that it was capable of operation, his DWI conviction should be reversed.

Mr. Bohanan's sufficiency argument is without merit. It is well settled that the State may prove physical control of a vehicle through circumstantial evidence. *Wetherington v. State*, 319 Ark. 37, 889 S.W.2d 34 (1994). The supreme court has held that evidence that an intoxicated person was asleep behind the wheel of a car with the key in the ignition was sufficient to show the person accused was in control of a vehicle. *Roberts v. State*, 287 Ark. 451, 701 S.W.2d 112 (1985). Similarly, we have held that evidence that an intoxicated person was asleep or "passed out" in the front seat of a vehicle with the lights on and motor running was sufficient to show the person was in control of a vehicle. *Blakemore v. State*, 25 Ark. App. 335, 758 S.W.2d 425 (1988). Here, there was evidence that Mr. Bohanan was asleep in the front seat, as if he had been in the driver's seat and then lay down, and the keys were in the ignition. In addition, he admitted that he had been drinking and shooting pool miles away, and given that he was the only person in the car, the jury could have reasonably concluded that he must have driven there. There was sufficient evidence to establish that he was in control of the car.

Similarly, there was circumstantial evidence that the vehicle was operable. In *Azbill v. State*, 285 Ark. 98, 685 S.W.2d 162 (1985), the supreme court held there was circumstantial evidence that appellant had been operating his truck, which was stuck in the median, because appellant told the police he was coming from Jonesboro. In the instant case, Mr. Bohanan was the only person near the car, the keys were in the ignition, and he said he had been in Fort Smith drinking beer earlier. The circumstantial evidence excludes every other reasonable hypothesis other than the jury's conclusion that the car was capable of operation, and that Mr. Bohanan was in control of it while intoxicated.

Mr. Bohanan next argues that the trial court erred in admitting his statements to the police because he was not Mirandized before being questioned and making incriminating statements. In *Shelton v. State*, 287 Ark. 322, 699 S.W.2d 728 (1985), the supreme court announced:

> It is settled that the safeguards prescribed by Miranda become applicable as soon as a suspect's freedom of action is curtailed to a degree associated with formal arrest. A policeman's unarticulated plan has no bearing on the question whether a suspect was "in custody" at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.

Id. at 328-29, 699 S.W.2d at 731 (quoting *Berkemer v. McCarty*, 486 U.S. 420 (1984)). In this case, the police officer pulled up behind appellant's vehicle, which blocked him in because he was in front of a locked fence. Then the police officer shined a flashlight in his car and knocked on the window until he woke up. Under these circumstances, appellant contends that a reasonable man would believe he was in custody, and thus that his subsequent confessions should have been suppressed.

The trial court did not err in admitting the incriminating statements. In *Cook v. State*, 37 Ark. App. 27, 823 S.W.2d 916 (1992), we held that *Miranda* warnings were not required during a police officer's investigation of an accident. In that case, the officer smelled alcohol on appellant and knew he was going to arrest him, and asked appellant if he had been driving. Appellant's affirmative response was held admissible because at the time appellant had insufficient reason to believe he was in custody.

Miranda warnings are not required if the police questioning is simply investigatory. *Cook v. State*, *supra*. In the present case, the officer had not yet decided to arrest Mr. Bohanan when asking about his identification and whether he had been drinking. These were investigatory questions which might have, and did, lead to an arrest. But when the questions were asked he was not "in custody," and would not have reasonably thought that he was under arrest. This was a traffic investigation, for which *Miranda* warnings are not initially necessary. Mr. Bohanan attempts to distinguish this case because the officer blocked him in when he parked behind him. However, he was blocked in only because he decided to park in front of a locked gate, and he would have been allowed to leave but for the eventual determination that he was intoxicated. The trial court's decision to admit the statements was not erroneous.

Mr. Bohanan next argues that the trial court erred in not suppressing evidence collected by the police because the police lacked reasonable suspicion to justify a stop of his vehicle. The

evidence showed that, on the night at issue, a couple stopped into a gas station and told Officer Spearman that a reckless/drunk driver, driving a light blue car, was in a ditch a few miles away on Highway 252. The couple asked if the man needed a ride, but he refused, and the couple told the officer that they "didn't know what was wrong with him." No license plate number was given, and the tipsters were unknown to the officer. Mr. Bohanan submits that the tip given by the informants was insufficient to give the officer the right to order him out of his car when they found it in the driveway.

Mr. Bohanan cites *Frette v. City of Springdale*, 331 Ark. 103, 959 S.W.2d 734 (1998), where the supreme court stated that the justification for a stop depends on whether, under the totality of the circumstances, the police have specific, particularized and articulable reasons indicating the person or vehicle may be involved in criminal activity. Arkansas Rule of Criminal Procedure 3.1 provides that an officer may stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit a misdemeanor involving forcible injury to persons or damage to property. When reasonable suspicion is based solely on a citizen-informant's report, the three factors in determining reliability are:

1. Whether the informant was exposed to possible criminal or civil prosecution if the report is false.
2. Whether the report is based on personal observations of the informant.
3. Whether the officer's personal observations corroborated the informant's observations.

Frette v. City of Springdale, supra. Mr. Bohanan argues that the first prong of the above test was not met because the informants did not give their names, and that the third prong was not met because the blue car was found in a driveway and not a ditch.

The officer in the instant case had reasonable suspicion to order appellant out of his car. The mere approach of a police officer to a car parked in a public place does not constitute a seizure. *Hammons v. State*, 327 Ark. 520, 940 S.W.2d 424 (1997). The police officer had as much right to be on the driveway as Mr. Bohanan, and when the officer shined his flashlight he found empty beer cans, a man sleeping with a coat over him, and keys in the ignition. All of these things were in plain view and, combined with

the tip, gave the officer reasonable suspicion that appellant was driving while intoxicated, which clearly falls under Rule 3.1 because it is a misdemeanor involving danger of injury to persons or damage to property. *See Frette v. City of Springdale, supra.*

In *Frette, supra,* the supreme court stated:

> Before turning to the analysis in the present case, we would be remiss in not first emphasizing the significant policy considerations present where a tip reports a driver who is drinking. This court has previously recognized the magnitude of the State's interest in eliminating drunk driving in comparison to relatively minimal intrusions on motorists. In balancing the rights of a motorist to be free from unreasonable intrusions and the State's interest in protecting the public from unreasonable danger, one court has stated that "[a] motor vehicle in the hands of a drunken driver is an instrument of death. It is deadly, it threatens the safety of the public, and that threat must be eliminated as quickly as possible.... The 'totality' of circumstances tips the balance in favor of public safety and lessens the ... requirements of reliability and corroboration."

Id. at 120-21, 959 S.W.2d at 743 (quoting *State v. Tucker*, 878 P.2d 855 (Kan. Ct. App. 1994)). In this DWI case the informants' information was relatively accurate: the police did find a blue car on the stretch of highway indicated by the informants, and came into contact with virtually no other cars. The car was not in a ditch, but was on the side of the road with a man passed out in the front seat. Based on the policy considerations set forth in *Frette*, and the specific circumstances of this case, the trial judge's decision to deny the motion to suppress was not clearly against the preponderance of the evidence.

The appellant's remaining argument is that the trial court erred in allowing Officer Spearman to testify, on rebuttal, that he received the tip about a blue car driving erratically. At a pretrial suppression hearing, appellant moved to suppress this statement, and specifically asked the court whether the testimony of his girlfriend (*i.e.*, that she was driving) would "open the door" to Officer Spearman's testimony. The trial judge answered "no" and said that the officer's testimony was not admissible. But the judge further announced that he was going to read some more cases on the issue. At trial, after appellant's girlfriend's testimony, the court allowed the officer's testimony over objection. Appellant asserts that this was error, as he made it clear to the court at the suppression hearing

that he would not put the girlfriend on the stand if it would open the door to the anonymous-tip testimony.

We think the trial court should have excluded the testimony. The court gave appellant the indication that it would not let the testimony in, and had appellant known it would "open the door," he presumably would not have called his girlfriend to testify. Furthermore, the officer did not relate the part of the tip that referenced a man as a driver, which would have rebutted the testimony that appellant was not driving; rather, he only gave information that a blue car was driving erratically, and this hearsay testimony was inadmissible.

Even though the trial court should have excluded the testimony, no reversible error occurred. When evidence of guilt is overwhelming and the error is slight, the error can be declared harmless and the case affirmed. *Greene v. State*, 317 Ark. 350, 878 S.W.2d 384 (1994). In the instant case, evidence that a blue car was driving recklessly was not needed by the State and added little to its case. There was overwhelming evidence of guilt in that appellant was lying in the front seat with keys in the ignition, smelled of alcohol, slurred his speech, staggered, refused the breath test, and refused sobriety tests so as not to "make a fool of himself." Thus, the error was harmless.

Affirmed.

BIRD and ROAF, JJ., agree.

PITTMAN, J., concurs.

HART and NEAL, JJ., dissent.

OLLY NEAL, Judge, dissenting. I cannot agree that the trial court's cautionary instruction that Chief Spearman's testimony could not be considered for the truth of the matter asserted made harmless the prejudice that occurred to appellant and would reverse and remand this case for a new trial.

Trial courts have discretion to decide the propriety of evidence offered in rebuttal. *Isbell v. State*, 326 Ark. 17, 931 S.W.2d 74 (1996); *Schalski v. State*, 322 Ark. 63, 907 S.W.2d 693 (1995). Genuine rebuttal, however, is evidence offered in reply to new matters. *Schalski, supra*. Rebuttal evidence must be responsive to

evidence which was presented by the defense. *Pyle v. State*, 314 Ark. 165, 862 S.W.2d 823 (1993).

In this case, the only witness called by the defense, Karen Whitted, testified that she drove the car in which appellant was found to the driveway where Deputy Cox discovered appellant sleeping. The State's claim that Chief Spearman's testimony that someone advised him that there was a blue four-door passenger car driving erratically on Highway 252 rebuts Ms. Whitted's testimony is completely unavailing. As the majority notes, the officer failed to relate the part of the tip that referenced a male driver, which would have been responsive to Ms. Whitted's testimony.

Moreover, there is no question that Chief Spearman's testimony was prejudicial. Absent Chief Spearman's "rebuttal" testimony the jury was left simply to believe or disbelieve Ms. Whitted's testimony that she had driven appellant to the location where Deputy Cox discovered him. Chief Spearman's testimony that someone told him that a blue car was driving erratically on Highway 252 unquestionably implied that someone was driving a car similar to the one in which appellant was found in an erratic manner and that person was probably under the influence.

The majority concedes that Chief Spearman's testimony was inadmissible. The majority, however, determines that no reversible error occurred because the court gave a cautionary instruction admonishing the jury not to consider the testimony for the truth of the matter asserted. I disagree.

The prosecutor's sole reason for calling Chief Spearman was to get testimony before the jury that someone was driving a blue four-door passenger car along Highway 252 in an erratic manner and presumably that person was under the influence of alcohol. The prosecutor almost admitted as much when he said, "What I am afraid of, Judge, is that if we exclude all of that, you are basically going to have or all of a sudden the officers going to the scene and finding this vehicle and the jury isn't going to get to hear the whole story about why they actually responded to that area and approached that particular vehicle, and that would be because they saw a blue passenger car driving in that manner. That is my concern." In fact, during the hearing on appellant's motion in limine to prevent the introduction of the testimony, the trial court surmised that the only purpose for the testimony was for the truth

of matter asserted. In such a situation where the prosecutor admits his need for such testimony and the trial court immediately recognizes its prejudicial effect and its purpose, I do not think a cautionary instruction alleviates that prejudice.

HART, J., joins.

