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Mark Eric JORDEN *v.* ARKANSAS DEPARTMENT of HUMAN SERVICES

CA 00-819 38 S.W.3d 914

Court of Appeals of Arkansas
Division IV
Opinion delivered February 28, 2001

Floyd J. Taylor, Jr., for appellant.

Kathy L. Hall, for appellee.

Sharon M. Fortenberry, attorney ad litem for minor children.

JOHN F. STROUD, JR., Chief Judge. On October 25, 1999, appellee, Arkansas Department of Human Services, filed a petition for emergency custody of three children, Paris, Mark, and Jasmine Harding. The petition was prompted by a report from the Child Abuse Hotline, alleging that the five-year-old child, Paris Harding, "had open wounds and bruises on both sides of his buttocks [and] the open wounds stained his underpants and were stuck to his skin." The report also alleged that the child had stated that his father had hit him with a stick. Although no order of paternity has been entered, it appears to be undisputed that appellant, Mark Jorden, is the children's natural father. The mother, Celestine Harding, verified by affidavit that he was the biological father and that he had sole physical custody of the children. The children were living with him at the time the petition was filed, and he was identified as their putative father in the petition. Appellant was notified of the dependent-neglect proceedings and appeared with his attorney at the hearing; however, he was not allowed to participate. The trial court determined "that although Mark Eric Jorden is the putative father of the juveniles and had physical custody of the juveniles, he was not a legal custodian or a legal guardian of the juveniles [and the] Court is therefore satisfied that Mark Eric Jorden, as a putative father of the juveniles, lacks standing to contest the dependency/neglect proceeding." Following the hearing, the trial court concluded that the children were dependent-neglected and that they should remain in DHS custody. We reverse and remand.

For his first point of appeal, appellant contends that the trial court erred as a matter of law in denying him standing. Appellee acknowledges error in this regard, and we agree. Appellant focuses much of his argument in his brief on his position that he satisfied the statutory definition of a custodian, and thereby achieved standing. While we do not necessarily disagree with his position, we think his standing in the case is clearly satisfied by his status as the putative father, which was at all times acknowledged by the trial court and the parties.

Arkansas Code Annotated section 9-27-311 (Supp. 1999), delineates the necessary contents of a petition filed pursuant to the provisions of the Juvenile Code:

> (a) The petition shall set forth the following:
>
> . . . .
>
> (6) In a dependency-neglect proceeding, the name and address of a putative parent, if any.
>
> . . . .
>
> (c) All persons named in subdivisions (a)(1) - (3) and (6) of this section shall be made defendants and served as required by this subchapter, except that all actions filed pursuant to § 9-27-310(b)(4)(D) shall be required to name as defendants only the mother, the putative father, and the presumed legal father, if any.

"Putative father" is defined by the Code as "any man not deemed or adjudicated under the laws of the jurisdiction of the United States to be the biological father of a juvenile who claims or is alleged to be the biological father of the juvenile." Ark. Code Ann. § 9-27-303(34) (Supp. 1999). Both appellant and the children's biological mother alleged that appellant was the biological father, so he clearly fits within this definition. As a "putative father," appellant was made a defendant in this action pursuant to subsection (c) above. He clearly had standing, and the trial court erred in finding otherwise. Moreover, we cannot presume that the results of any of the issues will be the same once appellant is allowed to participate in the proceedings on remand. Therefore, our conclusion that the trial court erred in finding that appellant had no standing is determinative of all the issues raised on appeal, requiring that we reverse and remand on all of them.

Consequently, it is not necessary to address the remaining issues raised by appellant except to the extent that such issues are likely to arise in the retrial of this case. The only issue that we anticipate is likely to arise again involves appellant's objection to hearsay testimony by the attorney *ad litem* in the case. With respect to that issue we simply remind the trial court that "[u]nless otherwise indicated, the Arkansas Rules of Evidence shall apply" to juvenile proceedings. Ark. Code Ann. § 9-27-325(e) (Supp. 1999).

Reversed and remanded.

BIRD and VAUGHT, JJ., agree.

Lindsey Jerome SWANNER *v.* STATE of Arkansas

CA 00-973 37 S.W.3d 697

Court of Appeals of Arkansas
Division III
Opinion delivered February 28, 2001

Randy Rainwater, for appellant.

Mark Pryor, Att'y Gen., by: *Lauren Elizabeth Heil*, Ass't Att'y Gen., for appellee.

JOSEPHINE LINKER HART, Judge. Appellant, Lindsey Jerome Swanner, was adjudicated a delinquent for committing two counts of second-degree criminal mischief, one a Class D felony and the other a Class B misdemeanor. *See* Ark. Code Ann. § 5-38-204 (Repl. 1997). At the delinquency adjudication hearing, the State submitted testimony from appellant's accomplices implicating him in the turning off of the main power breaker at the Polk County Health Office, which caused the spoilage of $10,145.85 worth of immunization vaccines, and in the spray painting of an exterior portion of the building.

Citing the accomplice-corroboration rule, Ark. Code Ann. § 16-89-111(e)(1) (1987), which provides that "[a] conviction

cannot be had in any case of felony upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense," appellant argued below in his motion for a directed verdict and argues on appeal that he should not have been adjudicated a delinquent because there was insufficient evidence to corroborate the testimony of his accomplices. As noted by the State, however, the Arkansas Supreme Court has recently held that the accomplice-corroboration rule does not apply to juvenile proceedings. *See Munhall v. State*, 337 Ark. 41, 986 S.W.2d 863 (1999). Given this holding, we must conclude that the trial court properly denied appellant's motion for a directed verdict and affirm appellant's delinquency adjudication. While the court below concluded that there was adequate corroboration of the testimony of the accomplices and denied appellant's motion for a directed verdict, we may uphold the court's ruling if it was correct for any reason. *See Warren v. State*, 314 Ark. 192, 862 S.W.2d 222 (1993).

Affirmed.

JENNINGS and CRABTREE, JJ., agree.

Joyce BOND *v.* LAVACA SCHOOL DISTRICT

CA 00-236 38 S.W.3d 923

Court of Appeals of Arkansas
Division I
Opinion delivered February 28, 2001
[Petition for rehearing denied April 4, 2001.]

[redacted]

Mitchell, Blackstock, Barnes, Wagoner & Ivers, by: *Jack Wagoner III*, for appellant.

Thompson & Llewellyn, P.A., by: *James M. Llewellyn, Jr.*, for appellee.

WENDELL L. GRIFFEN, Judge. Joyce Bond appeals from the order of summary judgment entered in favor of her employer, appellee Lavaca School District. We hold that the statute of limitations under the Fair Teacher Dismissal Act does not bar appellant's claim because the case does not involve dismissal or nonrenewal of a contract. We also hold that the trial court erred as a matter of law in finding that the Arkansas statute mandating proportional pay for additional days worked, Arkansas Code Annotated section 6-17-807 (Repl. 1999), does not apply to appellant's teaching contract. We further hold that the trial court erred in finding that the school district's supplemental salary schedule complied with Arkansas Code Annotated section 6-17-204(b) (Repl. 1999), and that appellant was not entitled to compensation for duties performed in addition to her certified teaching assignments. Finally, we hold that a genuine issue of material fact remains regarding how many additional days appellant worked under each contract involved in this case; thus, a genuine issue of fact remains with respect to how much compensation appellant is entitled. Accordingly, we reverse and remand for trial.

Appellant is employed by appellee in two capacities. She teaches in certified areas as defined by the school's administration. She also serves as appellee's Chapter One Coordinator, an administrative position involving eighteen different major duties, but the primary function is to "insure adherence to and compliance of the regulations and guidelines set by the Federal and State government" for the Chapter One program.

Appellant's teaching contract runs from July 1 through June 30, states that the grade or subject to be taught is "Chapter I Lab," requires her to teach in certified areas as assigned by administration and any other reasonable and relevant duties as assigned by the

principal, indicates that her salary will be paid in twelve installments, and provides that the length of her term of employment is 205 days. The salary schedule attached to her annual contract states that "[e]xtended contracts will result in an increase of .005 per day for each day beyond one hundred [and] eighty five days." The salary schedule also indicates that certain duties performed by certified personnel will be compensated at a specified rate. However, the salary schedule does not include a special rate of compensation for the Chapter One Coordinator position.

On June 22, 1998, appellant filed a complaint in Sebastian County Circuit Court, alleging that for the school years 1993-94, 1994-95, 1995-95, 1996-97, and 1997-98, appellee failed to pay her as required under Arkansas Code Annotated sections 6-17-807 and 6-17-204(b)(2) (Repl. 1999). Appellant subsequently amended her complaint to include the years 1998-99 and any time through trial. Specifically, appellant alleged that the Chapter One Coordinator position requires her to work the equivalent of twenty additional days beyond the 185-day regular school year, but appellee did not pay her proportionately for additional days worked based on her daily rate for the regular school year as required under section 6-17-807. She also alleged that appellee violated section 6-17-204(b) by failing to include the Chapter One Coordinator position on its salary schedule and by failing to pay her for additional duties performed.

Appellant and appellee filed competing motions for summary judgment. Appellee asserted that appellant's action was barred by the Fair Teacher Dismissal Act under Arkansas Code Annotated sections 6-17-1506 and -1510 (Supp. 1999). Appellee also argued that section 6-17-807 only applied when additional days are added to a teacher's contract from one year to the next, which was not the case here; it maintained that it complied with section 6-17-204(b)(2); and it asserted that appellant waived any complaints she had under her contract when she renewed her contract each year without complaint. In her motion for summary judgment, appellant raised the same arguments as alleged in her complaint, specifically disputed appellee's waiver argument, and denied that the statute of limitations found in the Fair Teacher's Dismissal Act precluded her complaint because this case did not involve nonrenewal of a contract or dismissal.

The trial court found that appellee had not violated the above statutes because the salary schedule provided for an additional increment for days worked beyond the regular school year, and the statutes did not require appellee to provide an added increment for

the Chapter One Coordinator position because it was not a certified position. The court further found section 6-17-807 did apply to any contract for a single year in which a teacher is required to teach more than 185 days. In addition, the court found that appellant's contract required her to provide services as a Chapter One Coordinator after the end of the regular school year. However, the court also found that she was not required to *teach* in excess of the days in a standard school year.[1] This appeal arises from the trial court's grant of summary judgment in favor of appellee.

Under Arkansas Rule of Civil Procedure 56, summary judgment is properly granted only where the pleadings, depositions, and answers to interrogatories, together with the affidavits, show there is there is no genuine issue as to any material fact, so that the moving party is entitled to judgment as a matter of law. *See Dickson v. Delhi Seed Co.*, 26 Ark. App. 83, 760 S.W.2d 382 (1988). Once the moving party makes a *prima facie* showing of entitlement to summary judgment, the party opposing summary judgment must meet proof with proof by demonstrating that a genuine issue of material fact remains unresolved. *See Pugh v. Griggs*, 327 Ark. 577, 940 S.W.2d 445 (1997). This requires a nonmoving party in its response to set forth specific facts showing there is a genuine issue for trial. *See* Ark. R. Civ. P. 56(e). When reviewing the grant of a motion for summary judgment, we determine whether the evidence presented by the moving party left any material questions of fact unanswered. *See Keller v. Safeco Ins. Co. of America*, 317 Ark. 308, 877 S.W.2d 90 (1994). We view the evidence in the light most favorable to the nonmoving party, and resolve any doubts or inferences against the moving party. *See Pyle v. Robinson*, 313 Ark. 692, 858 S.W.2d 662 (1993).

We note at the outset appellee's argument that appellant's claim is barred by the seventy-five-day statute of limitations under the Arkansas Fair Teacher Dismissal Act ("FTDA"). The argument is without merit because the FTDA, by its express terms, governs termination or nonrenewal of teacher contracts. *See* Ark. Code Ann. §§ 6-17-1506 & 6-17-1510 (Repl. 1999). Appellee would have us continue the Act as applicable to *any* grievance filed by a nonprobationary teacher against the school district. The statute is simply not that broad. Rather, the FTDA provides that an appeal to the circuit court is the exclusive remedy for any nonprobationary

[1] The trial judge made no express finding with regard to appellee's waiver argument. However, since the trial judge examined the merits of appellant's argument, we infer that he found she did not waive her cause of action.

teacher *who is terminated or whose contract is not renewed.* Appellee does not and cannot in good faith argue that appellant's contract was not renewed or that she was terminated. Therefore, the statute of limitations under the FTDA does not bar her claim.

Compensation for Additional Days Worked

The first issue is whether the trial court erred in ruling as a matter of law that appellant's contract did not violate Arkansas Code Annotated section 6-17-807, which governs teachers' compensation for days worked in addition to the regular school year. This statute provides:

> If additional days are added to a teacher's contract or if the teacher is required to work more days than provided for under the teacher's contract, then the teacher's pay under the contract shall be increased proportionately so that the teacher will receive pay for each day added to the contract or each additional day the teacher is required to work at no less than the daily rate paid to the teacher under the teacher's contract.

Appellant argues that the statute mandates that if additional days are added to a teacher's contract, then the teacher is entitled to be paid the same for each extra day worked as she was paid for each day worked during the standard portion of the contract. She asserts that because she works the equivalent of twenty extra days in her capacity as the Chapter One Coordinator, she is entitled to compensation for those extra days based on her daily rate of pay instead of the lower rate specified under her contract. Thus, she asserts that her contract violates the statute because she works additional days beyond the normal school year; the provision in the supplemental salary schedule that calculates her daily rate of pay using a multiplier of .005 times her base salary for each additional day worked past the 185th day compensates her at less than her daily rate of pay. That is, for the first 185 days of her contract, her daily rate is calculated by dividing her base salary by 185. However, using the .005 multiplier, she will be paid less for each additional day worked past the 185th day than she earned during the first 185 days of her contract. Thus, she maintains that she is being paid less than her daily rate, which violates the express terms of section 6-17-807.[2]

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[2] Appellant's salary increased with each contract. She received a salary of $37,345 for 1997-1998. To demonstrate the application of the two methods of computation, assume a base salary of $30,000. At this base salary level, appellant's daily rate of pay would be $162 per

In finding that appellant's contract did not violate section 6-17-807, the trial court stated:

> I am convinced that 6-17-807 is designed to make sure teachers are treated fairly when they are required to do additional work over and above the days they are contracted to work. I think that means the 185 days that the State mandates that they work. I think it means that if they are called upon to teach, to do the job they are contracted for to do, then the school district has to pay them proportionally for that work . . . The school district offered to pay her a certain amount of money for [the Chapter One Coordinator position] and she accepted the offer. I do not think that [section 6-17-]807 has been violated.

There are no cases interpreting this statute. The basic rule of statutory construction is to give effect to the intent of the legislature, and when a statute is clear, it is given its plain meaning; the legislative intent is gathered from the plain meaning of the language used. *See Hercules, Inc. v. Pledger*, 319 Ark. 702, 894 S.W.2d 576 (1995).

The emergency clause in section 4 of Act 712 of 1989, which enacted section 6-17-807, states in part, " the school districts are . . . increasing teacher contract days from one school year to the next with no guarantee to the teacher of a daily pro rata increase in pay based on the salary schedule . . . for the next year." Although this statute was passed in response to the school districts' practice of adding days to the teacher's contracts from one year to the next without a proportional increase in pay, the statute does not restrict its requirement to pay teachers according to their daily rate only if additional days added to a teacher's contract *from one school year to the next*. Nor does the statute confine itself to the act of teaching as apparently contemplated by the trial court. That is, the purpose of the statute may be fairly construed to ensure that teachers are fairly compensated for additional days worked beyond the standard school year. Work, whether teaching or something else, is to be compensated at the same daily rate whether performed within the standard school year or beyond it.

Therefore, we hold that the trial court erred as a matter of law when it held that appellant's contract did not violate section

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day (30,000/185). However, if the multiplier as provided in the contract were used, she would only receive $150 per day for each day past the 185th day (30,000 x .005), for a difference in pay of $12 per day.

6-17-807. Appellant's contract was first extended from 185 days to 205 days in 1985 or 1986. However, she sues only for the years 1994—present. Clearly, then, this is not a case whereby the school board increased the number of working days from one contract to the next, nor is appellant required to work more days than is required under her contract. However, the statute applies because the contracts plainly obligate appellant to work additional days beyond the standard school year and paid less than her daily rate of pay for those additional days. We also hold that the school's supplemental salary schedule, which is incorporated into appellant's contract and which compensates appellant for extra days at a rate less than her daily rate of pay, violates section 6-17-807. *See Helena-West Helena School Dist. # 2 v. Randall,* 32 Ark. App. 50, 796 S.W.2d 586 (1990) (affirming bench finding that coaches' 203-day contract requiring them to report to work before the school year started was an extended-term contract requiring a daily rate of pay in addition to compensation under supplemental salary schedule, where extended-term contract provision provided for extra compensation at their daily rate of pay).[3]

We also hold that summary judgment in favor of appellee was inappropriate because there remains a question of fact as to whether or how many days appellant actually worked past the 185th day of the school year for each year in which she brings suit. She testified in her deposition that her position as Chapter One Coordinator requires her to work until 4:30 or 5:00 p.m. every day while school is in session, whereas other teachers stay only until 3:20 or 3:25 p.m. Appellant further testified that "at" and "pretty much" after the end of the school year, she writes a Chapter One annual needs report. She also testified that she collects information for the report

[3] Appellee cites two opinions by the Attorney General for support. However, these opinions do not govern in this case. In the first opinion, the Attorney General opined that salaries for supplemental summer instruction or optional summer school programs are to be negotiated rather than to be computed in accordance with section 6-17-807. *See* Op. Att'y Gen. # 90-39 (1990). The Attorney General found that the term "teacher's contract" was ambiguous, and examined the emergency clause as noted above to conclude that the legislature intended the statute to apply *only* to contracts implemented during the regular school year. *See id.* We disagree that the statute is so limited in its application. Appellee also cites an opinion in which the Attorney General stated that where additional days are added to a teacher's contract from one year to the next, but the hours per day are shortened so that the number of hours worked remains the same, the school district is nonetheless required to increase the teacher's pay proportionately based on the teacher's daily rate of pay, and not on an per-hour basis. *See* Op. Att'y Gen. # 96-179 (1996). Rather than strengthen appellee's argument, this opinion simply offers support for the conclusion that teacher's are to compensated under Arkansas law on a daily basis, rather than an hourly basis.

during the year, but cannot complete the report until after the end of the school year.

The trial court determined that under this statute, a teacher is entitled to be paid for days worked in excess of the days required to be worked by the "state board's regulation for accreditation." Currently, the standard school year consists of 185 days, and appellee's salary schedule defined an extended contract as a contract exceeding 185 days. The trial court found that appellant was not required to teach beyond the number of days established by the state board's regulation; that is, that the trial court initially found that she performed her duties throughout the entire year, but is not required to stay past the 185th day. However, in response to appellant's counsel's statement that he believed the court was assuming that appellant performed all of the Chapter One work during the extra twenty days, the trial judge stated:

> No. I think she does it throughout the whole year. But I think that when school is over on whatever date it is over, she closes and leaves with all the other teachers. *That is what I think happens, but I don't know.* But I think she puts in twenty extra days of work over and above what the other teachers put in who are just teaching from 8:30 until 3:30.

(Emphasis added.)

Appellant's testimony that she worked longer hours during the school year and completed the report at the end of the school year appears uncontradicted. The fact that appellant works *longer hours* during the year than other teachers is not dispositive with regard to whether she is entitled to compensation for working *extra days*. What is critical is that appellee, as movant, did not present evidence to refute her testimony that she worked *extra days* after the regular school year ended. On the other hand, appellant's testimony did not establish that she actually worked the *entire* twenty additional days under each of her contracts.

[redacted] However, in viewing this evidence in favor of appellant, as the nonmoving party, we hold that her testimony leaves an unresolved issue of fact as to whether she actually worked the entire extra twenty days under each of her contracts. Therefore, we reverse and remand for trial to determine what compensation, if any, appellant is entitled, based upon her daily rate of pay as defined under section 6-17-807 instead of the daily rate of pay as specified under her teaching contract.

Compensation for Extra Duties

We further hold that the trial court erred in finding that appellee's supplemental salary schedule complies with Arkansas law. The applicable statute provides that "A school district shall adopt, in accordance with this subchapter, a supplement to the salary schedule for those certified staff employed longer than the period covered by the salary schedule and for duties in addition to certified employees' regular teachers assignments." Ark. Code Ann. § 6-17-204(c)(2). Appellant argues that appellee violated this statute because its supplemental salary schedule does not provide special remuneration for all of the additional duties performed by certified personnel, and specifically does not include special remuneration for the Chapter One Coordinator position.

The salary schedule defines the base salary for a teacher with a Masters or Specialist Degree and states that the schedule is based on a 185-day contract year. The schedule further states that extended contracts will "result in an increase of .005 per day for each day beyond" 185 days. The schedule specifically lists the compensation rates for the following positions: superintendent, high school principal, elementary principal, head coach, counselor, band director, assistant coach, athletic director, annual sponsor, Gifted and Talented coordinator, cheerleader sponsor, specialist degree, sound system, quiz bowl, dean of students, and assistant band director.

The trial court found appellee did not violate this statute by failing to include the Chapter One Coordinator position because that position is an administrative position that does not require certified personnel. The court seemed to interpret this statute to require the school district to list on its supplemental salary schedule only those positions that must be filled by certified personnel. However, some of the other duties on the list, such as cheerleader sponsor and sound system operator, can be performed by noncertified personnel. Moreover, the statute, by its plain terms, requires remuneration for *certified staff* who work 1) longer than the time frame covered by the salary schedule or 2) who perform duties *in addition to* their assignments as certified teachers.

The statute does not require that certified staff work in positions requiring certified personnel in order to receive remuneration under the supplemental salary schedule for extra work performed. The trial court seemed to find the job classification was dispositive, rather than the certified status of the person holding the additional position or performing the additional duties. However, a

plain reading of this statute compels us to conclude that it guarantees remuneration to *certified personnel* for those job duties performed *in addition to* their duties as a certified teacher, regardless whether those duties are required to be performed by certified personnel. It is not disputed that appellant is a certified employee and that her duties as Chapter One Coordinator are performed in addition to her regular teaching assignments.

Therefore, we hold that the trial court erred as a matter of law when it ruled that the school district's salary schedule complied with the requirements of section 6-17-204. The statute does not authorize the school district to select which positions it lists on the salary schedule based on whether the additional position or duties require certified personnel. By its plain terms, the statute requires the school district to adopt a salary schedule for those certified personnel who work more than 185 days *or* who perform duties in addition to their certified teaching assignments.

The statute is written in the disjunctive, but appellant's contractual duties satisfy both criteria: she is required to work for longer than 185 days *and* to perform duties in addition to her certified teaching assignments. Furthermore, we have previously held that the provisions for payment for additional days and for extra duties are not mutually exclusive. That is, a teacher may receive compensation under both provisions. *See Helena-West Helena School Dist. # 2, supra.* Moreover, unlike the issue of whether appellant actually worked the extra twenty days under each contract, there is no dispute that appellant performed the extra duties required by the Chapter One Coordinator position. Therefore, appellant on remand will not be required to prove that she performed the extra duties under the supplemental salary schedule.[4]

Reversed and remanded.

ROBBINS and NEAL, JJ., agree.

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[4] We recognize that our remand presents to the trial court the issue of the extent to which appellant will be compensated for performing these extra duties, since the school district has not provided for compensation for this position under the supplemental salary schedule.

REGIONS BANK & TRUST, N.A., Administrator of the Estate of Victoria Ann Elder *v.* STONE COUNTY SKILLED NURSING FACILITY, INC.

CA 00-147 38 S.W.3d 916

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered February 28, 2001
[Petition for rehearing denied April 4, 2001.]

McMath & Associates, by: *Sandy S. McMath*, for appellant.

Anderson, Murphy & Hopkins, L.L.P., by: *David A. Littleton*, for appellee.

ANDREE LAYTON ROAF, Judge. Regions Bank & Trust, N.A., serving as administrator of the estate of Victoria Ann Elder ("Elder"), appeals the grant of summary judgment in favor of Stone County Skilled Nursing Facility, Inc ("Stone County"). Elder argues on appeal that the circuit court erred in finding Stone County was entitled to summary judgment as a matter of law because it was not liable under a theory of either *respondeat superior* or negligent supervision for the actions of its employee. Because genuine issues of fact exist, we reverse.

A review of the evidence, in a light most advantageous to appellant, reveals the following. On Saturday, November 3, 1996, between the hours of 8 p.m. and 9 p.m., William McConnaughey, an employee of Stone County, sexually assaulted Victoria Elder, a quadriplegic accident victim, by placing his hand and fingers on and inside her genitalia while he was assigned to clean and change her.[1] McConnaughey's actions were observed by Marlie O'Dell Foster, another employee, who was assigned to work the three to eleven shift with McConnaughey. At the time of the incident, Foster had been working on the floor for approximately two weeks. Foster discussed the incident with a senior certified nurse, who told her to "wait to see if it happened again." Foster testified in her deposition that she felt uncomfortable with this response, and reported McConnaughey's behavior to Becky Diaz, the charge nurse. Diaz attempted to call Kathy Baldwin, the director of nursing and Vickie Sandage, the nurse administrator. Although she tried repeatedly, she was unable to contact either of them. Diaz did not contact the police, or call the Office of Long Term Care. Instead, Diaz came in Monday morning and reported the incident to Sandage, who reported the incident to Eva Appelgate, vice president of operations for Stone County. Appelgate instructed Sandage to get statements from everyone. Sandage did so, and also contacted Elder's father, Elder's physician, the Office of Long Term Care, and the police. McConnaughey was suspended, pending an investigation.

On March 12, 1998, Elder filed suit against Stone County, alleging that it was vicariously liable for McConnaughey's behavior, and liable for negligently hiring and supervising McConnaughey.

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[1] Victoria Elder died on July 4, 1998, and appellant was appointed as administrator of her estate.

Stone County denied all of the allegations, and subsequently filed a motion for summary judgment with supporting affidavits, asserting that it was entitled to judgment as a matter of law. A hearing was held on September 7, 1999. Following the hearing, the circuit court granted Stone County's motion. In its order, the court relied on *Porter v. Harshfield*, 329 Ark. 130, 948 S.W.2d 83 (1987), as setting forth the test to determine when *respondeat superior* liability attaches. The court found that Stone County's affidavits established that it had no knowledge or indication that McConnaughey would act in the manner he did, and that McConnaughey's actions were outside his scope of duties as a certified nurse's assistant. The court also found that Stone County checked McConnaughey's personal references and the national abuse registry, and that Elder failed to prove that a further criminal background check would have indicated McConnaughey's propensity to commit sexual assault. Therefore, the court determined that Elder failed to meet proof with proof on the issue of *respondeat superior*. The court also found that there was no genuine issue of material fact that appellee knew, or in the exercise of ordinary care, should have known that McConnaughey's conduct would expose Elder to an unreasonable risk of harm for sexual assault. Again, the court noted that affidavits provided by Stone County established that it had no knowledge or information of any history of similar sexual misconduct by McConnaughey. Lastly, the court found that Stone County did not engage in willful or wanton behavior to substantiate a claim for punitive damages, and that Elder's claim for punitive damages was insufficient, as a matter of law.

Rule 56 of the Arkansas Rules of Civil Procedure governs motions for summary judgment. Basically, Rule 56 dictates that the moving party bears the burden to prove, based on the pleadings, discovery responses, admissions, and any submitted affidavits, that no genuine issues of material fact exist for a trier of fact to resolve. Ark. R. Civ. P. 56. It is not necessary that a moving party file an affidavit in support of a motion for summary judgment, and affidavits filed in support of the motion are construed against the moving party. *Guthrie v. Kemp,* 303 Ark. 74, 78, 793 S.W.2d 782 (1990).

[3-5] The purpose of a summary judgment hearing is not to try the issues, but rather to determine if there are any issues to try. *Muddiman v. Wall*, 33 Ark. App. 175, 803 S.W.2d 945 (1991). The trial court must consider all proof in favor of the non-moving party. *Knowlton v. Ward*, 318 Ark. 867, 889 S.W.2d 721 (1994). Once the moving party proves there are no genuine issues, the burden shifts

to the non-moving party to set out specific facts that demonstrate there are genuine issues of trial. *Id.* On summary judgment appeal, we limit our review to the pleadings, affidavits, and other supporting documents filed by the parties in support of their arguments. *Earp v. Benton Fire Dep't,* 52 Ark. App. 66, 914 S.W.2d 781 (1996). We review all evidence in the light most favorable to the non-moving party, and only reverse the trial court when we determine that a material question of fact remains. *Keller v. Safeco Ins. Co. of Am.,* 317 Ark. 308, 877 S.W.2d 90. We need only decide if the grant of summary judgment was appropriate, considering whether the evidentiary items presented by the moving party in support of the motion left a material question of fact not answered. *Inge v. Walker,* 70 Ark. App. 114, 15 S.W.3d 348 (2000).

When considering if an employer is liable for the acts of its employee, Arkansas follows the doctrine of *respondeat superior. Porter v. Harshfield,* 329 Ark. 130, 948 S.W.2d 83 (1997). This doctrine assigns liability to expected acts that are incidental to the employee's duties, or that benefit the employer. *Id.* at 136, 948 S.W.2d at 86. In other words, liability attaches when an employee commits a foreseeable act "within the scope of his employment at the time of the incident." *Id.* at 137, 948 S.W.2d at 86. The scope of the employment includes acts done with the "object and purpose of the enterprise," and not acts that are strictly personal. *Id.*

Furthermore, an employer may be liable for a battery committed by an employee while acting within the scope of employment. 6 AM. JUR. 2D *Assault & Battery* § 111 (1999). However, to be within the scope of employment, the conduct must 1) be of the kind the employee is employed to perform; 2) occur substantially within the authorized time and space limits; and 3) be actuated, at least in part, by a purpose to serve the master.

In this regard the trial court correctly relied upon *Porter v. Harshfield, supra,* in granting Stone County's motion for summary judgment on the theory of *respondeat superior.* In *Porter,* the supreme court concluded that a radiology technician was not acting within the scope of his employment when he attempted to perform a sex act upon a patient while he was conducting an ultrasound examination of the patient's abdomen. The facts of *Porter* are analogous to this case in all material respects. We agree with the trial court that *Porter* is dispositive on the issue of *respondeat superior* and affirm on this ground.

Elder also claimed that Stone County negligently supervised McConnaughey. To recover under a theory of negligent supervision, a plaintiff must show that an employer knew, or through the exercise of ordinary care should have known, that its employee's conduct would subject third parties to an unreasonable risk of harm. *Sparks Reg'l Med. Ctr. v. Smith*, 63 Ark. App. 131, 976 S.W.2d 396 (1998). Liability for negligent supervision differs from that of *respondeat superior*, because recovery for negligent supervision rests on the wrongful conduct of the employer, not the employee. *Id.* at 135, 976 S.W.2d at 396.

In the present case, the trial court found that Stone County presented affidavits of employees that established that it had no knowledge of information of any similar sexual misconduct by McConnaughey. While this information established a *prima facie* case for summary judgment entitlement, Elder met proof with proof that a genuine issue of material fact existed that Stone County negligently supervised McConnaughey, in the form of an affidavit by Pamela Taylor Smith, a health care consultant, whose practice focused on the care of the elderly and severely disabled persons. Smith's affidavit stated that Medicare and Medicaid require that Long Term Care facilities observe the work performance of nurse's aides, and that the facilities ensure that nurse's aides demonstrate competency in requisite skills. Smith noted that Stone County received numerous deficiencies in a March 1996 survey, including a failure to require aides to demonstrate skill competency, a failure to do aide background checks, and a cursory completion of orientation check-off lists. Smith observed that even though the March survey was done prior to Stone County's purchase of the home, most of the staff were the same, including the charge nurse and the director. Smith pointed to Ms. Appelgate's testimony that an LPN is required to supervise aides to make sure they learn all the necessary skills before they complete the course. Also the director of nursing stated that aides are "to complete the orientation check-off lists and sign." Smith noted that McConnaughey was not observed for a period of time by a charge nurse to document his skills, and that McConnaughey was left alone in a disabled patient's room with no supervision. Smith noted that McConnaughey was hired as a janitor, and then took a two-week course and test to become a nurse's aide. She stated that Appelgate testified that it was company policy to have male aides attend patients alone, even while still a student trainee. She also discussed management's delay in reporting the assault for more than twenty-two hours, despite a local rule of reporting within an hour; and the inability of the charge nurse to reach the director of nursing or the administrator to notify them of

the assault was indicative of general inattentiveness to proper nursing care and lack of personnel supervision.

In her affidavit, Smith opined that Stone County was negligent in permitting unaccompanied access to helpless female patients by male aides with little or no previous health care experience. She stated this policy was not in keeping with accepted nursing practice. Smith further opined that Stone County failed to supervise its aides properly, particularly those, such as McConnaughey, who had not been on the job long enough to establish a record of patient care and dependability. Smith referred to the following standard references in reviewing proper long-term care supervision procedures: Uphold and Graham, *Clinical Guidelines in Adult Health*; Lubkin, *Chronic Illness, Impact, and Intervention*; Hazard, *Principles of Geriatric Medicine and Gerontology*.

Elder has met proof with proof that a genuine issue of material fact remains with regard to this theory. Therefore, we reverse only the trial court's decision to grant summary judgment on the theory of negligent supervision.

Affirmed in part, reversed in part and remanded.

STROUD, C.J., JENNINGS, BIRD, JJ., agree.

GRIFFEN and PITTMAN, JJ., concurring in part; dissenting in part.

WENDELL L. GRIFFEN, Judge, concurring in part; dissenting in part. Although I agree with the majority to reverse and remand regarding negligent supervision, I respectfully dissent from the majority regarding the issue of *respondeat superior*.

When considering if an employer is liable for the acts of its employee, Arkansas follows the doctrine of *respondeat superior*. *See Porter v. Harshfield*, 329 Ark. 130, 948 S.W.2d 83 (1997). This doctrine assigns liability to expected acts that are incidental to the employee's duties, or that benefit the employer. *See id.* at 136, 948 S.W.2d at 86. In other words, liability attaches when an employee commits a foreseeable act "within the scope of his employment at the time of the incident." *See id.* at 137, 948 S.W.2d at 86. The scope of employment includes acts done with the "object and purpose of the enterprise," and not acts that are strictly personal. *See id.*, 948 S.W.2d at 86.

In *Porter*, the appellee's radiology technician unzipped the appellant's pants, examined around his testicles, and performed oral sex on him during the course of a gallbladder ultrasound. Although Porter urged the court to analyze his case using a common carrier, job-created power, or reasonably incidental theory of liability, the court declined to do so. Instead, it chose to follow the theory of master-servant liability, which has been followed in Arkansas since 1910. *See Porter, supra.* The court then held that the employer was not liable because the technician's act of performing a homosexual assault on a patient was purely personal and not foreseeable. *See Porter, supra.*

The facts in the instant case are readily distinguishable from the facts presented in *Porter.* Unlike the radiology technician in *Porter*, a substantial portion of McConnaughey's job as a certified nurses' aide ("CNA") in appellee's long term care facility involved providing custodial care to patients, including the assigned duty of regularly washing and cleansing the genital area of female patients. While it is plainly beyond the scope of employment for a radiology technician to touch a male's genital area with his mouth while performing an ultrasound procedure of the patient's gallbladder, it is certainly within the scope of employment for a certified nurse's aide — of any gender — to clean and wash a person's genitals with his hands while providing custodial care. The factual inquiry is not simply whether such touching of the patient's genital area is within the scope of employment, but whether, given the plain proof that certified nurses' aides are charged with doing so, McConnaughey's conduct was "strictly personal."

It is also important to note that in *Porter*, there was no evidence of a custodial relationship. Here it is not disputed that Ms. Elder was an immobile quadriplegic in the complete custody of the defendant. Also, the patient in *Porter* was only under the control of the clinic momentarily and even then, he remained alert and ambulatory. Here, Ms. Elder was unable to control even her basic movements and was totally dependent on appellee for personal hygiene. While the technician in *Porter* was an experienced worker who was personally known to the physician and had worked in health care without blemish for over ten years, McConnaughey was a new hire with no health care experience who had previously worked as a janitor and reportedly lived in his car.

In *Life & Cas. Ins. Co. v. Padgett*, 241 Ark. 353, 407 S.W.2d 728 (1966), our supreme court held that a master is liable for the intentional torts of a servant when the servant's conduct is not

unexpectable in light of the servant's duties. *Padgett* involved an insurance agent who assaulted and beat a customer with a heavy stick of firewood after attempting to collect insurance premiums. The court held that it was not unforeseeable for a dispute to arise within the scope of the insurance agent's employment, which included collecting insurance premiums from customers. Here, McConnaughey was a CNA. His primary responsibilities included providing intimate, personal care to immobile patients. Clearly, it is not unforeseeable that a CNA charged by his employer with cleansing the genitalia of patients may abuse that responsibility.

Our supreme court again examined *respondeat superior* in *Gordon v. Planters & Merchants Bankshares, Inc.*, 326 Ark. 1046, 935 S.W.2d 544 (1996). There, a bank official improperly charged-back a check against his former partner's account because the official thought he was entitled to half of the check that was made payable to the partnership. Although the bank argued that *respondeat superior* did not apply because the official acted for his own personal pecuniary interest, our supreme court disagreed and determined that the official used his position at the bank to further his own purpose and acted within the scope of his employment when he caused the charge-back. Because the official was carrying out the "object and purpose of the enterprise," the court held that *respondeat superior* applied. It further observed that the president of the bank demonstrated a "conscious indifference" to the employee's acts by refusing to intervene in the matter and instructing the customer to resolve the matter directly with the employee.

Similar to the rationale expressed in *Planters*, it is not dispositive that McConnaughey's act of sexually manipulating Elders with his fingers may have been for his own sexual gratification. Rather, the issue is whether McConnaughey used his position as a CNA to further his purpose so as to warrant a finding that he acted within the scope of his employment when he sexually assaulted Elders under the pretext of cleaning her. The nursing home's policy of allowing male certified nurses' aides to attend immobile female patients and the significant lapse of time between Foster reporting the incident and the nursing home's investigation also raise genuine issues of fact as to whether "conscious indifference" or ratification occurred.

In sum, a genuine issue of fact exists as to whether McConnaughey's actions were a foreseeable act incident to his duties as a certified nurse or if they were "strictly personal." Although the trial court concluded that the affidavits provided by appellee established

that McConnaughey's actions were not within the scope of his duties as a CNA, and that appellee had no knowledge or indication that McConnaughey would act in the manner that he did, appellant met proof with proof with an affidavit by Pamela Taylor Smith, a health care consultant, whose practice focused on the care of elderly and severely disabled persons. Smith noted that it was appellee's policy to have male aides attend patients alone even while the male aides were still student trainees, and that the appellee's practice of permitting unaccompanied access to helpless female patients by male aides with little or no previous health care experience was not in keeping with accepted nursing practice. In view of Smith's affidavit, a genuine issue of material fact arose concerning whether McConnaughey's actions were foreseeable.

It is certainly foreseeable that a person with such direct and intimate access to helpless patients might act improperly, even if well trained and supervised. It is also foreseeable that the improper conduct could involve sexual misconduct or abuse. Where an employer permits such access by poorly trained, unsupervised, and unmonitored staff *as a matter of practice and policy* contrary to accepted clinical norms, I see no reason why these facts should not be considered by a trier of fact in determining whether to impose liability under ordinary *respondeat superior* analysis. We should not reject that conclusion merely because the same or similar facts also create a genuine issue of material fact concerning negligent supervision.

The purpose of a summary judgment hearing is not to try the issues, but rather to determine if there are any issues to try. *See Muddiman v. Wall*, 33 Ark. App. 175, 803 S.W.2d 945 (1991). We need only decide if the grant of summary judgment was appropriate, considering whether the evidentiary items presented by the moving party in support of the motion left a material question of fact not answered. *See Inge v. Walker*, 70 Ark. App. 114, 15 S.W.3d 348 (2000). Appellant has met proof with proof that genuine issues of material fact remain as to *respondeat superior* and negligent supervision Therefore, I would reverse the trial court's decision to grant summary judgment on both theories.

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

Terry L. SEAMANS *v.* Pamela L. SEAMANS

CA 00-491 37 S.W.3d 693

Court of Appeals of Arkansas
Division II
Opinion delivered February 28, 2001

Gibson & Hasem, P.L.C., by: *C.C. Gibson, III*, for appellant.

No response.

ANDREE LAYTON ROAF, Judge. Terry L. Seamans appeals the portion of an order of the Drew County Chancery Court awarding attorney fees pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) to Terry's ex-wife, Pamela L. Seamans. On appeal, Terry argues that the chancellor erred in awarding fees without express statutory authorization and in setting the amount at $2,517 because it was "grossly excessive and unjust." We reverse and remand for further proceedings not inconsistent with this opinion.

In 1994, Terry and Pamela were divorced in Louisiana. The divorce was uncontested, and the parties agreed to joint custody of their minor daughter, Victoria. Under the joint custody plan that was appended to the decree, Pamela had physical custody of Victoria during the week, and Terry had physical custody on the weekends. The agreement also recited that "the parties may agree to additional visitation times, but said modification, if meant to be permanent in nature, shall be reduced to writing by the parties and recorded with the Court."

Shortly after the divorce, Terry and Pamela moved back to Arkansas, where they had grown up and both of their extended

families resided. Pamela entered college at the University of Central Arkansas and Victoria started school in Conway, where she completed kindergarten and first grade. In 1998, however, the parties verbally agreed that Victoria could attend school in Monticello, where Terry resided with his new wife. The school year went well, but Pamela decided that she would have Victoria attend school in Conway the next school year.

Terry discovered Pamela's plan and filed for emergency and permanent custody of Victoria in the Drew County Chancery Court at 8:00 a.m. on August 10, 1999. By 10:00 a.m. on the same date, the Drew County Chancery Court entered its Emergency Custody Order giving custody of Victoria to Terry. Terry, however, failed to register the Louisiana decree. On the same day, Pamela filed for custody in the Faulkner County Chancery Court, and she obtained her own emergency custody order for Victoria two days later. Pamela did register the Louisiana decree in Faulkner County Chancery Court. Pamela subsequently filed a motion to vacate the emergency custody order of the Drew County Chancery Court and also sought dismissal of the Drew County action. The Drew County Chancery Court set the matter for expedited hearing on August 19, 1999.

At the hearing, both Terry and Pamela testified about their agreement to allow Victoria to attend second grade in Monticello. Pamela stated that she understood the terms of the Louisiana decree to require any agreement to be reduced to writing if they intended to make it permanent, and because their agreement to have Victoria spend the 1998-1999 school year in Monticello was not in writing, it allowed her to revert back to the original visitation schedule when she decided that it would be in Victoria's best interest to return to school in Conway. Pamela admitted that she did not inform Terry about her plans and that Terry was upset when he discovered her intentions. Pamela claimed that she wanted to avoid a confrontation over the issue, but admitted that she did bring police to Terry's house in an effort to find Victoria and take her back. Terry confirmed that Pamela had not informed him of her intention to re-enroll Victoria in the Conway school system and that he was upset when he found out. He also stated that he believed that if Pamela picked up Victoria, she would not bring her back to attend school in Monticello.

At the close of the hearing, the chancellor found that Terry had "improperly retained the child after a visit or other temporary

relinquishment of physical custody" and declined to exercise jurisdiction over the custody dispute. He also found that jurisdiction should be vested in the Chancery Court of Faulkner County. The chancellor ultimately assessed $2,517 in attorney fees and costs against Terry, specifically reciting the UCCJEA as authority.

Terry first argues that the chancellor's award of fees and costs violated the general rule in Arkansas that, absent explicit statutory authority, each party must bear their own costs and fees. He contends that while attorney fees can be awarded pursuant to the UCCJEA, that legislation only relates to disputes between Arkansas courts and those of foreign jurisdictions, not disputes involving the courts of different counties within Arkansas, which is the situation in the instant case.

This court reviews a chancellor's application of substantive law under the clearly erroneous standard of review. *See Gray v. Gray*, 69 Ark. App. 277, 12 S.W.3d 648 (2000). In part, the UCCJEA governs the modification of child custody determinations made in foreign jurisdictions and registered in Arkansas. *See* Ark. Code Ann. § 9-19-305 (Supp. 1999). It also guides the determination by a court of whether or not it should assume jurisdiction over a petition to modify an existing child-custody determination made by a foreign jurisdiction. Relevant to the instant case, the UCCJEA states in pertinent part:

> (a) Except as otherwise provided in § 9-19-204 or by other law of this state, if a court of this state has jurisdiction under this chapter because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless:
>
> (1) the parents and all persons acting as parents have acquiesced in the exercise of jurisdiction;
>
> (2) a court of the state otherwise having jurisdiction under §§ 9-19-201 - 9-19-203 determines that this state is a more appropriate forum under § 9-19-207; or
>
> (3) no court of any other state would have jurisdiction under the criteria specified in §§ 9-19-201 — 9-19-203.
>
> (b) If a court of this state declines to exercise its jurisdiction pursuant to subsection (a) of this section, it may fashion an appropriate remedy to ensure the safety of the child and prevent a

repetition of the unjustifiable conduct, including staying the proceeding until a child-custody proceeding is commenced in a court having jurisdiction under §§ 9-19-201 - 9-19-203.

(c) If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction pursuant to subsection (a) of this section, it shall assess against the party seeking to invoke its jurisdiction necessary and reasonable expenses including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees are sought establishes that the assessment would be clearly inappropriate. The court may not assess fees, costs, or expenses against this state unless authorized by law other than this chapter.

Ark. Code Ann. § 9-19-208 (Supp. 1999).

The UCCJEA was enacted to replace the former chapter entitled the Uniform Child Custody Jurisdiction Act (UCCJA), which dated back to 1979. The preamble of the latter states in pertinent part, "The general purposes of the subchapter are to . . . avoid jurisdictional competition and conflicts with courts of other states in the matter of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being." Ark. Code Ann. § 9-13-201 (repealed 1999). *See also LeGuin v. Caswell,* 277 Ark. 20, 638 S.W.2d 674 (1982). This court has said that the UCCJA and the federal Parental Kidnaping Prevention Act (PKPA), found at 28 U.S.C. § 1738A (1981), govern state conflicts over child custody jurisdiction. *Gray v. Gray, supra.* The UCCJEA has revised the UCCJA in part to incorporate the home state preference of the PKPA and also to clarify the rules for original, modification, and enforcement jurisdiction. *See McCulley v. Bone,* 979 P.2d 779 (Or. App. 1999).

We can find no language within the UCCJEA statutory scheme that broadens its application to purely intrastate custody disputes or evidences such legislative intent. Consequently, we find that because the UCCJEA has no application to intrastate custody disputes, the chancellor lacked the authority to award Pamela attorney fees pursuant to this statute.

However, our courts have recognized the inherent power of a chancellor to award attorney fees in domestic relations proceedings. *See Schwarz v. Moody,* 55 Ark. App. 6, 928 S.W.2d 800 (1996); *Tortorich v. Tortorich,* 50 Ark. App. 114, 902 S.W.2d 247

(1995). The award of attorney fees is within the sound discretion of the chancellor in a child custody case even though an aftermath of a divorce. *Moore v. Smith*, 255 Ark. 249, 499 S.W.2d 634 (1973); *Hydrick v. Hydrick*, 224 Ark. 712, 275 S.W.2d 878 (1955). Although the chancellor in this instance lacked the authority to award attorney fees pursuant to the UCCJEA, which provides that where a person has engaged in unjustifiable conduct, the chancellor "*shall* assess against the party seeking to invoke its jurisdiction necessary and reasonable expenses including costs, communication expenses, attorney's fees," it was clearly within his discretion to do so. In this instance, because the chancellor was erroneously proceeding under a section that made an award of fees mandatory and not discretionary, we reverse the award of attorney fees and remand to the chancellor to exercise his discretion on this issue. *See Hall v. Staha*, 314 Ark. 71, 858 S.W.2d 672 (1993); *Tortorich v. Tortorich, supra*. Accordingly, we do not reach Terry's second point that the fee award was not "just and reasonable," because our remand to review the fee petition presupposes a consideration of the equities involved in making a discretionary award of attorney fees. *See Jablonski v. Jablonski*, 71 Ark. App. 33, 25 S.W.3d 433 (2000).

Reversed and remanded.

PITTMAN and BAKER, JJ., agree.

Jerry MORROW *v.* STATE of Arkansas

CA CR 00-759 41 S.W.3d 819

Court of Appeals of Arkansas
Division III
Opinion delivered March 7, 2001

Robert S. Blatt, for appellant.

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

JOHN F. STROUD, JR., Chief Judge. Appellant, Jerry Morrow, entered a conditional plea of guilty to the charges of manufacturing a controlled substance and simultaneous possession of drugs and firearms. He was sentenced to nine years in the Arkansas Department of Correction for each offense, with the sentences to run concurrently, and ordered to pay court costs of $150. His sole point on appeal is that the trial court erred in denying his motion to suppress evidence found during the execution of a search warrant for his residence. We affirm.

At the hearing on appellant's motion to suppress, Officer William Kelley of the Fifth Judicial District Drug Task Force testified that on July 31, 1999, he applied for a search warrant for appellant's house based upon information he received from Kathy Lehman, a private citizen. In the affidavit, Kelley stated that he and another officer interviewed Lehman during the first week in July regarding an incident in which appellant had beaten and choked Lehman. During this interview, Lehman expressed her anger toward appellant, and that she wanted to assist in an investigation of his drug activity. Lehman told the officers that appellant had marijuana every time she was at his house, and on one occasion, he had methamphetamine. She also stated that she had been present when appellant had sold marijuana to other individuals, and that she had used methamphetamine on one occasion while at appellant's house. In the affidavit, Officer Kelley wrote that he "instructed Lehman to attempt to make amends with Morrow in an attempt to have her witness his possession and dealing of marijuana."

On July 26, July 28, and July 30, 1999, Lehman went to appellant's house, where she looked in a "collection box" and observed quantities of marijuana, a hand scale, seeds, and marijuana roaches. She also observed persons smoking marijuana, including appellant, and she witnessed appellant's sale of marijuana to at least two persons. Furthermore, information she relayed about the manner in which appellant transported the marijuana corroborated independently-gained information contained in the drug task force's intelligence files. Based upon Lehman's information, Officer Kelley sought and received a search warrant for appellant's house. The search yielded, among other things, marijuana plants, a bag of green, leafy substance, and two guns.

When reviewing the trial court's denial of a motion to suppress, the appellate courts make an independent determination based on the totality of the circumstances and reverse only if the trial court's ruling was clearly against the preponderance of the evidence. *Embry v. State*, 70 Ark. App. 122, 15 S.W.3d 367 (2000). On appeal, appellant contends that the trial court erred in denying his motion to suppress because Lehman was acting as an agent of the State when she observed the activity that formed the basis for the search warrant. He bases this argument on the fact that in the affidavit, Officer Kelley stated that he "instructed" Lehman to make amends with Morrow so that she could witness his drug trafficking.

The Fourth Amendment's prohibition against unreasonable searches and seizures does not apply to searches conducted by

private citizens. *Norton v. State*, 307 Ark. 336, 820 S.W.2d 272 (1991). Only when it is established that the private individual acted at the direction of a law enforcement agency or officer can he or she be considered an arm of the government. *Parette v. State*, 301 Ark. 607, 786 S.W.2d 817 (1990). If a search and seizure is instigated or encouraged by the police, Fourth Amendment constraints are applicable, "as the construction to be attached to the Fourth Amendment does not permit of evasion by circuitous means." *Smith v. State*, 267 Ark. 1138, 1140, 594 S.W.2d 255, 256 (Ark. App. 1980) (citing *People v. Evans*, 49 Cal. Rep. 501 (1966)).

In support of his argument, appellant attempts to distinguish his case from *Collins v. State,* 9 Ark. App. 23, 658 S.W.2d 881 (1983) *rev'd on other grounds, Collins v. State,* 280 Ark. 453, 658 S.W.2d 877 (1983). In that case, an informant told a deputy sheriff that he knew appellants had possessed marijuana plants; however, too much time had passed between the time the informant learned of this information and when he told the deputy. The informant was told that the sheriff's office could not act on the information unless the marijuana plants were still in appellants' possession. The informant returned approximately one week later and told the deputy that the plants were still in appellants' house. Based on this information, a search warrant was obtained, and appellants were convicted of the manufacture of controlled substances. This court affirmed the denial of appellants' motion to suppress, holding that the informant was acting as a private citizen and not an agent of the State when he observed the marijuana plants for the second time.

Appellant contends that his case is distinguishable from *Collins* because while the officer in *Collins* did not give any instructions to the informant, in his case, Officer Kelley "instructed" Lehman to make amends with him so she could witness his drug dealing. We do not find this argument persuasive.

We believe that the facts of the instant case are more analogous to *Smith v. State*, 267 Ark. 1138, 594 S.W.2d 255 (Ark. App. 1980). In that case, a grocery store was broken into, and a deputy gave the store owner names of several possible suspects, including the name of appellant. The owner was "instructed to call the sheriff's office if he discovered any leads or heard anything." The owner undertook his own investigation, setting up surveillance of appellant's trailer, and he caught appellant moving items taken from the grocery store out of his trailer and placing them in a car parked in his driveway. In rejecting appellant's argument that the search was instigated at the suggestion of the deputy, this court noted that the deputy did not

accompany the store owner in the surveillance of appellant's trailer and was not involved in any of the activities at the trailer; rather, the totality of the deputy's role in the events was "to instruct Mason [the store owner] to get back in touch with him if he had any leads or heard anything."

In the present case, although Officer Kelley used the word "instructed," he did not provide Lehman with instructions about how to gather any information about appellant's drug activities, he did not tell her to search appellant's house, nor was he present when Lehman obtained the information used in the affidavit for the search warrant. Merely because the word "instructed" was used in the search warrant did not make Lehman an agent of the government. Based upon the totality of the circumstances, we cannot say that the trial court's denial of appellant's motion to suppress was clearly against the preponderance of the evidence.

Affirmed.

JENNINGS and NEAL, JJ., agree.

Terry HAYES, Individually and d/b/a Terry's Towing
v. ADVANCED TOWING SERVICES, INC., and
Robert N. Jeffries

CA 00-654 40 S.W.3d 800

Court of Appeals of Arkansas
Division I
Opinion delivered March 7, 2001

Carol Gillespie, for appellant.

Pearson Law Firm, by: *Ralph C. Epperson*, for appellees.

JOSEPHINE LINKER HART, Judge. Terry Hayes appeals a directed verdict that dismissed his tortious interference claim against appellees.[1] Appellant argues that when viewing the evidence in a light most favorable to him, substantial evidence existed that tended to establish his claim against appellees, and, therefore, the directed verdict was inappropriate. We agree with appellant and reverse and remand.

Both parties operated competing towing companies in the same town. At the time of the trial, appellant had worked in the area for approximately fifteen years, while appellees had worked in the area for only two and one-half years. After losing a series of business accounts, appellant sued appellees alleging, *inter alia*, tortious interference. In response, appellees denied appellant's averments and counterclaimed, alleging that appellant had tortiously converted items of personal property.

According to the testimony elicited from several witnesses during appellant's case-in-chief, when appellees began operations, Robert "Nick" Jeffries, the principal owner of Advanced Towing Services, Inc., began an unusual campaign to strip business away from appellant by telling appellant's customers that appellant had a criminal record. Appellant did not deny his past, but, of course, he did not volunteer that information. Numerous employees from various companies and a local university transit department, who were or had been appellant's customers, testified that Jeffries had told them that appellant had such a record. Despite a general consensus among the witnesses that appellant did a good job and that

[1] The trial court, in fact, dismissed several counts of appellant's complaint - tortious infliction of emotional distress and defamation (as against separate defendant Jeffries). However, we address only appellant's tortious interference claim inasmuch as it is the only cause of action addressed by appellant on appeal.

no complaints were made against him during the lengthy period that he worked for them, there was testimony that appellant suffered business losses as a result of appellees' conduct.

Following appellant's case-in-chief, appellees' directed-verdict motion on appellant's claim of tortious interference was granted. The trial court reasoned that appellant failed to demonstrate that Jeffries's conduct (*i.e*, making truthful statements regarding appellant's criminal history) was improper.[2] Thereafter, a judgment was entered awarding Advanced Towing Services, Inc., $23.50 and costs on its counterclaim commensurate with the jury's special verdict. Appellant seeks reversal of this directed verdict.

"In reviewing an order granting a motion for directed verdict, this court views 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 motion for directed verdict." *Sexton Law Firm, P.A. v. Milligan*, 329 Ark. 285, 297, 948 S.W.2d 388, 394 (1997) (citations omitted). Appellant argues that the trial court erred by determining that he could not prevail as a matter of law merely because the statements Jeffries made were truthful and, therefore, could not be considered improper.

Our supreme court addressed the claim of tortious interference in *Mason v. Wal-Mart Stores, Inc.*, 333 Ark. 3, 13, 969 S.W.2d 160, 165 (1998), and in doing so adopted the *Restatement (Second) of Torts* § 766 (1979), which provides:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Consistent with the instructions found in commentary to section 766 and to obtain a better understanding of the term "improperly,"

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[2] The trial judge stated, "the law requires that unlawful or untrue statement to harm a competitor - the evidence before the Court, as admitted by Mr. Hayes that he was, indeed, a convicted felon, and we have a free speech in this country, so therefore, I've ruled that that's not sufficient evidence to allow that issue to go to the jury."

the court referred to *Restatement (Second) of Torts* § 767 (1979), which states:

> In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:
>
> (a) the nature of the actor's conduct,
>
> (b) the actor's motive,
>
> (c) the interests of the other with which the actor's conduct interferes,
>
> (d) the interests sought to be advanced by the actor,
>
> (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
>
> (f) the proximity or remoteness of the actor's conduct to the interference and
>
> (g) the relations between the parties.

See Mason, 333 Ark. at 14, 969 S.W.2d at 165. We now discuss in sequence these factors as they relate to the facts of this case.

The nature of appellees' conduct

According to the drafters of *Restatement (Second) of Torts* § 767 cmt. c (1979):

> Under the same circumstances interference by some means is not improper while interference by other means is improper; and, likewise, the same means may be permissible under some circumstances while wrongful in others. The issues is not simply whether the actor is justified in causing the harm, but rather whether he is justified in causing it in the *manner* in which he does cause it.

(Emphasis added.) Here, several university employees testified that Jeffries not only told them of appellant's criminal history but screamed threats[3] and approached at least one employee at a restaurant, challenging the university's use of appellant's towing service.

Appellees' motives

"In determining whether the interference is improper, it may become very important to ascertain whether the actor was motivated, in whole or in part, by a desire to interfere with the other's contractual relations [and if] this was the sole motive the interference is almost certain to be held improper." *Restatement (Second) of Torts* § 767 cmt. d (1979). In this case, at least one witness testified that she believed that Jeffries's purpose in telling her about appellant's criminal history was to induce her employer, the owner of a taxi cab company, to terminate their business relationship with appellant and use appellees' services. In fact, appellees offered free towing services to the company if it would not use appellant's services.

Interests of the other with which appellees' conduct interferes

The drafters state in *Restatement (Second) of Torts* § 767 cmt. e (1979), that:

> Some contractual interests receive greater protection than others. Thus, depending upon the relative significance of the other factors, the actor's conduct in interfering with the other's prospective contractual relations with a third party may be held to be not improper, although his interference would be improper if it involved persuading the third party to commit a breach of an existing contract with the other.

Evidence was presented in appellant's case-in-chief that appellant had existing and long-standing relationships with several entities, including the university and a local apartment complex. These relationships, however, were apparently not memorialized in a formal written contract.

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[3] According to the testimony of one university employee, Jeffries threatened to go to the university's chancellor unless appellant was removed from the university's rotation list.

The interests sought to be advanced by appellees

On this factor, the drafters state:

> Usually the actor's interest will be economic, seeking to acquire business for himself. An interest of this type is important and will normally prevail over a similar interest of the other if the actor does not use wrongful means. If the interest of the other has been already consolidated into the binding legal obligation of a contract, however, that interest will normally outweigh the actor's own interest in taking that established right from him.

Restatement (Second) of Torts § 767 cmt. f (1979). As previously stated, appellant offered evidence that an established business relationship existed between him and several entities when appellees began informing those entities of appellant's past criminal record.

The social interest in protecting the freedom of action of appellees and the contractual interests of the other

The drafters recognized the need to avoid identifying reasonable competition as improper and, therefore, provided:

> [I]t is thought that the social interest in competition would be unduly prejudiced if one were to be prohibited from in any manner persuading a competitor's prospective customers not to deal with him. On the other hand, both social and private interests concur in the determination that persuasion only by suitable means is permissible, that predatory means like violence and fraud are neither necessary nor desirable incidents of competition.

Restatement (Second) of Torts § 767 cmt. g (1979). Generally speaking, one business can solicit business from a competitor's client; however, there are limits, and this restatement attempts to establish such limits. Although no evidence was offered suggesting that appellees committed either fraud or violent acts, there was evidence that Jeffries made threats to at least one of appellant's clients and demanded that the client stop using appellant's service.

Proximity or remoteness of appellees' conduct to the interference

> One who induces a third person not to perform his contract with another interferes directly with the other's contractual relations. The interference is an immediate consequence of the conduct, and the other factors need not play as important a role in the determination that the actor's interference was improper. The actor's conduct need not be predatory or independently tortious, for example, and mere knowledge that this consequence is substantially certain to result may be sufficient.

Restatement (Second) of Torts § 767 cmt. h (1979). Here, there was evidence that established close proximity between appellees' conduct and the interference.

Relations between the parties

"A and B may be competitors, and A's conduct in inducing C not to deal with B may be proper, though it would have been improper if he had not been a competitor." *Restatement (Second) of Torts* § 767 cmt. i (1979). Of course, the parties here were business competitors.

If we view the evidence in a light most favorable to appellant in this case, then some factors favor each party. For example, the manner in which appellees caused harm to appellant triggers consideration of the first factor. Jeffries did not merely share information with others; rather, he made threats in order to persuade others to act based on that information and forced them to consider this information outside the traditional places and times of work. Likewise, one could find that appellees' threats demonstrated that their motive was to directly interfere with appellant's existing business relationships, which are entitled to greater protection because such relationships affect others. On the other hand, because appellees' conduct was not fraudulent and the parties were competitors, these facts could constitute a type of business competition that, as a general rule, the law should avoid hindering.

Because the foregoing factors do not lead to an obvious conclusion, it is necessary to offer a generalized rule to aid in defining the term "improper"[4] — "[T]he real question is whether the actor's conduct was fair and reasonable under the circumstances." *Restatement (Second) of Torts* § 767 cmt. j (1979). In our view, however, reasonable people could differ as to whether appellees' conduct was fair and reasonable under the circumstances. After all, appellees' conduct does not fit within the traditional concepts of business inasmuch as it may have caused business decisions to be based on factors other than economics or quality of service.[5]

Moreover, although a truthful statement may be less likely to be considered improper, we are not disposed to create a *per se* rule that under all circumstances an actor is justified in interfering with either a contractual relationship or a business expectancy so long as the interference is in the nature of a truthful statement. The law does not provide that knowledge about a particular fact concerning an individual carries with it a corresponding right to reveal that fact under all circumstances without any exposure to potential civil liability. To focus on the truthfulness of a statement and ignore other facets of an actor's conduct and motives would plainly be contrary to the law as expressed in the restatements.

Nevertheless, our task on review is not to establish whether in fact appellees' conduct was improper; instead, we merely must determine whether the claim disposed of as a matter of law should have been resolved by the finder of fact. In this respect, we defer to the drafters, who express the opinion that "when there is room for different views, the determination of whether the interference was improper or not is ordinarily left to the jury, to obtain its common feel for the state of community mores and for the

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[4] *See* Odette Woods, Note, *Tort Law — Tortious Interference with Contract: The Arkansas Supreme Court Clarifies Who has the Burden and What They Have to Prove.* Mason v. Wal-Mart Stores, Inc., *333 Ark. 3, 969 S.W.2d 160 (1998)*, 21 U. ARK. LITTLE ROCK L. REV. 563, 575 (1999) ("One potential problem with the use of the term 'improper' lies with the vagueness of its definition.").

[5] This stands in stark contrast with the facts of *Mason*, in which Wal-Mart simply contacted vendors, offering to deal with them instead of an intermediary for mutual benefit. *See Mason*, 333 Ark. at 5, 969 S.W.2d at 160-161. Although this move interfered with the intermediary's business, Wal-Mart's conduct was not improper because, in part, by its very nature it was consistent with traditional concepts of business inasmuch as it was motivated by a desire to create a more accurate, efficient, and, by implication, economical means of communication between the parties to the agreement. Appellees' conduct, arguably, lacks such similar motivation.

manner in which they would operate upon the facts in questions." *Restatement (Second) of Torts* § 767 cmt. j (1979).

Reversed and remanded.

VAUGHT, J., agrees.

PITTMAN, J., concurs.

Velma Jane MAXWELL *v.* STATE of Arkansas

CA CR 00-626 41 S.W.3d 402

Court of Appeals of Arkansas
Division IV
Opinion delivered March 7, 2001

Robert Jeffrey Connor, for appellant.

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

JOHN B. ROBBINS Judge. Appellant Velma Jane Maxwell appeals her convictions in the Izard County Circuit Court of two counts of first-degree battery for which she received two consecutive ten-year prison sentences. These charges stemmed from appellant's act of firing a shotgun that resulted in pellets hitting her neighbor, Mr. Ring, and his grandson whom he was holding. Her arguments for reversal are: (1) that the trial court abused its discretion in denying her motion to withdraw her waiver of a jury trial; and (2) that the trial court abused its discretion in allowing the prosecution to introduce into evidence appellant's responses to requests for admissions that she had given in a related civil action. We reverse and remand on both points.

The Sixth Amendment to the United States Constitution provides that a criminal defendant shall have the right to a trial by jury but that this right can be waived if the defendant gives an express and intelligent consent to waiver. *Patton v. United States*, 281 U.S. 458 (1930). This jury-trial right is also preserved by article 2, § 10, of the Arkansas Constitution, which states that "the right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law." A waiver is the intentional relinquishment of a known right. *Johnson v. Zerbst*, 304 U.S. 458 (1938). A knowing and intelligent waiver is proper when a capable person knows of her right to a jury trial and has adequate knowledge upon which to make an intelligent decision. *Duty v. State*, 45 Ark. App. 1, 871 S.W.2d 400 (1994); *see also Williams v. State*, 65 Ark. App. 176, 986 S.W.2d 123 (1999).

In every criminal trial where there is a right to trial by jury, the court should proceed as if there will be a jury trial, and it is the court's burden to ensure that if there is a waiver, the defendant waives the right to trial by jury in accordance with the Arkansas Rules of Criminal Procedure. *Grinning v. City of Pine Bluff*, 322 Ark. 45, 907 S.W.2d 690 (1995). To waive a jury trial, a defendant must personally do so in writing or verbally in open court, the prosecutor must assent, and the trial court must approve. Ark. R. Crim. P. 31.1 (2000); *Calnan v. State*, 310 Ark. 744, 841 S.W.2d 593 (1992). As an alternative to the defendant personally waiving in writing or in open court, he may do so through counsel if the waiver is made in open court and in the presence of the defendant;

a verbatim record shall be made and preserved if the waiver is made in open court. Ark. R. Crim. P. 31.2. (2000). The manner of waiver is not specified by the constitution, any more than the manner of entering a plea of guilty is so specified. *See Griggs v. State*, 280 Ark. 339, 658 S.W.2d 371 (1983); *Smith v. State*, 264 Ark. 329, 571 S.W.2d 591 (1978). The record or the evidence must demonstrate that the defendant made a knowing, intelligent, and voluntary relinquishment of her right to a trial by jury. *Duty v. State*, 45 Ark. App. 1, 871 S.W.2d 400 (1994). After a valid waiver is accepted, it is within the trial court's discretion to decide whether to allow the defendant to withdraw the waiver prior to the commencement of trial. Ark. R. Crim. P. 31.5 (2000).

At a pretrial hearing on September 2, 1999, appellant's public defender was permitted to withdraw from the case after the trial court determined that appellant did not qualify for appointed counsel, having posted a $15,000 bond and there being evidence that she owned real property and a home in the county. Immediately thereafter, appellant requested on the record to waive a jury trial:

> DEFENDANT: Do I have to have a trial by jury? I don't have a choice in that.
>
> THE COURT: Well, you've got a right to a trial by jury. The only way around that is if you waive the jury trial and the State does too. Both of you would have to waive your right to a jury trial.
>
> PROSECUTOR: Or she can plead guilty or nolo.
>
> THE COURT: So right now you've got a right to a jury trial. There hasn't been any waiver of a jury trial by you or the State. So that, you know, it is set for a jury trial that week of September 20th. Is that — that's what you're requesting your right to a jury trial.
>
> DEFENDANT: No, to not have one.
>
> THE COURT: Well, you're wanting to waive a jury trial, is that right? You need to answer out loud.
>
> DEFENDANT: Yes, sir.
>
> THE COURT: What's the State's position on any —

PROSECUTOR: She wants to waive a jury trial?

THE COURT: Yes.

PROSECUTOR: That's fine with the State.

THE COURT: Okay. The State agrees to waive a jury trial. And are you doing this voluntarily? Are you waiving your right to a jury trial voluntarily?

DEFENDANT: Yes, sir.

THE COURT: Is anybody applying any kind of force or pressure, making any threats to get you to waive this right to a jury trial?

DEFENDANT: No, sir.

THE COURT: Or is anybody making any promises to you —

DEFENDANT: No, sir.

THE COURT: — to get you to waive this right to a jury trial?

Okay, Mrs. Maxwell, the Court finds that you have voluntarily, knowingly, and intelligently waived your right to a jury trial. And I'll schedule this for a bench trial then for — we don't have anything available that week. I think I've set something for November the 9th. So the Court — that's the next available date I've got for a bench trial. So the Court will schedule your case for a bench trial on November the 9th.

DEFENDANT: Yes, sir.

Appellant initiated the waiver, and she was not coerced or urged to relinquish this right. However, appellant did not know what a bench trial was until after the trial judge had accepted her waiver and had immediately moved on to another motion. This was evident by her asking the trial judge to tell her what he meant by "bench trial," to which the trial judge responded:

THE COURT: A bench trial is just a trial before the Judge. It'll be a trial before me to decide what the facts are instead of a jury deciding on what the facts are.

DEFENDANT: You just don't just get up there and say I'm guilty or not guilty, you present a case.

THE COURT: Right. The State will present their case and you can cross examine their witnesses and then present any evidence that you'd have in your own behalf.

DEFENDANT: I'll have witness [*sic*].

THE COURT: Yes, ma'am you'll need to bring your witnesses or subpoena those witnesses for that trial date.

DEFENDANT: Thank you.

Furthermore, there was some indication that appellant's ability to comprehend her right might be impaired, which was made known to the trial judge after he had accepted her waiver. Specifically, the public defender who had just been allowed to withdraw as appellant's counsel was still present in the courtroom, and she mentioned to the trial judge that she had been made aware that appellant had a mental condition and that the trial court might want to inquire. The trial court asked appellant if she had any mental condition, to which she responded that she had a depression anxiety, but that she hoped it would not prevent her from understanding what was going on in court. To clarify, the trial court asked her if she understood these proceedings, and she responded affirmatively. The trial court inquired no further.

A bench trial was set on the court's calendar, having been continued before at appellant's request. At a later date, appellant retained private counsel, who entered his appearance on October 4, 1999, and moved to withdraw appellant's waiver of a jury trial. The circuit court judge denied this request in an order filed on October 15, 1999. Trial was conducted on November 9, 1999, resulting in convictions on each count of battery.

The State contends that appellant gave a sufficiently knowing, voluntary, and intelligent waiver of the right to a jury trial and that the trial court did not abuse its discretion in denying her motion. Appellant disagrees, asserting that she did not knowingly and intelligently waive a jury trial and that this decision should not have been made without counsel. The voluntariness of her waiver is not in question. The first question on appeal is whether she waived that right knowingly and intelligently. Whether there was an intelligent, competent and self-protecting waiver of a jury trial by an

accused must depend upon the unique circumstances of each case. *Adams v. United States ex rel McCann*, 317 U.S. 269 (1942).

It is not required that such a waiver be accompanied by the advice of an attorney before a decision to waive a jury trial in order for that waiver to be "intelligent." *Id.* But, the view is generally taken that such a waiver must rest on an adequate preliminary statement of the trial court delineating the rights of the accused and the consequences of the proposed waiver with the implication, at least tacit, that the accused should reasonably comprehend her position and appreciate the possible effects of her choice. *See* 21A AM. JUR. 2d *Criminal Law* § 1082 (1998).

Though a pro se waiver may be legally effective, it has been also held that a withdrawal of a waiver of a jury trial should be granted when a defendant waives his or her right while not represented by counsel and, following employment of counsel by the defendant, he asks to rescind that waiver. *See People v. Melton*, 271 P.2d 962 (Cal. App. 1954); *State v. Williams*, 11 So.2d 701 (La. 1942); *Butler v. State*, 23 S.E. 822 (Ga. 1895); *Wilson v. State*, 4 S.E.2d 688 (Ga. App. 1939). A trial court should consider this fact when contemplating a motion to withdraw a prior waiver of the right to a jury trial. In addition, the trial court should consider such matters as the timeliness of the motion to withdraw and whether a delay of the trial will impede justice or inconvenience witnesses. *See People v. Melton, supra*; 21A AM. JUR. 2d *Criminal Law* § 1084 (1998).

We hold that the trial court abused its discretion in denying appellant's motion to withdraw her waiver in this instance because we are satisfied that the trial court (1) erred in concluding that appellant waived her right to a jury trial knowingly and intelligently in accordance with the Arkansas Rules of Criminal Procedure, and (2) abused its discretion in denying her motion for the additional reason that this motion was filed after appellant engaged private counsel who advised her that a jury trial was preferable, her motion was filed more than one month prior to trial, and no inconvenience to witnesses or to the administration of justice was demonstrated.

Requests for Admissions

We address appellant's second point because this issue is likely to arise upon retrial. Appellant's second point on appeal is that the

trial court committed reversible error when it admitted into evidence appellant's discovery responses in the civil litigation regarding these same facts. The State does not entirely concede error on this point, but it argues that even if error occurred, it was harmless error such that no reversal would be warranted. We find merit in appellant's argument with regard to the evidentiary ruling, and hold that the error is reversible.

The State was charged with the burden of proving that appellant was guilty of first-degree battery, which defined in this context means, with the purpose of causing physical injury to another person, she caused physical injury to any person by means of a firearm. Ark. Code Ann. § 5-13-201(a)(7) (Repl. 1997). A person acts purposefully with respect to his conduct when it is her conscious object to engage in conduct of that nature or to cause such a result. *Harmon v. State*, 340 Ark. 18, 8 S.W.3d 472 (2000). The fact that appellant twice fired a shotgun was not in dispute. The controversy centered on appellant's intent.

The responses to requests for admissions were filed in the civil circuit court action for damages pursued by her neighbors who were shot by appellant. The responses read:

> 1) Request for Admission No. 1: Admit or deny that on the 20th day of April, 1998, you pointed and fired a shotgun at Plaintiff, Verbal Ring, with the intent of shooting said plaintiff.
>
> Answer to Request for Admission No. 1: Admitted
>
> 2) Request for Admission No. 2: Admit or deny that on the 20th day of April, 1998, you pointed and fired a shotgun at the minor grandson of Plaintiffs, Verbal Ring and Diana Ring, guardians of Michael Ray Barkley, with the intent of shooting the Plaintiff's grandson, Michael Ray Barkley.
>
> Answer to Request for Admission No. 2: Denied

Appellant argues on appeal that admitting into evidence her responses was in violation of her Fifth Amendment right against self-incrimination, and that the ruling was directly contrary to Ark. R. Civ. P. 36.

We do not reach appellant's constitutional argument regarding the Fifth Amendment because it is raised for the first time on appeal. *See Woods v. State*, 342 Ark. 89, 27 S.W.3d 367 (2000). It

is well settled that appellant may not change the grounds for objection on appeal but is limited by the nature and scope of his objections and arguments presented at trial. *Ayers v. State*, 334 Ark. 258, 975 S.W.2d 88 (1998).

However, we agree, and the State appears to concede, that using appellant's requests for admissions against her in this criminal trial violated Ark. R. Civ. P. 36(b)(2000), which states in pertinent part that "[a]ny admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose, nor may it be used against him in any other proceeding." Though the Rules of Civil Procedure are not applicable to criminal proceedings, *see* Ark. R. Civ. P. 1 and 81, the information gained through this civil-discovery mechanism is self-limiting. A plain reading of the rule precludes their use in this criminal trial. Other courts have so held, and we are persuaded by them. *See, e.g., Gordon v. Federal Deposit Insur. Co.*, 427 F.2d 578 (D.C. Cir. 1970); *Hooker v. State*, 516 S.2d 1349 (Miss. 1987); *Antonio v. Solomon*, 41 F.R.D. 447 (D. Mass. 1966).