Dennis HOLMESLEY *v.* Chris WALK and Spouse, Individually and as Trustee of the 1997 Walk Family Trust dated 11/19/1997

CA 00-518 39 S.W.3d 463

Court of Appeals of Arkansas
Division I
Opinion delivered February 14, 2001

Peel & Simmons, P.A., by: *Scott M. Simmons*, for appellant.

Lorre Moore, for appellee.

JOHN B. ROBBINS, Judge. Appellant Dennis Holmesley appeals an order of the Johnson County Chancery Court that denied his request for a permanent injunction against appellees

Chris Walk and his spouse in the construction of a lake home in the Piney Bay Development of Knoxville, Arkansas. Appellant is the owner of Lot 32, and appellees are the owners of Lot 9. Lot 9 is a lakefront lot, and Lot 32 is an interior land lot situated directly across the street from Lot 9. A bill of assurance with protective covenants pertaining to the Piney Bay Development was filed of record in 1989, and it states in pertinent part that:

> No two (2) story dwelling shall be constructed on Lots 1-15 or on Lots 28 and 29 unless prior written approval as to the design, location and type structure of such two-story dwelling is granted by the existing lot owners or Grantor-Developer located on each side and the two (2) most closely located lots behind each of these proposed lots.

Appellees began construction of their residence on Lot 9 without obtaining any such consents, and appellant instituted this action on July 7, 1999, to halt construction of what appeared to appellant to be a two-story house. A temporary injunction was granted, but after a final hearing, a permanent injunction was denied by order entered on October 11, 1999. This appeal followed, and we reverse.

The standard of review in chancery cases is well settled. Though we review chancery cases de novo, we will not reverse unless the chancery decision is clearly against the preponderance of the evidence or clearly erroneous, giving due deference to the superior position of the chancellor to judge the credibility of the witnesses. *Riddick v. Street*, 313 Ark. 706, 858 S.W.2d 62 (1993); *Welchman v. Norman*, 311 Ark. 52, 841 S.W.2d 614 (1992). A decision is clearly erroneous when, although there is evidence in the record to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Simmons First Bank v. Bob Callahan Servs., Inc.*, 340 Ark. 692, 13 S.W.3d 570 (2000); *Myrick v. Myrick*, 339 Ark. 1, 2 S.W.3d 60 (1999).

Courts do not favor restrictions upon the use of land, and if there is a restriction on the use of land, it must be clearly apparent. *McGuire v. Bell*, 297 Ark. 282, 761 S.W.2d 904 (1988). But, one taking title to land with notice that it is subject to an

agreement restricting its use will not, in equity and good conscience, be permitted to violate its terms. *Harbour v. Northwest Land Co.*, 284 Ark. 286, 681 S.W.2d 384 (1984). The general rule governing the interpretation, application, and enforcement of restrictive covenants is that the intention of the parties as shown by the covenant governs. *McGuire v. Bell, supra.* Where there is uncertainty in the language by which a grantor in a deed attempts to restrict the use of realty, freedom from that restraint should be decreed; but when the language of the restrictive covenant is clear and unambiguous, the parties will be confined to the meaning of the language employed, and it is improper to inquire into the surrounding circumstances of the objects and purposes of the restriction to aid in its construction. *Hays v. Watson*, 250 Ark. 589, 466 S.W.2d 272 (1971). However, such strict rules of construction shall not be applied in such a way as to defeat the plain and obvious purpose of the restriction. *Id.*

The question on appeal can be distilled to this: Is appellees' dwelling under construction on Lot 9 a two-story structure or not? The chancellor determined that appellees' house did not qualify as a two-story building; consequently permission from those listed in the protective covenant was not required. Therefore, the chancellor denied the petition for a permanent injunction. Although there is evidence in the record to support this decision, we are left with a definite and firm conviction that a mistake has been committed. Therefore, we reverse.

The evidence adduced before the chancery court at the preliminary hearing was as follows. Appellant submitted color photographs of the Lot 9 construction, including Exhibit 4 appended to this opinion, demonstrating wood framing on the foundation and a staircase leading upward indicating two levels of living space. Also framed up at the top of the staircase were two bedrooms, a bathroom, and closet space. Appellant testified that neither Mr. Walk nor his wife obtained consent from him to construct a two-story house. Appellees' builder, Jimmy E. Oliver, testified that in his opinion, a two-story home has as much floor space on the second floor as the first floor, which this house did not. Oliver admitted knowledge of the subdivision restrictions but decided that this

building did not violate them. Oliver stated that the roof line of this house sits on the first floor, and he was simply utilizing the attic space. If the second floor were built without the added living space, the exterior of the house would not change, according to Oliver. In contrast, when addressing the upper space, the house plans undisputedly and repeatedly make reference to the "second floor."

At the conclusion of this preliminary hearing, the chancellor stated his findings that the intent of the restrictive covenants was to prevent any blockage of the view of the lake, that Mr. Oliver and the Walks were aware of the restrictive covenants, and that the injunction would continue until the final hearing on August 20, 1999.

Several witnesses were produced at the final hearing, the first of whom was Karen May, the owner of the corporation that developed Piney Bay Development. May affirmed that no one had asked her permission to construct the appellees' house. May considered appellant's lot to be "behind" Lot 9 because appellant's lot was on interior land. The builder, Mr. Oliver, testified that the second level of the house was 30 percent complete. Oliver also verified that the architectural plans described the house as having a first floor, second floor, and top plate of second floor, and that the plans referenced "second floor" five times. Oliver restated his opinion that a house only has a second story if the same square footage is on the second level as the first. Oliver described the living room as having a cathedral ceiling that reaches within three or four feet of the roof and the rest of the second floor as utilizing the remaining attic space. Oliver stated that as long as the levels going up decreased in square footage, then it would be permissible to "keep going up."

The assistant director of the Clarksville Housing Authority, Toby Wilson, was called to testify by appellees, and he opined that appellees' house was a one-story or one-and-one-half-story house. Wilson stated that this house would not be defined as a two-story house because the second story, "whether it be the same size or whatever, it is framed up and the roof line is put on that."

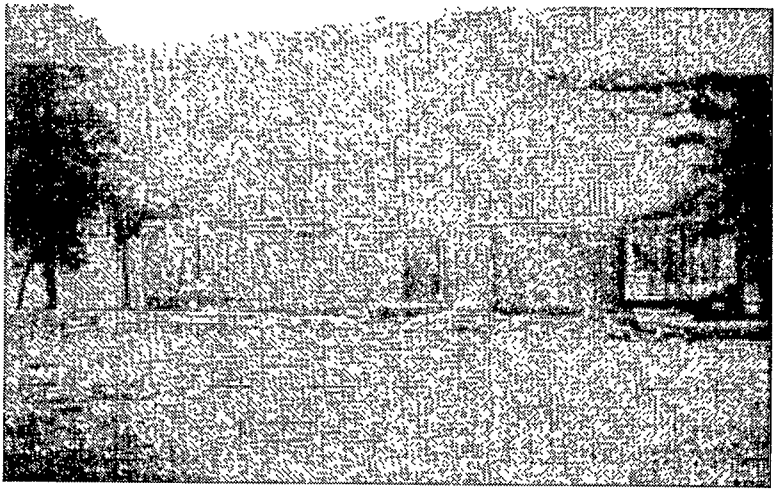
Maximum height restrictions have commonly been expressed in terms of "stories." 20 AM. JUR. 2d *Covenants, Etc.* § 229. In *Webster's Ninth New Collegiate Dictionary*, (1991), the word "story" as used in this context means "the space in a building between two adjacent floor levels or between a floor and the roof," or "a set of rooms in such a space." There is nothing vague, ambiguous, or uncertain in the meaning. *See, e.g., Dickstein v. Williams*, 93 Nev. 605, 571 P.2d 1169 (1977) (holding that there is nothing ambiguous in restrictive phrase "not exceeding one story from ground level"); *King v. Kugler*, 17 Cal. Rptr. 504, 197 Cal. App.2d 651 (1961) (holding that there is nothing ambiguous about restrictive phrase "one story in height").

Though the Walks introduced opinions of two persons in the construction field that favored their view of the definition, there was also the expert opinion of the architect whose drawings of the house repeatedly referenced the second floor of this house. Resort to differences in expert opinion was unnecessary, though, because "two story" is to be applied in its plain and unambiguous form. Both parties agree that the language of the protective covenant is unambiguous, as do we. The Walks' house had more than one "space in a building between two adjacent floor levels or between a floor and the roof," or "a set of rooms in such a space." Attempting to avoid this clear restrictive covenant was impermissible, and we hold that the chancellor clearly erred in this case.

As to appellees' contention that it would be unfair and inequitable to require them to remove that portion of the house that violates the restrictive covenant at this late date, we disagree. Courts have commonly ordered removal of structures erected in violation of restrictive covenants. *See Holaday v. Fraker*, 323 Ark. 522, 915 S.W.2d 280 (1996); *McDonough v. W. W. Snow Constr. Co.*, 131 Vt. 436, 306 A.2d 119 (1973); *Hanson v. Hanly*, 62 Wash.2d 482, 383 P.2d 494 (1963). Parties who are fully aware of the restrictive covenants, as were these parties, and who choose to rely on a mistaken assumption that they were acting legally and properly, do so at their own risk. *See Smith v. Nelson*, 149 Colo. 200, 368 P.2d 566 (1962).

Reversed and remanded.

GRIFFEN and NEAL, JJ., agree.



CANAL INSURANCE COMPANY *v.* Jim ADAMS *d/b/a* Adams Trucking and DeWitt Bank & Trust

CA 00-301 37 S.W.3d 677

Court of Appeals of Arkansas
Division III
Opinion delivered February 14, 2001

Matthews, Sanders, & Sayes, by: *Doralee Idleman Chandler* and *Roy Gene Sanders*, for appellant.

Gibson & Hashem, P.L.C., by: *Hani W. Hashem*, for appellee.

TERRY CRABTREE, Judge. This is an appeal from the Arkansas County Circuit Court's decision to grant summary judgment in favor of the appellee, Jim Adams, and to deny summary judgment to the appellant, Canal Insurance Company. The facts in this case were stipulated to by the parties. In March 1996, appellee was traveling in New Mexico pulling a 1988 Cornhusker trailer. The trailer was loaded with twenty-five tons of pot ash. After traveling about fifteen miles, appellee approached a set of railroad tracks. Appellee traversed the railroad tracks, and as a result sustained damages to the trailer. Appellee filed a proof of loss for the damage to his trailer under the collision provision of his insurance policy. Appellant had issued an insurance policy to appellee providing coverage to the 1988 Cornhusker trailer. The policy covers physical damage caused by collision. Collision is defined in the policy to mean "collision of a covered automobile with another object." The trial court granted appellee's motion for summary judgment and denied appellant's motion for summary judgment, finding that coverage was mandated in this case.

At issue is the policy provision defining collision as "collisions between a covered automobile and another object." More specifically the issue in this case is whether or not a collision with another object occurs when a covered automobile is traversing a set of railroad tracks. Appellant argues that no coverage exists as no collision occurred between the trailer and another object. We disagree, and thus affirm.

Where the parties have agreed that there is no genuine issue as to any material fact we determine whether the appellee was entitled to judgment as a matter of law. *City of Little Rock v. Pfeifer*, 318 Ark. 679, 887 S.W.2d 296 (1994). We will not reverse the trial court's ruling unless the court's findings are clearly erroneous. *Grayson v. Bank of Little Rock*, 334 Ark. 180, 971 S.W.2d 788 (1998). A trial court's 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. *Ouachita Trek & Dev. Co. v. Rowe*, 341 Ark. 456, 17 S.W.3d 491 (2000).