We will not reverse an evidentiary ruling in the absence of prejudice, *Clark v. State*, 323 Ark. 2111, 913 S.W.2d (1996), but we cannot conclude that this evidence was harmless. It was undisputed that appellant caused physical injury to two persons by firing a shotgun in their direction. The State's real task in this prosecution was to prove her mental state or level of intent, which is seldom capable of direct evidence but must often be inferred from the circumstances. *E.g., Stegall v. State*, 340 Ark. 184, 8 S.W.3d 538 (2000). This was the unusual circumstance of an accused providing direct evidence of intent, and is in essence a confession. It is evident that the admission of this evidence prejudiced appellant. The trial court, when rendering its findings of guilt, specifically found that her admissions affected the outcome of this trial:

> There's no question that Mrs. Maxwell caused physical injury to Verbal Ring and to Michael Barkley with a firearm. The element of whether she purposely caused physical injury to another person is the key element and the most contested element for the offense of battery in the first degree as to both counts.
>
> The Court finds that the State as to Count One has proved beyond a reasonable doubt each element of the offense of battery in the first degree. *The purpose is proved beyond a reasonable doubt by the admission contained in State's exhibit one wherein Mrs. Maxwell admitted that she pointed and fired a shotgun at Verbal Ring*; the direct testimony

> of Mr. Ring; the evidence from the video tape; the testimony of Mrs. Maxwell that she went inside of her house and reloaded after the first shot; and the circumstantial evidence of the land dispute with Mr. Ring; the confrontation with Mr. Ring on the land in dispute just minutes before; and the testimony of Mrs. Maxwell that the confrontation upset up [sic] pretty bad; and also her testimony that she was a good shot with a shotgun establishes by direct and by circumstantial evidence her purpose to cause physical injury to Mr. Ring.

(Emphasis added.) Therefore, this error requires reversal as well.

We reverse and remand for a new trial.

BIRD and ROAF, JJ., agree.

Billy SPENCER, *et al. v.* REGIONS BANK

CA 00-624 40 S.W.3d 319

Court of Appeals of Arkansas
Division I
Opinion delivered March 7, 2001

Sloan-Rubens, by: *Kent J. Rubens*, and *Timothy O. Dudley*, for appellants.

Friday, Eldredge & Clark, by: *William A. Waddell, Jr.*, for appellee.

JOHN B. ROBBINS, Judge. The appellants in this case, Billy Spencer, Jason G. Spencer, Adam W. Spencer, Ann E. Griffin Nelson, and Elizabeth L. Forbes, appeal the dismissal of their action, which they had brought against appellee Regions Bank ("Regions") in its capacity as the executor of their relative's will. Appellants contend that because of a drafting error in the will of Lois E. Burnett, a substantial amount of Ms. Burnett's personal property was not bequeathed to them as Ms. Burnett intended. Appellants wanted Regions to bring a malpractice suit against the attorney who drafted the will, but Regions did not, resulting in this action in Garland County Circuit Court in which appellants alleged negligence, breach of contract, and breach of fiduciary duty. The trial court entered summary judgment for Regions, and appellants appeal. We affirm.

A recitation of the history of this case is enlightening. The testatrix, Ms. Burnett, employed an attorney to prepare her will. The will was prepared, and Ms. Burnett executed it on March 6, 1992. She died on June 10, 1994, and her will was admitted to probate. The residuary clause of the will placed the residue of her estate in trust for the benefit of her friend, Flournoy Adkins. The terms of trust stated that Mr. Adkins would then possess the right for his lifetime to use of her automobile and her home. The will directed the trustee to distribute "the above described land" upon Mr. Adkins' death, one-half to her nephew William Spencer, Jr., and one-half to this nephew's six children (who include all five

appellants). Mr. Adkins died on November 19, 1998, and the realty passed to the designated devisees. However, because the will made no provision for disposition of the personal property, it passed to Ms. Burnett's heirs at law pursuant to the laws of intestate succession. At the time of Ms. Burnett's death in 1994, her real property was valued at $25,000, and her personal property was valued at $194,702.14.

After Mr. Adkins' death in 1998, Regions' predecessor in interest (First Commercial Trust Company) sought a declaratory judgment in Garland County Chancery Court requesting that the will be reformed to permit distribution of the personal property in the same manner as the real property, alleging that this was the intent of the testatrix. Ms. Burnett's brother, James Burnett, who was an heir of Ms. Burnett but who was not devised anything under her will, objected to Regions' position and averred that the will was not ambiguous and that the personal property should pass under the laws of intestacy. The chancellor allowed parol evidence to explain what he considered to be an ambiguity. This evidence included the testimony of the attorney hired to draft the will who admitted that a clerical error occurred and that Ms. Burnett had expressed an intent to disinherit her brother. The proceeding resulted in a decree, which in effect reformed the will to correct the clerical error. On appeal, the supreme court held that there was no ambiguity, that the will reflected Ms. Burnett's unambiguous intent to only distribute the land upon expiration of Adkins' life estate, and that the chancellor's order reforming the will would be reversed. *Burnett v. First Commercial Trust Co.*, 327 Ark. 430, 939 S.W.2d 827 (1997).

Thereafter, an order was entered in the Garland County Chancery Court permitting Regions to place the trust assets into the registry of the probate court, dismissing Regions from that litigation, and discharging and relieving Regions of any further responsibility regarding the trust. Six days later, appellants filed this action in Garland County Circuit Court contending that Regions had a duty on behalf of the estate to file suit against the negligent attorney to recover damages sustained as a result of Ms. Burnett's will not accurately expressing her testamentary desires, that it failed to do so in a timely fashion, and that any action against the attorney was now barred by the statute of limitations. Appellants claimed that Regions was liable for negligence, breach of fiduciary duty, and breach of contract. Regions answered by asserting that it had fulfilled the duties required of an executor under the law, that it had no duty to appellants regarding the trust generally or the personal property, and that there existed no contract between them to

breach. Regions then moved for summary judgment. After a hearing on the matter, the trial court concluded that, because appellants were not damaged by Regions' failure to sue the attorney, it did not make any difference whether Regions had breached any duty owed to appellants; the trial court therefore dismissed appellants' complaint with prejudice.

■ ■ Summary judgment is governed by Rule 56 of the Arkansas Rules of Civil Procedure. The judgment sought shall be rendered 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 judgment as a matter of law. Ark. R. Civ. P. 56(c). The purpose of summary judgment is not to try the issues but to determine if there are any issues to be tried. *Flentje v. First Nat'l Bank of Wynne*, 340 Ark. 563, 11 S.W.3d 531 (2000). All doubts and inferences are to be drawn in the light most favorable to the party resisting the motion, and summary judgment is not proper if reasonable minds could reach different conclusions when given the facts. *Tullock v. Eck*, 311 Ark. 564, 845 S.W.2d 517 (1993). If there is any doubt whatsoever, the motion should be denied. *Flentje v. First Nat'l Bank of Wynne, supra.* It should be noted that the supreme court has ceased referring to summary judgment as a drastic remedy; it is simply one of the tools in a trial court's efficiency arsenal. *Wallace v. Broyles*, 332 Ark. 189, 961 S.W.2d 712 (1998).

Appellants argue that *McDonald v. Pettus*, 337 Ark. 265, 988 S.W.2d 9 (1999), stands for the proposition that persons who would have been designated as beneficiaries in a will but for the neglect of the attorney who prepared the will, have an avenue for recovery, i.e., through a breach of contract action by the executor against the attorney. In *McDonald* the supreme court discussed the various actions that might result from an attorney's negligence in an estate planning situation, including an action by the beneficiaries against the attorney. The supreme court concluded that, because of lack of privity, beneficiaries of the estate lacked standing to bring an action against the attorney unless the exceptions to the privity requirement enumerated in Ark. Code Ann. § 16-22-310 (Repl. 1999) were met, which would permit them to sue as third-party beneficiaries. The opinion in *McDonald* then proceeded to discuss whether the personal representative of the decedent's estate could bring an action. It held that the personal representative could not bring a tort claim against the attorney on behalf of the deceased testator because the decedent did not suffer any injury prior to his death, as is

required under the survival statute. Ark. Code Ann. § 16-62-101 (1987). The supreme court's opinion in *McDonald* ended on a positive note, however, by holding that the personal representative may bring a breach-of-contract action on behalf of the decedent's estate. The case was remanded to the trial court for further proceedings on the breach-of-contract claim.[1]

There is a very significant distinction, however, between the operative facts in *McDonald* and those in the case before us. In *McDonald*, the alleged negligence, or breach of contract, of the attorney pertained to certain promissory notes in which the decedent's wife had an interest. The decedent's children contended that the attorney was employed to prepare an assignment of these interests from their father's wife over to their father. It was not a case of failing to designate someone as beneficiary or failing to devise his entire estate. If the personal representative was successful in proving that the attorney had indeed failed to do what he was hired to do, there would have been damage to the estate to the extent of the value of the promissory notes that were not assigned to the decedent.

In the case at bar, however, the estate was not damaged by the failure of Ms. Burnett's attorney to direct disposition of the remaining personal property of her estate. The estate was not diminished by this failure, nor would the estate have been greater had there been such a dispositive clause in Ms. Burnett's will. Consequently, there were no damages to the estate to support a breach-of-contract action.

Assuming for sake of argument that Regions could have recovered some damages had it sued the attorney, any such recovery would not have passed to appellants. Funds recovered from the attorney would have passed by intestate succession to the same heirs who were entitled to inherit the personal property in the residue of Ms. Burnett's estate. Ms. Burnett's heirs at law would have received a windfall, but appellants would still have received nothing.

The trial court properly granted summary judgment and dismissed this action.

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[1] On remand, a jury trial resulted in a judgment against the attorney for over $300,000. However, this judgment was reversed on appeal for failure of the decedent's children to prove that it was intended that the promissory notes involved in that case be assigned to the decedent and serve to benefit his estate. *Pettus v. McDonald*, 343 Ark. 507, S.W.3d (2001).

Affirmed.

NEAL, J., agrees.

GRIFFEN, J., concurs.

WENDELL L. GRIFFEN, Judge, concurring. I agree that based on the holdings in *McDonald v. Pettus*, 337 Ark. 265, 988 S.W.2d 9 (1999), and *Pettus v. McDonald*, 343 Ark. 507, 36 S.W.3d 745 (2001), we must affirm the trial court. However, I write separately to express my concern that our lawyer immunity statute, as written and construed by the supreme court, has the practical effect of undermining the confidentiality and trust integral to an attorney-client relationship and eroding the attorney-client privilege. It also suffers from the defect of threatening to circumvent a testator's intent — the cornerstone of will construction.

A portion of the lawyer-immunity statute, which is codified at Arkansas Code Annotated sections 16-22-310(a)(2) (Repl. 1994) and 16-114-303 (Repl. 1997), reads as follows:

> No person licensed to practice law in Arkansas and no partnership or corporation of Arkansas licensed attorneys or any of its employees, partners, members, officers, or shareholders shall be liable to persons not in privity of contract with the person, partnership, or corporation for civil damages resulting from acts, omissions, decisions, or other conduct in connection with professional services performed by the person, partnership, or corporation, except for:
>
> . . . .
>
> Other acts, omissions, decisions, or conduct if the person, partnership, or corporation was aware that a primary intent of the client was for the professional services to benefit or influence the particular person bringing the action. For the purposes of this subdivision, if the person, partnership, or corporation:
>
> (A) Identifies in writing to the client those persons who are intended to rely on the services, and
>
> (B) Sends a copy of the writing or similar statement to those persons identified in the writing or statement, then the person, partnership, or corporation or any of its employees, partners, members, officers, or shareholders may be held liable only to the

> persons intended to so rely, in addition to those persons in privity of contract with the person, partnership or corporation.

Upon applying the statute to the instant case, the following scenario must have had to occur in order for the testator to have effectuated her will. First, the attorney would have told the testator that in order for an intended third-party beneficiary to benefit from the will, the testator was required to allow the attorney to notify the beneficiary, or the testator must have done so. Had the testator agreed, the attorney would have then been required to provide the testator with a writing indicating that the testator hired the attorney to perform a service for the purposes of benefitting a named third party. The attorney or the testator then would have needed to provide the intended third-party beneficiary with a writing that expressed the intent of the testator that the named beneficiary would benefit from the testator's contract with the attorney. Although the foregoing exercise seems harmless at first blush, a closer look reveals troubling possibilities.

Rule 502 of the Arkansas Rules of Evidence governs the lawyer-client privilege, and mandates that clients have a privilege to refuse to disclose or to prevent others from disclosing confidential communications that occur as a result of an attorney providing legal services to a client. The Rule defines the term "confidential communication" as a communication that is not intended for disclosure to third persons other than disclosures that are necessary in order to render legal service or to transmit information. It is important to note that the privilege is held by the *client*, although attorneys may claim it on behalf of the client. *See* Ark. R. Evid. 502(c). *See also Sikes v. Segers*, 266 Ark. 654, 587 S.W.2d 554 (1979) (holding that the client, not the attorney, is the person given the privilege and the attorney may only claim privilege on behalf of a client).

The drafting of one's will is by its very nature, a private and personal matter. Our courts recognize this and as a result, have consistently held that the intent of the testator, determined from the face of the will, is given the utmost consideration. *See Chlanda v. Estate of Fuller*, 326 Ark. 551, 932 S.W.2d 760 (1996); *Merriman v. Yutterman*, 291 Ark. 207, 723 S.W.2d 823 (1987).

Because wills are private and personal, it is reasonable for a client to assume that the information exchanged with an attorney in the preparation of a will is confidential and thus protected from

disclosure to third parties. In other words, the client might reasonably believe that her communications regarding the will are privileged and fall within the ambit of Rule 502. However, given the mandatory disclosure requirement of the lawyer-immunity statute, a client who erroneously believes her communication is privileged is gravely mistaken because exercising her choice to will part of her estate to third party beneficiaries requires that she agree to sacrifice her privilege rights.

Additionally, Rule 1.6(a) of the Model Rules of Professional Conduct provides that "a lawyer shall not reveal information relating to representation of a client unless the client *consents* after consultation . . . . (Emphasis added.)" This rule suggests that a client who consults an attorney does so under a presumption that the relationship is confidential unless the client says otherwise. But the lawyer-immunity statute turns this presumption on its head, because the only way a testator may effectuate her intent to benefit third parties is to agree to expose the provisions of her will to third parties *before the will takes effect.* Thus, testators are placed in the precarious position of alerting those who may gain pecuniarily from their death and those who may not.

We should also consider the effects that the mandatory disclosure requirement to third party beneficiaries may have on the presumption that exists when beneficiaries procure a will. Our law has long been that beneficiaries who prepare or procure a will bear the burden of proving beyond a reasonable doubt that the procurement was not the result of undue influence or lack of testamentary capacity. *See Pyle v. Sayers*, 72 Ark. App. 207, 34 S.W.3d 786 (2000). Thus, an intended beneficiary who receives the required advance written notice that he or she will benefit from a will may be suspected of having procured a will and may face the heavy task of demonstrating lack of undue influence or testamentary capacity.

Also, the lawyer-immunity statute contemplates that an attorney will disclose to the client that the only way the client's third party beneficiaries may successfully sue the attorney is when the attorney or testator notifies the intended third party that the client intends that they benefit from the contract. But consider the plight of the intended beneficiaries where the attorney fails to advise the client about the notice requirement or who fails to provide written notification to intended third party beneficiaries. The statute shields attorneys who fail to follow its mandate, yet it provides no sword for intended third-party beneficiaries who lack written notification of a testator's intent to benefit them even if that failing resulted

from error by the attorney. The intended beneficiaries would not know their status until after the client's death. The decisions in *McDonald v. Pettus, Pettus v. McDonald*, and our decision in this case show beyond argument that the beneficiaries will face a sorry plight when they try to recover damages against the negligent lawyer whose client may have done all she knew to effect her testamentary intent.

Thus, in what is plainly an effort to shield lawyers from the consequences their negligence will produce when third-party beneficiaries such as appellants are not protected due to attorney error, the Arkansas General Assembly has created a major problem for potential testators, their relatives, the attorney-client privilege, and the ethical obligation owed by lawyers to clients making wills. When one appreciates the fact that the immunity statute that produces this result was initiated by lawyers, is construed by judges who are lawyers, and works to benefit lawyers, it is understandable why the public sometimes questions whether the legal profession can be trusted to promote the interests of clients above the interests of lawyers. The statute and our court decisions will not improve this crisis of confidence. As Pogo said, "We have met the enemy and he is us."

CITY SLICKERS, INC. *v.* Joseph E. DOUGLAS

CA 00-681 40 S.W.3d 805

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered March 7, 2001

[redacted]

Waring Cox, PLC, by: *Marcus N. Bozeman*; and *Friday, Eldredge & Clark*, by: *Daniel L. Herrington* and *John C. Fendley, Jr.*, for appellant.

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., by: *Byron Freeland* and *Marsha Talley Ballard*, for appellee.

SAM BIRD, Judge. Appellant, City Slickers, Inc., is appealing an order of the Pulaski County Chancery Court that denied its motion for a temporary restraining order against appellee, Joseph E. Douglas, by which it sought to enjoin Douglas from violating the Arkansas Theft of Trade Secrets Act. We agree with the chancellor's decision to deny the temporary relief, and we affirm.

The undisputed facts are that City Slickers is a Tennessee Limited Liability Corporation that is registered to do business in Arkansas, and Jeff Goodman is its president. Herein, they are

referred to collectively as "City Slickers." City Slickers is in the business of providing on-site automotive oil-changing services to customers such as rental-car fleets. Douglas was employed by City Slickers from February 1, 2000, to March 17, 2000, as general manager to develop its Arkansas region. Douglas signed three agreements with City Slickers, including a "Non-Disclosure Agreement" dated December 1999, a "Confirmation," and a "Confidentiality and Non-Disclosure Agreement," both dated February 1, 2000. In addition, City Slickers provided Douglas with company documents, including a copy of the corporation's "Executive Summary [and] Business Plan Overview" and a copy of a handbook called the "2000 Little Rock Launch." Douglas resigned from his position with City Slickers on March 17, 2000, and he informed City Slickers that he intended to start his own fleet oil-changing business. Sometime thereafter, Douglas opened his own business.

On March 22, 2000, City Slickers brought an action against Douglas for breach of contract, theft of trade secrets, tortious interference with a contract or business relations, breach of common-law duty not to sue or disclose confidential and proprietary information, unfair competition, and conversion. In its complaint, City Slickers asked the trial court to order Douglas to identify every person or entity whom he solicited to provide services, with whom he had discussed services, and with whom he had entered into contracts; City Slickers also asked the court to issue a temporary restraining order, a preliminary injunction, and a permanent injunction enjoining Douglas and any party assisting him from providing any services to any persons or entities described in the complaint and from directly or indirectly using or disseminating City Slickers' confidential information. City Slickers also asked that Douglas and anyone acting in concert with him be required to return its confidential information and other property, including customer lists, marketing plans, business plans, and pricing plans. Finally, City Slickers asked for punitive damages, prejudgment interest, and attorney's fees.

Also on March 22, 2000, City Slickers filed a motion for a temporary restraining order and preliminary injunction, and attached a supporting brief. Douglas filed a response to the motion for a temporary restraining order on March 31, 2000, arguing that the information was not confidential, that City Slickers has not demonstrated a continuing interest in opening a business in Arkansas, and that City Slickers breached its agreement with Douglas. A hearing on the motion for a temporary restraining order was held on March 31, 2000, and Douglas moved for a directed verdict.

On May 9, 2000, the chancellor issued an order holding that City Slickers had failed to demonstrate the likelihood of success on the merits of its claim that the financial and business information it provided to Douglas constituted a trade secret or was "highly-proprietary" information. The court further found that the February 1, 2000, confidentiality and nondisclosure agreement constituted an unreasonable and unlawful restraint on trade and that it was an overly broad covenant not to compete masquerading as a confidentiality and nondisclosure agreement. The chancellor denied City Slickers' motion for a temporary restraining order.

The two issues that City Slickers raises on appeal are (1) whether the chancery court erred by concluding that there was no substantial likelihood that it would prove that the materials provided to Douglas were confidential and constituted "trade secrets" for purposes of the Arkansas Theft of Trade Secrets Act, and (2) whether the chancery court erred when it concluded that various confidentiality agreements signed by Douglas were unenforceable. City Slickers also asks that this court enter an injunction.

The grant or denial of an injunction is generally a matter within the discretion of the chancery court, and we do not reverse the court unless there has been a clearly erroneous factual determination, or unless the decision is contrary to a rule of equity or the result of an improvident exercise of judicial power. *Dawson v. Temps Plus, Inc.*, 337 Ark. 247, 987 S.W.2d 722 (1999).

The first issue we address is whether the chancery court erred by concluding that there was no substantial likelihood that City Slickers would prove that the materials provided to Douglas were confidential and constituted "trade secrets" for purposes of the Arkansas Theft of Trade Secrets Act. The Arkansas Theft of Trade Secrets Act is codified at Ark. Code Ann. §§ 4-75-601 through 4-75-607. The portions relevant to this appeal provide:

> (4) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:
>
> > (A) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

> (B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Ark. Code Ann. § 4-75-601 (Repl. 1996). The Act also provides for both injunctive relief and damages for trade secret violations.

The six factors used in determining what constitutes a trade secret are: (1) the extent to which the information is known outside the business; (2) the extent to which the information is known by employees and others involved in the business; (3) the extent of measures taken by appellee to guard the secrecy of the information; (4) the value of the information to appellee and to its competitors; (5) the amount of effort or money expended by appellee in developing the information; and, (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *Saforo & Assocs., Inc. v. Porocel Corp.*, 337 Ark. 553, 991 S.W.2d 117 (1999).

In the instant case, City Slickers alleges that Douglas misappropriated trade secrets found as information in its "Little Rock Launch 2000" handbook and its executive summary and business plan overview. In support of this assertion, it points to Jeff Goodman's testimony about documents that were provided to Douglas.

Goodman testified that general managers were given the company's executive summary, business plan overview, and financial performance, present, past and projected, before coming to work for the company, and that they were required to sign a nondisclosure and confidentiality agreement before receiving the documents. He said that every employee was given the employee handbook, which contained a paragraph concerning the confidentiality of company secrets; that every employee had to sign an agreement to abide by the handbook; and that, additionally, employees at the general manager level also sign nondisclosure and confidentiality agreements. Goodman also said that Douglas signed a nondisclosure agreement when he received the marketing plan and signed the confirmation agreeing to abide by the employee handbook, including the confidentiality clause.

Goodman further testified that Douglas began working for the business on February 1, 2000, with full autonomy in running the company's Arkansas business. Goodman said that Douglas was able to quote prices for automobiles in the range of $19.99 to $29.99 for a standard, five-quart, 10W30 oil change; that Douglas was instructed on how to identify and contact customers; and that they

discussed ways the business had found customers in Memphis. Goodman explained that the business had a book of lists it had purchased that identified the largest companies in the city, and that people were contacted from those companies. Goodman stated that marketplace software was also used to find customers, and that, apart from that, Douglas was provided a list of current customers that had been developed, such as Enterprise and Service Master, who had Little Rock offices and who would be Douglas's initial core customers.

Goodman testified as follows regarding financial and marketing information in the business plan:

> With regard to financial information, it included our income statements since 1998 and our projected future income statements. It also has our balance sheets, our cash flow and the supporting financials broken down city by city. It contains our profit margin and debt ratios in the past and projected for the future. That information in the hands of a competitor would allow them to come in and undermine our pricing structure. We don't want our competitors to have that information. It loses its value if it's distributed to the general public. In regard to marketing information, it discusses our print advertising, our radio advertising, television advertising, how much we're willing to spend, and how we plan on marketing this to our customers in cities where we open up, and how we will try to thwart any competition that tries to come in. It also identifies the cities in which we plan to expand. It contains business plans on how we're going to penetrate those markets.... It's taken us two years to put this business plan together. We've hired outside experts to assist us, two accounting firms in Memphis and a marketing firm. We have ten to twelve thousand dollars ($10,000-$12,000) invested in this business plan. It contains information that's not readily available to someone who's just starting up this business from scratch.

Goodman testified that other confidential information was provided to Douglas in the form of the Little Rock Launch 2000 handbook, which he said was the marketing plan developed specifically for Little Rock. He further described the handbook:

> It gives a brief industry and company overview, describes our core service and identifies our target audience. It also identifies our competitors. It is all specific to the Little Rock market. The information on pages 6A and 6B is an advertising schedule for Little Rock that would cover TV, radio and print media. That's very

> valuable to us. We would not want it in the hands of a competitor. It would allow them to anticipate what we're going to do. It also tells them what we're willing to spend in the market. It would lose its value if distributed to our competitors. We tried to ensure the secrecy of these plans with the non-disclosure and confidentiality agreements.... We also have control numbers on each copy so we know who has a copy....

Goodman then responded to questions about how Douglas intended to get customers. Goodman admitted that he had not heard "any radio or newspaper ads," nor had he seen that Douglas used any of the business's advertising materials. Goodman said that he was aware that there were all kinds of things on the Internet that have prices of products and profit margins for the industry. He further testified:

> I assume that Mr. Douglas is using my customer list. He would certainly have access to that. He definitely has to be using my pricing schedules. There's nothing tangible that I can tell you that he's using other than the knowledge that he's gained.... A person with reasonable intelligence could look in the phone book and locate all the rental car companies.... With regard to Mr. Douglas' use of our pricing schedules, I know from the comments he made while he was employed by us that he disagreed with some of our pricing schedules and wanted to change some of the pricing on some of the vehicles. I am assuming he's doing what he wants to do now.... Our oil extraction system is atypical of the common quick lube industry.... [The] product is available on the open market.... One of our trade secrets is our advertising program. I don't have any information that Mr. Douglas has used our advertising program over the last two weeks.... We have not run a single ad in the Little Rock metropolitan area.

■ In support of its argument that Douglas misappropriated trade secrets, appellant cites *Cardinal Freight Carriers, Inc. v. J.B. Hunt Transp. Servs., Inc.*, 336 Ark. 143, 987 S.W.2d 642 (1999), as a case identical to the instant case. However, *Cardinal* involved former employees of Hunt Transportation who had worked for Hunt for six years; in the instant case, Douglas worked for City Slickers only six weeks. There was testimony in *Cardinal* that Hunt's trade secrets included the amount of profit that Hunt made on a contract with particular customers, Hunt's margins of profitability utilized in its pricing model, a customer's established buying habits with Hunt over a long-term period, Hunt's methods of doing business, and Hunt's strategic plans for the future and how to attack certain

markets with specific customers. *Id.* In the case at bar, the chancellor correctly held that it was unlikely that City Slickers could prove that they have trade secrets that need protection under the Act. Information in the subject documents can be ascertained without utilizing City Slickers' documents. City Slickers has only one actual customer in Little Rock; the business plan uses statistics from public surveys and studies; its customer profile and competition figures are easily ascertainable from phone books and surveys; its marketing campaign in the business plan does not include the Little Rock market; and the master customer list includes only Memphis businesses.

City Slickers failed to point out any instances in which Douglas is utilizing its plans, and it admitted that Douglas did not agree with its pricing structure and is probably using his own prices. City Slickers also admitted that a person of reasonable intelligence could determine which businesses might have automotive fleets that need servicing; that City Slickers has not run a single ad in the Little Rock metropolitan area; and that it has no information that Douglas has used this information. Additionally, the advertising information itself is composed of demographics of the best time slots, and that information is readily available and easily accessible through various media outlets. Based on these facts, we cannot say that the chancellor was clearly erroneous in denying the motion for temporary injunction.

The chancery court did not address the issue of whether Douglas misappropriated trade secrets because it found it unlikely that City Slickers could prove that the documents were trade secrets within the meaning of the Act. We agree with the chancellor and do not reach this issue.

The final issue is whether the chancery court erred when it concluded that various confidentiality agreements signed by Douglas are unenforceable. The three agreements that Douglas signed with City Slickers are the December 1999 nondisclosure agreement, and the February 2000 confirmation, and confidentiality and nondisclosure agreement. The pertinent portion of the nondisclosure agreement provides:

> Definition of Confidential Information. Confidential Information as used throughout this Agreement means any secret or proprietary information relating directly to Goodman's business and that of Goodman's affiliated companies and subsidiaries, including but not limited to, products, customer list, pricing policies, employment,

> otherwise records and policies, operational methods, marketing plans and strategies, product development techniques or plans, business acquisition plans, new personnel acquisition plans, methods of manufacture, technical processes, designs and design projects, inventions and research programs, trade "Know-how", trade retaining secrets, specific software, algorithms, computer processing systems, object and source codes, user manuals, systems documentation and other business affairs of Goodman and Goodman's Affiliated companies and subsidiaries.

The confidentiality and nondisclosure agreement states:

> I, Joseph E. Douglas ... agree and understand and acknowledge that all information I see, hear, come in contact with or otherwise gain knowledge of, in connection with my employment with City Slickers, Inc.... is CONFIDENTIAL AND PROPRIETARY INFORMATION. I agree that I will not discuss, reveal or permit the duplication, use or disclosure of ANY information, to which I have access, to any person or entity, unless I am specifically authorized....
>
> I AGREE THAT THIS AGREEMENT ON MY PART SHALL CONTINUE FOR A PERIOD OF FIVE (5) YEARS BEYOND MY EMPLOYMENT WITH THE COMPANY.

Specifically, the chancellor found that the confidentiality and nondisclosure agreement constituted an unreasonable and unlawful restraint of trade, and that it was an overly broad covenant not to compete masquerading as a confidentiality and nondisclosure agreement.

The Arkansas Supreme Court has long held:

> It would abridge competition in business, the life of trade, if an employee who had rendered services to a business of any character for a long period of time and who had helped build up a business on account of performing his duties well should be prohibited after severing his relationship with a business concern from establishing and prosecuting a similar business in the same territory or field in which his employer had done business, especially where the employee had not contracted when entering into the employment to refrain from establishing an independent business of like nature. Legitimate competition should be encouraged rather than restricted, and, in the aid of the freedom of employment, combinations and monopolies which would result in the restraint of trade

> should not be tolerated in a democratic form of government. Certain restrictions have been imposed upon employees when severing their relationship with an employer. For example where the particular business in which he had been employed has trade secrets an employee is not permitted to set up an independent business of a similar nature and use the trade secrets of his employer or confidential information received from his employer in the new or independent business in which he engages, *but it is allowable for him to use his experience and knowledge gained during the period of his employment in his independent business.* The experience and knowledge he had acquired as an employee in no sense becomes the property of his employer.

Witmer v. Arkansas Dailies, Inc., 202 Ark. 470, 476, 151 S.W.2d 971, 974 (1941) (emphasis added).

Jeff Goodman testified that the nondisclosure agreements would prevent Douglas from working in the oil-changing business for five years. In light of the holding in *Witmer*, we agree that the nondisclosure agreements here constitute unreasonable and unlawful restraints of trade and are overly broad, and that the agreements that were signed by Douglas clearly violate the supreme court's holding in *Witmer*.

Affirmed.

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

PITTMAN and GRIFFEN, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. I agree with the majority that the chancellor did not err in determining that City Slickers' customer list did not constitute a trade secret and that the February 1, 2000 confidentiality agreement is a covenant not to compete masquerading as a confidentiality and nondisclosure agreement. However, I dissent because I believe the chancellor erred in finding that there was no substantial likelihood that appellant could establish that the detailed information specific to City Slickers contained in the Little Rock Launch 2000 marketing plan and in the business plan were not trade secrets, and in finding that City Slickers had no legitimate business interest in customers in the Little Rock service area.

The Little Rock Launch handbook in this case provided a detailed plan for penetrating the Little Rock market, including a

schedule of when and through what venues, at what time, and for what duration, appellant would advertise through television, radio, and print media, and the cost of such advertising. The handbook further describes distinct "tactics" for its public relations campaign, identifying on which specific dates and times and to which specific radio, television, and newspaper personalities it will offer on-site oil changes to promote its business. Finally, it described the contents of its press kits, a public relations time line, and its budget for the Little Rock launch. Appellant Goodman testified that the Little Rock launch information was very valuable to City Slickers because it allows a competitor to anticipate what the company was going to do, and informs competitors what the company is willing to spend in the market. He also testified that there were only four copies of the Little Rock launch handbook and that appellee never returned his copy.

The separate business plan in this case was prepared to explain the company's operations to potential investors, and contained a confidentiality and nondisclosure agreement. This plan generally explained the company's operation, listed some of its more prominent customers, and declared City Slickers' intent *within the next twelve months* to expand into four additional markets, including Little Rock. The plan provided an industry overview, a financial summary and company overview of City Slickers, which includes its staff, a general customer profile, identifies its competition, and its general approach for its long-range marketing campaign, including a list of fifty-one metropolitan markets it intends to penetrate. The plan also included a customer reference list, a clipping from the *Memphis Business Journal* highlighting the company, and a magazine article from the *National Oil & Lube News* containing results of the 1999 Mobile Lube Survey. This survey contains such information on 110 mobile lube operations, as the average costs of operation. City Slickers did not participate in this survey.

The business plan also contained statements of explanations and assumptions, pricing information, and a statement of the "corporate financials." The explanations and assumptions section includes information such as the price per oil change, overhead costs, operating expenses, corporate expenses, and a balance sheet indicating accounts receivable, and costs to service equipment and vehicles. The pricing information lists the service provided, the type of vehicle, the type of oil to be used, the price for different types of vehicles and the price of extra oil.

The statement of corporate financials contains actual information for 1998-99, and projected information for 2000-02, concerning the company's revenues, costs of sales including gross profit margin, operating expenses, inventory, accounts payable, and net loss. This information was provided on a monthly basis. Appellee also had access to the company's corporate income statement, supporting financials for new markets, projected cash flow, balance sheets, and vehicle service information.

Our supreme court has held that information such as price modeling, customer profit margins, logistics, future plans, and specific marketing strategies are protected under the Trade Secrets Act. *See Cardinal Freight Carriers, Inc. v. J.B. Hunt Transp. Serv.*, 336 Ark. 143, 987 S.W.2d 642 (1999). Moreover, an examination of the above information and an application of the *Safaro* factors, as noted by the majority, weigh in favor of finding that the above information likely constituted trade secrets.

First, Goodman testified that it took the company two years to compile its business plan, at an expense of $10,000 to $12,000. Second, City Slickers took numerous reasonable measures to insure the secrecy of its information. The company placed control numbers on the plans and on the back of the nondisclosure agreements. Further, the company defined confidential information to include precisely the type of information it supplied to appellee; it had appellee sign three separate nondisclosure statements; it took measures to limit the unauthorized use, copying or removal of confidential information by not only its employees, but also its potential investors and their employees; it used control numbers and limited the number of copies available. Finally, it disclosed confidential information to those only at the general manager position or higher.

Closely related to the steps taken to insure secrecy of the information is the question of whether the information contained in the handbook and business plan was readily ascertainable and/or could be properly acquired or duplicated by others. Appellee argues that the information contained in the handbook and business plan is not protected under the Trade Secrets Act because he did not need the information in the handbook and business plan to start an on-site oil changing operation. However, the test for determining whether information constitutes a trade secret is not a "but-for" test. That is, the issue is not whether appellee could have started his business but for the information appellants provided him. The issue is whether appellee's new employment will inevitably lead him to

rely on the plaintiff's trade secrets. *See Cardinal Freight*, 336 Ark. at 152, 987 S.W.2d at 646. *See also Bendinger v. Marshalltown Trowell Co.*, 338 Ark. 410, 994 S.W.2d 468 (1999).

The majority failed to address this issue, but the inevitable disclosure inquiry is a factual inquiry that may include consideration of the similarity of the employee's new job to the position he held with his former employer and consideration of whether or not he exhibited a lack of compunction about using his former employer's proprietary information to gain an unfair tactical advantage. *See Bendinger*, 338 Ark. at 421-23, 994 S.W.2d at 474-75; *Cardinal Freight*, 336 Ark. at 152-53, 987 S.W.2d at 646-47. The inevitable disclosure principle seems squarely applicable here, as it is difficult to conceive of how appellee, with no prior experience in the automotive oil changing industry, could *operate an on-site oil changing facility after a mere six weeks of training without misappropriating the information provided by City Slickers.*

The majority maintains that the information in the subject documents can be ascertained without utilizing City Slickers' documents because the business plan uses statistics from public surveys and studies; because its customer profiles and competition figures are easily ascertainable from phone books and surveys; and because its marketing campaign in the business plan does not include the Little Rock market. However, the detailed information relating specifically to City Slickers and the Little Rock marketing plan contained in the business plan and handbook is not easily ascertainable. Further, although information regarding the existence and operation of an on-site oil changing business may be found on the Internet and in trade publications, the detailed information regarding City Slickers' methods of operation, in particular, is not. Moreover, the examples of information available on related Internet pages offered by appellee in his brief do not provide the level of detail found in appellants' business plan and Little Rock launch handbook. Even appellants' own Internet page, by which it provides on-line quotes, is not published. Finally, although anyone can call a radio or television station or newspaper and receive an estimate on how much air time will cost, the advertising plan, formulated at considerable expense to City Slickers, has obviously been designed to reach the company's target audience.

Further, appellee's position with appellant is virtually identical to his current position. Goodman testified that appellee's job was to "start up" and manage the business in the Little Rock area, which is

precisely what appellee is now attempting to do on his own. Appellee demonstrated no compunction about using the confidential information to create an unfair advantage for himself. The same day that appellee resigned, he used his knowledge of City Slickers' pricing structure, contacted one of City Slickers' potential customers, and offered to match any quote the customer had already been given. Goodman testified that when appellee resigned, appellee told him that he intended to open his own oil-changing operation and compete with Goodman in the Little Rock market. Finally, appellee either informed or misinformed a Little Rock customer that City Slickers' entry into the Little Rock area would be delayed.

The majority attempts to distinguish *Cardinal Freight* because it involved specific customers, whereas appellee and City Slickers are essentially competing for new customers. The majority also maintains that Douglas has not actually misappropriated any information. It is true that some of the information in *Cardinal Freight* related to specific customers, such as the profit margin and marketing plans for specific customers, but that case also involved general information regarding the employer's method of doing business and its marketing program. Moreover, it is the nature of the *information* that is dispositive, not the nature or duration of the customer/employer relationship. It is also true that there is no proof in the record that appellee has misappropriated any confidential information. However, a court may enjoin the threat of misappropriation under the Trade Secrets Act. *See* Ark. Code Ann. § 4-75-604; *Cardinal Freight, supra.* Based on the above authorities, I would hold the chancellor erred in determining that there was no substantial likelihood that appellant would be able to show that the information contained in the Little Rock Launch 2000 and in the business plan constituted trade secrets.

I also believe the chancellor erred in finding that appellant did not have a legitimate business interest in customers in the Little Rock area. A legitimate business interest arises when an employer provides special training or makes available trade secrets, confidential business information or customer lists, if the associate can use that information to gain an unfair advantage. *See Duffner v. Alberty*, 19 Ark. App. 137, 139-40, 718 S.W.2d 111, 112 (1986). As noted above, City Slickers expended considerable time and resources to develop plans to enter the Little Rock market, including the cost of hiring, training, and supporting Douglas as he began developing that market. Specifically, the evidence showed that a competitor's knowledge of City Slickers' overhead costs could be critical information in placing a bid to a potential customer, because such

knowledge would allow a competitor to have a good estimate of how much City Slickers could bid per vehicle, which would allow a competitor to match or beat City Slickers' bid.

In sum, it appears that appellee approached Goodman seeking employment and stayed with the company long enough to determine that Little Rock was a seemingly untapped market for an on-site oil changing business. Armed with the knowledge gleaned from two years' worth of research explaining how to advertise and start such a business in that specific, untapped market, and how to build a customer base, appellee obtained a private investor and attempted to open his own business. While appellee did not need such information to start such a business, there is ample proof in the record suggesting that he would be able to use the information to an unfair advantage.

Appellee maintains that he only intended to match City Slickers' price, not to undercut it. It is precisely this pivotal issue that appellee and the majority misapprehend in this case: the same factors that enabled appellee to match appellants' price support a finding that he violated the Trade Secrets Act. That is, Douglas was able to match City Slickers' price only because that information was made available to him as an employee of City Slickers, and only after he signed a confidentiality agreement. Unfortunately, the majority opinion sanctions that conduct as permissible under the Arkansas Trade Secrets Act.

For the above-noted reasons, I respectfully dissent. Judge PITTMAN has authorized me to state that he joins this opinion.

Gregory DONALD *v.* STATE of Arkansas

CA CR 00-677 42 S.W.3d 563

Court of Appeals of Arkansas
Division I
Opinion delivered March 7, 2001

Charles S. Gibson, for appellant.

Mark Pryor, Att'y Gen., by: *Misty Wilson Borkowski*, Ass't Att'y Gen., for appellee.

LARRY D. VAUGHT, Judge. Appellant Gregory Donald was convicted of driving while intoxicated. After the jury deadlocked in the sentencing phase, the trial court assumed the sentencing function. Appellant was given the maximum sentence of a year in jail, a $1,000 fine, and suspension of his driver's license for 120 days. Appellant argues that the trial court committed reversible error in imposing this sentence in the absence of a presentence report required by Arkansas Code Annotated section 5-65-109 (Repl. 1997), and the State concedes the issue. We agree, and reverse the sentence and remand for resentencing.

In August of 1999, after appellant was found guilty of DWI, the trial court ordered appellant's probation officer, Ms. Moody, to prepare a presentence report. Sentencing was set for November 8, 1999. At the sentencing hearing, Moody stated that she was unable

to prepare the report because she was waiting for some papers to be filled out by appellant. The trial judge expressed his disappointment that the report had not been completed and instructed Moody that if she had informed the court that she needed information, he would have ordered cooperation. The judge also instructed Moody that she should have, at the very least, presented the information that her office had on record relating to appellant's criminal history. Appellant responded that he had seen Moody three times in the interim and she had not inquired about any missing information.

Despite appellant's objection, the trial judge continued with sentencing. Interestingly, the trial judge made several comments during the sentencing indicating that knowledge of the appellant's criminal history and his history with alcohol abuse would have been useful in deciding the length of appellant's incarceration.

Appellant argues that the trial judge's imposition of sentencing absent a presentence report amounts to reversible error. Arkansas Code Annotated section 5-65-109 provides in pertinent part:

> (a) Upon a plea of guilty or nolo contendere to or a finding of guilt of violating § 5-65-103, the court shall immediately request, and the Highway Safety Program or its designee shall provide, a presentence screening and assessment report of the defendant; (b) The presentence report shall be provided within thirty (30) days of the request, and *the court shall not pronounce sentence until receipt of the presentence report*; (c) The report shall include, but not be limited to, the offender's driving record, an alcohol problem assessment, and a victim impact statement where applicable.

(Emphasis added.) Our supreme court has given us strong direction regarding the presentence report requirement of section 5-65-109. In *Watson v. City of Fayetteville,* 322 Ark. 324, 909 S.W.2d 637 (1995), the defendant refused to participate in the presentence interview, upon the advice of his counsel that he may further incriminate himself. The supreme court held that even when the defendant does not willingly cooperate during the presentence interview, the language of section 5-65-109 remains clear and mandatory. Additionally, the court reasoned that the requirement is absolute and refused to apply an invited-error analysis. *Id.*

In the case at bar, the record reflects the appellant was willing to participate in the presentence interview. Specifically, the report was initially requested by appellant, the sentencing took place over

the appellant's objection, the appellant never refused participation, and the trial court attributed the failure to produce a report to miscommunication.

The State concedes that the trial court erred by sentencing without the report, but asks that the case be certified to the supreme court to overturn *Watson* because the statutory requirement of a presentence report produces "absurd results" through "invited error." This issue was thoroughly addressed by the supreme court in *Watson,* under a much more favorable fact scenario. In *Watson,* there was undisputed evidence that the defendant refused to cooperate, yet the supreme court still held the trial court to the statutory requirements of section 5-65-109. In contrast, the evidence in this case suggests a much different scenario. The appellant was willing to participate in the presentence process, and the court's initial request for the report came at appellant's urging. Therefore, we reverse the sentence and remand for resentencing in accordance with this opinion and Arkansas Code Annotated section 5-65-109.

Reversed and remanded for resentencing.

PITTMAN and HART, JJ., agree.

Terry WARD d/b/a Ward's Pools & Spas *v.*
David B. SWITZER and Patricia L. Switzer

CA 00-340 40 S.W.3d 325

Court of Appeals of Arkansas
Division I
Opinion delivered March 7, 2001
[Petition for rehearing denied April 4, 2001.]

Ogles Law Firm, P.A., by: *John Ogles*, for appellant.

One brief only.

LARRY D. VAUGHT, Judge. This is an appeal from an order of contempt arising from appellant's failure to respond to discovery. Appellant contends that the trial court erred in granting the appellees' motion for contempt. We agree.

Appellees, David and Patricia Switzer, filed a complaint against appellant, Terry Ward d/b/a Ward Pools and Spas, alleging breach of contract, replevin, and fraud. The allegations in the complaint arose out of a contract appellees entered into with appellant for the construction of a swimming pool in their backyard. Appellant filed an answer and counterclaim and subsequently filed an amended answer and counterclaim.

Appellees served various discovery requests upon appellant, including two sets of interrogatories, request for production of documents, and requests for admissions. When appellant failed to respond to the requests for admission, appellees filed a motion to deem the requests admitted. Appellees also filed a motion to compel answers to the two sets of interrogatories and request for production of documents.

Appellees subsequently filed a motion for judgment on the pleadings based on the requests for admission. A hearing was held on December 17, 1999. The trial court granted appellees' motion to compel and ordered that the responses to both sets of interrogatories and requests for production be filed by December 24, 1999. The trial court also granted appellees' motion to deem requests admitted and appellees' motion for judgment on the pleadings, but reserved the issue of damages for a hearing. Appellant's amended counterclaim was also dismissed.

An order signed by the trial judge on January 3, 2000, indicates that on December 29, 1999, appellees presented a motion for sanctions and for order of contempt. Based on the pleadings and other matters before the trial court, it awarded appellees a judgment against appellant in the amount of $21,000. However, despite the fact that appellant designated the entire record, the motion for sanctions and for order of contempt do not appear in the record. Nor is there any indication in the record that a hearing was actually held on December 29, 1999. The trial judge also entered an order of contempt on January 3, 2000, referencing appellees' December 29th presentment of a motion for sanctions and for order of contempt. The court found appellant in contempt because he failed to comply with the court's December 17th order requiring him to respond to discovery by December 24, 1999. This order directs the

Garland County Sheriff to take appellant into custody and hold him until such time as he responds to the discovery. On appeal, appellant contends that the trial court erred in granting the order of contempt.

An act is deemed contemptuous if it interferes with the order of the court's business or proceedings or reflects upon the court's integrity. *Etoch v. State*, 332 Ark. 83, 964 S.W.2d 798 (1998). The supreme court in *Fitzhugh v. State,* 296 Ark. 137, 752 S.W.2d 275 (1988), addressed the distinction between civil and criminal contempt. The court quoted the United States Supreme Court to explain the difference:

> 'If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.' *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911). The character of the relief imposed is thus ascertainable by applying a few straightforward rules. If the relief provided is a sentence of imprisonment, it is remedial if 'the defendant stands committed unless and until he performs the affirmative act required by the court's order,' and is punitive if 'the sentence is limited to imprisonment for a definite period.' *Id.*, at 442. If the relief provided is a fine, it is remedial when it is paid to the complainant, and punitive when it is paid to the court, though a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order.
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> . . .
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> The distinction between relief that is civil in nature and relief that is criminal in nature has been repeated and followed in many cases. An unconditional penalty is criminal in nature because it is 'solely and exclusively punitive in character.' *Penfield Co. v. SEC*, 330 U.S. 585, 593 (1947). A conditional penalty, by contrast, is civil because it is specifically designed to compel the doing of some act. "One who is fined, unless by a day certain he [does the act ordered], has it in his power to avoid any penalty. And those who are imprisoned until they obey the order, 'carry the keys of their prison in their own pockets' " *Id.*, at 590, quoting *In re Nevitt*, 117 F. 448, 461 (CA8 1902).

Id. at 139-40, 758 S.W.2d at 276-77 (citing *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624 (1988)).

The contempt charge in the present case arose from the appellant's failure to respond to discovery propounded by appellees. The order of contempt ordered the sheriff to take appellant into custody and to hold him until "he purges the contempt by responding to the discovery...." Because the trial court was attempting to enforce the rights of the parties by compelling appellant to act, the nature of the contempt charge is civil. At the time the order of contempt was entered, the trial court also entered a judgment in favor of appellees for $21,000, plus costs of $125. Therefore, the discovery became moot since appellees received a judgment against appellant. It is well settled that where the parties settle the underlying case that gave rise to the civil contempt sanction, the contempt proceeding is moot because the case has come to an end. *See State ex rel. Corn v. Russo*, 90 Ohio St. 3d 551, 740 N.E.2d 265 (2001)(citing *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911)). Thus, the contempt proceeding in the present case is moot because the underlying case came to an end at the point the trial court awarded appellees a monetary judgment. Accordingly, we reverse the trial court's order of contempt.

Even if the proceeding were considered criminal contempt because it was punitive in nature, we would still reverse because there is no evidence that appellant received notice of contempt and an opportunity to be heard. Arkansas Code Annotated section 16-10-108(c) provides that "Contempts committed in the immediate view and presence of the court may be punished summarily. In other cases, the party charged shall be notified of the accusation and shall have a reasonable time to make his defense." *See also Fitzhugh v. State*, *supra* (stating that the Due Process Clause, as applied in criminal proceedings, requires that an alleged contemnor be notified that a charge of contempt is pending against him and be informed of the specific nature of that charge). There is no evidence that appellant received notice of contempt or an opportunity to defend.

Reversed.

PITTMAN and HART, JJ, agree.

Timothy J. FLEMING *v.* DIRECTOR, Arkansas Employment Security Department; and T.J. Smith Box Company

E 00-216 40 S.W.3d 820

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered March 14, 2001

[redacted]

Appellant, pro se.

Allan Franklin Pruitt, for appellee Director, Arkansas Employment Security Department.

JOSEPHINE LINKER HART, Judge. Timothy J. Fleming appeals a decision of the Arkansas Board of Review ("Board") that affirmed the Appeal Tribunal's denial of unemployment insurance benefits and concluded that he was disqualified from receiving those benefits because of his misconduct in connection with his work. The Board determined that appellant's failure to attend work because he was incarcerated on a matter that was later dismissed by the presiding judge constituted misconduct that justified a denial of benefits. On review, we conclude that such a result could not have reasonably been reached based on the evidence before the Board, and, accordingly, we reverse and remand.

Appellant was employed by T.J. Smith Box Company, Inc. ("T.J. Smith"), from January 3, 2000, until his termination on March 28, 2000. While employed by T.J. Smith, appellant was arrested on March 23, 2000, for allegedly failing to make proper child-support payments. The following day, appellant's girlfriend notified T.J. Smith that appellant was incarcerated. Appellant remained incarcerated until April 13, 2000, when the trial court dismissed the case as a matter of law. His employment with T.J. Smith, however, had been terminated because, according to his employer, appellant missed three or more days without excuse, which constituted a violation of the company's attendance policy.

Thereafter, appellant sought unemployment compensation benefits, claiming that his failure to attend work was not within his control. Before the Appeal Tribunal, appellant acknowledged that he was behind with regard to some child-support payments, but also testified that the underlying child-support case for which he was incarcerated had been dismissed. Nevertheless, the Appeal Tribunal denied benefits, and the Board agreed, concluding that appellant's actions constituted misconduct, as provided for in Ark. Code Ann. § 11-10-514(a) (Repl. 1996). Specifically, the Board, while acknowledging that the underlying child-support case had been dismissed by the trial judge, concluded that appellant's "failure to pay child support resulted in his incarceration," which was an intentional disregard of his employer's interest. From that decision, comes this appeal.

Our scope of appellate review in cases such as this is well-settled and oft-stated:

> On appeal, the findings of the Board of Review are conclusive if they are supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. We review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board's findings. Even when there is evidence upon which the Board might have reached a different decision, the scope of judicial review is limited to a determination of whether the Board could reasonably reach its decision upon the evidence before it.

E.g., Love v. Director, 71 Ark. App. 396, 399, 30 S.W.3d 750, 752 (2000). Because we conclude the Board's decision could not reasonably be reached based upon the evidence before it, we reverse.

As we noted in *Love*, the seminal decision concerning "misconduct" as used in Ark. Code Ann. § 11-10-514(a), is *Nibco, Inc. v. Metcalf*, 1 Ark. App. 114, 118, 613 S.W.2d 612, 614 (1981), where we provided the following definition of the term:

> [M]isconduct involves: (1) disregard of the employer's interests, (2) violation of the employer's rules, (3) disregard of the standards of behavior which the employer has a right to expect of his employees, and (4) disregard of the employee's duties and obligations to his employer.

> To constitute misconduct, however, the definitions require more than mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies, ordinary negligence in isolated instances, or good faith error in judgment or discretion. There must be an intentional or deliberate violation, a willful or wanton disregard, or carelessness or negligence of such degree or recurrence as to manifest wrongful intent or evil design.

See also Niece v. Director, 67 Ark. App. 109, 112, 992 S.W.2d 169, 171 (1999). We have repeatedly stated that "[t]here is an element of *intent* associated with a determination of misconduct." *Niece*, 67 Ark. App. at 112, 992 S.W.2d at 171 (emphasis added). *See also McKissick v. Rolle*, 61 Ark. App. 266, 269, 966 S.W.2d 921, 923-924 (1998); *Rollins v. Director*, 58 Ark. App. 58, 61, 945 S.W.2d 410, 411 (1997). In the case at bar, there is a conspicuous lack of evidence that Fleming *intended* to violate T.J. Smith's attendance policy. As such, the Board erred by concluding that Fleming's actions constituted misconduct.

Here, the Board approached this case as if the issue was whether a claimant, who was unable to attend work because he was incarcerated for failure to make proper child-support payments, has committed misconduct under the statute. That, however, is not the issue in this appeal. To frame the issue in this case in that manner ignores the critical fact that the underlying case that gave rise to the incarceration was dismissed. Moreover, to reach the conclusion that appellant's "failure to pay child support resulted in his incarceration" when there is no evidence that he was legitimately incarcerated for failure to make child-support payments, required the Board to make a finding that appellant was in violation of a child-support order, which it is without jurisdiction to do.[1]

In our view, the issue in this case is whether a claimant, who was unable to attend work because he was incarcerated in a matter

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[1] Generally speaking, enforcement of a child-support order is in the nature of show-cause proceeding wherein the party who has the obligation to pay child support must demonstrate why he should not be held in civil contempt for violating the previous court orders. Accordingly, the party with the child-support obligation can offer the defense of impossibility of performance (*i.e.,* inability to make child-support payments). If it is determined that the party obligated to make the payments was, in fact, able to make such payments, then he can be held in civil contempt of court and incarcerated until he discontinues the contemptuous conduct. In this case, the trial court did not make findings and only dismissed the action. The Board lacked both the evidence and jurisdiction to make the necessary determination of whether appellant's actions constituted civil contempt.

that was ultimately dismissed as a matter of law, has committed misconduct under the statute. In this regard, we conclude that such actions do not constitute misconduct. To conclude otherwise could be construed as a license for the Board to decide matters that it is incompetent to hear under the statutes. Additionally, such a conclusion would be manifestly unjust and require that we abandon the well-settled principle that only *intentional* violations of an employer's policies constitute misconduct. Neither the Director nor T.J. Smith has asked this court to abandon this principle, and we decline to do so.

Accordingly, because there is a lack of evidence that appellant intentionally failed to attend work, we conclude that the Board could not have reasonably reached the decision it did upon the evidence before it. In doing so, we do not hold that a claimant's actions cannot constitute misconduct when he is absent from work because he is incarcerated after a court of competent jurisdiction determines that he is in violation of a child-support order. Instead, we limit our decision to the facts of this case and reverse and remand this matter with instructions to award benefits.

Reversed and remanded.

STROUD, C.J., and JENNINGS, BIRD, and VAUGHT, JJ., agree.

CRABTREE, J., dissents.

Arley David MATHIS *v.* STATE of Arkansas

CA CR 00-551 40 S.W.3d 816

Court of Appeals of Arkansas
Division I
Opinion delivered March 14, 2001

Robert Scott Parks, for appellant.

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

JOSEPHINE LINKER HART, Judge. Arley David Mathis appeals the trial court's denial of his motion to suppress the admission into evidence certain items that were seized from both his person and vehicle. For reversal, appellant argues that the denial of his suppression motion was in error because: (1) the initial stop violated Ark. R. Crim. P. 3.1(2), because the police lacked reasonable suspicion; (2) the search warrant did not justify the stopping and searching of appellant; (3) the pat-down search that resulted in the discovery of a controlled substance and pipe violated *Terry v. Ohio*, 392 U.S. 1 (1968); (4) the search of appellant's person was not incidental to a lawful arrest in that the officer could not recall placing appellant under arrest after the weapon was produced, the officer failed to comply with Ark. R. Crim. P. 4.4, and the officer repeatedly testified that the search warrant was the authority on which he relied to search appellant; and (5) the trial court's decision was contrary to the prohibition against unreasonable searches and seizures and it was tantamount to concluding that a warrant to search a particular place can also constitute an authorization for an officer to stop and detain other persons in the vicinity to determine whether they were connected to a crime.

During the course of a search of a particular place pursuant to a warrant, appellant was stopped and detained after he drove his vehicle near[1] the place being searched. According to the arresting officer's testimony, he searched appellant's vehicle because such a search was authorized by the search warrant he was executing.[2] The

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[1] According to the arresting officer's testimony, appellant was stopped and detained approximately twenty to thirty yards from the caboose that was being searched.

[2] The search warrant, in pertinent part, stated:

> [The affiant] has reason to believe that on the premises known as the caboose at Simpson Lake, including all person, vehicles, and outbuildings, in the County of White, State of Arkansas, there is now being concealed certain property, namely methamphetamine, items used to manufacture methamphetamine including but not limited to tablets containing pseudoephedrine or ephedrine, anhydrous ammonia, firearms, and items used to weigh, package, and consume methamphetamine, which are being possessed illegally as described in statutes 5-64-401 and 5-64-403 of the Arkansas State Statutes.

officer also testified that he did not reasonably suspect that appellant was either committing or was about to commit a crime because he was in close proximity to the place being searched. In addition, despite the fact that he did not provide the nature of his knowledge of appellant, the officer testified that he knew appellant, which added to his suspicion.

The officer advised appellant that a search of the place was being conducted and told him to step out of his car and advised him of his *Miranda* rights. Appellant was asked whether he had any weapons, and he acknowledged that in fact he did have a .380 pistol on his person and a shotgun in a box inside the vehicle. Despite the fact that he could not specifically recall telling appellant he was under arrest, the officer at this point considered appellant to be under arrest because he was carrying a concealed weapon. The officer searched appellant's person and found two small bags of white powder and a marijuana pipe. Thereafter, the officer also searched the vehicle and found a box that contained two bags of marijuana and a sawed-off shotgun.

Appellant's suppression motion sought to have those items seized during the detainment excluded from evidence. Following the hearing on the motion, the trial court denied appellant's suppression motion, reasoning that the search and seizure was lawful because it was incidental to a lawful arrest. Thereafter, appellant entered a conditional guilty plea commensurate with Ark. R. Crim. P. 24.3(b), and was sentenced to 144 months in the Arkansas Department of Correction for possession of both methamphetamine and marijuana, simultaneous possession of drugs and firearms, and criminal use of a prohibited weapon. From the denial of the suppression motion, comes this appeal.

The caboose is located approximately 200 yards north of State Highway (SH) 11 between Morning Sun and Higginson. The driveway to the caboose is approximately 8/10 mile east of the intersection of SH 367 and SH 11. A sign is located at the south end of the driveway which is marked Simpson Lake.

I am satisfied there is probable cause to believe the property so described is being concealed on or in person, premises, vehicle above described and the foregoing grounds for application for issuance of the search warrant exist.

YOU ARE HEREBY COMMANDED to search forthwith the premises described above, including all persons, vehicles, and outbuildings, for the property specified, serving this warrant and if the property be found there to seize it, and prepare a written inventory of the property seized and return this warrant and bring the property as required by law. . . .

If, following an independent determination based on the totality of the circumstances, we conclude that a denial of a suppression motion was clearly against the preponderance of the evidence, then we will reverse. *See, e.g., Welch v. State*, 330 Ark. 158, 164, 955 S.W.2d 181, 183 (1997). In our view, the trial court's finding that the search and seizure at issue was incidental to a lawful arrest was clearly erroneous. Thus, we reverse and remand.

Our law regarding the circumstances that an officer can detain an individual is found at Ark. R. Crim. P. 3.1, which provides:

> [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, had committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to person 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.

(Emphasis added.) Moreover, if an officer has *reasonable cause* to believe that a person has committed a felony, then he can arrest the person without a warrant. *See* Ark. R. Crim. P. 4.1(a). Following such a lawful arrest, the officer, under certain circumstances, can "without a search warrant, conduct a search of the person accused . . . ." Ark. R. Crim. P. 12.1.

On a review of the entire evidence, we are left with a definite and firm conviction that the denial of the suppression motion was clearly against the preponderance of the evidence. We agree with the trial court that the search and seizure was not authorized by the warrant; however, we disagree with the lower court's conclusion that the search was incidental to a lawful arrest. Such a determination ignores the arresting officer's initial contact with appellant, which we conclude was in the form of a detainer, as provided for in Ark. R. Crim. P. 3.1. In our view, the officer's actions — telling appellant the area was being searched, asking him to exit his vehicle, and asking him whether he had weapons on him — would lead a reasonable person to believe that he was not free to leave. *See Phillips v. State*, 53 Ark. App. 36, 39, 918 S.W.2d 721, 723 (1996). Accordingly, our inquiry must turn to whether there was reasonable suspicion to justify appellant's detainment.

The evidence fails to demonstrate that the detaining officer had more than a bare suspicion that appellant either had committed or was about to commit any wrongdoing.[3] The officer initially testified that his actions were motivated by his understanding that the search warrant authorized such action. However, the officer later testified that he gave the *Miranda* warnings because he knew appellant and also knew that methamphetamine had been manufactured at the place being searched.

While we agree that it was justifiable to establish and secure a reasonable perimeter to insure the safety of the law enforcement officers that were conducting the lawful search, we do not agree with appellee that an officer is justified in detaining and searching an individual or his vehicle simply because he is approaching this perimeter from the outside. The notion that under any circumstances a person can be subject to a warrantless search merely because he was approaching such a perimeter is inconsistent with the principle that an individual is free from unreasonable searches and seizures.

Appellee argues that pursuant to Ark. Code Ann. § 16-81-203 (1987), the officer who made initial contact was reasonably suspicious because of the time of day and appellant's proximity to known criminal conduct. Appellant's arrest, however, happened at a time that, by itself, is not unusual (approximately 10:00 p.m.), and appellant's proximity to the place that was allegedly known to the police for criminal conduct, alone, does not create more than a bare suspicion and, therefore, does not provide a sufficient basis to constitute reasonable suspicion. Moreover, it is important to note that these facts may only establish the sixth and eleventh of the fourteen factors listed in Ark. Code Ann. § 16-81-203.[4] Furthermore, to

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[3] Rule 2.1 of the Ark. R. Crim. P. provides:

> For the purposes of this Article, unless the context otherwise plainly requires:"Reasonable suspicion" means 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.

(Emphasis added.)

[4] Act 378 of 1969, as codified at Ark. Code Ann. § 16-81-203, provides that:

> The following are among the factors to be considered in determining if the officer has grounds to "reasonably suspect":
>
> (1) The demeanor of the suspect;
> (2) The gait and manner of the suspect;
> (3) Any knowledge the officer may have of the suspect's background or character;

support the officer's grounds for reasonable suspicions, each of these factors must be considered together with the surrounding circumstances to determine whether reasonable suspicion exists. In our view, reasonable suspicion does not exist merely because a person acts in the manner appellant acted.

Although we are mindful that our decision could keep certain items from the finder-of-fact's consideration, we are convinced that to conclude otherwise would exact too high a cost inasmuch as such a decision would be contrary to the principles embodied in the Fourth and Fourteenth Amendments to the United States Constitution. Objectively speaking, there are a host of legitimate reasons that various persons — either purposefully or accidentally — could be found in such a similar place and at such a similar time. Under the circumstances of this case, we conclude that the trial court clearly erred in finding that the officer had reasonable suspicion to detain appellant.

Reversed and remanded.

PITTMAN and VAUGHT, JJ., agree.

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(4) Whether the suspect is carrying anything, and what he is carrying;
(5) The manner in which the suspect is dressed, including bulges in clothing, when considered in light of all of the other factors;
(6) The time of the day or night the suspect is observed;
(7) Any overheard conversation of the suspect;
(8) The particular streets and areas involved;
(9) Any information received from third persons, whether they are known or unknown;
(10) Whether the suspect is consorting with others whose conduct is "reasonably suspect";
(11) The suspect's proximity to known criminal conduct;
(12) Incidence of crime in the immediate neighborhood;
(13) The suspect's apparent effort to conceal an article;
(14) Apparent effort of the suspect to avoid identification or confrontation by the police.

ROLLING PINES LIMITED PARTNERSHIP
v. CITY of LITTLE ROCK

CA 00-165 40 S.W.3d 828

Court of Appeals of Arkansas
Division III
Opinion delivered March 14, 2001

Mitchell, Blackstock, Barnes, Wagoner & Ivers, by: *Clayton R. Blackstock*, for appellant.

Stephen R. Giles, for appellee.

Steve Owings, amicus curiae, for American Planing Association.

JOHN E. JENNINGS, Judge. This is an appeal from the denial of a conditional use permit. For reversal, appellant contends that the trial court erred in its interpretation of certain city ordinances; that the trial court failed to apply recognized presumptions and standards that accompany conditional uses; and that the trial court erred in concluding that one of the ordinances was not unconstitutionally vague. We affirm.

Appellant, Rolling Pines Limited Partnership, is engaged in the development of the Rolling Pines subdivision in southwest Little Rock. The subdivision is zoned R-2, Single-Family District. Approximately twenty-six, site-built and predominantly brick homes now occupy the western part of the subdivision. In 1994, a second phase of development began on approximately twenty lots located in the eastern part of the subdivision. Appellant encountered difficulty in generating buyer interest and decided to place manufactured homes in the subdivision. However, the City's zoning ordinances do not allow manufactured homes to be placed in an R-2 district as a matter of right. The zoning code does allow them as a conditional use, provided certain criteria are met.

Under the pertinent zoning ordinances, the City Planning Commission is given the authority to approve or disapprove conditional use permits "[a]fter detailed review of [the use's] compatibility with the area...." Little Rock Code § 36-101. The code sets out both general and specific guidelines to be used by the Commission in evaluating applications for conditional use permits. Among the general guidelines is that the "proposed land use is compatible with and will not adversely affect other property in the area where it is proposed to be located." Little Rock Code § 36-107(2). The code also provides under § 36-254(a) that conditional uses will be permitted "provided they do not have objectionable characteristics, and provided further that they otherwise conform to the provisions of this chapter." With regard to manufactured homes, the code sets out specific guidelines for conditional use permits as found in § 36-254(d)(5). That section designates the following eight "minimum" standards that apply to the placement of a manufactured home in an R-2 zone: (1) a pitched roof of three (3) in twelve (12) or fourteen (14) degrees or greater; (2) removal of all transport elements; (3) permanent foundation; (4) exterior wall finished so as to be compatible with the neighborhood; (5) orientation compatible with placement of adjacent structures; (6) underpinning with permanent

materials; (7) all homes shall be multi-sectional; and (8) off-street parking per single-family dwelling standard.

On July 19, 1996, appellant applied to the City for a conditional use permit to place nineteen manufactured homes in the subdivision. The Planning Commission Staff recommended approval of the permit after being satisfied that appellant met the eight, specific requirements of § 36-254(d)(5). However, the Commission, after hearing opposition from subdivision owners, denied appellant's application. On October 31, 1997, appellant filed another application for a conditional use permit but reduced the number of proposed manufactured homes from nineteen to five. The Commission Staff again recommended approval, but the Commission denied the permit. In both instances of denial, the Commission determined that manufactured homes did not meet the standard of compatibility and that appellant had failed to show that the placement of manufactured homes would not have an adverse effect on the neighborhood.

Appellant appealed the Commission's decision to the Little Rock City Board of Directors. After a hearing on February 17, 1998, the Board tabled the issue for further consideration. On March 17, 1998, when ten people were scheduled to speak in opposition to the permit, Mayor Dailey determined that there was no support on the Board to rescind the Commission's denial and therefore let it stand. Appellant then appealed to the Pulaski County Circuit Court, arguing that it was entitled to a conditional use permit, that the Commission's decision was arbitrary, and that the general review standards set forth in the zoning ordinances were so vague that they violated the constitutional right to due process and constituted an illegal delegation of legislative power.

As pursuant to Ark. Code Ann. § 14-56-425 (Repl. 1998), the circuit judge conducted a de novo trial. After hearing the evidence, the judge ruled in favor of the City and denied the permit. His order contained the following specific findings: (1) the eight technical requirements of § 36-254(d)(5) alone do not control the issuance of a conditional use permit but are to be considered in addition to the requirement that the use be compatible and not have an adverse effect on surrounding property; (2) appellant's application failed to meet the compatibility standard; and (3) the manufactured homes appellant proposed have a very different appearance from the site-built homes in that they have vinyl exterior and fewer options for variations in appearance. The judge also ruled that the ordinances

did not violate appellant's right to due process, nor were they so vague as to allow unbridled discretion in the Commission.

Under its first point, appellant argues that the trial court erred in its interpretation of the city's ordinances in three respects. In addressing this issue, we note that a zoning ordinance, being in derogation of common law, must be strictly construed in favor of the property owner. *Blundell v. City of West Helena,* 258 Ark. 123, 522 S.W.2d 661 (1975). However, we also apply the same rules of statutory construction to zoning ordinances as we do to statutes. *Stricklin v. Hays,* 332 Ark. 270, 965 S.W.2d 103 (1998). In interpreting a statute, we will give the words in the statute their ordinary meaning and common usage. *Burcham v. City of Van Buren,* 330 Ark. 451, 954 S.W.2d 266 (1997). In addition, we will avoid resorting to a subtle or forced construction for the purpose of limiting or extending the meaning of a statute. *Young v. Energy Transportation Systems Inc. of Arkansas,* 278 Ark. 146, 644 S.W.2d 266 (1983). Although zoning laws must be strictly construed in favor of the property owner, that does not compel a contrived result when common sense dictates otherwise. *Tillery v. Meadows Construction, Inc.,* 284 Ark. 241, 681 S.W.2d 330 (1984).

Appellant's arguments are centered upon § 36-107(2), which provides:

> The proposed land use is compatible with and will not adversely affect other property in the area where it is proposed to be located.

Appellant first argues that the trial court erred in treating the phrase "proposed land use" as meaning the proposed structure, *i.e.,* manufactured home. Appellant contends that the phrase refers instead to single family living. We disagree. This subsection is found in that portion of the code dedicated to the Commission's review of conditional use permits, and manufactured homes are specifically classified as such a conditional use. Further, a definition section of the code specifically refers to a manufactured home as a "use." *See* Little Rock Code § 36-3. It is clear to us that the phrase "proposed land use" refers to the proposed conditional use, which in this case, is manufactured housing.

Next, appellant contends that the compatibility requirement found in this subsection is controlled by the eight technical requirements specific to manufactured homes that are set out in § 36-254(d)(5). Appellant argues that the technical requirements inherently contain a compatibility determination, meaning that if an

applicant meets the eight requirements, his proposed use is necessarily considered compatible with the surrounding property. Therefore, appellant argues that, once the trial court found that there was compliance with the eight technical requirements, the court erred in making a separate compatibility determination.

We can accept appellant's argument that the eight requirements evidence an attempt by the city lawmakers to ensure that manufactured homes will be as harmonious as possible in structure and appearance with site-built homes. However, the eight requirements are by their own definition regarded as "minimum siting standards." The use of the term "minimum" necessarily implies that the Commission may consider matters over and above those eight requirements in assessing a conditional use.

Third, appellant argues that the trial court misinterpreted the word "compatible" to mean "identical." We cannot agree. The word "compatible" means "capable of existing together without discord or disharmony." Webster's Third New Int'l Dictionary 463 (1976). From our review of the trial court's decision, there is no indication that the trial court interpreted it to mean anything other than its accepted definition.

As its second issue on appeal, appellant contends that the trial court erred in failing to apply certain presumptions that accompany the review of a conditional use application. According to appellant, there are three presumptions or rules that the trial court failed to consider: (1) the presumption that a conditional use is in general harmony with the neighborhood; (2) the rule that a conditional use cannot be denied based on its inherent nature; and (3) the rule that a conditional use cannot be denied if its effect on surrounding property is no greater than the permitted use. Appellant argues that, had the court applied these principles, its findings would have been different.

As a general proposition, we have no quarrel with appellant's recitation of these principles, which are gleaned from 83 Am. Jur.2d *Zoning and Planning* §§ 991, 992, 998, and 999 (1992). However, we do not agree that they must be applied conclusively or without regard to the requirements of an ordinance and the circumstances surrounding any particular permit application. Contrary to appellant's assertions, designating a use as a conditional one does not necessarily constitute a predetermination that the proposed use *must* be permitted. While classifying a use as a conditional one may result from a legislative determination that such a use may be

acceptable in a given district, there is no prohibition against an ordinance requiring compliance with specific and measurable criteria. *See Gorham v. Town of Cape Elizabeth,* 625 A.2d 898 (Me. 1993). To say otherwise would convert a conditional use into one that is allowed as a matter of right. As even the appellant acknowledges, the Commission is afforded some discretion in the matter:

> Basically such permits [conditional use] may issue when the appropriate municipal agency finds that certain conditions or requirements have been satisfied. That determination involves the exercise of discretion and necessitates a quasi-administrative or quasi-judicial consideration. It provides flexibility in a sense that certain uses which are not permitted as a matter of right in particular use districts may be permitted conditionally when the end result will not adversely affect the comprehensive plan for the area and is not incompatible with the permitted uses.
>
> . . . .
>
> The conditional use permit device is quite valuable in providing flexibility to the decisions of boards or commissions involved in the zoning process. It is not possible in an ordinance to pinpoint with accuaracy the potential impact of every type of use. The same general type of use, described in fairly broad terms, may be appropriate as a conditional use in one situation and not in another. The impact upon the surrounding area may differ appreciably . . . . In the conditional use permit situation, the uses will be permitted if in the discretion of the Planning Commission and the Board, certain conditions have been met — the most important one being that that the use in question will not be incompatible with the surrounding neighborhood and will not adversely affect the plan for the area.

Wright, Robert, *Zoning Law in Arkansas: A Comparative Analysis,* 3 UALR Law Journal 421, 452-53 (1980).

In the exercise of that discretion, it was determined that the aggregate placement of manufactured homes was not compatible with the character of the existing neighborhood, which is one that is well-established and consists of modest, well-kept homes where all but one are brick-and-frame structures. The homes in the neighborhood ranged in value from $39,450 to $51,780. There was concern as to the long-term quality of manufactured homes and the effect that manufactured housing would have on property values, questions that went unanswered due to appellant's failure to provide

an impact study as requested. The only evidence offered to show that manufactured housing would not have an adverse effect on value was an appraisal of a manufactured home located in west Little Rock. However, the court rejected the appraisal as a valid comparison because the manufactured home was situated on a large, wooded lot, whereas the proposed manufactured homes were to be situated side by side on smaller lots. On this record, we cannot agree with appellant that the application of those general principles mandated a different result.

Appellant's final argument is that the compatibility standard is unconstitutional for three reasons: (1) it violates the equal protection clause; (2) it violates the right to due process because of its vagueness; and (3) it is an unconstitutional delegation of legislative power because of its vagueness. The trial court made no rulings with respect to appellant's equal-protection or delegation-of-power arguments. Consequently, we do not consider them. *Martin v. Arthur,* 339 Ark. 149, 3 S.W.3d 684 (1999).

An ordinance is presumed to be constitutional, and the burden of proving otherwise is on the challenging party. *Craft v. City of Fort Smith,* 335 Ark. 417, 984 S.W.2d 22 (1998). A statute violates the first essential of due process of law if it either forbids or requires the doing of an act in terms so vague that persons of ordinary intelligence must necessarily guess at its meaning and differ as to its application. *Anderson v. City of Issaquah,* 851 P.2d 744 (Wash. App. 1993). The purpose of the void for vagueness doctrine is to limit arbitrary and discretionary enforcement of the law. *Id.* In the area of land use, a conditional use standard must be sufficiently specific to guide both an applicant in presenting his case and the Board in examining the proposed use. *See Wakelin v. Town of Yarmouth,* 523 A.2d 575 (Me. 1987). In determining this issue, it is permissible for a court to look not only at the face of the ordinance but also at its application to the person who has sought to comply with the ordinance and who is alleged to have failed to comply. *Anderson v. City of Issaquah, supra.*

Appellant cites *Wakelin v. Town of Yarmouth, supra,* and *Anderson v. City of Issaquah, supra,* in support of its argument that the term "compatible" is unconstitutionally vague. Neither case is particularly helpful because neither one deals directly with an ordinance that permits a planning commission to review a proposed use in light of its "compatibility." The *Wakelin* case involved an ordinance that included the terms "intensity of use" and "density of development." The court found that these terms lacked any quantitative

standard by which an applicant or the board could gauge compliance. *Anderson* involved an ordinance with phrases such as "harmonious," and "interesting," as well as "compatible," and the case was marked by numerous attempts on the part of the applicant to meet the board members' subjective concepts of acceptability. Because the board had to draw upon its own subjective "feelings" due to the absence of objective guidelines, the court held that the ordinance failed to pass constitutional muster.

More on point is the decision in *Anderson v. Peden,* 569 P.2d 633 (Or. App. 1977). As in the instant case, the municipal code designated mobile homes as a conditional use and included a "compatibility with the established neighborhood" standard. The court found that the phrase was not unconstitutionally vague. Also in *Life Concepts, Inc. v. Harden,* 562 So.2d 726 (Fla. Ct. App. 1990), the court addressed a challenge to the term "compatible" and found that it was not impermissibly vague because it has a plain and ordinary meaning that could be readily understood by reference to a dictionary. We agree that the term has a well-defined meaning and is not so vague as to leave an applicant guessing as to its import or meaning. Moreover, there is no indication that appellant was laboring under any misconception of what the ordinance required in order to obtain a permit. We conclude that appellant has not established that the ordinance is unconstitutional.

Appellant also questions whether the trial court properly conducted a trial de novo, challenges the trial court's allocation of the burden of proof, and argues that the trial court's findings concerning adverse effect are clearly erroneous. Appellant did not make these arguments in its opening brief but advances them in its reply brief. We do not consider arguments made for the first time in a reply brief. *Partin v. State Bar of Arkansas,* 320 Ark. 37, 894 S.W.2d 906 (1995).

Affirmed.

HART and CRABTREE, JJ., agree.

Thomas K. MORGAN *v.* STATE of Arkansas

CA CR 00-598 42 S.W.3d 569

Court of Appeals of Arkansas
Division IV
Opinion delivered March 14, 2001

Greg A. Knutson, for appellant.

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

JOHN B. ROBBINS, Judge. Appellant Thomas K. Morgan pleaded no contest to second-degree battery and received four years' probation on October 21, 1996. The conditions of his probation prohibited him from committing any offense punishable by imprisonment and required him to submit to drug screenings. On November 5, 1999, the trial court revoked Mr. Morgan's probation pursuant to its finding that he tested positive for illegal drugs and committed the crimes of public intoxication and disorderly conduct.

Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Rule 4-3(j) of the Rules of the Arkansas Supreme Court and Court of Appeals, Mr. Morgan's counsel has filed a motion to withdraw on the grounds that the appeal is without merit. The motion was accompanied by a brief discussing all matters in the record that might arguably support an appeal, including the adverse rulings, and a statement as to why counsel considers each point raised as incapable of supporting a meritorious appeal. Mr. Morgan was provided with a copy of his counsel's brief and notified of his right to file a list of points on appeal within thirty days. Mr. Morgan has responded by filing a list of pro se points with this court.

At the revocation hearing, Mr. Morgan's probation officer testified that Mr. Morgan tested positive for marijuana on May 25, 1999, on June 16, 1999, and again on July 30, 1999. The State also introduced documents from municipal court showing that Mr. Morgan was found guilty of public intoxication and disorderly conduct, with an offense date of May 24, 1999. Mr. Morgan testified on his own behalf, and he admitted having a problem with marijuana and testing positive on the drug screens. He also acknowledged his conviction for public intoxication.

In his brief, Mr. Morgan's counsel addresses two adverse rulings. The first occurred prior to the revocation hearing, when appellant argued that the trial court lacked jurisdiction because, when two additional probation conditions were imposed through an order entered August 20, 1998, appellant did not sign the order reflecting receipt of the additional conditions. This order with these two additional conditions resulted from an earlier probation revocation proceeding. However, as appellant's counsel points out, no

error was committed in the present revocation because it was based on violations of written terms that appellant received when he was originally placed on probation, and not for violating the additional requirements referenced in the subsequent order.

The remaining adverse ruling was the trial court's decision that, by a preponderance of the evidence, Mr. Morgan failed to comply with his conditions of probation. Mr. Morgan's counsel asserts that this decision should not be reversed since it was not clearly against the preponderance of the evidence, *see Baldridge v. State*, 31 Ark. App. 114, 789 S.W.2d 735 (1990), and in light of the evidence of clear probation violations we agree that the decision to revoke was not clearly against the preponderance of the evidence. However, we further note that the sufficiency issue was not preserved for review because Mr. Morgan failed to move for dismissal at the close of the evidence. *See* Ark. R. Crim. P. 33.1; *Miner v. State*, 70 Ark. App. 142, 15 S.W.3d 356 (2000).

We next turn to the list of pro se points submitted by Mr. Morgan. He first advises this court that, although in the State's revocation petition he is accused of DWI on three separate occasions, he did not commit these offenses. However, this assertion is immaterial since the alleged DWIs were not the basis for revocation. Mr. Morgan also attempts to explain the circumstances surrounding his public intoxication conviction, while denying that he was convicted of disorderly conduct. The short answer to this point is that, even without proof of these convictions, there was sufficient evidence to revoke his probation because it is undisputed that he violated a condition by testing positive for marijuana. *See Brock v. State*, 70 Ark. App. 107, 14 S.W.2d 908 (2000) (holding that the State must prove only one violation to sustain a revocation). At any rate, the above points appear to be challenges to the sufficiency of the evidence, and are therefore not preserved for review.

The remainder of Mr. Morgan's filing is dedicated to explaining how he has complied with many of his probation conditions, including paying fines, serving detention, reporting to his probation officer, and making efforts to attend drug rehabilitation. However, as previously indicated, the revocation may be premised on only one violation, even if there has been compliance with the other conditions of probation. Mr. Morgan also states, "In conclusion I would like to add that I would very much like to get my driver's license reinstated and have some independence." However, this issue was not presented below and thus cannot be raised on

appeal. *See Ashlock v. State*, 64 Ark. App. 253, 983 S.W.2d 448 (1998).

Although it is conceded by Mr. Morgan's counsel that the revocation must be affirmed, his counsel has presented a sentencing issue. During Mr. Morgan's period of probation he was twice ordered to serve time in the county detention center pursuant to Ark. Code Ann. § 5-4-304(a) (Repl. 1997). These periods of confinement were for 30 and 120 days, respectively. At the conclusion of the revocation hearing the trial court announced that Mr. Morgan would be given credit for time served; however, the judgment and commitment order failed to reflect such credit. Mr. Morgan's counsel urges this court to modify the sentence to reflect jail-time credit pursuant to Ark. Code Ann. § 5-4-304(d) (Repl. 1997), which provides:

> If the suspension or probation of the defendant is subsequently revoked and the defendant is sentenced to a term of imprisonment, the period actually spent in confinement pursuant to this section shall be credited against the subsequent sentence.

In Mr. Morgan's list of points, he states, "I am making a final plea to please acknowledge [my attorney's] recommendation and give me credit for the 150 days I already served in jail." The State does not dispute that Mr. Morgan is entitled to credit for time served.

We hold that Mr. Morgan cannot raise this issue on direct appeal because it was not raised below. The sentence was not illegal on its face, and our supreme court has stated that a request for jail-time credit is a request for a modification of a sentence imposed in an illegal manner. *See Delph v. State*, 300 Ark. 492, 780 S.W.2d 527 (1989). A claim that a sentence was imposed in an illegal manner must be raised in a petition filed with the circuit court under Rule 37. Ark. R. Crim. P. 37.2(b); *Cooley v. State*, 322 Ark. 348, 909 S.W.2d 312 (1995). No such petition was filed in this case.

Mr. Morgan is not left without a remedy, however. Rule 37.2(c) provides that if an appeal was taken, a petition for relief under the rule must be filed with the circuit court within sixty days of the issuance of the mandate by the appellate court. Thus, Mr. Morgan has sixty days from the issuance of our mandate to seek correction of his sentence that was imposed in an illegal manner. *See Cooley v. State, supra.*

Based on our review of the record and the briefs presented, we conclude that Mr. Morgan's counsel has complied with Rule 4-3(j) and that the appeal is without merit. However, because further relief regarding Mr. Morgan's sentencing may be obtained from the trial court, we decline to relieve his counsel from representation.

Affirmed.

BIRD and ROAF, JJ., agree.

Ray E. RIPPEE *v.* Dorothy Sue WALTERS

CA 00-834 40 S.W.3d 823

Court of Appeals of Arkansas
Division IV
Opinion delivered March 14, 2001

[redacted]

James R. Filyaw, for appellant.

Mashburn & Taylor, by: *Timothy L. Brooks*, for appellee.

JOHN B. ROBBINS, Judge. Appellant Ray E. Rippee appeals the dismissal of his complaint against appellee Dorothy Sue Walters, with whom appellant had a live-in, nonmarital relationship for several years. Appellant filed the instant action seeking the imposition of a constructive trust to prevent appellee's unjust enrichment or, alternatively, to enforce an implied contract between the parties in order to force a division in accordance with the Arkansas laws on divorce and division of marital property. Appellant's complaint in the Crawford County Chancery Court alleged the following, which we condense:

That the parties met and began a relationship in 1987; that they later agreed to live together and establish a household toward which both would contribute time, effort, and money; that they moved to Winslow, Arkansas, in 1991; that he contributed his earnings from employment in construction and stonework for the purposes of joint living expenses, the expenses of their separate minor children, and for the purpose of acquiring personal and real property; that he was led to believe and was informed, directly and indirectly, by appellee that all properties acquired during their cohabitation were their joint property; that he believed her representations that their association was permanent and that if it dissolved, appellant would be entitled to a proportional value of the property to which he contributed or created; that the house in Winslow was titled in appellee's name alone; that in 1991, the house was in a dilapidated

condition, but appellant restored the value to the property; that appellee began a relationship with another man and ordered appellant from the premises on or about February 28, 1998; that she has failed to reimburse appellant for the monies he entrusted to her during their cohabitation or to reimburse him for services performed in the acquisition of real and personal properties; that appellant is entitled to an equitable division of the properties without regard to the title or that, alternatively, he is entitled to the enforcement of an implied contract as evidenced by their conduct from 1987 through 1998; and that a trust should be imposed to hold those assets to prevent unjust enrichment. The concluding "prayer clause" of the complaint (1) asked that the property acquired by the parties be held in trust, and upon dissolution of that trust, appellant be restored to his fair share, and (2) requested that all the property be divided equally in accordance with the divorce laws of Arkansas.

Appellee filed a 12(b)(6) motion alleging that appellant had failed to state facts upon which relief could be granted and requested that the complaint be dismissed. After a hearing on this motion, the trial judge granted the motion. This appeal resulted, and we affirm.

In determining whether to dismiss a complaint under Rule 12(b)(6), it is improper for the trial court to look beyond the complaint. *Guthrie v. Tyson Foods, Inc.*, 285 Ark. 95, 685 S.W.2d 164 (1985). When we review a trial court's decision on a Rule 12(b)(6) motion, we treat the facts alleged in the complaint as true and view them in the light most favorable to the party seeking relief. *Allred v. Arkansas Dep't of Correction Sch. Dist.*, 322 Ark. 772, 912 S.W.2d 4 (1995). The complaint must state facts and not mere conclusions. Ark. R. Civ. P. 8. Arkansas is a fact-pleading state, and when determining whether a cause of action has been sufficiently pled, we look to the allegations of fact that the plaintiff contends support that cause of action. *Brown v. Tucker*, 330 Ark. 435, 954 S.W.2d 262 (1997). Where the complaint only states conclusions without facts, the appellate court will affirm a trial court's dismissal on a 12(b)(6) motion. *Id.*

We first dispose of appellant's allegation and prayer for relief that all the property that was acquired during the parties' relationship should be divided in accordance with the divorce laws of our state. These parties were never married nor was there ever an allegation that they were. To request relief in accordance with statutory and case law principles concerning divorcing spouses is

inapposite, and no relief could possibly be granted on those grounds such that dismissal on this issue was appropriate.

As to any allegation that an implied or express contract was breached with regard to personalty, or that a constructive trust should be established to hold such personalty, appellant alleged no facts in his complaint upon which to support such a claim. Appellant simply generally stated that he had contributed toward the acquisition of personalty for which appellee would not reimburse him. No specific instances or specific items were mentioned in the complaint, and this defeats this claim. *See Mann v. Orrell*, 322 Ark. 701, 912 S.W.2d 1 (1995). The complaint alleges that he contributed funds to the household to raise each of their children and to pay for their joint living expenses, which would provide no basis for reimbursement. Attempting to state the elements of a cause of action but setting forth virtually no facts that correspond to and support those elements will result in this court affirming a trial court's dismissal on 12(b)(6) grounds. *Id.*

We similarly reject appellant's claim that he was entitled to relief as a result of the breach of an implied or express contract between the parties with regard to the realty in Winslow. Appellant and appellee both cite to us *Mitchell v. Fish*, 97 Ark. 444, 134 S.W. 940 (1911), where our supreme court held that an agreement between unmarried cohabitants who homesteaded a tract of land in the state of Washington, worked hard to improve it, sold the land for a substantial profit, each took a small portion of the funds, and entrusted the remaining profit to one who was to invest it for both of their benefit, was sufficient to entitle each to their respective share of profits. In that case, Mr. Fish left Washington and traveled to Arkansas where he was supposed to invest the profits in another piece of land. Ms. Mitchell stayed in Washington in order to obtain a divorce so that she and Mr. Fish could later marry. Each subsequently married someone else, and when appellant sought to take her share of their profits, appellee repudiated the contract, denying its existence. The supreme court held that the chancellor correctly found that a partnership existed, but went further and held that the partnership was ended when the property was sold and the parties had voluntarily agreed to divide the profits, creating a new and untainted contract. *Id.* at 450.

The supreme court in *Mitchell* noted that the question of whether the partnership agreement at the time it was formed was void as against public policy was not the controlling question. *Id.* at

448. Rather, the question was whether one partner, having concluded the business and received the profits of the partnership and having voluntarily agreed to divide it, is liable to the other. *Id.* at 448. The supreme court answered this question in the affirmative without regard to the validity of the underlying contract. *Id.* at 450. In the appeal before us now, there was no allegation that, when their cohabitation ended, the parties then agreed to divide any assets.

The chancellor's conclusion in this case is further supported by the case of *Karoley v. Reid*, 223 Ark. 737, 269 S.W.2d 322 (1954), wherein the parties lived together, though the woman was married to someone else, they took title to a home in both of their names as husband and wife, they separated, and they executed a written contract after their separation affirming certain monies due to the woman, among them the profits realized in the sale of that house. The supreme court found it specifically unnecessary to choose between conflicting views on the propriety of contracts entered and consideration founded on an illicit relationship. The supreme court noted that past illicit relationships will not otherwise invalidate a contract supported by valuable consideration. The supreme court held that the parties' contract was supported by valuable consideration because they had permanently separated prior to the agreement, the contract was reduced to writing, appellant relinquished rights to her personal property under the contract, and this supported her contractual interest, apart from her interest as a tenant in common in their house. None of these factors, which clearly evidence a contractual arms-length agreement, are alleged concerning appellant herein. Consequently, we conclude that appellant has failed to plead facts that would constitute an oral contract, express or implied, for appellee to convey part of her real property, or the value thereof, to appellant.

We also hold that the chancellor did not err in dismissing appellant's complaint as it pertained to the imposition of a constructive trust. The supreme court has held that a homosexual mate may be in a confidential relationship with his lover and be entitled to a constructive trust with regard to the mate's equitable interest in land owned and titled in the name of his lover. *Bramlett v. Selman*, 268 Ark. 457, 597 S.W.2d 80 (1980). A constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. *Scollard v. Scollard*, 329 Ark. 83, 947 S.W.2d 345 (1997). We recognize that a constructive trust may be imposed when the elements necessary for

constructive fraud are not present; it is not necessary to show a material misrepresentation of fact to recover under the theory of constructive trust. *Id.; Betts v. Betts*, 326 Ark. 544, 932 S.W.2d 336 (1996). In *Bramlett*, a constructive trust was ordered to be imposed when Mr. Selman undisputedly provided the purchase money for the real property titled in Mr. Bramlett's name. Mr. Selman was married at the time, and he secreted these funds and used them to purchase a residence in Mr. Bramlett's name. There was a confidential relationship between these men, just as there was between appellant and appellee in the case at bar. What is missing in appellant's claim regarding the Winslow house, however, is any allegation of fact that he ever had any interest in the realty that appellee is refusing to convey to him. In fact, he denied having an ownership interest, appellee was undisputedly the sole titled owner, and there was no allegation that he contributed any money toward the purchase of that property, which are hallmarks in the classic case of constructive trusts regarding realty. *See, e.g., Robertson v. Robertson,* 229 Ark. 649, 317 S.W.2d 272 (1958); *McCall v. Frampton*, 415 N.Y.S.2d 752 (Sup. Ct. 1979).

Rippee's complaint was dismissed without prejudice. He had the option to plead further. However, he chose to appeal. Since we have determined that the trial court's dismissal was proper, Rippee's complaint is now dismissed with prejudice. *See Mann v. Orrell, supra; Ratliff v. Moss*, 284 Ark. 16, 678 S.W.2d 369 (1984).

Affirmed.

BIRD and ROAF, JJ., agree.

James Harold HOEY *v.* STATE of Arkansas

CA CR 00-707 42 S.W.3d 564

Court of Appeals of Arkansas
Division IV
Opinion delivered March 14, 2001

[redacted]

Goodwin, Moore, Colbert, Broadaway & Gray, by: *Michael W. Langley*, for appellant.

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

SAM BIRD, Judge. James Harold Hoey, appellant, was charged by the State with possession of a controlled substance and with possession of drug paraphernalia. In a pretrial motion to suppress evidence, he contended that these charges resulted from a search and seizure that violated his Fourth Amendment rights. The trial court denied the motion, and Hoey entered a conditional plea of guilty pursuant to Ark. R. Crim. P. 24.3, reserving a right to appeal the adverse ruling. He was sentenced to seventy-two months in the Arkansas Department of Correction for the controlled-substances conviction and to sixty months for the possession of drug paraphernalia. His sole argument on appeal is that the trial court erred in denying his motion to suppress. We agree, and therefore reverse and remand.

In reviewing the denial of a motion to suppress, we make an independent determination based on the totality of the circumstances and view the evidence in the light most favorable to the

State. *Travis v. State*, 331 Ark. 7, 959 S.W.2d 32 (1998). We reverse only if the trial court's ruling is clearly against the preponderance of the evidence. *Id.* (citing *Burris v. State*, 330 Ark. 66, 954 S.W.2d 209 (1997)); *Wofford v. State*, 330 Ark. 8, 952 S.W.2d 646 (1997). When police officers have conducted a search without a warrant, our review begins with the basic premise that a warrantless search is unauthorized. *Evans v. State*, 65 Ark. App. 232, 987 S.W.2d 741 (1999). All warrantless searches are unreasonable unless shown to be within one of the exceptions to the rule that a search must rest upon a valid warrant, and the burden of proof is on those who seek to justify it. *Id.*

At the suppression hearing, Officer Jamie Martin of the Green County Sheriff's Department testified as follows regarding events that began around 2:53 a.m. on December 30, 1998. Martin stopped Hoey's vehicle after observing it cross the highway's center line three times in approximately a mile and a half. A driver's license check and criminal history revealed that Hoey had been convicted of possession of methamphetamine, but that he had no outstanding warrants. Martin asked for proof of insurance and a consent to search. Hoey became "kind of angry," said that he had nothing in the vehicle, refused to give consent to a search, and was unable to provide proof of insurance.

Martin informed appellant that it was the sheriff department's policy, pursuant to an order by the municipal judge, to impound and inventory a vehicle when no proof of insurance was available and to take the owner to his destination within the county. Officer Bradley Snyder arrived, and the two officers began an inventory of Hoey's truck to protect the department from claims of lost or stolen property. Because Hoey was going to need a ride, Martin asked "if he had anything." Hoey said that he had a pocket knife, and Martin told him it needed to be put in the patrol car. Martin asked if Hoey had "anything else on him," Hoey said that he did not, and Martin asked him to empty his pockets. Hoey took out of his coat pocket four hollowed-out wooden tubes, which Martin described as "suspicious, like what people use to ingest methamphetamine by snorting." Martin further testified:

> He was emptying his pockets. I became suspicious. He lifted up his jacket and turned around and said he did not have anything on him. I did not tell him to do that. When he turned around, in his watch pocket of his blue jeans, I had my flashlight, you could see part of a clear bag hanging out of that watch pocket. [As I earlier testified,] I realized that methamphetamine is packaged in a

> clear plastic bag. I realized that he had been previously convicted of possession of a controlled substance and that he had snort tubes in his pocket. Those factors along with the plastic bag made me suspicious. At that point, my main concern was the clear bag hanging out. I just simply pulled it out of the pocket. It was a rock of crystal meth.

At that point, Martin placed Hoey under arrest. Hoey asked if Martin was finished searching his truck, and Martin said that he was not.

Martin testified that because the officers had found narcotics at that point, they waited to do an inventory after arriving at the sheriff's department. He testified that he stopped the inventory before completion for no particular reason, that he made no inventory list at the time of the stop, that he did not issue a citation for lacking proof of insurance, that he asked about weapons for his own protection, and that he did not conduct a pat down. Martin stated that Hoey was not under arrest when he handed over his knife, raised up his coat, and said that he had nothing else; nor was he under arrest at the point when Martin saw the bag. Martin acknowledged that there was nothing readily, apparently illegal about the protruding piece of plastic, and that at the time he reached for the plastic he saw no "white substance or anything," only clear plastic. He conducted no further search after pulling the methamphetamine from Hoey's pocket.

Hoey does not challenge the initial stop of his vehicle for a traffic violation. He contends that the warrantless search was unreasonable because the officer did not have probable cause to search him and because the methamphetamine in his pants pocket was not in plain view. Hoey concludes that the officer unlawfully directed Hoey to empty his pockets.

The State contends that the warrantless search was justified because Officer Martin had probable cause to believe that Hoey had committed a felony, possession of methamphetamine. The State asserts that probable cause arose from the officer's suspicions after learning of Hoey's criminal history with methamphetamine and seeing his hollowed-out wooden tubes, commonly used as drug paraphernalia, and from other factors. The State cites *Brunson v. State*, 54 Ark. App. 248, 925 S.W.2d 434 (1996) (rev'd on other grounds), for the holding that probable cause for an arrest means a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves and existing at the time the arrest is

made that justify a cautious and prudent police officer's belief that the accused committed a felony, although this does not require the quantum of proof necessary to support a conviction. We note, however, that a search incident to arrest may not precede an arrest and serve as part of the justification for the arrest. *Brunson, id.* (citing *Sibron v. New York*, 392 U.S. 40 (1968)). Under Ark. R. Crim. P. 3.1 (2000), a law-enforcement officer lawfully present in a place may, in the performance of his duties, stop and detain anyone who he reasonably suspects has committed a felony, if such action is reasonably necessary to determine the lawfulness of the person's conduct. "Reasonable suspicion" is defined as follows:

> "Reasonable suspicion" means 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 (2000) (emphasis added).

Here, neither the emptying of Hoey's pockets nor the removal of the plastic bag was conducted pursuant to a pat-down search for officer safety, and Hoey had been neither arrested nor given a citation.[1] We hold that under the circumstances of this case, a reasonable suspicion that Hoey had committed a felony could not have arisen before Officer Martin grabbed the plastic bag from Hoey's pocket and discovered the methamphetamine. Again, an incident search may not precede an arrest and serve as justification for it. Therefore, we agree with Hoey that no reasonable cause existed for the search of his person, and that the directive that he empty his pockets was unlawful.

Neither do we find merit in the argument that the methamphetamine was seized from appellant's pocket as a result of the plain-view doctrine, under which officers who are legitimately at a location and acting without a search warrant may seize an object in plain view if they have probable cause to believe that the object is either evidence of a crime, the fruit of a crime, or an instrumentality of a crime. *Fultz v. State*, 333 Ark. 586, 972 S.W.2d

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[1] We note that under our recent decision in *Howe v. State*, 72 Ark. App. 466, 39 S.W.3d 467 (2001), the operator of a vehicle who cannot produce proof of insurance should be allowed to keep the vehicle and be given at least ten days to present proof of insurance. Thus, there was no reason for the impoundment of Hoey's truck or for an inventory of its contents.

222 (1998). Officer Martin specifically testified that he saw only plastic protruding from Hoey's pocket, with no indication that it contained a white substance or anything else. Thus, nothing in plain view could have caused the officer to believe that something in the plastic was evidence of a crime, the fruit of a crime, or an instrumentality of a crime.

Applying the principles of "reasonable cause" and "plain view," we conclude that the trial court incorrectly denied the motion to suppress. Therefore, we reverse and remand this case for further proceedings consistent with this opinion.

Reversed and remanded.

STROUD, C.J., concurs, and VAUGHT, J., agrees.

JOHN F. STROUD, Jr., Chief Judge, concurring. I agree with the result reached in this case. However, I would reverse and remand based solely upon our recent decision in *Howe v. State*, 72 Ark. App. 466, 39 S.W.3d 467 (2001), which is cited in footnote 1 of the prevailing opinion.

April PACK *v.* STATE of Arkansas

CA 00-736 41 S.W.3d 409

Court of Appeals of Arkansas
Division I
Opinion delivered March 14, 2001

Everett Law Firm, by: *Elizabeth E. Storey*, for appellant.

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

WENDELL L. GRIFFEN, Judge. April Pack appeals from her adjudication as a delinquent in connection with two charges of felony criminal mischief. She argues that the trial court erred in denying her motions for a directed verdict on the criminal mischief charges and erred in failing to suppress an inculpatory

statement taken in violation of her *Miranda* rights. We disagree and affirm.

On Friday, October 8, 1999, at approximately 8:00 p.m., Officer Richard Jensen of the Lincoln Police Department was patrolling the Lincoln Square when he received a report that some potted plants had been destroyed at a doctor's office located on the square. When Jensen went to investigate the report, he saw appellant, Terrence Brunner, Krystle Murphy, and Brad Olsen near the Veterans of Foreign Wars Building (VFW), which stands approximately fifty to seventy-five feet from the doctor's office.

Later that night, appellant's mother, Sandra Bowman, telephoned Jensen to determine why he was looking for appellant. As a result of this conversation, Bowman took appellant to the police station on October 9, where they both signed a *Miranda* rights form. Appellant then gave Jensen the following statement concerning the incidents that occurred on the Square on October 8:

> I, April Pack, Krystle Murphy, [and] Brad were walking around by the Square at p.m.[*sic*] and Brad keyed a car and yanked up flowers by the office so we went the other way and left him [*sic*] then Krystle's mom picked her up, and so I called my mom and had her come pick me up and she took me home and then she called the cops and said something and I had to go to the police station and talk about something.

The next day, Jensen received criminal mischief reports for damages that occurred to two vehicles that were parked on the Square in a parking lot adjacent to the VFW Building and the doctor's office. These reports indicated that between 8:00 p.m. and 9:00 p.m. on October 8, Mary Barnes' green Ford Aerostar Van was scratched from the front to the back on the passenger side, and the "F word" was scratched across the fender. The reports also indicated that the words "F*ck Lincoln" were written in nail polish on the right front fender of Joann Wyatt's white Pontiac Bonneville.

Jensen testified that after he received the reports on the damaged vehicles, he telephoned appellant's mother. He stated that appellant and her mother voluntarily returned to the police station on October 13 on an unrelated matter. He said that after appellant and her mother had been there about fifteen minutes, he told them that he needed to get another statement from appellant. He then

asked her why she did not tell him about any cars being keyed in her October 8 statement.[1] Appellant responded, "You didn't ask me." At this point, appellant's mother became upset and indicated to appellant, "You better tell him what you know." Jensen then handed appellant a "Suspect's Statement" form and said, "Write down what happened that night." At this point, appellant gave the following statement:

> April Pack, Krystle Murphy, Brad Olsen, Terrence Brunner were walking around Friday '99 [*sic*] and we got in the bad attitude mood and decided to key cars and bust plants and paint on cars and then Terrence went home, Krystle went home, Brad went home, then so did I.

Jensen admitted that he did not advise her of her *Miranda* rights.

Appellant was charged with two counts of felony criminal mischief, based on the damage to the vehicles, and one count of misdemeanor criminal mischief, based on the destruction of the plants. Appellant filed a motion to suppress her October 13 statement, arguing that when Jensen questioned her on October 13, he knew that she was a suspect in the incidents; therefore, it was improper for him to interrogate her without advising her of her *Miranda* rights. The State argued that *Miranda* warnings were not necessary in this case because appellant was not in custody. The trial court found that there was no evidence appellant was in custody and further found that her mother was a participant in the conversation with Jensen, and was the actual person who prompted her daughter to provide the statement. Thus, the trial court denied appellant's motion to suppress.

At trial, Jensen testified to the events as noted above. In addition, the State presented testimony from the owners about the damage caused to their vehicles. Mary Barnes testified that her van was scratched by a key or a knife, causing approximately $1,443.17 in damages. Barnes stated that her vehicle was scratched from front to back on the passenger side and across the fender. She also stated that the "F word" was scratched onto her car. Joann Wyatt testified that her Bonneville was damaged with fingernail polish and was scratched. She stated that the words "F*ck Lincoln" were written in nail polish on her front right fender, and her car was scratched all

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[1] However, as the above statement shows, on October 8 appellant did tell Jensen that "Brad keyed a car."

the way down on the right side. She testified that the estimated cost to repair the damage from the scratches was $1,058 and the estimated cost to repair the damage from the nail polish was $50.

Terrence Brunner also testified on behalf of the State. In his original statement to police, he maintained that Murphy did not damage either vehicle. At trial, he testified that he was with appellant on October 8; that Olsen keyed a green van and pushed over some plants; that Murphy keyed a white car; and that appellant put fingernail polish on the white car. Brunner also stated that the keys and nail polish came from Murphy's purse. He said that Murphy rummaged through her purse and set items out on the ground. Then, Olsen picked up the key and handed it to Murphy, and appellant picked up the nail polish. He stated that neither appellant nor Murphy was with Olsen when he knocked over the plants, but that all four of them were together when the cars were damaged. He also testified that he was standing approximately six to eight feet away from them at the time, but he did not know what appellant was doing while the cars were being keyed and the fingernail polish was being used. Brunner further stated that he was holding his nephew during these incidents and did not cause any damage to the vehicles.

At the close of the State's evidence and at the close of all of the evidence, appellant moved for a directed verdict on all charges. She maintained that the evidence was not specific enough to convict her of any of the three charges, and she maintained that Brunner was not a credible witness. She argued that his statement, as an accomplice, did not constitute sufficient evidence to support a conviction. The State maintained that it had corroborating evidence in the form of 1) Jensen's testimony that appellant was on the Square at approximately the same time the incidents occurred; 2) Bowman's phone call to Jensen shortly after the incident asking why he wanted to talk to appellant when he had not even filed a report at that point; and 3) appellant's inculpatory statements. The trial court denied appellant's motion for a directed verdict.

Appellant then presented her case. She had Jensen read into the record a statement given to Jensen by Murphy in which she stated that Brunner and Olsen keyed a car; that Brunner wrote "F Lincoln" on a car; and that she and appellant sat on the sidewalk while Olsen and Brunner damaged the vehicles. Brunner testified that appellant did not encourage or assist Olsen in keying the van and did not encourage or assist Murphy in keying the Bonneville. He also stated that appellant was at a nearby gas station when Olsen

knocked over the plants, because she had told him she was going there.

At the close of her case, appellant renewed her motion for a directed verdict, maintaining that there was no evidence that she was involved in the keying of the van or the damaging of the flower pots. With regard to the Bonneville, appellant maintained that the evidence showed only that she used the fingernail polish; there was no testimony that she keyed the Bonneville. The trial court granted appellant's motion with respect to the charge of damaging the flower pots. However, the trial judge specifically found that Brunner was not a credible witness with respect to his testimony that he was not involved. The trial judge further found that appellant was guilty as an accomplice regarding the damage to the Bonneville, in that she not only placed nail polish on one vehicle, but was doing so when the other damage occurred. With regard to the van, the court stated that the owner's testimony in conjunction with Jensen's testimony was sufficient to find the petition to be true with respect to that charge. The court ordered appellant to serve thirty days at the Juvenile Detention Center, with twenty days suspended. The court also placed her on twelve months' probation and ordered her to pay restitution to the victims.

I. Sufficiency of the Evidence

Appellant was charged with felony counts of criminal mischief for the damage caused to the two vehicles. Criminal mischief is defined under Arkansas Code Annotated section 5-38-203 (Repl. 1997). This statute provides:

> (a) A person commits the offense of criminal mischief in the first degree if he purposely and without legal justification destroys or causes damage to:
>
> (1) Any property of another[.]
>
> ***
>
> (c)(1) Criminal mischief in the first degree is a Class C felony if the amount of actual damage is five hundred ($500.00) or more.
>
> (2) Otherwise, it is a Class A misdemeanor.

In resolving the question of the sufficiency of the evidence in a juvenile delinquency case, the standard of review is the same as in a criminal case. *See McGill v. State*, 60 Ark. App. 246, 962 S.W.2d 382 (1998). On appeal, we treat a motion for a directed verdict as a challenge to the sufficiency of the evidence. *See Bangs v. State,* 338 Ark. 515, 998 S.W.2d 738 (1999). 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 id.* Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without mere speculation or conjecture. *See id.* In determining whether there is substantial evidence, we consider only that evidence tending to support the verdict. *See Johnson v. State*, 337 Ark. 196, 987 S.W.2d 694 (1999). We do not weigh the evidence presented at trial, as that is a matter for the fact-finder. *See Freeman v. State*, 331 Ark. 130, 959 S.W.2d 400 (1998).

Appellant maintains that the State did not present substantial evidence that she caused any damage to the vehicles. First, she maintains that her inculpatory statements do not establish that she caused any of the damage to the vehicles or the plants. Further, to the extent that she alleged that "we got in the bad attitude mood and decided to key cars and bust plants and paint on cars," the only person she ever identified as keying a vehicle or damaging plants was Olsen. Moreover, she never identified the cars or made reference to a particular vehicle. Therefore, she argues, the trial court had to engage in speculation and conjecture in order to determine that she scratched either of the vehicles.

She also argues that even if the trial court believed Brunner's testimony, the most that it established was that she caused $50 in damage to the Bonneville by using fingernail polish. The statute clearly requires a showing of at least $500 in damage to support a felony criminal mischief charge; therefore, she maintains that the evidence is insufficient to support such a charge in this case.

We hold that the evidence favoring the State is sufficient to support a finding that appellant is liable as an accomplice in this case. An accomplice is one who directly participates in the commission of an offense or who, with the purpose of promoting or facilitating the commission of an offense, or aids, agrees to aid, or attempts to aid the other person in the planning or committing the offense. Ark. Code Ann. §§ 5-2-403(a)(1)-(2) (Repl. 1997). Further, each accomplice is criminally liable for the conduct of the

others. *See Robinson v. State*, 318 Ark. 33, 883 S.W.2d 469 (1994). The relevant factors in determining the connection of an accomplice to a crime are the presence of the accused in the proximity of the crime, the opportunity to commit the crime, and an association with a person involved in the crime in a manner suggestive of joint participation. *See Banks v. State*, 315 Ark. 666, 869 S.W.2d 700 (1994). Further, because this was a juvenile case, the State was not required to show corroborating evidence to independently establish the crime. *See Munhall v. State*, 337 Ark. 41, 986 S.W.2d 863 (1999).

■ We hold that the trial court did not err in denying appellant's motions for a directed verdict, because the evidence in this case was sufficient to hold her criminally responsible as an accomplice to felony criminal mischief. First, even excluding appellant's October 13 statement, her first statement, Jensen's testimony, and Brunner's testimony provide overwhelming evidence that she was near the proximity of the crime at the time when it was alleged to have occurred. Likewise, the same testimony establishes that she had the opportunity to commit the crimes. Third, the same testimony shows that she was associated with others involved in the crimes in a manner to suggest joint participation. In addition, Brunner's testimony that appellant got the nail polish from the ground after Murphy removed it from her purse also supports a finding of joint participation.

■ Finally, Brunner's testimony that appellant painted on the Bonneville with nail polish is the sole evidence that establishes her direct involvement. It is true that the trial court stated that Brunner was not a credible witness, but the court made this statement in regard to Brunner's denial of his involvement, not in regard to his testimony regarding appellant's involvement. In any event, the resolution of conflicting testimony and an assessment of the credibility of witnesses are issues given wide discretion to the fact-finder. *See Ricks v. State*, 316 Ark. 601, 873 S.W.2d 808 (1994). Therefore, we hold that the trial court did not err in denying appellant's motion for a directed verdict.

II. Motion to Suppress

■ ■ We further hold that the trial court did not err in denying appellant's motion to suppress her October 13 statement because she was not subjected to a custodial interrogation. In

reviewing a trial court's ruling on a motion to suppress, the appellate court makes an independent determination based on the totality of the circumstances. *See Travis v. State*, 331 Ark. 7, 959 S.W.2d 32 (1998); *Wofford v. State*, 330 Ark. 8, 952 S.W.2d 646 (1997); *Hale v. State*, 61 Ark. App. 105, 968 S.W.2d 627 (1998). Where the trial court denied a defendant's motion to suppress, we will reverse only if, in viewing the evidence in the light most favorable to the State, the trial court's ruling is clearly against the preponderance of the evidence. *See Travis, supra*; *Wofford, supra.*

According to Jensen's testimony, after he received the report regarding the two vehicles being damaged, he telephoned appellant's mother. He stated that appellant and her mother later voluntarily came into the police station, on an unrelated matter, on October 13. He stated that after they had been there approximately fifteen minutes, he asked appellant why she did not tell him about the cars being damaged when she gave her prior statement. Appellant responded, "You didn't ask me." At this point, appellant's mother became upset and indicated to appellant that she had better tell Jensen what happened. At that point, Jensen handed appellant a piece of paper that has a box labeled "Suspect's Statement" that Jensen checked at the top of the form. Jensen concedes that appellant was a suspect in the case when she came in on October 13.

The issue is whether under the above circumstances, appellant was subjected to custodial interrogation so that Jensen was required to inform her of her *Miranda* rights. The test in this regard has been articulated as follows:

> '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 of 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.'

Shelton v. State, 287 Ark. 322, 328-29, 699 S.W.2d 728, 731 (1985) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984)).

We hold that the trial court did not err in denying appellant's motion to suppress. The purpose of *Miranda* warnings is to protect defendants from custodial interrogations by the State, not by third parties. *See Miranda v. Arizona*, 384 U.S. 436, 461 (1966)(stating the principles embodied in the privilege apply to

informal compulsion exerted by law-enforcement officers during in-custody questioning). Here, appellant was not entitled to *Miranda* warnings on October 13 because her statement was the result of prompting that was neither custodial nor the product of interrogation by the State.

First, there is nothing in the record to suggest that a reasonable person in appellant's position would assume that she was in custody. Jensen's undisputed testimony shows that appellant and her mother voluntarily came to the police station on an unrelated matter. Thus, they were not there at the behest of the State and were not there in connection with the charges in this case. After they had been at the police station for approximately fifteen minutes, Jensen asked appellant why she had not told him about the cars being damaged. Appellant's mother was with her during the entire incident. Appellant was not taken into an interrogation room; nor was she arrested. She does not allege that she was physically or verbally threatened or restrained in any manner.[2]

Second, appellant's statement was prompted by her mother, not the State. While Jensen initially asked appellant why she had not originally told him about the damaged vehicles, it is clear that appellant's mother took over the discussion at that point and ordered appellant to tell Jensen what happened. Thus, appellant's mother, and not Jensen, prompted her to answer his questions in this case. *Miranda* warnings are not required under these circumstances.

Affirmed.

ROBBINS and NEAL, JJ., agree.

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[2] The trial court specifically found that the *Miranda* warnings that were issued on October 8 did not extend forward to the exchange on October 13 because appellant was questioned with regard to a different subject, the damage caused to the vehicles. Appellant has not appealed this finding; thus, we do not address that issue.

Darrell Patrick FOUSE *v.* STATE of Arkansas

CA CR 00-477 43 S.W.3d 158

Court of Appeals of Arkansas
Division I
Opinion delivered March 14, 2001

[redacted]

Hampton, Larkowski & Benca, by: *David Sachar*, for appellant.

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

OLLY NEAL, judge. Appellant, Darrell Patrick Fouse, was charged with manufacturing a controlled substance (methamphetamine), possession of a controlled substance with intent to deliver, possession of drug paraphernalia, simultaneous possession of drugs and firearms, and felon in possession of a firearm. The trial court denied appellant's pretrial motion to suppress evidence. Pursuant to Ark. R. Crim. P. 24.3(b), appellant entered a conditional guilty plea to the charges of manufacturing a controlled substance, possession of drug paraphernalia, and possession of a controlled substance with the intent to deliver. In this appeal, appellant argues that the trial court erred in denying his motion to suppress because the search warrant did not establish probable cause and the good-faith exception to the warrant requirement does not apply, or, alternatively, because the no-knock authorization was not properly supported by the police officer's affidavit.

On December 31, 1998, Michael Steele, chief investigator for the Sixteenth Judicial District Drug Task Force, swore out an affidavit for a search warrant. The affidavit listed several facts, which we now set forth in abbreviated form:

> 1) On September 19, 1998, an informant reported to Deputy Angie McGee of the Jackson County Sheriff's Office that a clandestine methamphetamine lab was operating at the Ron Tyler residence. Deputy McGee has smelled the odor of ether, a solvent

commonly used in manufacturing methamphetamine at the residence, and she has received reports from other sources that a methamphetamine lab and a chop shop are operating from the residence.

2) In a September 28, 1998 statement, Deputy Dickie Morris of the Jackson County Sheriff's Office indicated that a reliable confidential informant reported smelling ether emanating from the Tyler residence on several occasions. Deputy Morris also stated that other sources have told him that a chop shop operates out at the Tyler residence.

3) Deputy Marvin Vanoven of the Jackson County Sheriff's Office has reported receiving several reports that someone at the Tyler residence is making methamphetamine. Deputy Vanoven has smelled the odor of ether at the Tyler residence, and a reliable confidential source has told him that both a clandestine methamphetamine lab and a chop shop are operating at the Tyler residence.

4) A concerned citizen reported visiting the residence and encountering an armed individual seated on a four wheeler at the entrance to the property. The citizen also reported that a locked gate blocks the entrance. Agents of Drug Task Force have received other reports that armed guards patrol the area surrounding the Ron Tyler residence. On October 26, 1998, agents of the force traveled to the residence and observed someone driving a four wheeler around the woods to the west of the residence. The agents also observed lights pointing away from the residence indicating the residents attempt to observe individuals approaching the house. Additionally, agents have observed a motion sensitive light at the gated entrance to the residence.

5) Aerial photographs reveal that several vehicles have been stored on the property. The vehicles first appeared on the property within the last year.

6) Investigator Steele conducted a tactical open field surveillance at the residence on November 3, 1998. During this surveillance, Steele observed individuals using an infrared light source. Based on the experience he gained from four years in the United Stated Army, Agent Steele, believed that the individuals using the infrared light source were attempting to conduct counter surveillance.

> 7) On December 30, 1998, Steele and other agents conducted a second tactical open field surveillance in which they observed a small shed to the south of the Tyler residence. At the shed the officers noticed the strong odor of ether. The officers approached the shed and through an open door were able to observe a "military type ammo can" from which the ether odor seemed to originate. Steele stated that in his experience he has known those types of containers to conceal the components of clandestine methamphetamine labs. The agents also observed a vehicle circling around the field adjacent to the residence in a fashion indicating that the driver was conducting counter surveillance and heard noises coming from the residence that sounded like heavy items being moved or loaded.

On the basis of Steele's affidavit the municipal judge issued a search warrant for Ron Tyler's residence. The warrant allowed for a nighttime search because the place to be searched is difficult for speedy access. The warrant also permitted a no-knock entry because of reports of weapons at the premises and reports of active countersurveillance.

I.

The State first contends that we should affirm the trial court without reaching the merits of appellant's arguments because appellant failed to establish that he has standing to challenge the search. We disagree.

Rights secured by the Fourth Amendment are personal in nature, and may not be vicariously asserted. *Rakas v. Illinois*, 439 U.S. 128 (1978). A person's Fourth Amendment rights are not violated by the introduction of damaging evidence secured by a search of a third person's premises or property. *Id.; Rankin v. State*, 57 Ark. App. 125, 942 S.W.2d 867 (1997). Thus, a defendant must have standing before he can challenge a search on Fourth Amendment grounds. *Ramage v. State*, 61 Ark. App. 174, 966 S.W.2d 267 (1998); *Rankin, supra*. The pertinent inquiry regarding standing to challenge a search is whether a defendant manifested a subjective expectation of privacy in the area searched and whether society is prepared to recognize that expectation as reasonable. *Rankin, supra*.

It is well settled that the defendant, as the proponent of a motion to suppress, bears the burden of establishing that his Fourth Amendment rights have been violated. *Ramage, supra; Rankin,*

supra. One is not entitled to automatic standing simply because he is present in the area or on the premises searched or because an element of the offense with which he is charged is possession of the thing discovered in the search. *Ramage, supra.* We will not reach the constitutionality of the search where the defendant has failed to show that he had a reasonable expectation of privacy in the object of the search. *McCoy v. State*, 325 Ark. 155, 925 S.W.2d 391 (1996).

The State concedes that it did not question appellant's standing to challenge the search before the trial court. The State also correctly notes that this court has ruled that standing can be raised for the first time on appeal and that this court may affirm the result reached by the trial court even though the reason given by the trial court may have been wrong. *See Richard v. State*, 64 Ark. App. 177, 983 S.W.2d 438 (1998). Appellant responds that in the instant case the State has waived its standing argument because in documents filed with and statements made to the trial court the State made affirmative statements indicating its belief that appellant lived at the residence. Appellant supports this argument by noting that the affidavit for probable cause to arrest appellant signed by the prosecutor, the deputy prosecutor, and the judge who eventually ruled on the motion to suppress stated that a search warrant was executed at the residence of Darrell Patrick Fouse. Appellant also quotes a statement from the prosecutor to the trial court in which the prosecutor affirmatively declares that the "search warrant was executed at the residence of Darrell Patrick Fouse."

During oral argument before this court, the State contended that even when the State implies to the trial court that the proponent of a motion to suppress has standing to challenge the search, the movant maintains the burden of establishing standing and if he fails to meet that burden, the State can raise standing for the first time on appeal. The State cites our decision in *Richard, supra*, as support for its argument. The instant case, however, is easily distinguishable from *Richard*. In *Richard*, not only did the accused fail to establish standing, but the record was absolutely devoid of indication of the accused's interest in the residence. Here, however, the record shows that appellant asserted that the search was of his residence, and the State, in both pleadings and oral declarations to the trial court, made affirmative statements indicating appellant lived at the searched residence. This distinction is supported by the United States Supreme Courts holding in *Stegald v. United States,* 451 U.S. 204 (1981). In *Stegald*, the Court held that the Government is precluded from raising standing for the first time at the Supreme Court when the Government failed to make that

argument in the courts below but rather had sought to connect the accused with the residence, had acquiesced in statements by the courts below characterizing the search as one of the accused's residence, and had made similar assertions of its own. Thus, while we have previously held that the State may raise a party's standing to challenge a warrant for the first time on appeal when the record is devoid of any evidence establishing the accused's interest in the place searched, the State, in this case, waived its right to challenge appellant's assertion that he had a legitimate expectation of privacy in the residence by making affirmative declarations to the trial court implying that appellant lived at the residence and had standing to challenge the search of the residence.

Before we turn to the merits of appellant's claim, we address appellant's motion requesting attorney's fees and costs that he incurred when his attorney was forced to prepare a substituted abstract in response to the State's argument that he had not established standing in the trial court. Appellant states that because the State conceded standing at the trial level and because the trial court acknowledged standing, he did not abstract the portion of the record relevant to standing in his opening brief. He argues that when the State decided to raise standing for the first time on appeal, the State maintained the responsibility of abstracting the relevant portions of the record. Appellant contends that because he took on the onus of supplementing his original abstract and submitting a substituted abstract including materials relevant to standing when the State raised the issue for the first time on appeal, the State should be responsible for his costs associated with preparing the substituted abstract.

Rule 4-2(a)(6) of the Arkansas Rules of the Supreme Court requires an appellant to abstract the record, without comment or emphasis, and include only those parts that are vital to an understanding of the issue(s) presented to the court. Ark. Sup. Ct. R. 4-2(a)(6). An appellee who considers the brief provided by appellant as insufficient may call this matter to the appellate court's attention and include a supplemental abstract. *Id.* at (b)(1). When the case is considered on the merits, this court may impose costs to compensate either party for the other party's noncompliance. *Id.*

Appellant has cited no authority for the awarding of attorney's fees against the State, and we know of none. We do not consider arguments not supported by convincing authority. *Johnston v. Curtis*, 70 Ark. App. 195, 16 S.W.3d 283 (2000).

Though we award no attorney's fees, we are nonetheless disturbed by the State's response to appellant's motion. In its response, the State argues:

> Whether standing is conceded or not, the appellant's abstract must demonstrate that he had it. Thus, his counsel is simply wrong that the State should have supplementally abstracted any parts of the record relevant to standing. *To do so would have cured the apparent defect in the appellant's initial abstract, thereby preventing the State from making a standing argument at all.* (Emphasis supplied.)

What is dismaying about this statement is that it appears to be an outright admission that, in this case at least, the State is more concerned with obtaining a victory rather than justice. As citizens, we understand the State's desire to see to it that those who choose to violate the law are punished accordingly. We cannot, however, condone the use of this court's procedural rules that are designed to ensure the efficient operation of justice as shields from justice.

II.

When reviewing a trial court's ruling on a motion to suppress, we make an independent determination based upon the totality of the circumstances; we view the evidence in the light most favorable to the appellee and reverse only if the ruling is clearly erroneous or against the preponderance of the evidence. *Fouse v. State,* 337 Ark. 13, 989 S.W.2d 146 (1999). We apply the totality-of-the-circumstances test in determining whether the magistrate had a substantial basis for concluding that probable cause existed to issue the warrant. *Id.*

Appellant's first contention regarding the warrant is that the affidavit failed to set forth particular facts bearing on the informants' reliability. Appellant notes that throughout the affidavit, Investigator Steele repeatedly states that a confidential informant told other officers about activities, including the production of methamphetamine, the operation of an illegal chop shop, and the use of armed surveillance, occurring at the residence. These informants are never identified and, save the occasional reference to a "reliable confidential source," there is no indicia of their reliability.

Arkansas Rule of Criminal Procedure 13.1(b) provides in pertinent part:

> If an affidavit or testimony is based in whole or in part on hearsay, the affiant or witness shall set forth particular facts bearing on the informant's reliability and shall disclose, as far as practicable, the means by which the information was obtained. . . . Failure of the affidavit or testimony to establish the veracity and bases of knowledge of persons providing information to the affiant shall not require that the application be denied, if the affidavit or testimony viewed as a whole, provides a substantial basis for a finding of reasonable cause to believe that things subject to seizure will be found in a particular place.

A search warrant is flawed if there is no indicia of the reliability of the confidential informant. *Henry v. State*, 29 Ark. App. 5, 775 S.W.2d 911 (1989). Furthermore, the conclusory statement, "reliable informant" is not sufficient to satisfy the indicia requirement. *Jackson v. State*, 291 Ark. 98, 722 S.W.2d 831 (1987). If, however, the affidavit when viewed as a whole provides a substantial basis for a finding of reasonable cause to believe that things subject to seizure may be found in a particular location, the failure to establish the veracity of the informant is not fatal. *Hayne v. State*, 314 Ark. 354, 862 S.W.2d 275 (1993).

In the instant case the statements of the confidential informants reported in the affidavit, alone, fail to establish probable cause. "There is however no rule, statute, or other procedure which prevents officers from following through and investigating any information received by them whether by confidential informant or otherwise." *Toland v. State,* 285 Ark. 415, 417, 688 S.W.2d 718, 720 (1985). Moreover, a presumption exists that public officials are credible. *French v. State*, 256 Ark. 298, 506 S.W.2d 820 (1974).

In this case, a number of sheriff's deputies and task force agents confirmed the smell of ether originating from the residence after receiving reports that a methamphetamine lab was located at the residence. Additionally, members of the drug task force personally observed the counter-surveillance measures being employed at the residence and aerial surveillance corroborated the presence of a large collection of automobiles. Finally, on the evening before applying for the warrant, members of the Drug Task Force entered property near the residence and could smell ether and hear the movement of large items. These personal observations of members of the Sheriff's office and the Drug Task Force provide confirmation of the information supplied by the confidential informants.

Appellant also urges that the warrant violates prohibitions against unreasonable searches and seizures because the affidavit failed to state when the criminal activity it asserts as a basis for the search occurred. In support of this contention, appellant cites *Herrington v. State*, 287 Ark. 228, 697 S.W.2d 899 (1985), and *Ulrich v. State*, 19 Ark. App. 62, 716 S.W.2d 777 (1986). In both of those cases, the courts held that search warrants that failed to mention the time in which the observations occurred or failed to establish a basis upon which a time frame could be inferred were defective.

Appellant's argument that the affidavit in the present case does not provide a time frame is mistaken. Although most of the dates provided in the affidavit reference the date the officer received a report and not when the activity was observed, these references are sufficient to establish a time frame during which the activities occurred. The dates provided in the affidavit reveal that officers received reports beginning in September 1998, and that they investigated until December 1998. Moreover, on October 26, 1998, agents observed a four wheeler traveling around the wooded area to the west of the residence and the lights pointed away from the residence as if to observe individuals approaching the residence and on November 3, 1998, and December 30, 1998, Investigator Steele and others entered property surrounding the residence. On those dates the agents observed individuals using infrared lighting devices commonly used in association with night-vision goggles and smelled ether respectively. Finally, Sergeant Morris's September 28, 1998, statement indicates that an informant had told him of the smell of ether originating from the residence on several occasions within the preceding ninety days. From the affidavit, it can be inferred that the reported activities occurred between June 1998 and December 1998.

Appellant also argues that the surveillance performed by the officers on November 3, 1998, and on December 30, 1998, amount to unlawful searches. Specifically, appellant contends that these searches fell within the curtilage of the residence. We do not reach appellant's argument because he did not receive a specific ruling on whether the area falls within the curtilage of the residence. In order to preserve a point for appellate review, a party must obtain a ruling from the trial court. *Alexander v. State*, 335 Ark. 131, 983 S.W.2d 110 (1998); *Jordan v. State*, 323 Ark. 628,632, 917 S.W.2d 164, 166 (1996). We will not review a matter on which the trial court has not ruled; and, a ruling should not be presumed. The burden of obtaining a ruling is on the movant; matters left unresolved are waived and may not be raised on appeal. *Id.*

Applying a totality-of-the-circumstances test, we cannot conclude that the trial court was clearly erroneous in denying appellant's motion to suppress the evidence. The search warrant was based upon numerous reports that a methamphetamine lab and chop shop were operating out of appellant's residence. These reports were confirmed by aerial photographs showing a recent collection of vehicles on the property, observations of security measures employed at the residence, and the detection of the strong odor of ether emanating from the residence. Citing *Fouse v. State, supra*, appellant argues that the smell of ether alone is not sufficient to establish probable cause. In *Fouse*, the supreme court noted that the smell of ether is insufficient probable cause to justify a *nighttime search*. The court made no pronouncement as to whether the smell is sufficient to justify a daytime search.

In the present case, however, the smell of ether, alone is not the only evidence offered to establish probable cause. Also offered were numerous reports of methamphetamine production, a chop-shop operation, and activities indicative of counter surveillance measures. In light this other information, we conclude that the trial court did not clearly err in denying appellant's motion to suppress. Because we conclude that the trial court did not err in denying appellant's motion to suppress, we do not need to address his argument that the good faith exception to the warrant requirement does not apply in this case.

III.

Appellant's final point on appeal is that the no-knock authorization contained in the warrant was not supported by a reasonable suspicion. Appellant contends that the authorization was based solely on generalizations in the affidavit about officer safety. Appellant has not presented any evidence showing that the warrant was executed using the no-knock clause. Thus, there was no showing that appellant was prejudiced by the no-knock entry provision. The law is well settled that prejudice is not presumed, and we will not reverse absent a showing of prejudice. *Camp v. State*, 66 Ark. App. 134, 991 S.W.2d 611 (1999).

Affirmed.

STROUD, C.J., and JENNINGS, J., agree.

WHEELER CONSTRUCTION COMPANY *v.*
Raymond L. ARMSTRONG

CA 00-875 41 S.W.3d 822

Court of Appeals of Arkansas
Division III
Opinion delivered March 14, 2001

[redacted]

Laser Law Firm, P.A., by: *Frank B. Newell*, for appellant.

Raymond L. Armstrong, for appellee.

OLLY NEAL, Judge. Appellant, Wheeler Construction Company, appeals the Workers' Compensation Commission's award of benefits to appellee, Raymond Armstrong, for a burn injury he received while working for appellant. Appellant makes two arguments in this appeal. For its first point on appeal, appellant contends that the Commission erred in determining that Armstrong is entitled to temporary total disability benefits because he failed to demonstrate a total incapacity to earn wages during his healing period. For its second point on appeal, appellant argues that Arkansas Code Annotated section 11-9-812 (Repl. 1996) should be interpreted to permit an inmate's spouse or minor dependent child to receive permanent disability benefits or permanent partial disability benefits, but not temporary total disability benefits, since the latter are intended to replace the earnings of a worker who, but for his injury, would be able to earn income.

Both parties agreed that Armstrong suffered a compensable injury on August 8, 1996, when he spilled hot tar on his right arm. Armstrong initially sought medical treatment at the Ouachita County Medical Center emergency room. He continued medical treatment at the medical center through the month of August. During that period, appellant continued to pay Armstrong regular wages based on the amount of work performed by his coworkers. Appellant discontinued paying Armstrong wages after he was incarcerated in the Arkansas Department of Correction on August 30, 1996.

Dr. George Gray III treated Armstrong while he was incarcerated. Dr. Gray treated Armstrong's burn with debridement, antibiotics, and analgesics. Over the course of the treatment, Armstrong developed a keloid over his forearm which Dr. Gray initially attempted to treat with topical florinated corocosteroids. After this course of treatment proved unsuccessful, Dr. Gray injected the keloid with Kenalog on at least two occasions. Because Armstrong's condition remained stagnant, Dr. Gray resorted to CO2 laser destruction of the keloid in February 1997. Dr. Gray surmised that Armstrong would need at least three months before he could return to work and that he could not determine when Armstrong could

return to work with no restrictions. While incarcerated, Armstrong returned to the workforce operating a sewing machine at the prison on June 9, 1997. Armstrong contends that he is entitled to temporary total disability benefits from August 8, 1996, through May 30, 1997.

Pursuant to Arkansas Code Annotated section 11-9-521(a) (Repl. 1996), the Commission determined that Armstrong was entitled to the benefits that he sought because he remained in his healing period from August 8, 1996 through May 30, 1997, and because he had not returned to work. The Commission also determined that his dependent daughter, Ashley Armstrong, properly petitioned the Commission to receive the benefits to which her father was entitled while he was incarcerated pursuant to Arkansas Code Annotated section 11-9-812(a)(1).

When reviewing a decision of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission and affirm that decision if it is supported by substantial evidence. *Ritchie Grocery v. Glass*, 70 Ark. App. 22, 16 S.W.3d 289 (2000). Substantial evidence is that relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *Oliver v. Guardsmark, Inc.*, 68 Ark. App. 24, 3 S.W.3d 336 (1999). The Commission's decision 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. *Johnson v. Democrat Printing & Lithograph*, 57 Ark. App. 274, 944 S.W.2d 138 (1997).

Entitlement to Disability Benefits

In this appeal, appellant argues that Armstrong is not entitled to disability benefits because he has failed to demonstrate an incapacity to earn wages during the entire period of August 8, 1996, until May 30, 1997. Appellant correctly notes that there is no mention of Armstrong's ability or inability to work in any documents prior to Dr. Gray's note regarding the laser surgery performed in February 1997.

Prior to the amendments of Act 796 of 1993, Arkansas Code Annotated section 11-9-521(a) provided:

> An employee who sustains a permanent injury scheduled in this section shall receive, *in addition to compensation for the healing period*, weekly benefits in the amount of the permanent partial disability rate attributable to the injury, for that period of time set out in the following schedules. (Emphasis supplied.)

Before the passage of Act 796, our supreme court defined temporary total disability as "that period within the healing period in which the employee suffers a total incapacity to earn wages." *Arkansas State Highway & Transp. Dep't v. Breshears*, 272 Ark. 244, 246, 613 S.W.2d 392, 393 (1981). Thus, the healing period and the period of temporary total disability are not one and the same.

Arkansas Code Annotated section 11-9-521(a) now provides:

> An employee who sustains a permanent compensable injury scheduled in this section shall receive, *in addition to compensation for temporary total and temporary partial benefits during the healing period or until the employee returns to work, whichever occurs first*, weekly benefits in the amount of the permanent partial disability rate attributable to the injury, for that period of time set out in the following schedule....(Emphasis supplied.)

Appellant contends that the amendment to section 11-9-521(a) codified the supreme court's decision in *Breshears* and requires a claimant seeking temporary total disability benefits to show (1) that he remains in his healing period, (2) that he is totally incapacitated to earn wages, and (3) that he has not returned to work.

The Commission disagreed with appellant's interpretation of the General Assembly's intentions in amending section 11-9-521(a). The Commission concluded that the legislature did not intend to codify *Breshears* based on three distinct reasons. First, the Commission explained that notably absent from the amended statute is any use of the term "disability" or the phrase "incapacity to earn wages." The Commission concluded that if the General Assembly had intended to amend the law to require a claimant to specifically prove "an incapacity to earn" or a "disability" as a prerequisite to temporary benefits for a scheduled injury, it would have used some language to that effect or would have at least referenced the *Breshears* decision. Second, the Commission determined that to the extent the General Assembly had some prior decision in mind when amending the section, it clearly meant to overrule the Commission's decisions interpreting the section to permit a worker to receive temporary total benefits even after returning to work.

Finally, the Commission concluded that appellant's argument appeared contrary to the supreme court's holding in *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999), that a loss in earnings on account of a scheduled injury is conclusively presumed under section 11-9-521(a).

We agree with the Commission's interpretation of section 11-9-521(a). The provisions of the Workers' Compensation Act were formerly construed liberally in accordance with the act's remedial purpose; Act 796, however, changed the former practice and mandated that the Commission and the courts construe the provisions strictly. *See Torrey v. City of Fort Smith*, 55 Ark. App. 226, 934 S.W.2d 237 (1996). *See also* Ark. Code Ann. § 11-9-704(c)(3) (stating that administrative law judges, the commission, and any reviewing courts are to construe the provisions of the workers' compensation law strictly). Our supreme court has defined "strict construction" as narrow construction. *Lawhon Farm Servs. v. Brown*, 335 Ark. 272, 984 S.W.2d 1 (1998). Strict construction requires that nothing be taken as intended that is not clearly expressed. *Thomas v. State*, 315 Ark. 79, 864 S.W.2d 835 (1993). The doctrine of strict construction is to use the plain meaning of the language employed. *Holaday v. Fraker*, 323 Ark. 522, 915 S.W.2d 280 (1996).

The court's view of strict construction is supported by the express statements of the General Assembly in passing Act 796. In section 35 of Act 796, the legislature expressly provided:

> 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 Worker's Compensation statutes of this state....When, and if, the Worker's 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 need to be liberalized, broadened, or narrowed it shall be addressed by the General*

> *Assembly and should not be done by Administrative Law Judges, the Workers' Compensation Commission or the courts.* (Emphasis supplied.)

In light of Arkansas Code Annotated section 11-9-704(c)(3) and section 35 of Act 796, we must construe Arkansas Code Annotated section 11-9-521(a) using the plain meaning of the language that the General Assembly employed. The statute expressly provides that for scheduled permanent injuries the injured employee is to receive compensation for temporary total or temporary partial disability during the healing period or until the employee returns to work, whichever occurs first. Conspicuously absent from the statute is any indication that the injured employee show an incapacity to earn wages as a requirement to receiving temporary benefits. This absence is key to any construction of the provision. We hold that the plain meaning of the language employed indicates that an employee who has suffered a scheduled injury is to receive temporary total or temporary partial disability benefits during his healing period or until he returns to work regardless of whether he has demonstrated that he is actually incapacitated from earning wages.

Substantial evidence supports the Commission's finding that Armstrong is entitled to temporary total disability benefits from August 8, 1996, until May 30, 1997. There is no dispute that Armstrong did not return to work prior to May 30, 1997. Thus, the only issue in dispute is whether Armstrong remained within his healing period.

■ The healing period is that period for healing of the injury which continues until the employee is as far restored as the permanent character of the injury will permit. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). If the underlying condition causing the disability has become more stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. *Id.* Whether an employee's healing period has ended is a factual determination to be made by the Commission. *Ketcher Roofing Co. v. Johnson*, 50 Ark. App. 63, 901 S.W.2d 25 (1995).

■ The Commission concluded that appellee's healing period did not end before he returned to work in June 1997. Armstrong's testimony and exhibits indicate that Dr. Gray continuously provided medical treatment to treat Armstrong's burn and resulting keloid formation. The evidence further indicates that Armstrong did not fully recover from his burns and resulting complications until he recovered from the laser surgery to remove the keloid formation.

Based on this evidence, we cannot say that there is no substantial evidence to support the Commission's finding.

Applicability of Ark. Code Ann. § 11-9-812(a)(1)

Arkansas Code Annotated section 11-9-812(a)(1) provides:

> When any person who receives workers' compensation benefits is incarcerated in an institution under the control of the Department of Correction, the inmate's spouse or, if no spouse, the inmate's minor dependent children, may petition the Workers' Compensation Commission to award to the spouse or minor dependent children the inmate's workers' compensation weekly disability benefits for the period of the claimant's incarceration.

Appellant argues that Armstrong's daughter should not be allowed to recover benefits pursuant to this section, because Armstrong's incarceration, and not his injury, prevented him from earning wages. Appellant argues that temporary total disability benefits are intended to replace the earnings of a worker who, but for his injury, would be able to earn income. Thus, appellant's argument continues, because Armstrong could not earn wages after August 30, 1996, due to his incarceration, his inability to earn income is directly attributable to his criminal conduct and not to his injury.

No cases construing section 11-9-812 have been found. As we have construed section 11-9-521, however, whether an injured employee is incarcerated is immaterial as long as that employee remains within his healing period and has not returned to work. Because we have concluded that substantial evidence supports the Commission's decision that Armstrong is entitled to temporary total disability benefits, we also conclude that section 11-9-812(a)(1) is applicable to the instant action and affirm the decision of the Commission.

Affirmed.

STROUD, C.J., and JENNINGS, J., agree

AUTO CONNECTION, INC., Jimmy Smith, Individually and d/b/a The Auto Connection, and H.P. Fraley, Individually, and as Agent, Servant, and Employee *v.* Nina Sue GARDNER

CA 00-415 41 S.W.3d 417

Court of Appeals of Arkansas
Division II
Opinion delivered March 14, 2001

Constance G. Grayson, for appellants.

S. Butler Bernard, Jr., for appellee.

TERRY CRABTREE, Judge. This appeal arises from an Order of the Circuit Court of Crittenden County granting summary judgment to the appellee, Nina Gardner. Appellants, The Auto Connection, Jimmy Smith individually and d/b/a The Auto Connection, Inc., and H.P. Fraley individually and d/b/a The Auto Connection, Inc., argue on appeal that the trial court improperly granted summary judgment because questions of fact remained to be decided. Appellants further argue that even assuming summary judgment was proper, the trial court did not award appellee the proper measure of damages. We find no error and affirm.

This case concerns the sale of a 1996 Mazda 626 automobile. On January 20, 1998, appellee purchased a 1996 Mazda 626 from appellants. Appellants are merchants engaged in the business of buying and selling used automobiles. Appellee purchased the vehicle from appellant for the purchase price of $10,900. The purchase price included a $1,000 trade-in allowance for appellee's 1990 Pontiac Grand Am automobile, and appellee financed the remaining $9,900. The Mazda 626 vehicle purchased by appellee had a title which had been branded as "damaged." Appellee picked up the vehicle on January 23, 1998, after appellants were supposed to perform certain repairs on the vehicle. Appellee was not satisfied with the repairs made by appellants and returned the vehicle. Subsequently, appellee gave written notice to appellants of her intent to void the sale. The trial court found that appellants did not meet the disclosure requirements required by Ark. Code Ann. § 27-14-2303 (Supp. 1999), regarding disclosures to be made to a buyer of a vehicle with a negatively branded title. The trial court granted summary judgment in favor of appellee, and awarded damages in the amount of $10,900, the purchase price of the 1996 Mazda 626.

Summary judgment is to be granted by a trial court when it is clear that there are no genuine issues of material fact to be decided, and the party is entitled to judgment as a matter of law. *Pugh v. Griggs*, 327 Ark. 577, 940 S.W.2d 445 (1997). On review, this court determines if summary judgment was appropriate based on whether the evidence presented in support of summary judgment leaves a material question of fact unanswered. *Id.* We view the

evidence in the light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.* The standard is whether the evidence is sufficient to raise a fact issue, not whether the evidence is sufficient to compel a conclusion. *Caplenger v. Bluebonnet Milling Co.*, 322 Ark. 751, 911 S.W.2d 586 (1995).

Appellants argue that there was a genuine issue of material fact as to whether appellee was made aware that the title was branded as damaged before she purchased the vehicle. We do not address the issue of when appellee was made aware of the damaged title. We affirm the trial court's decision on the basis that appellants did not satisfy the requirements of Ark. Code Ann. § 27-14-2303 (Supp. 1999), which states in pertinent part as follows:

> (a)(1) When any dealer in this state offers for sale a motor vehicle which carries a title branded pursuant to this subchapter, the dealer shall disclose to any prospective buyer or purchaser to sale the nature of the title brand and shall furnish him a description of the damage sustained by the motor vehicle on file with the Office of Motor Vehicle.
>
> (2) The disclosure shall be on a buyer's notification form to be prescribed by the Consumer Protection Division of the Office of the Attorney General.
>
> (3)(A) The form shall be fully filled out and affixed to a side window of the motor vehicle with the title "Buyers Notification" facing to the outside.

Appellants were required to furnish appellee with a description of the damage sustained to the Mazda on a buyer's notification form. Appellants did not furnish appellee with this form, nor did appellants affix a buyers notification form to the vehicle's window.

Section 27-14-2303 further states:

> (c)(1) The forms to be prescribed by the division shall have an acknowledgment section that the seller shall require the buyer to sign prior to completing a sales transaction on a motor vehicle that carries a branded title.
>
> (2) The seller shall retain a copy of the signed notification form.

> (d)(1) Failure of the seller to procure the buyer's acknowledgment signature shall render the sale voidable at the election of the buyer.
>
> (2) The election to render the sale voidable shall be limited to sixty (60) days after the sales transaction.[1]

Appellants argue that it is in dispute as to when appellee was notified of the damage to the vehicle. Appellants' argument is without merit as there is no dispute that appellants failed to meet the requirements of § 27-14-2303. Appellants failed to procure appellee's acknowledgment signature on a buyer's notification form. Thus, under § 27-14-2303(d)(2) appellee could elect to void the sale. There is no dispute that within the prescribed time appellee returned the vehicle and gave written notification to the appellants of her intent to void the sale. Therefore, it was proper for the trial court to grant summary judgment in favor of appellee.

Appellants argue that even if summary judgment is appropriate in this case, the trial court awarded appellee incorrect damages. We disagree and affirm the trial court's award of damages. Damages recoverable from breach of contract are those damages that would place the injured party in the same position as if the contract had not been breached. *Dawson v. Temps Plus Inc.*, 337 Ark. 247, 987 S.W.2d 723 (1999). In this case, the trial court awarded appellee $10,900, the purchase price of the 1996 Mazda 626. This amount of damages was proper as it placed appellee in the position she was prior to the sale. Appellants argue that appellee will get a windfall from this award. This argument is without merit. Appellee purchased the vehicle for $10,900 which included a $1,000 trade-in allowance for appellee's 1990 Pontiac Grand Am. Appellee remains fully liable to her lending institution for the balance on the original loan which was for $9,900. No evidence was introduced to suggest that appellee's liability had been reduced. Thus, appellee will receive no windfall.

Affirmed.

GRIFFEN and BAKER, JJ., agree.

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[1] This section was amended in 1999 to extend the buyer's time to void the sale from thirty days to sixty days. The statute in place at the time of appellee's purchase gave her only thirty days to void the sale.

WACKENHUT CORPORATION and St. Paul Fire & Marine Ins. Co. *v.* Geneva Marchelle JONES

CA 00-865 40 S.W.3d 333

Court of Appeals of Arkansas
Division III
Opinion delivered March 21, 2001

[redacted]

Chisenhall, Nestrud, & Julian, P.A., by: *Jim L. Julian* and *Marck W. Hodge*, for appellants.

McCormick Law Firm, P.A., by: *David H. McCormick*, for appellee.

JOHN F. STROUD, JR., Chief Judge. Appellants, Wackenhut Corporation and St. Paul Fire & Marine Insurance Company, appeal the Workers' Compensation Commission's determination that appellee Geneva Marchelle Jones's left knee replacement was a reasonable and necessary consequence of her compensable injury under Ark. Code Ann. § 11-9-508(a) (Repl. 1996). We affirm.

Appellee, a security guard employed through appellants at Arkansas Nuclear One, sustained a compensable injury on November 21, 1996, when she slipped on the wet running board of a truck and fell, injuring her left knee. She was treated conservatively by Dr. Terry Green, an orthopedic surgeon, and released to return to work on December 2, 1996.

Appellee continued to experience pain after her return to work, and she was referred to Dr. James Mulhollan, an orthopedic surgeon specializing in arthroscopic knee surgery, in April 1997. Dr. Mulhollan performed surgery on appellee's left knee on April 14, 1997, and performed a second surgery on the left knee[1] on July 1, 1998.

[1] Dr. Mulhollan performed surgery on appellee's right knee in October 1997; however, this surgery was not work related and is not the subject of this appeal.

Appellee returned to work on July 15, 1998, and worked on limited duty status until October 21, 1998, when she tripped on a mat at work and strained her knee again. Appellee did not return to work after this injury, and Dr. Barry Sorrells performed total knee replacements on both knees on March 2, 1999.

Appellee made a claim against appellants for the left knee replacement surgery, which appellants refused to pay. The administrative law judge denied appellee's claim; however, the Commission reversed that decision and awarded appellee benefits. Appellants now appeal, arguing that the surgery was not a reasonable and necessary consequence of appellee's compensable injury.

The standard of review in workers' compensation cases is well-settled. We view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirm the decision if it is supported by substantial evidence. *Geo Specialty Chem. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Air Compressor Equip. v. Sword*, 69 Ark. App. 162, 11 S.W.3d 1 (2000). 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. *Geo Specialty, supra.* What constitutes reasonable and necessary medical treatment is a question of fact for the Commission. *Green Bay Packaging v. Bartlett*, 67 Ark. App. 332, 999 S.W.2d 695 (1999). When the primary injury is shown to have arisen out of and in the course of the employment, the employer is responsible for any natural consequence that flows from that injury; the basic test is whether there is a causal connection between the two episodes. *Jeter v. B.R. McGinty Mech.*, 62 Ark. App. 53, 968 S.W.2d 645 (1998).

In its decision, the Commission relied upon the deposition testimony of Dr. Mulhollan in awarding benefits to appellee. In his deposition, Dr. Mulhollan testified that appellee was bowlegged, which caused the load on the inner part of her knee to be dramatically higher than it is in the outer compartment of the knee. This condition is known as varus degeneration, which is an angular degenerative process, and it is the cause of most knee failures in females in their fifties, sixties, and seventies; however, appellee was in her early forties at the time of her knee replacements. He testified that when he first saw appellee in April 1997, her left knee, on a scale of one to four, with four being the worst, was probably a

grade one, and her right knee was already a grade two or three. However, by January 1999, both knees had degenerated to a four-plus level, which necessitated the double-knee replacement.

Dr. Mulhollan unequivocally stated that appellee's compensable injury was the start of the rapid deterioration of appellee's knee, that it was "probably predestined that this was going to occur, and the job injury just happened to be what triggered this one knee." When asked whether the deterioration would have taken place as quickly without the job injury, Dr. Mulhollan replied, "That would be a purely speculative guess, because under my very eyes the opposite knee had the same process occur. So it may well have been predestined that it was going to occur, it just so happened that the job injury started the process on the left side." When asked by appellants' attorney whether it was his belief that the job injury probably exacerbated or accelerated the need for treatment of appellee's condition, Dr. Mulhollan replied, "That's correct." On redirect examination, the following dialogue occurred between Dr. Mulhollan and appellee's counsel:

APPELLEE'S COUNSEL:

> In terms of when [appellee] would have probably faced this [knee replacement] in the future had not this injury occurred, what, in your opinion — when would this have probably manifested itself to a degree that she would have had that knee replacement?

DR. MULHOLLAN:

> You know, I can't imagine. I think —. All I can really say is that it just probably occurred sooner.

APPELLEE'S COUNSEL:

> Any figure, in your best professional judgment, of how much sooner because of the job-related injury?

DR. MULHOLLAN:

> Probably the best guesstimate of how to come up with that number would have to be based on the —. By January of 1999, both knees had reached a 4+ degenerative level.