In *Washington Fire & Marine Ins. Co. v. Ryburn*, 228 Ark. 930, 311 S.W.2d 302 (1958), the Arkansas Supreme Court upheld coverage where the insured's truck, because of a slick place in the road, careened off the highway and into a ditch filled with water. The

supreme court found that there was a collision with another object within the policy provision authorizing recovery for "[a]ny direct and accidental loss caused by collision of the automobile with another object or by upset of the automobile." *Id.* at 933, 311 S.W.2d at 305. At issue was whether the truck collided with an object. The court found that the truck had collided with another object, the water in the ditch. *Id.* at 934, 311 S.W.2d at 305.

The Arkansas Supreme Court, quoting from *Blashfield-Automobile Law and Practice,* Volume 7, § 312.4, p.487, has defined "object" as "any tangible thing, visible or capable of discernment by the senses, which offers an impediment or resistance to another object." *New Hampshire Ins. Co. v. Frisby*, 258 Ark. 39, 43, 522 S.W.2d 418, 420 (1975). In *Frisby*, the supreme court found that coverage existed when a bulldozer struck a protruding valve which protruded above the ground 10-14 inches. *Id.* It was found that coverage existed under the provision covering collision with an object. *Id.*

On the facts of the case at bar, we hold that under the definition of object provided for us in *Frisby*, appellee's trailer collided with another object, *i.e.* the railroad tracks. The tracks were a tangible object that offered an impediment to the trailer. Therefore, the railroad tracks were an object with which appellee's trailer collided. "Courts must give effect to the plain wording of an insurance policy according to the ordinary meaning of its terms where the language is unambiguous." *Phelps v. U.S. Life Credit Life Ins. Co.*, 336 Ark. 257, 261, 984 S.W.2d 425, 428 (1999). This case centers around the interpretation given to the policy provision defining collision to mean "collision of a covered automobile with another object." In giving effect to the plain wording of the insurance policy we hold that the damage to the trailer was occasioned by a collision with an object, and the loss is thus covered under the collision provision of the policy.

Affirmed.

HART and JENNINGS, JJ., agree.

Stephen L. CLEMMONS *v.* OFFICE of CHILD SUPPORT ENFORCEMENT

CA 00-393 37 S.W.3d 687

Court of Appeals of Arkansas
Division IV
Opinion delivered February 21, 2001

Kenneth A. Hodges, for appellant.

Phillips & Douthit, by: *Michael Lamoureux*, for appellee.

JOHN F. STROUD, JR., Chief Judge. Sheila and Stephen Clemmons were married in Missouri on March 4, 1971, and a son, Christopher Stephen Clemmons, was born of that union on June 5, 1973. The couple divorced in Missouri on October 16, 1974, and Sheila was awarded custody of Christopher, with Stephen ordered to pay seventy-five dollars per month in child support until Christopher entered the first grade, at which time support was to increase to one-hundred dollars per month. The Missouri court modified the custody and support provisions on May 7, 1976, awarding Sheila custody of Christopher for nine months during the school year and Stephen custody for the three summer months, with reasonable visitation allowed for the non-custodial parent. Stephen was ordered to pay seventy-five dollars per month in child support for each of the nine months Sheila had Christopher in her custody, and support was abated during his three months of custody.

On September 7, 1976, the Washington County, Arkansas, juvenile court placed custody of Christopher with Sheila, but quashed that order on September 9, 1976, and placed physical custody with Stephen. However, Sheila failed to appear at that hearing with Christopher, and Stephen would later learn that she

had taken him to California. On November 17, 1976, Stephen also obtained an order from Missouri placing temporary custody of Christopher with him.

A hearing was held in California in December 1977 on the issues of custody, visitation, and support. Both parties were present and represented by counsel. On March 27, 1978, an order was entered in the Superior Court of California in the County of Los Angeles acknowledging the Missouri decree as a valid foreign decree and giving it full faith and credit; finding a child support arrearage of $525 from June 1977 through December 1977; placing custody of Christopher with Sheila, with reasonable visitation awarded to Stephen; and modifying Stephen's child-support obligation from seventy-five dollars per month to one hundred twenty-five dollars per month as of January 1, 1978.

Christopher attained the age of eighteen (18) years on June 5, 1991. In 1993, Sheila assigned her rights to the state of Missouri for assistance in collecting the child support arrearages. After locating Stephen in Arkansas, Missouri initiated an interstate action to enforce Stephen's child-support obligation under the 1978 California award. On February 6, 1995, the Arkansas Office of Child Support Enforcement ("OCSE") filed a request for registration of the California order and a petition to reduce Stephen's unpaid child support to a judgment.

On November 14, 1995, the Pope County Chancery Court entered the California order as a foreign decree. On January 22, 1998, the chancellor entered an order finding that the assignment by Sheila to OCSE was proper; that the statute of limitations was ten years unless the action was filed prior to the child attaining twenty-four years of age, and then all arrearages would be collectable; that Arkansas law controlled; but that OCSE and Sheila were both estopped from obtaining a judgment and/or attempting to collect any child support arrearages based upon the fact that Sheila had wilfully concealed Christopher from his father.

OCSE appealed this order, and this court reversed and remanded the case, holding that the chancellor directly contravened the purpose of the Uniform Interstate Family Support Act ("UIFSA") when he refused to allow the collection of past-due support based upon a failure to allow visitation, and ordering that

the chancellor "determine the proper amount of child-support arrearage due pursuant to the March 27, 1978, California order, taking into consideration the applicable statute of limitations and the propriety of the mother's assignment." *Office of Child Supp. Enforcem't v. Clemmons*, 65 Ark. App. 84, 984 S.W.2d 837 (1999).

Upon remand, without elaborating his reasons, the chancellor made the conclusory determination that, "taking into consideration the applicable statute of limitations and the propriety of the mother's assignment, it is hereby found that the Defendant's child support delinquency to be [sic] the sum of $20,775 as of July 28, 1999." Stephen now appeals that ruling, arguing that the chancellor erred (1) in not considering the propriety of Sheila's assignment of child support to OCSE pursuant to the instructions of this court on remand, and (2) in calculating the child-support arrearage. We affirm the chancellor's decision.

■ The appellate courts review chancery cases *de novo* and will not reverse a finding of fact by the chancery court unless it is clearly erroneous. *Kelly v. Kelly*, 341 Ark. 596, 19 S.W.3d 1 (2000). 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. *O'Fallon v. O'Fallon*, 341 Ark. 138, 14 S.W.3d 506 (2000). However, we do not defer to a chancery court's conclusion on a question of law; if the chancery court erroneously applied the law and the appellant suffered prejudice as a result, we will reverse the chancery court's erroneous ruling on the legal issue. *Oliver v. Oliver*, 70 Ark. App. 403, 19 S.W.3d 630 (2000).

Appellant's first issue on appeal is the propriety of Sheila's assignment of child support arrearages to OCSE. He argues that because Christopher was no longer a minor at the time Sheila assigned her rights to OCSE, it had no authority to pursue collection because Sheila no longer had any authority to pursue any child-support arrearages. Arkansas Code Annotated section 9-14-236(b) & (c) (Repl. 1998) provides:

> (b) In any action involving the support of any minor child or children, the moving party shall be entitled to recover the full amount of accrued child support arrearages from the date of the initial support order until the filing of the action.

> (c) Any action filed pursuant to subsection (b) of this section may be brought at any time up to and including five (5) years beyond the date the child for whose benefit the initial support order was entered reaches the age of eighteen (18) years.

"Moving party" is defined as a custodial parent; any person or agency to whom custody of a minor child has been given; a minor child through his guardian or next friend; a person for whose benefit the support was ordered, within five years of obtaining majority; or OCSE if the person who has custody of the minor child is or has been receiving Aid to Families with Dependent Children or has contracted with OCSE for the collection of support. Ark. Code Ann. § 9-14-236(a)(2) (Repl. 1998).

This statute appears to allow a moving party, which includes a custodial parent, to pursue child-support arrearages until the child for whose benefit the support order was entered attains the age of twenty-three. Although neither this court nor our supreme court has directly addressed the issue, *Cole v. Harris*, 330 Ark. 420, 953 S.W.2d 586 (1997), and *Sanderson v. Harris*, 330 Ark. 741, 957 S.W.2d 685 (1997), seem to imply that a custodial parent may file a petition to collect child-support arrearages after the child has attained the age of majority but prior to his twenty-third birthday.

In *Cole*, the supreme court affirmed a chancellor's finding that a mother's action to recover child-support arrearages brought on behalf of her adult child was barred; however, the basis for the decision was not because the mother could not pursue a claim on behalf of her adult child, but rather because she did not file the claim prior to her son turning twenty-three and she was therefore barred by the statute of limitations. In recounting the applicable statutes of limitation, the court stated, "The effect of the legislature's action in adopting Act 870 of 1991 was to expand the time in which a cause of action could be maintained, thereby affording a greater opportunity for a *parent or child* to collect child-support payments than the ten-year statute that it repealed." 330 Ark. at 425, 953 S.W.2d at 588 (emphasis added). Likewise, in *Sanderson*, which involved the same obligor as in *Cole*, the supreme court held that the mother's attempts to enforce child support arrearages for her adult children were barred by the statute of limitations because the children were past the age of twenty-three. The decision was not based on the mother having no authority to bring the action

after the children had attained the age of majority. Because the holdings in *Cole* and *Sanderson* imply that a custodial parent may pursue child-support arrearages for adult children who have not yet attained the age of twenty-three, we find that Sheila's assignment to OCSE was appropriate because Christopher had not yet attained the age of twenty-three at the time Sheila made the assignment nor at the time OCSE filed the action to recover the arrearages.

Having determined that Sheila's assignment to OCSE was proper, we turn to the question of what portion of the arrearages are collectable. Because this action arose under the Uniform Interstate Family Support Act (UIFSA), we must decide whether the Arkansas or California statute of limitations is applicable. In UIFSA arrearage proceedings, the applicable statute of limitations is the longer of the statute of limitations under Arkansas law or the state issuing the support order. Ark. Code Ann. § 9-17-604(b) (Repl. 1998).

Our supreme court set out the history of the Arkansas statute of limitations for child support in *Johnson v. Lilly*, 308 Ark. 201, 823 S.W.2d 883 (1992):

> Prior to 1989, the statute of limitations for child support arrearages was five (5) years. In 1989, the General Assembly changed the limitation to ten (10) years. We held the 1989 amendment did not apply retroactively. The General Assembly wanted to further enlarge this statute of limitation, so it passed Act 870 of 1991, which amends Ark. Code Ann. 9-14-105 & 9-14-236, and provides child support actions can be "brought at any time up to and including five (5) years beyond the date the child for whose benefit the initial support order was entered reaches the age of eighteen (18) years." The 1991 act also provides that the enlarged limitation "shall retroactively apply to all child support orders now existing."
>
> . . .
>
> We have long held that the legislature has the power to amend statutes of limitation affecting causes of action which are not yet barred. . . . However, we have long taken the view, along with a majority of the other states, that the legislature cannot expand a statute of limitation so as to revive a cause of action already barred.

308 Ark. at 202-03, 823 S.W.2d at 884-85.

At the time the current statute was enacted on March 29, 1991, all claims for child support arrearages that had accrued prior to March 29, 1986, were barred under the prior five-year statute of limitations and cannot now be revived by the new statute of limitations. However, because the five-year limitation period had not yet run on any arrearages accrued after March 29, 1991, those arrearages are governed by the 1991 amendment. *See Branch v. Carter,* 326 Ark. 748, 933 S.W.2d 806 (1996).

In the present case, if the Arkansas statute of limitations governs, then appellee is entitled to recover all arrearages that accrued between March 29, 1986, and June 5, 1991, Christopher's eighteenth birthday. This is a period of approximately sixty-two months, which would translate into a recoverable arrearage of $7,750.