APPELLEE'S COUNSEL:

That's the most severe?

DR. MULHOLLAN:

That's as bad as it can be. And this, of course, is when I referred her to Dr. Sorrells to have total replacement or osteotomy. But in any event, one knee had an injury and one knee didn't have an injury prior to that, and they both ended up at the same level at the same time. So, you know, I guess I really —. The only timetable I can give you is that I think it happened quicker than it probably would have without the job injury, but probably not a wide time span different.

Appellants contend that our supreme court's decisions in *Crudup v. Regal Ware, Inc.*, 341 Ark. 804, 20 S.W.3d 900 (2000), and *Frances v. Gaylord Container Corp.*, 341 Ark. 527, 20 S.W.3d 280 (2000), mandate reversal of the Commission's decision. In *Frances, supra*, the supreme court held that "expert opinions based upon 'could,' 'may,' or 'possibly' lack the definiteness required to meet the claimant's burden to prove causation pursuant to section 11-9-102(16)(B)." 341 Ark. at 533, 20 S.W.3d at 284. This same rationale was employed by the supreme court one month later in *Crudup, supra*. We disagree with appellant's argument that the language in *Frances* and *Crudup* require reversal in the case presently before us.

An expert opinion is to be judged upon the entirety of the opinion, and it is not validated or invalidated on the presence or lack of "magic words." *Tyson Foods, Inc. v. Griffin*, 61 Ark. App. 222, 966 S.W.2d 914 (1998). In the present case, Dr. Mulhollan stated that the job injury began the deterioration process in appellee's left knee, and that the need for the total left knee replacement probably occurred sooner as a result of the compensable job injury. "Probably" is defined in *The American Heritage Dictionary*, New College Edition, as "most likely," and it was not expressly prohibited by the supreme court's decisions in *Frances* and *Crudup, supra*. We hold that use of the word "probably" is sufficient to satisfy the requirement of Ark. Code Ann. § 11-9-102(16)(B) (Supp. 1999) that medical opinions addressing compensability must be stated within a reasonable degree of medical certainty.

Affirmed.

JENNINGS and NEAL, JJ., agree.

Thornton TWEEDY and Diane Tweedy *v.*
Ronnie COUNTS and Sarah Counts

CA 00-771 40 S.W.3d 328

Court of Appeals of Arkansas
Division IV
Opinion delivered March 21, 2001

Dick Jarboe, for appellants.

Lyons, Emerson & Cone, P.L.C., by: Scott Emerson, for appellees.

JOHN B. ROBBINS, Judge. Thornton Tweedy and his wife Diane Tweedy appeal an order from the Randolph County Chancery Court that denied their request for an easement across appellees' property and held that the land reverted back to appellees as property owners when the road was closed by the county court. For the reasons discussed herein, we affirm in part and reverse in part.

In 1990, proceedings were begun in Randolph County to close certain roads that were not being used so that the county

would not have to maintain them. The county clerk ran a notice in the local newspaper, in May 1990, notifying the public that certain roads "not now open, shall be declared to be closed." The notice also indicated on a diagram the establishment of certain roads, and gave notification of a larger map available at the courthouse for inspection. It is undisputed that the road at issue here was not shown on the notices for Shiloh Township or shown on the county map. Public hearings were held thereafter; however, an order resulting from the hearings and notices was never entered by Jim Andrews, who was the county judge at that time. Five years later, a subsequent Randolph County judge, John Hart, realized that no formal order closing the roads had been entered, and on July 20, 1995, he signed a *nunc pro tunc* order to finalize the proceedings that began with the 1990 notice.

Appellants bought their property on March 1, 1994, after the road-closure proceedings began in 1990 but before entry of the *nunc pro tunc* order. On December 27, 1995, appellants filed a notice of appeal from the *nunc pro tunc* order. No further action was taken in that proceeding until August 3, 1998, when appellees filed a motion to intervene, which was granted. On November 24, 1998, appellees filed an objection to the appeal and a petition to affirm the county court. The Randolph County Circuit Court entered an order on August 31, 1999, that dismissed appellants' December 27, 1995, appeal with prejudice as not being timely. Appellants did not appeal the circuit court order dismissing their appeal of the 1995 county court order.

Appellees own the property on both sides of the former road, and at some point in 1994 they constructed a fence down the center of the road to keep people from trespassing, hunting, and dumping trash on their property. Appellants allege that this prevents them from accessing some of their property during spring and winter months because they have to ford a creek. Appellees argue that the water level of the creek rarely gets that high, and if it does it subsides in a matter of hours, thus giving appellants alternate access to their property. On October 23, 1997, appellants filed suit against appellees in the Randolph County Chancery Court, asking that the subject road be declared a county road, a public road, or a private easement for the purpose of ingress and egress. Appellants also asked for damages caused by appellees' obstruction of the road. A hearing was held on March 21, 2000, and the chancery court issued the following order:

> The road in question in this case was formerly a county road.... [I]t was formally vacated, closed and abandoned by the county as a result of a County Court order entered July 20, 1995. The plaintiff had the right to appeal that County Court order ... but because they did not do so in a timely manner, that appeal was dismissed.... The [appellees] owned all the property on both sides of the subject county road ... thus ... ownership of that part of the road ... reverted to the [appellees] as the property owners. The court is of the opinion that it does not have jurisdiction to modify a county court order and the court declines to do so. The claim of the [appellant] to an easement across the property of the [appellees] is denied, it being the opinion of the Court that the [appellants] have reasonable access to their property.

Appellants now appeal from this chancery court order and raise three issues: whether the court erred as a matter of law in finding that appellants' access had been terminated by the closing of the road; whether the court erred in failing to consider whether the county court order applied to the road in question; and whether the *nunc pro tunc* order entered by a different judge was void.

The road in question was opened in Shiloh Township in 1947. It is undisputed that the road transverses property owned by appellees Ronnie and Sarah Counts and leads to, and ends on, property now owned by appellants. Although appellants' property fronts on Black Ferry Road, a creek runs through appellants' property, and appellants used the subject road to access their property that is on the other side of the creek.

On appellate review of ordinary equity cases, there are two different components of the chancellor's ruling that are considered. *Duchac v. City of Hot Springs*, 67 Ark. App. 98, 992 S.W.2d 174 (1999). The appellate court will not set aside a chancellor's finding of fact unless it is clearly erroneous. *Id.* This deference is granted because of the regard the appellate court has for the chancellor's opportunity to judge the credibility of the witnesses. *Id.* However, a chancellor's conclusion of law is not entitled to the same deference. If a chancellor erroneously applies the law and the appellant suffers prejudice, the erroneous ruling is reversed. *Id.* Manifestly, a chancellor does not have a better opportunity to apply the law than does the appellate court. *Id.*

We first consider appellant's second issue — whether the court erred in failing to consider whether the county court order applied to the road in question. Appellants argue that they were merely

asking the chancery court to consider proof on whether the road was open within the meaning of the description in the notice of hearing that was published in 1990. The 1990 notice provided as follows:

> Notice is hereby given that on the 17th day of May, 1990, at 4:30 P.M., hearing will be had concerning the establishment, widening, and closing of roads in Shiloh Township generally.
>
> ....
>
> That it is proposed that all roads as marked on the diagram below shall be and become established roads of Shiloh Township, with a right of way of 50 feet, and that any and all other roads which may heretofore have been established, which are not now open, shall be declared to be closed.
>
> [diagram omitted]
>
> A complete larger map of said roads is available at the County Clerk's Office in Randolph Clerk's Office in Randolph County Courthouse, Pocahontas, Arkansas, for inspection of any interested party....

Appellants argue that this notice did not apply to the subject road because it was an open road and, therefore, was not one of the roads included in the notice.

Notwithstanding the language cited in the notice of hearing, there can be no doubt that the order at issue applied to the subject road. The *nunc pro tunc* order entered by the county judge on August 15, 1995 provided:

> That all roads set forth and notices as amended upon proper hearings and placed in the file of this cause are hereby designated as county roads of Randolph County, Arkansas....
>
> That this Order is Nunc Pro Tunc and shall not [a]ffect any road designated as a road from or after January 1, 1980.
>
> That any road not so shown and not established subsequent to January 1, 1980, is hereby determined to be closed and abandoned by Randolph County as a county road....

By the plain language of the last paragraph above, any road not shown on the notices and not established subsequent to January 1, 1980, is closed and abandoned by the county. Therefore, inasmuch as the road in question was not designated in the file and was established prior to January 1, 1980, it was closed. The general rule is that a judgment is construed as written, and the language of the judgment, as opposed to the reasons for the judgment, is controlling. 50 C.J.S. *Judgment* § 534 (1997).

We now address the issue of whether the *nunc pro tunc* order entered by a different judge was void. Appellants argue that the county judge in 1990 made no such order and therefore the *nunc pro tunc* order is void. Appellants also argue that the rule on *nunc pro tunc* orders is that such orders can be entered only upon proof that such an order or judgment was in fact made and not entered. *Bobo v. State*, 40 Ark. 224 (1882). While that may be the ruling in *Bobo*, it is irrelevant for purposes of this appeal. If one wants to challenge a county court order, then the proper place to do so is through posttrial motions to that county court or on appeal to the circuit court of that county. Additionally, a judgment cannot be collaterally attacked unless it is void on the face of the record or it is shown that the rendering court lacked subject-matter jurisdiction. *Rowland v. Farm Credit Bank*, 41 Ark. App. 79, 848 S.W.2d 433 (1993). The *nunc pro tunc* order was entered by the county court of Randolph County, and that court is granted the power to make such orders pursuant to Ark. Code Ann. § 14-298-101 (1987). A *nunc pro tunc* order may be entered to make the court's record speak the truth or to show that which actually occurred. *Hansberry v. State*, 318 Ark. 326, 885 S.W.2d 296 (1994). Because the order is not void on its face and the county court had jurisdiction, appellant has not demonstrated that it is void.

The final issue we address is whether the court erred as a matter of law in finding that appellants' access had been terminated by the closing of the road. Appellants state that they are not claiming an easement by necessity nor are they arguing that the fee of the road did not revert to appellees as the adjoining landowners. Appellants argue that, as abutting landowners, they have an independent right, separate from the public's right, to use the road, which was not affected by the vacation or abandonment of the road by the county. Appellants cite *Sevener v. Faulkner*, 253 Ark. 649, 488 S.W.2d 316 (1972), *Flake v. Thompson*, 249 Ark. 713, 460 S.W.2d 789 (1970), and *Paschall v. Valentine*, 321 S.W.2d 568 (Tenn. App. 1958), in support of this argument, and we find this argument persuasive.

In *Sevener,* the parties were next-door neighbors. Their homes faced a state highway, and a county road ran between them, thereby affording them access to the state highway. At some point the county discontinued its maintenance of the road. Subsequently, appellant discovered that the former county road was on her property and moved her fence over to include the roadbed, blocking the appellees' access to the state highway. The issue was whether the rights of either litigant were cut off by the passage of time or by abandonment of maintenance by the county. The supreme court followed the general rule that, when a public highway is abandoned, it does not affect the private right of occupants to the use of the abandoned road for purposes of ingress and egress. *Sevener v. Faulkner, supra.*

In *Flake v. Thompson, supra,* there was a dispute between property owners and the City of Little Rock, which sought condemnation without just compensation. The chancery court found that the appellant property owners had no right in a purported public easement because the easement was never accepted by city ordinance. The appellants' property abutted the purported easement, and they claimed a right of ingress and egress to and from their property. The supreme court held that the owner of property abutting upon a street has an easement in such street for the purpose of ingress and egress which attaches to his property and in which he has a right of property as fully as in the lot itself. *Id.*, and *see Campbell v. Arkansas State Highway Commission,* 183 Ark. 780, 38 S.W.2d 753 (1931).

Appellants also cite *Paschall v. Valentine,* 321 S.W.2d 568 (Tenn. App. 1958), as support for their argument. In *Paschall,* the appellants erected fences across an old road which the county had closed. The appellees claimed a right of ingress and egress as abutting property owners even though they had other access to a new highway. The chancery court said that the appellees had a vested interest in the use of the old road and that the abandonment of the road by the county did not operate to divest them of their rights to use the road. *Id.* The general rule cited in *Paschall* is that an abutting owner has two distinct kinds of rights in a highway: a public right that he enjoys in common with all other citizens and certain private rights that arise from his ownership of property contiguous to the highway and that are not common to the public generally, and this is regardless of whether the fee of the highway is in him or not. *Id.*

In the instant case, even though there was a valid road closing and Randolph County no longer has any responsibility for

maintenance, appellants, as abutting property owners, still have a right to use the old road for ingress and egress to their property, and the chancellor erred in finding otherwise.

Affirmed in part; reversed in part.

BIRD and ROAF, JJ., agree.

Terry Edward GABRION *v.* STATE of Arkansas

CA CR 00-473 42 S.W.3d 572

Court of Appeals of Arkansas
Division IV
Opinion delivered March 21, 2001

Stuart Vess, for appellant.

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

ANDREE LAYTON ROAF, Judge. Terry Edward Gabrion was convicted in a Pulaski County jury trial of two counts of pandering or possessing a visual or print medium depicting sexually explicit conduct involving a child, for which he received concurrent four-year sentences in the Arkansas Department of Correction. On appeal, Gabrion challenges the sufficiency of the evidence and the trial judge's refusal to give the jury his proffered instruction defining the word "lewd." We affirm.

The charges arose from a complaint made by two individuals that Gabrion had possessed videotapes containing child pornography. Gabrion admitted to the North Little Rock Police that he had made the tapes of two girls, whom he knew to be fourteen years old. On the tapes, Gabrion can be seen and heard directing both girls to undress and assume suggestive poses that showed off their breasts and buttocks. The tapes contained full frontal nudity of both young girls as they donned costumes that Gabrion had provided for them.

Looking first at Gabrion's challenge to the sufficiency of the evidence, he concedes that he knowingly possessed two videotapes depicting two fourteen-year-old girls with their breasts exposed and that in one "scene" one of the girls kissed one of the other girl's nipples. However, Gabrion argues that these scenes do not constitute sufficient evidence to sustain his convictions because they do not involve sexually explicit conduct as required by Ark. Code Ann. § 5-27-304 (Repl. 1997). Gabrion claims that in deference to *Ferber v. New York*, 458 U.S. 747 (1982), the legislature inserted the word "lewd" into the statute to avoid "any constitutional problem" and that the images on the tapes simply were not "lewd." He asserts that if "any exhibition by a child" were deemed to be "lewd," the word would have no meaning and the statute would criminalize even the possession of nude or seminude baby pictures. Without citation of authority, Gabrion argues that in determining if the acts on the tapes were "lewd," this court should ignore the fact that the girls were underage and consider the same acts as if they were performed by adults. This argument is without merit.

In a challenge to the sufficiency of the evidence, we review the evidence in the light most favorable to the State and sustain a judgment of conviction if there is substantial evidence to support it. *Abdullah v. State*, 301 Ark. 235, 783 S.W.2d 58 (1990). Substantial evidence is evidence that is of sufficient certainty and precision to compel a conclusion one way or another. *Byrd v. State*, 337 Ark. 413, 992 S.W.2d 759 (1999). The offense of pandering or possessing visual or print medium depicting sexually explicit conduct involving a child is codified in pertinent part as follows:

> (a) No person, with knowledge of the character of the visual or print medium involved, shall do any of the following:
>
> . . .

> (2) Knowingly solicit, receive, purchase, exchange, possess, view, distribute, or control any visual or print medium depicting a child participating or engaging in sexually explicit conduct.

Ark. Code Ann. § 5-27-304 (Repl. 1997). In pertinent part, Ark. Code Ann. § 5-27-401(3) (Repl. 1997) states: " 'Sexual conduct' means . . . lewd exhibition of the genitals or pubic area of any person or the breasts of a female." *Black's Law Dictionary* in part defines "lewd" as "obscene, lustful, indecent, lascivious." 907 (6th ed. 1990). It defines "indecent" as "offensive to common propriety; offending against modesty or delicacy." *Id.* at 768.

Gabrion's argument ignores the fact that the videotapes in question show full frontal nudity of both underage girls. Even if we were to accept Gabrion's argument that exhibition of the girls' breasts on the tape was not "lewd," his failure to address this important fact is fatal to his appeal. However, even if Gabrion had not made this omission, we would still hold that the scenes depicted on the tapes were at the very least indecent and, therefore, "lewd" as contemplated by Ark. Code Ann. § 5-27-401(3).

Gabrion also argues that the trial court erred in failing to instruct the jury as to the definition of "lewd" because "sexually explicit conduct" was defined as the "lewd exhibition of . . . the breast of a female." He contends that "lewd" does not have an ordinary meaning, and with no definition of "lewd" in the code, the jury was left to speculate as to its meaning. This argument is without merit.

We disagree with Gabrion's bald assertion that "lewd" does not have an ordinary meaning, and it is settled law that common words with ordinary meanings need not be explained to the jury. *Pridgeon v. State*, 266 Ark. 651, 587 S.W.2d 225 (1979). Moreover, at trial, Gabrion proffered the following jury instruction:

> "Obscene material" means material which:
>
> (1) Depicts or describes in a patently offensive manner sadomasachistic abuse, sexual conduct or hard-core sexual conduct,
>
> (2) that to the average person, applying contemporary statewide standards, and
>
> (3) taken as whole lacks serious literary, artistic, political, or scientific value.

As noted above, the definition of lewd is more inclusive and not simply synonymous with the word "obscene," which, conversely, is a term of art. Accordingly, even if we were to find that an instruction on the meaning of lewd was indicated in this case, the failure to give Gabrion's proffered instruction was not reversible error because it was an inaccurate statement of the law. *See, e.g., Smith v. State*, 68 Ark. App. 106, 3 S.W.3d 712 (1999).

Affirmed.

ROBBINS and BIRD, JJ., agree.

WAL-MART STORES, INC., and
Claims Management, Inc. *v.* Kemberly BROWN

CA 00-944 40 S.W.3d 835

Court of Appeals of Arkansas
Division II
Opinion delivered March 28, 2001

Roberts, Roberts, & Russell, P.A., by: *Mike Roberts* and *J.R. Wildman*, for appellant.

Philip M. Wilson, for appellee.

TERRY CRABTREE, Judge. This is an appeal of an Arkansas Workers' Compensation Commission's decision awarding attorney's fees to appellee, Kemberly Brown, on the amount of temporary partial disability benefits paid to her by appellants, Wal-Mart Stores, Inc., and Claims Management, Inc. Appellee sustained a compensable injury to her wrist while lifting a box. Appellants initially accepted the claim and paid certain medical expenses. On October 20, 1998, at a prehearing conference, appellants admittedly controverted appellee's temporary partial disability benefits. A hearing was scheduled for January 6, 1999, on that issue. By letter dated December 7, 1998, appellants' attorney advised appellee's attorney that appellants would agree to accept the temporary partial disability, and appellants paid it accordingly. Appellants refused to pay any attorney's fees with respect to the temporary-partial disability benefits paid.

In an opinion filed on November 22, 1999, an Administrative Law Judge ("ALJ") found that appellee did not show by a preponderance of the evidence that she was entitled to an attorney's fee on the amount of the temporary partial benefits paid by appellants. Appellee appealed to the full Workers' Compensation Commission. The Commission reversed the ALJ, and held that appellee was

entitled to such attorney's fees. Appellants appeal the Commission's decision. We hold that the Commission's decision was supported by substantial evidence, and, thus, we affirm.

The Commission's award of attorney's fees was given pursuant to Ark. Code Ann. § 11-9-715(a)(2)(B)(ii) (Repl. 1996), which provides that fees for legal services shall be allowed only on the amount of compensation controverted and awarded. Appellants argue on appeal that no "award" was granted in this case, and thus an award of attorney's fees was not supported by substantial evidence.

This court reviews decisions of the Arkansas Workers' Compensation Commission to see if the they are supported by substantial evidence. *Crossett Sch. Dist. v. Fulton*, 65 Ark. App. 63, 984 S.W.2d 833 (1999). Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion. *Id.* The issue is not whether this court might have reached a different result from the Commission. *Malone v. Texarkana Pub. Schs.*, 333 Ark. 343, 969 S.W.2d 644 (1998). If reasonable minds could reach the result found by the Commission, we must affirm the decision. *Bradley v. Alumax*, 50 Ark. App. 13, 899 S.W.2d 850 (1995).

Appellants admit that they initially controverted appellee's temporary partial disability benefits. Appellants argue, however, that they eventually paid the benefits voluntarily, and thus appellee was never awarded the benefits and section 11-9-715(a)(2)(B)(ii) was not fulfilled. The Commission interpreted the requirements of section 11-9-715(a)(2)(B)(ii) to be that where an employer controverts an injured employee's entitlement to certain benefits, but later accepts liability prior to a hearing on the merits, the employee's attorney may still request a hearing for an attorney's fee on those controverted benefits. The Commission found that when there is no dispute that the employer controverted benefits but then paid the benefits on which an attorney's fee is sought that the employee has established entitlement to an award of those benefits for purposes of the employee's attorney seeking an attorney's fee under Ark. Code Ann. § 11-9-715(a)(2)(B)(ii). The Commission found no requirement in section 11-9-715(a)(2)(B)(ii) requiring that an award of controverted benefits must precede the employer's payment of benefits for the claimant's attorney to be entitled to a fee. We agree and hold that the Commission's findings are supported by substantial evidence.

It has long been recognized that "making an employer liable for attorney's fees serves legitimate social purposes such as discouraging oppressive delay in recognition of liability, deterring arbitrary or capricious denial of claims, and insuring the ability of necessitous claimants to obtain adequate and competent legal representation." *Cleek v. Great S. Metals*, 335 Ark. 342, 345, 981 S.W.2d 529, 530 (1998). "If the fundamental purposes of attorney's fee 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." *Id.* If appellee had not employed counsel to assist her in this matter, it is reasonable to conclude that her claim for temporary partial disability benefits would not have been properly presented and protected. *See id.* Appellants controverted appellee's claim to temporary partial disability benefits at a prehearing conference on October 20, 1998. Appellants did not agree to pay the temporary partial disability benefits until December 1998, a month before the scheduled hearing. Appellee's attorney requested a hearing for attorney's fees on the temporary partial disability benefits. We hold that there is substantial evidence to support the Commission's findings in this case, and that the Commission strictly interpreted § 11-9-715(a)(2)(B)(ii).

Affirmed.

GRIFFEN and BAKER, JJ., agree.

Lark HUNTER and Adelma Hunter
v. Vernon L. ROBERTSON

CA 00-379 40 S.W.3d 337

Court of Appeals of Arkansas
Division IV
Opinion delivered March 28, 2001

[redacted]

Pike & Bliss, P.A., by: *George E. Pike, Jr.*, for appellants.

McMullan Law Firm, by: *Marian M. McMullan*, for appellee.

ANDREE LAYTON ROAF, Judge. In this adverse-possession case, Lark and Adelma Hunter appeal from a Pulaski County Chancery Court order granting summary judgment in favor of Vernon L. Robertson, an owner of adjacent land on Kanis Road in Little Rock. The Hunters had sought to be declared the owners of a three-tenths of an acre tract of unimproved land (hereinafter the "disputed tract") that was excluded from the legal description of both the Hunter and Robertson properties when

their land was conveyed from a common predecessor-in-title. On appeal, the Hunters argue that: 1) payment of taxes for fifteen consecutive years on wild and unimproved land vests title under Ark. Code Ann. § 18-11-103 without proof of the elements of actual adverse possession; 2) the payment-of-taxes requirement of Ark. Code Ann. § 18-11-103 is satisfied if no taxes are assessed on the disputed tract; and 3) the legal description in the tax receipts was sufficient to prove payment of taxes on the property. We affirm.

Both parties agree that prior to the dispute, the last record title holders of the disputed tract were L. A. and Leila Mae Kessinger, husband and wife, who were common grantors in both Robertson's and the Hunters' chain of title. Robertson acquired his property, approximately one acre, in 1992. The Hunters purchased their land, approximately ten acres, in 1993. Their direct predecessor-in-title, the Durhams had acquired the land from a tax-exempt charitable organization, Aldersgate, Inc., in 1981. The Pulaski County Assessor, however, did not remove the tax-exempt status on the land until 1985, at which time the Durhams began to pay *ad valorem* taxes. The Hunters paid *ad valorem* taxes for the entire time that they owned their property. Together, the Durhams and the Hunters paid taxes on the disputed tract for thirteen years.

According to Lark Hunter's deposition testimony, in January of 1998, the Pulaski County Assessor's Office informed the Hunters that they had erroneously been paying taxes on the disputed tract for "numerous years" and inquired whether or not they claimed the property. At the time, Hunter told the assessor's office that he had no such intention, however, he subsequently obtained legal counsel and, on advice of counsel, immediately erected a two-strand, steel-post barbed-wire fence to connect the disputed tract to his property. Hunter admitted, however, that Robertson had been using at least part of the disputed tract by driving on it.

Initially, the Hunters sued Robertson in circuit court seeking declaratory judgment as well as compensatory and punitive damages for trespass, wrongful removal of the Hunters' fence, and slander of title, based on the fact that Robertson had obtained a quit-claim deed to the disputed parcel in December 1998 from the family of L. A. Kessinger. Robertson counterclaimed, alleging that he and his predecessors-in-title had adversely possessed the disputed parcel and had obtained a quit-claim deed from the owners of record. Robertson prayed for dismissal of the Hunters' complaint, for the title to

be quieted, and for his own declaratory and monetary relief. Subsequently, Robertson successfully moved to transfer the case to chancery court.

Once in chancery court, Robertson filed a motion for partial summary judgment. Attached as an exhibit were graphic depictions of how the property descriptions in the Hunters' deed and the tax bill did not coincide. After a hearing, the chancellor granted Robertson's motion, finding that the Hunters did not establish the elements of adverse possession because they did not hold with the required intent in that they were not even aware that they had any possible ownership interest in the disputed parcel until the assessor's office told them that they had been paying taxes on it. The chancellor also found that tacking to an owner with tax-exempt status would not be allowed because it produced "wholly inequitable results," and therefore, the Hunters did not have color of title. The Hunters moved for reconsideration and Robertson filed a motion to dismiss his counterclaim. The chancellor denied the Hunters' motion, but allowed Robertson to dismiss his counterclaim.

The Hunters concede that there are no factual disputes and therefore summary judgment was appropriate; on appeal they challenge the chancellor's conclusions of law. Accordingly, this shall be the focus of our review. *See McCutchen v. Patton*, 340 Ark. 371, 10 S.W.3d 439 (2000). All of the issues raised in the court below are before us for decision, and trial *de novo* on appeal in equity cases involves determination of fact questions as well as legal issues. *Jones v. Abraham*, 341 Ark. 66, 15 S.W.3d 310 (2000). We will uphold the chancellor's decision unless it is clearly erroneous. *Id.* Although this court gives great deference to findings of fact by the chancellor due to the chancellor's superior position to determine credibility issues, it does not give such deference to matters of law, in that the chancellor stands in no better position to apply the law than this court, and when we find that the chancellor misapplied the law and that, as a result, an appellant has suffered prejudice, we will reverse the erroneous ruling. *Acord v. Acord*, 70 Ark. App. 409, 19 S.W.3d 644 (2000).

The Hunters first argue that payment of taxes for fifteen consecutive years on wild and unimproved land vests title under Ark. Code Ann. § 18-11-103 without proof of the elements of actual adverse possession. They contend that the chancellor incorrectly concluded that they could not hold by adverse possession under Ark. Code Ann. § 18-11-103 (1987), unless they also proved all of the elements required for proof of actual adverse possession. Citing

Schmeltzer v. Schied, 203 Ark. 274, 157 S.W.2d (1941), they contend that the supreme court has "consistently" held that the effect of this statute is to vest title once a claimant proves that he has paid taxes on wild and unimproved land for fifteen consecutive years. The Hunters assert that the chancellor erroneously interpreted the effect of Ark. Code Ann. § 18-11-106 (Supp. 1999), on Ark. Code Ann. § 18-11-103, because once they proved the two elements required by that statute, *i.e.*, that the land was wild and unimproved and that taxes were paid for fifteen consecutive years, then title vests. Robertson concedes that the chancellor may have erred when he dismissed the Hunters' case pursuant to Ark. Code Ann. § 18-11-106; however, he asserts that the error was "merely harmless" because the chancellor also found that the Hunters had not satisfied the elements of Ark. Code Ann. § 18-11-103.

The statutory section that the Hunters rely on states:

> Payment of taxes on wild and unimproved land in this state by any person or his predecessor in title for a period of fifteen (15) consecutive years shall create a presumption of law that the person, or his predecessor in title, held color of title to the land prior to the first payment of taxes made as stated and that all the payments were made under color of title.

Ark. Code Ann. § 18-11-103. Case law applying this section appears to support the Hunters' argument; paying taxes on wild and unimproved land not only gives a claimant color of title, but constructive possession as well. *See Smith v. Boynton Land & Lumber Co.*, 131 Ark. 22, 198 S.W. 107 (1917); *Wells v. Rock Island Improvement Co.*, 110 Ark. 534, 162 S.W. 572 (1913); *see also McKim v. McLiney*, 250 Ark. 423, 465 S.W.2d 911 (1971). Accordingly, the real issue, as Robertson asserts, is whether the chancellor erred in finding that the Hunters failed to satisfy the requirements of Ark. Code Ann. § 18-11-103, in that they and their predecessors-in-title actually paid taxes on the disputed tract for only thirteen years.

In this regard, the Hunters also argue that the payment-of-taxes requirement of Ark. Code Ann. § 18-11-103 is satisfied if no taxes are assessed on the disputed tract. The Hunters contend that "logic and fairness dictate" that the requirement under Ark. Code Ann. § 18-11-103 that property tax be paid on wild and unimproved land for fifteen years can be satisfied by something other than money and that in this case that satisfaction was accomplished by the granting of tax-exempt status. They claim that by granting tax-exempt status, the obligation to pay taxes had been discharged and payment had

been made. The Hunters assert that while their interpretation is still an open question in Arkansas, cases from foreign jurisdictions support their position. This argument is without merit.

In *Kelley Trust Co. v. Lundell Land & Lumber Co.*, 159 Ark. 218, 251 S.W. 680 (1923), the supreme court stated that an appellant had not acquired property by the payment of taxes where its predecessor-in-title, upon whom it depended for payment of taxes for a portion of the statutory period, was a tax-exempt entity and therefore paid no taxes. Contrary to the Hunters' assertion, we find the applicable language in this case to be a holding, and not *dicta*, because it is dispositive of one of the issues raised by the appellant on appeal.

Not allowing the Hunters to realize the same benefit from not paying taxes as they would from paying taxes seems to be eminently sound and unfailingly fair. In *Schmeltzer v. Schied, supra*, the supreme court noted that the enactment of Act 199 of 1929, which is currently codified as Ark. Code Ann. § 18-11-103, was to encourage the *payment of taxes. See also Burbridge v. Bradley Lumber Co.*, 214 Ark. 135, 215 S.W.2d 710 (1948). Obviously, being excused from paying taxes is its own reward and needs no inducement.

Furthermore, under Ark. Code Ann. § 18-11-103, it is the paying of taxes that gives color of title and, pursuant to the interpretation of the statute by our supreme court, constructive possession of the property. The payment of taxes involves positive action by the claimant and serves as constructive notice to the true owner of this action through the recording of this payment in the collector's office. If no tax bill was issued, neither would occur.

Moreover, the decisions from foreign jurisdictions cited by the Hunters do not compel a contrary interpretation. In *Mings v. Compton City Sch. Dist.*, 18 P.2d 967 (Cal. App. 1933), in upholding a decision that the appellee school district had acquired by adverse possession a strip of property that had been used as part of a school playground for more than twenty years, the California Court of Appeals held that the district met the requirements of the California adverse-possession statute requiring it to pay all property taxes on the claimed property for the statutory period by paying all the taxes that had been levied and assessed, which by virtue of its tax-exempt status meant none. *Mings* is distinguishable from the instant case in that all the other requirements for adverse possession were met by the school district. Similarly, *Trappett v. Davis*, 633 P.2d 592 (Idaho

1981), and *Hogan v. Blakely*, 251 P.2d 309 (1952), are also cases where the "non-tax elements" of adverse possession had been met. In *Park West Village, Inc. v. Avise,* 714 P.2d 1137 (Utah 1986), some taxes were paid, though, through an error at the assessor's office, not enough.

In the instant case, the Hunters rely on no act of adverse possession other than that they and their predecessors-in-title paid taxes *and* were exempted from paying taxes on the disputed tract. Were we to carry the Hunters' rationale to its ludicrous extreme, tax-exempt entities, by doing nothing, could conceivably acquire wild and unimproved land in Arkansas where someone fails to pay the taxes on it for the applicable statutory period. In sum, we construe the statutory requirement exactly as written: "payment of taxes" means actual payment of taxes.

The Hunters finally argue that the legal description in their tax receipts was sufficient to prove payment of taxes on the property. They contend that the chancellor's finding of fact: "That Plaintiffs paid taxes on said property due to a mistake in the legal description maintained by the Pulaski County Tax Assessor's office," is sufficient to "cure any question" raised below by Robertson that defects in the legal description of the disputed tract are fatal to their adverse-possession claim. Citing *Junction City Special Sch. Dist. No. 75 v. Whiddon*, 220 Ark. 530, 249 S.W.2d 990 (1952), they contend that the fact that the disputed tract was misdescribed in the tax records is "immaterial" to their adverse-possession claim because the chancellor found that they had paid taxes on the disputed tract. The Hunters further assert that the disputed tract could be readily ascertained from the tax records as evidenced by the fact that the assessor's office simply removed the disputed tract from the Hunter tract and gave it its own parcel number.

Because we are affirming the chancellor on point II, this point becomes moot. However, we note that in *Charles v. Pierce*, 238 Ark. 22, 378 S.W.2d 213 (1964), the supreme court held that an indefinite description of the property on which the taxes were being paid prevented the appellant from acquiring title to property by adverse possession, and distinguished *Junction City Special Sch. Dist. No. 75 v. Whiddon*, *supra*, the case relied upon by the Hunters, noting that in that case the court stated:

> While the description under which appellees claimed was faulty, it was evident that they were claiming all that remained of the NW 1/4 of the NW 1/4 of section 28, township 19, range 16

> west, 35 acres, after appellant's 5-acre tract had been carved out of that 40 acres under a definite correct metes and bounds description, which located the 5 acres in the NW corner of the NW 1/4 of section 28, township 10, range 16 west, etc. We think this was sufficient to identify this 35 acres claimed by appellees and entitled them to the benefits of 37-103.

The holding in *Charles v. Pierce, supra* is analogous in that there is a substantial variance between the two possible interpretations of the tax bill description and the description in their deed.

We affirm.

ROBBINS and BIRD, JJ., agree.

Teresa Ann HARRIS *v.* STATE of Arkansas

CA CR 00-943 44 S.W.3d 347

Court of Appeals of Arkansas
Division III
Opinion delivered April 4, 2001

Robert N. Jeffrey, for appellant.

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

JOHN F. STROUD, JR., Chief Judge. A Cleveland County Circuit Court jury found appellant, Teresa Harris, guilty of the offenses of manufacturing methamphetamine; possession of drug paraphernalia with intent to manufacture methamphetamine; possession of anhydrous ammonia in an unlawful container; and simultaneous possession of drugs and firearms. She was sentenced to the Arkansas Department of Correction for twelve years; ten years; five years; and five years, respectively, with the sentences to run concurrently. Harris's sole point on appeal is that the trial court erred in denying her motion for directed verdict on the count of simultaneous possession of drugs and firearms because there was insufficient evidence to show that she was in possession of a useable amount of methamphetamine. We affirm.

Directed-verdict motions are treated as challenges to the sufficiency of the evidence. *Blockman v. State*, 69 Ark. App. 192, 11 S.W.3d 562 (2000). When the sufficiency of the evidence is challenged, the appellate court considers only that evidence which supports the guilty verdict, and the test is whether there is substantial evidence to support the verdict. *Id.* Substantial evidence is evidence of such certainty and precision as to compel a conclusion one way or another. *Id.*

At trial, the State called Chris Harrison, a forensic chemist with the Arkansas State Crime Laboratory, who testified that the only exhibit he tested was a coffee filter containing residue that tested positive for methamphetamine. Harrison stated that he was unable to weigh the residue, but he opined that it was less than one gram.

Based upon Harrison's testimony, appellant contends that because there was not a useable amount of methamphetamine introduced into evidence, she cannot be guilty of the offense of simultaneous possession of drugs and a firearm. In support of her argument, appellant cites *Harbison v. State*, 302 Ark. 315, 790 S.W.2d 146 (1990), contending that possession of a controlled substance must be of a measurable or useable amount to constitute a violation of Ark. Code Ann. § 5-64-401. While we agree that *Harbison* stands for the proposition that a defendant must possess a useable amount of the controlled substance to constitute criminal possession of a controlled substance under section 5-64-401, *Harbison* is not dispositive in the present case.

Subsection (a)(1) of Arkansas Code Annotated section 5-74-106 (Repl. 1997), the statute governing the offense of simultaneous possession of drugs and firearms, provides: "No person shall unlawfully commit a felony violation of § 5-64-401 or unlawfully attempt, solicit, or conspire to commit a felony violation of § 5-64-401 while in possession of a firearm." Section 5-64-401(a) (Supp. 1999) provides: "Except as authorized by subchapters 1-6 of this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver a controlled substance."

Appellant was convicted of manufacture of methamphetamine under Ark. Code Ann. § 5-64-401, a Class Y felony, and she did not appeal that conviction to this court. Although she argued to the trial court below that there was insufficient evidence presented by the State to prove that she possessed a firearm, she abandons that argument on appeal. Appellant's felony conviction of the manufacture of methamphetamine under Ark. Code Ann. § 5-64-401, which she did not appeal, together with a finding of simultaneous possession of a firearm, satisfies the requirements of Ark. Code Ann. § 5-74-106 irrespective of whether a useable amount of a controlled substance was involved in the offense. Therefore, the evidence, when viewed in the light most favorable to the State, is sufficient to sustain appellant's conviction for simultaneous possession of drugs and firearms.

Affirmed.

JENNINGS and NEAL, JJ., agree.

Tony and Karen CAVALIERE *v.* David SKELTON, James Sanders, Tiffani and Damon Jones, and Danny Johnson

CA 00-772 40 S.W.3d 844

Court of Appeals of Arkansas
Division I
Opinion delivered April 4, 2001

Turberville Law Firm, P.A., by: *Richard N. Turberville*, for appellants.

Boyd Tackett, Jr., for appellees.

JOSEPHINE LINKER HART, Judge. Appellants, Tony and Karen Cavaliere, kept Bengal tigers at their residence in Treasure

Hills No. 1 subdivision in Faulkner County. Appellees filed a complaint asserting that as a result of keeping the tigers, appellants were violating a restrictive covenant contained in the subdivision's bill of assurance that only allowed the keeping of household pets. The chancellor granted appellees' motion for summary judgment, and appellants now argue on appeal that the judgment was in error because there remained genuine issues of material fact. We affirm.

On review of the granting of a motion for summary judgment, we ask whether the evidence presented by the movant left a material question of fact unanswered. *See Welch Foods, Inc. v. Chicago Title Ins. Co.*, 341 Ark. 515, 518, 17 S.W.3d 467, 469 (2000). The proof submitted is viewed in a light most favorable to the party resisting the motion. *Id.* If the moving party establishes a *prima facie* entitlement to summary judgment by affidavits or other supporting documents or depositions, then the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.*

Attached to appellee's complaint was a copy of the bill of assurance, filed on June 6, 1972, in Book 203, at page 784, in the Faulkner County real estate records, regarding the Treasure Hills subdivision. The bill of assurance stated in part that "[n]o animals, livestock, or poultry shall be raised or kept on any building site; but dogs, cats, or other household pets may be kept, provided they are not kept for any commercial purpose." Appellees Jan Sanders and David Skelton asserted in their complaint that they and appellants resided in Treasure Hills No. 1 subdivision, which appellees further asserted was covered by the bill of assurance. Appellants pleaded in their answer the affirmative defenses of "laches, estoppel, and statute of limitations" and further stated that "no irreparable harm is likely to occur in view of the fact that the tigers have been present on the property since March or April, 1995." In their response to the amended complaint, appellants admitted owning and residing on a lot in Treasure Hills No. 1 subdivision.

Appellees moved for summary judgment, claiming that appellants' keeping of Bengal tigers in Treasure Hills No. 1 subdivision was in violation of the restrictive covenant contained in the bill of assurance. Appellees also attached affidavits asserting that Bengal tigers are not household pets. Appellants argued in their response that "violations exist throughout the Treasure Hills Subdivision to such a degree that the covenants are no longer enforceable." Appellants noted that horses were being kept on three separate parcels within the subdivision. Appellees, however, then expressed their

belief that the three parcels noted by appellants were located in Treasure Hills No. 3 subdivision, which was covered by a separately recorded bill of assurance that specifically permitted the keeping of horses and cows. The chancellor granted appellees' motion for summary judgment.

Appellants first argue that appellees failed to establish that the Treasure Hills bill of assurance covered appellants' property. They note that the bill of assurance only contained a metes-and-bounds property description of the subdivision and argue that appellees did not present a legal description of appellants' property to establish that the property was within the subdivision. Appellants further argue that there was no proof that they were "fully aware" of the restrictive covenant when they purchased the property.

A purchaser of land covered by a bill of assurance is entitled to have the reciprocal obligations of restrictions enforced against the owners and purchasers of other lands subject to the same bill of assurance. *See Rickman v. Mobbs*, 253 Ark. 969, 972, 490 S.W.2d 129, 131 (1973). Moreover, one taking title to land with notice that it is subject to an agreement restricting its use will not be permitted to violate its terms. *See Harbour v. Northwest Land Co.*, 284 Ark. 286, 288, 681 S.W.2d 384, 385 (1984). Further, enforcement of restrictive covenants is controlled by Ark. Code Ann. § 18-12-103 (1987), which provides that "[n]o restrictive or protective covenants affecting the use of real property nor any instrument purporting to restrict the use of real property shall be valid or effective against a subsequent purchaser or owner of real property unless the restrictive or protective covenants or instrument purporting to restrict the use of the real property is executed by the owners of the real property and recorded in the office of the recorder of the county in which the property is located."

In the case at bar, appellants admitted in their pleadings that their residence is situated in Treasure Hills subdivision No. 1. Appellees presented a duly recorded bill of assurance containing a restrictive covenant that precluded the keeping of animals other than dogs, cats, or other household pets within the Treasure Hills subdivision. Because the bill of assurance was recorded, the restrictive covenant was valid and enforceable against property owners within the Treasure Hills subdivision. Thus, appellants' property, which was located in the Treasure Hills subdivision, was subject to the restrictive covenant.

For their second point on appeal, appellants note that a provision found in the bill of assurance sets out a time period during which persons may seek enforcement of a restrictive covenant governing the construction of buildings on property within the subdivision. They argue that the time for seeking enforcement of that restrictive covenant had passed. We simply note that this issue was not raised before the chancellor, and we do not address arguments on appeal that were not raised below. *See Holloway v. Stuttgart Reg. Med. Spec. Ctr.*, 62 Ark. App. 140, 142, 970 S.W.2d 301, 302 (1998).

Next, appellants argue that the doctrine of laches precludes enforcement of the restrictive covenant because they presented evidence that horses were maintained on at least three different parcels of property within the Treasure Hills subdivision. They further argue that there remains a material issue of fact as to which bill of assurance covered those properties.

"The doctrine of laches is based on a number of equitable principles that are premised on some detrimental change in position made in reliance upon the action or inaction of the other party." *Goforth v. Smith*, 338 Ark. 65, 77, 991 S.W.2d 579, 586 (1999). Further, "[l]aches requires a demonstration of prejudice to the party alleging it as a defense resulting from a plaintiff's delay in pursuing a claim." *Goforth*, 338 Ark. at 78, 991 S.W.2d at 587.

Even assuming that the three properties on which horses were kept were subject to the restrictive covenants governing the Treasure Hills subdivision, appellants failed to plead or affirmatively assert any reliance on other subdivision residents' acquiescence to the asserted violations when appellants began to maintain tigers on their own parcel. In other words, appellants made no showing that they kept tigers on their parcel because other subdivision residents kept horses. Likewise, appellants failed to provide any evidence of the date either they or appellees acquired knowledge of such violations, proof of which is necessary to establish the reliance required to prove their affirmative defense of laches. Given this absence of proof, we cannot say that the chancellor erred in finding that the doctrine of laches is inapplicable and that there was no remaining material issue of fact.

For their fourth and final point, appellants, citing the doctrines of estoppel and waiver, contend that appellees were barred from seeking enforcement of the restrictive covenant because they failed

to seek enforcement in a timely manner, specifically, when appellants began construction on the property and during the four years prior to the commencement of appellees' lawsuit. Appellants conclude that there remain material issues of fact underlying their defense of estoppel, specifically: (1) "ignorance of [appellants] in the truth of facts in question"; (2) "conduct of [appellees] in not enforcing the covenants as required before completion of construction or otherwise complaining which misled [appellants]"; (3) appellants' "reliance upon the conduct of [appellees] in housing the tigers and expending research funds for four years"; and (4) "prejudicial change of position by [appellants] in completing construction of the research habitat as a result of that reliance."

Waiver is the voluntary abandonment or surrender by a capable person of a right known to him to exist, with the intent that he shall forever be deprived of its benefits, and it may occur when one, with full knowledge of the material facts, does something which is inconsistent with the right or his intention to rely upon it. *See Goforth*, 338 Ark. at 77, 991 S.W.2d at 586. In addition, the doctrine of equitable estoppel has four requirements: (1) the party to be estopped must know the facts; (2) the party to be estopped must intend that his or her conduct be acted on or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the latter must be ignorant of the true facts; and (4) the latter must rely on the former's conduct to his or her injury. *See Rasberry v. Ivory*, 67 Ark. App. 227, 230, 998 S.W.2d 431, 433 (1999).

Appellants misunderstand the nature of a summary-judgment motion. While appellants affirmatively pleaded "laches, estoppel, and statute of limitations," they failed to present to the chancellor any evidence to support the invocation of the affirmative defenses they listed in their answer. Once the movant makes a *prima facie* showing of entitlement to a summary judgment, the party opposing the motion must meet proof with proof and demonstrate the existence of a material issue of fact. *See, e.g., Flentje v. First Nat. Bank of Wynne*, 340 Ark. 563, 569, 11 S.W.3d 531, 536 (2000). Appellants' argument that there remains a material issue of fact because they were unable to present evidence regarding these matters simply begs the question. Their obligation was to meet proof with proof when responding to the summary judgment motion, and appellants failed to present such evidence. Thus, we cannot conclude that an issue of material fact remained.

Affirmed.

PITTMAN and VAUGHT, JJ., agree.

J.R. *v.* STATE of Arkansas

CA 00-885 40 S.W.3d 342

Court of Appeals of Arkansas
Division IV
Opinion delivered April 4, 2001

Robert D. Klock, for appellant.

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

JOHN B. ROBBINS, Judge. Appellant J.R. was adjudicated a delinquent after the trial court found that he committed possession of a controlled substance (methamphetamine) with intent to deliver. At the time of the alleged offense, he was fifteen years old. For his sole argument on appeal, J.R. argues that the trial court's decision was not supported by substantial evidence. We find no error and affirm.

In reviewing a juvenile-delinquency case, we look at the record in the light most favorable to the State to determine whether there is substantial evidence to support the conviction. *K.M. v. State*, 335 Ark. 85, 983 S.W.2d 93 (1998). Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without mere speculation or conjecture. *Sublett v. State*, 337 Ark. 374, 989 S.W.2d 910 (1999).

Officer Ronnie Boyd testified on behalf of the State. He stated that he was patrolling on the evening of January 5, 2000, when he saw a pickup truck run a red light. Officer Boyd stopped the truck and found that J.R. was driving but could not produce a driver's license. Officer Boyd asked J.R. to exit the vehicle. J.R. complied and identified himself.

Officer Boyd observed an adult passenger, Lamberto Gonzales, sitting in the passenger's seat of the truck. When he opened the door to speak with Mr. Gonzales, Mr. Gonzales made a quick turn toward the middle of the seat. Officer Boyd then removed him from the truck, and Mr. Gonzales continued to act suspiciously by turning away from the officer as if to shield something from him. Soon thereafter, Officer Kenny Fitch arrived with a drug dog. The dog indicated that there were controlled substances in the vehicle, and after a search Officer Fitch advised Officer Boyd that he found a

quantity of suspected methamphetamine. According to Officer Boyd, he then placed J.R. under arrest, but before notifying him of the reason for the arrest or that they had found suspected drugs, J.R. stated that "the stuff in the vehicle was not his." Mr. Gonzales was also arrested, and during a search of his person the police found marijuana.

Officer Fitch testified that, during his search of the truck, he found a rock in a plastic baggie that was later determined to weigh 12.266 grams and contain methamphetamine. The rock was underneath a shirt or a towel and was found on the floorboard. Officer Fitch stated that its location on the floorboard was where the driver's right foot would be if it were not on the gas pedal, that it was accessible to the driver, and that "the passenger would have to have scooted over to reach it."

J.R. testified on his own behalf, and he stated that he knew Mr. Gonzales had marijuana on his person at the time he was stopped by Officer Boyd. However, J.R. denied having any knowledge of the methamphetamine. He testified that, when he told Officer Boyd that the stuff in the vehicle was not his, he was talking about the marijuana.

For reversal, J.R. argues that substantial evidence did not support the trial court's finding that he possessed the methamphetamine. He notes that it was the behavior of Mr. Gonzales that made Officer Boyd suspicious, in that Mr. Gonzales appeared to be concealing something during the stop. J.R. further points out that, as Officer Boyd's testimony indicated, he did not exhibit suspicious behavior and was cooperative. Although J.R. informed Officer Boyd that the "stuff in the car" was not his, he explained in his testimony that he was referring to the marijuana and was not aware that there was methamphetamine in the truck. Under these circumstances, J.R. submits that it was more likely that Mr. Gonzales possessed the methamphetamine, and thus urges us to reverse his delinquency adjudication.

The State argues that J.R.'s challenge to the sufficiency of the evidence is not preserved for review because he failed to move for dismissal at the close of the evidence pursuant to Ark. R. Crim. P. 33.1(b). We agree. Rule 33.1(b) provides:

> In a nonjury trial, if a motion for dismissal is to be made, it shall be made at the close of all of the evidence. The motion for dismissal shall state the specific grounds therefor. If the defendant moved for

> dismissal at the conclusion of the prosecution's evidence, then the motion must be renewed at the close of all of the evidence.

Pursuant to Rule 33.1(c), a defendant's failure to make a timely motion for dismissal constitutes a waiver of any question pertaining to the sufficiency of the evidence. The rules of criminal procedure are applicable in juvenile-delinquency proceedings. Ark. Code Ann. § 9-27-325 (Repl. 1998); *Trammell v. State*, 70 Ark. App. 210, 16 S.W.3d 564 (2000).

In the instant case, J.R. did not move for dismissal at the close of the evidence. Rather, he made his motion as part of and during his closing argument, after the State gave its closing argument. Thus his motion was untimely. *See generally Rankin v. State*, 329 Ark. 379, 948 S.W.2d 397 (1997). J.R.'s failure to make a timely motion for dismissal precludes our review of his sufficiency argument on appeal.

We note that, even if J.R.'s sufficiency argument had been properly preserved for review, it would have been of no avail. While joint occupancy of a vehicle is not alone sufficient to establish possession, and additional factors are necessary, *Miller v. State*, 68 Ark. App. 332, 6 S.W.3d 812 (1999), in this case there were additional factors to link J.R. with the contraband. These included close proximity and accessibility to the methamphetamine, the fact that J.R. was driving the truck, and the fact that he told the officer "the stuff was not his," indicating guilty knowledge of its presence. The State presented substantial evidence that J.R. was in possession of the contraband.

Affirmed.

BIRD and ROAF, JJ., agree.

OFFICE of CHILD SUPPORT ENFORCEMENT *v.*
Michael B. NEELY

CA 00-789 41 S.W.3d 423

Court of Appeals of Arkansas
Division IV
Opinion delivered April 4, 2001
[Petition for rehearing denied May 2, 2001.]

[redacted]

Greg L. Mitchell, for appellant.

Ronald L. Griggs, for appellee.

SAM BIRD, Judge. This is a child-support case involving a 1983 Texas divorce decree. Tommie Neely and appellee Michael Neely were divorced in Texas on September 13, 1983, and appellee was ordered to pay $210 per month child support for one child. After appellee moved to Arkansas, appellant, Office of Child Support Enforcement, filed a petition in the Union County Chancery Court under the Revised Uniform Reciprocal Enforcement of Support Act (hereinafter "RURESA") seeking to enforce the Texas decree for judgment on the arrearages and for an increase in child support. The court entered an agreed order on August 29, 1984, that reduced appellee's child-support obligation to $30 per week and awarded appellant a $300 judgment against appellee for arrearages. Tommie and the child later moved to Oklahoma. On referral from Oklahoma's Child Support Enforcement Division, appellant filed a petition in Union County Chancery Court in 1991 for an

increase in child support and for judgment on the arrearages accruing under the 1984 order. Referring to the 1984 order setting appellee's obligation at $30 per week, the chancellor entered judgment in favor of appellant on November 26, 1991, in the amount of $2,203 and directed that appellee's support obligation would remain at $30 per week.

On August 3, 1998, appellant filed another petition for arrearages in Union County Chancery Court based on the $30 weekly amount. However, on appellant's motion, an order dismissing that petition was entered on December 15, 1998.

On December 15, 1998, appellant filed a petition pursuant to the Uniform Interstate Family Support Act (hereinafter "UIFSA") to register the 1983 Texas divorce decree and requesting judgment for arrearages in the amount of $22,816 based upon the $210 monthly child support amount specified in that decree. (Act 468 of 1993 enacted UIFSA and repealed RURESA. *See Office of Child Support Enforcem't v. Cook,* 60 Ark. App. 193, 959 S.W.2d 763 (1998).) Appellee was notified of the petition to register the 1983 Texas decree and was informed that he had twenty days within which to contest its registration. Appellee did not contest registration of the Texas decree or request a hearing within twenty days. By a January 20, 1999, order of the Union County Chancery Court, the Texas decree was registered.

Appellant filed a contempt motion against appellee on February 22, 1999, alleging that appellee's monthly child-support obligation remained at $210, as set by the 1983 Texas decree. Appellant sought judgment against appellee for an arrearage of $23,246.10, which it alleged to be the balance owed after giving appellee credit for all payments he had made. Appellee filed an answer to this motion in which he denied all of the allegations. Following a hearing, the chancellor rendered two orders, the combined effect of which was to hold that the 1983 Texas divorce decree did not repeal or take precedence over the subsequent Arkansas RURESA orders that reduced appellee's child support obligation to $30 per week, that the Agreed Order of the Union County Chancery Court entered August 29, 1984, effectively modified the Texas divorce decree by changing his child-support obligation to $30 per week, that appellee's failure to object to the registration of the Texas divorce decree did not have the effect of causing appellee to be in default, and that the Arkansas General Assembly's repeal of the Uniform Reciprocal Enforcement of Support Act subsequent to the entry of the August 29, 1984, and November 26, 1991, orders

of the Union County Chancery Court constituted an *ex post facto* law prohibited by the Constitutions of the United States and Arkansas.

The chancellor entered judgment in favor of appellant for arrearages in the amount of $2,690.56, based on the $30 weekly child-support amount set in the 1984 RURESA order, and increased appellee's support obligation to $68 per week based on current income.

Appellant argues on appeal that the chancellor erred in holding that the August 29, 1984, RURESA order, rather than the 1983 Texas decree registered in Arkansas under UIFSA, was the controlling order as to child support because (1) the 1984 RURESA order did not modify the Texas decree and (2) appellee did not contest registration of the Texas decree under UIFSA's provisions. Appellant also argues that the chancellor erred in modifying appellee's child-support obligation.

On appellate review of ordinary equity cases, there are two different components of the chancellor's ruling that are considered: the appellate court will not set aside a chancellor's finding of fact unless it is clearly erroneous; this deference is granted because of the regard that the appellate court has for the chancellor's opportunity to judge the credibility of the witnesses. *Duchac v. City of Hot Springs*, 67 Ark. App. 98, 992 S.W.2d 174 (1999). However, a chancellor's conclusion of law is not entitled to the same deference; if a chancellor erroneously applies the law and the appellant suffers prejudice, the erroneous ruling is reversed; a chancellor does not have a better opportunity to apply the law than does the appellate court. *Id.*

Whether the 1984 RURESA Order Modified the Texas Decree

In *Jefferson County Child Support Enforcem't Unit v. Hollands*, 327 Ark. 456, 939 S.W.2d 302 (1997), the supreme court held that, in a RURESA proceeding, an Arkansas court does not nullify or supersede a sister court's support decree unless it specifically provides for nullification; absent express words of nullification, an order filed by an Arkansas court that imposes a child-support obligation that is different from the obligation originally imposed by the sister state does not change or modify the sister state's decree. In *Hollands*, the chancellor denied the child support unit's motion to

enforce a Michigan child-support order on the ground that a Jefferson County Chancery Court order entered pursuant to RURESA seven years previously had modified the Michigan court's support decree and that, therefore, the Jefferson County order controlled the calculation of arrearages. The supreme court's explanation for its decision to reverse warrants consideration here:

> As noted above, the General Assembly repealed RURESA when it enacted UIFSA, and the motion brought by the JCCSEU on behalf of the State of Michigan was brought under UIFSA rather than RURESA. Nonetheless, we must apply RURESA and the case law interpreting it in order to ascertain the effect, if any, of the Chancellor's previous RURESA order upon the original Michigan support decree. *Office of Child Support Enforcement v. Troxel,* 326 Ark. 524, 526, 931 S.W.2d 784, 785 (1996). The Chancellor's RURESA order entered in July 1992 did not nullify the Michigan decree; thus the Chancellor erred in refusing to calculate the amount of arrearages owed by Mr. Hollands with reference to the Michigan court's award of $87 per week in child support.
>
> As we observed in the *Troxel* case, the effect of an Arkansas court's RURESA order upon a sister state's support decree must be determined in light of RURESA's "anti-supersession clause," which provides in part as follows:
>
>> A support order made by a court of this state pursuant to this subchapter does not nullify ... a support order made by a court of any other state pursuant to a substantially similar act or any other law, regardless of priority of issuance, unless otherwise specifically provided by the court. Amounts paid for a particular period pursuant to any support order made by the court of another state shall be credited against the amounts accruing or accrued for the same period under any support order made by the court of this state.
>
> Ark. Code Ann. § 9-14-331 (Repl. 1991) (repealed 1993).
>
> In the *Troxel* case, we cited *Tanbal v. Hall,* 317 Ark. 506, 878 S.W.2d 724 (1994), and *Britton v. Floyd,* 293 Ark. 397, 738 S.W.2d 408 (1987), for the proposition that an Arkansas court does not nullify or supersede a sister court's support decree in a RURESA proceeding unless it *specifically* provides for nullification. Absent express words of nullification, we said, an order filed by an Arkansas court that imposes a child-support obligation different from the

> obligation originally imposed by the sister state does not change or modify the sister state's decree.
>
> Although an Arkansas court is free to require a lesser payment from the obligor spouse, the obligor spouse remains obliged for the difference between the original award and the modified award unless the order reducing the support obligation expressly nullifies the sister state's decree. If there are no express words of nullification, the sister state's decree remains extant, and arrearages accrue under the *original* support obligation even as the obligor satisfies the *locally ordered* support obligation. The obligor, of course, is entitled to credit for any payments he or she makes under the orders of the Arkansas court reducing the child-support obligation.
>
> In the *Troxel, Tanbal,* and *Britton* cases, this Court reviewed the Arkansas courts' orders and found no express words of nullification. We therefore concluded that the sister state's decree remained in effect and that the obligee spouse was entitled to an arrearage as calculated under the original decree. Likewise, in the case at bar, the orders of the Chancellor do not contain express words of nullification. Therefore, we must conclude that the Chancellor failed to effect a "nullification" of the Michigan order and that the Chancellor erred in refusing the JCCSEU's request to determine the arrearage owed to Ms. Hollands based on the Michigan court's decree awarding $87 per week in child support.

327 Ark. at 462-63, 939 S.W.2d at 305-06. *Accord, Office of Child Support Enforcem't v. Eagle*, 336 Ark. 51, 983 S.W.2d 429 (1999); *Office of Child Support Enforcem't v. Troxel*, 326 Ark. 524, 931 S.W.2d 784 (1996).

■ The 1984 Union County RURESA order did not contain any language of modification or nullification of the 1983 Texas divorce decree, nor did the 1991 order. Following the foregoing authorities, we are constrained to hold that the 1984 RURESA order did not modify the Texas decree and that arrearages continued to accrue under the Texas decree even as appellee satisfied the Arkansas order's obligation.

■ We also agree with appellant that the chancellor erred in applying the *Ex Post Facto* Clause of the federal and Arkansas constitutions to this situation. That clause is violated by any statute that punishes as a crime an act previously committed that was innocent when done; that makes more burdensome the punishment for a crime, after its commission; that deprives one charged with a

crime of any defense available according to the law at the time when the act was committed; or that purports to make innocent acts criminal after the event. *Kellar v. Fayetteville Police Dep't*, 339 Ark. 274, 5 S.W.3d 402 (1999).

Appellee argues that it would be inequitable to give appellant judgment for the arrearages accrued on the 1983 Texas decree after he has made payments for years pursuant to the 1984 order to which appellant agreed. He contends that the chancellor could have employed the equitable principles of waiver, laches, and estoppel to refuse to enforce the Texas decree. It is true that Arkansas courts have recognized that, in a proper case, equitable defenses such as estoppel may apply so as to prevent the collection of past-due child-support payments. *See Burnett v. Burnett*, 313 Ark. 599, 855 S.W.2d 952 (1993); *State v. Mitchell*, 61 Ark. App. 54, 964 S.W.2d 218 (1998). However, we are precluded from considering this question because appellee did not raise these affirmative defenses to the trial court. A ruling by the chancellor on a challenged issue is a prerequisite to our review of that issue. Even questions raised at the trial level, if left unresolved, are waived and may not be relied upon on appeal. *Kralicek v. Chaffey*, 67 Ark. App. 273, 998 S.W.2d 765 (1999).

The Effect of Appellee's Failure to Contest the Registration of the Texas Decree

Appellant also argues that appellee's failure to contest the registration of the Texas decree or to request a hearing within twenty days after he received notice of its registration bars his defense to its enforcement. We agree. Arkansas Code Annotated section 9-17-606 (Repl. 1998) states:

> (a) A nonregistering party seeking to contest the validity or enforcement of a registered order in this state shall request a hearing within twenty (20) days after notice of the registration. The nonregistering party may seek to vacate the registration, to assert any defense to an allegation of noncompliance with the registered order, or to contest the remedies being sought or the amount of any alleged arrearages pursuant to § 9-17-607 (Contest of registration or enforcement).
>
> (b) If the nonregistering party fails to contest the validity or enforcement of the registered order in a timely manner, the order is confirmed by operation of law.

> (c) If a nonregistering party requests a hearing to contest the validity or enforcement of the registered order, the registering tribunal shall schedule the matter for hearing and give notice to the parties of the date, time, and place of the hearing.

Therefore, under section 9-17-606, the only method for contesting the validity of a foreign support order is to request a hearing within twenty days after notice of registration. *State of Washington v. Thompson*, 339 Ark. 417, 6 S.W.3d 82 (1999). Arkansas Code Annotated section 9-17-608 (Repl. 1998) provides that once a registered support order is confirmed, whether by operation of law or after notice and a hearing, further contest of the order is precluded.

After appellant filed its February 22, 1999 motion, appellee argued that the Texas order had been modified. *See* Ark. Code Ann. § 9-17-607(a)(3). However, he failed to contest the Texas order's registration or ask for a hearing within twenty days after receiving notice of its registration. We therefore agree with appellant that appellee was precluded from later contesting its enforcement.

Whether the Chancellor Could Modify Appellee's Child-Support Obligation

Appellant also asserts that the chancellor erred in modifying appellee's support obligation. We note that in its motion for contempt, appellant requested that appellee's support obligation be increased. However, regardless of who requested the modification, the statutory requirements for modifying the Texas decree have not been met. Arkansas Code Annotated section 9-17-603(c) (Repl. 1998) provides: "Except as otherwise provided in article 6, a tribunal of this state shall recognize and enforce, but may not modify, a registered order if the issuing tribunal had jurisdiction." Arkansas Code Annotated section 9-17-611 (Repl. 1998) places the following limitations upon the modification of child-support orders issued in other states:

> (a) After a child support order issued in another state has been registered in this state, the responding tribunal of this state may modify that order only if § 9-17-613 does not apply and after notice and hearing it finds that:
>
> (1) the following requirements are met:

(i) the child, the individual obligee, and the obligor do not reside in the issuing state;

(ii) a petitioner who is a nonresident of this state seeks modification; and

(iii) the respondent is subject to the personal jurisdiction of the tribunal of this state; or

(2) the child, or a party who is an individual, is subject to the personal jurisdiction of the tribunal of this state and all of the parties who are individuals have filed written consents in the issuing tribunal for a tribunal of this state to modify the support order and assume continuing, exclusive jurisdiction over the order. However, if the issuing state is a foreign jurisdiction that has not enacted a law or established procedures substantially similar to the procedures under this chapter, the consent otherwise required of an individual residing in this state is not required for the tribunal to assume jurisdiction to modify the child support order.

Unless these statutory requirements with respect to the limitations placed upon the modification of foreign child-support orders are met, such orders cannot be modified. *See Office of Child Support Enforcem't v. Cook, supra.*

Here, Tommie's participation in appellant's request for a support increase is not apparent from this record. Additionally, all of the individual parties have not filed written consents for a court of this state to modify the support order and assume continuing, exclusive jurisdiction over the order. Therefore, the requirements for modification set forth in Ark. Code Ann. § 9-17-611 have not been met, and the chancellor erred in modifying appellee's support obligation. *See Office of Child Support Enforcem't v. Cook, supra.*

We therefore must hold that the chancellor erred in refusing to enforce the Texas decree and refusing to award appellant judgment for the difference between the arrearages accrued under that decree and the amount paid by appellee. For this reason, we reverse and remand to the trial court for the entry of judgment in favor of appellant for the amount of child support due under the Texas decree, less all credits to which appellee is entitled.

Reversed and remanded.

ROBBINS, J., agrees.

ROAF, J., concurs.

ANDREE LAYTON ROAF, Judge, concurring. Once again, an Arkansas child-support payor has been entrapped by the federally imposed quagmire that constitutes our URESA and UIFSA statutes and case-law interpretations. *See Jefferson County Child Support Enforcem't Unit v. Holland*, 327 Ark. 456, 939 S.W.2d 302 (1997). In this instance, Michael B. Neely will be saddled with an arrearage judgment of $22,816 rather than the $2,690 he would have owed pursuant to the modified support order entered by the Union County Chancery Court some sixteen years earlier. This is because Neely's 1984 and subsequent Arkansas support orders did not contain the "express words of nullification" that would have allowed the Arkansas order to supersede or replace Neely's 1983 Texas divorce decree. The cases mandating such language were all decided after the 1984 support order was entered. See *Office of Child Support Enforcem't v. Troxel*, 326 Ark. 524, 931 S.W.2d 784 (1996); *Tanbal v. Hall*, 317 Ark. 506, 878 S.W.2d 724 (1994); *Britton v. Floyd*, 293 Ark. 397, 738 S.W.2d 408 (1987). I concur, not so much to take issue with these decisions, but to note that there must be hundreds, if not thousands, of unsuspecting Arkansans who face the same unhappy fate as Mr. Neely, many of whom may not even be in arrears in their child-support payments pursuant to their URESA or UIFSA support orders. This court may not consider Neely's argument that this result is inequitable because he failed to raise any equitable defenses before the chancellor. However, counsel for child-support payors would be well advised not to omit these defenses in the many like cases that undoubtedly are coming down the pike.

James TYRONE *v.* Marcus DENNIS

CA 00-682 39 S.W.3d 800

Court of Appeals of Arkansas
Division IV
Opinion delivered April 4, 2001

Harris, Shelton, Dunlap, Cobb & Ryder, P.L.L.C., by: *Michael F. Rafferty*, for appellant.

Gibson Law Firm, by: *Mike Gibson*; and *Branch, Thompson, Philhours & Warmath*, by: *Robert F. Thompson*, for appellee.

SAM BIRD, Judge. This appeal arises from the Crittenden County Circuit Court's denial of a motion to set aside a default judgment against appellant, James Tyrone d/b/a Acme Pest Management Company (Tyrone), in a lawsuit brought by appellees, homeowners Marcus and Wanda Dennis. The circuit judge found that Tyrone had shown no mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation, other misconduct of an adverse party, or other reason justifying relief from the operation of the judgment; and that he had presented no meritorious defense. On appeal, Tyrone lists three points that allege error in the denial of his motion to set aside the judgment, and he submits two points regarding the award of damages. We find no merit in any of these points, and we affirm.

The parties do not dispute the events that led to entry of the default judgment. In May 1996 the Dennises entered into a contract with Tyrone for protection against termite damage to their home, and in March 1998 they notified Tyrone of potential termite problems. After tearing down a bedroom wall to inspect for termite damage, Tyrone directed the Dennises to deal with his insurance company, Frontier Insurance, because their claim was too much for him to handle. Frontier and the Dennises' lawyers failed to negotiate a settlement, and he informed Frontier by certified mail that it could expect its insured to be served with a complaint and summons within a week.

On November 18, 1999, the Dennises filed their complaint in circuit court, stating that in March 1999 they had discovered live termite infestation within their dwelling and that Tyrone had refused to meet contractual obligations to repair damage resulting from the infestation. The complaint sought damages for breach of contract and the intentional infliction of emotional distress. On November 30, 1999, the complaint and summons were served upon Tyrone, who then forwarded them to Frontier. On December 8, 1999, Frontier received the pleadings. Under Ark. R. Civ. P. 12(a) Tyrone's answer was due within twenty days after he was served, or not later than December 20, 1999.

On December 22, 1999, the Dennises appeared before the circuit court and moved for a default judgment. Finding that the complaint stated a cause of action for damages for breach of contract and intentional infliction of emotional distress as a matter of

law, and finding that Tyrone had failed and refused to file an answer to the complaint within the time allowed by law after service of process, the court entered a default judgment on the issue of liability against Tyrone pursuant to Ark. R. Civ. P. 55 and ordered that a hearing be held to determine the amount of damages.

A hearing on the issue of damages was held on December 29, 1999, following which a default judgment for damages was entered on the same date. This judgment states that the Dennises appeared to present testimony and evidence as to damages alleged in their complaint, and that three witnesses presented competent evidence as to the damages that the Dennises sustained. The order reflects that as of December 29, 1999, Tyrone had not filed an answer or other pleading and that he had not otherwise entered his appearance in the case. The judgment awarded the Dennises $95,000 damages for breach of contract and $35,000 for the intentional infliction of emotional distress, and attorneys' fees of $9,500, resulting in a total judgment of $139,500; they also were awarded costs and interest. The abstract reflects that no transcript of the hearing on damages is available.

On January 3, 2000, Tyrone filed an answer to the Dennises' complaint. The answer denied any negligent or wrongful acts; it alleged that termite damage existed at the time contract coverage began; and alleged that the Dennises' negligence was a complete bar to recovery for any termite damage, or alternatively, that any award should be reduced under the doctrine of modified comparative fault. Tyrone filed his motion to set aside the default judgment on January 7, 2000. On January 18, 2000, the Dennises filed both a response to Tyrone's motion to set aside the default judgment and a motion to strike his answer. Following a hearing on these motions, the trial court entered its orders denying Tyrone's motion to set aside the default judgment and granting the Dennises' motion to strike Tyrone's answer.

[redacted] Arkansas Rule of Civil Procedure 55 provides for entry of a default judgment when a party fails to appear or otherwise defend. *Southeast Foods, Inc. v. Keener*, 335 Ark. 209, 979 S.W.2d 885 (1998). Rule 55 (c) provides that a default judgment may be set aside for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) the judgment is void; (3) fraud, misrepresentation, or other misconduct of an adverse party; or (4) any other reason justifying relief from the operation of the judgment. Tyrone compares the stringent application of the rule by Arkansas courts to the "more forgiving" environment of the federal courts, where "the

emphasis is on avoiding defaults and promoting trials on the merits." He submits that Arkansas should adopt and follow federal jurisprudence in applying the rule to advance the goal of resolving cases on the merits, which is the stated intent of the 1990 amendment to Rule 55(a). He relies on *Addition to Reporter's Note to Rule 55, 1990 Amendment*; Watkins, *Revised Rule 55, Five Years Later*, 49 ARK. L. REV. 23, 31 (1996); and federal cases including *Johnson v. Dayton Elec. Mfg. Co.*, 140 Fed. 3d 781 (8th Cir. 1998).

Tyrone presents five arguments under his contention that the trial court erred in denying his motion to set aside the default judgment. His first argument is that a timely answer was not filed because of mistake, inadvertence, or excusable neglect within the meaning of Ark. R. Civ. P. 55(c). He submits that, at worst, this is a case where defense counsel incorrectly calculated the date that a responsive pleading was due, and that, consistent with federal cases involving strikingly similar circumstances, he has shown mistake, inadvertence, or excusable neglect within the meaning of Rule 55(c).

In *Layman v. Bone*, 333 Ark. 121, 967 S.W.2d 561 (1998), our supreme court addressed similar arguments regarding the "liberalization" of Rule 55. Layman had forwarded a complaint to his attorney, and the attorney, relying on erroneous information from Layman about the date he was served, filed his answer one day late. The trial court found that the failure to file an answer within twenty days was not the result of mistake, inadvertence, surprise, or excusable neglect or other just cause. Affirming the trial court's granting of a motion for default judgment, the supreme court stated:

> The reporter's note following Rule 55(a) suggests also that, in applying that rule, we should look to the federal cases interpreting the parallel federal rule and consider factors such as lack of prejudice to the plaintiff, the defendant's preparedness to defend, and avoidance of "largely technical" default judgments. No doubt those are factors that may influence a trial court in the exercise of discretion to determine whether a mistake or inadvertence is of the sort that should not yield a default or whether a negligent act is excusable.
>
> Rule 55(a) provides that the court "may" grant a default-judgment motion in the event of failure to answer or otherwise defend. Thus, we apply an "abuse of discretion" standard in reviewing the granting of a default judgment pursuant to Rule

> 55(a), just as we do in reviewing the trial court's ruling on a Rule 6(b)(2) motion to enlarge the time for answering. *Maple Leaf Canvas, Inc. v. Rogers*, 311 Ark. 171, 842 S.W.2d 22 (1992); *B&F Eng'g, Inc. v. Cotroneo,* [309 Ark. 175, 830 S.W.2d 835 (1992)]. Again, in this instance an abuse of discretion has not been shown.

Id. at 127, 967 S.W.2d at 565.

Just as Rule 55(a) states that a default judgment "may be entered" by the trial court, Rule 55(c) states that the court "may, upon motion, set aside a default judgment." Therefore, the reasoning of *Layman v. Bone, id.*, is applicable, and we apply an abuse-of-discretion standard in reviewing the trial court's granting of a default judgment pursuant to Rule 55(c). Here, Tyrone was served on November 30, 1999, and his answer was due no later than December 20, 1999; but he filed nothing until January 3, 2000. The *Layman* court characterized counsel's actions as " 'neglect' that was not 'excusable' rather than 'mistake' " where counsel, instead of checking the record to ascertain the date of service, relied on his client's faulty recollections as to when he had been served. Our supreme court has also stated that the negligence of the insurance company is imputed to its insured. *Truhe v. Grimes*, 318 Ark. 117, 884 S.W.2d 255 (1994). In light of *Truhe* and *Layman*, *supra*, we cannot state that the trial court abused its discretion in ruling that there was no mistake, inadvertence, surprise, excusable neglect, or other just cause for relief from the operation of judgment.

Tyrone's second argument is that a timely answer was not filed for reasons that justify granting relief to the defendant from the operation of the judgment under Rule 55(c). Tyrone characterizes the entry of the default judgment as "a rush to judgment" between Christmas and New Year's Day. He complains that the Dennises knowingly and intentionally chose not to inform defense counsel of an *ex parte* hearing on the issue of damages despite receiving a letter from Tyrone's counsel on December 28, 1999, the day before the scheduled hearing, indicating his intention to contest allegations of the complaint. He states that the judge who conducted the hearing on damages was not the judge to whom the case was actually assigned, and that there was no record of the proceedings. He submits that Arkansas should follow federal precedent in explicitly stating certain factors to be considered in ruling on motions to set aside default judgments, such as whether failure to file a timely answer is largely due to poor communication between an insurer and its counsel.

Although federal court precedents may be persuasive in a well-reasoned argument, they are not controlling. *See Brown v. Arkansas Dep't of Correction*, 339 Ark. 458, 6 S.W.3d 102 (1999). We do not consider assignments of error that are unsupported by convincing legal authority or argument unless it is apparent without further research that the argument is well taken. *Grayson v. Bank of Little Rock*, 334 Ark. 180, 971 S.W.2d 788 (1998). Because Tyrone presents no convincing authority or argument on this point, we affirm.

Tyrone's third argument is that he has shown a meritorious defense to the claims of breach of contract and intentional infliction of emotional distress. He points to allegations in his answer that there was damage to the Dennises' home at the time the parties entered into the agreement to provide a termite plan.

Unless the ground asserted is that the judgment is void, the defendant must demonstrate a meritorious defense to the action *in addition to establishing one of the grounds of Ark. R. Civ. P. 55(c). Southern Transit Co. v. Collums*, 333 Ark. 170, 966 S.W.2d 906 (1998) (emphasis added). We need not address Tyrone's argument that he has shown a meritorious defense to the claims of breach of contract and intentional infliction of emotional distress, as we see no abuse of discretion in the trial court's finding that Tyrone was unable to establish the grounds of mistake, inadvertence, surprise, excusable neglect, or other just cause for relief from the default judgment.

Tyrone's fourth argument is that he was entitled to notice of the hearing on damages because he had made an appearance through counsel and the Dennises' counsel was aware of his representation prior to the hearing. Tyrone again complains, as he did in his second argument, about the hearing on damages being conducted without a court reporter, by a judge different than the one to whom the case was assigned, and without notice to his counsel, despite the Dennises' knowledge that counsel intended to respond to the complaint. Tyrone submits that our courts should adopt the federal rule of *FROF, Inc. v. Harris*, 695 F. Supp. 827 (E.D. Tex. 1972), where a letter from defense counsel to plaintiff's counsel was deemed sufficient appearance to indicate a clear purpose to defend a suit. Again, we state that while federal precedents from district courts may be persuasive, they are not controlling on our decisions. Until such time as the supreme court adopts the federal standards urged by Tyrone, we are obligated to follow the precedents of our

supreme court. *See Layman v. Bone, supra*, and *Brown v. Arkansas Dep't of Correction, supra.*

Finally, Tyrone argues that the award of damages was excessive and represents a windfall to the Dennises at his expense in the name of efficiency and expediency. Noting the lack of a transcript for the hearing on damages, Tyrone complains that the Dennises took the risk of going forward without the presence of a court reporter, that they did so at their peril, and that they should not get the benefit of their failure to make a record that could be reviewed on appeal. No authority is cited for these propositions, and we therefore will not address them.

Affirmed.

STROUD, C.J., and VAUGHT, J., agree.

James R. NEWSOME *v.* STATE of Arkansas

CA CR 00-1006 42 S.W.3d 575

Court of Appeals of Arkansas
Division I
Opinion delivered April 4, 2001

Ben Beland, Public Defender, by: *Claire Borengasser*, Deputy Public Defender, for appellant.

Mark Pryor, Att'y Gen., by: *Misty Wilson Borkowski*, Ass't Att'y Gen., for appellee.

LARRY D. VAUGHT, Judge. Appellant was charged with aggravated robbery arising from the robbery of a convenience store. At a jury trial, appellant was convicted and sentenced to ten years in the Department of Correction. On appeal, appellant contends that the trial court erred (1) in refusing to instruct the jury on robbery and theft by threat, and (2) in allowing the testimony of the State's expert witness when defense counsel was not given sufficient notice that the State intended to call the witness. We affirm.

Appellant does not challenge the sufficiency of the State's evidence; therefore, it is not necessary to set out the facts in detail. Suffice it to say that appellant was identified by the owner of a

convenience store as the man who robbed her at gunpoint. Appellant first contends that the trial court erred in not allowing robbery and theft by threat jury instructions be given to the jury when there was evidence appellant did not have a gun. The State responds that appellant did not preserve this argument for appellate review because he did not proffer the jury instructions he contends should have been given. We agree.

The supreme court has stated that an appellant who seeks reversal based on the failure to instruct the jury as requested by the appellant must present a record showing a proffer of the requested instruction. *Watson v. State*, 329 Ark. 511, 951 S.W.2d 304 (1997). Where the record does not contain any such proffer, we must affirm. *Id.* Appellant's abstract does not include a proffer of the instructions requested by appellant; therefore, we affirm the trial court's refusal to give the requested instructions.

Appellant's second argument is that the trial court erred in allowing the testimony of the State's expert witness when defense counsel was not given sufficient notice that the State intended to call the witness and the appellant was prejudiced as a result. The witness, Dr. Chambers, was originally a potential defense witness that appellant decided not to call.

Prior to trial, appellant's counsel filed several motions asking the trial court to order psychiatric evaluations of the appellant, which the trial court granted. The last motion was filed on February 9, 2000, asking for a continuance and further evaluation of appellant. On April 3, 2000, the trial court entered an order authorizing the hiring of Dr. Chambers, a local psychiatrist, to conduct further mental evaluation.

Appellant's counsel filed a motion for discovery on April 10, 2000, and also filed a motion to compel discovery the same day. Although appellant's abstract does not so reflect, the State, according to the supplemental abstract, responded on April 24, 2000, stating that it had an open-file policy and listing Dr. John Anderson of the Arkansas Department of Human Services as a potential witness. The State's supplemental abstract also includes its motion for discovery filed April 10, 2000, requesting, *inter alia*, that it be informed of and permitted to inspect and copy or photograph any reports or statements of experts, made in connection with the case, including results of physical or mental examination and/or scientific tests, experiments, or comparisons. The appellant's abstract does

not reflect that he filed a response to the State's motion for discovery.

A jury trial was scheduled for May 8, 2000, which was a Monday. On the Wednesday before trial, the prosecutor called appellant's counsel and asked for Dr. Chambers's report on the examination of appellant. Appellant's counsel contends that the prosecutor only asked who had seen appellant. Because appellant had no report of Dr. Chambers's examination as none had been prepared, the State subpoenaed Dr. Chambers on Friday and faxed a notice to appellant's counsel on Sunday informing him that Dr. Chambers would be called as a witness.

At trial, appellant's counsel objected to Dr. Chambers testifying. The trial court postponed his testimony to the following morning to give appellant's counsel an opportunity to interview him. Appellant claims that the forty-five-minute interview was insufficient to prepare an adequate cross-examination of Dr. Chambers. The trial court in overruling appellant's objection stated that Dr. Chambers was a potential defense witness and thus the defense could not claim surprise as to what Dr. Chambers would say or could have said. Further, the trial court noted that the order allowing the examination was entered April 3, 2000, giving defense counsel adequate time to interview the witness. In addition, the trial court afforded defense counsel the opportunity to interview Dr. Chambers the evening before he testified.

Appellant argues that a discovery violation occurred and that the subsequently admitted testimony of Dr. Chambers prejudiced him. The State responds that there was no discovery violation and that appellant was not prejudiced by Dr. Chambers's testimony.

Rule 17.1(a) of the Arkansas Rules of Criminal Procedure provides that "the prosecuting attorney shall disclose to defense counsel, upon timely request, the following material and information which is or may come within the possession, control, or knowledge of the prosecuting attorney: (i) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at any hearing or at trial..." In this case the prosecutor did not decide to call Dr. Chambers until after speaking with appellant's counsel the Wednesday before trial and after she was unable to obtain a report from Dr. Chambers's office. As the State contends, this does not appear to be a situation where the prosecutor was using last-minute preparation as a ploy or subterfuge to gain advantage over the defense. *Nooner v. State*, 322 Ark. 87, 907 S.W.2d

677 (1995), *cert. denied,* 517 U.S. 1143 (1996). In *Nooner,* the supreme court stated "We have endowed the trial courts with great discretion over such matters, and the circuit court in this case assessed each assertion of a Rule 17.1(a)(i) violation carefully before making its decisions. The circuit court was reasonable in its resolution of these matters, and we cannot say that it abused its discretion." *Id.* at 99, 907 S.W.2d at 683-84. A trial court has four options under Ark. R. Crim. P. 19.7 to remedy a violation of discovery rules: permit discovery, exclude the undisclosed evidence, grant a continuance, or enter an order as the court deems appropriate under the circumstances. The supreme court has stated that a recess to interview the witness may be sufficient to remedy a discovery violation in some instances. *Nooner v. State, supra.*

The defense requested that appellant be examined by Dr. Chambers, and Dr. Chambers was a potential defense witness. The State was not informed of Dr. Chambers's conclusions after evaluating appellant. Dr. Chambers's testimony was used to corroborate Dr. Anderson's testimony that appellant was competent to stand trial. And defense counsel was given an opportunity to interview Dr. Chambers the night before he testified. Based on these facts, we cannot say that the trial court abused its discretion in allowing Dr. Chambers's testimony.

Affirmed.

PITTMAN, J., agrees.

HART, J., concurs.

JOSEPHINE LINKER HART, Judge, concurring. Although I agree that the result reached by the majority is consistent with the law, I write separately to express my opinion concerning the law. Appellant's communications with Dr. Chambers apparently were not considered to be privileged commensurate with Ark. R. Evid. 503(d)(2),[1] which allowed the State to use those communications as a part of its case-in-chief. As the majority explains, Dr. Chambers was a private psychotherapist whom appellant thought he needed for his defense. Because appellant was indigent and

[1] Rule 503(d)(2) of the Arkansas Rules of Evidence provides:

If the court orders an examination of the physical, mental, or emotional condition of a patient, whether a party or a witness, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the court orders otherwise.

needed assistance to pay for a private psychotherapist, he was forced to seek the court's approval for the examination. This placed him in an awkward position — on the one hand, honest disclosure to the examiner might have led to a legitimate legal defense; however, on the other hand, too much information may have been dangerous because the State would be privy to what was said to the therapist.

In addition, this rule creates an untenable disparagement between wealthy and poor criminal defendants. For example, the State, having obtained the name of the defendant's psychotherapist through court proceedings, may subpoena a defendant's psychotherapist and use that testimony, as it did here, to buttress its case over the defendant's objection. Thus, the State can circumvent the privilege expressed in that rule of evidence. This situation, however, does not exist when a defendant has the necessary wealth to hire a psychotherapist and is not obligated to disclose such information to the State. Consequently, the wealthy defendant is free to hire multiple psychotherapists without the State's knowledge, and then use one or more psychotherapists as defense witnesses.

While we undoubtedly cannot eliminate every possible advantage that a wealthy person may have over a poor person in our criminal justice system, we should not use that realization as an excuse to deny a defendant a fair trial. Whether a product of poor policy or simple oversight, this rule strengthens the argument of those who believe that if one is poor, the government is in a better position to deprive one of personal liberties than it would be if one were a person of means. In any event, it is a rule that has long since outlived whatever usefulness it may have had, and it should be changed to eliminate the disadvantages that the trial court allowed the State to have in this trial.

SOUTHWESTERN BELL MOBILE SYSTEMS, INC.,
et al. v. ARKANSAS PUBLIC SERVICE COMMISSION

CA 00-407 40 S.W.3d 838

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered April 4, 2001

[redacted]

Catlett, Yancey & Stodola, PLC, by: *Mark A. Stodola* and *Christian C. Michaels*, for appellant Southwestern Bell Mobile Systems, Inc.

H. Edward Skinner, for appellant Sprint Spectrum L.P.

Lee McCullough, for appellee.

LARRY D. VAUGHT, Judge. This appeal presents the question of whether the Tax Division of the Arkansas Public Service Commission has the authority to assess the property of appellants for *ad valorem* tax purposes. It also presents the question of whether the Tax Division's assessment of appellants' property violated appellants' right to equal protection. The Commission and the trial court determined that the Tax Division had the authority to assess appellants' property and that no constitutional violation occurred. We agree and affirm.

Appellants are Pine Bluff Cellular, Inc., Pinnacle Cellular Limited Partnership, Sprint Spectrum, L.P., and Southwestern Bell Mobile Systems, Inc. These companies are commercial mobile radio service (CMRS) providers. They provide what the public would commonly refer to as cellular telephone service. The Tax Division of the Public Service Commission was created in 1959 for, among other purposes, assessing the value of property owned by public utilities, including telephone companies. In July 1997, the Tax Division sent appellants notice of their *ad valorem* tax assessments. Appellants filed petitions with the Commission challenging the Division's authority to assess their property on the ground that they were not "telephone companies" as defined by the tax assessment statutes. They also protested that section 11(g) of Act 77 of 1997, known as the Telecommunications Regulatory Reform Act, terminated the Commission's regulatory power over CMRS providers, thereby terminating the Tax Division's corresponding assessment power. Finally, appellants claimed that the Tax Division's assessment of CMRS providers' property without assessing the property of similarly situated competitors such as paging companies violated appellants' right to equal protection. The Commission ruled in favor of its Tax Division, and that ruling was affirmed on appeal to Pulaski County Circuit Court. This appeal follows.

Appellants begin their first argument by pointing out that CMRS providers have been virtually deregulated and are no longer

subject to the jurisdiction of the Commission. They cite the aforementioned section 11(g) of Act 77 of 1997, now codified at Arkansas Code Annotated section 23-17-411(g) (Supp. 1999). Section 11(g) reads as follows:

> The commission, except as provided in this subchapter with respect to universal services, shall have no jurisdiction to regulate commercial mobile services or commercial mobile service providers.

The "universal services" language in the statute refers to the obligation of all telecommunications providers to contribute to the Arkansas Universal Services Fund. *See* Ark. Code Ann. § 23-17-404(b) (Supp. 1999).

In 1998, we interpreted section 11(g) to say that, except as specifically set forth in Act 77, the Commission's "traditional regulatory authority" over commercial mobile service providers has been terminated. *See Alltel Mobile Communications, Inc. v. Arkansas Public Serv. Comm'n*, 63 Ark. App. 197, 975 S.W.2d 884 (1998). Following our ruling in that case, the Commission entered an order in another docket stating that, with the exception of universal services funding, "commercial mobile service providers are not subject to any regulatory authority or jurisdiction of the Commission," and "no other statutes, rules, or regulations jurisdictional to the Commission shall be applicable to cellular mobile service providers." *See* Order No. 14 in Docket No. 97-041-R.

In light of this deregulation of CMRS providers, appellants argue that the Commission is no longer vested with the power to assess the property of CMRS providers. Appellants do not contend that the power to assess is included in the power to regulate; rather, they contend that these two powers must be exercised in a symmetrical manner. If the Commission is permitted to assess the property of CMRS providers when it is not permitted to regulate them, they claim, this symmetry is broken. To support their argument, appellants point to the fact that the Tax Division's assessment power is restricted to public carriers and utilities, the very entities regulated by the Commission. *See* Ark. Code Ann. § 26-24-101(1)(A) (Repl. 1997); Ark. Code Ann. § 26-26-1602(b)(1) (Repl. 1997).

Despite the fact that the Commission has both regulatory and assessment power over utilities, we disagree that these dual powers may only be exercised in a parallel fashion. First, neither the regulatory statutes contained in Title 23 nor the tax statutes contained in Title 26 contain an express mandate that assessment

authority be exercised only when regulatory authority is present. Secondly, the statutory scheme that gives the Tax Division its assessment authority belies a legislative intention that a link must exist between regulatory and assessment powers. The Commission's assessment authority is part of an independent, freestanding grant of power that not only vests the Tax Division with the mandate to assess the property of public utilities and carriers, but with a broad range of assessment responsibilities unrelated to public utilities and carriers. *See, e.g.*, Arkansas Code Annotated section 26-24-102 (Supp. 1999), giving the Division supervision and control over the valuation, equalization, and assessment of property and over the several county assessors, boards of review and equalization; and Arkansas Code Annotated section 26-26-701 (Repl. 1997), requiring the Commission to prepare the forms used by county assessors in performing their duties. Thus, it does not appear that the legislature envisioned that the Tax Division would exercise its assessment authority only where the Commission exercised its regulatory authority. We are not convinced, therefore, that the Commission's assessment power is extinguished in the absence of concurrent regulatory power.

As further support for their argument, appellants cite several cases from other jurisdictions in which the courts held that a public utility commission should treat a company the same way for regulatory and assessment purposes. *See In re United Teleservs., Inc.*, 267 Kan. 570, 983 P.2d 250 (1999); *In re Topeka SMSA Ltd. Partnership*, 260 Kan. 154, 917 P.2d 827 (1996); *MCI Telecomm. Corp. v. Limbach*, 68 Ohio St. 3d 195, 625 N.E.2d 597 (1994), *cert. denied*, 513 U.S. 818 (1994); *Airtouch Paging v. Tracy*, 111 Ohio App. 3d 202, 675 N.E.2d 1305 (1996). Of particular interest to us is the *Topeka SMSA* case, which is strikingly similar to the case before us. We will discuss that case further in relation to the next issue on appeal. However, to the extent that these cases may be read to support appellants' argument regarding the symmetry of regulatory and assessment authority, and they would have to be read very broadly to do so, we disagree with their holdings. The fact remains that there is nothing either express or implied in our statutes that the legislature intended the Commission's assessment power to be exercised only over those entities regulated by the Commission.

Our holding in *Alltel Mobile Communications, Inc., supra*, and the Commission's Order No. 14 issued in response, do not change our decision. By its own terms, our opinion in *Alltel* refers to the fact that the Commission has been divested of "traditional regulatory authority" over CMRS providers. As we have already discussed, the

Commission's assessment power stands separate and apart from its regulatory power.

Appellants argue next that they are not "telephone companies" or any other type of utility subject to the Commission's assessment authority. The Commission's Tax Division has the exclusive power to assess the property of, among other entities, "telephone ... or other similar companies...." *See* Ark. Code Ann. § 26-24-103 (Repl. 1997); Ark. Code Ann. § 26-26-1602(b)(1) (Repl. 1997). Telephone companies are in turn defined as companies that transmit for hire within, into, from, or through this state, telephonic messages. *See* Ark. Code Ann. § 26-26-1601(13) (Repl. 1997). The term "telephonic messages" is not defined in these statutes. Appellants claim that they are distinguishable from telephone companies in several ways, among them: 1) they are licensed by the FCC as commercial radio service providers; 2) communications initiated or terminated by appellants' customers are initiated or terminated by means of radio signals using radio facilities, including antennae, transmitters and handsets, and radio technology; and 3) appellants do not own or operate any telephone lines. In support of their argument, they cite *In re Topeka SMSA Ltd. Partnership*, the Kansas case mentioned earlier in this opinion. There, the Kansas court determined that a CMRS provider was not a telephone company transmitting telephonic messages.

■■ Our resolution of this issue requires us to interpret the statutory terms "telephone company," "other similar companies," and "telephonic messages." The basic rule of statutory construction is to give effect to the intent of the legislature. *Central & Southern Cos. v. Weiss*, 339 Ark. 76, 3 S.W.3d 294 (1999). When the language of a statute is plain and unambiguous, legislative intent is determined from the ordinary meaning of the language used. *Id.* In considering the meaning of a statute it is construed just as it reads, giving words their ordinary and usually accepted meaning in common language.[1] *Id.* As we consider the ordinary and common meaning of the terms to be interpreted in this case, we must

[1] Appellants urge us to apply certain special rules of statutory construction used in interpreting tax statutes, *e.g.*, when the meaning of a tax statute is doubtful, its meaning should be resolved in favor of the taxpayer, and a tax should not be imposed except by express words indicating that purpose. *See Leathers v. Active Realty, Inc.*, 317 Ark. 214, 876 S.W.2d 583 (1994). We decline to apply these rules of construction because the meaning of the statutory language is clear in this case. Additionally, it has been recognized that statutes establishing procedures for assessment of taxes will be construed in favor of the government. *See Ragland v. Alpha Aviation, Inc.*, 285 Ark. 182, 686 S.W.2d 391 (1985).

disagree with appellants and with the *Topeka SMSA* case because it is clear to us that appellants are telephone companies that transmit telephonic messages. Appellants use their assets to provide a service whereby persons who are at some distance from each other may communicate by voice in real time. During many of their customers' transmissions, the customers are interconnected with the public switched telephone network. The handsets used by these customers have the look and function of wire-based telephones. To establish communications, customers dial a number just as they do when using a wire-based telephone. They may also establish communication directly with a wire-based telephone. As the Court of Appeals of Kentucky recognized in addressing this argument, "[t]he only thing that significantly sets cellular telephone companies apart from traditional telephone companies seems to be the technology involved. The means to the end may have changed, but the end remains the same, that is, cellular phone companies are designed and operated to provide telephone service." *Central Kentucky Cellular Tel. Co. v. Commonwealth of Kentucky*, 897 S.W.2d 601, 603 (Ky. App. 1995).

Appellants argue further that, when the legislation that contained these terms was first passed in Act 129 of 1927, the legislature could not have intended the terms "telephone" and "telephonic" to include entities such as CMRS providers. In support of their argument, they cite *Radio Tel. Comm. v. Southeastern Tel. Co.*, 170 So.2d 577 (Fla. 1964), in which the Florida court agreed with such a proposition. We decline to follow the holding in the Florida case and instead adopt the rationale approved by the Kentucky court in *Kentucky Cellular Tel. Co., supra,* that "[i]t is apparent that many of the communications technologies utilized today by the traditional 'land-line' telephone companies are not the same technologies that were used at the time of the statute adoption. This fact does not mean that telephone companies become something else simply because they use improved communication techniques." *Id.*, 897 S.W.2d at 603. The terms "telephone" and "telephonic" are flexible enough to encompass changes in the state of the art of telephone communication, which is what we have in this case.

Before leaving this issue, we also note that appellants are surely subject to assessment as "other similar companies." As we have already discussed, appellants' similarities to wire-based telephone companies far outweigh their differences. Further, appellants use public airwaves and air space for the transmission of messages.

We turn now to appellants' equal protection argument. Appellants claim that their right to equal protection was violated because, while their property was assessed by the Commission's Tax Division, the property of similarly situated taxpayers such as paging companies was assessed by county assessors. The Equal Protection Clause of the Fourteenth Amendment protects an individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. *See Hillsborough v. Cromwell*, 326 U.S. 620 (1946). However, the clause applies only to taxation that in fact bears unequally on persons or property of the same class. *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County*, 488 U.S. 336 (1989). Further, the Equal Protection Clause requires a "rough equality" in the tax treatment of similarly situated property owners. *Id.*; *Pockrus v. Bella Vista Village Prop. Owners Ass'n*, 316 Ark. 468, 872 S.W.2d 416 (1994).

Even if we agree that appellants and paging companies are similarly situated enterprises, appellants have not shown that they bear an unequal burden, nor have they shown a lack of rough equality between their treatment by the Tax Division and the paging companies' treatment by county assessors. No matter which entity conducts the assessment, the same twenty-percent valuation rate is used. *See* Arkansas Code Annotated section 26-26-304(b)(3) (Supp. 1999), requiring that the assessed value of property be placed on the tax record at twenty-percent of its true and full market or actual value. Although appellants, in a joint stipulation of facts before the Commission, claimed that, had the county assessors rather than the Tax Division assessed their property, the assessments would have been lower, the Tax Division included a stipulation that the assessments by the counties could possibly have been higher or lower than its own assessments. Given the uniform assessment rate, we can only conclude that, in the absence of any contrary evidence by appellants, any possible difference in assessed values would result from the application of different accounting methods. The use of different accounting methods to assess property in the same class is of no constitutional moment. *Allegheny Pittsburgh Coal Co., supra; Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 307 Ark. 171, 818 S.W.2d 935 (1991). We therefore find no constitutional violation based upon the record before us.

Appellants' final argument concerns a procedural matter in circuit court. Before trial, appellants filed a motion for leave to present additional evidence. They asked to present experts to testify regarding the difference between themselves and traditional telephone companies and to testify that assessment by county assessors

would result in a lower assessment. The trial judge refused to allow the additional evidence on the basis that his review was restricted to the record made before the Commission.

We agree with the trial judge. Arkansas Code Annotated section 26-24-123(c) (Repl. 1997) provides that appeals from a Commission ruling regarding assessment shall be tried *de novo*. The type of *de novo* trial contemplated under this statute is not the type that calls for the reception of new evidence but the type in which review is confined to the record made before the administrative body. *See* Comment, *Judicial Review of Findings of the Arkansas Public Service Commission*, 2 ARK. L. REV. 67 (1947-48); *see also St. Louis-San Francisco Ry. Co. v. Public Serv. Comm'n*, 227 Ark. 1066, 304 S.W.2d 297 (1957). It is also important to read section 26-24-123(c) in conjunction with Arkansas Code Annotated section 26-24-101(1)(B)(i)(b) (Repl. 1997), which specifically provides that appeals from a Commission ruling with regard to the assessment of a public utility shall be to circuit court "upon the record before the commission."

Affirmed.

PITTMAN, HART, GRIFFEN, CRABTREE, and BAKER, JJ., agree.

Elizabeth FRAWLEY and J & J Bonding, Inc. *v.*
Tom NICKOLICH

CA 00-872 41 S.W.3d 420

Court of Appeals of Arkansas
Division II
Opinion delivered April 4, 2001

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

Mark Pryor, Att'y Gen., by: *Ainsley H. Lang*, Ass't Att'y Gen., for appellee.

KAREN R. BAKER, Judge. This is an administrative appeal from the Arkansas Professional Bail Bond Company and Professional Bail Bondsman Licensing Board. The appellant, Elizabeth Frawley, is a licensed bail bondsman who was employed by appellant, J & J Bonding, Inc., on December 16, 1997. Appellant Frawley was notified by the Board that she solicited business or advertised for business in or about a place where prisoners were confined in violation of Ark. Code Ann. section 17-19-105(2). Appellant J & J Bonding, Inc. was notified that it was responsible for Ms. Frawley's actions pursuant to Ark. Code Ann. section 17-19-210(b) because she was acting within the scope of her authority as a J & J bondsman. The statutory prohibition against solicitation reads as follows:

> No professional bail bondsman or professional bail bond company, nor court, nor law enforcement officer nor any individual working on behalf of a professional bail bondsman or professional bail bond company shall: . . .(2) Solicit business or advertise for business in or about any place where prisoners are confined or in or about any court; . . . .

Ark. Code Ann. § 17-19-105(2) (Supp.1999).

This prohibition was amended in 1997 with an effective date of July 1, 1997. The amendment inserted the language "nor any individual working on behalf of a professional bail bondsman or professional bail bond company" in the introductory language. *Id.* (commentary).

The charges in this case were based upon allegations that Dixie Hinerman, a friend of Ms. Frawley's, accompanied Ms. Frawley to the Pulaski County jail and distributed business cards of Ms. Frawley's to a trusty and others at the facility. A hearing was held before the Board on March 13, 1998, and the Board found appellants guilty of the charges. The Board suspended Ms. Frawley's license for ninety days and imposed a fine of $2,500 against J & J Bonding. Appellants timely appealed the Board's decision and argued to the circuit court, and again in this appeal, that there was no evidence of an agency relationship between Ms. Hinerman and Ms. Frawley. They urge that without evidence of an agency relationship, Ms. Hinerman's actions on December 16, 1997, should not have been imputed to Ms. Frawley. In addition, they argue that the punishments imposed were unduly harsh and excessive.

This court's review, like that of the circuit court, is limited in scope and is directed not to the decision of the circuit court, but to the decision of the administrative agency. *Tomerlin & All Arkansas Bail Bond Co., Inc. v. Nickolich*, 342 Ark. 325, 331, 27 S.W.3d 746, 749 (2000) (citing *Arkans as Bd. Of Exam'rs v. Carlson*, 334 Ark. 614, 976 S.W.2d 934 (1998)); *Arkansas Dept. of Human Servs. v. Thompson*, 331 Ark. 181, 959 S.W.2d 46 (1998). Our review is limited to ascertaining whether there is substantial evidence to support the agency's decision. *Id.*

The Arkansas Supreme Court set forth the following test for determining whether substantial evidence supports the agency's decision:

> Substantial evidence has been defined as valid, legal, and persuasive evidence that a reasonable mind might accept as adequate to support a conclusion, and force the mind to pass beyond conjecture. The challenging party has the burden of proving an absence of substantial evidence. To establish an absence of substantial evidence to support the decision the challenging party must demonstrate that the proof before the administrative tribunal was so nearly

> undisputed that fair-minded persons could not reach its conclusion. The question is not whether the testimony would have supported a contrary finding but whether it supports the finding that was made. It is the prerogative of the agency to believe or disbelieve any witness and to decide what weight to accord the evidence.

Arkansas State Police Comm'n v. Smith, 338 Ark. 354, 362, 994 S.W.2d 456, 461 (1999)(citations omitted).

To prevail, appellants must demonstrate that the proof before the administrative tribunal was so nearly undisputed that fair-minded persons could not reach the conclusion that Ms. Hinerman was working on behalf of appellants when she distributed Ms. Frawley's business cards at the Pulaski County jail.

The following facts were largely undisputed. On December 16, 1997, Ms. Hinerman accompanied Ms. Frawley to the Pulaski County jail. Ms. Frawley left her cellular phone with Ms. Hinerman outside the facility and entered the jail on a bond matter. While Ms. Frawley was inside the facility, Ms. Hinerman gave several of Ms. Frawley's business cards to an inmate with trusty status and told him to take the cards into the jail and pass them out to anyone who needed them. She also passed out cards to other individuals. At least one of these cards had Ms. Hinerman's name handwritten with "Sec." to indicate secretary. All of the cards had both Ms. Frawley's and J & J Bonding's names imprinted. The cards also listed Ms. Frawley's cellular phone number. Although not paid by Ms. Frawley, Ms. Hinerman helped Ms. Frawley by driving around with her and answering her cellular phone. When answering the telephone for Ms. Frawley, Ms. Hinerman would gather the caller's name, phone number, and information about the person for whom a bond was sought. She denied giving specific information about fees for obtaining a bond and claimed she only answered a few phone calls. Both Ms. Frawley and J & J Bonding would receive the financial benefit of any bail bond business solicited by Ms. Hinerman through the distribution of cards on December 16, 1997, in or about the premises of the Pulaski County jail. Ms. Frawley denied knowing that Ms. Hinerman was distributing the cards at the time of distribution, but said she was upset with Ms. Hinerman when she found out and told her never to do it again.

The Arkansas Supreme Court adopted the definition of agency contained in the Second Restatement of the Law of Agency, § 1, comment a, which provides that the relation of agency is created as the result of conduct by two parties manifesting that

one of them is willing for the other to act for him subject to his control, and that the other consents so to act. The principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on the principal's behalf and subject to his control. *Evans v. White*, 284 Ark. 376, 682 S.W.2d 733 (1985) (citing *Crouch v. Twin City Transit*, 245 Ark. 778, 434 S.W.2d 816 (1968)). The two essential elements of the definition are authorization and right to control. *Id.*

There is substantial evidence from which the Board could conclude that Ms. Hinerman was acting on behalf of Ms. Frawley when distributing her business cards at the jail. Ms. Frawley left Ms. Hinerman with access to her business cards and cellular phone and gave instructions to obtain certain information from the callers regarding their bonding needs. The cards had Ms. Frawley's cellular phone number on them. Ms. Frawley left Ms. Hinerman outside the detention facility while she was inside preparing a bond on behalf of J & J Bonding. Appellants fail to demonstrate how a fair-minded person could not reach the conclusion that Ms. Frawley in some manner indicated that Ms. Hinerman was to act for her. Neither have appellants demonstrated that a fair-minded person could not reach the conclusion that Ms. Hinerman acted on appellants' behalf. It is logical to conclude that someone who received a business card could contact Ms. Frawley and J & J Bonding for a bond and therefore the distribution of the card was on appellants' behalf. Even if no one contacted appellants as a result of the distribution, Ms. Hinerman's actions were still on behalf of appellants in that she was providing individuals with the name and number of a bail bondsman. Similarly, Ms. Frawley's instruction to Ms. Hinerman to never pass out the cards again at a jail supports the conclusion that Ms. Hinerman was subject to appellants' control in some way, whether or not appellants had prior knowledge of this specific distribution of cards by Ms. Hinerman. Therefore, Ms. Frawley is accountable for Ms. Hinerman's actions. In addition, substantial evidence supports the finding that Ms. Frawley was acting within the scope of her employment as a J & J bondsman, and J & J was properly held accountable pursuant to statute.

Regarding the sanctions imposed, Ms. Frawley's ninety-day suspension is not an abuse of discretion or unduly harsh, particularly in light of the fact that under Ark. Code Ann. section 17-19-210(a) she was subject to a one-year suspension. Likewise, J & J Bonding's fine of $2500, in lieu of suspension or revocation of its license as an administrative penalty pursuant to section 17-19-211, was in the mid-range of fines. The sanctions are fair and reasonable.

Accordingly, we affirm.

Affirmed.

GRIFFEN and CRABTREE, JJ.,agree.

Rex ROWELL *v.* CURT BEAN LUMBER COMPANY

CA 00-884 40 S.W.3d 344

Court of Appeals of Arkansas
Division II
Opinion delivered April 4, 2001

Lane, Muse, Arman & Pullen, by: *Shannon Muse Carroll*, for appellant.

Murray Law Firm, by: *Walter A. Murray*, for appellee.

KAREN R. BAKER, Judge. Rex Rowell brings this appeal challenging a decision of the Workers' Compensation Commission. The Administrative Law Judge awarded permanent partial disability benefits to appellant. The Workers' Compensation Commission reversed the Administrative Law Judge's award and found that an award of permanent partial disability was barred. The Commission also remanded to the Administrative Law Judge for a ruling on the constitutional challenge of Ark. Code Ann. § 11-9-522(g) (Repl. 1996 and Supp. 1999). Appellant's first point on appeal is that the Commission erred in denying the appellant functional and anatomical loss because there was no specific percentage of permanent impairment assigned. Appellant's second point on appeal is that Ark. Code Ann. § 11-9-522(g) is unconstitutional because it does not provide appellant a legal remedy when there are permanent restrictions and no impairment rating assigned. We hold that because the constitutionality issue was remanded to the Administrative Law Judge there is not a final appealable order and this appeal must be dismissed.

Appellant was employed by Curt Bean Trucking as a truck driver. On December 22, 1995, appellant was exiting his truck when he slipped on the icy running board of his truck, falling to the ground. The fall resulted in an injury to his right shoulder. Dr. Robert Olive, who remains appellant's primary care physician, successfully operated on appellant and repaired a right rotator cuff tear. Following the surgery, Dr. Olive restricted appellant to a seventy-five pound permanent weight lifting limit to prevent further re-injury. By January 1998, appellant had reached maximum medical improvement to the point that his healing period was extinguished. Dr. Olive anticipates appellant will have problems with the shoulder from time to time, however, appellant demonstrates full range of motion and has good strength. Dr. Olive is prohibited from assigning a permanent impairment rating due to the lack of an objective impairment, as per the Guidelines to Evaluation of Permanent Impairment.

The Administrative Law Judge found that appellant had proven by a preponderance of the evidence that he was entitled to permanent partial disability benefits representing a permanent partial disability of five percent to the body as a whole. However, on May 5, 2000, after a *de novo* review by the full Commission, it was found that since there were no objective findings of permanent impairment, the Administrative Law Judge erred in awarding permanent partial disability benefits. The Commission remanded the issue of constitutionality of Ark. Code Ann. § 11-9-522(g) to the Administrative Law Judge. Following the Commission's reversal, appellant filed a timely notice of appeal claiming that the Commission erred in denying the appellant's functional and anatomical loss because there was no specific percentage of permanent impairment assigned and challenging the constitutionality of Ark. Code Ann. § 11-9-522(g). However, this court is unable to reach the merits of this case and must dismiss for lack of a final order.

Appeals from the Commission to this court shall be allowed as in other civil actions. *TEC v. Falkner*, 38 Ark. App. 13, 827 S.W.2d 661 (1992) (citing Ark. Code Ann. § 11-9-711(b)(2)). For an order to be appealable, it must be final. *Rogers v. Wood Mfg.*, 46 Ark. App. 43, 877 S.W.2d 94 (1994). To be final, an order must dismiss the parties from the court, discharge them from the action, or conclude their rights as to the subject matter in controversy. *Id.* Ordinarily an order of the Commission is reviewable only at the point where it awards or denies compensation. *TEC, supra.* As a general rule, orders of remand are not final and appealable. *Rogers, supra.*

Addressing only one of the issues on appeal would be to encourage piecemeal litigation. We conclude that, due to the Commission's remand of the undecided issue of the constitutionality of Ark. Code Ann. § 11-9-522(g), there is not a final determination; hence, it is not a final appealable order.

Dismissed.

GRIFFEN and CRABTREE, JJ., agree.

James R. BOWEN and James Richard Cagle *v.*
STATE of Arkansas

CA CR 00-537 42 S.W.3d 579

Court of Appeals of Arkansas
Division IV
Opinion delivered April 4, 2001

[redacted]

Hodson, Wood & Snively, by: *Michael Hodson*, for appellants.

Mark Pryor, Att'y Gen., by: *Misty Wilson Borkowski*, Ass't Att'y Gen., for appellee.

ANDREE LAYTON ROAF, Judge. Appellants James Ronnie Bowen and James Richard Cagle were arrested on May 15, 1997, and charged with theft by receiving over $2,500. A jury trial was held on December 14 and 15, 1999, and the jury returned a guilty verdict against both appellants. They were sentenced to ten years' probation, a fine of $10,000, and ordered to pay $310,000 in restitution. For their sole point on appeal, they argue the trial court erred in failing to dismiss their case for violation of their right to a speedy trial. We affirm.

Under Ark. R. Crim. P. 28.1, an accused must be brought to trial within twelve months unless necessary delay occurs as authorized in Ark. R. Crim. P. 28.3. The speedy-trial period began on the date of Bowen and Cagle's arrest. Ark. R. Crim. P. 28.2(2)(a). It is undisputed that 944 days lapsed from the date of Bowen's and Cagle's arrest and their jury trial. This exceeds the twelve-month requirement of Ark. R. Crim. P. 28.1 and 28.2 by 579 days. Accordingly, appellants made a *prima facie* showing of a violation of the rule, and the burden shifted to the State to show good cause for the delay. *Chenowith v. State*, 341 Ark. 722, 19 S.W.3d 612 (2000).

The first time period in dispute is from September 24, 1997, to February 4, 1998. The trial court excluded this period from the speedy-trial calculations in its October 4, 1999, order, reasoning that because appellants' counsel approved the order as to form and did not raise any objections to the excluded period of time, the motion was a joint motion to have the period excluded. Appellants

argue the trial court erred in excluding this period for three reasons: (1) the motion for continuance was made solely on behalf of the State; (2) neither the docket sheet, nor the order, contains any reference to the reasons for the State's requested continuance; (3) the order excluding time for the continuance was not date specific in violation of Ark. R. Crim. P. 28.3.

Appellants first assert that the September 24, 1997, motion for continuance was made solely on behalf of the State and hence, is governed by Ark. Rule Crim. P. 28.3(d). Therefore, they assert, there are two situations where State-requested continuances may be excludable, *i.e.*, unavailability of evidence and complexity of the case. Ark. R. Crim. P. 28.3(d)(1) and (d)(2). They argue neither of these factors were present nor were they evidenced by the testimony, docket entries, or orders. The State counters that although it made the motion for a continuance, appellants' attorney signed and approved the order as to form, which read "upon oral motion of the parties," and forwarded it to the judge for final entry. Hence, the State asserts that appellants' argument is barred due to failure to timely object, citing *Dean v. State*, 339 Ark. 105, 3 S.W.3d 328 (1999). Bowen and Cagle respond that they did not waive their argument for exclusion and cite *Tanner v. State*, 324 Ark. 37, 918 S.W.2d 166 (1996), *Dean, supra*, and *Mack v. State*, 321 Ark. 547, 905 S.W.2d 842 (1995), in support of their position.

In *Mack*, our supreme court said that the time to raise the issue of whether a certain period is excludable is at the hearing where excludability is discussed. Subsequently, in *Tanner*, our supreme court reaffirmed the holding in *Mack*, but refused to extend it to a situation where the trial court continues the case on its own motion, outside the presence of either party. In *Dean*, the defense counsel was present when the trial court plainly stated that it was granting appellant's motion to continue, and defense counsel did not object to the continuance being charged to the appellant. The supreme court held that the time to object is when the trial court makes its ruling, not in a subsequent speedy-trial motion. It then found the period excludable. *Dean, supra.*

It is clear from these holdings that a contemporaneous objection to the excluded period is necessary to preserve the argument in a subsequent speedy-trial motion if defense counsel is present at the hearing and has an opportunity to object. Here, appellants' counsel signed the October 6, 1996, order, acquiescing to its express terms, that included the statement that the motion was made "upon oral motion of the *parties*" (emphasis added). When a

defendant takes exception to the wording of an order, it is incumbent on him to bring the matter to the attention of the trial court within a reasonable time. *Clements v. State*, 312 Ark. 528, 851 S.W.2d 422 (1993). Thus, the trial court correctly found that the continuance was considered a joint request.

A joint continuance is presumably desired by both parties, which would include the defendant. *Gwin v. State*, 340 Ark. 302, 9 S.W.3d 501 (2000). When a motion for continuance is a joint request, the State is not required to establish the unavailability of evidence or the complexity of the case. *Gwin, supra*. Further, because Bowen and Cagle did not object to the order of continuance prior to signing and forwarding it to the judge, their argument that the motion for continuance was made solely on behalf of the State and that the State must give reasons for the continuance is barred by their failure to object to this order. *Mack, supra*.

Bowen and Cagle's argument that the order granting the continuance was not date specific is likewise barred due to their failure to timely object. Bowen and Cagle argue that the time period in the September 24 continuance the order was not excludable pursuant to *Hicks v. State*, 305 Ark. 393, 808 S.W.2d 348 (1991). They assert that the untimely filing of the order, a few weeks after the decision to continue the case, is sufficient reason to disallow the exclusion of time because *Hicks* held that "a trial court should enter written orders or make docket notations at the time continuances are granted to detail the reasons for the continuances and to specify, to a day certain, the time covered by such excluded periods." *Hicks, supra*.

The State correctly argues that reliance on *Hicks* is misplaced as Rule 28.3(b) was amended by per curiam order on April 22, 1999. *See In Re Ark. R. Crim. P. 28*, 337 Ark. 627 (1999). Appellants' motion to dismiss for lack of a speedy trial, brought August 12, 1999, is governed by this amended rule, which provides that the excludable period of time "shall be set forth by the court in a written order or docket entry, but it shall not be necessary for the court to make the determination until the defendant has moved to enforce his right to a speedy trial." Thus, it is of no consequence that the oral motion for continuance was entered on the docket sheet on September 24, 1997, but the order granting the continuance was not filed until October 6, 1997.

The next time period contested by appellants is from February 5, 1998, to February 25, 1998. Appellants argue that this period

should not be excluded from the speedy-trial calculation because the order memorializing this continuance was never filed. There is no docket notation for the month of January 1998. However, at the hearing on appellants' motion to dismiss, the State introduced as exhibits two orders of continuance dated January 28, 1998, and signed by the trial court and approved as to form by appellants, their defense counsel, and the prosecuting attorney. The order provides that it was granted upon the defendants' oral motions and excludes the period of time from January 28, 1998, to February 25, 1998. At the hearing, appellants did not contest the validity of defense counsel signatures, but objected because there was no showing that they were in fact orders of the court, they were not filed, and as copies, they were not the best evidence.

The State argues that the "defendant has an affirmative obligation to offer proof that the delay was not at the instance of the defendant." *Roberts v. City of Conway*, 266 Ark. 825, 826, 586 S.W.2d 13, 14 (1979). Although the orders of continuance were not filed, the State asserts that they demonstrated the defendants requested the delay, and the time was properly excluded pursuant to Ark. R. Crim. P. 28.3(c) (2000). Notwithstanding, appellants argue that according to Ark. R. Crim. P. 28.3(i), all excluded periods of time shall be by written order and that it can be assumed that the order must be filed to be effective, citing *Hicks, supra*. It is true that a trial court should enter written orders or make docket notations at the time the continuance is granted to detail reasons for the continuance, but a trial court's failure to comply with subsection (i) does not result in automatic reversal. *McConaughy v. State*, 301 Ark. 445, 784 S.W.2d 768 (1990); *Henson v. State*, 38 Ark. App. 155, 832 S.W.2d 269 (1992). In *McConaughy, supra,* and *Henson, supra,* the court held that because the delaying act was memorialized in the record, taken at the time it occurred, the record was sufficient to satisfy the requirements of Rule 28.3(i). Here, there is no record for this court to rely upon. Therefore, because the order was not filed, there is no docket notation at the time the continuance was granted, and there is no record memorializing the continuance, we agree that this twenty-day time period is not excludable. *See Shaw v. State*, 18 Ark. App. 243, 712 S.W.2d 338 (1986) (reversing the denial of the appellant's speedy-trial motion because there was a complete absence of written orders or docket entries detailing the reasons for the delay in trial).

Appellants next argue that the period of time from February 26, 1998, to June 8, 1998, is not excludable. There is no indication in the record or the docket of any activity during the February trial

term and the case was apparently reset for trial on June 8, 1998. It is the State's burden to show the delay was a result of the defendant's conduct or otherwise justifiable by the excluded period recognized by the criminal rules. *Gwin, supra*. The State does not contend that this period is excludable. Thus, these 102 days are not excludable.

The period from June 8, 1998, to October 4, 1998, is the next contested period. The State moved for a continuance on May 20, 1998, with an excludable period of time due to the fact that the chief investigator in the case, Glenn Sligh, would be out of state and unable to testify at the scheduled June 8, 1998, trial. Upon receiving the May 11, 1998, order setting the trial for June 8, Officer Sligh testified that he immediately wrote the prosecuting attorney of his longstanding vacation plans. The court signed the order dated May 20, 1998, excluding the requested period of time.

Appellants argue that they did not waive their objection because they had no opportunity to object to the continuance before the order was entered. However, appellants' counsel was mailed a copy of the motion in which the State expressly requested an excludable period on May 19. Even if appellants' counsel received notification after the order granting the continuance was signed, in accord with *Dean, supra*, appellants had the obligation to object to the exclusion of the time at the earliest opportunity after receiving this notice, rather than over a year later in the speedy-trial motion to dismiss.

The next period contested is July 30, 1999, until August 12, 1999. Again, it is the State's burden to show the delay was excludable, and the State concedes this fourteen-day period is not excludable.

Lastly, appellants contest the period of time from October 8, 1999, to December 14, 1999, arguing that this period of time from the trial court's denial of their motion for a speedy trial until the beginning of the trial is not excludable. The State counters that appellants filed a motion for continuance on September 22, 1999, requesting that the September 21, 1999, trial date be rescheduled for a later date. The trial court entered an order granting the continuance from September 21, 1999, through December 14, 1999. Ark. Rule Crim. P. Rule 28.3(c) permits the exclusion of periods resulting from a continuance granted at either the defendant's or his counsel's request. This period was requested by the appellants and is excludable.

The excludable periods plus the time appellants do not contest total 679 days. Thus, appellants were tried within 265 days, well within the one-year speedy-trial period.

Affirmed.

ROBBINS and BIRD, JJ., agree.

Ron and Ramona DAVENPORT,
as the Administrators of the
Estate of Linda Kay Moore, Deceased, or,
in the Alternative, Ron and Ramona Davenport,
Individually and as Heirs at Law of
Linda Kay Moore, Deceased, on Behalf of
Themselves and All Other Heirs at Law of
the Deceased, or All Who Are Entitled to
Legal Redress for the Death of
Linda Kay Moore, Deceased *v.* Tyrone LEE,
M.D.; Conway Regional Medical Center; Craig
Cummins, M.D.; and James Throneberry, M.D

CA 00-696 40 S.W.3d 346

Court of Appeals of Arkansas
Division IV
Opinion delivered April 4, 2001
[Petition for rehearing denied May 9, 2001.]

Charles Phillip Boyd, Jr., and *Christopher D. Anderson*, for appellants.

Wright, Lindsey & Jennings, LLP, by: *Patricia Sievers Harris*, *Elisa Masterson White*, and *Jane M. Weisenfels*, for appellees Tyrone Lee, M.D., and Conway Regional Medical Center.

Armstrong Allen, PLLC, by: *Ken Cook* and *E.B. Chiles, IV*, for appellee Craig Cummins, M.D.

Anderson, Murphy & Hopkins, LLP, by: *Overton S. Anderson* and *Scott D. Provencher*, for appellee James Throneberry, M.D.

ANDREE LAYTON ROAF, Judge. Ron and Ramona Davenport were appointed administrators of the estate of Linda Kay Moore, Ramona Davenport's sister. Subsequently, the Davenports filed a *pro se* negligence/wrongful death action against the appellee medical providers five days before the expiration of the two-year statute of limitations. The complaint alleged that the appellees' negligent medical treatment was the cause of Ms. Moore's death. The circuit court granted the appellees' motions to dismiss, based on a finding that personal representatives who are not licensed attorneys are not acting individually, and may not file a wrongful-death or survivorship action on behalf of either the estate or the wrongful-death statutory beneficiaries. The trial court found that the Davenports' complaint was consequently a nullity, and that an entry of appearance and amended complaint later filed by their attorney did not relate back to the initial filing so as to toll the running of the statute of limitations. On appeal, the Davenports raise seven points for reversal. With regard to the sixth point raised by the Davenports, we agree that the trial court erred in finding that the complaint filed by them was a nullity, and reverse and remand.

Ron Davenport and Ramona Davenport are the administrators of the estate of the decedent, Linda Kay Moore. Ramona Davenport is Ms. Moore's sister, and Ramona and Ron are husband and wife. Ms. Moore was also survived by three children. Appellees are Drs. Tyrone Lee, Craig Cummins, Greg Lewis, Gil Johnson, and James Throneberry, Conway Regional Medical Center (hereinafter "CRMC"), and/or John Doe A-Z, and they are the medical personnel and the hospital that treated Ms. Moore.

On February 11, 1997, Ms. Moore went to the CRMC emergency room suffering from pneumonia. On February 15, 1997, prior to a scheduled surgery for her condition, she was intubated, and she died only minutes later. The Faulkner County Probate Court appointed the Davenports as the administrators of Ms. Moore's estate. The Davenports filed a complaint *pro se* as administrators of the estate or alternatively, individually, and as the heirs at law of the decedent, and on behalf of other heirs at law or all who are entitled to legal redress for the decedent's death, in the Faulkner County Circuit Court on February 10, 1999. The Boyd Law Firm filed an entry of appearance and an addendum to the complaint modifying a defendant's name on May 29, 1999. The Boyd Law Firm then had the summons, complaint, and the addendum to the complaint timely served on all appellees.

Over the course of this case, five amended complaints were filed, and the appellees all filed motions to dismiss. An order was entered by the circuit court on November 24, 1999, dismissing all claims with prejudice, stating in pertinent part that, as personal representatives of the estate, Ramona and Ron Davenport could not file a valid complaint for wrongful death or survivorship if neither of them is an attorney, that they were not acting individually, and that the subsequent amended pleadings filed by their attorneys do not relate back to the initial filing under the circumstances of this case. The Davenports filed a motion for reconsideration on November 26, 1999. The trial court entered two orders on January 25, 2000, denying that motion and striking the Davenport's fifth amended complaint filed after the trial court had announced its decision to dismiss the action.

The Davenports raise seven points for reversal, some of which are interrelated. They contend that the trial court erred in: 1) failing to deny the motions to dismiss filed by Craig Cummins, M.D., Tyrone Lee, M.D., and Conway Regional Medical Center because they failed to raise their motions to dismiss in their initial pleadings as required by Ark. R. Civ. P. 12(b); 2) determining that this action was commenced without an attorney acting on behalf of the estate of Linda Kay Moore; 3) alternatively, failing to find that the administrators of the estate were vested with the rights of the decedent and were not "trustees" for the estate; 4) dismissing with prejudice the individual complaint of Ramona Davenport, an administrator of the estate who is also an heir, where she alleged both her individual and representative capacity; 5) alternatively, if the original complaint was ineffectual due to technical defect, failing to apply Ark. R. Civ. P. 17 to allow cure of any defect to permit the real party in interest to appear and/or ratify the filing of the complaint; 6) determining that the complaint filed by Ron and Ramona Davenport was a nullity; and 7) failing to find that the appellees' fraudulent concealment tolled the two-year limitations period.

We have concluded that the trial court erred in holding that the Davenports' *pro se* complaint was a nullity. Consequently, we need not address the other six arguments raised by the Davenports except as they relate to the discussion of this point or overlap with this issue. This is an issue of first impression in Arkansas.[1] The

[1] The appellants attempted to file this appeal in the supreme court, asserting that it presents an issue of first impression, is of significant public interest, and involves a significant issue needing clarification or development of law. However, the supreme court declined the

supreme court in *Arkansas Bar Ass'n v. Union Nat'l Bank*, 224 Ark. 48, 273 S.W.2d 408 (1954), held that a bank serving as personal representative of an estate was not looking after its own affairs, but was acting in a fiduciary capacity. The court expressly held that a person who is not a licensed attorney and who is acting as an administrator, executor, or guardian cannot practice law in matters relating to his trusteeship on the theory that he is practicing for himself. We consider this holding dispositive on the question of whether the Davenports were authorized to proceed *pro se* on behalf of the estate; they were not. *See also* Ark. Code Ann. § 16-62-101 (1987). Moreover, Ark. Code Ann. § 16-62-102 (1993), the wrongful-death statute, requires that "every action shall be brought by and in the name of the personal representative of the deceased person. If there is no personal representative, then the action shall be brought by the heirs at law of the deceased person." *Id.* at 102(c). Although Ramona Davenport is a statutory beneficiary pursuant to subsection 102(d) of this statute, she cannot proceed individually where a personal representative has been appointed.

However, the question of whether such a complaint is considered a nullity has not been answered in this state. In *McKenzie v. Burris*, 255 Ark. 330, 500 S.W.2d 357 (1973), cited by appellees, the supreme court considered whether the trial court erred in allowing a Tennessee attorney, not licensed in Arkansas, to assist Arkansas counsel in representing the appellees in the trial of a medical malpractice action against the appellants. The appellants had sought to quash the trial court's order allowing the participation; the supreme court granted certiorari on the denial of the motion to quash; and held that the trial court had the authority to permit the participation. In discussing whether the appellants had standing to challenge the nonresident attorney's right to participate, the court first held that they did have this right pursuant to 135 years of Arkansas case law. However, the court further stated that "It is widely held in other jurisdictions that proceedings in a suit instituted or conducted by one not entitled to practice are a nullity, and if appropriate steps are timely taken the suit may be dismissed, a judgment in the cause reversed, or the steps of the unauthorized practitioner disregarded," citing a lengthy list of cases from foreign jurisdictions. It scarcely needs saying that this is dicta, and found in a case completely at odds factually with the instant case. Consequently, we do not consider *McKenzie* to provide direction on the issue before us.

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case.

Although there is no Arkansas case law on point, appellate courts from other jurisdictions have considered this issue or issues closely analogous. Most of these cases involve pleadings filed by nonresident lawyers. The courts that have addressed this issue are divided. Alabama, Maryland, South Dakota, Wyoming, Indiana, Tennessee, and Nebraska appellate courts have held that pleadings or proceedings by persons not entitled to practice law in the state are a nullity. See *Black v. Baptist Med. Ctr.,* 575 So. 2d 1087 (Ala. 1991); *Turkey Point Property Owners' Ass'n, Inc. v. Anderson,* 106 Md. App.710, 66 A.2d 904 (1995); *Stevens v. Jas. A. Smith Lumber Co.,* 54 S.D. 170, 222 N.W. 665 (1929); *North Laramie Land Co. v. Hoffman,* 30 Wyo. 238, 219 P. 561 (1923); *Simmons v. Carter,* 576 N.E.2d 1278 (Ind. App. 1991); *Bivens v. Hospital Corp. of America,* 910 S.W.2d 441 (Tenn. Ct. App. 1995); *Anderzhon/Architects, Inc. v. 57Oxbow II Partnership, Michael Krill,* 250 Neb. 768, 553 N.W.2d 157 (1996). The Alabama Supreme court in *Black v. Baptist Med. Ctr.,* 575 So. 2d 1087 (Ala. 1991), held that a complaint filed by a nonresident attorney not admitted *pro hoc vice* at the time the complaint was filed was a nullity for statute-of-limitation purposes, and that the ineffective filing was not cured by the notice of appearance filed by an attorney licensed in Alabama two months after the statute of limitations had expired.

[redacted] However, we join with courts from North Carolina, Kentucky, Georgia, Florida, and Missouri in holding that such a pleading is a not a nullity. *Theil v. Detering,* 68 N.C. App. 754, 315 S.E.2d 789 (1984); *Richardson v. Dodson, M.D.,* 832 S.W.2d 888 (Ky. 1992); *Peachtree Plastics, Inc. v. Verhine,* 242 Ga. App. 21, 528 S.E.2d 837 (2000); *Torryey v. Leesburg Reg'l Med. Ctr.,* 769 So. 2d 1040, 25 Fla. L. Weekly S911 (2000); *Mikesic v. Trinity Lutheran Hosp.,* 980 S.W.2d 68, (Mo. App. 1998).

Two of these cases are especially persuasive in the discussion of this issue. In *Richardson v. Dodson, M.D.,* 832 S.W.2d 888 (1992), the supreme court of Kentucky held that the timely *pro se* filing of a wrongful-death complaint by decedent's son was sufficient to toll the statute-of-limitations period and permit relation back of a subsequent amended complaint naming him as personal representative. The court reasoned:

> It is widely recognized that the purpose of statutes of limitations is served when notice of litigation is given within the period allowed. *Nolph v. Scott, Ky.,* 725 S.W.2d 860 (1987). In W. Bertelsman & K. Philips, *Kentucky Practice,* CR 15.03, comment 6 (4th ed. 1984), the view is expressed that if an opposing party "is reasonably informed of the general wrong complained of and the background

> out of which the claim arose, then he may begin preparation of his defense when the original claim is asserted against him. Under such circumstances the statute of limitations should not constitute a bar."

In *Mikesic v. Trinity Lutheran Hospital*, 980 S.W.2d 68 (Mo. App. 1998), the Missouri Court of Appeals reversed the dismissal of a medical malpractice action on statute-of-limitations grounds in a case factually similar to the present one. The plaintiff's wife had filed a *pro se* negligence action on her husband's behalf prior to her appointment as his guardian. The court found that the wife's appointment as guardian related back to the filing of the original petition, that the defendant was clearly advised by the original complaint that the plaintiff was seeking damages for medical malpractice, and was in no way prejudiced by the wife's failure to file the action in the proper capacity. The court, in addressing the statute of limitations, stated:

> Statutes of limitation are never intended to be used as swords. Rather, they are shields, primarily designed to assure fairness to defendants by prohibiting stale claims, those where evidence may no longer be in existence and witnesses are harder to find, all of which tends to undermine the truth-finding process.

The court further noted that even if the wife's filing of the original petition constituted the unauthorized practice of law, as guardian, she was an officer of the court and her actions should not prejudice the substantial rights of the litigant she has been assigned to protect. Under the circumstances, the court held the dismissal of the amended petition to be inappropriate.

■ We find the rationale employed by these authorities applicable to the facts of the Davenports' case. Here, the appellees can demonstrate no prejudice as the complaint was both timely filed and served along with the amendment apprising them of the identity of the Davenports' counsel. Moreover, the decedent in this case is survived by several children whose rights in this action are at stake. We agree with the Davenports' contention that dismissal of this action is unduly harsh. Under these circumstances, we hold that the initial complaint was not a nullity for purposes of the tolling of the statute of limitations, but was instead an amendable defect.

Reversed and remanded.

ROBBINS and BIRD, JJ. agree.

Loretta VALDEZ *v.* Richard LIPPARD

CA 00-516 39 S.W.3d 804

Court of Appeals of Arkansas
Division IV
Opinion delivered April 4, 2001

[redacted]

Oscar Stilley, for appellant.

Witt Law Firm, P.C., by: *Ernie Witt*, for appellee.

ANDREE LAYTON ROAF, Judge. Loretta Valdez appeals from an order of the Scott County Circuit Court granting a remittitur in favor of her former attorney, Richard Lippard, that reduced her jury verdict in a breach-of-contract case against Lippard from $32,000 to $3,972.50, plus $1,500 in attorney fees. She also challenges the trial court's refusal to give her proffered jury instruction on punitive damages. Regarding the remittitur, Valdez argues that the trial court erred in granting it because she was entitled to compensatory damages for disruption of her life, "serious anxiety," and mental distress. As to the jury instruction, she asserts that her proof that Lippard repeatedly claimed to have obtained a custody hearing for her when he had in fact never entered an appearance, warranted a punitive-damages instruction. We affirm the first point and hold that Valdez's acceptance of the remitted judgment bars consideration of the second point.

It is undisputed that Lippard defended Valdez when she was extradited from New Mexico to Scott County in January of 1997 after she failed to appear for a Class D felony interference with custody charge. It is also undisputed that after posting a $5,000 cash bond, Valdez paid Lippard, who is also a public defender, a $2,500 retainer and that Lippard succeeded in having the charges dismissed shortly after he took Valdez's case. The central issue in this case was, however, whether the retainer was paid to Lippard for his services in the criminal case, as Lippard contends, or whether it was for his services in Valdez's domestic-relations case involving disputed custody and visitation of her three children. While Lippard claims that $2,500 is his minimum fee for representation in a felony case,

Valdez contends that the $2,500 that she paid to Lippard represented a $2,000 retainer for Lippard's services in seeking to regain custody of her children, and $500 for a deposition of Valdez's ex-husband. In July of 1997, Valdez faxed a letter to Lippard, firing him. She sought the return of the $2,500 retainer, and eventually, Lippard refunded $527.25. Valdez subsequently filed suit for the return of the rest of the retainer in small-claims court, but Lippard prevailed. She appealed to circuit court and in her pleadings requested not only the return of the rest of the retainer but other consequential damages, and punitive damages as well.

At trial, Valdez testified that she lost custody of her children in 1995 by default judgment in Texas after she failed to attend a hearing. Valdez subsequently picked up her children and took them to her residence in New Mexico, where she obtained an *ex parte* order giving her temporary custody. However, Valdez never succeeded in bringing the matter to a final hearing on the merits, and her case was dismissed in November or December of 1996.

Meanwhile, Valdez's ex-husband had filed a case in Arkansas, and by January 1997, Valdez, who had moved to Michigan, learned that a Governor's Warrant had been filed in Arkansas seeking her extradition. According to Valdez, she went to see Lippard on January 30, 1997, having been told that he was the public defender. She claimed that he made one phone call that day and the charges were dropped the next day. Valdez claimed that she gave Lippard the retainer after the charges had been dismissed and it was solely for his services in her domestic case. She claimed, however, that he did nothing for her, despite the fact that she called him twenty-nine times. She alleged that Lippard told her that he had hearings set for March 13, April 13, May 10, May 22, and June 12, but in truth, Lippard had not even filed an appearance. Regarding the June 12 hearing, Valdez stated that when she arrived for the hearing with her mother, Lippard told her that it was "next week," and at that point, she decided to fire him. Her new counsel succeeded in getting a custody hearing in December of 1997, however, she was unsuccessful in regaining custody. Her appeal of that decision was also unsuccessful. Valdez did, however, admit that she exercised visitation with her children during spring break in 1997, which was before she fired Lippard.

Valdez claimed that she suffered emotionally from the "false promises" that Lippard had made. She opined that if Lippard had "done what he promised he would do," she would have gotten her children back two-and-a-half years ago. According to Valdez, she

had been required to pay child support since December 1997. She asserted that Lippard was responsible for her having to make the 2,200-mile round trip from Michigan to Arkansas five times, and as a result, incurred $2,000 in travel expenses. On cross-examination, Valdez admitted that she had initially attempted in small claims court to secure a refund of part of the retainer that she gave to Lippard, but was unsuccessful. She emphatically denied that the retainer was for the criminal case, and "assumed" that Lippard represented her free of charge in that matter because he was the public defender.

Lippard was called in Valdez's case-in-chief and testified that the $2,500 retainer was for Valdez's criminal case and did not recall making an agreement to represent her in her domestic case. According to Lippard, he did not charge for representation in criminal matters on an hourly basis and that the $2,500 retainer was "completely consumed" by his efforts to get the charges dismissed. However, he admitted that because he was able to settle her criminal matter without a trial, he agreed to allocate $1,500 of the $2,500 to the criminal case and charge her $110 an hour for his work on the domestic case. Lippard stated that his work in the domestic case consisted of making several phone calls to the attorney representing Valdez's ex-husband and to the judge in an effort to secure for Valdez the visitation that she was awarded under the Texas custody order. Lippard claimed that after he was discharged by Valdez, he refunded approximately $500 just to "satisfy" her. Lippard testified that he never filed anything for Valdez because he felt certain that the chancellor would not entertain a motion to change custody, as he had just vested custody with Valdez's ex-husband pursuant to the Texas decree.

Valdez concluded her case with the testimony of her mother, Nancy Rodriquez. Rodriquez testified that the $2,500 retainer, which she provided out of a recent inheritance, was strictly for the domestic-relations case. She corroborated Valdez's claim that $2,000 was for legal services and $500 was to take a deposition of Valdez's ex-husband.

In Lippard's case, he presented the testimony of municipal court judge Donald Goodner, who recalled that Valdez had testified in her small-claims court case that the $2,500 retainer was for the criminal case. He stated that in his written decision in the small-claims court case, he noted that Valdez had admitted that additional fees would be charged by Lippard in the civil case.

The jury returned a general verdict in the amount of $32,000. Lippard filed a notice of appeal and a motion for remittitur. The latter was granted, and the trial judge lowered the award to the balance of the retainer that Valdez gave to Lippard, plus $2,000 in travel expenses, and a $1,500 attorney fee. Valdez then filed a notice of appeal. Lippard subsequently paid the judgment, however, Valdez filed a document, prepared and signed by her attorney, entitled "Limited Satisfaction of Judgment (As to Amount Covered by Remittitur Only)," asserting that acceptance of that payment did not impair her right to appeal.

Valdez argues that the trial court erred in granting remittitur of damages, when the proof showed that she suffered a serious disruption of her life, and serious anxiety and mental distress, as a result of breaches of contract and misrepresentations made by Lippard, a licensed attorney. Valdez asserts that Lippard can point to no evidence, appropriately objected to, which would be likely to inflame the passion and prejudice of the jury or that the award shocks the conscience of the court. She contends that the six months' delay that she suffered as a result of Lippard's "inaction" was "extremely costly" to her, because the time for appealing the January 10, 1997, custody award ran out with no action taken. Valdez argues that a reasonable jury could have found that she lost "substantial rights involving her children and that she suffered "much anguish of soul and interruption of her normal routine of life" because of Lippard's lies and inaction. She concedes that she subsequently lost her case and her subsequent appeal to this court, but asserts that "in all probability," if Lippard had acted promptly after making his contract, the January 10, 1997, order would have been set aside due to the lack of a hearing, and at a hearing she could have set forth her claims as to custody. Valdez argues that unless this court reinstates the original verdict, then we are creating a "special privilege" for lawyers that exempts them from the consequential damages flowing from their misrepresentations. This argument is not persuasive.

Remittitur is within the inherent power of the court if an award is grossly excessive or appears to be the result of passion or prejudice. *See McNair v. McNair*, 316 Ark. 299, 870 S.W.2d 756 (1994). Remittitur is appropriate when the compensatory damages awarded cannot be sustained by the evidence. *United Ins. Co. of Am. v. Murphy*, 331 Ark. 364, 961 S.W.2d 752 (1998); *Johnson v. Gilliland*, 320 Ark. 1, 896 S.W.2d 856 (1995). We review the issue of remittitur *de novo*. *Smith v. Hansen*, 323 Ark. 188, 914 S.W.2d 285 (1996).

Valdez has predicated her argument on the assertion that had Lippard acted with diligence, she would have been awarded custody of her children in January of 1997. In fact, when she did obtain a hearing, she lost both at the trial-court level and on appeal. While it is true that she stated that she believed that she would have regained custody of her children, in light of her subsequent failure in court and on appeal, this amounts to speculation. Speculation does not constitute substantial evidence to support a jury verdict. *See Farmers & Merchants Bank v. Deason,* 25 Ark. App. 152, 25 Ark. App. 152 (1988). Additionally, while it is also true that she claimed to have suffered some emotional distress, her domestic-relations problems predated her association with Lippard by several years and obviously continued after she discharged him. In the order granting the remittitur, the trial judge stated:

> In reviewing the facts of the case and applying the law applicable in this matter, there is no substantial basis for the amount of the judgment awarded by the jury and feels an Order of Remittitur should be entered. The Court makes this finding based on the facts this was an action brought in a contract for the return of a $2,500,00 retainer. There were collateral issues concerning the Plaintiff's loss of her children in a separate Chancery proceeding. The Plaintiff was emotional in describing the impact on losing her children and the Court feels this could have influenced the decision by the jury. The Court finds that the only damages that were substantially proven were for $2,000.00 in travel expenses and the balance of the retainer of $1,972.50, for a total of $3,972.50. The Court finds the Plaintiff should be awarded her attorney fees and costs and awards a reasonable attorney fee of $1,500.00.

We agree with the trial court that the jury's award of $32,000 compensatory damages cannot be sustained by the evidence.

Valdez also argues that the trial judge erred in refusing to give her proffered jury instruction on punitive damages. This argument is apparently posed as a contingent one in that Valdez states that "if she can recover back the full amount of the judgment, she seeks no more. However, if this Court decides that remittitur was proper, she would respectfully request a remand for trial to determine punitive damages." However, we hold that by accepting the remitted judgment, Valdez is barred from raising this issue on appeal.

In *Wilson v. Fullerton*, 332 Ark. 111, 964 S.W.2d 208 (1998), the supreme court stated two well-settled rules that directly

bear on this case: "acceptance of an amount less than appellant contends is due him is an estoppel against an appeal when seeking to gain more by the appeal, he risks a smaller recovery on reversal," and "acceptance of benefits of a decree or judgment which are inconsistent with the relief sought on appeal, and detrimental to the rights of others, bars the appeal and requires dismissal." Were we to find merit in Valdez's argument that the trial court erred in refusing to give her punitive-damages instruction, relief would come in the form a new trial, at which the issue of damages would necessarily be considered anew. Accordingly, it would be a situation where Valdez's award of remitted damages would necessarily be at risk, so the appeal of this issue must be dismissed. *Wilson v. Fullerton, supra.*

Affirmed in part; dismissed in part.

ROBBINS and BIRD, JJ., agree.

Michele TYLER *v.* Eddie D. TALBURT

CA 00-898 41 S.W.3d 431

Court of Appeals of Arkansas
Division IV
Opinion delivered April 11, 2001

Clark & Spence, by: *Greg Clark*, for appellant.

Matthews, Campbell, Rhoads, McClure, Thompson & Fryauf, P.A., for appellee.

JOSEPHINE LINKER HART, Judge. Michele Tyler appeals the denial of her petition to relieve her of the obligation to pay appellee spousal maintenance commensurate with a registered foreign decree of divorce. We, however, conclude *sua sponte* that pursuant to the Uniform Interstate Family Support Act ("UIFSA"), the relevant provision of which is codified at Ark. Code Ann. § 9-17-205(f) (Repl. 1998), the chancery court lacked jurisdiction to consider the modification petition, and we, consequently, reverse and remand with instructions to dismiss.

The parties' ten-year marriage ended by foreign decree of divorce dated September 29, 1997, which required appellant to pay alimony to appellee in the amount of $456 "each month . . . during the period of [appellee's] continuing incapacitated physical, or mental disability, or until further orders of this Court. . . . [T]his Court shall review the maintenance provisions of this Decree after [appellee] receives a kidney transplant at two (2) month intervals at the motion of either party hereto." Appellant petitioned the chancery court for registration of the foreign decree ostensibly because appellee had moved to Arkansas since the entry of said decree. The chancery court ordered the registration of the decree, and, thereafter, appellant petitioned to be relieved of the maintenance obligation contained in the decree. A trial on the petition was conducted on December 16, 1999, wherein the chancery court heard arguments of counsel and the testimonies of the parties.[1]

[1] Actually, the chancery court also heard the testimony of one of the parties' children on an issue that is not the subject of this appeal. Accordingly, we only focus on the material portions of the testimonies given on the matter that is the subject of this appeal.

Appellee testified that during his marriage to appellant, he had suffered from a condition known as polycystic kidney disease, which, prior to his transplant in April, 1999, required that he undergo dialysis three time each week. He also testified that although he has physically felt well, his doctors have expressed to him their concern that his new kidney might be rejected by his body. In addition, he stated that prior to the onset of his condition he had worked as a mechanic; however, since that time he has been unable to maintain full-time employment, and that his sole means of financial support has been his spousal support, social security disability, and some miscellaneous income from small jobs that he did in town. Finally, his testimony revealed that although he is presently able to meet his expenses, his medicines, of which there were many, were being paid for by a kidney foundation, but that benefit would last for only three years following the transplant.

In support of her petition, appellant testified that since the divorce, she had moved to Europe, where living expenses were much higher, commensurate with a job assignment. In addition, she testified that she originally received $456 per month from social security, which was the amount she was ordered to pay appellee; however, that amount has grown to $472 per month. Finally, she testified that in a year she received in excess of $60,000 in entitlements, pay (which was to increase the following month), and social security offset.

In the end, the chancery court denied the petition, reasoning that appellant had failed to demonstrate a material change in circumstances that would justify a modification of the foreign decree. Thereafter, appellant moved for a new trial, which was also denied. Commensurate with Ark. R. App. P.—Civil 4(b)(1), appellant filed her notice of appeal, specifying the denials of her petition for modification and new trial as being the orders from which the appeal was taken.

■ ■ We review issues of law decided by a chancery court *de novo*. *E.g., Atkinson v. Atkinson*, 72 Ark. App. 15, 19, 32 S.W. 3d 41, 44 (2000) (citations omitted). However, we can raise *sua sponte* the question of whether the lower court lacked subject-matter jurisdiction. *See, e.g., Leinen v. Arkansas Dep't of Human Servs*, 47 Ark. App. 156, 161-162, 886 S.W.2d 895, 898 (1994) (citations omitted). If we conclude that the lower court lacked such jurisdiction, then dismissal is an appropriate disposition of the case. *See Koonce v. Mitchell*, 341 Ark. 716, 718, 19 S.W.3d 603, 605-606 (2000).

Arkansas statutory law provides that "[a] tribunal of this state may not modify a spousal support order issued by a tribunal of another state having continuing, exclusive jurisdiction over that order under the law of that state." Ark. Code Ann. § 9-17-205(f). The law of the state that issued the spousal-support order[2] at issue, Texas, provides that "[a] tribunal of this state issuing a support order consistent with the law of this state has continuing, exclusive jurisdiction over a spousal support order throughout the existence of the support obligation." Tex. Fam. Code Ann. § 159.205(f) (West 1998). *See also Bork v. Bork*, 27 Conn. L. Rptr. 26 (Conn. Super. Ct. 2000) (ruling that Connecticut court lacked subject-matter jurisdiction over plaintiff's claim for alimony in light of New York spousal-support order).

As explained by the adopted commentary for Ark. Code Ann. § 9-17-205:

> [T]he issuing tribunal retains continuing exclusive jurisdiction over an order of spousal support throughout the entire existence of the support obligation. The prohibition against a modification of an existing spousal support order of another state imposed by Sections 205 and 206 . . . marks a radical departure from [the Revised Uniform Reciprocal Enforcement of Support Act], which treats spousal and child support identically. Under UIFSA . . . modification of spousal support is permitted in the interstate context only if an action is initiated outside of, and modified by the original issuing state.

Because Arkansas statutory law precludes our courts from entertaining petitions to modify Texas spousal-support orders, we conclude that the chancery court lacked subject-matter jurisdiction to hear appellant's petition. Consequently, we reverse and remand with instructions to dismiss.

Reversed and remanded with instructions to dismiss.

NEAL and BAKER, JJ., agree.

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[2] Pursuant to UIFSA, a spousal-support order is "a support order for a spouse or former spouse of the obligor." Ark. Code Ann. § 9-17-101(18) (Repl. 1998).

Darrell W. WHITE *v.* STATE of Arkansas

CA CR 00-1023 42 S.W.3d 584

Court of Appeals of Arkansas
Division IV
Opinion delivered April 11, 2001

The Cannon Law Firm, P.L.C., by: *David R. Cannon*, for appellant.

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

OLLY NEAL, Judge. A jury convicted appellant, Darrell W. White, of second-offense driving while intoxicated ("DWI"), driving with a suspended license, speeding, and failing to wear a seatbelt. White was sentenced to one year in the Pulaski County Jail for the DWI conviction and concurrent terms of thirty days for the speeding conviction and six months for driving with a suspended license. In addition, he was fined $25 for failing to wear a seat belt. Appellant raises two points in this appeal. First, he argues that the trial court erred in admitting the results of a breathalyzer test because the State did not make available for cross-examination those persons who calibrated or operated the machine used in

determining his blood-alcohol content. For his second point on appeal, appellant contends that the State did not present sufficient evidence to convict him of driving with a suspended license.

The basic facts of this case are not in dispute. Trooper Jeff Long of the Arkansas State Police encountered a 1970 Ford LTD traveling at seventy-nine miles per hour in a sixty-mile-per-hour zone along Interstate 40 near Levy between 7:00 and 7:15 p.m. on October 8, 1998. Long stopped the vehicle, and appellant, the only person in the vehicle, exited the car and met Long between his car and Long's police car. Long testified that he could smell the odor of alcohol on appellant and when he asked appellant about the odor, appellant explained that he had taken cough syrup earlier in the day.