However, if California's statute of limitations provides a longer period than Arkansas, then it is applicable. Since 1993, section 4502 of the California Family Code has provided that a judgment for child support "is enforceable until paid in full and is exempt from any requirement that judgments be renewed." Cal. Fam. Code § 4502 (West 1994).

Prior to 1993, pursuant to former Cal. Fam. Code § 4383, which was repealed at the time Cal. Fam. Code § 4502 became effective, a judgment for child support was enforceable by writ of execution without prior court approval until five years after the child reached majority, and thereafter only as to amounts that were not more than ten years overdue; beyond those time frames, the trial court had the discretion to determine whether to allow enforcement of the judgment. *In re Marriage of Dancy,* 98 Cal. Rptr. 2d 775 (2000). However, the above-mentioned statute was not considered by the California courts to be a statute of limitations because it did not set forth a time after which a family law judgment was unenforceable or after which an action thereon could not be maintained; rather, it merely provided a procedure for enforcement by execution without the necessity of obtaining prior court approval. *In re Marriage of Wight,* 264 Cal. Rptr. 508, fn. 4 (1989). Nevertheless, in *Wight, supra,* the California Court of Appeals held that if an action was brought prior to five years after the child attained the age of majority, all past due support was collectable by writ of execution without prior court approval.

In the present case, based upon the holding in *Wight,* Sheila could have filed a writ of execution in California and collected all child-support arrearages without court approval. Because California allows for collection of the entire arrearage amount, the law of that state is applicable in this UIFSA action, and the entire arrearage of $20,775 awarded by the trial judge in this case is recoverable.

Affirmed.

BIRD and VAUGHT, JJ., agree.

Blandina SPENCER *v.*
STONE CONTAINER CORPORATION

CA 00-538 38 S.W.3d 909

Court of Appeals of Arkansas
Division III
Opinion delivered February 21, 2001
[Petition for rehearing denied April 4, 2001.]

[redacted]

Davis, Mitchell & Davis, by: *Gary Davis*, for appellant/cross-appellee.

Thomas W. Mickel, P.A., by: *Terry D. Lucy*, for appellee/cross-appellant.

JOSEPHINE LINKER HART, Judge. The issue on appeal is whether appellant's claims for additional workers' compensation benefits are barred by the statute of limitations. The Arkansas Workers' Compensation Commission determined that the statute of limitations did not bar Spencer's claim for additional compensation arising from her September 26, 1991, injury, but it did bar her claim for additional compensation arising from her August 24, 1992, injury. For reversal, appellant Spencer argues that the Com-

mission erred by concluding that her claim for additional compensation arising from the 1992 injury was barred, and on cross-appeal, appellee Stone Container argues that the Commission wrongly concluded that Spencer's claim for additional compensation arising from her 1991 injury was not barred. We, nevertheless, affirm on appeal and on cross-appeal.

On review, we affirm if the Commission's decision is supported by substantial evidence. *See* Ark. Code Ann. § 11-9-711(b)(4)(D) (Repl. 1996). To determine whether the decision is supported by substantial evidence, we view the evidence in a light most favorable to the Commission's findings and affirm if reasonable minds could have reached the same conclusion. *See Frances v. Gaylord Container Corp.*, 341 Ark. 527, 531, 20 S.W.3d 280, 283 (2000) (citing *Ester v. National Home Ctrs., Inc.*, 335 Ark. 356, 981 S.W.2d 91 (1998)).

As we address each claim for additional compensation, we are mindful of the relevant code provision prior to the enactment of Act 796 of 1993, as it appeared at Ark. Code Ann. § 11-9-702(b) (1987), and stated:

> In cases where compensation for disability has been paid on account of injury, a claim for additional compensation shall be barred unless filed with the commission within one (1) year from the date of the last payment of compensation, or two (2) years from the date of the injury, whichever is greater. . . .

We consider each claim separately.

I. Additional compensation for September 26, 1991 injury

Spencer sustained a compensable injury to her neck and back on September 26, 1991, when she was struck by a forklift and pushed into a box. Stone Container paid some benefits, and later Spencer filed an A-7 Form on December 26, 1991, requesting "a second opinion of a doctor." Spencer made a claim for additional compensation on December 22, 1997, which the Commission determined was not barred by the statute of limitations because, as it concluded, the statute had been tolled when Spencer made a claim for additional compensation when she requested a change of physician (*i.e.*, the request for a doctor's second opinion) on December 26, 1991. On cross-appeal, Stone Container argues that

this conclusion was in error because (1) it is incorrect to consider a request for the change of a physician to be a valid claim for additional compensation; and (2) it is unreasonable to conclude that the filing of the A-7 Form in 1991 should toll the statute of limitations till December 22, 1997. We disagree with cross-appellant on both issues and affirm.

Cross-appellant argues that Spencer's request for a change of physician did not constitute a claim for *additional* compensation; instead, it argues, that because Spencer had already been seen by a number of other physicians, her request merely represented a claim for benefits already received. We, however, reject that argument. It is axiomatic that when a claimant makes a proper request for a change of physician, she is seeking compensation benefits in addition to that which she has either been awarded or otherwise provided. Therefore, we agree with the Commission that such a request can constitute a claim for additional compensation and toll the statute.

Additionally, Spencer's filing that requested a change of physician did toll the statute of limitations till December 22, 1997, when she made another claim for additional compensation. Cross-appellant argues that such an interpretation of the applicable statutory law is unreasonable and that the Commission's reliance on *Arkansas Power & Light Co. v. Giles*, 20 Ark. App. 154, 725 S.W.2d 583 (1987), and *Bledsoe v. Georgia-Pacific Corp.*, 12 Ark. App. 293, 675 S.W.2d 849 (1984), was in error because those cases are distinguishable from the case at bar inasmuch as they concerned claimants who did not wait as long as Spencer did to file a claim for additional compensation.

We are persuaded, however, that the Commission's decision was correct and consistent with our decision in *Sisney v. Leisure Lodges, Inc.*, 17 Ark. App. 96, 97-100, 704 S.W.2d 173, 174-175 (1986). In *Sisney*, the claimant sustained a compensable injury on March 8, 1979; received some compensation benefits; filed a claim for additional compensation benefits on May 19, 1980; received her last benefits payment on May 6, 1982; and made another claim for additional benefits on August 26, 1983. With these key facts in mind, we held that the 1980 filing tolled the statute of limitations relying on the rationale used in *Bledsoe*, 12 Ark. App. at 295, 675 S.W.2d at 850:

> Otherwise, the statute has no meaning. If the statute is not tolled when the claimant files a claim for additional benefits, what could possibly toll the statute? We prefer to think the statute means what its plain language implies.

See also Giles, 20 Ark. App. at 156-157, 725 S.W.2d at 584-585. In this case, Spencer was injured on September 26, 1991; she received some compensation benefits; filed a claim for additional compensation benefits on December 26, 1991; received her last benefits payment on March 11, 1996;[1] and made another claim for additional benefits on December 22, 1997. We conclude that despite the amount of time, this matter is governed by our holding in *Sisney*, and conclude that the Commission's finding that the 1991 filing tolled the statute of limitations is supported by substantial evidence.

II. Additional compensation for August 24, 1992 injury

Spencer sustained a second compensable injury to her neck and back on August 24, 1992, when she slipped on some spilled hydraulic fluid and fell. Stone Container again paid some benefits until March 11, 1996, and on December 22, 1997, Spencer filed a Form AR-C, requesting additional compensation benefits. Spencer argues that her claim was filed within one year from the last time Stone Container furnished medical services. The Commission, however, concluded that her claim was barred by the statute because the treatment she received was not reasonably necessary in connection with the injuries she received in 1991 and 1992, and, therefore, it did not constitute payment of compensation, which would have tolled the statute. Spencer argues that the Commission's decision should be reversed because it was in error (1) to conclude that the medical treatment she received in 1997 and 1998 was not reasonably necessary in connection with the injuries she received; and (2) to not consider letters from Spencer's legal counsel as claims for additional compensation that tolled the statute of limitations. We nevertheless affirm.

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[1] Appellee's workers' compensation carrier had written appellant on February 26, 1996, and on May 9, 1996, seeking a settlement of the outstanding claims and stating that the case would be closed if it did not receive word from appellant within a certain period of time. Appellant testified that she did not receive the February letter. Apparently, the payments ended in March, 1996, commensurate with the carrier's aforementioned threat.

Our oft-stated rule is that for purposes of the aforementioned statute of limitations, "the *furnishing* of medical services constitutes payment of compensation . . . ." *Heflin v. Pepsi Cola*, 244 Ark. 195, 197, 424 S.W.2d 365, 366 (1968). Moreover, an employer is deemed to be furnishing such services if it has either actual notice or has reason to know of a claimant receiving medical treatment. *See Plante v. Tyson Foods, Inc.* 319 Ark. 126, 131, 890 S.W.2d 253, 255-256 (1994) (held that an employer that did not receive actual notice that employee was receiving medical treatment was deemed to be furnishing medical services because it had reason to know it would be furnished). To successfully toll the statute of limitations, however, the furnished services must be reasonably necessary in connection with the injury received. *See Northwest Tire Serv. v. Evans*, 295 Ark. 246, 748 S.W.2d 134 (1988). In spite of these well-settled principles, an employer does not have the burden of determining whether medical treatments are continuing; to the contrary, the burden remains with the claimant "to act within the time allowed." *Superior Fed. Sav. & Loan v. Shelby*, 265 Ark. 599, 601, 580 S.W.2d 201, 203 (1979).

Appellant argues that the medical treatments she received in 1997 and 1998 were furnished by Stone Container (despite the fact that it did not pay for said treatments) because it had actual notice or reason to know she was receiving the treatment. Appellee counters by arguing that this treatment was not reasonably necessary in connection with the injury appellant received. Although we agree with appellant that appellee either had actual notice or reason to know of the treatments, we conclude that the statute of limitations was not tolled as a result of the treatments appellant received.

From our understanding of the record, appellee had no reason to believe that treatments would cease, and, in fact, the only reason payments stopped was because appellant did not respond to an effort to coerce her to settle her compensation claim. In our view, to allow appellee to prevail simply on those facts would undermine the principle established by *Heflin* because it would base limitations questions on something other than the furnishing of medical services. Despite this conclusion, we hold that the statute was not tolled because we conclude that there is substantial evidence to support the Commission's finding that the treatments at issue were "related primarily to asthma and bronchitis . . . ." and not reasonably necessary in connection with the injuries appellant

received. Appellant argues that such a finding cannot be supported by substantial evidence in light of documentation from different physicians supporting the conclusion that her pain was "chronic" in nature. Despite this position, the record, in fact, demonstrates that during this period appellant was mainly treated for asthma and bronchitis.[2] Accordingly, we hold that the statute of limitations was not tolled by the treatments received in 1997 and 1998.

Appellant counters by arguing that if those treatments did not toll the statute of limitations, then the Commission erred by not considering certain letters from her legal counsel as claims for additional compensation that would toll the statute of limitations. We, however, disagree with appellant.

The first letter was dated January 26, 1993, and was sent to the Commission and carbon-copied to appellee's counsel and carrier.[3] The letter plainly demonstrates that at that time Spencer's dispute with appellee centered on claims arising from her September 26, 1991, injury (*i.e.,* the "first injury"), and not claims arising from her August 24, 1992, injury (*i.e.,* the "second injury"). Accordingly, we conclude that this letter did not constitute a claim for additional compensation for Spencer's claim arising from her 1992 injury, inasmuch as this letter expressed that appellee's carrier had at that time paid all claims arising from that injury.