Long proceeded to conduct two field-sobriety tests, the HGN test and the one-leg-stand test, on appellant. According to Long, appellant failed both tests. Specifically with regard to the one-leg-stand test, Long instructed appellant to raise one of his feet six inches from the ground while keeping his arms to his side and counting to thirty. Long testified that appellant lost his count and raised his arms twice for balance. Based on appellant's performance, Long testified that he opined that appellant was intoxicated and that his intoxication would hinder his ability to safely operate a vehicle. Long arrested appellant for DWI and asked appellant for his driver's licence. Appellant informed the trooper that his license had been suspended. Long then transported appellant to the Sherwood Police Department for a breathalyzer test. Over appellant's objection, the trial court admitted the results of the breathalyzer showing that appellant had a blood-alcohol content of 0.10 percent.

Prior to trial, appellant indicated that he wished to cross-examine all persons responsible for the calibration and certification of the B.A.C. Datamaster. The State failed to make such persons available at appellant's trial, and appellant objected to Long's testimony regarding the results of the breathalyzer. The court overruled the objection and admitted the testimony.

Arkansas Code Annotated section 5-65-206(d)(3) (Supp. 1999) provides:

> Nothing in this section shall be deemed to abrogate a defendant's right of cross-examination of the person calibrating the machine, the operator of the machine, or any person performing work in the Blood Alcohol Program of the Department of Health, who shall be made available by the state if notice of intention to

> cross-examine is given ten (10) days prior to the date of hearing or trial.

In this case, the State concedes that appellant requested that those persons responsible for calibrating the machine be made available for cross-examination and that the State did not do so. Thus, it is clear that the trial court erred in admitting Trooper Long's testimony regarding the results of appellant's breathalyzer test. The State argues, however, that the admission of the breathalyzer results was harmless error. We disagree.

Pursuant to our DWI statute, a person violates the law by either operating a motor vehicle while intoxicated or operating a motor vehicle with a blood-alcohol content of one tenth of one percent (0.10%) or more. Ark. Code Ann. § 5-65-103 (Repl. 1997). *See also Whitson v. State*, 314 Ark. 458, 863 S.W.2d 794 (1993). In *State v. Johnson*, 326 Ark. 189, 931 S.W.2d 760 (1996), our supreme court held that conviction for DWI is not dependent upon evidence of blood-alcohol content in view of sufficient other evidence of intoxication. Thus, officer testimony that the defendant exhibited slurred speech and had red and glassy eyes combined with testimony of the odor of an intoxicant emanating from the defendant constituted competent evidence to support a DWI conviction even though the defendant's blood-alcohol content was 0.06 percent.

In this case, the jury was instructed that appellant could be convicted of DWI if they found beyond reasonable doubt that appellant operated or was in actual physical control of a motor vehicle while intoxicated pursuant to section 5-65-103(a) or operated a motor vehicle while there was 0.10 percent or more by weight of alcohol in his blood pursuant to section 5-65-103(b). It appears, therefore, that the jury might have convicted appellant of operating a motor vehicle while intoxicated based on the testimony of Trooper Long that appellant had an odor of alcohol about him and failed two field-sobriety tests without considering the improperly admitted testimony concerning appellant's blood-alcohol content. Under the court's holding in *Johnson,* sufficient evidence would support such a conviction.

In *Mitchell v. City of North Little Rock*, 15 Ark. App. 331, 692 S.W.2d 624 (1985), however, this court held that when the results of a breathalyzer test are improperly admitted into evidence there can be no conclusion other than the results were prejudicial to a determination that the appellant was intoxicated. In *Mitchell*, one

of the arresting officers testified that the defendant was unsteady on his feet, exhibited slurred speech, and had bloodshot eyes in addition to failing two field-sobriety tests and registering a 0.20 percent blood-alcohol level, double the legal limit. The State conceded that results of the breathalyzer test were improperly admitted into evidence, but as it does in the present case, argued that the admission was harmless error because the officer's testimony was sufficient to convict the defendant of DWI. The court agreed that the evidence was sufficient to support the conviction, but held that in a situation where the defendant is accused of DWI and breathalyzer test results showing the defendant's blood-alcohol content exceeds the legal limit are improperly admitted, reversal is required. Based on our decision in *Mitchell*, we hold that the improper admission of appellant's breathalyzer test was prejudicial error and reverse his conviction for DWI.

For his second point on appeal, appellant argues that the trial court erred in failing to grant his motion for a directed verdict on the charge of driving on a suspended driver's license. Specifically, appellant argues that the only evidence to support his conviction for driving with a suspended license was his uncorroborated confession. We do not agree and affirm.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Barr v. State*, 336 Ark. 220, 984 S.W.2d 792 (1999). The test for such motions is whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* Substantial evidence is evidence of sufficient certainty and precision to compel a conclusion one way or another and pass beyond mere suspicion or conjecture. *Peeler v. State*, 326 Ark. 423, 932 S.W.2d 312 (1996). On appeal, we review the evidence in the light most favorable to the appellee and consider only the evidence that supports the verdict. *Barr v. Sate, supra.*

Unless made in open court, a confession will not warrant a conviction unless the confession is accompanied by other proof that the offense was committed. Ark. Code Ann. § 16-89-111(d) (1987). Our supreme court has stated, "a confession is an admission of guilt as to the commission of a criminal act." *Stephens v. State*, 320 Ark. 426, 431, 898 S.W.2d 435, 437 (1995). In *Stephens*, the defendant told an officer that he was the driver of a vehicle and had been drinking prior to driving. On appeal, the defendant claimed that the evidence was insufficient to support his DWI conviction because the only evidence that he was driving the car was his pre-arrest statement to the officer. The defendant argued

that this statement was a confession that the State was required to corroborate. The court held that the statement was an admission but not a confession because the defendant had only admitted to one element of the offense of DWI, but that he did not admit to being intoxicated as that term is used in our DWI statute.

The instant action presents a fact scenario that is similar to that in *Stephens*. Here, appellant's admission to Long that his license had been suspended was only one element of the offense of driving with a suspended license. The criminal act of driving with a suspended license was established by appellant's admission in conjunction with Long's testimony that appellant was the only person in the vehicle. Thus, we hold that section 16-89-111(d) is inapplicable in the present action and affirm appellant's conviction for driving with a suspended license.

Affirmed in part; reversed in part.

HART and BAKER, JJ., agree.

Sheila WAGNON, d/b/a
Ouachita Valley Nursing Center, Inc. *v.*
ARKANSAS HEALTH SERVICES AGENCY, *et al.*

CA 00-317 40 S.W.3d 849

Court of Appeals of Arkansas
Division III
Opinion delivered April 11, 2001
[Petition for rehearing denied May 16, 2001.]

Cross, Gunter, Witherspoon & Galchus, P.C., by: *Janie W. McFarlin*, for appellant.

Mark Pryor, Att'y Gen., by: *Warren T. Readnour*, Ass't Att'y Gen., for appellees Arkansas Health Services Agency; Sandra Winston, Director, Arkansas Health Services Agency; and Arkansas Health Services Commission.

Robert D. Smith, III, and *Tom Tanner*, for appellees Quality Care Nursing Center, Inc., and Quapaw Nursing Center, Inc.

ANDREE LAYTON ROAF, Judge. This is an appeal from an order of the Pulaski County Circuit Court declaring an emergency rule enacted by appellee Arkansas Health Services Commission (hereafter "Commission") invalid and affirming the Commission's subsequent decision to repeal it. The Commission, which is vested with authority to approve permits of approval for nursing homes, and appellee Arkansas Health Services Agency (hereafter "Agency"), which reviews and processes applications for permits of approval, scheduled an emergency meeting on March 22, 1999. Advance notification of the meeting was given to several people, but not to the public, certain entities who had requested notice of all Commission meetings or to entities on the Agency's list of parties affected by proposed Agency and Commission actions. At this meeting, the Commission adopted an emergency rule that permitted it to disregard the overall county occupancy rate provision on a one-time basis in order to approve a new 70-bed nursing home in any county where the projected need for the county exceeded the existing number of beds by 150 or more. This rule concluded with the following statement: "Furthermore, that the Commission finds that imminent peril to the public's health, safety, and welfare requires adoption of this rule to be effective immediately upon filing."

At the time that this rule was passed, the information available to the Commission indicated that the new rule would apply only to Benton County. As it turned out, Garland County also came within its terms. Relying on the emergency rule, appellant Sheila Wagnon,

d/b/a Ouachita Valley Nursing Center, Inc., filed an application for a new nursing home in Garland County on May 3, 1999. On May 21, 1999, appellees Quality Care Nursing Center, Inc., and Quapaw Nursing Center, Inc., which operate nursing homes in Garland County, brought this action challenging the emergency rule. On June 17, 1999, the Commission voted to repeal the emergency rule because of the lack of proper notice given before its adoption. After the Agency returned appellant's application without acting on it, appellant filed pleadings in the circuit court challenging the repeal of the emergency rule.

The circuit judge held that the emergency rule was invalid from its inception because it was not adopted in compliance with the Arkansas Administrative Procedure Act (hereinafter "APA"). He based his decision on the Commission's failure to state in writing its reasons for finding that imminent peril to the public health, safety, and welfare required its adoption without prior notice.

Appellant focuses a significant portion of her argument on a mischaracterization of the circuit judge's decision. She asserts that the circuit judge held that, under the APA, the Commission was required to give notice of the emergency meeting and that the notice that was given was insufficient. She also asserts that the circuit judge construed the emergency rule as one involving local or special legislation. We disagree. The circuit judge clearly based his decision on the Commission's failure to state in writing its reasons for finding that imminent peril to the public health, safety, and welfare required its adoption without prior notice. He did not find that the APA requires prior notice of emergency meetings, nor did he base his decision on the sufficiency of the notice that was given. Additionally, the circuit judge did not find that the rule was an act of special or local legislation.

We need not address appellant's argument that the doctrine of equitable estoppel should be applied to require the Commission to consider her application, regardless of the rule's validity, because appellant failed to obtain a finding on this issue. We will not consider an argument on appeal that was not ruled upon by the Commission or the circuit court. *See Olsten Health Servs., Inc. v. Arkansas Health Servs. Comm'n*, 69 Ark. App. 313, 12 S.W.3d 656 (2000).

To the same effect is appellant's assertion that the circuit judge's ruling, that the Agency acted properly in returning the application without reviewing it, impermissibly allowed the Agency to usurp

the Commission's authority to grant or deny applications for permits of approval. Because appellant also failed to obtain a ruling by the Commission or circuit court on this argument, we need not decide it. In any event, it is abundantly clear, at this stage of the proceedings, that the Commission has endorsed the Agency's return of appellant's application. *See* Ark. Code Ann. § 20-8-103 (Repl. 2000).

■ We review agency rulemaking procedures to determine if the agency acted arbitrarily, capriciously, in an abuse of discretion, or otherwise not in accordance with the law. *National Park Med. Ctr., Inc. v. Arkansas Dep't of Human Servs.*, 322 Ark. 595, 911 S.W.2d 250 (1995); *Gurley v. Mathis*, 313 Ark. 412, 856 S.W.2d 616 (1993); *Department of Human Servs. v. Berry*, 297 Ark. 607, 764 S.W.2d 437 (1989). In this case, our review is focused on the Commision's decision to repeal the emergency rule, which was an act of rulemaking. Therefore, the controlling question on appeal is whether the Commission's decision to repeal the emergency rule was arbitrary, capricious, an abuse of discretion, or not in accordance with the law. Because, as explained below, the emergency rule was not enacted in compliance with the law, we cannot say that the Commission's decision to repeal it was arbitrary, capricious, or an abuse of discretion.

Arkansas Code Annotated section 25-15-204(a) (Supp. 1999) provides that an agency must give at least thirty days' notice of its intended action and sets forth the methods for publication of notice. This section also requires that the notice shall be mailed to all persons who have requested advance notice of rulemaking proceedings. There is no doubt that the Commission did not attempt to comply with this section of the statute. However, Ark. Code Ann. § 25-15-204(b) (Supp. 1999) permits an agency to adopt an emergency rule without giving prior notice if the agency finds and states in writing its reasons for finding that "imminent peril to the public health, safety, or welfare requires adoption of a rule upon fewer than twenty (20) days' notice." It was the Commission's failure to follow this section of the APA on which the circuit judge based his decision. Arkansas Code Annotated section 25-15-204(e) (Supp. 1999) provides that an emergency rule may become effective immediately upon filing if the agency finds that it is necessary because of imminent peril to the public health, safety, or welfare, and that the agency's finding and a brief statement of the reasons therefor shall be filed with the rule. No rule shall be valid unless it has been adopted and filed in substantial compliance with section 25-15-204. Ark. Code Ann. § 25-15-204(f) (Supp. 1999).

According to appellant, section 25-15-204(b)'s requirements are merely "technical" and an emergency rule can validly be adopted without the Commission's writing and filing the reasons for its adoption. Although there is no Arkansas case directly on point, we cannot agree that this statute's requirements are mere technicalities. The meaning of the phrase "substantial compliance," as it applies to the emergency exception to the statute's notice requirements, cannot be understood without considering the reasons for notice-and-comment proceedings:

> Notice serves three distinct purposes. First, notice improves the quality of agency rulemaking by insuring that the agency regulations will be tested by exposure to diverse public comment. The notice and comment procedure assures that the public and the persons being regulated are given an opportunity to participate, provide information and suggest alternatives, so that the agency is educated about the impact of a proposed rule and can make a fair and mature decision.
>
> Second, notice and the opportunity to be heard are essential components of fairness to affected parties.
>
> Third, by giving affected parties an opportunity to develop evidence in the record to support their objections to a rule, notice enhances the quality of judicial review. However, these values must be balanced against the public's interest in expedition and finality.
>
> An opportunity to comment granted after a rule is promulgated cannot substitute for notice and an opportunity to comment beforehand.

2 AM. JUR. 2D *Administrative Law* § 166 (1994). Therefore, the reasons for departing from the notice requirements "should be truly emergent and persuasive to a reviewing court." *Id.* § 219 at 233.

In *Brodsky v. Zagata*, 629 N.Y.S.2d 373, 377 (N.Y.S.Ct. 1995), the court was faced with a similar situation:

> It is the decision of this Court that SAPA § 202(6)(d)(iv) requires at the very least that an agency seeking an emergency rule adoption illustrate the circumstances which give rise to the adoption of a rule on a[n] emergency basis. The mere parroting of the phrase "the public health, safety, or general welfare" with no

> specific facts, demonstrates to this Court the total absence of justification for such action. Without detailing the necessity of the adoption of a rule on an emergency basis the danger of abuse is obvious. In this case the manufacturing industry responsible for DEET has accomplished in weeks what it could not do in prior recent years during hearings and before the Courts. The practice avoids those regulatory safeguards in place and which are mandated to preclude such avoidance of SAPA § 202(6)(d)(iv). The requirement of a submitted statement fully describing the specific reasons the "public health, safety or general welfare" are in danger is a reasonable condition precedent which has not been satisfied.

Accord Florida Health Care Ass'n v. Agency for Health Care Admin., 734 So.2d 1052 (Fla. Dist. Ct. App. 1999).

In enacting the emergency rule, the Commission was required to state in writing its reasons for finding that imminent peril to the public health, safety, and welfare required its adoption without prior notice. This it did not do. It is obvious, therefore, that the emergency rule was not adopted in accordance with the law; consequently, we cannot say that, in repealing it, the Commission abused its discretion or acted arbitrarily or capriciously.

Appellant also argues that she had a substantive right to have her application considered, even if this rule was invalid. It is true that, if appellant had such a substantive right, the June 17 rule could not affect it retroactively. *See Carmichael v. Nationwide Life Ins. Co.*, 305 Ark. 549, 810 S.W.2d 39 (1991). However, appellant has cited no case that supports her claim that a substantive right was created by this invalid rule. Certainly, appellant's interest was less than fixed or determined. *See Tomerlin v. Nickolich*, 342 Ark. 325, 27 S.W.3d 746 (2000). We therefore hold that a chance to apply for a permit of approval is not equivalent to a substantive right. Additionally, there is no dispute that, without the emergency rule in place, appellant's application would be rejected; therefore, no purpose would be served by ordering the Commission to review it. A case is moot when any decision rendered by the appellate court will have no practical legal effect on an existing legal controversy. *Biedenharn v. Hogue*, 338 Ark. 660, 1 S.W.3d 424 (1999). With few exceptions not applicable here, we will not address moot issues. *See Dillon v. Twin City Bank*, 325 Ark. 309, 924 S.W.2d 802 (1996).

Affirmed.

STROUD, C.J., and PITTMAN, J., agree.

Carolyn MARTIN *v.* HEARN SPURLOCK, INC.,
d/b/a J.B.'s Express

CA 00-1001 43 S.W.3d 166

Court of Appeals of Arkansas
Division III
Opinion delivered April 18, 2001

[redacted]

Mark M. Derrick, for appellant.

Matthews, Sanders & Sayes, by: *Doralee Idleman Chandler* and *Roy Gene Sanders*, for appellee.

JOHN F. STROUD, JR., Chief Judge. This is a negligence case in which appellant, Carolyn Martin, slipped on the freshly mopped floor of a business establishment owned by appellee, Hearn Spurlock, Inc., and fractured her kneecap. At the close of appellant's case, appellee moved for a directed verdict, which the trial court granted. Appellant contends that the trial court erred in doing so. We agree, and therefore reverse and remand.

A property owner has a duty to exercise ordinary care to maintain his premises in a reasonably safe condition for the benefit of an invitee. *Brunt v. Food 4 Less, Inc.*, 318 Ark. 427, 885 S.W.2d 894 (1994). In order to prevail in a slip-and-fall case involving an invitee, the plaintiff must show either (1) that the presence of a substance upon the premises was the result of the defendant's negligence, or (2) that the substance had been on the premises for such a length of time that the defendant knew or reasonably should have known of its presence and failed to use ordinary care to remove it. *Kopriva v. Burnett-Croom-Lincoln-Paden, LLC.*, 70 Ark. App. 131, 15 S.W.3d 361 (2000).

Under the facts of this case, we are concerned with the first test. We have defined negligence as "the failure to do something which a reasonably careful person would do." *Ambrus v. Russell Chevrolet Co.*, 327 Ark. 367, 370, 937 S.W.2d 183, 184 (1997). In addressing the issue of whether a directed verdict should have been granted, we must view the evidence in the light most favorable to the party against whom the verdict is sought and give it the highest probative value, taking into account all reasonable inferences deducible from it. *Johnson v. Arkla, Inc.*, 299 Ark. 399, 771 S.W.2d 782 (1989). Where the evidence is such that fair-minded people might have different conclusions, then a jury question is

presented and the directed verdict should be reversed. *Id.* A motion for directed verdict should be granted only if there is no substantial evidence to support a jury verdict. *Boykin v. Mr. Tidy Car Wash, Inc.*, 294 Ark. 182, 741 S.W.2d 270 (1987).

In examining the negligence issue presented here, the ultimate question presented to us is whether there was any substantial evidence presented that would have supported a jury verdict in favor of appellant. The facts presented in the instant case resemble situations presented in *Boykin, supra*, and *McKay v. St. Paul Insurance Co.*, 289 Ark. 467, 711 S.W.2d 834 (1986).

In *Boykin*, the appellant went to the appellee's place of business, a full-service car wash. He fell when he exited the waiting room to retrieve his car after it had been washed and injured his knee, requiring surgery. He filed suit, contending that he slipped and fell on soapy water. After appellant presented his case, the trial court granted a directed verdict in favor of the car wash, stating that "from the evidence, the jurors would have to speculate that the water in front of the door resulted from the car-wash employee's actions." Our supreme court reversed and remanded the case, summarizing appellant's evidence as follows:

> In reviewing the record of the trial, the appellant presented the following evidence: 1) He testified that after he opened the door of the waiting room and stepped down from a curb, his foot slipped "like I hit ice or something"; 2) He said that after he fell, he "noticed there was water and soap, where it was running down in front of the door"; 3) He further related that the water and soap was coming from cars exiting the wash rack and that he was fairly certain that "this [the water and soap from rinsed cars] is what caused [him] to fall"; 4) Tom Beam, a frequent customer of the appellee, testified that he saw the appellant fall, but did not see what caused the fall; 5) Beam also testified that immediately where the appellant fell he did not recall water, but he did state that approximately six feet away from the door, an employee of the car wash was rinsing off cars as they exited the car wash rack. In addition, Beam stated that the cars normally were finished before they exited the rack.

Boykin, 294 Ark. at 184, 741 S.W.2d at 271. The supreme court explained its reversal in *Boykin*:

> Appellant's testimony showed that soapy water was running in front of the door he had exited, and Beam related that just six feet

> to the right of that door, an appellee's employee was rinsing off cars as they exited the wash rack. In viewing, as we must, the testimony in appellant's favor and deducing from the evidence all reasonable inferences, we believe the jury could have reasonably inferred from the evidence that the employee's actions resulted in soapy water running in front of the door. Whether that evidence shows the appellee was negligent and the soapy water caused the appellant to fall are simply questions for the jury to answer. Accordingly, we reverse and remand for the jury to determine these questions of fact.

Id. at 185, 741 S.W.2d at 272.

In *McKay v. St. Paul Insurance Co.*, 289 Ark. 467, 711 S.W.2d 834 (1986), the appellant, a security employee, slipped and fell in a substance in the hallway of Crittenden Memorial Hospital. On the date of the occurrence, other employees of the hospital were stripping and waxing the floor near where the appellant fell. In a discovery deposition of one of those employees, he stated that they had been working inside a roped-off area but were in the process of removing the equipment and returning it to the storage area. The appellant stated that the spot where he fell was about five feet from the roped-off area, and that he fell somewhere between the roped-off area and the place where the mops and buckets were resting. The appellee moved for summary judgment, which was granted by the trial court. Our supreme court reversed, finding that the "pleadings, depositions, and affidavits filed in this case, considered in the light most favorable to the appellant, together with all reasonable inferences and deductions therefrom, leave genuine issues of fact to be determined."

Here, appellant was the only witness to testify at the trial of this matter. She stated that she was fifty-two years old; that she was the manager of a Sonic restaurant in Searcy; that on the day of the incident, she stopped at appellee's business, J.B.'s Express, to buy gas; and that her thirteen-year-old son and three grandchildren were with her. She stated that when she entered the business, she saw "a lady up against the back wall, and there was — she had a mop in her hand, and there was a mop bucket beside her." She said that she walked down an aisle that had not been mopped, "Aisle No. 1," to get to the drink area; that she located the Diet Dr. Pepper section; and when she started to turn and come down the aisle where her son was standing, "Aisle No. 2," it was wet. Using a diagram that was not included in the record, appellant stated that she asked her son to hand her some candy, and she turned around

to come back and the girl that was mopping was right behind her. Appellant stated that she routinely walked on wet and greasy floors; that she did not run down the aisle and did not get in a hurry; and that she took her time and walked down the aisle. She stated that when she made the next step to go to the register, "I just picked up my right foot. . . . And took a step like this . . . and my foot went up and my body . . . went forward, and I went down on this knee." She testified that at first she did not think she had been hurt, but that she looked down at her knee, "and that's when I saw the bone."

She also testified that no one at the business told her where to walk; that no one pointed out any dry areas; and that she felt she was walking very cautiously because she was careful how she placed and picked up her feet.

On cross-examination, appellant acknowledged that from the minute she walked into the store she saw a lady mopping an area of the store; that she could see the aisle to her left, but not the other three aisles; and that she could see "Aisle No. 1," the aisle next to the window and the one she traveled to get to the back of the store, was dry. She stated that when she "went by the first time" she thought the spot where she eventually fell was dry. She stated that by the time she got her soft drink, got the candy from her son, and turned to leave, the lady with the mop was mopping right behind her; that she never saw the lady mopping Aisle No. 1, but that it was her belief that by the time she turned around and started back, the lady had done so. She said that she noticed Aisle No. 2, the aisle her son was in, had been mopped prior to her entering the store; that she did not know whether Aisle Nos. 3 and 4 had been mopped or whether the area in front of the cash register had been mopped; and that as far as she knew, those areas were dry. She acknowledged that at the point she was ready to return from the drink area, the most freshly mopped area would have been Aisle No. 1, which was the aisle she had originally traveled to get to the back of the store. She stated that she nevertheless decided to walk on Aisle No. 1. She said that she did not ask anybody if Aisle Nos. 3 or 4 had been mopped. She stated that other than water, she did not see anything else on the floor. She stated that the floor did not have water standing on it, and that it was not sloppy. She stated that she knew the area where she fell was wet because she "could feel it" after the fall.

Appellant's testimony established that large segments of the floor were being mopped in her vicinity, including "right behind

her" after she entered the store; that these mopped sections were not blocked off; and that she fell as she approached the area in front of the cash register. The cross-examination of appellant focused on the condition of the aisles in the store, some of which appellant acknowledged had been mopped and some of which she did not know whether they had been mopped. Appellant's uncontroverted testimony, however, was that she fell as she approached the area in front of the cash register, where it "did not look wet."

Viewing this testimony in the light most favorable to appellant, giving it the highest probative value, and taking into account all reasonable inferences deducible therefrom, we find that fair-minded people might reach different conclusions. As in *Boykin*, whether this evidence establishes that the mopping caused appellee to fall and that appellant was thereby negligent are simply questions for the jury to answer. Consequently, the evidence presented a question for the jury, and we hold that the trial court erred in granting a directed verdict in favor of the appellee.

Reversed and remanded.

PITTMAN and ROAF, JJ., agree.

Cindy D. BENNETT *v.* DIRECTOR,
Employment Security Department, and
North Arkansas Human Services System, Inc.

E 00-255 42 S.W.3d 588

Court of Appeals of Arkansas
Division I
Opinion delivered April 18, 2001

Appellant, pro se.

Phyllis Edwards, for appellee.

LARRY D. VAUGHT, Judge. Appellant Cindy Bennett appeals from an adverse ruling of the Board of Review denying her unemployment benefits. The first hearing in this case was held on March 29, 2000, before the Appeal Tribunal, which resulted in a favorable decision for appellant. The second hearing was on July 18, 2000, before the Board of Review on the timeliness of the employer's appeal. The last hearing was held on September 27, 2000, from which this appeal is taken. On March 7, 2001, we remanded this case to the Board of Review to supplement the record to include the transcript of the July 18 hearing so that we could examine the issue of the timeliness of appellees' appeal from the Appeal Tribunal's decision. Because we find that the appeal to the Board of Review was untimely, we reverse its decision for lack of jurisdiction.

A detailed recitation of the facts is not necessary because we do not reach the merits of the appeal. Appellant had been employed by appellee North Arkansas Human Services System for approximately seven years when she submitted a letter of resignation. At the time she resigned, she told her manager that her position could be performed in twenty hours per week instead of forty hours. She later retracted her resignation and was allowed to continue working. After about two weeks she was informed that she would be performing the job of roaming secretary in addition to her regular job. The new position would require her to travel. The Appeal Tribunal found that she had not agreed to travel when she was hired and that the travel requirement constituted a significant change in the job duties to such an extent that the average worker would be compelled to quit. Based on these findings, the Appeal Tribunal awarded benefits to appellant.

The decision of the Appeal Tribunal was handed down on March 29, 2000, and mailed to the parties on March 30, 2000. Appellees had twenty days from the date the decision was mailed to file a notice of appeal. Ark. Code Ann. § 11-10 524 (a)(1) (Supp. 1999). The notice is timely filed if it is postmarked by the twentieth day. However, if the appeal is not filed within twenty days and the Board of Review finds that the late filing is "beyond the control" of the appealing party, the filing may be deemed timely. Ark. Code Ann. § 11-10-524(a)(2).

In this case, the employer's appeal to the Board of Review was postmarked June 27, 2000, which is eighty-nine days from the date the decision was mailed. The Board found that the filing was timely because the delay was beyond the control of the employer. A timely notice of appeal is necessary for the appellate court to have jurisdiction of a case on appeal. *Cockrell v. Director,* 67 Ark. App. 132, 992 S.W.2d 181 (1999). This court's jurisdiction is derived from the appeal, and we may not render any judgment that the Board of Review could not have rendered. *See Markham v. Evans,* 239 Ark. 1154, 397 S.W.2d 365 (1965).

The Board of Review held a hearing on July 18, 2000, to determine the timeliness of the appellee's appeal. Ms. Lamons, the employer's representative, testified that she prepared the notice of appeal on April 10, 2000, and ran it through the postage meter that day. The envelope introduced into evidence reflected the April 10 meter stamp. Ms. Lamons further stated that "Someone else carries it to the post office." The envelope had a postmark of June 27, 2000, and there was no evidence presented by the employer of how

or when the envelope was taken to the post office. The Board found that the late filing was beyond the control of the employer.

On appeal, the findings of fact of the Board of Review are conclusive if they are supported by substantial evidence. Ark. Code Ann. § 11-10-529(c)(1) (Supp. 1999). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Baldor Electric Co. v. Arkansas Employment Sec. Dep't,* 71 Ark. App. 166, 27 S.W.3d 771 (2000). We review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board's findings. *Id.* 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. *Id.*

In this case, there was no substantial evidence presented to sustain the Board's finding that the employer's late filing was beyond its control. The only evidence presented was that Ms. Lamons prepared the notice of appeal in a timely manner. Since the envelope containing the notice of appeal was at all times in the control of the employer and timely delivery to the post office was not proven, the decision of the Board cannot be sustained. At most, the evidence shows that the late filing was beyond the control of Ms. Lamons. We therefore reverse the decision of the Board of Review and remand to reinstate the decision of the Appeal Tribunal.

Reversed and remanded.

PITTMAN and HART, JJ., agree.

Roy NEWTON *v.* STATE of Arkansas

CA CR 00-1057 43 S.W.3d 170

Court of Appeals of Arkansas
Division III
Opinion delivered April 25, 2001

Fields, Tabor, Langston & Shue, P.L.L.C., by: *Daniel Shue*, 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, Roy Newton, entered a conditional plea of guilty to the offense of possession of a controlled substance with intent to deliver. He was sentenced to twelve years in the Arkansas Department of Correction, followed by a six-year suspended imposition of sentence, and was assessed fines and court costs in the amount of two thousand dollars. Newton's sole point on appeal is that the trial court erred in denying his motion to suppress. We affirm.

When reviewing the trial court's denial of a motion to suppress, the appellate courts make an independent determination based on the totality of the circumstances and reverse only if the trial court's ruling was clearly against the preponderance of the evidence. *Embry v. State*, 70 Ark. App. 122, 15 S.W.3d 367 (2000).

At the hearing on the motion to suppress, Russellville Police Officer Chris Goodman testified that he was on patrol in a high-crime area the night of July 2, 1999, when he stopped the car Newton was driving at approximately 10:13 p.m. because Newton had crossed the center line several times. Goodman stated that Newton was visibly shaking and would not make eye contact when Goodman asked for his driver's license. When asked for the insurance and registration papers for the car, Newton advised Goodman that his girlfriend, Elizabeth Brennan, had rented the vehicle at the Tulsa Airport, and they had misplaced the paperwork. Brennan was a passenger in the vehicle and confirmed that she was the person who had rented the vehicle.

When asked to step out of the vehicle, Newton said, "I'm not drinking. I haven't been drinking and I'm sorry for driving bad. It's just that it's a new car and I'm just trying to get adjusted to driving it." While Newton was outside the vehicle, Goodman asked him what he was doing in the area, to which Newton responded that he was visiting family. He also stated that he had known Brennan for only two months. When Brennan was questioned separately, she said they were in Arkansas visiting friends and that she had known Newton for five or six months.

At this time, Goodman called for a backup officer, and Russellville Police Officer William Ridenhour responded. Although he believed that something was "wrong," Goodman decided to only write Newton a warning citation. As he explained to Newton what he was doing, appellant was walking around unsteadily and talking very fast. After issuing the warning citation, Goodman advised Newton that he was free to leave. However, Goodman requested and received permission from Brennan, as the person who had rented the vehicle, to search the automobile.

Goodman began a manual search of the vehicle, but Ridenhour, the canine handler for the Russellville Police Department, had arrived and suggested that the officers conduct the search with his dog, Anuck, to perform the search more quickly. As Ridenhour began the search with Anuck, Goodman explained to Newton what the dog was doing during the search.

While Ridenhour and Anuck were conducting the consensual search of the vehicle, Newton was standing on the driver's side of Goodman's patrol car, holding Brennan tightly in front of his body with his arms around her. When Anuck scratched on the passenger side door of the vehicle, which is a sign for the presence of drugs, Goodman asked Newton if he saw what the dog was doing, to which Newton replied, "Yes." At that time, Newton released Brennan and placed his hands in his pants pockets. When he placed his hands in his pockets, he raised his shirt, and at that time Goodman observed a bulge on the left side of Newton's groin. Newton then turned away from Goodman and started walking to the back of the police cruiser; Goodman then stopped him and asked him to place his hands on the car so that he could pat him down for weapons.

During the patdown, Goodman felt a very hard object in Newton's pants where he had observed the bulge, at which time Newton attempted to jerk away. Goodman handcuffed Newton, and called for Ridenhour, who removed the object from Newton's

pants. Ridenhour estimated the packet to be approximately eighteen inches long, and it consisted of a set of scales that Ridenhour testified were six to seven inches long and enclosed in a hard carrying case, a baggie of methamphetamine in rock form, and a baggie of methamphetamine in powder form. All of these items were contained in one large plastic bag.

Goodman testified that he did not feel that he needed to pat Newton down for weapons until Anuck alerted on the vehicle for drugs, and Newton raised his shirt, revealing the bulge, and began walking behind the police cruiser. The patdown for weapons was not triggered until "all of these things built up" and Goodman saw the bulge at Newton's groin.

Newton concedes that Goodman's initial stop for a traffic violation was appropriate; however, he contends that although he was told he was free to leave, he really was not free to leave because he could not drive the car away. Although Newton could not leave in the vehicle, that has no bearing on whether he was free from police custody. The reason he could not drive away in the vehicle was due to the fact that his girlfriend, who by his own admission was the person who had rented the car, had given her consent for the automobile to be searched. *See Muhammad v. State*, 337 Ark. 291, 988 S.W.2d 17 (1999)(holding that a stop can be extended by authorizing a search of the vehicle).

Appellant also argues that the stop exceeded the fifteen-minute limit provided for in Rule 3.1 of the Arkansas Rules of Criminal Procedure, and therefore the articles seized during the search of his person must be suppressed. We disagree.

Rule 3.1 of the Arkansas Rules of Criminal Procedure provides:

> 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.

In the present case, the testimony revealed that from the time of the stop to the time of Newton's arrest was a period of between seventeen and twenty minutes. Although this period of time exceeds the stated fifteen minutes, it is of no moment because a person may be detained under Rule 3.1 "for a period of not more than fifteen (15) minutes *or for such time as is reasonable under the circumstances.*" (Emphasis added.) In the present case, the officers acted diligently and caused no undue delay in performing the consensual search; furthermore, appellant's girlfriend extended the stop by consenting to the search of the car. *See United States v. Sharpe*, 470 U.S. 675 (1985) (holding that a twenty-minute detention was reasonable when the police acted diligently and the defendant contributed to the delay). We cannot say that the seventeen-to-twenty-minute search was unreasonable under the circumstances.

Newton next contends that Goodman was not authorized to conduct a weapons search under Rule 3.4 because there was no indication Newton was committing, had committed, or was about to commit a felony or a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property under Rule 3.1. We disagree. Goodman had legally stopped Newton for a traffic violation and obtained consent from Brennan to search the car, and he developed a reasonable suspicion that Newton had committed or was committing a felony at the time Anuck, the drug dog, alerted the officers of the possibility of drugs in the car. A drug dog's identification of drugs in a car provides probable cause that drugs are present. *United States v. Bloomfield*, 40 F.3d 910, 919 (8th Cir. 1994).

Newton further argues that there were no specific and articulable facts that the officers observed the bulge in his pants to be a weapon; therefore a search under Rule 3.4 was not permissible. We must disagree.

Rule 3.4 of the Arkansas Rules of Criminal Procedure provides:

> If a law enforcement officer who has detained a person under Rule 3.1 reasonably suspects that the person is armed and presently dangerous to the officer or others, the officer or someone designated by him may search the outer clothing of such person and the

> immediate surroundings for, and seize, any weapon or other dangerous thing which may be used against the officer or others. In no event shall this search be more extensive than is reasonably necessarily to ensure the safety of the officer or others.

Rule 2.1 of the Arkansas Rules of Criminal Procedure defines "reasonable suspicion" 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.

Arkansas Code Annotated section 16-81-203 (1987) sets forth factors to be considered when determining whether an officer has grounds for reasonable suspicion. Of these factors, the ones present in this case include the demeanor of the suspect; the gait and manner of the suspect; the manner in which the suspect is dressed, including bulges in clothing, when considered in light of all of the other factors; the time of the day or night the suspect is observed; incidence of crime in the immediate neighborhood; and the suspect's apparent effort to conceal an article.

In the present case, Newton had been stopped at night in an area known for its crime, and he was visibly nervous during the entire stop, walking around unsteadily and talking very fast. During the consensual search, Anuck alerted on the passenger door of the vehicle, indicating the presence of drugs in the car. At that time, Newton raised his shirt, revealing a bulge on the left side of his groin. Upon a patdown search for weapons, this bulge was found to be hard and about eighteen inches long.

In support of his argument, appellant cites *Bell v. State*, 68 Ark. App. 288, 7 S.W.3d 343 (1999), and *Pettigrew v. State*, 64 Ark. App. 339, 984 S.W.2d 72 (1998). However, both of these cases are distinguishable from the case at bar.

In *Bell*, the officer noticed a bulge in the appellant's left rear pants pocket and frisked him for weapons. However, the officer testified that the bulge "felt like a plastic bag with what felt like a vegetable-like substance in the pocket." 68 Ark. App. at 290, 7 S.W.3d at 344. This court held in *Bell* that although the officer was justified in performing a weapons search, because the initial frisk yielded no weapons, the search should have ended at that point. In

the present case, the officers testified that the search indicated a hard bulge to the left of Newton's groin. This fact is certainly distinguishable from the facts in *Bell* where the officer's testimony could in no way support the possibility of finding a weapon during the search.

Likewise, *Pettigrew* is also distinguishable from the case at bar. In that case, the officer observed appellant and four other individuals in a car parked in a parking lot, and a passenger appeared to be drinking an alcoholic beverage. Open containers of beer and other alcoholic beverages were observed in the car. The officer ordered everyone out of the vehicle, and then immediately began a patdown weapons search of appellant. During the search, the officer felt an object in the front waistband of appellant's pants, which was eventually determined to be seventy grams of cocaine. This court agreed with appellant that the officer had no specific and articulable facts upon which he could reasonably believe that appellant was armed and presently dangerous; therefore, the search for weapons in which the cocaine was found was not permissible, and the denial of appellant's motion to suppress was reversed.

The facts in the present case are substantially different from the facts in *Pettigrew*. In this case, Newton had appeared extremely nervous throughout the stop and even after he was told he was free to go. He was walking unsteadily and "babbling," and he and his passenger had told conflicting stories when questioned separately. After Goodman obtained consent to search the vehicle from Brennan, the person who had rented it, the drug dog alerted to the presence of drugs in the vehicle. When Newton saw the dog alert, he placed his hands in his pocket, causing his shirt to rise and exposing a large bulge on the left side of his groin as he was walking toward the rear of the police cruiser. Goodman stopped him and performed a patdown search, found the bulge to be hard, and called on Ridenhour to remove the object from his pants to determine if it was a weapon. Based upon the totality of the circumstances, we cannot say that the trial court's denial of appellant's motion to suppress was clearly against the preponderance of the evidence.

Affirmed.

PITTMAN and ROAF, JJ., agree.

VIRGINIA INSURANCE RECIPROCAL *v.* Eva VOGEL

CA 00-781 43 S.W.3d 181

Court of Appeals of Arkansas
Division I
Opinion delivered April 25, 2001

[redacted]

Friday, Eldredge & Clark, by: *Gregory D. Taylor*, for appellant.

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

JOHN MAUZY PITTMAN, Judge. The appellee in this tort case, a very elderly woman, brought this action alleging that she was injured through the negligence of Crittenden Memorial Hospital when she was caught in the automatic doors at a professional office building leased and operated by the hospital. The jury returned a verdict in favor of appellant, the hospital's insurer.

Appellee subsequently moved for a new trial. The trial court granted appellee's motion for a new trial on the grounds of newly discovered evidence and erroneous failure to instruct the jury on *res ipsa loquitur*. From that decision, comes this appeal.

For reversal, appellant contends that the trial court erred in granting a new trial on the grounds of newly discovered evidence and for refusing to instruct the jury on *res ipsa loquitur*. We affirm.

A new trial based on newly discovered evidence is not a favored remedy, and whether to grant a new-trial motion on such grounds is within the sound discretion of the trial court. *Lee v. Lee*, 330 Ark. 310, 954 S.W.2d 231 (1997). The supreme court has held that, in a hearing on a motion for new trial based on newly discovered evidence, the burden is on the movant to establish that he or she could not with reasonable diligence have discovered and produced the evidence at the time of the trial, that the evidence is not merely impeaching or cumulative, and that the testimony would have changed the result of the trial. *Id.* On appeal from the grant of a new trial, we will affirm unless there has been a manifest abuse of discretion:

> 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.*

Garnett v. Crow, 70 Ark. App. 97, 99-100, 14 S.W.3d 531, 533 (2000).

We cannot say that the trial judge acted thoughtlessly and without due consideration in granting appellee a new trial in the case at bar. Appellee sought to prove that the hospital had been negligent in inspecting, servicing, and maintaining the automatic door. To this end she propounded interrogatories and requests for production of documents asking whether the hospital had any notice of the doors closing on any person other than herself, and for the details and documentation relating to such incidents if the hospital had notice of any such prior incident. The hospital responded by stating that it had no notice or documentation of any

such prior occurrence. Appellee also requested maintenance records relating to the door; although some maintenance logs were provided, the maintenance log for 1996 was not. Soon after trial, appellee's attorney learned through chance conversation of another incident where a person was injured in 1996 when the professional office building door malfunctioned. He obtained affidavits documenting that this injury had occurred, that the hospital's insurance carrier had paid a claim relating to this injury, and that the hospital had provided medical treatment for the injury, the charges for which were adjusted by the hospital administration.

Appellant contends that appellee would have learned of this prior incident independently had she conducted a reasonably diligent investigation. We think that the trial judge could properly find that appellee's interrogatories and requests for production constituted reasonable diligence. Appellant contends that evidence of the prior incident serves only to impeach the testimony of hospital officials to the effect that no such accident had or could occur. Although this evidence did impeach the testimony of the hospital's CEO that he had no knowledge of similar occurrences, it also tended to show that subsequent malfunctions of the door were foreseeable in light of those prior incidents. The foreseeability of the malfunction was a serious weakness in appellee's case, especially in light of the hospital CEO's assertion that no such incidents had happened before, and we cannot say that the trial judge manifestly abused his discretion in finding that this evidence would likely lead to a different result were the case to be retried. We hold that the trial judge did not err in granting a new trial on the grounds of newly discovered evidence.

Appellant also contends that the trial court erred in granting a motion for new trial on the ground that it erroneously failed to instruct the jury on the doctrine of *res ipsa loquitur*. A *res ipsa* instruction is properly denied where there is substantial evidence that the plaintiff's injury was not caused by the instrumentality under the exclusive control of the defendant. *Eisner v. Fields*, 67 Ark. App. 238, 998 S.W.2d 421 (1999). At trial in the present case, such evidence was present in the form of testimony by appellant's agents to the effect that the door could not malfunction and had not malfunctioned. We think it unlikely that such testimony will be repeated on retrial. Consequently, although we think that the trial court was initially wrong in believing that *res ipsa loquitur* must be specifically pled, *see Stalter v. Coca-Cola Bottling Co. of Ark.*, 282 Ark. 443, 669 S.W.2d 460 (1984), we do not address this issue because it is not likely to arise on retrial.

Affirmed.

VAUGHT and HART, JJ., agree.

Shonda BROWN, Shenia Biggs, Gledia Thomas,
Katrena Freeman, and Unique Design Wholesale, Inc.
v. RUALLAM ENTERPRISES, INC.
d/b/a Lam Container

CA 00-934 44 S.W.3d 740

Court of Appeals of Arkansas
Division II
Opinion delivered April 25, 2001

Orr, Scholtens, Willhite & Averitt, PLC, by: *Kevin J. Orr, Jay Scholtens*, and *Chris A. Averitt*, for appellants.

Clifford M. Cole, for appellee.

JOHN B. ROBBINS, Judge. This appeal arises from a suit filed by appellee against appellants in Greene County Chancery Court requesting relief under the Arkansas Trade Secrets Act, specifically seeking an injunction, damages and attorney's fees. Appellants are Shonda Brown, Shenia Biggs, Glendia Thomas, and Katrena Freeman, who work for Unique Design Wholesale, Incorporated, also named as a defendant in the complaint (collectively "Unique"). Appellee is Ruallam Enterprises, Incorporated, doing business as Lam Containers ("Lam"). For the unauthorized use of trade secrets, Lam was awarded a judgment for $50,000.00 plus $10,000.00 for its attorney's fees. Both parties appeal the amount of damages awarded. We reverse and remand for the chancellor to reconsider and recalculate the damages owing to Lam.

The parties to this action operate telemarketing companies that sell products such as baskets, silk flowers, containers, and other items used in the florist industry. Both companies are based in Paragould, Arkansas. Their marketing is designed to sell these items to operating florists all over the United States for use in their shops. Lam initiated this action seeking an injunction and damages for alleged trade secret misappropriation, which it alleged was accomplished by Unique's employees, most of whom were former employees of Lam. Lam contended that these employees had taken Lam's index cards containing customer information and were using this information in Unique's competing business. According to Lam, the information on those cards constituted trade secrets protected by the Arkansas Trade Secrets Act. The information included customer buying history, the contact person, and the pricing structure.

On November 1, 1999, Lam's request for an immediate order of delivery of Lam's property was heard. At the conclusion of that

preliminary hearing, the sheriff was dispatched to retrieve from Unique any materials owned by Lam and protected as trade secrets; index cards and computer sheets were recovered from Unique's offices. Another hearing was conducted on November 18, 1999, to determine if a preliminary injunction was warranted, and the chancellor found that Unique had in fact misappropriated Lam's trade secrets, a finding which is not in dispute on appeal. A forty-five-day temporary restraining order was entered preventing Unique from contacting, selling to, or engaging in any business with, those customers to whom Lam had sold product within the last year. Lam was instructed to provide a list of those prohibited contacts.

Subsequent hearings were conducted at Lam's request to determine whether Unique was in contempt for continuing to use information from the index cards by soliciting business from those customers, in violation of the preliminary injunction. The hearing on the first motion for contempt was conducted on January 31, 2000, and in that hearing Unique admitted that it had mistakenly called some of Lam's customers, but these mistakes were attributed in part to Lam's preparation of less-than-clear customer lists. Because the acts of Unique were found not to be willful, contempt was not entered. The chancellor reserved the issue of damages to a later hearing. A second motion for contempt was heard on February 23, 2000, and resulted in a finding that Unique had committed numerous contacts in violation of the preliminary injunction. This led the chancellor to extend the temporary restraining order, but no specific contempt finding was made.

The third and fourth motions for contempt were consolidated with the trial on damages. At the final hearing conducted on April 19, 2000, the parties presented testimony by expert witnesses, both certified public accountants, supporting their respective positions as to their profit margins, or lack thereof. Unique averred that Lam had not suffered damages at all, and Lam asserted that it had lost profits in the amount of $313,564.00, calculated from the difference in gross profits between 1998 and 1999. The chancellor rendered a judgment in the amount of $50,000.00 as the unjust enrichment retained by Unique. The chancellor arrived at this amount by taking Unique's gross sales ($278,385.65) minus freight costs ($36,190.14), multiplied by a ten-percent profit multiplier. This calculation produced the amount of $24,219.55, which the chancellor chose to double, and then round off, resulting in a final figure of $50,000.00. The concluding sentence stated that this amount was justified by the circumstances, "which included four contempt hearings."

Unique moved for a new trial, which was deemed denied by operation of law. A timely notice of appeal and a timely notice of cross-appeal were filed from the order assessing damages. Unique argues on appeal that the chancellor erred in awarding damages because appellee failed to prove damages in any amount, and, in the alternative, that if any damages were owing to appellee, the amount was miscalculated and should be reduced to $24,219.55 or should be remanded to the trial court for a recalculation. Lam cross-appeals the calculation of damages, asking that this court raise the damages award to $313,564.00, an amount suggested by the difference in gross profits that Lam generated in 1998 versus 1999. Lam alternatively argues that if we do not award the amount it deems appropriate, then the award given should either be upheld or the case remanded to the chancellor for a recalculation. We hold that this case must be reversed and remanded.

The standard of review of chancery cases is well settled. Chancery cases are tried de novo on the record, but we do not reverse a finding of fact by the chancellor unless it is clearly erroneous. *See Slaton v. Slaton*, 336 Ark. 211, 983 S.W.2d 951 (1999). A finding 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. *Id.* With regard to findings of fact, we give due deference to the superior position of the chancellor to weigh the credibility of the witnesses. *Hunt v. Hunt*, 341 Ark. 173, 15 S.W.3d 334 (2000). However, a chancellor's conclusion on a question of law is given no deference on appeal. *See Kelly v. Kelly*, 341 Ark. 596, 19 S.W.3d 1 (2000); *City of Lowell v. M&N Mobile Home Park*, 323 Ark. 332, 916 S.W.2d 95 (1996).

The damages at issue in this appeal were awarded pursuant to the Arkansas Trade Secrets Act, codified at Ark. Code Ann. §§ 4-75-601 through 4-75-607 (Repl. 1996). A trade secret is defined in the Act as information that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; a trade secret is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. Ark. Code Ann. § 4-75-601(4)(A) and (B). Because the parties do not dispute the finding of the chancellor that the pieces of information contained on the index cards were trade secrets, we will not reiterate the factors used to determine whether information constitutes a trade secret. Whether Lam was entitled to the award of attorney's fees reflected in the order is not at issue

before us either, and we do not discuss the statutory authority that permits such an award or the propriety of such an award in this case. We do address, however, the amount of damages, if any, that was warranted by the taking of these trade secrets.

Arkansas Code Annotated section 4-75-606 (Repl. 1996) authorizes recovery to be awarded in the event of a violation of the Act, and it states:

> (a) In addition to or in lieu of injunctive relief, a complainant may recover damages for the actual loss caused by misappropriation.
>
> (b) A complainant also may recover for the unjust enrichment caused by misappropriation that is not taken into account in computing damages for actual loss.

Our legislature did not define "actual loss." In *Saforo & Associates, Inc. v. Porocel Corp.*, 337 Ark. 553, 991 S.W.2d 117 (1999), the Arkansas Supreme Court addressed for the first time the calculation of damages in the trade-secret context. The supreme court declared this statute ambiguous and construed it to mean that damages are to be calculated by determining either the plaintiff's lost profits or the defendant's gain, but not by a combination of the two. The rule was stated that, "a complainant may recover either his own lost profits or the defendant's profits, whichever affords the greater recovery." *Id.* at 567, 991 S.W.2d at 124. The supreme court then reversed and remanded the case so that the chancellor could recalculate the proper amount of damages. The supreme court in *Saforo* did not answer the question of whether profit or gain was to be calculated on a gross or net basis, or whether deductions could be made and for what expenses.

We must examine the wording of the order to determine what exactly was done. The chancellor's order read in relevant part:

> As a result and proximate cause of the Defendants' willful and intentional conduct, the Defendants have been unjustly enriched in the amount of $50,000.00. Said sum is determined by taking the gross sales, as reflected in Plaintiff's Exhibit #1, less freight, at 10%, to determine the net profit for that period reflected in Exhibit #1, and then multiplied by two (2) and rounded-off to $50,000.00, which sum the Court determines to be the proper measure of damage when the profits earned by Defendants and loss to Plaintiff's business are compared. In addition, the Court concludes that

> the circumstances including four contempt hearings justify the damages assessed.

We are convinced that the chancellor attempted to calculate damages based upon a hybrid formula, which has specifically been rejected by our supreme court.

Unjust enrichment is the principle that one person should not be permitted to unjustly enrich himself at the expense of another, but should be required to make restitution for property or benefits received, retained, or appropriated, where it is just and equitable that such restitution be made, and where such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly. *Adkinson v. Kilgore*, 62 Ark. App. 247, 970 S.W.2d 327 (1998). To be unjustly enriched, a party must have received something of value to which he was not entitled and that he should restore. *Id.* Unjust enrichment in this context must mean the benefit conferred upon the defendant by the profit margin earned as a result of the wrongful taking of trade secrets. *See Saforo, supra.*

Thus, we are faced with further interpreting the damages statute beyond that answered in *Saforo*. Each of the parties propose various calculations, ranging from no damages at all, to the profit earned by Unique without doubling the figure, to the ruling made by the trial court, to the difference in Lam's gross profits between 1998 and 1999. We hold that the proper method of calculation is on the basis of net profit, whether lost by the injured party or gained by the wrongdoer, based upon our examination of authority from across the United States, and we reverse and remand to the chancellor with instructions to recalculate the damages award. *See* Rosenhouse, *Proper Measure and Elements of Damages for Misappropriation of Trade Secrets*, 11 A.L.R. 4th 12 (1982) and cases cited therein. Due to Unique's appropriation of Lam's trade secrets, Lam is entitled to recover either its resulting lost net profits or that portion of Unique's net profits by which it has been unjustly enriched, whichever affords the greater relief.

Because there is such a variance in the expert opinions offered to the trial court, we believe the chancellor is in a better position to weigh the evidence and to consider the basis of the respective experts' opinions. Affording the "greater relief" is not inconsistent with the principle that the harmed party is to be made whole, and this is commanded by Arkansas' highest court. *See* Felix Prandl, *Damages for Misappropriation of Trade Secret*, 22 TORT & INS.

L.J. 447 (1987); *Saforo, supra.* We further state that the chancellor erred as a matter of law in doubling the figure determined to be Unique's profit, as this is not authorized by statute. This is in the nature of punitive damages, which are not expressly included in the Arkansas Trade Secrets Act. Again, the purpose of the damages allowed is to make the injured party whole, not punish the wrongdoer or provide a windfall. Nor is there any authority to "round off" the profit once a figure is reached, and we hereby state that this was error.

While we acknowledge that the chancellor was attempting to do equity in the face of an ambiguous statute and with little guidance from case law, we are convinced that reversible error occurred. We remand for a reconsideration of Lam's "actual loss" and Unique's "unjust enrichment" in light of our opinion.

VAUGHT and CRABTREE, JJ., agree.

Kenneth Wayne SLUSHER *v.* April Dawn SLUSHER

CA 00-933 43 S.W.3d 189

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered April 25, 2001

Thurman Ragar, Jr., for appellant.

Robert S. Blatt, for appellee.

WENDELL L. GRIFFEN, Judge. Kenneth Wayne Slusher appeals from a second amended divorce decree entered by a Crawford County chancellor that found he was not the father of E.S., and which set aside a previous order granting visitation and ordering appellant to pay child support. Appellant argues that the chancellor erred in entering the second amended decree and alternatively that the court erred in denying visitation. We hold that Rule 60 of the Arkansas Rules of Civil Procedure precluded the chancellor from modifying the order.[1] Accordingly, we reverse and remand with instructions for the chancellor to dismiss its March 30, 1999, order pursuant to Rule 60.

While the facts in this case are not in dispute, the procedural aspects are somewhat convoluted. The parties were married October 24, 1996. Prior to their marriage, appellee gave birth to E.S. on August 24, 1996, and named appellant as the father on the child's birth certificate. The parties separated in April 1997. Appellant later filed a complaint for divorce alleging that no children were born of the marriage, and a divorce decree was entered on November 4, 1997 (after appellee waived service and agreed for the court to hear the matter without further notice to her). The decree did not mention children of the marriage. On February 18, 1999, appellant filed a motion to amend the decree to reflect that E.S. was born of the marriage and to order visitation and child support. Although appellee received copies of the motion and a summons to court

[1] We recognize that appellant challenged the chancellor's decision based on *Office of Child Support Enforcement v. Williams*, 338 Ark. 347, 995 S.W.2d 338 (1999). However, based on our determination that questions arise concerning the chancellor's jurisdiction to enter the March 30, 1999, decree, it is not necessary that we reach appellant's *res judicata* argument.

served by certified mail on February 23, 1999, she failed to file a response or otherwise appear. Appellant then moved for default judgment and requested that the chancellor enter an amended decree pursuant to his motion. The chancellor granted his motion and entered an amended decree dated March 30, 1999, which declared that E.S. was born of the marriage, awarded custody of E.S. to appellee with visitation rights to appellant, and ordered appellant to pay child support of $40.00 per week.

In June 1999, appellant filed a motion to change custody of E.S., alleging that a material change of circumstances made a change of custody in the best interest of E.S. Specifically, appellant alleged that E.S. had been sexually molested, was infected with genital warts, had a serious head lice problem, and that appellee failed to remedy the situation. Appellee responded and denied that she neglected E.S. She also counterclaimed and alleged that appellant failed to pay child support. The chancellor denied appellant's motion to change custody, ordered the parties to undergo DNA testing to determine paternity based on appellee's assertion that appellant was not E.S.'s biological father, ordered appellee to attend parenting classes, and ordered a home investigation of her residence. A paternity evaluation report submitted to the chancellor on October 11, 1999, indicated that appellant could not be E.S.'s biological father.

On March 3, 2000, appellee filed a motion for entry of a second amended divorce decree indicating that appellant was not the father of E.S. Appellant responded with the argument that he was listed as E.S.'s father on the birth certificate, that appellee permitted him to have extended visitation with E.S. after the divorce, and that he had developed a father-son bond with E.S. Following a hearing on May 3, 2000, the chancellor entered the second amended divorce decree from which appellant now appeals. That decree 1) found that appellant was not E.S.'s father based on paternity tests, 2) set aside the previous orders mandating appellant to pay child support, and 3) set aside the previous visitation orders.

Rule 60 of the Arkansas Rules of Civil Procedure provides that a court may modify a judgment after ninety days when the court seeks to correct a clerical error, or if the party demonstrates that the circumstances warranting a modification fall within seven enumerated grounds. These grounds include: 1) granting a new trial because evidence was discovered after ninety days; 2) granting a new trial in proceedings against a defendant who was constructively summoned and failed to appear; 3) misprisions of the clerk; 4)

misrepresentation or fraud; 5) erroneous proceedings against a minor or person deemed incompetent; 6) the death of one of the parties; and 7) errors in a judgment shown by an infant within twelve months after reaching eighteen years. *See* Ark. R. Civ. P. 60.

After a ninety-day lapse of time, a court has no authority to modify an order absent a showing of one of the enumerated exceptions provided in Rule 60. *See Blackwood v. Floyd*, 342 Ark. 498, 29 S.W.3d 694 (2000). In *Blackwood*, the supreme court held that although a chancery court has continuing jurisdiction over child custody, support, and visitation, the chancellor may not modify an order that affects custody of a child absent proof that circumstances have changed since the entry of the original order. The court concluded that a stepparent who did not contend at the time of the divorce that she was entitled to visitation with her stepson or that she stood in loco parentis to her stepson, could not request that the court amend its order to include visitation as visitation was not an issue before court at the time of the original order. *See Blackwood, supra.*

When we apply the rationale espoused in *Blackwood* to the instant case and consider the fact that appellant sought to amend the original decree fourteen months after the parties were divorced and the fact that children born of the marriage was not an issue before the trial court, we must conclude that the chancellor lacked jurisdiction pursuant to Rule 60 to amend its original order. Because the chancellor's order that modified the original divorce decree was void for lack of jurisdiction, we reverse and remand with instructions for the trial court to dismiss its March 30, 1999, order.

Reversed and remanded.

PITTMAN, ROBBINS, BAKER, and ROAF, JJ., agree.

NEAL, J., concurs.

OLLY NEAL, judge, concurring. I agree that the chancellor lacked jurisdiction to amend the original divorce decree to reflect that appellant is the child's father. I write separately only to mention the effect of naming appellant as the child's father on the child's birth certificate.

In this state, if the mother of a child is not married at the time of either conception or birth, the name of the father is not to be entered on the child's birth certificate unless the mother and the

putative father sign an affidavit of paternity. Ark. Code Ann. § 20-18-401(f)(2) (Repl. 2000). Prior to signing the affidavit, the mother and natural father are given written information explaining the implications of signing the affidavit and their resulting parental rights and responsibilities. Ark. Code Ann. § 20-18-408(2). Once the mother and the putative father execute an acknowledgment of paternity pursuant to section 20-18-408, the man executing the document is the father of the child for all intents and purposes and the acknowledgments, by operation of law, constitute a conclusive finding of paternity. Ark. Code Ann. § 9-10-120 (Repl. 1998).

In the instant action, we have held that each of the amended decrees entered subsequent to the original divorce decree is void and that the parties are returned to the postures that they held when the original divorce decree that made no mention of the child was entered. There is no dispute that April Slusher was unmarried at the time she gave birth to the child and that Kenneth Slusher's name appears on the child's birth certificate. It would appear, therefore, that appellant has certain parental rights and responsibilities with regard to the child and that while those rights and responsibilities could not be established by modifying the parties' divorce decree, those rights and responsibilities may be enforced in a separate proceeding.

Joseph A. BUKOWCZYK *v.* STATE of Arkansas

CA CR 00-982 42 S.W.3d 590

Court of Appeals of Arkansas
Division III
Opinion delivered April 25, 2001

Irwin Law Firm, by: *Robert E. Irwin*, for appellant.

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

OLLY NEAL, Judge. Appellant Joseph Bukowczyk was convicted at a bench trial of violating the Arkansas Hot Check Law, and was sentenced to three years' probation and ordered to pay $1,756.68 in restitution and $650.00 in fines and costs. On appeal, he makes two assignments of error, which can be consolidated into one issue: whether the trial court erred in finding that appellant violated the Arkansas Hot Check Law when the postdated instrument given by appellant to Suzuki of Russellville (Suzuki) was nothing but a memorandum clearly showing on its face that it was to be held in "lieu of a loan check." We have

reviewed the abstract of the record and hold, as a matter of law, that the judgment for conviction must be reversed and dismissed.

The evidence is undisputed that on April 22, 1999, appellant went to Suzuki of Russellville to shop for a motorcycle. On April 23, 1999, appellant returned to Suzuki and gave an $8,400.00 check to a Suzuki salesman for the purchase of a motorcycle. The check was drawn in favor of Suzuki of Russellville, and postdated April 27, 1999. The check was also marked "hold in leiu [*sic*] of loan check" on the "For" line. Suzuki's general manager testified that Suzuki deposited the check "a day or two after [appellant] purchased the motorcycle," and that the check was returned for insufficient funds. Thereafter, appellant was charged with violating the Arkansas Hot Check Law under Ark. Code Ann. § 5-37-302 (Repl. 1997).

There is some dispute as to whether Suzuki was aware on April 23, 1999, that the check was postdated and bore a memorandum notation. However, for purposes of this opinion, we believe that the essential question raised by the appellant is whether the giving of a postdated check, bearing the notation, "hold in lieu of loan check," constitutes a violation of section 5-37-302 under the Arkansas Hot Check Law. We hold it does not.

The appellate court reviews a challenge to the sufficiency of the evidence in the light most favorable to the State and affirms the lower court's decision if there is substantial evidence to support the conviction. *Leatherwood v. State*, 69 Ark. App. 233, 11 S.W.3d 571 (2000).

Arkansas Code Annotated section 5-37-302 provides in pertinent part:

> It shall be unlawful for any person:
>
> (1) To procure any article or thing of value, . . . or for any other purpose to make or draw . . . with the intent to defraud, any check, draft, or order for the payment of money upon any in-state or out-of-state bank, . . . knowing at the time of such making, drawing, . . . that the maker or drawer has not sufficient funds in, or on deposit with, such bank, . . . for the payment of such check, draft, or order in full, and all other checks, drafts, or orders upon such funds then outstanding; ...

It appears from a careful reading of the statute that a violation occurs when there is an intent to defraud at the time a check is issued. Although the statute does not speak to postdated checks, our supreme court has addressed the application of a postdated check to an earlier and similar act[1], which made it a crime "for an individual, either resident or doing business in this State, to give a check in favor of any one on any bank when there shall not be sufficient funds therein to cover same." *Smith v. State*, 147 Ark. 49, 226 S.W. 531 (1921). In *Smith*, the supreme court reversed the appellant's conviction and held that "the giving of a postdated check implies a promise to deposit money in the bank at a future date to pay the check, and there is nothing in the act which makes it unlawful to promise and fail to pay at a future date." *Id.* at 50, 226 S.W. at 532. Later, by Act 304 of the Acts of 1929, the Legislature amended Act 258 to extend the purview of the law to cover postdated checks. *See Patterson v. State*, 194 Ark. 488, 107 S.W.2d 545 (1937). Act 304 provides in relevant part:

> Any person who, with intent to defraud, shall make or draw, . . . any check, draft or order, for payment of money, upon any bank or other depository, knowing at the time of such making, drawing, . . . that the maker, or drawer has not sufficient funds in, . . . with such bank or other depository, for the payment of such check, draft, or order, in full, upon its presentation, shall be guilty of a misdemeanor . . .
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> As against the maker or drawer thereof, the making, drawing, . . . of a check, draft or order, payment of which is refused by the drawee, shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds in, . . . such bank or other depository, provided such maker or drawer shall not have paid the drawee thereof the amount due thereon, together with all costs and protest fees, within ten days after receiving notice that such check, draft or order has not been paid by the drawee.

The language of Act 304 clearly states that the drawing of a check where the payment of such is refused by the drawee creates prima facie evidence of intent to defraud and knowledge of insufficient funds against the drawer. However, while the *Patterson* court read Act 304 to mean that the statute applied to a postdated check, a reading of Act 1051 of the Acts of 1991, now codified at Ark. Code

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[1] Act 258 of 1913.

Ann. § 5-37-302, does not include the language "prima facie evidence of intent to defraud and of knowledge of insufficient funds" as it relates to the drawing of a check where the payment of such has been refused by the drawee. Thus, to the extent that *Patterson v. State*, *supra*, may be presently read to mean that Act 1051 of the Acts of 1991, now codified at Ark. Code Ann. § 5-37-302, applies to a postdated check, it is no longer good law.

The undisputed evidence shows that appellant did not have sufficient funds on deposit to pay the check that he had issued Suzuki. However, under the present statute, the appellant must have intended to defraud Suzuki at the time he delivered the check. In the instant case, we hold that the element of intent to defraud has not been met. Here, the check was specifically postdated for April 27, 1999, and contained a memorandum notation that it was to be held "in lieu of a loan check." Although an employee for Suzuki testified that he did not notice the memorandum at the time appellant presented the check on April 23, the postdated nature of the check coupled with the memorandum contained therein should have put Suzuki on notice that the check was not eligible for presentment of payment until a future date.

Based on the evidence presented, we hold that the postdated check and the memorandum notation contained therein are conclusive evidence of a lack of intent to defraud as required by the statute. For these reasons, the judgment for conviction is hereby reversed and dismissed.

Reversed and dismissed.

STROUD, C.J., and JENNINGS, J., agree.

Geraldine Morrow BARNES *v.* Jerry W. MORROW

CA 00-1089 43 S.W.3d 183

Court of Appeals of Arkansas
Division II
Opinion delivered April 25, 2001

Nolan, Caddell & Reynolds, P.A., by: *Fred L. Caddell*, for appellant.

Sargent Law Firm, by: *Shelton Sargent*, for appellee.

LARRY D. VAUGHT, Judge. This is an appeal from the chancellor's order awarding appellant child-support arrearages in the amount of $1,508. The chancellor refused appellant's request for additional arrearages for time that the child was not in her custody on the basis of equitable estoppel. She contends that the chancellor erred in failing to award her child-support arrearages through the date appellee petitioned for termination of support. We affirm.

The parties were married on December 21, 1971. Two children were born of the marriage. Tracy Morrow was born February 11, 1976, and David W. Morrow was born July 6, 1981. The divorce decree filed September 4, 1991, awarded custody of Tracy to appellee and custody of David to appellant. Appellee was also ordered to pay child support in the amount of $35 per week. On October 9, 1991, appellant filed a motion for change of custody regarding Tracy, alleging that appellee refused to take custody over Tracy. The chancellor granted the motion on January 2, 1992, and ordered appellee to pay child support in the amount of $96 per week.

On November 30, 1995, appellee filed a petition to modify child custody, requesting that custody of David be changed from appellant to him. Appellant filed a response; however, no further action was taken. The court, on its own motion, filed an order June

25, 1997, dismissing the case without prejudice stating that no action had been taken during the previous twelve months.

Appellant then filed a motion on June 18, 1999, requesting relief that is not at issue in this appeal. Appellee filed a response and an amended response to appellant's motion. Appellant filed a first amended motion for relief, which is not part of the record. However, appellee filed a response to appellant's first amended motion for relief on February 18, 2000, which is contained in the record. The response indicates that appellant sent David to live with his sister in October 1995, and he eventually moved in with appellee in August 1996. Appellee also filed a petition to modify child custody on February 18, 2000, requesting that custody of David be changed from appellant to him. Appellee further alleged that he should not be required to pay child support after August 1996 when he obtained physical custody of David. Appellant denied the allegations of appellee's petition and stated, *inter alia*, that once a child-support order is in place it cannot be modified except by an additional order and that the courts do not permit forgiveness of past-due child support. On June 5, 2000, appellee filed a notice "raising the affirmative defenses of equitable estoppel, estoppel, laches, resjudication [sic], payment, set off, and waiver" to the allegations contained in the plaintiff's first amended motion for relief.

A hearing was held on June 6, 2000. It was agreed that Tracy was of age and that David no longer lived in his mother's home as of October 23, 1995. The issue was whether appellee owed child support in addition to that which was due at the time the youngest child moved out. The parties stipulated that David left home October 23, 1995, and moved in with his sister and then went to live with his father in August 1996.

Appellant testified at the hearing. She stated that her son went to live with her daughter on October 23, 1995, and then went to live with his father on August 16, 1996. However, she stated that since October 23, 1995, her son lived with her for about five months. She testified that she did not provide any assistance concerning the child's finances or help with school during the time the child was out of her custody. She testified that appellee owed $16,808 in child support at the time her former husband filed a motion to terminate child support in February 2000.

Appellee testified that his son moved in with his daughter on October 23, 1995. He stated that he did not file a petition for reduction in child support until 2000. He explained the delay by

stating he "wasn't thinking." He testified that his wife did not mislead him about where his son was living; he knew his son was living with his sister. Appellee stated that he gave his daughter money to help feed and clothe his son, although he did not keep records of the support. He felt that appellant abandoned their son when she dropped him off at the sister's house. He explained that he wanted custody of his son, but that he had to convince his second wife about his son coming to live with them. He further testified that he hired an attorney in 1994 to file pleadings because one of his children had turned eighteen, but he could not remember if that proceeding was ever completed. He stated that he did not retain an attorney to terminate child support when David went to live with his sister.

A child-support summary was introduced into evidence detailing the child support paid and owed until 2000. The chancellor entered a judgment in favor of appellant in the amount of $1,508. The order states that appellant's "request for child support at any time that the child was not in her custody is denied on the basis of equitable estoppel." Appellant appeals from that part of the chancellor's order.

Appellant contends that the trial court erred in failing to award appellant child support through the date appellee petitioned for termination of support. Appellant cites Ark. Code Ann. § 9-14-234 (Repl. 1998). This section provides in pertinent part:

> (b) Any decree, judgment, or order which contains a provision for the payment of money for the support and care of any child or children through the registry of the court or the Arkansas child support clearinghouse shall be final judgment subject to writ of garnishment or execution as to any installment or payment of money which has accrued until the time either party moves through proper motion filed with the court and served on the other party to set aside, alter, or modify the decree, judgment, or order.
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> (c) The court may not set aside, alter, or modify any decree, judgment, or order which has accrued unpaid support prior to the filing of the motion. However, the court may offset against future support to be paid those amounts accruing during time periods, other than reasonable visitation, in which the noncustodial parent had physical custody of the child with the knowledge and consent of the custodial parent.

In *Roark v. Roark*, 34 Ark. App. 250, 809 S.W.2d 822 (1991), this court addressed the vesting of child-support payments as follows:

> Once a child-support payment falls due, it becomes vested and a debt due the payee. *Holley v. Holley*, 264 Ark. 35, 568 S.W.2d 487 (1987). Arkansas has enacted statutes in order to comply with federal regulations and to insure that the State will be eligible for federal funding. *Sullivan v. Eden*, 304 Ark. 133, 801 S.W.2d 32 (1990); *see* Ark. Code Ann. 9-12-314 and 9-14-234 (Repl. 1991). These statutes provide that any decree, judgment, or order which contains a provision for payment of child support shall be a final judgment as to any installment or payment of money which has accrued. Ark. Code Ann. 9-14-234(a) (Repl. 1991); Ark. Code Ann. 9-12-314(b) (Repl. 1991); *see Sullivan v. Eden, supra.* Furthermore the court may not set aside, alter, or modify any decree, judgment or order which has accrued unpaid support prior to the filing of the motion. Ark. Code Ann. 9-14-234(b) (Repl. 1991); Ark. Code Ann. 9-12-314(c) (Repl. 1991); *see Sullivan, supra.* While it appears that there is no exception to the prohibition against the remittance of unpaid child support, the commentary to the federal regulations which mandated our resulting State statutes, makes it clear that there are circumstances under which a court might decline to permit the enforcement of the child-support judgment. The commentary states:
>
> > [e]nforcement of child support judgments should be treated the same as enforcement of other judgments in the State, and a child support judgment would also be subject to the equitable defenses that apply to all other judgments. Thus, if the obligor presents to the court or administrative authority a basis for laches or an equitable estoppel defense, there may be circumstances under which the court or administrative authority will decline to permit enforcement of the child support judgment. 54 Fed. Reg. 15,761 (April 19, 1989).

Id. at 252-53, 809 S.W.2d at 824[1]. This court has often stated that Ark. Code Ann. § 9-14-234 prohibits the modification of child-

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[1] The supreme court noted in *State v. Robinson*, 311 Ark. 133, 842 S.W.2d 47 (1992), the that its decision could be read to conflict with *Roark v. Roark, supra*, and *Cameron v. ADHS*, 36 Ark. App. 105, 818 S.W.2d 591 (1991). It concluded that "To prevent any possible confusion, we note that the federal regulation quoted in those cases. 54 Fed. Reg. 15,761 (April 19, 1989), is not related to visitation or custody defenses, and to the limited extent that there may be some conflict, they are overruled." *State v. Robinson*, 311 Ark. at 136, 842 S.W.2d at 48. Unlike *State v. Robinson*, the present case does not involve a visitation or

support orders that retroactively affect the time period before the petition for modification was filed and proper notice given to the opposing party. *Laroe v. Laroe,* 48 Ark. App. 192, 893 S.W.2d 344 (1995). However, this court has affirmed the use of equitable defenses to prevent the enforcement of a child-support order, including arrearages. *See Ramsey v. Ramsey,* 43 Ark. App. 91, 861 S.W.2d 313 (1993); *ADHS v. Cameron,* 36 Ark. App. 105, 818 S.W.2d 591 (1991); *Roark v. Roark; supra.* The elements of equitable estoppel are (1) the party to be estopped must know the facts; (2) she must intend that her conduct shall be acted on or must so act that the party asserting estoppel has a right to believe the other party so intended; (3) the party asserting estoppel must be ignorant of the facts; and (4) the party asserting estoppel must rely on the other's conduct to his detriment. *ADHS v. Cameron, supra.* This court applied equitable estoppel in both *Ramsey, supra* and *Cameron, supra.*

In *Ramsey,* the parties divorced in December 1985 and Mr. Ramsey was ordered to pay Mrs. Ramsey $300 a month in child support. The parties continued to live together after the divorce. In 1992, Mrs. Ramsey filed a motion seeking $25,800 in past-due child support. Mr. Ramsey raised the affirmative defense of equitable estoppel, contending that he had been the children's primary supporter since the divorce and until the parties separated in 1992. At trial, both parties testified that they lived together after the divorce and paid bills from a joint checking account. Mr. Ramsey testified that he and Mrs. Ramsey and two children continued to operate as a family unit after the divorce. Mrs. Ramsey disputed this fact contending that Mr. Ramsey was gone from the home for long periods of time and that they did not live together as husband and wife. She also stated that she did not consent to his living in the home. Mr. Ramsey testified that he used a lump-sum disability settlement to enlarge the house Mrs. Ramsey received in the divorce, to pay a debt owed to her father, and to pay family expenses such as taxes, insurance, medical treatment, food, and clothing. One of the daughters testified that her dad helped support the family and that he had been there most of the time since 1985. A neighbor also testified that Mr. Ramsey was in the home the majority of the time after the divorce. She stated that Mrs. Ramsey once told her that she could not make it with her daughters without him. The trial court held that Mrs. Ramsey was estopped from claiming child-support arrearages that accrued between December

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custody defense, but rather only a defense to child-support payments.

1985 and January 1992. This court affirmed stating that the circumstances were sufficient to establish equitable estoppel.

Although appellant contends that we would have to overrule *Ramsey* in order to rule in favor of appellee, we believe that *Ramsey* supports our decision. Here, appellant left David with his sister on October 23, 1995, and admitted that she provided no support for him when he was out of her home. Her conduct of dropping her son off gave appellee a right to believe that she intended him to act. Appellee relied on her conduct to his detriment by not making child-support payments to appellant and instead providing the support through his daughter and directly to his son when his son began living with him in August 1996. With a few exceptions, the appellee had been paying child support regularly. Similar to *Ramsey*, appellant waited approximately five years before complaining of appellee's failure to pay child support. Moreover, David went to live with appellee in August 1996 and continued to live with him throughout high school, without any assistance from appellant. The chancellor found that the circumstances were sufficient to establish equitable estoppel.

We review the chancellor's decision *de novo*, but do not disturb his findings unless they are clearly against the preponderance of the evidence. *Roark v. Roark, supra.* In this case, we cannot say that the chancellor's finding of equitable estoppel was clearly erroneous.

Affirmed.

CRABTREE, J., agrees.

ROBBINS, J., concurs.

JOHN B. ROBBINS, Judge, concurring. I concur with the majority decision to the extent that it does not require appellee to actually pay appellant for the support that accrued for their son David during the four years or so after August 1996 that David resided with appellee. The rationale, however, for my position differs somewhat from that of the majority.

On our de novo review the majority affirms the trial court's finding that appellant should be barred from collecting this support by application of the principle of equitable estoppel. However, I do not believe it necessary to resort to equity for a defense to enforcement of appellee's support obligation. Equitable remedies and

defenses have historically served to provide relief where law was inadequate to do so. Here, however, the law provided the court with a remedy where a child, for whom support is ordered to be paid, in fact resides with the noncustodial parent. Arkansas Code Annotated sections 9-12-314(c) and 9-14-234(c) (Repl. 1998) provide:

> (c) The court may not set aside, alter, or modify any decree, judgment, or order which has accrued unpaid support prior to the filing of the motion. However, the court may offset against future support to be paid those amounts accruing during time periods, other than reasonable visitation, in which the noncustodial parent had physical custody of the child with the knowledge and consent of the custodial parent.

Pursuant to this statute, appellee's current support obligation could be terminated, at the earliest, when appellee filed his petition on February 18, 2000, seeking such termination. Although appellee was held no longer responsible for current support after that time, Ark. Code Ann. § 9-14-235(a) requires that as to any arrearage in support existing when the obligation to pay current support terminates, the obligor shall pay such arrearage by continuing "to pay an amount equal to the court-ordered child support, or an amount to be determined by a court based on the application of guidelines for child support under the family support chart, until such time as the child support arrearage or judgment has been satisfied."

Applying these statutory provisions to the facts of this case, we should conclude that the $15,000 of support that had already accrued when appellee petitioned to terminate his support duty had become a judgment pursuant to Ark. Code Ann. §§ 9-12-314(b) and 9-14-234(b) (Repl. 1998). Thereafter, even though appellee was no longer responsible for current support, he was obligated by virtue of Ark. Code Ann. § 9-14-235(a) to continue paying the sum of $68 per week until his total arrearage was paid. However, pursuant to §§ 9-12-314(c) and 9-14-234(c) the trial court could offset against this ongoing obligation the $15,000 which had accrued while David resided in appellee's household with the knowledge and consent of appellant. And this, I submit, is what we should consider the trial court to have done, notwithstanding the trial court's reference to equitable estoppel. To do so would not be inconsistent with the cases cited in the majority where equitable defenses against enforcement of support orders were upheld, because none of those cases turned on the fact that the child for whom support was being paid was actually residing away from the

custodial parent in the obligor's household. *See Ramsey v. Ramsey*, 43 Ark. App. 91, 861 S.W.2d 313 (1993) (children, custodial parent, and obligor all resided in same residence as a family unit); *Ark. Dep't of Human Servs. v. Cameron*, 36 Ark. App. 105, 818 S.W.2d 591 (1991) (custodial parent induced obligor to sign consent to adoption but, unknown to obligor, adoption was not pursued); *Roark v. Roark*, 34 Ark. App. 250, 809 S.W.2d 822 (1991) (custodial parent interfered with obligor's visitation rights).

For the foregoing reasons, I believe that the trial court's refusal to require appellee to pay support that accrued while David was residing in his household was not error, but should have been based upon the offset provisions of §§ 9-12-314(c) and 9-14-234(c).

Tony BONHAM, Jr. *v.* STATE of Arkansas

CA CR 00-1115 43 S.W.3d 753

Court of Appeals of Arkansas
Division II
Opinion delivered April 25, 2001

Tiner & Spruell, by: *Raymond l. Spruell, Jr.*, for appellant.

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

LARRY D. VAUGHT, Judge. Appellant, Tony Bonham, alleges that the circuit court committed reversible error during his revocation hearing concerning two separate felony charges. In support of his assertion, he asks this court to specifically consider whether the circuit court lacked jurisdiction, whether he received proper notice of the revocation hearing, and the circuit court's failure to hold a preliminary hearing. After a review of all issues raised by appellant, we affirm the circuit court in all respects.

On February 26, 1999, appellant entered a plea of *nolo contendere* to arson, criminal mischief, and theft-of-property charges filed against him in Poinsett County, case number CR 98-147. Appellant received a twelve-month suspended imposition of sentence for each conviction. On September 24, 1999, the State filed an amended petition to revoke appellant's probation. Pursuant to the State's petition, the circuit court declined to enter a specific sentence, but extended appellant's probation by two years. Again,

the State filed a petition to revoke appellant's probation, and on December 27, 1999, the circuit court found that appellant had violated the terms of his probation. A sentencing hearing was held on January 25, 2000, and appellant received a sentence of ten years of supervised probation for the theft conviction, and a specific sentence of probation for twelve consecutive years on criminal mischief, but the circuit court did not enter a specific term on the arson charge and ordered a probationary period, without pronouncement of a sentence, for a period of ten years.

On September 17, 1998, a felony information was filed against appellant in Poinsett County for criminal mischief and intimidating a witness, case number 98-215. On October 6, 1999, appellant entered a guilty plea to criminal mischief. Appellant was released without pronouncement of a specific sentence, but was placed on three years of supervised probation and three years of unsupervised probation. On December 27, 1999, a hearing was held to address a petition for revocation filed by the State. The circuit court found that appellant had violated the terms of his probation. At a sentencing hearing on January 25, 2000, the circuit court again declined to sentence him to a specific term and instead merely extended his probation period to six years of supervised probation.

On May 21, 2000, appellant was arrested for battery in the first degree. On May 24, 2000, the State again filed a petition to revoke appellant's probation in Poinsett County for case numbers CR 98-147 and CR 98-215. The bench warrant served on appellant listed his date to appear as July 5, 2000. Appellant appeared before Poinsett County Circuit Judge Fogleman on June 2, 2000; at this hearing appellant received notice that his revocation hearing was scheduled for June 13, 2000. On June 13, 2000, the circuit court found that appellant had violated the terms of his probation by a preponderance of the evidence in both cases, for "fighting, drinking, and battery in the first degree — now a homicide." On the criminal mischief charge, case 98-215, appellant received six years' imprisonment in the Arkansas Department of Correction, and he also received ten years' imprisonment in the Arkansas Department of Correction on the arson count, case 98-147. Appellant appeals the combined sentence of sixteen years' imprisonment imposed on June 13, 2000.

For his first point, appellant contends that the circuit court had no jurisdiction to alter, amend, or modify his sentence. Appellant argues that his sentence had "been put into execution prior to each revocation hearing" and that the circuit court cannot amend or

modify an original sentence once put into execution. Appellant's argument is premised on there having been multiple revocations filed in these cases. In 98-147 appellant received specific sentences on theft and criminal mischief at the January 25, 2000, sentencing after revocation, but his probation was continued in the arson charge. In 98-215 he was never specifically sentenced after revocation, his probation was merely continued on January 25, 2000.

Appellant can only prevail on appeal if an extension of probation is an execution of sentence. This issue was addressed by the Arkansas General Assembly in 1999. Arkansas Code Annotated section 5-4-309(f) provides:

> (f) (1) (A) If the court revokes a suspension or probation, it may enter a judgment of conviction and may impose any sentence on the defendant that might have been imposed originally for the offense of which he was found guilty.
> (B) Provided, that any sentence to pay a fine or to imprisonment, when combined with any previous fine or imprisonment imposed for the same offense, shall not exceed the limits of § 5-4-201 or § 5-4-401, or, if applicable, § 5-4-501.
>
> (2) (A) *For purposes of this subsection, the term "any sentence" includes the extension of a period of suspension or probation.*
> (B) *If, upon revocation, an extension of suspension or probation is made, the court is not deprived of the ability to revoke such suspension or probation again should the defendant's conduct so warrant.*[1]

(Emphasis added.)

The statutory language in section 5-4-309(f)(2) clearly addresses the propriety of the circuit court's action to continue appellant's suspension periods multiple times before entering a sentence.

Appellant cites *Ramey v. State*, 62 Ark. App. 204, 972 S.W.2d 952 (1998), for the proposition that probation cannot be revoked a second time in the same case. However, *Ramey* is easily distinguished from the case at bar. In *Ramey*, a revocation hearing was held and a specific sentence of ninety days' imprisonment was

[1] The 1999 amendment added subsection (f)(2) and made stylistic changes.

given, then the circuit court revoked the probation again and sentenced Ramey to five years' imprisonment. The court therefore not only revoked Ramey's probation twice for the same offense, but placed two separate sentences into execution.

Here, Ark. Code Ann. § 5-4-309(f) provides the circuit court with ample authority and jurisdiction to enter a judgment of conviction upon a second or subsequent revocation and impose any sentence that might have been imposed originally for the offense of which he was found guilty.

For his second point on appeal, appellant claims that the circuit court erred in holding the revocation hearing on June 13, 2000, rather than on the previously scheduled date of July 5, 2000. However, appellant made no objection to the timing of the hearing, nor did he move for a continuance. Although this issue was not properly preserved for appeal, if we were to address it we would find no error. We have reviewed the language contained in Arkansas Code Annotated section 5-4-310(b)(3) (Repl. 1997). This section provides that "the defendant shall be given prior written notice of the time and place of the revocation hearing, the purpose of the hearing and the condition of suspension or probation that he is said to have violated." Appellant admits that he received notice from Judge Fogleman on June 2, 2000, that the revocation hearing had been rescheduled from July 5, 2000, to June 13, 2000. If a defendant is given actual notice of the time and place of a hearing, the lack of written notice of the time and place of the hearing is not reversible error. *Reynolds v. State,* 282 Ark. 98, 100, 666 S.W.2d 396, 397 (1984).

Finally, appellant argues that the circuit court violated Ark. Code Ann. § 5-4-310(a)(1) (Repl. 1997), which affords a defendant a preliminary hearing to determine whether there is reasonable cause to believe he has violated a condition of suspension or probation. First, it is clear from the record that a hearing was held before Judge Fogleman on June 2, 2000. During this hearing the revocation hearing was rescheduled from the original date of July 5, 2000, to June 13, 2000. However, the appellant did not present any preliminary matters at this hearing. Second, a preliminary revocation hearing is not required to determine if a defendant has violated a condition of suspension if he is arrested for committing another criminal offense. *Brandon v. State,* 300 Ark. 32, 776 S.W.2d 345 (1989). In *Dunavin v. State,* 18 Ark. App. 178, 712 S.W.2d 326 (1986), this court reasoned that a probable-cause hearing on the underlying new offense serves the same purpose as a

preliminary hearing on the suspension revocation. Where the defendant was charged with violating conditions of his suspension because he committed the offense of criminal attempt, the probable-cause hearing on the criminal attempt charge served the same purpose as a preliminary hearing on the suspension revocation, and the defendant was not prejudiced by the lack of a preliminary hearing pursuant to subsection (a) of this section. *Id.*

Appellant's argument that he was in essence forced into a murder trial at a time when he was expecting a preliminary hearing is overly dramatic and without merit. Appellant has presented no convincing evidence that the June 2, 2000, hearing was not in fact a preliminary hearing, and *Dunavin* provides ample authority that a probable-cause hearing serves as an adequate preliminary hearing forum.

The circuit court is affirmed in all respects.

ROBBINS and CRABTREE, JJ., agree.

Rennae SIMS and Rebecca Sims *v.*
FIRST STATE BANK of PLAINVIEW

CA 00-673 43 S.W.3d 175

Court of Appeals of Arkansas
Division II
Opinion delivered April 25, 2001

Mobley Law Firm, by: *Jeff Mobley*, for appellants.

Terry Sullivan, for appellee.

LARRY D. VAUGHT, Judge. This is an appeal from an order of the Yell County Circuit Court interpreting and enforcing an earlier order of replevin and finding appellants Rennae Sims and Rebecca Sims in contempt of court. In 1994, Mr. Sims sold a John Deere tractor, a backhoe, and a front-end loader to William Foster, who gave him a promissory note and security interest in the equipment. Mr. Sims, however, did not file a financing statement covering the equipment. Mr. Foster later gave appellee First State Bank of Plainview a security interest in a "JOHN DEERE MODEL 750 BACKHOE SR#CHO750SO28578,"along with all accessions and additions, as collateral for a loan. The financing statement, which was filed in February 1995, listed the property as "JOHN DEERE MODEL 750 BACKHOE SR#CHO750SO28

578," and included all "accessions, accessories, additions, amendments, attachments, [and] modifications ...." Mr. Foster pledged the same equipment as collateral for another loan with appellee in 1996. After Mr. Foster defaulted on his debt to appellee, appellee filed a foreclosure suit against him on December 9, 1998. In February 1999, Mr. Sims notified Mr. Foster that he was in default on his debt to him; the next month, Mr. Foster allowed Mr. Sims to repossess the equipment. In April 1999, appellee obtained a foreclosure decree ordering the property sold; appellee purchased it at the sale held in July 1999. Mr. Sims, however, sold this equipment to James Hasty in August 1999.

In October 1999, appellee filed suit against appellants and Mr. Hasty for possession of the equipment. Appellants filed an objection to the issuance of an order of delivery, stating that they were the lawful owners of the tractor and the other equipment, and attached copies of the promissory note and security agreement signed by Mr. Foster. Appellants also filed an answer and a counterclaim asserting ownership of the equipment with attached copies of Mr. Sims's letter informing Mr. Foster that he was delinquent on his account, Mr. Hasty's promissory note, and Mr. Hasty's checks given in partial payment of his obligation to appellants. In response to appellants' counterclaim, appellee stated that it was obvious from the pleadings that appellants had failed to file the security agreement Mr. Foster had given them, and therefore, their security interest was unperfected and subordinate to appellee's security interest in the equipment. On November 10, 1999, appellee filed a motion for judgment on the pleadings.

On November 23, 1999, the circuit judge entered an order finding that appellee had a valid financing statement and security agreement covering the following property: "John Deere Tractor, serial number CHO750SO28578, with attached backhoe." He also found that appellee's interest in the property took priority over appellants' unrecorded and unperfected security interest. The circuit judge granted appellee's motion for judgment on the pleadings, declaring appellee the owner of the property and granting it an immediate order of possession.

Appellee filed a motion for contempt and other relief on December 1, 1999, asserting that, after the entry of the replevin order, appellee hired a truck and driver to remove the equipment from appellants' premises; however, upon arrival, appellee discovered that appellants had detached the front-end loader from the tractor. Appellee alleged that the front-end loader had previously

been attached to the tractor at all times and was an integral part of it, stating, "the backhoe in question is a totally useless piece of equipment without the front-end loader which has been removed ...." Appellee requested that appellants be ordered to release the front-end loader to appellee and that they be held in contempt. In response, appellants asserted that the tractor, backhoe, and front-end loader were three separate pieces of equipment and that appellee did not have a lien on the front-end loader because it had not been specifically mentioned in appellee's financing documents.

On December 16, 1999, appellee filed an amended complaint for replevin of the front-end loader, which it described as an "accessory" and "part and parcel of the backhoe ...." On January 24, 2000, appellants filed a response to appellee's amended complaint, an amended counterclaim, and a motion to set aside the November 1999 order on the ground that appellee's financing statement contained an inadequate description of the equipment. According to appellants, this description was so inadequate that it rendered all of appellee's financing documents ineffective to create any lien on the equipment. Therefore, appellants argued, their own security interest in the equipment, which was specifically described, took priority, even though it was unrecorded. In response, appellee asserted the defense of *res judicata* because appellants had failed to appeal from the November 1999 order finding it to have a valid security interest that took priority over appellants' interest in the equipment. Appellants replied that the circuit court could set aside the November 1999 order within ninety days by reason of a mistake or newly discovered evidence.

The circuit judge held a hearing on March 30, 2000, at which he took testimony about the nature of the front-end loader and heard the arguments of counsel. Gary Boland, an assistant vice-president of appellee, testified that, when appellee attempted to replevy the equipment, it was broken apart; the front-end loader was in five or six pieces; and the backhoe could not be reattached to the tractor without using a bracket that went with the front-end loader. On the first trip, he said, only the tractor was recovered; appellee later recovered the backhoe by hiring someone with a tractor and front-end loader. Mr. Boland said that the backhoe is not useable without the front-end loader. He also stated that, when appellee's employees viewed the equipment at Mr. Hasty's premises before appellee filed the replevin action, the front-end loader was attached to the tractor.

Clark Haynes, the manager of a John Deere dealership, testified that the backhoe will not work without the front-end loader. Mr. Foster stated that the entire time he owned the equipment, he never detached the front-end loader from the tractor, and affirmed that the backhoe is not useable without the front-end loader. Mr. Hasty also testified that the front-end loader was attached to the tractor when he first viewed the equipment at Mr. Foster's premises and when he took it home. He said that he also never detached it from the tractor.

In his order dated April 13, 2000, the circuit judge found that the front-end loader was attached at all times to the tractor and that the tractor, backhoe and front-end loader were included within appellee's security agreements, which covered "all accessories, additions, [and] attachments ...." to the collateral. He further found that the front-end loader was "part and parcel of the equipment that should have been replevied" by appellee. He ordered appellants to reassemble and reattach the front-end loader to the tractor within thirty days and found appellants in contempt for removing it from the tractor. He gave appellee judgment for $200 for its expenses in attempting to recover the front-end loader, as well as its related attorney's fees.

In their first point on appeal, appellants contend that the circuit judge erred in finding that appellee's security interest had priority over appellants' interest and, therefore, he should not have granted judgment on the pleadings to appellee. Appellants also assert that, because of their contract with Mr. Foster, they were the rightful owners of the property. They further contend that this issue is outside the terms of the Uniform Commercial Code's provisions regarding the priority of security interests. Appellants, however, conceded the validity of appellee's security interest in the equipment before the earlier order was entered. They did not make these arguments to the circuit judge before he entered the November 1999 order of replevin, nor did they file an appeal from that order. Therefore, they are now in no position to complain about the validity of appellee's security interest in, or right to possess, the equipment. When a judgment becomes final, it is protected by the common law principle of *res judicata*, and the findings and orders of the decree cannot later be collaterally attacked, even if they are erroneous. *Ford v. Ford*, 30 Ark. App. 147, 783 S.W.2d 879 (1990). *See also Knox v. Knox*, 25 Ark. App. 107, 753 S.W.2d 290 (1988).

Clarification of the November 1999 Order

Appellants next argue at length that the circuit judge erred in denying their January 24, 2000, motion to set aside the November 1999 replevin order because appellee's financing statements contained such inadequate descriptions of the equipment as to render them unenforceable. According to appellants, the circuit court had jurisdiction under Arkansas Rule of Civil Procedure 60(b) to set the previous order aside. Appellants also claim that the financing documents' inadequate description of the collateral amounted to newly discovered evidence. We disagree.

Rule 60(b), as it stood at the time appellants filed their motion, provided that, to correct any error or mistake, or to prevent the miscarriage of justice, a court could modify an order within ninety days of its filing. (Rule 60 was amended by *In Re: Arkansas Rules of Civil Procedure*, 340 Ark. 738 (January 27, 2000).) The only exceptions to the ninety-day limit in Rule 60(b) were set out in subsections (a) and (c). Provision (a) stated that, after the ninety-day deadline, a court only had jurisdiction to correct clerical errors.[1] Rule 60(c) enumerated seven different grounds by which a court could set aside or modify a judgment. It provided that, after ninety days, a new trial could be granted on the basis of newly discovered evidence which the moving party could not have discovered in time to file a motion under Rule 59. It is settled law that a new trial based on newly discovered evidence is not a favored remedy, and whether to grant a motion for new trial on such grounds is within the sound discretion of the trial judge. *Lee v. Lee*, 330 Ark. 310, 954 S.W.2d 231 (1997). In a hearing on a motion for new trial based on newly discovered evidence, the burden is on the movant to establish that he could not with reasonable diligence have discovered and produced the evidence at the time of trial. *Id.*

Appellants, however, did not establish that they could not, with due diligence, have discovered this matter before entry of the judgment on the pleadings. Appellants' attorney admitted that, before entry of the November 1999 order, he had overlooked what he later thought was a problem with the description of the collateral in

[1] Although appellants filed their motion to set aside the November 23, 1999, order within ninety days, the hearing on that motion was not held until March 30, 2000, and the resulting order was entered on April 13, 2000. Both events occurred outside Rule 60(b)'s ninety-day limit. Because the relief sought by appellants was far more substantive than the correction of a clerical error, appellants' only possible means of setting aside the judgment was Rule 60(c).

appellee's financing documents. He said that, only later, after discussing the matter with people in the farming industry, did he believe there was a problem with the description.

After ninety days, without the showing of one of the exceptions listed in Rule 60, a court has no power to modify or set aside an order. *See Blackwood v. Floyd,* 342 Ark. 498, 29 S.W.3d 694 (2000). A court can only correct the record to make it conform to action that was actually taken; a decree cannot be modified to provide action that the court, in retrospect, should have taken but which it in fact did not take. *Holt v. Holt,* 70 Ark. App. 43, 14 S.W.3d 887 (2000). *Accord Taylor v. Zanone Props.*, 342 Ark. 465, 30 S.W.2d 74 (2000). However, a court does have the power to correct a decree to more accurately reflect its original ruling. *Ford v. Ford, supra.* We have long recognized the inherent power of the courts to enter orders correcting their judgments where necessary to make them speak the truth and reflect actions accurately. *Id. Accord McGibbony v. McGibbony*, 12 Ark. App. 141, 671 S.W.2d 212 (1984).

Therefore, when the circuit judge entered his order of April 13, 2000, finding the front-end loader to be a part of the tractor for which replevin had been ordered in November 1999, the circuit court had no jurisdiction to revisit the issue of the validity of appellee's financing documents. That court did, however, have jurisdiction to interpret its November 1999 order as including the front-end loader and to enforce that order, which is precisely what it did in April 2000. At the March 30, 2000, hearing, the circuit judge stressed that the controlling issue was whether the front-end loader was a part of the tractor. He heard extensive testimony demonstrating that, at all relevant times, the front-end loader was in fact attached to, and an integral part of, the tractor. We will not reverse his finding of fact to that effect unless it is clearly against a preponderance of the evidence. *Fulkerson v. Van Buren*, 60 Ark. App. 257, 961 S.W.2d 780 (1998). Because the circuit judge did not err in denying appellants' motion, we must also reject appellants' argument that, under Arkansas Rule of Civil Procedure 61, their rights were adversely affected in a manner inconsistent with substantial justice.

Contempt

Appellants also argue that the circuit judge erred in finding them in contempt of court. In cases of civil contempt, the objective is the enforcement of the rights of private parties to litigation.

Wakefield v. Wakefield, 64 Ark. App. 147, 984 S.W.2d 32 (1998). Punishment for civil contempt will be upheld by this court unless the trial court's order is arbitrary or against the weight of the evidence. *Id.*

Appellants point out that the November 1999 order did not expressly refer to the front-end loader, nor did appellee's financing documents. Before a person may be held in contempt for violation of a judge's order, the order alleged to be violated must be definite in its terms as to the duties imposed and the command must be express rather than implied. *Johnson v. Johnson,* 343 Ark. 186, 33 S.W.3d 492 (2000). When a party does all that is expressly required of him, it is error to hold him in contempt. *Id.* Although appellee proved that the front-end loader was within the terms of the financing documents, it was not expressly mentioned in the November 1999 order. Therefore, we hold that it was error to find appellants in contempt for not delivering the front-end loader after entry of the November 1999 order. However, we affirm that part of the circuit judge's order directing appellants to reassemble the front-end loader and to deliver it to appellee within thirty days.

Affirmed in part; reversed and remanded in part.

ROBBINS and CRABTREE, JJ., agree.

Bobbie SMITH *v.*
COUNTY MARKET/SOUTHEAST FOODS
and Wausau Insurance Company

CA 00-0656 44 S.W.3d 737

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered April 25, 2001

Howard J. Goode, for appellant.

Michael E. Ryburn, for appellees.

LARRY D. VAUGHT, Judge. This is an appeal from a decision of the Arkansas Workers' Compensation Commission denying additional temporary total disability benefits, permanent disability benefits, and medical expenses. Appellant, Bobbie Smith, argues that the Commission erred in ruling that she failed to establish a compensable injury by medical evidence, supported by objective findings. We reverse and remand the decision of the Commission for further proceedings.

Bobbie Smith was working as a cashier at County Market on October 2, 1995, when she slipped and fell on a recently-mopped floor at the workplace, during work hours. Appellee initially accepted her injury as compensable, and stipulated that it was work-related. Appellee paid for the cost of the claimant's medical treatment relating to complaints from the October accident through July 19, 1996. Subsequent to July 19, appellee concluded that appellant did not have objective findings sufficient to support a claim of compensability. However, appellant utilized her health insurance to obtain additional treatment and diagnostic studies after her employer controverted the compensability of the claim in July of 1996.

Appellant's primary complaint, after her fall, was bruising and pain in her hip. She was evaluated by Dr. Norris Knight, an orthopaedic surgeon. who referred her to Dr. Freddie Contreras, a neurosurgeon, for her complaints of low back pain. After several radiographic diagnostic studies, including an MRI, myleogram, and CT scan, that were essentially normal, Dr. Contreras referred Smith to a physical medicine and rehabilitation specialist, Dr. Rosham Sharma, in an effort to treat her conservatively, without surgery. Dr. Sharma treated Smith over a course of time, noting muscle spasm in her back, atrophy, and a decreased size in her right calf muscle. Dr. Sharma eventually recommended a "discogram," which was obtained on August 22, 1996, from a Dr. Patrick Peavey in Shreveport, Louisiana.

The discogram revealed certain abnormalities at the L4-L5 level that were characterized as a disc bulge or a "large annular"

fissure. Based on the results of the discogram, Dr. Sharma assigned a 15% physical impairment rating to the body as a whole, relying on the *AMA Guide to Evaluation of Permanent Impairment,* 3rd Edition. Subsequently, the ALJ awarded benefits based on Dr. Sharma's impairment rating, and appellant's wage-loss claim. The Commission reversed, over the dissent of Commissioner Humphrey, based on its view that a fissure indicated by a discogram is not an "objective finding" to support a compensable injury under the Arkansas Workers' Compensation Act.

Arkansas Code Annotated section 11-9-102(5)(D) (Repl. 1997) provides that a compensable injury must be established by medical evidence supported by "objective findings." An objective finding is defined as a finding that cannot come under the voluntary control of the claimant. Ark. Code Ann. § 11-9-102(16) (Repl. 1997). This court reviews decisions of the Workers' Compensation Commission to see if they are supported by substantial evidence. *Deffenbaugh Indus. v. Angus,* 39 Ark. App. 24, 832 S.W.2d 869 (1992). Substantial evidence is that relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *Wright v. ABC Air, Inc.,* 44 Ark. App. 5, 864 S.W.2d 871 (1993). The issue is not whether this court might have reached a different result from that reached by the Commission, or whether the evidence would have supported a contrary finding. If reasonable minds could reach the result shown by the Commission's decision, we must affirm the decision. *Bradley v. Alumax,* 50 Ark. App. 13, 899 S.W.2d 850 (1995). Further, the Commission has the authority to accept or reject medical opinions, and its resolution of the medical evidence has the force and effect of a jury verdict. *Estridge v. Waste Management,* 343 Ark. 276, 33 S.W.3d 167 (2000).

Based on the letters and reports from Dr. Peavy, we note that he performed a "five level lumbar discogram" at the request of Dr. Sharma. The discogram involves injecting a dye into the disc spaces, and observing both the patient's pain response to the different injections at each level and observing the dispertion pattern of the dye on x-ray and CT films. Dr. Peavy stated that diskography is "somewhat controversial" but does appear to be useful in certain cases. He admits that some of the "provocative response is subjective," but he describes Smith's pain response as "unequivocal." Smith's pain response at the L4-L5 level was consistent with "fissuring" on that level that he visualized on an accompanying CT scan. In later correspondence to appellant's attorney, Dr. Peavy stated that the significant objective anatomic findings were at the L4-L5 level where a "fairly large central annular fissure" was observed on

CT scan. He also noted a small "focal associated bulge" at this level. Dr. Peavy was not deposed, and did not testify at the hearing. His report and correspondence were stipulated to and admitted at the hearing.

In support of Dr. Peavy's discogram, appellant submitted a letter from Dr. Joseph Greenspan. Dr. Greenspan offers the opinion that the discogram on Bobbie Smith was composed of three parts, two of which are objective. He admits that the third might be considered subjective for purposes of the Arkansas Workers' Compensation Act. He says that the "post-injection plain films" document "one markedly positive disc and four distinctly negative control discs." Dr. Greenspan opines that the second part, the objective post-injection CT scan films, document the same findings. The third portion of the test, based on the patient's pain response, is consistent with the first two. Dr. Greenspan goes on to state that the discogram is the "diagnostic gold standard" when MRI and CT scans fail to document disc pathology. Dr. Greenspan was not deposed, and did not testify at the hearing. His letter opinion was admitted at the hearing. However, Dr. Greenspan's report is never mentioned in the Commission's decision.

Appellant's treating neurosurgeon, Dr. Contreras, takes a different view of the validity of the discogram. He states in deposition that he has not ordered more than one discogram in ten years, that he believes them to be 99% unreliable, and that he believes healthy discs will exhibit the same changes on discogram as diseased discs. However, he admits that a discogram is an approved test by the "Medical Association."

The Commission denied benefits based on the discogram results not confirming the "objective findings" required by the Act. Clearly, a patient's pain response to an injection in his spine is something at least partially within his control, and potentially subject to manipulation. However, radiographic images of the dye, once injected into the spine, are clearly not subject to a claimant's manipulation. Results of x-ray, CT scan, MRI, and other radiographic and computerized diagnostic studies are "objective findings" for purposes of the Arkansas Workers' Compensation Act. Therefore, we must conclude that an x-ray and CT scan of the spine, with dye contrast, cannot be rendered meaningless in a Workers' Compensation context just because a patient's pain response during the injection of the dye is taken into account.

While the Commission hinges its analysis upon a lack of "objective findings," it may be that it is attempting to embrace Dr. Contreras's skepticism about the value of the discogram findings in light of numerous "normal" CT and MRI scans. Reasonable minds may disagree about the significance of objective findings; however, it is impossible to disagree that objective findings do exist. Here, the Commission may believe, as does Dr. Contreras, that the results of Smith's discogram do not indicate surgery, and may simply represent the degenerative aging process. However, reasonable minds cannot conclude that evidence of Dr. Peavy's visualization of a fissure is not objective in nature.

The Commission attempts to announce a bright-line rule prohibiting discograms to prove "objective findings" in Arkansas Workers' Compensation proceedings. This is contrary to a strict reading of the text of the statute in that the discogram, as described here, is clearly an objective test that also takes into account a patient's subjective pain response.

For her second point on appeal, appellant argues that the Commission erred in disregarding two other "objective findings" supporting her injury, namely muscle spasm and muscle atrophy, both observed and noted by Dr. Sharma. Appellee and the Commission seem to suggest that the Commission is free to disregard such findings when they are not clearly linked to the compensable injury. Dr. Contreras opined that he could not say for certain that the atrophy resulted from a disc injury. However, as Commissioner Humphries' dissent points out, the standard is not one of "absolute certainty," but merely a "reasonable degree of medical certainty." The Commission is the finder of fact, and is free to disregard medical testimony that it deems incredible. *Estridge, supra.* However, muscle spasm, or involuntary muscle contraction or tension and shortness in the muscles, has been held to be an "objective finding." *See Continental Express, Inc. v. Freeman*, 339 Ark. 142, 4 S.W.3d 124 (1999); *UAMS v. Hart*, 60 Ark. App. 13, 958 S.W.2d 546 (1997).

Therefore, we reverse and remand the decision of the Commission, for further proceedings consistent with this opinion.

PITTMAN, HART, GRIFFEN, CRABTREE, and BAKER, JJ., agree.

Troy PIERCE *v.* Casie PIERCE

CA 00-1231 43 S.W.3d 192

Court of Appeals of Arkansas
Division III
Opinion delivered April 25, 2001

Bridges, Young, Matthews & Drake PLC, by: *Michael J. Dennis*, for appellant.

Sharon M. Fortenberry, for appellee.

ANDREE LAYTON ROAF, Judge. Troy Pierce appeals from an order of the Jefferson County Chancery Court denying his petition for change of custody. Troy alleged in his petition that his five-year-old son Lucas had suffered cigarette burns on his arm from the child's twenty-year-old half-brother Todd Grinstead, who also lived in the home with the child's mother, appellee Casie Pierce. On appeal, Troy argues that the chancellor erred in refusing to change custody after he proved that the abuse took place. We reverse and remand for appointment of a guardian *ad litem* and for further proceedings not inconsistent with this opinion.

At a hearing on the change-of-custody petition, a Jefferson Regional Medical Center certified emergency-room physician, Dr. Angelique Fontenette Burton, testified that on June 16, 2000, she observed three one-centimeter circular lesions on Lucas's right arm. She stated that to a reasonable degree of medical certainty the circular lesions, which were second-degree burns surrounded by first-degree burns, were caused by a cigarette. The condition of the burns indicated that they were twenty-four hours old. According to Dr. Fontenette, Lucas told her that the burns were caused by Grinstead, but also stated that he did not tell his mother because he did not want to get Grinstead in trouble. Charge nurse Wannetta Clowers corroborated Dr. Fontenette's testimony and also stated that she observed bruises on Lucas, some of which Lucas claimed were caused by Grinstead.

Sharon Pierce, Troy's new wife of two years, testified that she was present when Troy picked up Lucas for visitation on June 16, 2000, and she heard Casie state in regard to the burns on Lucas's arm that he was "broken out." Sharon stated that she examined Lucas's arm, which was covered in Calamine lotion. When she questioned Lucas about it, Lucas told her that Grinstead had burned him. She claimed that she believed that Grinstead had hurt Lucas

on prior occasions, but when Troy had reported this suspected abuse to DHS, no abuse was found to have occurred. According to Sharon, each time after Troy made these reports, Casie retaliated by not allowing Troy to exercise visitation with Lucas for long periods of time.

Detective Henry Hudspeth of the Pine Bluff Police Department testified that he investigated a possible battery to Lucas, and in the course of that investigation, he interviewed Lucas, Troy, Sharon, and Casie as well as Dr. Fontenette and Nurse Clowers. Detective Hudspeth stated that Lucas told him that Todd Grinstead burned him with a cigarette, and he believed the child. However, Detective Hudspeth also stated that Lucas also told him "other stories," including that he was burned on more than one occasion and that the burns were mosquito bites. Detective Hudspeth testified that he also interviewed Grinstead and that Grinstead denied hurting Lucas, however, Grinstead did admit that he had a drug problem. Detective Hudspeth stated that Grinstead was arrested on the battery charge on the night of June 16. According to Detective Hudspeth, Troy took and passed a polygraph test concerning whether he coerced Lucas in any way to incriminate Grinstead. He also stated that Grinstead and Casie refused to take a polygraph.

Troy testified that he called DHS on prior occasions, suspecting that Lucas had been abused. He stated that he found bruises on Lucas's arm from someone grabbing him and also bruises on the child's neck. However, DHS found the abuse allegations unsubstantiated. Regarding the night when he discovered the cigarette burns on Lucas, he stated that when he picked up his son, he noted that Casie had put Calamine lotion on the lesions and told him that Lucas had "broken out" with something. He testified that when he returned from a wedding, his wife Sharon told him that when she asked Lucas about his "boo-boos," the child stated that Grinstead had burned him with a cigarette.

In Casie's case-in-chief, Grinstead testified that he had been charged with second-degree battery in connection with the cigarette burns on Lucas's arm, but that the charges had been dropped. He claimed that he had stopped smoking cigarettes by the time Lucas received the lesions on his arm. However, Grinstead admitted that he had a drug problem at the time of the alleged incident, and that Casie's brother Jerry Trustee, who was also a drug-user, was living in the home at that time. According to Grinstead, although he did not smoke at the time, Casie and Casie's other son, Shane, did.

Lavonda Bailey, a family-service worker with DHS testified that she investigated two previous reports of abuse on February 10, 2000, and March 27, 2000, and that the allegations were unsubstantiated. However, she admitted that Lucas had told her that Grinstead had grabbed him by the arm and scratched him on the neck and that Grinstead "really hurts him sometimes." Bailey stated that Lucas told her that Grinstead grabbed him after he punched Grinstead "real hard" in the stomach and the eye, and that she did not regard that as abuse. She also stated that Lucas told her that sometimes he tells his parents that Grinstead hurts him to get Grinstead into trouble and that Lucas stated that Grinstead did not hurt him intentionally. She also stated that she found no permanent marks on the child. However, Bailey admitted that she had not investigated the cigarette-burn incident.

Casie testified that Lucas did not want to go to Troy's residence for visitation. She admitted that she put Calamine lotion on Lucas's lesions prior to his June 16 visit, believing that the burns were chigger or mosquito bites. According to Casie, Lucas had been scratching the lesions for three or four days. She intimated that the lesions looked like impetigo. Casie claimed that she took Lucas to his primary doctor, Dr. Wesley Cluck, and to the Arkansas Children's clinic where she was told to put Neosporin on the lesions. According to Casie, she subpoenaed Dr. Cluck, but he did not appear at the hearing. Casie claimed that she asked Lucas if Grinstead had burned him and Lucas told her that he did not. Casie claimed that Lucas made the allegation against Grinstead because Troy and Sharon would not accept his story that the lesions were "bug bites." Casie stated that while she was at work, Grinstead and Shane took care of Lucas. She admitted that she was aware that Grinstead smoked marijuana, as did her brother Jerry, who also lived in her home. After the hearing, the chancellor filed an order stating that he found insufficient evidence to warrant a change in custody. He then ordered regular visitation and appropriate child support, including an arrearage of more than $8,000.

On appeal, Troy argues that where medical evidence, stated to a reasonable degree of medical certainty, evidenced that a child had been burned several times on the arm by a cigarette and where the only person that the child attributed those burns to was a twenty-year-old half-brother, an admitted drug user who lived in the home with the child, the chancellor erred in failing to grant his petition for change of custody. Troy argues that the testimony of Dr. Fontenette and Nurse Clowers was clear, concise, and stated to a reasonable degree of medical certainty that Lucas had sustained

multiple cigarette burns on his arm. He also stated that Lucas related to several disinterested persons that Grinstead had burned him and that no medical evidence was presented to challenge this diagnosis. Further, citing *Rector v. Rector*, 58 Ark. App. 132, 947 S.W.2d 389 (1997), he contends that the drug use by Grinstead, a frequent caretaker of Lucas, is relevant in determining the best interest of the child. Regarding Grinstead's claim that he no longer smoked marijuana, Troy contends that Grinstead made the same claim to Bailey when she interviewed him on February 11, 2000, a claim that Grinstead himself refuted in his testimony at the hearing. Troy asserts that the clear evidence of child abuse in the home dictates that custody should be changed.

This court reviews chancery decisions *de novo* and reverses only if it finds that the chancellor's findings are clearly against the preponderance of the evidence. *Fitzpatrick v. Fitzpatrick*, 29 Ark. App. 38, 776 S.W.2d 836 (1989). In a custody hearing, the court considers what is in the best interest of the child. Ark. Code Ann. § 9-13-101 (Repl. 1998). In child-custody cases, the chancellor has a heavy burden of evaluating the witnesses, their testimony, and determining what is in the child's best interest.

While this court generally defers to the superior position of the chancellor to judge the credibility of the witnesses, nonetheless, on *de novo* review, we do not abdicate our role in determining the best interest of the child. Here, the record indicates that Lucas was the victim of either heinous abuse that the custodial parent tolerated or the noncustodial parent's campaign of lodging unfounded complaints of abuse. The potential for egregious harm to Lucas if the former situation is in fact true is self-evident. However, if the situation is of the latter, the risk to Lucas is also considerable. There is a significant and growing body of scholarly writing that has identified high-conflict custody disputes as forms of child abuse and maltreatment. *See generally* H. Patrick Stern, M.D., *Battered Child Syndrome: Is it a Paradigm for a Child of Embattled Divorce*, 22 U. ARK. LITTLE ROCK L. REV. 335 (2000); *see also* Kathleen Coulborn Faller, Ph.D., *Child Maltreatment and Endangerment in the Context of Divorce*, 22 U. ARK. LITTLE ROCK L. REV. 429, 446 (2000).

In our *de novo* review, all issues of law or fact raised in the chancery court are before this court for determination. *See Hansen v. Hansen*, 11 Ark. App. 104, 666 S.W.2d 726 (1984). Where error appears and the record is fully developed so that we can plainly see where the best interest of a child lies, we will correct the error by

entering the decree that should have been entered by the chancellor. *Id.* However, in this case, we cannot say that the record is fully developed as there was no satisfactory determination of what happened to Lucas. Additionally, there was very little evidence presented concerning Troy's home. Moreover, nearly seven months have now passed since the custody hearing was held. An appellate court has the discretionary power to remand an equity case for further testimony or proceedings on a limited point if that is necessary to achieve equity. *Id.* (citing *Arnett v. Lillard*, 247 Ark. 931, 448 S.W.2d 626 (1970)); *see also Ferguson v. Green*, 266 Ark. 556, 587 S.W.2d 18 (1979)). We therefore exercise our discretion and reverse and remand for further proceedings and order that the chancellor appoint a guardian *ad litem* to thoroughly investigate this case and make recommendations concerning custody.

Reversed and remanded with instructions.

STROUD, C.J., and PITTMAN, J., agree.

Lavon (Hawks) SORY *v.* Bobby Lee WOODALL, Jr.

CA 00-1111 43 S.W.3d 765

Court of Appeals of Arkansas
Division I
Opinion delivered May 2, 2001

James R. Filyaw, for appellant.

Christine Horwart, for appellee.

JOHN MAUZY PITTMAN, Judge. The appellee in this paternity/child-custody case, Bobby Woodall, is the putative father of two minor children. The appellant is the maternal grandmother of the two children. The mother died on October 5, 1999, during the birth of the younger child. The mother and the appellee were not married but were residing together prior to the mother's death. Appellee moved to Gentry, Arkansas, in December 1999. On April 26, 2000, appellee filed to establish paternity and obtain custody of the two minor children. Appellant, who then had physical custody of the children, was named as a party to that suit. Although appellant was never served and had no notice of a hearing, the trial court entered an order finding appellee to be the children's father and granting him custody. Appellant filed a motion to set aside the judgment, stating that she did not dispute appellee's paternity but that she did not believe it would be in the children's best interest for appellee to be granted custody of them. The trial court denied the motion, and this appeal followed.

Whether to set aside a judgment is a question within the sound discretion of the trial court. *Fazeli v. Barnes*, 47 Ark. App. 99, 885 S.W.2d 908 (1994). We think that the trial court abused its

discretion in the case at bar. Here, appellant had been named as a party, but had never been served and had no notice of a hearing. Furthermore, while appellant's presence at the hearing would have no bearing on the issue of appellee's paternity, it could have had a decisive impact on the question of whether custody of the children should be vested in appellee. Although there is a preference to award custody of a child to a biological parent, this preference is not absolute. *See generally Lloyd v. Butts*, 343 Ark. 620, 37 S.W.3d 603 (2001). The court may grant custody to a biological father whose paternity has been established in a court of competent jurisdiction only on a showing that (1) he is a fit parent to raise the child; (2) he has assumed his responsibilities toward the child by providing care, supervision, protection, and financial support for the child; and (3) it is in the best interest of the child to award custody to the biological father. Ark. Code Ann. § 9-10-113(c); *see Freshour v. West*, 334 Ark. 100, 971 S.W.2d 263 (1998).

According to the allegations in appellee's own motion, the children were in the custody of appellant. Furthermore, although appellee alleged that it was not in the children's best interest to remain with appellant and that their best interest would be served by placing them in appellee's custody, this was a question of fact that should have been determined after an adversarial hearing. It was appellee's choice to name appellant as a party defendant in this suit, and we note that, although appellant was never served or notified, the chancellor's order specifically directed appellant to relinquish custody of the children. A judgment rendered without notice to the parties is void *ab initio. Vanzant v. Purvis*, 54 Ark. App. 384, 927 S.W.2d 339 (1996). In the absence of any allegation that there was any emergency or exigent circumstances requiring *ex parte* action, and where appellant was a named party, where she had neither been served nor given actual notice of any hearing, where she was the *de facto* custodian of the children, and where the chancellor's order specifically directed her to relinquish custody of the children, we hold that the trial court abused its discretion in denying her motion to set aside the judgment in this case.

Reversed and remanded.

HART and VAUGHT, JJ., agree.

Mark ADAMS, *et al. v.* Richard WOLF, *et al.*

CA 00-700 43 S.W.3d 757

Court of Appeals of Arkansas
Divisions I, III, and IV
Opinion delivered May 2, 2001

Conner & Winters, P.L.L.C., by: *John R. Elrod* and *Terri Dill Chadick*, for appellants.

Friday, Eldredge & Clark, by: *William A. Waddell, Jr.*, for appellees.

JOSEPHINE LINKER HART, Judge. This case arises out of a lawsuit in which appellants sought damages from appellees for breach of warranty, breach of contract, and fraud. The trial judge granted summary judgment in favor of appellees on the ground that appellants' claims were barred by the applicable statutes of limitation. On appeal, appellants argue that the summary-judgment ruling was erroneous as it pertained to their cause of action for fraud. We agree and reverse and remand.

Appellants are forty individuals and five corporations engaged in the business of growing turkeys. In the 1980s and 1990s, their turkeys were processed at a Huntsville, Arkansas, plant operated by appellee Swift-Eckrich, Inc., a subsidiary of appellee Conagra, Inc. The plant's production manager was appellee Richard Wolf.[1] Appellants did not contract directly with Swift during this period but operated through two independent producers, Hugh McClain and Kirk Powell. McClain and Powell had written contracts with Swift whereby they purchased turkey poults from Swift, then resold the grown turkeys back to Swift for processing.

On October 21, 1998, appellants sued appellees, seeking compensatory and punitive damages for breach of warranty, breach of contract, and fraud. On the fraud count, they complained that appellees' improper weighing practices caused appellants to be paid less than they were owed. The thrust of their allegations was that appellees allowed turkeys arriving at the plant to remain on the trucks too long, causing significant shrinkage and death of turkeys; that appellees charged appellants with all dead-on-arrival turkeys without regard to fault; and that appellees improperly weighed condemned parts and carcasses. Appellants did not state a specific time period during which the abovementioned fraudulent conduct took place. However, they alleged that, beginning in 1983 and ending in March 1992, appellees concealed their misconduct so as to prevent appellants from becoming aware of their cause of action.

Appellants' lawsuit is one of many that have been filed by turkey growers against Swift since 1992. Two of the prior lawsuits that are of particular interest in this case are *Jennings v. Swift-Eckrich*, filed in federal court in Arkansas in 1993, and *Taylor v. Swift-Eckrich*, filed in federal court in Arkansas in 1994. In *Jennings*, the plaintiffs attempted certification of a class that would likely have included many of the appellants herein, but certification was denied. There is no conclusive evidence in the record before us that appellants had actual knowledge of the *Jennings* class-action attempt. In *Taylor*, certification of a similar class was attempted, and certification was granted in 1996. Appellants were notified as potential class members in approximately November 1996, but opted out, choosing instead to file the lawsuit that is the subject of this case.

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[1] Appellants direct their arguments on appeal strictly to appellee Swift. Therefore, we conclude that they agree with the trial court's dismissal of appellees Conagra and Wolf.

On May 25, 1999, appellees filed a motion for summary judgment. They argued that the complaint that appellants filed against them in 1998 was barred by the three-year statute of limitations applicable to fraud. Appellants responded that genuine issues of fact remained as to whether appellees had fraudulently concealed appellants' cause of action, thus tolling the limitation period until they discovered appellees' misconduct in November 1996, upon receiving notice of the *Taylor* class action.

Appellants and appellees attached over sixty exhibits to their pleadings filed in connection with the motion for summary judgment. Appellees used their exhibits to emphasize their claim that appellants either knew or should have known of the cause of action for fraud before November 1996. Included among those exhibits were the depositions of Hugh McClain and Kirk Powell. In McClain's deposition, he stated that the existence of the *Taylor* class action was common knowledge in the poultry industry prior to the time that notice of it was received and that he verified his belief that Swift was engaging in misconduct at the time another turkey grower's lawsuit was filed in 1992. In Powell's deposition, he stated that, at a November 1996 meeting with growers who were potential class members in the *Taylor* suit, the attorney speaking to the group expressed concern about the statute of limitations and agreed that "everyone in the room" knew about Swift's incorrect weighing practices and questions regarding condemnation calculations. Appellees also attached as exhibits the pleadings in several lawsuits that other turkey growers had filed against Swift. Between 1992 and 1996, approximately thirty such suits were filed, based upon allegations the same as or similar to those in this case. Other than the *Jennings* and *Taylor* cases previously mentioned, the most prominent of the suits was *Jackson v. Swift-Eckrich, Inc.*, filed in federal court in Arkansas by two individual growers in 1992. The suit resulted in a $341,500 verdict in favor of the growers in August 1993. The verdict was reported in newspapers throughout northwest Arkansas, and appellees attached copies of the newspaper articles to their motion. Appellees also attached excerpts from the trial testimony in the *Jackson* case in which two growers, Bill Jackson and Jack Greer, stated that they had been permitted to observe the weighing process at the Swift plant.

In response to appellees' summary-judgment motion, appellants filed approximately forty affidavits stating that they were unaware until they received notice in the *Taylor* lawsuit in November 1996 that Swift was engaging in the improper practices set forth in their complaint. Approximately eight of the affiants stated that they

suspected wrongdoing earlier, but did not actually learn of it until 1996 or later. All but one also stated that they had not read the newspaper articles that reported the 1993 *Jackson* verdict. Appellants also attached numerous investigative reports and letters of correspondence between Swift and the Packers and Stockyards Administration (hereafter "the PSA"), the federal agency charged with regulating packers such as Swift, pursuant to the Packers and Stockyards Act. *See* 7 U.S.C.A. §§ 181 to 229 (1999 & Supp. 2000). Those exhibits reveal that, as early as 1984, Swift's weighing practices and turkey marketing contracts had come under PSA scrutiny. The PSA was particularly concerned that Swift was allowing turkeys to remain on trucks too long before they were weighed and that Swift was improperly computing the weight of condemned carcasses, parts, and dead-on-arrival birds. Swift informed the PSA at that time that it believed its practices were proper and that the hauling of birds to the plant in a timely manner was the responsibility of the growers. Its practices continued until at least 1989, and possibly 1992, when Swift put certain procedures into place that apparently satisfied the PSA.

Additionally, appellants attached the affidavit of an economist, Dr. Leonard White. Dr. White stated that he had been working on cases involving Swift and its growers for over four years. He conducted an examination of the weighing tickets issued by Swift and determined that a great deal of variation was found in the tare (empty) weights for each trailer. His conclusion was that the large variations could only be explained by deliberate manipulation. He examined approximately 5,891 tickets to reach his conclusion and stated that it was only after he had examined thousands of tickets that he became aware of the possibility of deliberate manipulation. In his opinion, an individual grower would not have been able to recognize the manipulation that occurred. Finally, appellants referenced the trial testimony of Jack Greer in the *Jackson* case in which Greer stated that he had observed Swift employees estimating the weight of parts rather than weighing them on a scale.

[redacted] Following two hearings, the trial judge granted appellees' motion for summary judgment. Appellants bring their appeal from that ruling. In summary-judgment cases, we need only decide if the granting of summary judgment was appropriate based upon whether the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered. *Inge v. Walker*, 70 Ark. App. 114, 15 S.W.3d 348 (2000). The burden of sustaining a motion for summary judgment is always the responsibility of the moving party. *Id.* All proof submitted must be viewed

in a light most favorable to the party resisting the motion, and any doubts and inferences must be resolved against the moving party. *Id.*

The statute of limitations for fraud is three years. Ark. Code Ann. § 16-56-105 (1987); *Hampton v. Taylor*, 318 Ark. 771, 887 S.W.2d 535 (1994). The limitation period begins to run, in the absence of concealment of the wrong, when the wrong occurs, not when it is discovered. *Hampton v. Taylor, supra.* Appellants do not argue that appellees engaged in any conduct giving rise to a cause of action for fraud within the three years preceding the filing of the complaint. Rather, they contend that, through March 1992, appellees concealed their fraud, thus tolling the limitations period until November 1996, when appellants learned of appellees' alleged misconduct.

A concealed fraud suspends the running of the statute of limitations, and the suspension remains in effect until the party having the cause of action discovers the fraud or should have discovered it by the exercise of reasonable diligence. *SEECO v. Hales*, 341 Ark. 673, 22 S.W.3d 157 (2000). No mere ignorance on the part of the plaintiff of his rights, nor the mere silence of one who is under no obligation to speak, will prevent the statute bar. *Chalmers v. Toyota Motor Sales, USA, Inc.*, 326 Ark. 895, 935 S.W.2d 258 (1996). There must be some positive act of fraud, something so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed or perpetrated in such a way that it conceals itself. *Id.* If the plaintiff, by reasonable diligence, might have detected the fraud he is presumed to have had reasonable knowledge of it. *Id.* Although the question of fraudulent concealment is usually a question of fact that is not suited for summary judgment, when the evidence leaves no room for a reasonable difference of opinion, a trial court may resolve fact issues as a matter of law. *Id.*; *Smothers v. Clouette*, 326 Ark. 1017, 934 S.W.2d 923 (1996).

The numerous exhibits referenced above show that issues of fact remain on the matter of whether Swift engaged in positive acts of fraud to conceal improper weighing procedures and on the matter of whether appellants exercised due diligence in discovering the existence of these improper procedures. Swift was required by law to prepare true and accurate settlement sheets, *i.e.*, final accountings, for growers at the time of settlement. *See* 9 C.F.R. § 201.100(b) (1994). Such settlement sheets, as shown by a sample abstracted by appellants, contain, among other information, the condemnation weights and the weight of parts. Based upon Jack

Greer's testimony, there is some evidence that Swift did not accurately weigh parts, and thus would have issued inaccurate settlement sheets. Further, Dr. White's affidavit is evidence that Swift may have deliberately manipulated its weight tickets.[2] In *Randles v. Cole*, 68 Ark. App. 7, 2 S.W.3d 90 (1999), we held that a false disclosure form provided to a buyer in a real estate case could be a positive act of fraud sufficient to toll the statute of limitations. Similarly, in this case, the issuance of documents that inaccurately reflected the weight of appellants' product or trailers could be evidence of artifice engaged in by Swift to conceal its improper weighing practices and prevent appellants from learning of their cause of action.

As to the question of whether appellants should have discovered their causes of action before November 1996, the trial judge made no express finding on this issue, having already ruled that there was no fraudulent concealment by Swift. However, because we have decided to reverse and remand the grant of summary judgment on the issue of fraudulent concealment, we briefly address the issue of due diligence so that there will be no confusion upon remand. Swift argues that the existence of numerous lawsuits by other growers and the reporting of the lawsuits in the newspaper should have alerted appellants to their cause of action. However, there is nothing in Swift's exhibits to indicate that, as a matter of law, appellants should have been aware of the basis of the allegations made against Swift in the other lawsuits. Further, all appellants except one deny seeing the newspaper articles Swift attached to its motion. When a plaintiff denies knowledge of a newspaper article, it is improper to hold, as a matter of law, that he knew or should have known of the article's contents. *See Hickson v. Saig*, 309 Ark. 231, 828 S.W.2d 840 (1992). Additionally, in order to resolve this issue in favor of appellees, the trial judge would have had to determine that appellants' representations in their affidavits were not credible. Summary judgment is not proper where it is necessary to weigh the credibility of statements to resolve an issue. *See Bennett v. Trout*, 297 Ark. 202, 760 S.W.2d 850 (1988). Swift also argues that appellants could have observed the weighing process at the Swift plant themselves and thus discovered any alleged improprieties. However, a fact question exists as to whether the constant observation of Swift's weighing procedures is the type of diligence that is called for in this situation.

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[2] Although Swift argues that appellants did not plead in their complaint that the tare weight readings were inaccurate, they did plead that Swift's weighing method was improper and contrary to law.

The final issue we address concerns Swift's argument that any tolling of the statute of limitations due to fraudulent concealment ceased in 1993 when class certification was attempted in the *Jennings* case. It argues that, upon the filing of the class action in *Jennings* on September 3, 1993, appellants, as members of the proposed class, were deemed to be actively pursuing their claim against Swift. We disagree with Swift on this issue. First, we point out that none of the appellants herein were parties to the *Jennings* action, nor is there conclusive evidence that they had actual knowledge of the action. Secondly, we disagree with Swift's interpretation of *Doe v. Blake*, 809 F. Supp. 1020 (D. Conn. 1992), upon which its argument is based. It is true that the court in *Blake* recognized that a class member is deemed to be actively prosecuting his rights during the time class certification is under consideration. However, the *Blake* court was making a general statement and was not concerned with the issue of fraudulent concealment. It would thwart the intent of our law to say that, despite a defendant's fraudulent concealment, a limitations period begins running and continues to run when a class action is filed in which the plaintiff neither joins nor opts out.

Reversed and remanded.

STROUD, C.J., and JENNINGS, ROBBINS, GRIFFEN, NEAL, and VAUGHT, JJ., agree.

CRABTREE, J., concurs in part and dissents in part.

BIRD, J., dissents.

TERRY CRABTREE, Judge, concurring in part; dissenting in part. As the majority recognizes, the type of fraudulent concealment that tolls the statute of limitations must involve some positive act of fraud, something so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed or perpetrated in such a way that it conceals itself. *See Chalmers v. Toyota Motor Sales USA, Inc.*, 326 Ark. 895, 935 S.W.2d 258 (1996). Appellants have alleged that Swift's fraudulent concealment took the form of allowing turkeys to sit on the trucks too long, improperly charging for dead-on-arrival turkeys, improperly weighing carcasses and parts, and issuing settlement sheets that reflected these practices. These acts by Swift, however, were not separate, furtively planned devices executed to conceal appellants' cause of action. They were the basis for the underlying fraud claim. Further, the

settlement sheets, even if inaccurate, reflected nothing that appellants could not have discovered by the exercise of reasonable diligence. I therefore dissent from that portion of the majority opinion that holds otherwise.

By contrast, the affidavit of Dr. Leonard White raises the possibility that Swift deliberately misstated the tare weights of the growers' trailers and the likelihood that the growers could not have discovered these misstatements on their own. This is the type of fraudulent concealment that I believe is contemplated by our case law. A genuine issue of material fact therefore remains as to whether the alleged manipulation of tare weights amounts to fraudulent concealment that tolls the statute of limitations and could not have been discovered by the exercise of reasonable diligence. Upon remand, I would limit appellants' proof on fraudulent concealment to this issue.

SAM BIRD, Judge, dissenting. I respectfully dissent from the decision of the majority to reverse the trial court's grant of summary judgment in favor of the appellee because I believe the majority opinion extends the existing precedent far beyond the notion that the fraudulent concealment of a cause of action tolls the statute of limitations. In my opinion, the effect of this court's action is to hold that in the case of the tort of fraud involving concealment, the statute of limitations is tolled from the time of the commission of the fraudulent act until the cause of action is discovered or could have been discovered with reasonable diligence. There is a difference between saying, as the majority does, that when the act of fraud involves concealment, the statute of limitations is tolled, and saying that affirmative actions of concealment of a cause of action in fraud tolls the statute of limitations, which is existing precedent, *O'Mara v. Dykema*, 328 Ark. 310, 942 S.W.2d 854 (1997).

In *O'Mara*, 328 Ark. at 317, 942 S.W.2d at 858, it was stated that "[w]hen there have been affirmative acts of concealment, the statute begins to run *again* at the time the cause is discovered or should have been discovered by reasonable diligence" (*emphasis added) (citing Wilson v. General Elec. Capital Auto Lease Inc.*, 311 Ark. 84, 841 S.W.2d 619 (1992)). This language can only be interpreted to mean that the statute of limitations on a cause of action in tort for fraud begins to run when the acts giving rise to the cause of action (*i.e.*, the acts of fraudulent conduct) are completed, that the running of the statute is then tolled when the tortfeasor commits positive acts of fraud to conceal the cause of action, and that the

statute begins *again*, *O'Mara*, *supra*, when the cause of action is, or reasonably could have been, discovered.

The tort of fraud necessarily includes either the false representation of a matter of fact or the concealment of that which should have been disclosed. *Medlock v. Burden*, 321 Ark. 269, 900 S.W.2d 552 (1995). In other words, in the absence of a false representation or concealment, there is no fraud. The affirmative acts of concealment of a fraud required to toll the statute of limitations must be acts of concealment different from the concealment that forms the basis of the cause of action for fraud. The statute of limitations on a cause of action for fraud is not tolled merely because concealment is employed in the perpetration of the fraud. The statute of limitations is not tolled unless, in addition to the concealment that constitutes the cause of action for fraud, there are affirmative actions of concealment, so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed. *Chalmers v. Toyota Motor Sales, USA, Inc.*, 326 Ark. 895, 935 S.W.2d 258 (1996). It is the act of concealing the cause of action that tolls the statute of limitations, not the concealment that gives rise to the cause of action for fraud.

The majority relies upon *SEECO, Inc. v. Hales*, 341 Ark. 673, 22 S.W.3d 157 (2000), which I do not agree supports the majority's position at all. *SEECO* held that "a concealed fraud suspends the running of the statute of limitations, and the suspension remains in effect until the party having the cause of action discovers the fraud or should have discovered it by the exercise of reasonable diligence." 341 Ark. at 712, 22 S.W.3d at 181. For this proposition, the *SEECO* court cited *Martin v. Arthur*, 339 Ark. 149, 3 S.W.3d 684 (1999), a medical malpractice case in which it was alleged that the defendant doctors were negligent in their use of an artificial ceramic block, Orthoblock, in performing plaintiff's cervical spine fusion, and that the doctors failed to disclose to plaintiff the risk involved in the use of Orthoblock. For their defense, the doctors pled the running of the two-year statute of limitations. The plaintiff countered that by their continued failure to disclose the risk of the use of Orthoblock, the doctors and their clinic fraudulently concealed the plaintiff's cause of action, thereby tolling the statute of limitations. The trial court granted summary judgment in favor of the doctors, holding that the statute of limitations had not been tolled. In affirming the trial court, the supreme court held that the doctors' continued failure to disclose the risks of Orthoblock was nothing more than a "continuation of prior nondisclosure which ... is insufficient to raise a fact question relative to fraudulent concealment," *Martin v. Arthur*, *supra*, 339 Ark. at 155, 3 S.W.3d 687, and that such

continued nondisclosure did not "rise to the level of a positive act of fraud." *Id.*

The majority also relies on *Hampton v. Taylor*, 318 Ark. 771, 887 S.W.2d 535 (1994), for the proposition that the statutory limitation period begins to run, in the absence of concealment of the wrong, when the wrong occurs, not when it is discovered. I have no argument with the majority that *Hampton* is an accurate statement of the law. I do disagree, however, that *Hampton* stands for the proposition that the concealment that forms the basis for the fraud can be the same concealment that is necessary to toll the statute of limitations.

The majority refers to the affidavit of Dr. Leonard White in which White, based on his examination of 5,891 weighing tickets, opined that it would have been difficult for individual growers to have recognized that Swift was manipulating the weighing process. However, what the majority fails to reveal is that White made his discovery as early as 1993 in connection with the *Taylor v. Swift-Eckrich* litigation. Appellants herein offered no explanation why they were unable, with the exercise of reasonable diligence, to discover the same information about which the entire turkey-raising industry in Arkansas was aware. The fact that the discovery of the existence of one's cause of action might be difficult, time-consuming, or expensive does not toll the statute of limitations. As the majority has correctly noted, no mere ignorance on the part of a plaintiff of his rights, nor the mere silence of one who is under no obligation to speak, will prevent the bar of the statute of limitations. It is only when the existence of the cause of action is concealed by some positive act of fraud or that the cause of action is perpetrated in such a way as to conceal itself, that the statute of limitations is tolled, and then only until the plaintiff, with the exercise of reasonable diligence, could have discovered the existence of the cause of action. *O'Mara* v. *Dykema, supra.*

Although the question of fraudulent concealment is normally a question of fact that is not suited for summary judgment, when the evidence leaves no room for a reasonable difference of opinion, the trial court may resolve fact issues as a matter of law. *Alexander v. Flake*, 322 Ark. 239, 910 S.W.2d 190 (1995). In response to appellee's motion for summary judgment, appellants produced no evidence whatsoever of any positive acts committed by the appellee to conceal their alleged fraudulent conduct in the misweighing of turkeys. To toll the statute, appellants rely solely upon the alleged acts of fraud by the appellees that form the basis of their cause of

action. There is neither an allegation by appellants nor evidence in the record that appellees did anything other than misweigh the turkeys and record the inaccurate weights on the weighing tickets. Appellants produced no evidence that appellee did anything to conceal the weighing process, their recordation of the alleged inaccurate results, or the weighing tickets. Nor was their evidence produced that appellees concealed the records of their alleged misdeeds after they were concluded. Under the circumstances, the decision of the trial court to grant appellees' motion for summary judgment was correct, and I would affirm that decision.

Janice TACKETT, Individually and as
Administratrix of the Estate of
Laurie Taffner, *Deceased v.*
MERCHANT'S SECURITY PATROL

CA 00-949 44 S.W.3d 349

Court of Appeals of Arkansas
Division IV
Opinion delivered May 2, 2001

McKinnon Law Firm, by: *Laura J. McKinnon*, for appellant.

Bassett Law Firm, by: *Woody Bassett* and *Vince Chadick*, for appellee.

JOSEPHINE LINKER HART, Judge. This appeal is brought from the trial court's grant of summary judgment in favor of appellee. Appellant argues that genuine issues of material fact remain to be decided, thus making summary judgment improper. We disagree and affirm.

On December 3, 1993, appellant was seriously injured and her daughter, Laurie Taffner, was killed when their vehicle was struck by a vehicle driven by John Sargent. In the one and one-half hour to two-hour period prior to the collision, Sargent had consumed at least three to four beers at Speedy's Sport Spot in Fayetteville. He subsequently pled guilty to negligent homicide and second-degree battery in connection with the accident. At the time Sargent left Speedy's, two security guards, Lloyd Taylor and Timothy Sutton, were present on the premises, although they deny actually seeing Sargent that night. Taylor and Sutton were employees of appellee Merchant's Security Patrol. On October 20, 1993, Merchant's had entered into a contract with Speedy to perform certain security services, to wit:

> Prevention of intrusion, entry, larceny, vandalism, abuse, fire or trespass on private property.
> Prevention, observation, or detection of any unauthorized activity on private property. Control, regulation, or direction of the flow or movements of the public, whether by vehicle or otherwise, only to the extent and for the time directly and specifically required to assure protection of property.
> Protection of individuals from bodily harm.

Under the section of the contract entitled "Details of the work to be performed," was the following:

> Parking Lot Patrol/with periodic walk-thrus of Bus. Mon.-Thurs. 7:00pm until 1:00am unless requested to stay longer by client. Two officers, Fri. And Sat. 7:00pm until 2:00am unless requested by client to stay longer.

Appellant filed suit against appellee alleging that its security guards forcibly evicted Sargent from the premises, thus requiring him to drive while intoxicated. However, in her amended complaints, appellant alleged that appellee was negligent in allowing Sargent to leave the premises while in an intoxicated state and in failing to detect that Sargent was driving while intoxicated. Appellee moved for summary judgment alleging that it owed no duty to

appellant. The trial court agreed and granted summary judgment on that basis. This appeal followed.

In summary-judgment cases, we need only decide if the granting of summary judgment was appropriate based upon whether the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered. *Inge v. Walker*, 70 Ark. App. 114, 15 S.W.3d 348 (2000). Summary judgment is no longer considered a drastic remedy but is regarded simply as one of the tools in the trial court's efficiency arsenal. *See Wallace v. Broyles*, 332 Ark. 189, 961 S.W.2d 712 (1998). The burden of sustaining a motion for summary judgment is always the responsibility of the moving party. *Inge v. Walker, supra.* All proof submitted must be viewed in a light most favorable to the party resisting the motion, and any doubts and inferences must be resolved against the moving party. *Id.*

The first question that must be answered in a negligence case is, what duty, if any, did the defendant owe to the plaintiff? *See Maneth v. Tucker*, 72 Ark. App. 141, 34 S.W.3d 755 (2000). Duty is a concept that arises out of the recognition that relations between individuals may impose upon one a legal obligation for the other. *Id.*; *see also Mans v. Peoples Bank of Imboden*, 340 Ark. 518, 10 S.W.3d 885 (2000). Ordinarily, a person is under no duty to control the actions of another person, even though he has the practical ability to do so. *See Trammell v. Ramey*, 231 Ark. 260, 329 S.W.2d 153 (1959). One is not liable for the acts of another person unless a special relationship exists between the two, such as master and servant, *see Boren v. Worthen Nat'l Bank*, 324 Ark. 416, 921 S.W.2d 934 (1996), or unless a special relationship exists between him and the victim which gives the victim the right to protection. *See Smith v. Hansen*, 323 Ark. 188, 914 S.W.2d 285 (1996). The question of what duty is owed to the plaintiff is always one of law. *Mans v. Peoples Bank of Imboden, supra.*

Appellant argues that appellee owed a common-law duty of reasonable care to her to train its employees to detect and observe intoxicated persons and to employ more security guards on the night the accident occurred.[1] However, she does not demonstrate that any special relationship existed between either appellee and

[1] Although appellant alleged in her first complaint that appellee's guards forcibly evicted Sargent from the premises, she does not urge this theory on appeal. We note that she presented no proof in her response to appellee's motion for summary judgment to rebut the guards' testimony that they did not see Sargent on the night in question.

Sargent or appellee and herself. In the absence of such a relationship, no duty is owed by appellee to appellant under traditional tort law.

However, a duty exists to protect persons from the acts of other persons in connection with the operation of a tavern. *See Industrial Park Businessmen's Club v. Buck*, 252 Ark. 513, 479 S.W.2d 842 (1972), and *Burns v. Boot Scooters, Inc.*, 61 Ark. App. 124, 965 S.W.2d 798 (1998). In those cases, it was held that a tavern owner had a duty to protect its own patrons from injury at the hands of others. Here, we are not concerned with the question of the liability of a tavern owner, nor with injury to a patron of the tavern. Instead, we address the duty owed by a security company to a person who was not present on the premises the company was guarding. We have found no case, and appellant has cited us to none, imposing a common-law duty in such a situation.

Although appellant relies on *Cobb v. Indian Springs, Inc.*, 258 Ark. 9, 522 S.W.2d 383 (1975), it is distinguishable. In *Cobb*, a security guard encouraged a driver to engage in unreasonable conduct that later resulted in an accident. There is no evidence in this case that appellee's security guards encouraged Sargent to drive while intoxicated.

Appellant argues next that the contract between appellee and Speedy's Sport Spot created a duty on the part of appellee to "prevent, detect, and observe unauthorized activity." She points not only to this contractual language, but to the deposition testimony of Lloyd Taylor and Timothy Sutton that they felt they would have a general duty to call the police if they saw an intoxicated person getting into his vehicle, although they denied that such a duty was part of their job description.

A duty of care may arise out of a contractual relationship between two parties. *See Keck v. American Employment Agency, Inc.*, 279 Ark. 294, 652 S.W.2d 2 (1983). In that case, appellant had a contract with appellee, an employment agency. She claimed that the agency was negligent in directing her to a prospective employer who abducted and raped her. Our supreme court reversed a directed verdict in favor of the agency and recognized that appellant's negligence action was based on the agency's duty of care created by the contractual relationship between the agency and appellant. In the case before us, it is clear that appellee had certain duties under its contract with Speedy's, among them, the "prevention, observation, or detection of any unauthorized activity on

private property" and the "protection of individuals from bodily harm." However, while the contract imposed such duties on appellee, there is nothing to indicate that the duties were owed to anyone other than Speedy's or perhaps Speedy's patrons, *i.e.*, persons and property on Speedy's premises. It is presumed that parties contract only for themselves. *Little Rock Utility v. Larry Moyer Trucking, Inc.*, 321 Ark. 303, 902 S.W.2d 760 (1995). A contract will not be construed as having been made for the benefit of third parties unless it clearly appears that such was the intention of the parties. *Id.* Even viewing the evidence in a light most favorable to appellant, there is nothing in the contract between Speedy's and appellee to indicate that it was intended to benefit appellant. Thus, we agree with the trial court that the contract created no duty upon which appellant could premise a negligence action.

We turn now to appellant's argument that security companies should be held to the same standard of liability as alcoholic beverage retailers, as set forth in *Jackson v. Cadillac Club, Inc.*, 337 Ark. 24, 986 S.W.2d 410 (1999), and *Shannon v. Wilson*, 329 Ark. 143, 947 S.W.2d 349 (1997). In *Shannon*, our supreme court broke with years of precedent and recognized that a vendor who sells alcohol to a minor might incur tort liability if the minor subsequently causes injuries to others while intoxicated. In *Jackson v. Cadillac Club*, that holding was extended to encompass a vendor selling alcohol to an already-intoxicated person. Appellant states, correctly, that the holdings in those cases were based in part on the idea that the Arkansas legislature established a high duty of care to be observed by those who are licensed to sell alcohol. The legislation, codified at Ark. Code Ann. § 3-3-218(a) and (b) (Repl. 1996), states in pertinent part:

> (a) It is the specifically declared policy of the General Assembly that all licenses issued to establishments for the sale or dispensing of alcoholic beverages are privilege licenses, and the holder of such privilege license is to be held to a high duty of care in the operation of the licensed establishment.
>
> (b) It is the duty of every holder of an alcoholic beverage permit issued by the State of Arkansas to operate the business wherein alcoholic beverages are sold or dispensed in a manner which is in the public interest, and does not endanger the public, health, welfare or safety.

Appellant argues that the legislature, by passage of the Private Investigators and Private Security Agencies Act, has imposed on security

guard companies a similar duty to refrain from endangering the public health, welfare, and safety. *See* Ark. Code Ann. §§ 17-40-101 to 353 (Repl. 1995 and Supp. 1999).

Appellant's argument fails to recognize that the legislature has not expressly imposed upon security guard agencies the same "high duty of care" required of alcoholic beverage vendors. Appellant points out that Act 429 of 1977 and Act 792 of 1981, which concern the licensing of security agencies, refer to the need to "protect the public" and to the "public peace, health, [and] safety." However, such language is contained in the emergency clauses of both acts, not in directives toward the security agencies. We have found no language in the Act, and appellant has cited us to none, that compares with the language the legislature used to impose an enhanced duty of care on the vendor of alcoholic beverages. Thus, we decline to extend the rationale in *Shannon* and *Jackson* to this case.

Finally, we consider appellant's argument that appellee should be held "to a professional standard of care." She claims that liability might be imposed on appellee as it is on other professionals in connection with Ark. Code Ann. §§ 16-114-301 to -303 (Supp. 1999). We are unable to determine how these statutes might be used to create a duty on the part of appellee. These statutes apply only to accountants and attorneys, and appellant offers no convincing argument as to why they should apply to security companies.

Affirmed.

NEAL and BAKER, JJ., agree.

Mildred MOORE *v.* PULASKI COUNTY
SPECIAL SCHOOL DISTRICT

CA 00-978 43 S.W.3d 204

Court of Appeals of Arkansas
Division II
Opinion delivered May 2, 2001

[redacted]

Mitchell, Blackstock, Barnes, Wagoner & Ivers, by: *Clayton R. Blackstock*, for appellant.

Skokos, Bequette & Billingsley, P.A by: *Jay Bequette*, for appellee.

JOHN B. ROBBINS, Judge. This case began with a frightening incident involving a teacher, appellant Mildred Moore, at Northwood Junior High School, where she taught home economics. On December 4, 1996, appellant discovered in her iced tea glass and pitcher some rat poison and straight pins that an investigation revealed had been placed there by one or more students. In the following days, appellant attempted to continue working but was physically unable to do so. Her physician diagnosed her as having post-traumatic stress disorder, depression, anxiety, and hypertension as a direct result of the incident and predicted that she might be unable to work for one to four years. Appellant filed for workers' compensation benefits at the instruction of her school administration. After that claim was denied, she was told that there was no alternative to using her accumulated sick leave. After her sick leave was exhausted, shortly before the end of that school year, appellant was told that she had no choice but to retire. Her claim for disability retirement from the Arkansas Teacher Retirement System was approved in the spring of 1997.