Finally, we also conclude that the second letter, dated July 30, 1997, did not toll the statute of limitations. This letter was addressed only to appellee's workers' compensation insurance carrier; accordingly, we cannot conclude that this letter constituted a valid claim for additional compensation inasmuch as it was not filed with the Commission, as required by Ark. Code Ann. § 11-9-

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[2] We note the opinion of the author of the independent medical evaluation report that, "an asthmatic attack is not at all beneficial for a person's spine."

[3] The body of the letter states:

Dear Mr. Harris:

We are requesting that the above file not be dismissed for want of prosecution.

We were undergoing discovery and negotiating with the attorney for Kempner [sic] when Mrs. Spencer was again injured at work. The second injury compounded the first injury and has resulted in surgery for Mrs. Spencer. To date, Mrs. Spencer is still not strong enough to pursue the first claim. Kempner [sic] has paid all of Mrs. Spencer's claims from the second injury but has paid none from the first injury. As soon as Mrs. Spencer is physically able to pursue her claim, I intend to set this before an Administrative Law Judge for a hearing. For the above reasons, we respectfully request that this file be kept opened [sic].

702(b) (1987). Moreover, if we were to assume that this letter constituted a claim, we note that this letter was dated after March 11, 1997, which as we stated above was the date after which all claims filed for additional benefits for the 1992 injury were barred.

We therefore also conclude that substantial evidence supports the Commission's finding that Spencer's claim for additional compensation that was filed on December 22, 1997, for injuries arising out of her August 24, 1992, injury was barred by the statute of limitations.

Affirmed on appeal and cross-appeal.

JENNINGS and CRABTREE, JJ., agree.

OAK HILL MANOR, LLC *v.*
ARKANSAS HEALTH SERVICES AGENCY
and Arkansas Health Services Commission;
Beverly Enterprises-Arkansas, Inc.

CA 00-170 37 S.W.3d 681

Court of Appeals of Arkansas
Division I
Opinion delivered February 21, 2001

Cross, Gunter, Witherspoon & Galchus, P.C., by: *Scotty M. Shively* and *Janie W. McFarlin*, for appelllant.

Mark Pryor, Att'y Gen., by: *Warren T. Readnour*, Ass't Att'y Gen., for appellees Arkansas Health Services Commission and Arkansas Health Services Agency.

Rose Law Firm, A Professional Association, by: *Richard T. Donovan*, for appellee Beverly Enterprises-Arkansas, Inc.

JOHN E. JENNINGS, Judge. The appellee, Beverly Enterprises-Arkansas, Inc., sought approval from the Arkansas Health Services Commission to build a new nursing home on land adjacent to a nursing home owned by appellant, Oak Hill Manor. The Commission eventually approved the request and Oak Hill appealed to Pulaski County Circuit Court. The case was set for hearing on February 26, 1999, and the court subsequently entered an order affirming the decision of the Commission.

On appeal from circuit court, Oak Hill raises two points for reversal: (1) the trial court erred in affirming the Commission's decision allowing Beverly Enterprises to move its site location for an existing permit of approval without seeking formal review by the Commission, and (2) that the Commission acted arbitrarily and capriciously when it failed to apply one of its own regulations. We do not reach the merits of either argument because we have concluded that appellant's notice of appeal was not timely filed and that we therefore lack jurisdiction.

After the February 26, 1999, hearing the circuit judge took the case under advisement. Sometime in March the judge decided the case and telephoned counsel for Beverly Enterprises, the prevailing party, to ask him to prepare a memorandum opinion and

order affirming the Commission's decision. Counsel did so and sent the draft to the trial judge without sending a copy to counsel for Oak Hill Manor. The court signed the order and entered it on March 29, 1999. Neither party was aware the order had been filed.

Sometime in October 1999, counsel for the appellant discovered that the order had been entered and asked the trial court for a hearing. At the hearing held on October 19, 1999, this transpired:

> THE COURT: March 29th. I had sometime prior to that point decided — made my decision in the case and as I normally do, I call the winning party and ask him to submit an order reflecting the Court's decision, which Mr. Donovan did. And then somehow or another, the order never got circulated. And, Rick, I don't think you ever got a copy of it, did you?
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> MR. DONOVAN: I did not sir.
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> THE COURT: I assume that I just signed it and sent it downstairs to the clerk's office and it was entered. And because of that, you did not get an opportunity to file your notice of appeal and that's wrong. So I am attempting to correct that now and I may be just trying to do some equity that I'm unable to do, but I am going to do what I think is right, and that is I'm going to set aside that order of March whatever it was. And that, I guess, an appealable order since more than 90 days has passed, or 120, whichever it is. But that's just not right to do it that way. I am not going to change my opinion. My decision will be the same. But in any event, there will now at least be an opportunity for an appeal.

The trial court then entered a duplicate order on October 19, 1999, and Oak Hill filed its notice of appeal on November 16, 1999.

The timely filing of a notice of appeal is, of course, essential to our jurisdiction. *See LaRue v. LaRue*, 268 Ark. 86, 593 S.W.2d 185 (1980). The issue here is whether the trial court had jurisdiction to enter the October 19, 1999, order so as to permit Oak Hill to perfect its appeal. Appellee's argument that the notice of appeal was not timely filed is based on Rule 4(b)(3) of the Rules of Appellate Procedure—Civil:

> Upon a showing of failure to receive notice of the judgment, decree or order from which appeal is sought and a determination that no party would be prejudiced, the trial court may, upon motion filed within 180 days of entry of the judgment, decree, or order, extend the time for filing the notice of appeal for a period of

> fourteen (14) days from the date of entry of the extension order. Notice of any such motion shall be given to all other parties in accordance with Rule 5 of the Arkansas Rules of Civil Procedure.

This version of Rule 4(b)(3) was adopted by a supreme court per curiam order dated January 28, 1999, and was in effect at the time of the proceedings in the trial court. The reporter's notes to the revised rule state, in pertinent part:

> Paragraph (b)(3) is a revised version of a provision previously found in subdivision (a), under which a party who did not receive notice of the judgment or order that he or she wished to appeal could obtain an extension from the trial court 'for a period not to exceed sixty (60) days from the expiration of the time otherwise prescribed by these rules.' This rule proved restrictive in operation. *See, e.g., Jones-Blair co. v. Hammett*, 51 Ark. App. 112, 911 S.W.2d 262 (1995), *rev'd on other grounds*, 326 Ark. 74, 930 S.W.2d 335 (1997); *Chickasaw Chemical Co. v. Beasley, supra.* Accordingly, paragraph (b)(3) expands the period during which an extension may be sought. The trial court may extend the time for filing the notice of appeal 'upon motion filed within 180 days of entry of the judgment, decree, or order.' If such an extension is granted, the notice of appeal must be filed within fourteen days from the date on which the extension order is entered. These time frames are taken from the corresponding federal rule. *See* Rule 4(a)(6), Fed. R. App. P.

If the case is governed by Rule 4(b)(3), clearly the notice of appeal was not timely filed. *See Jones-Blair Co. v. Hammett*, 51 Ark. App. 112, 911 S.W.2d 263 (1995).

Oak Hill's counterargument is based on Rules 58 and 60 of the Arkansas Rules of Civil Procedure. Rule 58 provides, in part:

> Subject to the provisions of Rule 54(b), upon a general or special verdict, or upon a decision by the court granting or denying the relief sought, the court may direct the prevailing party to promptly prepare and submit, for approval by the court and opposing counsel, a form of judgment or decree which shall then be entered as the judgment or decree of the court. The court may enter its own form of judgment or decree or may enter the form prepared by the prevailing party without the consent of opposing counsel.

Appellant points to the reporter's note to Rule 58 which states, "implicit in this rule is the right of opposing counsel to be afforded an opportunity to approve the form of judgment or

decree." Rule 60(c)(4) provides that the trial court may vacate or modify an order for misrepresentation or fraud ("whether heretofore denominated intrinsic or extrinsic") by an adverse party, even after the expiration of ninety days. Oak Hill does not contend that actual fraud was practiced but relies on *Davis v. Davis*, 291 Ark. 473, 725 S.W.2d 845 (1987), for the proposition that, under certain circumstances, "constructive fraud" may be sufficient for the trial court to act under Rule 60(c)(4). We have concluded that the appellee's position is correct.

Zimmer St. Louis, Inc. v. Zimmer, Co., 32 F.3rd 357 (8th Cir. 1994), is virtually identical to the case at bar and the reasoning of the Eighth Circuit Court of Appeals is persuasive. In *Zimmer* one of the parties was unaware that the court had signed an order and subsequently the trial court entered a duplicate order to permit the appeal. The trial court's action was based on Rule 60(b)(6) of the Federal Rules of Civil Procedure which allows a trial court to "relieve a party... from a final judgment," upon motion, for "any reason [other than those specified in another section of the rule] justifying relief from the operation of the judgment." *Zimmer*, 32 F.3d at 359. The question in *Zimmer* was whether the case was governed by Rule 4(a)(6) of the Federal Rules of Appellate Procedure.

The court in *Zimmer* held that the notice of appeal was not timely filed and that it lacked jurisdiction to hear the appeal. The court said:

> According to the Notes of the Advisory Committee on Appellate Rules, the purpose of the 1991 amendment was to provide 'a *limited* opportunity for relief in circumstances where the notice of entry of a judgment or order, required to be mailed by the clerk pursuant to [Fed.R.Civ.P. 77(d)], is either not received by a party or is received so late as to impair the opportunity to file a timely notice of appeal' (emphasis supplied). The Notes of the Advisory Committee on Appellate Rules further remark that the 180-day deadline 'establishes an *outer* time limit ... for a party who fails to receive timely notice of a judgment' (emphasis supplied).
>
> It is our view that the 1991 amendment was designed to respond to the circumstances that had prompted courts to use Fed.R.Civ.P. 60(b)(6) to circumvent the deadlines specified by Fed.R.App.P. (4)(a)(5). Other courts and commentators have so concluded as well. [Citations omitted.]

. . .

> It therefore appears that the plain language of both Fed.R.App.P. 4(a)(6) and Fed.R.Civ.P. 77(d) addresses specifically the problem of lack of notice of a final judgment. That specificity, in our view, precludes the use of Fed.R.Civ.P. 60(b)(6) to cure problems of lack of notice. Since that language also delineates a specific period during which the period for appeal may be reopened, moreover, we conclude that the district courts no longer have the discretion to grant motions to reopen the period for appeal that are filed outside that specific period, even if the appellant does not receive notice until that period has expired. Profession Siegel, commenting on the 1991 amendment to Fed.R.App.P. 4(a), agrees. *See* D. Siegel, *The Recent Changes*, 142 F.R.D. at 378.

Zimmer, 32 F.3d at 360.

We do not believe that the supreme court's decision in *Davis, supra*, requires a different conclusion. First, just as we did in *State Office of Child Support Enforcement v. Offitt*, 61 Ark. App. 207, 966 S.W.2d 275 (1998), we conclude that *Davis* is distinguishable on its facts. Second, *Davis* must be read in the light of the 1999 amendment to Rule 4(b)(3) of the Rules of Appellate Procedure. *See also Reaves v. Farm Bureau Mutual Ins. Co.*, 336 Ark. 269, 984 S.W.2d 447 (1999).[1]

Our conclusion is that the trial court was without jurisdiction to enter the October 19, 1999, order. Therefore, the notice of appeal was not timely filed, and we lack jurisdiction.

Appeal dismissed.

CRABTREE and ROAF, JJ., agree.

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[1] After Reaves' motion for a rule on the clerk was denied, she obtained an order from the trial court setting aside its first order under Rule 60 and on reentry of an identical order, again took an appeal. Farm bureau then filed a motion to dismiss and we certified the case to the supreme court. On April 27, 2000, that court granted the motion, dismissing the appeal.

CAPITOL LIFE & ACCIDENT INSURANCE COMPANY *v.* Lela K. PHELPS

CA 00-584 37 S.W.3d 692

Court of Appeals of Arkansas
Division I
Opinion delivered February 21, 2001

Mitchell, Williams, Selig, Gates & Woodyard P.L.L.C., by: *Byron Freeland* and *Leigh Anne Yeargan*, for appellant.

Walters, Hamby & Verkamp, by: *Bill Walters*, for appellee.

OLLY NEAL, Judge. Appellant Capitol Life and Accident Insurance Company appeals the order of the Sebastian County Chancery Court finding that the application for credit life insurance issued by the appellant to the decedent, Lincoln Phelps, Jr., was ambiguous and subject to interpretation, and denying its

motion to rescind three insurance policies issued to Phelps prior to Phelps's death. On appeal, appellant contends that the trial court erred in ruling that the policy was ambiguous, and that the trial court erred in not rescinding the policies due to the insured's incorrect statement. We conclude that the order appealed from is not a final order, and we dismiss.

The February 8, 2000, order, from which the appellant appeals, recites the following language in the last paragraph:

> IT IS THEREFORE BY THE COURT CONSIDERED, ORDERED, ADJUDGED, AND DECREED that the Defendant's [Appellant's] motion for recission is denied and the Plaintiff [Appellee] is given judgment against the Defendant in the sum of $52,610.07; that all matters pertaining to pre-judgment interest, statutory penalties, post-judgment interest, court costs and attorney's fees shall be held in abeyance until this matter has been finalized on appeal or until the time for appeal has expired; and this Court retains jurisdiction of this matter and these parties as may be necessary in the premises.

Whether an order is final and appealable is a matter going to the jurisdiction of the appellate court and is an issue that the appellate court has a duty to raise on its own motion. *Barnes v. Newton*, 69 Ark. App. 115, 10 S.W.3d 472 (2000). The rule that an order must be final to be appealable is a jurisdictional requirement, observed to avoid piecemeal litigation. *Beverly Enters.-Ark., Inc. v. Hillier*, 341 Ark. 1, 14 S.W.3d 487 (2000); Ark. R. App. P.—Civ. 2(a)(1). When the order appealed from is not final, the appellate court will not decide the merits of the appeal. *Roberts v. Roberts*, 70 Ark. App. 94, 14 S.W.3d 529 (2000). For an order to be final, it must dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy. *Id.* An order must be of such a nature as to not only decide the rights of the parties, but also to put the court's directive into execution, ending the litigation or a separable part of it. *Reed v. Arkansas State Hwy. Comm'n*, 341 Ark. 470, 17 S.W.3d 488 (2000). When the order appealed from reflects that further proceedings are pending, which do not involve merely collateral matters, the order is not final. *Harold Ives Trucking Co. v. Pro Transp., Inc.*, 341 Ark. 735, 19 S.W.3d 600 (2000).

In the instant case, the trial court's order awarded appellee a judgment in the amount of $52,610.07, and denied appellant's motion for rescission of the insurance policies. However, the trial

court has held in abeyance all matters concerning the issues of prejudgment interest and statutory penalties. We conclude that the trial court's reservation of such issues constitutes piecemeal litigation that could warrant later determination by the trial court. The order in question does not dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy. The trial court even acknowledged in its order that it retained jurisdiction of this matter and that it would hold in abeyance the matters of prejudgment interest and statutory penalties "until this matter has been finalized on appeal." Because the trial court has to address these issues, we dismiss the appeal.

Dismissed.

ROBBINS and GRIFFEN, JJ., agree.

Scott HOWE *v.* STATE of Arkansas

CA CR 00-143 39 S.W.3d 467

Court of Appeals of Arkansas
Division I
Opinion delivered February 21, 2001

Paul N. Ford, for appellant.

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

OLLY NEAL, Judge. A jury found appellant, Scott Howe, guilty of possession of a controlled substance (methamphetamine) and simultaneous possession of drugs and firearms and sentenced him to twelve years' imprisonment in the Arkansas Department of Correction. In this appeal, Howe raises three points for reversal. He contends that the trial court erred (1) by denying his motion to suppress evidence seized from his person and his vehicle, (2) by sustaining the State's objection to the introduction of the affidavit used to obtain the arrest warrant, and (3) by allowing witnesses who had not been disclosed during discovery or introduced to the jury during voir dire to testify. We conclude appellant's first point has merit and reverse and remand for a new trial.

Deputy Jamie Martin of the Greene County Sheriff's Office encountered appellant in the early morning hours of September 8, 1998. According to Martin, he was traveling along County Road 502 when he observed a truck sitting at the intersection of County Road 502 and Highway 34. Martin testified that the truck began rolling backwards and continued to do so for approximately twenty-five feet, then suddenly "squalled tires" and took off in the opposite direction. Martin turned around and stopped the truck for making an improper start.

Upon stopping the truck, Martin asked the driver, Scott Howe, and his passenger, Robert McCord, for identification. Howe provided identification, but his passenger did not and told the officer that his name was Donny Strope. When McCord was unable to provide a Social Security number or birth date, Martin returned to his car to complete a check on Mr. Strope. After discovering outstanding warrants for Mr. Strope, Martin arrested McCord. Deputy Martin then asked Howe for proof of insurance. When Howe could not provide insurance, Martin informed Mr. Howe that the truck had to be impounded pursuant to local policy.

Martin testified that because he was impounding Howe's truck, he felt that he should take Howe home. Although he had no fear for his own safety and did not believe that Howe was armed, Martin asked Howe if he could perform a pat-down search "to make sure that he didn't have anything on him." From Martin's testimony, it does not appear that he informed Howe that he was performing the pat-down to search for weapons, although Martin did state that the pat-down was for his own safety. According to Martin, Howe consented to the search and voluntarily placed his hands on the hood of the police car.

While conducting the search, Martin felt "something like a hard ball" in Howe's left pocket. Martin testified that he did not believe the item was a weapon, but he did ask Howe what the object was. Howe responded that it was piece of gum. Martin thought Howe was being deceptive and did not believe the item was a piece of gum. Martin testified that he then reached into Howe's pocket and recovered a ball of tinfoil. According to Martin, the foil did not resemble the type of foil that is used to package gum. Martin decided to open the foil and found methamphetamine. He then arrested Howe for possession of a controlled substance. A subsequent inventory search of the truck uncovered another bag of methamphetamine and a .38 caliber pistol.

For his first point on appeal, Howe argues that the trial court erred in admitting the evidence seized from his person and the vehicle because he was unreasonably searched. On review of a trial court's denial of a motion to suppress, the appellate court makes an independent examination based on the totality of the circumstances, and will reverse only if the trial court's ruling was clearly against the preponderance of the evidence. *Muhammad v. State*, 337 Ark. 291, 988 S.W.2d 17 (1999). In making that decision, the court reviews the evidence in the light most favorable to the State. *Id.*

There is no dispute in this case about Martin's justification for pulling Howe over for making an improper start. Clearly, Martin had the authority to do so. *See* Ark. Code Ann. § 27-51-104(b)(3) (Supp. 1999) (stating that operating a vehicle in such a manner so as to cause a spinning of the tires is unlawful). *See also Burris v. State*, 330 Ark. 66, 954 S.W.2d 209 (1997) (holding that all that is required for a lawful stop is that the officer have probable cause to

believe that a traffic violation has occurred; whether the defendant is actually guilty of the violation is for a jury or court to decide, and not the officer on the scene). The critical issue is whether Martin had a sufficient basis to conduct the "pat-down" search that is consistent with the Fourth Amendment.

In this case, Martin testified at the suppression hearing that at no time did he believe Howe was armed or dangerous. Nor did Martin place Howe under arrest or have probable cause to arrest him before conducting the pat-down search. Based on this testimony by Martin, the only basis upon which his pat-down search of Howe can be deemed constitutional is if the search was based on consent.

Arkansas Rule of Criminal Procedure 11.1 provides, "An officer may conduct searches and make seizures without a search warrant or other color of authority if consent is given to the search or seizure." Howe repeatedly asserts that Martin never feared for his safety or believed that appellant possessed a weapon. We note, however, that probable cause or reasonable suspicion is not necessary for an officer to request consent for a search. *See Muhammad v. State*, 337 Ark. 291, 988 S.W.2d 17 (1999).

In this case, Howe does not contend that he did not consent to the search or that the consent was the product of duress or coercion. He argues, instead, that he consented only to the pat-down search and not Martin's more intrusive act of reaching into his pockets.

Generally, the scope of a search is limited by its expressed object. *Florida v. Jimeno*, 500 U.S. 248 (1991). In *Jimeno*, the United States Supreme Court held that the standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of "objective" reasonableness — what the typical reasonable person would have understood by the exchange between the officer and the suspect. In *Jimeno*, the Court held that once the respondent gave the police officer permission to search his vehicle for drugs, it was objectively reasonable for that officer to believe that such permission extends to opening containers found in the vehicle. Finally, the Court pointed out that a reasonable person might be expected to know that narcotics are generally carried in some form of a container.

In the instant case, Martin testified: "I asked him if I could do a pat down just to make sure that he didn't have anything on him." Moreover, Martin repeatedly asserted that he searched appellant as a safety precaution. From the exchange between Martin and Howe, a reasonable person would have believed that Howe was consenting to a pat-down of his outer garments for guns, knives, or other items that could serve as instruments of harm. Based on this determination and Martin's testimony that he asked Mr. Howe for a search only out of his concern for his personal safety, the scope of the search was limited to a pat-down search for weapons.

In *Minnesota v. Dickerson*, 508 U.S. 366 (1993), the United States Supreme Court addressed what has been dubbed the "Plain Feel Doctrine" and stated:

> 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; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.

Minnesota v. Dickerson, *supra* at 375-76. 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 immediately apparent from its contour or mass.

The instant case is analogous to *Dickerson*. Based on consent, Martin was justified in patting the appellant down for weapons and could have recovered any items whose incriminating nature was immediately apparent. Martin's testimony, however, reveals that he was not able to immediately determine the incriminating nature of the item he felt in Howe's pocket. Martin testified that he did not believe Howe when Howe told him the object was a piece of gum. Martin explained his thought process during the search in the following exchange:

PROSECUTOR: Did you have a suspicion as to what it was?

MARTIN: At that time it wasn't gonna be gum. I had suspected that then.

PROSECUTOR: What did you suspect it to be?

MARTIN: I suspected it to be — at that time — just something illegal. His reaction just led me to believe that. He was just sure it was gonna be a piece of gum.

PROSECUTOR: So the fact that you believed he was being deceptive — was that what led you to believe it would be something worth confiscating?

MARTIN: Yes, sir.

It appears from Martin's testimony that he had absolutely no idea what the item in Howe's pocket was until he removed it. Martin's statement that he concluded the item might contain methamphetamine after he saw the foil belies the notion that he did not know what the item was before removing it from Howe's pocket. The statement, "I suspected it to be ... just something illegal," is not sufficient to show that the item's incriminating nature was immediately apparent. Completely absent from Martin's testimony is any statement explaining what it was about the object's feel, shape, or contour that lead him to believe that the object was contraband. Because it is clear from the facts that Martin did not know the item's incriminating nature before removing it from Howe's pocket, this search is contrary to the permissible scope outlined in *Dickerson*, and the trial court's determination that the search did not the violate the Fourth Amendment was clearly against the preponderance of the evidence.

Absent the contraband recovered from appellant's pocket, Howe argues that there was no legally justifiable reason to search his truck. The State responds that the vehicle was not searched based upon the items recovered from the search of Howe's person. The State argues that the contraband in the vehicle was found pursuant to an inventory search after the truck was impounded due to Howe's failure to provide proof of insurance.[1] Howe contends that

[1] We note that Martin testified that Howe's passenger told him a gun was in the truck sometime prior to arriving at the Sheriff's Department. The State has not argued that the passenger's statement provided a legally justifiable cause to search the vehicle, and we do not consider that argument.

such a search was unconstitutional because the State improperly impounded his vehicle.

Arkansas Code Annotated section 27-22-104(c) (Supp. 1999), provides that if a motor vehicle operator is unable to present proof of insurance coverage the police officer is to issue a notice of noncompliance and *impound the license plate* attached to the vehicle. The officer is also to issue a temporary sticker that is effective for ten days for the operator to attach to the rear of the vehicle for use in lieu of an official license plate. Ark. Code Ann. § 27-22-104(d).

Absent from the statute is any authority to impound the vehicle of an operator who cannot present proof of insurance. The statute only calls for the officer to impound the vehicle's license plate. In fact, the provision requiring the police officer to issue the operator a temporary sticker to use in lieu of an official license plate provides a strong implication that the operator of the vehicle should be allowed to keep the vehicle and has at least ten days to present proof of insurance.

In light of these provisions, we conclude that the officer improperly impounded appellant's vehicle and that his subsequent search of the vehicle was unconstitutional.

Reversed and remanded.

GRIFFEN, J., agrees.

ROBBINS, J., concurs.

James Lee REID *v.* Gregory S. FRAZEE

CA 00-353 41 S.W.3d 397

Court of Appeals of Arkansas
Division II
Opinion delivered February 21, 2001

[redacted]

James V. Coutts, for appellant.

Pate & Swain, by: *James R. Pate*, for appellee.

KAREN R. BAKER, Judge. The appellant, James Lee Reid, appeals a second time from the entry of a Final Decree of Adoption that terminated the appellant's rights as the natural father of his minor son and allowed the adoption of the minor son by the husband of appellant's ex-wife. On the first appeal, this Court reversed the probate court's entry of the adoption, holding that Ark. Code Ann. § 9-9-212(a) (Repl. 1993) imposed upon the probate judge a nondiscretionary duty to appoint an attorney ad litem to make reasonable efforts to locate and serve notice upon appellant once the appellees alleged they could not locate him. *Reid v. Frazee*, 61 Ark. App. 216, 966 S.W.2d 272 (1998). Because appellant neither received notice of the petition to adopt nor was an attorney ad litem appointed, we remanded the case for a full hearing on the merits, stating that "the probate court now clearly has jurisdiction to hear this adoption proceeding." *Id.* at 222, 966 S.W.2d at 274.

For his first point in this appeal, appellant argues that the trial court erred in granting a Final Decree of Adoption because the adoption statutes had not been strictly complied with in three respects: (1) the appellee Gregory Frazee failed to sign and verify the petition for adoption as required by Ark. Code Ann. § 9-9-210(a) (Repl. 1993); (2) the trial judge failed to obtain the minor child's consent at the adoption trial as required by Ark. Code Ann. § 9-9-206 (Repl. 1993) and had no power to schedule the subsequent hearing where he ascertained the child's consent to adoption; and (3) the trial court failed to notify the minor child of his right to withdraw consent as required by Ark. Code Ann. § 9-9-208 (Repl. 1993).

Appellant's second point for reversal is that the trial court erred in finding that the consent of appellant was not required pursuant to Ark. Code Ann. § 9-9-207(a)(2) (Repl. 1993) because he had failed to have significant contact with the child or pay support for the child for a period in excess of one (1) year prior to the filing of the Petition for Adoption. Appellant's third point for reversal is that the trial court failed to notify the minor of an asserted right to withdraw consent and that the consent was not in writing as required by Ark. Code Ann. § 9-9-208 (Repl. 1993).

Appellant's final point for reversal is that the trial court erred in finding that it was in the best interest of the minor child to be adopted. We affirm.

Appellee, the adoptive father, married the child's mother on October 26, 1990, shortly before the child's third birthday on December 27. He and the mother provided the child's primary residence from that time to the present. They moved their residence from Kansas to Arkansas in 1992. Appellee filed the petition for adoption when the child was seven years old.

Appellant married, divorced, remarried, and divorced again prior to the adoption proceeding. After filing bankruptcy, he moved his residence from Kansas to California and began working at a country club where his mother was employed and had been for many years. Appellant admitted that he had no in-person visit or physical contact with the child from August 1, 1993, to the time the petition was filed on September 5, 1995. He identified some attempts to speak with the child from pay phones in the summer of 1993 and specifically identified a conversation he had with the child in July 1994. He admitted that he personally paid none of the court-ordered child support from January 1, 1994, through September 5, 1995. He blamed his lack of contact with the child on the appellee and the child's mother, alleging they prevented him from having contact with the child. He explained that his lack of financial support resulted from credit-card debt and medical expenses in connection with the birth of a child on April 28, 1995, to his subsequent marriage. These debts resulted in a bankruptcy. He stated that he purchased a money order on September 11, 1995, to begin paying child support, claiming that, at the time, he knew nothing about the petition for adoption being filed. Appellant did not seek court intervention to enforce his visitation rights under the divorce decree at any time prior to the filing of the petition for adoption.

Appellant raised the issue of Gregory Frazee's failure to sign and verify the petition for adoption in the first appeal. We did not reach and discuss the issue because we reversed, finding no jurisdiction resulting from the lack of notice; however, we did specifically state that "the probate court now clearly has jurisdiction to hear this adoption proceeding." *Reid,* 61 Ark. App. at 222, 966 S.W.2d at 274.

Appellant first argues that an adoption petition is fatally defective if it fails to strictly comply with Ark. Code Ann. § 9-9-210 (Repl. 1993). That is not the case. A petition for adoption is valid where there is substantial compliance with the statutory requirements. *See Arkansas Dep't of Human Serv. v. Couch*, 38 Ark. App. 165, 171, 832 S.W.2d 265, 269 (1992) (citing *Taylor v. Collins*, 172 Ark. 541, 289 S.W. 466 (1927)).

In *Swaffar v. Swaffar*, 309 Ark. 73, 80, 827 S.W.2d 140, 144 (1992), the Arkansas Supreme Court cited the jurisdictional requirement of consent and that "the consent of the person to be adopted, as required by statute, must not be presumed." The court emphasized that it was the total lack of evidence of consent in the record, that resulted in the probate court's lack of jurisdiction. The court in *Swaffar* simply recognized that with no evidence of consent in the record, the court could not substantiate the probate court's jurisdiction over the minor to be adopted. *See id.* at 79-80, 827 S.W.2d at 144; *see also In re Adoption of Lybrand*, 328 Ark. 163, 946 S.W.2d 946 (1997) (finding suggestion that probate court lacked subject-matter jurisdiction for lack of strict compliance with the adoption statutes was not valid where cases addressed jurisdiction of the person).

Similarly, the consent and knowledge of the adoptive parent must not be presumed. In stark contrast to *Swaffar*, however, the record in this case provides ample evidence of knowledge and consent. Appellee Gregory Frazee appeared before the judge and under oath verified the allegations in the petition. He presented additional testimony about himself, his concern for the child's welfare, and his commitment to providing for the child financially and emotionally. The evidence concerning appellee Gregory Frazee's knowledge and participation in the adoption proceeding was before the court, and the probate judge did not abuse his discretion in finding statutory requirements had been satisfied.

Appellant's second assertion is that the probate court lacked authority to hold a subsequent hearing to ascertain the minor's consent. After the trial but before the judge entered the final decree, appellant brought to the court's attention in an Objection to Entry of Final Decree of Adoption and Motion to Dismiss that the minor child, who was seven years of age at the beginning of this process, was past the age of ten years at the time the trial was held.

The probate judge then scheduled a subsequent hearing, where he questioned the minor and ascertained the child's consent to be adopted by appellee.

Appellant's argument ignores Ark. Code Ann. § 9-9-214(b), which provides: "The court may continue the hearing from time to time to permit further observation, investigation, or consideration of any facts or circumstances affecting the granting of the petition."

Even absent statutory authority, the probate judge had inherent authority to hold the subsequent hearing. In *Massengale v. Johnson*, 269 Ark. 269, 599 S.W.2d 743 (1980), the chancellor vacated a judgment and granted a new hearing when it came to the court's attention that it had possibly overlooked certain defenses. The court reasoned:

> It is a well settled principle that courts have control over their judgments during the term at which they are made, and, for sufficient cause, may, either upon application or upon their own motion, modify or set them aside. This power is inherent and plenary and exists without reference to any statute. It exists so that courts may review and correct any mistakes, errors or indiscretions which might have been committed . . . .
>
> Appellants argue that the court should not have vacated the judgment and taken additional evidence because appellees should have adequately developed the issues at the first trial .... While we agree that the chancellor was not required to set the judgment aside and grant a new hearing, that in no way implies that the chancellor should be prohibited from doing so.

Id. at 271-72, 599 S.W.2d at 745.

The trial court has the inherent authority to protect the integrity of the proceedings and to safeguard the rights of the litigants before it. *City of Fayetteville v. Edmark*, 304 Ark. 179, 194, 801 S.W.2d 275, 283 (1990). Once it came to the probate judge's attention that the minor had reached the age of ten, an age requiring the minor's consent under the statute, the trial court properly exercised its discretion to ascertain the minor's consent before entry of its judgment.

Appellant's third argument, concerning compliance with the adoption statutes, is that the trial court failed to notify the minor of his right to withdraw consent and that the consent was

not in writing, as required by Ark. Code Ann. § 9-9-208 (Repl. 1993). We conclude that this argument is not preserved for appellate review. Appellant did not present these arguments to the trial court, and at the hearing on the issue of the minor child's consent, he objected only on the grounds that the consent was not given in a timely manner. Further, appellant did not ask the court for a ruling on this issue, and we do not address issues that are raised for the first time on appeal. *Giles v. Sparkman Res. Care Hosp.*, 68 Ark. App. 263, 6 S.W.3d 140 (1999).

We also hold that the trial court did not err when it found appellant's consent was not required pursuant to Ark. Code Ann. § 9-9-207(a)(2) (Repl. 1993). "In cases involving minor children a heavier burden is cast upon the court to utilize to the fullest extent all its power of perception in evaluating the witnesses, their testimony, and the children's best interests. This Court has no such opportunity, and we know of no case in which the superior position, ability, and opportunity of the probate court to observe the parties carries as great a weight as one involving minor children." *In re Adoption of B.A.B.*, 40 Ark. App. 86, 90, 842 S.W.2d 68, 70 (1992)(citations omitted).

When reviewing a finding that consent is not required pursuant to Ark. Code Ann. § 9-9-207(a)(2) (Repl. 1993), "we must inquire whether the parent has utilized those resources at his or her command . . . in continuing a close relationship with the child." *In the Matter of the Adoption of Titsworth*, 11 Ark. App. 197, 201, 669 S.W.2d 8, 10 (1984) (quoting *Zgleszewski v. Zgleszewski*, 260 Ark. 629, 542 S.W.2d 765 (1976)). "For purposes of determining whether a parent willfully deserted his child or intended to maintain his or her parental role, the trial court may consider as a factor the parent's failure to seek enforcement of his or her visitation rights during the relevant one-year period." *Vier v. Vier*, 62 Ark. App. 89, 94, 968 S.W.2d 657, 660 (1998).

Appellant admitted that from the period of August 1, 1993, to September 5, 1995, he had no physical contact with his son. He further admitted that from January 1, 1994, through September 5, 1995, he personally did not pay any court-ordered child support. In responses to interrogatories, when asked to specify his attempts to talk with the minor child by phone, appellant identified "approx-

imately once a month for six months from a pay phone in Lawrence, Kansas."

In testimony before the court, appellant testified that, "My new wife and my ex-wife went to high school together and I don't think they got along good in high school and it made it difficult for me to call Tyler. That's why I used a pay phone. ... As a result of the friction with my wife Laura, I had to send Tyler home early at some point. ... My new wife didn't like Tyler a whole lot and she called when I was at work and told Jackie to come pick him up, and then Tyler went home. ... I took Tyler [to a hotel] because it caused friction with me and she calls and says come pick him up. So now I have friction between myself and Jackie and myself and my new wife because of the call. ... From my own home I had to go and stay at a motel with my son. That's what caused the big downfall. That was in 1992 in the summer."

Appellant did not attempt to utilize the help of a court to enforce his visitation rights until approximately two and a half years after he learned of the first entry of adoption, and approximately six years after what he described as "the big downfall." He attempted to justify his failure to pay the court-ordered child support on financial trouble, including a bankruptcy and credit-card debt.

In his final point of on appeal, appellant argues that the court erred in finding that it was in the best interest of the minor child that the adoption be granted. In contrast to the appellant's testimony at trial, the adoptive father, appellee, testified, "My feelings are that we have had a lot of troubles, we've had financial troubles, and yet day to day, we've had to take care of Tyler, and take care of Lucas, and take care of Nicolle, [children born to the marriage of appellee and the minor's mother] and we feel the same pressures and we've had the same financial problems, and all along it was never a question of whether we were going to take care of our children." From a review of the record, we cannot say that the probate judge's finding was clearly erroneous.

Affirmed.

PITTMAN and ROAF, JJ., agree.

Jason Shawn MORGAN *v.* STATE of Arkansas

CA CR 00-595 37 S.W.3d 684

Court of Appeals of Arkansas
Division IV
Opinion delivered February 21, 2001

[redacted]

Blackmon-Solis & Moak, L.L.P., by: *DeeNita D. Moak,* for appellant.

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

ANDREE LAYTON ROAF, Judge. The circuit court revoked appellant Jason Morgan's probation, finding that he had violated the terms of his probation by testing positive for drugs. Morgan appeals, arguing that the trial court erred because (1) he was not provided with written notice of the controlling order and conditions of the probation and (2) there was no evidence that he had violated a condition of his probation. We affirm.

On October 18, 1996, Morgan entered a plea of nolo contendere to second-degree battery and was sentenced to four years' probation. The relevant conditions of his probation required him to pay a monthly probation fee, to submit to random drug testing, and to refrain from committing an offense punishable by imprisonment. Morgan signed the order of probation, acknowledging receipt of a copy.

The State filed a petition for revocation on March 23, 1998, based on Morgan's failure to comply with the conditions of his probation as he had failed to report, failed to pay final obligations, and tested positive for marijuana twice. After a hearing, the circuit court declined to revoke Morgan's probation but added two terms to his probation — 120 days in the Johnson County Detention Center and a requirement that Morgan complete a drug-rehabilita-

tion program. The order also stated that all previous conditions from the prior probation order were to remain in effect. The court entered a judgment on August 20, 1998, which did not include any acknowledgment of receipt by Morgan.

On September 13, 1999, the State filed a second petition to revoke Morgan's probation for failure to pay probation fees, continued use of marijuana, and commission of new criminal activity. After a hearing on October 15, 1999, the court found by a preponderance of the evidence that Morgan had violated the terms of his probation by testing positive for drugs. The court revoked Morgan's probation and sentenced him to eighteen months' imprisonment.

Morgan appeals, arguing that the trial court erred in revoking his probation because he was not provided with written notice of the terms of probation in the August 20, 1998, order. He claims that the 1998 order superseded the 1996 order, and that, because he did not receive written notice of the 1998 order, pursuant to Ark. Code Ann. § 5-4-303(g) (Supp. 1999), the revocation should be reversed. Section 5-4-303(g) provides: "If the court suspends the imposition of sentence on a defendant or places him on probation, the defendant shall be given a written statement explicitly setting forth the conditions under which he is being released."

Morgan made the same argument to the trial court at the October 15, 1999, hearing. The court found that, because Morgan violated the terms of his original probation order of which he received notice, the argument was without merit. The trial court was correct. The State's revocation petition was based on the violation of probationary terms contained in Morgan's 1996 probation order, not the additional terms the 1998 order imposed. Morgan acknowledges receiving notice of the 1996 order; therefore he had written notice of the terms of probation he violated.

Morgan next argues that, although he did receive notice of the 1996 order, the original conditions of his probation did not include a provision that he refrain from drug use, the basis for his probation revocation. Hence, Morgan seems to argue there was insufficient evidence that he had violated the terms and conditions of his suspended sentence. However, Morgan did not make this argument to the trial court and failed to move for dismissal at the

end of the hearing. Our supreme court has held that Ark. R. Crim. P. 33.1, as amended, requires a defendant in a revocation proceeding to move for dismissal, stating the specific grounds therefor, in order to preserve the question of the sufficiency of the evidence to support the verdict or judgment. *Miner v. State*, 342 Ark. 283, 28 S.W.3d 280 (2000). Moreover, in the absence of a specific objection below, the trial court had no opportunity to consider Morgan's sufficiency argument. It is equally well settled that we will not address arguments raised for the first time on appeal. *Windsor v. State*, 338 Ark. 649, 655, 1 S.W.3d 20 (1999); *see also McGhee v. State*, 330 Ark. 38, 42, 954 S.W.2d 206, 208 (1997). Given Morgan's failure to make a specific motion for dismissal, we affirm the trial court's order revoking his probation.

Even if this court could reach the merits of Morgan's argument, it is without merit. In a hearing to revoke, the burden is upon the State to prove a violation of a condition of the suspended sentence by a preponderance of the evidence; on appellate review, the trial court's findings are upheld unless they are clearly against a preponderance of the evidence. *Lemons v. State*, 310 Ark. 381, 836 S.W.2d 861 (1992); *Russell v. State*, 25 Ark. App. 181, 753 S.W.2d 298 (1988). Since a determination of the preponderance of the evidence turns on questions of credibility and weight to be given testimony, this court defers to the trial court's superior position. *Lemons, supra.*

The 1996 order states that, "the defendant shall submit to random drug testing." The order also provided that Morgan "shall not commit an offense punishable by imprisonment during the period of probation." Morgan asserts that he complied with the explicit conditions of the order as he did submit to random drug tests. Though Morgan tested positive for marijuana on May 25, 1999, and on June 23, 1999, and signed a confession that he used marijuana on June 23, 1999, he asserts that he was only ordered to submit to the tests, not to test negative. This argument is without merit. Morgan admitted using marijuana, in addition to his positive drug tests, clearly constituting evidence that he possessed marijuana, a controlled substance. *See Davis v. State*, 33 Ark. App. 198, 804 S.W.2d 373 (1991) (holding that a statement amounts to confession only if there is admission of guilt as to commission of criminal acts). The possession of a controlled substance is an offense punishable by imprisonment. *See* Ark. Code Ann. § 5-64-401(c) (Repl. 1997)

(providing that the punishment for a first offense for possession of a controlled substance is a Class A misdemeanor). *See also Powell v. State*, 33 Ark. App. 1 (1990) (finding that guilt of a Class A misdemeanor constitutes a violation of a probation condition of "refraining from violating any law which is punishable by imprisonment"). Thus, the trial court's revocation of Morgan's probation is supported by a preponderance of the evidence.

Affirmed.

PITTMAN and BAKER, JJ., agree.

James E. ELAM *v.*
FIRST UNUM LIFE INSURANCE COMPANY,

CA 00-316 37 S.W.3d 679

Court of Appeals of Arkansas
Division III
Dissenting opinion delivered February 21, 2001

SAM BIRD, Judge, dissenting. In *Elam v. First Unum Life Ins. Co.*, 72 Ark. App. 54, 32 S.W.3d 486 (2000), a three-judge panel of this court reversed the trial court's grant of summary judgment in favor of First Unum Life Insurance Company upon the trial court's finding that the term "mental illness," as contained in a coverage limitation provision of a long-term-disability insurance policy, was not ambiguous. In its opinion, this court concluded that the trial court should not have granted summary judgment because the term "mental illness" is ambiguous, and because it is a fact issue, not a question of law, whether Mr. Elam's bipolar affective disorder is a mental illness within the meaning of First Unum's policy. I would grant First Unum's petition for rehearing in this case and affirm the trial court because I believe that, as applied to the facts of this case, the term "mental illness" is not ambiguous; that the trial court was not erroneous in finding that no ambiguity

existed; and that appellant's bipolar affective disorder is a mental illness within the meaning of the policy.

There was no dispute between the parties that during the period of time applicable to the policy, Elam suffered from bipolar affective disorder. Nor was there any dispute that Elam was a psychiatric patient during that time. Doctors Bradley C. Diner and Joe T. Backus, the two psychiatrists who testified by deposition in support of Elam's claim, agreed that bipolar affective disorder is a mental illness, notwithstanding the currently evolving theory of researchers that the cause of the disorder may be biologically based. Although Dr. Diner expressed his opinion in more certain terms ("[i]t is my professional belief that all mood disorders have a biological basis") than did Dr. Backus ("[t]he present research believes that they have a mixture of biochemistry and life experience and how someone interacts with that experience"), both doctors agreed that bipolar disorder is classified as a mental illness, that there are no specific biological diagnostic markers for detecting bipolar affective disorder or any other mental illness, and that the only diagnostic technique for the detection of bipolar affective disorder and other mental illnesses is the observation of overt behavior, clinical presentation, and history.

The term "mental illness" in First Unum's policy is not rendered ambiguous merely because there may be disagreement among researchers in the mental health community whether, or to what extent, an insured's bipolar disorder may be caused by biological abnormalities. A mental illness that may be caused, in whole or in part, by an underlying biological condition is no less a mental illness than one that may be caused by the patient's reactions to life's experiences. To say that the term "mental illness" is ambiguous under these circumstances, and to require insurance policies to specifically define every theory of causation of every mental illness for which coverage is intended to be limited under the policy, would require that insurers predict in advance what theory the mental health community will next conclude is the cause of each mental illness.

According to Dr. Backus, different kinds of mental illness may have different, non-biological causes. For example, he discussed certain personality disorders, recognized as mental illnesses, as follows:

> [They] are thought to be the product of the interaction of a very young child, probably an age of one to three, maybe four years old, and interaction with the mother and father. Most theories now feel like the relationship with the mother is very, very important in the description of personality disorders.

Would the insurance policy, in order to avoid the pitfall of ambiguity in its limitation on coverage for mental illnesses, be required to specify every mental illness to which it is intended to apply and then define each such illness according to the different and evolving theories of causation within the mental health community? Would a policy that was issued containing a specific limitation of coverage for bipolar affective disorder, whose cause was believed when the policy was issued to be biologically based, become ambiguous when a new, previously unheard of, non-biologically based theory of causation of bipolar disorder became popular in the mental health community?

While the majority opinion engages in a theoretical discussion about how there are some physical conditions (*i.e.*, brain tumors) that may manifest themselves by symptoms normally associated with mental illness, and about there being some mental conditions (*i.e.*, stress and depression) that may manifest themselves as stomach disorders or headaches, I fail to understand what these observations have to do with the case at bar. Here, the psychiatric experts agree that Elam suffers from bipolar affective disorder, they agree that all the symptoms he exhibits support their diagnosis, and they agree that bipolar affective disorder is a mental illness. This is the information the trial judge had to consider in determining whether "mental illness" is ambiguous as applied to this case under First Unum's policy. I do not find the trial court's decision to be erroneous. In fact, I do not see how he could have reached any other conclusion.

For these reasons, I respectfully dissent.

[redacted]