Appellant sued appellee Pulaski County Special School District in 1998, asserting that, under Ark. Code Ann. § 6-17-1209 (Repl. 1999), appellee should have given her a year's paid leave of absence from work. That statute provides:

> (a)(1)(A) Whenever a schoolteacher is absent from his or her duties in a public school as a result of personal injury caused by either an assault or a criminal act committed against the teacher in the course of his or her employment, the teacher shall be granted a leave of absence from school with full pay for up to one (1) year from the date of the injury.
>
> (B) Teachers who suffer personal injury while intervening in student fights, restraining a student or protecting a student from harm shall be considered to be injured as a result of an assault or a criminal act.
>
> (2) The leave of absence for personal injury from an assault or a criminal act shall not be charged to the teacher's sick leave authorized under this subchapter.
>
> (b) The board of directors of each school district shall adopt written policies for the implementation of this section and incorporate them as part of the written personnel policies of the district.

Appellant also argued that her absence should not have been charged against her accumulated sick leave.

Appellee resisted her claim on several grounds: that appellant did not suffer a personal injury; that the statute did not provide a private cause of action; that appellant waived the rights provided under this statute; that the court lacked subject-matter jurisdiction; and that appellant failed to exhaust her administrative remedies.

The circuit judge found that appellant had sustained a personal injury within the terms of Ark. Code Ann. § 6-17-1209 and that she had not waived her rights under that statute. He rejected appellant's argument that, under the collateral source rule, her disability retirement income should not be deducted from the award. The circuit judge entered an order awarding appellant judgment for the paid leave of absence that appellee should have given her and for her accrued sick leave ($47,854.49), less the amount of disability retirement income ($21,197.22) she had received during the relevant time period, resulting in a total award of $26,657.27.

Appellant argues on appeal that the circuit judge erred in deducting her disability retirement income from her award against appellee because it is a collateral source. For its cross-appeal, appellee asserts that the trial judge erred in granting appellant any relief under Ark. Code Ann. § 6-17-1209 and in including her sick leave in the award. It necessarily follows, therefore, that we must address appellee's first point on its cross-appeal before turning to the other issues.

Appellant's Rights Under
Ark. Code Ann. § 6-17-1209

Appellee contends that Ark. Code Ann. § 6-17-1209 does not provide a private right of action and simply requires school districts to incorporate its terms into their written personnel policies. Under Ark. Code Ann. § 6-17-201 (1999), school districts must implement written personnel policies but, according to Ark. Code Ann. § 6-17-202 (1999), are exempt from this requirement if they have chosen to recognize a bargaining unit for the teachers in that district. Appellee recognizes the Pulaski Association of Classroom Teachers as the exclusive bargaining agent for its teachers; their Professional Negotiations Agreement (hereafter "PNA") sets forth their respective obligations. Appellee argues that, although the leave required by section 6-17-1209 was not addressed in the PNA, the

PNA sufficiently included it within a savings clause, which stated: "The parties agree that state and federal statutes and court orders are incorporated into this Agreement."

In considering the meaning of a statute, we consider it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Stephens v. Arkansas Sch. for the Blind*, 341 Ark. 939, 20 S.W.3d 397 (2000). If the language of a statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to rules of statutory interpretation. *Id.* Where the meaning is not clear, the court looks to the language of the statute, the subject matter, the remedy provided, the legislative history, and other appropriate means that shed light on the subject. *Id.* We will also look to the object to be accomplished and the purpose to be served by the statute. *Burford Distrib., Inc. v. Starr*, 341 Ark. 914, 20 S.W.3d 363 (2000). Although we are not bound by the decision of the trial court, in the absence of a showing that the trial court erred in its interpretation of the law, we will accept that interpretation as correct on appeal. *Stephens v. Ark. Sch. for the Blind, supra.*

Appellee has cited no case, nor have we found any, supporting its argument that the general savings clause in the PNA was sufficient to comply with the statute's express directive that school districts incorporate its rights within the terms of their written personnel policies. Indeed, it seems obvious to us that subsection (b) would be meaningless if we were to follow appellee's argument. We will not interpret a statute in a manner so as to reach an absurd conclusion that is contrary to legislative intent. *Moses v. State*, 72 Ark. App. 357, 39 S.W.3d 459 (2001). Similarly, it would be absurd to conclude that the statute does not give a teacher a private right of action.

Appellee also argues that the trial court should have rejected appellant's claim because she did not request this statutory leave while she was still employed by appellee. Again, we disagree. Appellant asked appellee if there was any alternative to using her accumulated sick leave and was informed that there was none. It is clear, therefore, that appellee breached its obligation to provide appellant with the statutory leave while she was still an employee and that appellant would not have taken retirement when she did if appellee had satisfied its statutory obligation to her.

We also must reject appellee's assertion that appellant's claim should have been denied because she failed to exhaust her

administrative remedies set forth in the PNA. Although the PNA provided a grievance procedure for matters included within its terms, it did not include the rights provided by section 6-17-1209. Therefore, no administrative remedy covering these rights was available to appellant.

We next turn to appellee's contention that appellant did not sustain a "personal injury" as contemplated by section 6-17-1209. Appellee urges us to hold that the General Assembly intended that this term be defined as narrowly as the term "compensable injury" is in the Workers' Compensation Act. Arkansas Code Annotated § 11-9-113(a)(1) (Repl. 1996) provides that a mental injury is not a compensable injury unless it is caused by physical injury to the employee's body; however, that physical injury limitation does not apply to any victim of a crime of violence. We are obliged to strictly construe and apply the Workers' Compensation Act. Ark. Code Ann. § 11-9-704(c)(3) (Repl. 1996); *Flowers v. Norman Oaks Constr. Co.*, 341 Ark. 474, 17 S.W.3d 472 (2000); *Byars Constr. Co. v. Byars*, 72 Ark. App. 158, 34 S.W.3d 797 (2000). We are under no such constraints, however, regarding section 6-17-1209, which is an entirely separate and unrelated statute. Appellant testified that, as a result of this incident, she developed hypertension that caused her to "pass out," in addition to depression, post-traumatic stress disorder, anxiety, and mental confusion. Given appellant's evidence of the effects that this incident had on her, we have no hesitation in holding that she sustained a personal injury within the meaning of section 6-17-1209.

Jurisdiction

Appellee also argues that the circuit court had no subject-matter jurisdiction to hear this case. According to appellee, appellant essentially asked the circuit court to rescind her resignation, reform her previous election of sick leave to that provided by section 6-17-1209, and reinstate her sick-leave benefits. We disagree. The question of subject-matter jurisdiction is determined by the characterization of the case. *Priest v. Polk*, 322 Ark. 673, 912 S.W.2d 902 (1995). In her complaint, appellant alleged that appellee's failure to comply with section 6-17-1209 constituted a breach of her employment contract with appellee. Clearly, the circuit court had subject-matter jurisdiction of this action.

Waiver

Appellee further argues that appellant waived any right to recover damages under section 6-17-1209 because she voluntarily resigned from her employment. Again, we must disagree. Waiver is the voluntary abandonment or surrender by a capable person of a right known by him to exist, with the intent that he shall forever be deprived of its benefits. *Pearson v. Hendrickson*, 336 Ark. 12, 983 S.W.2d 419 (1999). It may occur when one, with full knowledge of material facts, does something that is inconsistent with the right or his intention to rely upon that right. *Id.* The relinquishment of the right must be intentional. In *Lester v. Mount Vernon-Enola Sch. Dist.*, 323 Ark. 728, 732, 917 S.W.2d 540, 542 (1996), the supreme court explained: "In every case of which we are aware, we have held that a waiver of a right requires knowledge of that right on the part of the party who waived it." Whether a waiver occurred is a question of intent, which is usually a question of fact. *Beal Bank, S.S.B. v. Thornton*, 70 Ark. App. 336, 19 S.W.3d 48 (2000). We will not reverse a circuit judge's finding of fact unless it is clearly erroneous or clearly against the preponderance of the evidence. *Foundation Telecom. v. Moe Studio, Inc.*, 341 Ark. 231, 16 S.W.3d 531 (2000). The evidence in this case reveals that appellant had no knowledge of her rights under section 6-17-1209 until long after she had used up her sick leave and had taken disability retirement. It is equally clear that appellee took no action to inform appellant of those rights. The circuit judge's finding that appellant did not waive her statutory rights is not clearly erroneous or clearly against the preponderance of the evidence.

The Collateral-Source Rule

We now return to appellant's point on appeal, that the trial court's deduction of her disability retirement income from the award violated the collateral-source rule. The collateral-source rule provides that benefits received by a plaintiff from a source that is wholly independent of and collateral to the defendant does not reduce the damages recoverable for the defendant. It is generally held that recoveries from collateral sources do not redound to the benefit of a tortfeasor, even though double recovery for the same damage by the injured party may result. *Bell v. Estate of Bell,* 318 Ark. 483, 885 S.W.2d 877 (1994). This rule, which has long been applied in the context of tort cases, has also been applied in other types of actions. *Id.*

> As a general rule, benefits received by the plaintiff from a source collateral to the tortfeasor or contract breacher may not be used to reduce the defendant's liability for damages. This rule holds even though the benefits are payable to the plaintiff because of the defendant's actionable conduct and even though the benefits are measured by the plaintiff's losses.
>
> ....
>
> The arguments for the collateral-source rule are that it preserves the rights of subrogation for those who have aided the plaintiff; that in the case of a gift to the injured plaintiff, the gift was intended for him, not for the defendant, who should not, therefore get credit for it by a reduction in his damages; and that in the case of insurance paid for by the plaintiff, or job benefits bargained for by him, the benefit is one paid for by the plaintiff in the form of premiums or reduced salary scale, and that the defendant cannot reasonably claim any credit for something the plaintiff has bought.

Dan B. Dobbs, *The Law of Remedies* § 3.6, at 185-86 (1973).

As appellant points out, teacher retirement disability payments are not paid by the school district, but by a third party — the Arkansas Teacher Retirement System (hereafter "ATRS").[1] Appellant argues that appellee should not benefit from ATRS's payments to her, and we agree.

In the context of employment cases, an award of back pay cannot be reduced by unemployment compensation benefits because they are considered a collateral source. *Green Forest Pub. Schs. v. Herrington*, 287 Ark. 43, 696 S.W.2d 714 (1985). On the other hand, in *Western Grove School District v. Strain*, 288 Ark. 507, 707 S.W.2d 306 (1986), the supreme court affirmed a teacher's obligation to obtain other employment in mitigation of damages following the nonrenewal of her contract. We followed that case in *Marshall School District v. Hill*, 56 Ark. App. 134, 939 S.W.2d 319 (1997), and held that the collateral-source rule has no application to employment breach-of-contract cases where the dismissed employee has subsequently earned income from other employment. In so

[1] After the circuit judge issued a letter opinion, but before the entry of judgment, appellant proffered the affidavit of Michael Ray, manager of benefits for the ATRS, stating that, when a teacher receives an award of back pay after drawing retirement, the ATRS seeks a refund of those amounts paid to the teacher.

holding, we based our decision on the employee's duty to take reasonable steps to mitigate his damages.

In our view, the case before us bears more resemblance to *Green Forest Public Schools v. Herrington* than it does to *Marshall School District v. Hill* because appellant clearly lacked the ability to work at all, much less obtain other employment. We therefore hold that the circuit judge erred in deducting appellant's retirement disability pay from her award and reverse and remand on this point for the trial judge to enter a judgment consistent with this opinion.

The Award of Sick Leave

Appellee also argues that appellant should not have been awarded her sick leave because she had no contractual right to be paid for unused sick leave at the end of her contract. Appellee misses the point, however, of the basis for this award — if appellee had given appellant the statutory leave of absence, appellant would then have used her accumulated sick leave to continue her employment and would not have retired until after her sick leave was exhausted. This award, therefore, is consistent with the basic purpose of an award of damages. A party to a contract who is injured by its breach is entitled to compensation for the injury sustained and is entitled to be placed, insofar as this can be done with money, in the same position she would have occupied if the contract had been performed. *Carroll v. Jones*, 237 Ark. 361, 373 S.W.2d 132 (1963). *Accord Dawson v. Temps Plus, Inc.*, 337 Ark. 247, 987 S.W.2d 722 (1999).

Reversed and remanded on direct appeal; affirmed on cross-appeal.

VAUGHT and CRABTREE, JJ., agree.

David LAIME and Jeanna Dodd *v.* STATE of Arkansas

CA CR 00-382 43 S.W.3d 216

Court of Appeals of Arkansas
Divisions IV and I
Opinion delivered May 2, 2001

Hampton, Larkowski & Benca, by: *Patrick J. Benca*, for appellant.

Jeff Rosenzweig, for appellant Jeanna Dodd.

Mark Pryor, Att'y Gen., by: *Misty Wilson Borkowski*, Ass't Att'y Gen., for appellee.

SAM BIRD, Judge. David Laime and Jeanna Dodd entered conditional pleas of guilty to charges of possession with intent to deliver a controlled substance and possession of drug paraphernalia in violation of Ark. Code Ann. §§ 5-64-401 and 5-64-403 (Supp. 1999). Acting pursuant to Ark. R. Crim. P. 24.3, both reserved the right to appeal the court's denial of their motions

to suppress evidence found pursuant to a search of the vehicle that they occupied.

Laime and Dodd have filed separate appeals, which have been consolidated. Although expressed in slightly different terms, Laime and Dodd assert the same four points on appeal, to wit: (1) that [Arkansas State Police] Trooper Ramsey lacked probable cause to stop the vehicle; (2) that Trooper Ramsey violated their Fourth Amendment rights by continuing to detain them after he had concluded his investigation for the alleged traffic violation; (3) that omissions of facts in Ramsey's affidavit for search warrant undermined his drug dog's reliability and amounted to a violation of *Franks v. Delaware,* 438 U.S. 154 (1978); and (4) that the search warrant was objectively unreasonable because of its finding that the invocation of Laime and Dodd's constitutional rights provided probable cause, and there was no basis for a nighttime search. Because we agree that Laime and Dodd's Fourth Amendment rights were violated by Trooper Ramsey's detaining them after he had determined that the Texas registration of their van was valid, we hold that the trial court should have granted their motions to suppress the evidence resulting from the search of the van and its contents. Therefore, we reverse and remand.

A detailed recitation of the facts is essential to an understanding of our decision. At the suppression hearing, Trooper Ramsey testified regarding a traffic stop of a van that Laime was driving and in which Dodd was a passenger. Ramsey testified that at approximately 6:00 p.m. on July 28, 1998, while patrolling with his drug dog, Moose, he observed the van pass two tractor-trailer trucks in the far-left lane of I-30 between Benton and Little Rock. Ramsey testified that his attention was drawn to the van because it was traveling about sixty miles per hour in an area where the speed limit for cars was seventy miles per hour. He said that he was following the van in his marked patrol car but that there were two other cars between his car and the van, and that he considered the van to be holding up traffic. Ramsey said that it took the van about a mile and a half to complete its pass of the trucks, that the van then moved into the right-hand lane, and that the two cars ahead of the patrol car proceeded on past the van. Ramsey said that when his patrol car caught up with the van, he could see that it had a Texas license plate and he could read the tag number. He said that he called Hot Springs to run a check on the van's registration, and that a report came back that there was no registration in Texas for the license plate on the van.

Ramsey said that he stopped the van, approached the driver, and asked to see his driver's license. He said that the driver initially gave him a Virginia identification card issued to David Laime, but that the driver then produced a Virginia driver's license. Ramsey said that, because he wondered why Laime had a Virginia driver's license and was driving a car with Texas tags, he asked Laime if he owned the van. Laime responded that the van belonged to a friend in Texas, that he was headed to Little Rock to meet some friends who were going to take him on to Washington, D.C., and that his passenger was going to drive the van back to Texas. Ramsey then asked to see registration and insurance papers on the van. He was given an insurance document issued to a Jeanna Dodd for a Subaru vehicle, not for the Dodge van that Laime was driving. Ramsey returned to his patrol car to run another check on the Texas license plate and again received a report that there was no registration information on file for that license number.

At that point, Ramsey went back to the van and asked Laime to come to the patrol car because Ramsey had some questions. He said that at the patrol car, Laime handed Ramsey registration papers issued in Texas for the license plate that was on the van. The papers showed that the van was registered to Jeanna Dodd at Fort Sam Houston, Texas. He said that from "just looking on their computer thing," the registration appeared to have been issued at 12:30 that afternoon.

Ramsey testified that he started explaining to Laime the reason for the stop, but that Laime kept "firing" questions at him and would not give him a chance to explain anything. Laime said that Ramsey knew that he was in a hurry because he was supposed to meet people in Little Rock for supper, but Laime could not remember the name of the restaurant. Ramsey asked Laime who the lady passenger in the van was, and Laime told him that it was his sister. At this point, Ramsey told Laime to remain in the patrol car while he talked to Dodd. Ramsey said that he did not think that he asked what her name was, but that she told him that Laime was her brother. She told Ramsey that Laime was from Washington and she was from Texas, that the van belonged to "some of their kinfolk or friends or whatever it was back in Texas," that she was dropping Laime off in Little Rock, that they were going to have supper with friends who were taking Laime on to Washington, that she could not remember the name of the restaurant or tell him the names of the friends, and that after supper she was returning to Texas.

Ramsey said that he "started putting two and two together" after he talked to Dodd, and that the stories were "kind of falling apart" in the following ways:

> They were going to meet these folks that they didn't know where they was going to meet. They was driving somebody else's van that they didn't know — she was going to drop him off and she was going to take the van back to Texas. Their stories were just not matching up.

Ramsey said that he decided at that point to run a criminal history check on Laime "to see if they had some kind of violation somewhere down the way." He said he received a report that Laime had "some kind of charge out of Florida, some kind out of maybe Virginia or somewhere up there on the east coast." Ramsey said he asked Laime if he had ever been arrested for anything and Laime responded that he had received a speeding ticket or some kind of a driving offense a couple of years ago, but that he could not remember what it was for. Ramsey stated that, while he was writing the citations, he asked Laime, "You're not one of them guys to be carrying dope down the highway or anything, do you?" Ramsey testified that he felt like Laime was evading the questions and that Laime was becoming hostile, so he called for backup from Troopers Kellum, Cook, and Scarbrough. Ramsey said that while he was waiting on the backup to arrive, he asked Laime if he would give consent for a search of the van and that Laime responded, "No."

Ramsey said that he then pulled out a consent-to-search form and asked Laime if he knew what it was, and Laime said, "You're not going to look." When Ramsey started filling out the top part of the consent-to-search form, Laime repeated, "You're not going to look." When Ramsey tried to read the consent-to-search form to him, Laime again told Ramsey, "You're not going to look." Ramsey stated that Laime's attitude changed from "irate" to "bad combative" when Ramsey tried to read the consent-to-search form. He said that Laime stated that he was a law student, that he knew his rights, that Ramsey was violating those constitutional rights, and that Laime was going to sue Ramsey.

Ramsey stated that he decided to go back and talk again with the passenger in the van, and that he learned for the first time, from her Texas driver's license, that she was Jeanna Dodd. He said that he questioned her about why she and Laime had told him that the van belonged to someone else when it was registered in her name. Ramsey said that he asked her if he could look through the van, and

she responded that it would not be a problem except that they were in a hurry to get to Little Rock so that Laime could make connections with the friends who were taking him to Washington.

Ramsey said that he then returned to the patrol car, where Laime demanded that he be released unless he was under arrest. At that point Ramsey said that he told Laime he was free to go. Ramsey met Laime at the front of the patrol car after they got out of it, and Ramsey said, "[B]efore that van goes anywhere, I'm going to run the dog around it." Ramsey testified that when Laime protested, Ramsey again told him that he was "free to leave. He can walk. He can run. He can crawl. He can do whatever he wants to do. But before the van goes anywhere I am going to run the dog around the van. That's it, cut and dried. That's what's going to happen." Ramsey said that he instructed Laime and Dodd to get out of the van and get back out of the way, and that Ramsey then "put [the dog] to work on the van."

Ramsey testified that the dog began at the left rear of the van and proceeded around it counter clockwise. He said that Moose "alerted" (a term he explained meant that the dog was indicating "the presence of controlled substance") in the vicinity of the right rear tire where he noticed that a sliding window on the van was open. Ramsey said that after proceeding along the passenger side of the van, Moose alerted at the point where the van's double doors met. They proceeded toward the passenger door, and Moose alerted at the point where the passenger door met the door post. They proceeded around the front of the van and down the driver side to the general vicinity of the left rear tire and one of the windows, where Moose alerted again. According to Ramsey, it was at about this time that the backup troopers arrived, and that he told Laime, "[W]e're going to look in the van" ... because "my dog's telling me that he smells the odor of drugs in your vehicle, . . . and we're fixing to take a quick look." Ramsey said that because Laime continued to protest the search of his van, one of the other officers took him away and placed him in another patrol unit.

Ramsey described the search that he conducted of the van, resulting in the discovery of "a little bit of green, brown-looking vegetable matter" that he believed to be marijuana in the pouch on the back of the driver seat, and also what he believed to be a marijuana seed in a pouch on the driver-side door. Ramsey said that he then advised Laime and Dodd that they were under arrest for possession of a controlled substance. He went back to the van and found a shotgun case and a pistol box. He opened the pistol

box and found it empty. He opened the shotgun case and found about twenty "glass bongs, pipes, things I've seen in my years of law enforcement used to smoke marijuana through, or hashish or any other drug." He opened the back door of the van and discovered what appeared to be two safes, one about two-feet square with a combination lock "like a key pad that goes on a telephone," and a smaller one about half the size of the first one, with a turn-dial combination lock. He said that he asked Laime and Dodd to open the safes, but they replied that they did not have the combinations. Dodd said that one of the safes might have some money in it, that the combination had been sent somewhere else, and that the safe could not be opened in transport.

Ramsey said that one of the other troopers set the large safe on the ground, and that he went to get Moose to see if he would alert. Moose alerted on both safes. Ramsey then told the other troopers that since they could not open the safes, they needed to put everything back into the van, call for a wrecker to transport it, and "get a search warrant for these safes." Ramsey said that when the troopers opened the door of the van to put the large safe back, the small safe fell out on the ground and "busted open." A visual examination revealed that it was empty.

Ramsey said that while Troopers Scarbrough and Cook waited for the wrecker to come for the van, he and Trooper Kellum separately transported Laime and Dodd to the Bryant Police Department. Thereafter, a nighttime search warrant was obtained for the van and its contents, resulting in the discovery that the larger safe contained LSD and drug paraphernalia.

Whether Trooper Ramsey lacked probable cause to stop the vehicle

Laime and Dodd argue that Ramsey misapplied our "left-lane law" in concluding that their van, which was traveling over the minimum posted speed and below the maximum, was continuously obstructing traffic in the left lane. Arkansas Code Annotated section 27-51-301 (Supp. 1999) reads in pertinent part:

> (a) Upon all roadways of sufficient width, a vehicle shall be driven upon the right half of the roadway, except as follows:

> (1) When overtaking and passing another vehicle proceeding in the same direction under the rules governing that movement;
>
> . . . .
>
> (b) Motor vehicles shall not be operated continuously in the left lane of a multilane roadway whenever continuous operation in the left lane impedes the flow of other traffic.

The relevant inquiry on appeal is whether the officer had probable cause to believe that the defendant was committing a traffic offense at the time of the initial stop. *Travis v. State*, 331 Ark. 7, 959 S.W.2d 32 (1998); *see Whren v. United States*, 116 S. Ct. 1769 (1996). 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. *Travis v. State, id.* The question of whether the officer had probable cause to make a traffic stop does not depend upon whether the defendant is actually guilty of the violation that was the basis for the stop; all that is required is that the officer had probable cause to believe that a traffic violation had occurred. *Id.* (citing *Burris v. State*, 330 Ark. 66, 71, 954 S.W.2d 209 (1997)). In assessing the existence of probable cause, our review is liberal rather than strict. *Id.* (citing *Brunson v. State*, 327 Ark. 567, 940 S.W.2d 440 (1997)).

Appellants contend that Ramsey's inability to verify the license tag by radio could not have provided probable cause for the stop because he had decided to stop the van before he was able to read the tag. They also contend that the trooper's claim that the van impeded the flow of traffic was unreasonable: they note testimony that Laime used the left-hand lane for passing while maintaining a speed within the maximum and minimum limits, that he moved to the right-hand lane after passing, and that all of this took only about a mile and a half.

We need not address the issue regarding operation of the vehicle in the left lane because there was a separate reason for the traffic stop. As mentioned earlier, Trooper Ramsey testified that he noticed the Texas license plate when he pulled behind the van, and he then asked for a check on the tag and learned that there was no such registration. In *Travis v. State, id.*, our supreme court found probable cause for a traffic stop even though an officer acted upon

his erroneous belief that a Texas license plate must display an expiration sticker as is required for Arkansas tags under our state law. Similarly, Ramsey had probable cause to believe that driving a vehicle with an unregistered Texas license plate was a traffic violation. Thus, we hold that Trooper Ramsey had probable cause to stop the van in order to ascertain the validity of its registration.

Whether Trooper Ramsey violated Laime and Dodd's Fourth Amendment rights by continuing to detain them after concluding his investigation of the traffic violation

Appellants note Ramsey's testimony that he decided to search their van after learning that the license was valid. They contend that at this point there was no reason to further detain the van or the passengers, and that they should have been free to go. We agree.

Given the lawfulness of the initial stop, the question is whether the resulting detention was "reasonably related in scope to the circumstances which justified the interference in the first place." *Burris v. State*, 330 Ark. 66, 954 S.W.2d 209 (1997) (quoting *Terry v. Ohio*, 392 U.S. 1 (1968)). On this issue, the case of *United States v. Beck*, 140 F. 3d 1129 (8th Cir. 1998), is instructive.

The *Beck* court reversed the trial court's denial of a motion to suppress evidence that had been seized when the defendant's rented Buick was searched after a valid traffic stop. Officer Joe Taylor of the Conway, Arkansas, Police Department made the stop and gave Beck a verbal warning for following another car too closely. Taylor told Beck that he was free to go, inquired whether he had any weapons or drugs, asked to conduct a quick search of the car, and, in Beck's presence, radioed a canine officer for assistance. Beck, who had remained in the car and had responded that he did not have weapons or drugs, asked what would happen if he refused to consent to the search. Taylor said that no search would occur, but that a drug dog would be led around the outside of the car. Beck refused to consent to the search. When the canine officer arrived, Taylor motioned him to get the dog out and instructed Beck to stand to the side of the car, which Beck did. The dog was led around the automobile, and it alerted to a rear passenger door on the passenger side. Taylor informed Beck of his *Miranda* rights, and Beck told the officers that he had an illegal substance in his briefcase. A search of the briefcase revealed a residue that later tested positive for methamphetamine. Beck was subsequently placed

under arrest, and a small amount of methamphetamine was found pursuant to a search of his person.

The *Beck* court found no reasonable, articulable suspicion before the search was conducted that Beck's car was carrying contraband or that other criminal activity may have been afoot. The court held that asking Beck to step from his motor vehicle in order to await a drug-dog sniff of his automobile, after the completion of a valid stop for a traffic violation, constituted a seizure within the purview of the Fourth Amendment. Citing *U. S. v. Terry, supra*, the court stated that Beck's renewed detention after completion of the initial traffic stop could occur only if events that had transpired during the stop gave rise to a reasonable suspicion that justified further detention, and it rejected the government's contention that reasonable suspicion for the renewed detention arose from seven circumstances. The seven factors were as follows: (1) Beck was driving a car rented by an absent third party; (2) the car was licensed in California; (3) there was fast-food trash on the passenger side floorboard; (4) there was no visible luggage in the passenger compartment of the automobile; (5) Beck exhibited a nervous demeanor; (6) Beck was traveling from a drug source state to a drug demand state; and (7) Officer Taylor did not believe Beck's explanation, given the number of employment opportunities that lay between California and North Carolina, that he was driving across the country to procure employment. *See Beck, supra.* The *Beck* court discussed each circumstance as consistent with innocence or as generating suspicion of criminal activity; it found that reasonable suspicion for Beck's renewed detention arose from none of the circumstances, individually or in combination.

The State argues that the facts of the present case support, more strongly than *Beck*, Officer Ramsey's reasonable suspicion (1) because Laime and Dodd were unable to say whom they were meeting for dinner and at what restaurant; (2) because Laime and Dodd both told Ramsey that the van was borrowed, while the registration papers for it showed Dodd to be its owner; (3) because Laime stated that he had a traffic violation, but he failed to reveal drug violations, disorderly conduct, and obstruction charges; (4) because, unlike in *Beck*, Dodd's consumption of food and drink was inconsistent with Laime's contention that appellants were meeting someone for dinner within fifteen minutes; and (5) because Laime's demeanor was irate, hostile, combative, demanding, disorderly, and belligerent.

As to the first factor, we find nothing about a driver's inability or unwillingness, during a traffic stop, to reveal to a state trooper with whom and where he is having dinner later that evening as giving rise to a suspicion that illegal activity has occurred, is occurring, or is about to occur.

The second factor alleged by the State to justify a basis for suspicion of criminal activity is the contrast between Laime's statement that the van was borrowed from a friend in Texas and the registration papers that showed Jeanna Dodd of Fort Sam Houston, Texas, to be the owner of the van. However, as already discussed, Ramsey testified that he had already made his decision to search the van before he ever talked to Dodd and before he had any knowledge that the owner of the van was, in fact, its passenger. Ramsey's only knowledge regarding ownership of the van at the time he made his decision to search it was that it was owned by a friend of Laime's who lived in Texas, and that the owner was a Texas woman named Jeanna Dodd.

Regarding the third factor, the State argues "that [Laime] did not reveal, although given the opportunity, that he been [sic] arrested in Florida for a drug violation and charged in Virginia for a drug violation, disorderly conduct and obstruction." The State's characterization of Laime's "opportunity" to reveal his past record is disingenuous. Even considered in the light most favorable to the State, the most we can discern from Trooper Ramsey's testimony regarding Laime's "opportunity" is that, while writing out a traffic citation, he asked Laime "if he'd ever been arrested or had any type of history," and Laime responded that he had received a "speeding ticket or some kind of driving offense a couple of years back." Considering that Ramsey's inquiry was made while he was writing out a citation during the course of a traffic stop relating to an offense of impeding traffic and to questions about the registration of the motor vehicle Laime was driving, it is not illogical that Laime would interpret Ramsey's inquiry as being limited to whether he had been arrested or had a history of other traffic offenses. We do not believe that Ramsey's ambiguous inquiry could have been reasonably viewed by Laime as presenting him with the "opportunity" to reveal his entire criminal history, particularly where, under these circumstances, Ramsey had no right to inquire about Laime's criminal history, and Laime had no obligation to reveal such information.

Regarding the fourth factor, we find nothing that is inconsistent with innocent behavior about a traveler's consumption of a snack shortly before dinner.

Finally, regarding Laime's demeanor, we note Ramsey's testimony that Laime would not give him a chance to explain anything, and that Laime was in a hurry to meet people in Little Rock to catch a ride to Washington, D.C. Just as the government's reliance on nervousness as a basis for reasonable suspicion must be treated with caution, *Beck, supra,* (citing *United States v. Fernandez,* 18 F.3d 874 (10th Cir. 1994)), we think that the State's reliance on Laime's escalating demeanor as a basis for reasonable suspicion is misplaced. We view Laime's demeanor — even if accurately described by Ramsey as irate, hostile, combative, demanding, and disorderly — as consistent with Laime's expressed need to get to Little Rock in short order and with his justifiable protests of his unreasonable detention by Ramsey. The State's brief refers to Ramsey's need for additional officers "out of concern for his own safety," but our review of the testimony to which the State refers reveals no such concern expressed by him.

In sum, the point at which the initial traffic stop was completed was when Laime gave Trooper Ramsey proper registration papers for the van. Under the circumstances of this case, Ramsey could not have formed a reasonable suspicion that criminal activity was afoot from knowing that the van was registered to someone in Texas named Jeanna Dodd, from Laime's failure to specify details about the trip or previous violations in other states, or from Laime's agitated and hostile behavior. Therefore, the renewed detention of the van, its driver, and its passenger exceeded the valid reason for the initial stop and violated the Fourth Amendment. The subsequent search of the vehicle was an unconstitutional search, and the drugs and drug paraphernalia discovered were fruit of the poisonous tree. The trial court's denial of appellants' motions to suppress should have been granted. In light of this holding, we need not address the third point, that omissions of facts in Ramsey's affidavit for search warrant undermined the drug dog's reliability and amounted to a *Franks* violation; or the fourth point, that the search warrant was objectively unreasonable and that there was no basis for a nighttime search.

Reversed and remanded.

HART, ROBBINS, and NEAL, JJ., agree.

GRIFFEN, J., concurs.

STROUD, C.J., dissents.

WENDELL L. GRIFFEN, Judge, concurring. I agree that Trooper Ramsey violated appellants' Fourth Amendment rights by detaining them after he determined that the Texas registration of Dodd's van was valid. However, I write separately to state in the clearest terms that assertion of one's constitutional rights, even if asserted with rudeness, does not automatically provide a police officer with reasonable suspicion to conduct a warrantless search. The United States Supreme Court has held that a suspect's mere assertion of constitutional rights cannot constitute the sole basis for establishing probable cause to conduct a search. *See Florida v. Bostick*, 501 U.S. 429 (1991). *See also United States v. Hyppolite*, 65 F.3d 1151 (4th Cir. 1995) (holding that the mere assertion of constitutional right to refuse consent to search does not supply probable cause to search), *cert. denied*, 517 U.S. 1162 (1996); *Snow v. State*, 84 Md. App. 243, 578 A.2d 816 (1990) (holding the driver's refusal to consent to search of automobile did not give rise to reasonable suspicion that vehicle contained narcotics).

In this case, after Ramsey determined that the registration on Dodd's van was valid, Ramsey then began questioning appellants regarding Dodd's identity and why they were traveling to Little Rock. When their answers did not satisfy Ramsey, he then produced a consent form and asked Laime if he knew what it was. Laime responded, "You're not going to look." Nonetheless, Ramsey proceeded to fill out the top part of the consent form and Laime repeated, "You're not going to look." Ramsey attempted to read the consent form to Laime, who for the third time stated, "You're not going to look." When Ramsey informed Laime that he was going to use the drug dog to sniff the van, Ramsey said that Laime "went ballistic" and responded, "You're not going to do it." He also said, "You are violating my constitutional rights. Either arrest me or let me go." Laime repeated these protests as Ramsey ran the drug dog around the van and when he conducted the search of the interior of the van.

Ramsey testified that Laime's attitude changed from "irate" to "bad combative" when he tried to read the consent form to him, and the State argues that appellant's escalating demeanor provided Ramsey with reasonable suspicion to conduct the warrantless search of the van. We have rejected this argument, noting that nervousness as a basis for reasonable suspicion must be treated with caution.

Laime's conduct was consistent with his expressed need to get to Little Rock in short order.

However, Laime's behavior was also consistent with a person who was forced to repeatedly assert his Fourth Amendment right to withhold his consent to have the vehicle searched without a warrant and whose right to do so was being violated. Laime had every right to withhold consent to a warrantless search of the vehicle. Ramsey had no warrant and lacked reasonable suspicion to effect a warrantless search. He plainly was unjustified in insisting that Laime consent to a warrantless search.

Finally, I write to declare my profound disappointment and displeasure with regard to the cavalier, if not callous, disregard that Ramsey's conduct manifested for an individual's right to withhold consent from governmental infringement on his personal liberty and privacy. It has often been stated that the Fourth Amendment protects the right to be left alone. Laime repeatedly asserted that right during the encounter with Ramsey.

Moreover, one's frustration, resentment, or even anger in the face of the blatant disregard of the right to be left alone does not suggest criminal conduct. The police are sworn to protect life and liberty, including the liberty to say no to the police. Otherwise, the Fourth Amendment right to be free from unreasonable searches and seizures will mean only what police officers like Ramsey want. That is not liberty; it is the essence of a police state.

JOHN F. STROUD, JR., Chief Judge, dissenting. I agree with the majority that the police officer had probable cause to stop the van in order to ascertain the validity of its registration, and that, consequently, the initial stop was valid. I do not agree, however, that the officer's continued detention of the vehicle and its occupants exceeded the valid reason for the initial stop, thereby making the subsequent search unconstitutional. I therefore respectfully dissent and would affirm the convictions.

When reviewing a trial court's ruling on a motion to suppress, we make an independent determination based on the totality of the circumstances and reverse only if the trial court's ruling was clearly against the preponderance of the evidence. *Embry v. State,* 70 Ark. App. 122, 15 S.W.3d 367 (2000). The majority relies upon *United States v. Beck,* 140 F.3d 1129 (8th Cir. 1998). I, too, find that *Beck* is instructive. As explained by the Eighth Circuit Court of Appeals:

During an investigative stop, officers may check for weapons and may take any additional steps "reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop." *United States v. Hensley,* 469 U.S. 221, 235 (1985); *see also United States v. Dawdy,* 46 F.3d 1427, 1430 (8th Cir.) (holding that requests for identification of all occupants, explanation of presence in area, and warrant check was within reasonable scope of detention), *cert. denied,* 516 U.S. 872 (1995); *United States v. White,* 42 F.3d 457, 459 (8th Cir. 1994) (holding that request for license, destination, and purpose of trip within reasonable scope of detention); *United States v. Ramos,* 42 F.3d 1160, 1163 (8th Cir. 1994) (concluding that license and vehicle registration checks were reasonable), *cert. denied,* 514 U.S. 1134 (1995).

. . . .

Nonetheless, *unless [the police officer has] a reasonably articulable suspicion for believing that criminal activity was afoot,* continued detention of Beck became unreasonable after he had finished processing Beck's traffic violation. *See United States v. Mesa,* 62 F.3d 159, 162 (6th Cir. 1995) ("Once the purposes of the initial traffic stop were completed, there is no doubt that the officer could not further detain the vehicle or its occupants *unless something that occurred during the traffic stop generated the necessary reasonable suspicion to justify a further detention.*").

. . . .

Because the purposes of Officer Taylor's initial traffic stop of Beck had been completed by this point, Officer Taylor could not subsequently detain Beck *unless events that transpired during the traffic stop gave rise to reasonable suspicion to justify Officer Taylor's renewed detention of Beck.* . . . Thus, we must consider whether Officer Taylor had a reasonable, articulable suspicion that Beck's Buick was carrying contraband or that other criminal activity may have been afoot. . . . " 'Whether the particular facts known to the officer amount to an objective and particularized basis for a reasonable suspicion of criminal activity is determined in light of the totality of the circumstances.' "

. . . .

This court has summarized the standards used to consider whether reasonable suspicion exists as follows:

> The standard of articulable justification required by the fourth amendment for an investigative, *Terry*-type seizure is whether the police officers were aware of "particularized, objective facts which, taken together with rational inferences from those facts, reasonably warrant[ed] suspicion that a crime [was] being committed." . . . In assessing whether the requisite degree of suspicion exists, we must determine whether the facts collectively establish reasonable suspicion, not whether each particular fact establishes reasonable suspicion. "[T]he totality of the circumstances — the whole picture — must be taken into account." . . . We may consider any added meaning certain conduct might suggest to experienced officers trained in the arts of observation and crime detection and acquainted with operating modes of criminals. . . . It is not necessary that the behavior on which reasonable suspicion is grounded be susceptible only to an interpretation of guilt, . . .; however, the officers must be acting on facts directly relating to the suspect or the suspect's conduct and not just on a "hunch" or on circumstances which "describe a very broad category of predominantly innocent travelers."

140 F.3d at 1134-1136 (emphasis added) (citations omitted). Contrary to the conclusion reached by the majority in the instant case, I have concluded that, in viewing the totality of the circumstances, "something that occurred during the traffic stop generated the necessary reasonable suspicion to justify a further detention."

Here, when the officer checked the Texas license tags, they did not show that the car was registered, providing the basis for the initial stop. When he asked the driver, Laime, for his driver's license, Laime gave him an ID card from Virginia. The officer asked him why the van had Texas tags if he was from Virginia, and Laime told him that the van belonged to a friend in Texas. Laime also told him that he and the other occupant of the vehicle were heading to Little Rock to meet some friends for supper and that those friends were going to take him to Washington. He said that his female passenger [appellant Jeanna Dodd] would then take the van back to Texas.

The officer then asked for registration or insurance papers and he was given insurance papers made out to "Jeanna Dodd" with a "Subaru" listed as the insured vehicle rather than the Dodge van that Laime was driving. At that point the officer did not know who "Jeanna Dodd" was. The officer then went back to his patrol car to check the Virginia ID and to run the Texas tags again. The tags still came back with no registration information.

The officer then went back to the van and asked the driver, Laime, to return to the patrol car with him because he had some questions. When Laime came to the patrol car, he had the Texas registration papers on the van. Those papers showed that the van was registered to "Jeanna Dodd," the same name shown on the insurance papers. The papers showed that the van had been registered in Ft. Sam Houston at 12:30 p.m. that afternoon.

It is at this point that the majority maintains the detention should have ended, whereas I think the officer's suspicions were still reasonable because the computer was not showing the car as registered, and it would be implausible if not impossible to register a vehicle at Ft. Sam Houston/San Antonio, Texas, at 12:30 p.m. and be near Benton, Arkansas before 6:00 p.m. on the same afternoon. He produced nothing but registration papers and insurance papers in the name of a person, "Jeanna Dodd," that was not the driver and that had not yet been identified as the female passenger.

Moreover, when the officer asked Laime where they were going to eat, he responded that he could not remember the name, but that his sister would know. The officer then went to talk to the female passenger. She also stated that they were brother and sister, that she lived in Texas and he in Washington, and that they were going to Little Rock to eat supper with friends that were going to take him back to Washington. When the officer asked her where they were going to eat, "She couldn't remember the address or whether it was Arby's or Wendy's or any other place like that." Neither could she tell him the names of the people they were to meet. I think the officer's continued suspicions remained reasonable at this point as well.

The officer then returned to his patrol car to talk to Laime and to have Hot Springs run a criminal-history check on him. He asked Laime if he had any arrests and Laime responded that he had a driving offense a couple of years ago. The officer described Laime as becoming irate, combative, and hostile, and that at some point he called for other officers. The officer then returned to the van to talk to the passenger [Dodd] again. He asked her for identification, and it was at that point that he learned that she was "Jeanna Dodd," the person in whose name the van was registered. Yet both she and Laime had previously told him that the van belonged to a friend in Texas.

In short, I find that these facts are distinguishable from those presented in *Beck, supra*. Laime and Dodd both seemed to be trying

to avoid full identification of themselves and the ownership of the vehicle, neither could remember where they were meeting the people in Little Rock, and Dodd could not remember the names of the people they were meeting. Based on the totality of these circumstances, I think the officer had sufficient reasons for further detaining appellants even after being furnished Texas registration papers. Consequently, I would find that the trial court's denial of the motion to suppress was not clearly erroneous.

The majority opinion does not address the remaining points of appeal, and neither do I, other than to say that I do not find reversible error with respect to either of them.

SUPERIOR SENIOR CARE, INC. *v.*
DIRECTOR, Employment Security Department,
and Margaret A. Manuel

E 99-317 44 S.W.3d 749

Court of Appeals of Arkansas
Division I
Opinion delivered May 2, 2001

Hurst Law Offices, by: *Q. Byrum Hurst*, for appellant.

Alan Franklin Pruitt, for appellees.

SAM BIRD, Judge. Superior Senior Care, Inc., appeals a decision of the Board of Review declining to direct that Superior's proffer of additional evidence be considered in a further hearing. The decision allowed Margaret Manuel to receive benefits under Ark. Code Ann. § 11-10-513(b) (Supp. 1999), in that, after making reasonable efforts to preserve her job rights, she voluntarily left her last employment because of illness. Superior contends on appeal only that the Board erred in finding that it was an employer of Manuel. We disagree and affirm.

Manuel was employed in her last work, that of caregiver to an individual, after being referred by Superior, a licensed employment agency. Manuel's claim for benefits showed the dates of last employment as September 30, 1998, through May 5, 1999, and indicated that she had left because of vomiting and bad headaches. Manuel appeared in her own behalf in a telephone hearing conducted by a hearing officer of the Arkansas Appeal Tribunal, and Superior was represented by its president, Joseph Pascual. The hearing officer noted both parties' belief that because Superior was a referral service, it was incorrectly listed as Manuel's employer.

Superior contends that it is exempt from the Arkansas Employment Act under the requirements of Ark. Code Ann. § 11-10-210 (Supp. 1999) and *Barb's 3-D Demo Serv. v. Director,* 69 Ark. App. 350, 13 S.W.3d 206 (2000). It argues that there was no evidence from which the Board could have found that Manuel was employed by Superior, and it argues that the decision was unilateral, arbitrary, and capricious in naming Superior as the employer. Superior complains that these factors were totally disregarded: Superior neither trained nor instructed Manuel; it had no direct control over the method or means of services she performed; it had virtually no contact with her after she accepted a referral; it allowed her to accept or decline the offer of employment without consequences, and to perform services for others; [she] could have [been] referred to others through other employment agencies; another person could substitute for her if she were unable to perform the accepted engagement; and she was paid by the person to whom she was referred for employment.

The Board of Review affirmed and adopted the opinion of the Appeal Tribunal, which included the following reasoning and conclusions:

> The claimant and employer express concerns that Superior Senior Care may not technically be the employer for purposes of unemployment benefits. However, this issue is not before the Tribunal. For purposes of the claimant's separation from last work and availability for suitable work, Superior will be treated as the claimant's last employer, although this treatment does not establish that Superior is in fact an employer for contribution purposes. Any such determination rests with the Department and is not affected by this decision.

Regarding the issue of whether Superior was Manuel's employer for purposes of the claim, the Board additionally made these observations:

> The employer's presentation to the Appeal Tribunal, as well as its argument and offer to the Board of Review, principally concerns employer coverage issues. However, the appellate jurisdiction in this separation matter does not extend to such issues. *The issues of qualification for benefits arising from separation from "last work" are distinct from issues of whether the claimant performed "insured work,: that is, services for an "employer" in "employment," within the meanings of Ark. Code Ann. §§ 11-10-217, 11-10-209 and 11-10-210, respectively.* Any reference in this decision, or in the appeal Tribunal's decision as adopted by the Board, to an employer reflects factual circumstances of the claimant's last work. Such references are a convenience of form which does not indicate adjudication of the last work in this matter as covered or insured work under the Arkansas Employment Security Law. *The procedure for adjudication of any employer coverage issue raised in this record is principally provided for at Ark. Code Ann. § 11-10-308 and related regulations of the Director of Employment Security, especially Regulation No. 27. As need be, a party may apply to the Department in that regard.*

The procedure for making a determination of employer-coverage issues is found at Ark. Code Ann. § 11-10-308 (Supp. 1999), entitled "Director-Administrative determinations of coverage." Subsection (a) of the statute states:

> The Director of the Arkansas Employment Security Department may, upon his own motion or application of an employing

> unit, ... make findings of fact and, on the basis thereof, determinations with respect to whether an employing unit constitutes an employer and whether services performed for or in connection with the business of an employing unit constitute employment for that employing unit.

Subsection (b)(1) allows either the director or any interested party to certify the question of coverage to the Board of Review for its determination, and (b)(2) allows an appeal to the Board from the director's determination on all matters with respect to coverage.

We do not interpret the Board's decision, or the decision of the Appeal Tribunal that was adopted by the Board, as having determined any of the employer-coverage issues that are referred to in section 11-10-308, including Superior's status an an employer. The only determination made by the Board in its decision is that Manuel is entitled to benefits under the Employment Security Act upon a finding that she left her last work voluntarily and without good cause connected with the work because of illness, after making reasonable efforts to preserve her job rights. Superior does not contest that determination by the Board but argues, instead, that Superior is not Manuel's employer, an issue not addressed by the Board's decision.

We find that the Board was correct in ruling that its appellate jurisdiction in this separation matter did not extend to the issues of employer coverage. Manuel neither filed a motion for determination of employer coverage with the AESD director nor certified the question to the Board of Review. There was no appeal of the employer-coverage issues before the Board, and the Board made no determination as to the employer-coverage issues; therefore, the Board properly refused to consider the proffered evidence.

Affirmed.

JENNINGS and GRIFFEN, JJ., agree.

William J. WIGLEY *v.* STATE of Arkansas

CA CR 00-257 44 S.W.3d 751

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered May 2, 2001

R. Paul Hughes, III, for appellant.

Mark Pryor, Att'y Gen., by: *Misty Wilson Borkowski*, Ass't Att'y Gen., for appellee.

TERRY CRABTREE, Judge. Law-enforcement officials seized drugs and related materials after they made a warrantless entry into the home of a parolee, Lori Friddle, where the appellant, William Wigley, was an overnight guest. After a trial, a jury sitting in the Sebastian County Circuit Court found appellant guilty of manufacturing methamphetamine and sentenced him to twenty-three years in the Arkansas Department of Correction. On appeal, appellant maintains that the trial court erred in denying his motion to suppress part of the evidence seized from Friddle's residence. We affirm.

Friddle executed a consent-in-advance form as a condition of gaining parole. Friddle's parole officer testified that this condition of release stated that "you must admit your person, place or residence and motor vehicle to search and seizure at any time, day or night, with or without a search warrant, whenever requested to do so by any Department of Community Punishment Officer." Following Friddle's execution of this condition, the local drug task force began to investigate possible illegal drug activities occurring in her residence. The county criminal investigator understood, based on information gained from an informant who had been in Friddle's residence, that illegal activities were occurring in the house. On March 4, 1999, at approximately 5:00 a.m. the investigator contacted Friddle's parole officer and stated that methamphetamine was being cooked in the house. Approximately an hour later, a warrantless search of the house was conducted based on the "consent in advance" form signed by Friddle.

Four detectives and two patrolmen accompanied the parole officer to Friddle's residence to conduct the search. The search resulted in the seizure of a bag of white powder from a cigarette case with "Lori" on it, a hypodermic needle, and two used syringes. However, this appeal focuses on the search of a cardboard box and the seizure of its contents. In a den near the back-door entrance of the house, the officers found a cardboard box that was partially concealed with clothing and a trash bag lying on the top of the box. Inside the box, officers discovered one empty can of Toluene, one empty can of acetone, a plastic Dr. Pepper bottle with a reddish liquid, two jars with a chemical substance, tubing, and a Pyrex glassware with some residue. Based on this seized material, appellant was charged with possession of methamphetamine with intent to deliver. Appellant moved to suppress, arguing that the contents of the box were searched and seized in violation of the Fourth and Fourteenth Amendments, and the trial court denied the motion.

A defendant, as the proponent of a motion to suppress, bears the burden of establishing that his Fourth Amendment rights have been violated. *Richard v. State*, 64 Ark. App. 177, 983 S.W.2d 438 (1998). When reviewing the trial court's denial of a motion to suppress, the appellate courts make an independent determination based on the totality of the circumstances and reverse only if the trial court's ruling was clearly against the preponderance of the evidence. *Welch v. State*, 330 Ark. 158, 955 S.W.2d 181 (1997).

Appellant brings this appeal contending that the State violated his Fourth and Fourteenth Amendment rights by searching and seizing items by virtue of a warrantless search. In response, the State argues that appellant lacks standing to challenge the search because the host's consent-in-advance rendered appellant's expectation of privacy unreasonable. It is well settled that capacity to claim the protection of the Fourth Amendment depends upon whether a person who claims the protection has a legitimate expectation of privacy in the invaded place. *Katz v. United States*, 389 U.S. 347 (1967). We must decide whether appellant has standing to challenge the search in Friddle's residence. Fourth Amendment rights against unreasonable searches and seizures are personal in nature. *Rakas v. Illinois*, 439 U.S. 128 (1978). Thus, a defendant must have standing before he can challenge a search on Fourth Amendment grounds. *Ramage v. State*, 61 Ark. App. 174, 966 S.W.2d 267 (1998). A person's Fourth Amendment rights are not violated by the introduction of damaging evidence secured by a search of a third person's premises or property. *Rankin v. State*, 57 Ark. App. 125, 942

S.W.2d 867 (1997). One is not entitled to automatic standing simply because he is present in the area or on the premises searched or because an element of the offense with which he is charged is possession of the thing discovered in the search. *Embry v. State*, 70 Ark. App. 122, 15 S.W.3d 367 (2000). The pertinent inquiry regarding standing to challenge a search is whether a defendant manifested a subjective expectation of privacy in the area searched and whether society is prepared to recognize that expectation as reasonable. *Id.*

We are cognizant of *Minnesota v. Olson*, 495 U.S. 91 (1990), wherein the Supreme Court held that an overnight guest has a legitimate expectation of privacy in a host's home. However in *Olson*, the Court reasoned, "From the overnight guest's perspective, he seeks shelter in another's home precisely because it provides him with privacy, a place where he and his possessions will not be disturbed by anyone but his host and *those his host allows inside*." 495 U.S. at 99 (emphasis added). In this instance, Friddle, the host, expressly allowed law-enforcement officials to search her home and person at any time as a condition of her release.

In *United States v. Matlock*, 415 U.S. 164 (1974), the Court addressed third-party consents by commenting that "any of the co-inhabitants has the right to permit the inspection in his own right and that the others have *assumed the risk* that one of their number might permit the common area to be searched." 415 U.S. at 172, n.7 (emphasis added). Here, appellant assumed this risk. Indeed, Friddle could allow anyone inside her home, and Friddle had ample time to apprize appellant of this condition of her release.

We believe that an overnight guest has no reasonable expectation of privacy when the host consents to a search. Accordingly, we conclude that as an overnight guest in a parolee's home, appellant did not have a reasonable expectation of privacy in the cardboard box located in a common area of the parolee's residence. Thus, appellant lacks standing under the Fourth Amendment to contest the legality of the warrantless search based upon his host's consent-in-advance.

Affirmed.

STROUD, C.J., and JENNINGS, BIRD, and VAUGHT, JJ., agree.

HART, J., dissents.

JOSEPHINE LINKER HART, Judge, dissenting. Few things should cause more distress in an American than when the judiciary of this country decides to allow a defendant's misdeeds to diminish the liberties granted in the Bill of Rights for all. When viewed as a studied statement of law, the majority's efforts represent, by any objective measure, a new assault on the "right of the people to be secure in their person, houses, papers, and effects against unreasonable searches and seizures . . . ." U.S. Const., amend. 4. *See also* Ark. Const. art. 2, § 15. I have neither pity for appellant in this matter nor a role in determining his guilt or innocence. Instead, after careful consideration, the majority's opinion, in my view, further relegates the Fourth Amendment to a mere collection of artfully selected words that have progressively less value.

The critical facts of this case reveal that Lori Friddle executed a consent-in-advance as a condition of gaining parole, which, according to the testimony of the parole officer, gave law enforcement officials authority to search either her person or premises at any time or for any reason. Following Friddle's execution of this consent, the county criminal investigator understood, based on information gained from an informant who had been in the Friddle's residence, that illegal activities were occurring in the house. Upon ascertaining that Friddle resided in the house and that she was on parole, the investigator contacted Friddle's parole officer at approximately 5:00 a.m. and stated that up to fifteen people were in the house and that methamphetamine was being cooked in the house. Despite the government's knowledge that its search could affect the constitutional rights of up to fifteen people, it elected to avoid getting a warrant. Instead, within a one-hour period, it brought Friddle's parole officer to the house and began a warrantless search of the entire premises at approximately 6:00 a.m.

The search resulted in the seizure of both drugs and related materials: a bag of white powder from a cigarette case with "Lori" on it was located in Friddle's bedroom, a hypodermic needle in a dresser drawer, a used syringe in a lady's black coat that was hanging on the back of a chair in the kitchen, and a used syringe in a man's denim jacket that was hanging on the back of a chair in the bedroom. The seized items, however, that are the subject of this appeal were found in a box, the contents of which were concealed from the police because clothing covered the box's top, while the police were searching a common area of the house (a den near the back-door entrance). Appellant, an overnight guest, was removed

from the premises by the police before the search began and, consequently, was unable to assert any interest in the box.[1] In fact, the box and its contents belonged to appellant. Based on the seized material, appellant was charged with possession of methamphetamine with intent to deliver.

Appellant moved to suppress, arguing that the contents of the box were searched and seized in violation of the Fourth Amendment as made applicable to the respective states through the Fourteenth Amendment, and the trial court denied the motion. From appellant's conviction, comes this appeal.

We, of course, begin with the recognition that Fourth Amendment rights are personal in nature, *Rakas v. Illinois*, 439 U.S. 128, 133 (1978), and "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment . . . ." *Katz v. United States*, 389 U.S. 347, 357 (1967). Specifically, "searches and seizures inside a home without a warrant are presumptively unreasonable [partly because] . . . [i]n terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house." *Payton v. New York*, 445 U.S. 573, 586 and 590 (1980). These principles are "subject only to a few specifically established and well-delineated exceptions." *Katz*, 389 U.S. at 357. For example, searches based on first-party consent can be considered reasonable, *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973), and within the narrow parameters of *United States v. Matlock*, 415 U.S. 164 (1974), searches based on third-party consent can also be considered reasonable.

To raise a Fourth Amendment challenge, the defendant must demonstrate that he has a "legitimate expectation of privacy in the invaded place," which he can do if he establishes a subjective expectation of privacy that is "one that society is prepared to recognize as 'reasonable.' " *Rakas*, 439 U.S. at 143-144 n.12. Commensurate with this principle, "an overnight guest . . . [has] an expectation of privacy in [a host's] home," because as a guest, he has a subjective expectation of privacy "that society is prepared to recognize as reasonable." *Minnesota v. Olson*, 495 U.S. 91, 96-97 (1990). Furthermore, as the Court explained in *Olson*, 495 U.S. at 99-100:

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[1] Even if appellant had been present during the search, he should not be expected to forego his Fifth Amendment right to remain silent in order to preserve his Fourth Amendment challenge to the warrantless search and seizure of his personal property.

> That the guest has a host who has ultimate control of the house is not inconsistent with the guest having a legitimate expectation of privacy. . . . If the untrammeled power to admit and exclude were essential to Fourth Amendment protection, an adult daughter temporarily living in the home of her parents would have no legitimate expectation of privacy . . . .

Overshadowing this analysis is an understanding that, "[t]he essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials," *Delaware v. Prouse*, 440 U.S. 648, 653-654 (1979), and the "Amendment is designed to prevent, not simply to redress, unlawful police action." *Chimel v. California*, 395 U.S. 752, 766 n.12 (1969). Moreover, our understanding of the meaning of this Amendment is aided by an appreciation for the reasons that it was adopted. As stated in *Steagald v. United States*, 451 U.S. 204, 220 (1981) (citations omitted):

> The Fourth Amendment was intended partly to protect against the abuses of the general warrants that had occurred in England and of the writs of assistance used in the Colonies. The general warrant specified only an offense — typically seditious libel — and left to the discretion of the executing officials the decision as to which persons should be arrested and which places should be searched. Similarly, the writs of assistance used in the Colonies noted only the object of the search — any uncustomed goods — and thus left customs officials completely free to search any place where they believed such goods might be. The central objectionable feature of both warrants was that they provided no judicial check on the determination of the executing officials that the evidence available justified an intrusion into any particular home.

Commensurate with the foregoing, warrantless searches and seizures cannot be judicially sanctioned when to do so would establish a principle that would expose citizens to "a significant potential [of government] abuse." *Steagald*, 451 U.S. at 215. With specific regard to a consent by a third-party, the "common authority" requirement announced in *Matlock* cannot be inferred because "the burden of establishing . . . common authority rests upon the State." *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990). Furthermore, a "determination of consent to enter must 'be judged against an objective standard: would the facts available to the officer at the moment . . . warrant a man of reasonable caution in the belief' that the consenting party had authority over the premises?" *Rodriguez*, 497 U.S. at 188 (quoting *Terry v. Ohio*, 392 U.S. 1 (1968)). This

objective standard allows for the possibility that "when the invitation is accompanied by an explicit assertion that the person lives there, the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry." *Id.*

I dissent because the majority's view prevents an overnight guest from raising his personal Fourth Amendment rights and establishes a principle that allows warrantless searches in a manner that is contrary to the requirements embodied in the Fourth Amendment.

I.

The defendant, as an overnight guest, plainly has standing to raise a Fourth Amendment challenge. Contrary to the majority's opinion, the real issue in this case is not *standing*; instead, the issue is whether the warrantless search and seizure of the defendant's property was *reasonable* in light of the parolee's consent-in-advance. This is a important constitutional issue that has not been addressed by either the United States Supreme Court or the Arkansas Supreme Court.

II.

I am concerned that we have engaged in less than an independent determination based on the totality of the circumstances to determine whether the denial of the suppression motion was clearly against the preponderance of the evidence, *Welch v. State*, 330 Ark. 158, 164, 955 S.W.2d 181, 183 (1997), because we have not seen the document that is at the center of this storm — the parolee's consent form. That critical document encompasses the scope and breadth of the government's power, and in light of the fact that a critical constitutional question is posed in this case, I am uncomfortable with affirming the trial court without the benefit of a review of the actual consent. This is not a criticism of the witness whose testimony provides the only insight into the consent. Instead, I am concerned with whether the consent provided an appropriate balance between the government's interest in operating an effective parole system and society's interest in safeguarding constitutional rights of citizens, whose expectations of privacy are not reduced in the way a parolee's expectations are compromised.

III.

One may think that the majority's view is perfectly appropriate because, after all, if someone associates with a parolee, then they also should expect this type of government intrusion into their lives. Such a point of view fails to recognize that Fourth Amendment rights are personal in nature and condones warrantless searches that the Amendment was conceived to prevent. One may retort that such a close adherence to the Fourth Amendment may allow a third-party to provide sanctuary for a parolee and, thereby, contravene parole authorities. However, as the California Court of Appeals in *People v. Veronica*, 107 Cal. App.3d 906, 909, 166 Cal. Rptr. 109, 110-111 (1980), so rightly put it:

> This, of course, approaches the problem from the wrong end: it is the Fourth Amendment that makes a constitutional sanctuary of all "persons, houses, papers, and effects . . . ." which sanctuary can ideally only be violated by a search pursuant to a warrant. While a consent search of a parolee's home is an exception to this basic rule, it is not, however, an end in itself which justifies further invasions of constitutionally protected zones of privacy.

Furthermore, the government does not rely on any precedent to support its ostensible position that the consent-in-advance constituted a valid third-party consent. Any attempt to do so must, at a minimum, concede that the consent here was unlike that considered in *Matlock*. The search in *Matlock* was made immediately after the third-party consent was given. Here, we simply do not know how much time passed — days, months, or even years. Secondly, the consent in *Matlock* was given freely and without any benefit given in consideration for it; however, in the case at bar, the consent was bargained for and given in exchange for freedom from prison. Finally, the consent given in *Matlock* was undoubtedly a third-party consent; however, there is a real question of whether the consent-in-advance in this case was only a first-party consent that the government simply used as a third-party consent. We must cull through the facts of both *Matlock* and this case to determine whether the consent was truly a valid third-party consent. I submit that the facts here are sufficiently distinguishable to conclude that *Matlock* is not controlling in this matter.

The majority begins with the premise that the consent in this case was similar to any other typical third-party consent when, in fact, it was unlike the commonly understood concept of such a

consent. Generally, the host-guest relationship is created and, thereafter, the host gives the consent to search the guest's belongings. Here, however, the consent was given before the host-guest relationship was created, and there is no evidence in the record that appellant had knowledge of his host's status as a parolee. This distinction is critical.

One must acknowledge that this framework does not fit the facts of this case. Consequently, the majority's view alters the traditional definition of a third-party consent and allows for a new type of third-party consent. Under this new version, the host no longer has the exclusive right to consent to future searches of guests's belonging because that power has been given to the government in consideration for freedom from prison. Stated differently, the government is not subject to the direction of the host *vis-á-vis* an individual guest; instead, the government immediately acquires the power to search all guests's property unbeknownst to everyone other than the host and the government.

The majority's opinion attempts to take what is actually a less-than voluntary first-party consent, which is contrary to *Schneckloth*, and gives it the appearance of a valid third-party consent. Specifically, because the people who are actually giving the "consent" (*i.e.*, the guests) are effectively dealing directly, although unknowingly, with the government, it cannot be said that they stand in the shoes of a third-person *vis-á-vis* the government. Stated differently, under the traditional concept of third-party consent, a reasonable guest *knowingly assumes the potential risk* that his proxy may be used to permit a government search of his property; however, under the majority's view the guest *directly and unknowingly gives* the government the authority to search his property. In my view, the majority's version of third-party consent allows the government to intrude on an individual's Fourth Amendment rights by stealth.

Here, few would doubt that the government was really conducting a criminal investigation instead of trying to effectively administer a parole system.[2] Moreover, the government understood

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[2] As explained in *United States v. Harper*, 928 F.2d 894, 897 (9th Cir. 1991) (citations omitted):

> [T]he police may not use a parole officer as a "stalking horse" to evade the fourth amendment's warrant requirement. However, police and parole officers are entitled to work together to achieve their objectives; concerted action does not in and of itself make a search constitutionally infirm. The proper question is whether the parole officer used her authority to help the police evade the fourth amendment's warrant requirement or whether the parole

that its search could touch on the constitutional rights of up to *fourteen people* other than the parolee. Nevertheless, it proceeded to invade a house in a manner untested by our judiciary when, by my view, it had sufficient probable cause to obtain a search warrant. The facts of this case demonstrate perfectly that in the vast majority of cases the government can both engage in effective law enforcement and conduct a search with judicial oversight. In my view, we should not create one more exception to the requirement that government must first get a warrant before entering a house when, in fact, a warrant could have been so easily attained.

If there is to be liberty, then its survival depends upon the judiciary guarding it jealously. Our commission is to require that the government act faithfully in accordance with the Fourth Amendment, not to repeatedly absolve its warrantless searches and seizures. As Justice Bradley advised, "[I]llegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure. . . . It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon." *Boyd v. United States*, 116 U.S. 616, 635 (1886).

Although the Bill of Rights was a product of human efforts and, therefore, inherently imperfect, what the Founders left us, in my view, is far better than any alternative offered to date. We should, therefore, inspire compliance by the government, and in doing so, we would protect the law-abiding citizen from unreasonable intrusion by the government. The intent of the Fourth Amendment is not to protect criminals, but it is to establish rules to protect the innocent and to maintain the security of the citizenry in their own homes. By enforcing this rule, we would not only follow the mandates of the law, but we would also confirm to the people our continued faith in the vision given us by our Founders. It is upon that foundation that I respectfully offer this dissent.

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officer cooperated with the police to achieve her own legitimate objectives.

Walton Thomas BUCKLEY *v.*
Kimberly Kaye Carter BUCKLEY

CA 00-1368 43 S.W.3d 212

Court of Appeals of Arkansas
Division II
Opinion delivered May 2, 2001

Tiner & Spruell and *Lori B. Winters*, by: *Lori B. Winters*, for appellant.

Durrett & Coleman, by: *Chadd L. Durrett, Jr.*, for appellee.

ANDREE LAYTON ROAF, Judge. Walton Thomas Buckley appeals the chancery court's order awarding Kimberly Kay Carter Buckley custody of their two minor children and denying him visitation rights. On appeal, he argues that the trial court erred in awarding Ms. Buckley custody because the preponderance of the evidence did not support the court's finding that Ms. Buckley is fit

and he is unfit to have custody, and he further contends that it is not in the best interests of the children to be in Ms. Buckley's custody. He also argues the court erred in denying him visitation. We affirm.

Thomas and Kim Buckley were married on June 21, 1990, in Tennessee. During their marriage, they had two children, Janet, born on May 7, 1991, and Marcia, born on June 3, 1992. Additionally, Ms. Buckley had a child from a previous marriage, Jennifer Buckley, born on May 15, 1984, who was legally adopted by Mr. Buckley while the parties were married. Sometime in January of 1996 the parties separated, and Ms. Buckley moved to Arkansas in July of 1996. In September of that year, Ms. Buckley filed for divorce in Arkansas and two days later, Mr. Buckley filed for divorce in Tennessee. Mr. Buckley filed a motion to dismiss and answer in Arkansas, and after no action was taken for one year, the Arkansas case was dismissed without prejudice for want of prosecution.

On December 9, 1998, Ms. Buckley filed a new complaint for divorce in Arkansas, and the case came to trial on June 27, 2000. During the two-day trial, the chancellor heard testimony from both parties; Ms. Buckley's former employee, Kelley Bailey and her husband Randall Bailey; Pamela Buckley, Mr. Buckley's ex-wife; Dana Avant and Rob Rollans, Ms. Buckley's former co-workers; Laura Thomas, Ms. Buckley's former babysitter; Melissa Joyce Stoner, Ms. Buckley's friend; April Revelle, Ms. Buckley's babysitter; Paul Weaver, Ms. Buckley's friend; Jennifer Buckley; Trey Boals, Jennifer's ex-boyfriend; Linda Kline, Jennifer's paternal grandmother; and John Boals, Trey's father. A final ordered, entered August 14, 2000, awarded Ms. Buckley a divorce and custody of the parties' minor children, appointed a guardian ad litem to periodically evaluate the best interests of the children, and denied Mr. Buckley visitation rights. Mr. Buckley appeals the chancellor's award of custody to Ms. Buckley and the denial of his visitation rights.

■ Chancery cases are tried *de novo* on appeal. *Hollinger v. Hollinger*, 65 Ark. App. 110, 986 S.W.2d 105 (1999). The findings by a chancellor will not be disturbed unless they are clearly against the preponderance of the evidence. *Stone v. Steed*, 54 Ark. App. 11, 923 S.W.2d 282 (1996). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been

committed. *Fonken v. Fonken*, 334 Ark. 637, 976 S.W.2d 952 (1998).

For his first argument, Mr. Buckley argues that the chancellor erred in awarding custody of the parties' minor children to Ms. Buckley. He argues that the preponderance of the evidence does not support the trial court's findings that Ms. Buckley is fit and that he is unfit nor did it support the finding that it is in the best interests of the children to be in Ms. Buckley's custody. Mr. Buckley argues that the testimony of Trey Boals and Kelly and Randall Bailey establish that Ms. Buckley is unfit.

Trey Boals testified that he consumed alcohol at Ms. Buckley's home with her permission, that Ms. Buckley asked him to lie about his relationship with her daughter Jennifer, and that Ms. Buckley gave her younger children medication so they would sleep through parties at her house. However, on cross-examination Trey acknowledged that Mr. Buckley contacted him, accused him of having sex with the Buckleys' minor daughter, Jennifer, and told him that he had committed a Class Y felony and could get ten to forty years to life. Further, John Boals, Trey's father testified, "I felt like that he [Mr. Buckley] just had us over a barrel." Based on this testimony, the chancellor, in his findings, stated that Mr. Buckley "manipulated and coerced" Trey's testimony. Further, while Kelly and Randall Bailey testified that Ms. Buckley was drunk at a lake outing one weekend and sat on a young boy's lap, Ms. Buckley denied the allegations and testified that she had fired Ms. Bailey from her job two or three years earlier.

In regard to Ms. Buckley's fitness, the chancellor found, "That although evidence in this case indicates that plaintiff [Ms. Buckley] has been somewhat derelict as relates to the providing of appropriate surroundings and supervision for the three minor children since the separation of the parties, such parental shortcomings do not justify nor mandate the removal of said children, their welfare considered, from plaintiff to defendant." The chancellor noted the Ms. Buckley was "less than forthright" in testimony regarding her parental supervision, but he found she was "a fit parent to have the care and custody of the three minor children of the parties, subject to restrictions" that prohibited her from having an overnight male guest and prohibiting her from giving the minor children alcohol. Evidence before the chancellor established that Ms. Buckley is a registered nurse and has steadily been employed; she is the only source of income for the family; four witnesses testified that she is a good mother and has a good relationship with

her children and the children make good grades in school; and she and her children lived with the man she intended to marry for a short period four years after she was separated because she despaired of ever obtaining a divorce from Mr. Buckley. Based on this evidence, and the chancellor's superior position to judge the credibility of the witnesses, the chancellor's finding that Ms. Buckley is fit is not clearly erroneous.

In regard to Mr. Buckley, the chancellor found that he, "without valid justification or excuse, failed to support . . . his children in any way (financially, educationally, physically, spiritually, or otherwise) for over four years continuously." The chancellor then noted Mr. Buckley claimed to have spent $18,000 in attorney fees and costs in his domestic case without coming to court to seek visitation or custody and that "the evidence in this case is clear that defendant unlawfully entered the home of plaintiff for the purpose of gathering evidence and by defendant's own admission obtained, without anyone's permission, undergarments of his oldest daughter, sending the same to a laboratory for some sort of forensic examination." The chancellor observed that Mr. Buckley showed several people nude pictures of his daughter, that he "purloined without permission." He continued, "Further, there was credible evidence as to inappropriate acts done by defendant in the presence of his children contrary to their welfare and best interests." He noted that Mr. Buckley "manipulated and coerced" the testimony of Trey Boals. Further, he stated that Mr. Buckley claimed to be totally disabled and lived with his mother in a "very small dwelling" and had no "present suitable surroundings for the exercise of custody or visitation." He concluded, "The welfare of the children considered, the Court finds that defendant is not a fit nor proper person to have either the care or custody of the said minor children, or to be the beneficiary of visitation rights as relates to said children."

Mr. Buckley argues that he did not coerce the testimony of Trey and John Boals and that they both testified that Mr. Buckley had not threatened Trey with criminal prosecution. He also states that he did not engage in inappropriate acts with his children, which he says is supported by the fact that there is no evidence that DHS had taken any action against him, and he only showed the nude photograph of his daughter out of his concern for her welfare. He also argues that there is no evidence that his disability renders him unfit to be a parent. Even if true, these arguments ignore the fact that Mr. Buckley: (1) has not attempted to support or seek visitation with his children during the four years since he and Ms. Buckley separated, though he admitted monitoring his wife and

children's movements in person and via videotape; (2) has not called his children or sent them birthday or Christmas cards or presents; and (3) admitted going through his wife's trash and finding his daughter's underwear, which he sent off for laboratory testing. Further, Laura Thomas testified that Mr. Buckley stalked her and threatened her and her children while she was Ms. Buckley's babysitter, and Rob Rollans and Dana Avant testified that Mr. Buckley came to Ms. Buckley's work place and said that Ms. Buckley was a IV drug user, had been fired from every job she had, was a drunk, and stole drugs from patients and her previous employers. Also, Mr. Buckley's adopted daughter testified that he engaged in inappropriate sexual conduct with his children prior to the parties' separation. Based on this evidence and the chancellor's opportunity to judge Mr. Buckley's credibility, the chancellor's finding that he was unfit to have custody of the parties' minor children is not clearly erroneous.

Mr. Buckley also argues that the chancellor erred in determining it was in the best interests of the children to award custody to Ms. Buckley. This court has stated the best interest of the child is the polestar for making judicial determinations concerning custody. *Welch v. Welch*, 5 Ark. App. 289, 635 S.W.2d 303 (1982). As previously discussed, the chancellor's findings that Mr. Buckley is unfit and Ms. Buckley is fit to have custody are supported by the preponderance of the evidence. Further, the chancellor appointed a guardian ad litem to periodically evaluate the best interests of the children and report their status every four months. "We know of no type of case wherein the personal observations of the court mean more than in a child custody case." *Lumpkin v. Gregory*, 262 Ark. 561, 559 S.W.2d 151 (1977). In light of this, and based on our de novo review of the record, we cannot say that the chancellor reached an incorrect result as to the best interests of the children.

Lastly, Mr. Buckley argues that the trial court erred in terminating his visitation rights with his minor children. However, the court did not terminate Mr. Buckley's visitation rights, as he never pursued any visitation rights for the court to terminate; the chancellor simply declined "to award any visitation rights to the defendant at this time, finding that such visitation would be detrimental to the welfare of the three children." Mr. Buckley correctly notes that this court has consistently upheld visitation rights of noncustodial parents and asserts that the Arkansas Supreme Court has on only one occasion affirmed a trial court's denial of a parent's visitation rights. *See Hawn v. Hawn,* 8 Ark. App. 69, 648 S.W.2d 819 (1983)

(citing *Lumpkin v. Gregory*, 262 Ark. 561, 559 S.W.2d 151 (1977)). In *Hawn*, this court noted:

> Except for the *Lumpkin* decision, the Supreme Court and this Court have decided cases in which the termination of visitation was sought on appeal or ordered by the trial court; in each instance, the courts have upheld the parent's right to visitation. *Welch v. Welch*, 5 Ark. App. 289, 635 S.W.2d 303 (1982) (Court reversed denial of visitation to mother during summer months when father had custody of child); *Lewis v. Lewis*, 260 Ark. 691, 543 S.W.2d 222 (1976) (Court reversed trial court's denial of visitation to father who espoused religion to child and the mother); *McCourtney v. McCourtney*, 205 Ark. 111, 168 S.W.2d 200 (1943) (Court reversed trial court's order granting father visitation upon written permission of mother); *Lockhart v. Lockhart*, 143 Ark. 276, 220 S.W. 44 (1920) (Court reversed the trial court's denial of visitation to the mother whom father divorced on grounds of adultery); *DeReitmatter v. DeReitmatter*, 75 Ark. 193, 87 S.W. 118 (1905) (Court affirmed decree awarding custody to mother because father was cruel and a drunk — even so, it upheld the court's order permitting the father visitation after a showing that he had quit drinking); and *Haley v. Haley*, 44 Ark. 429 (1884) (Court affirmed visitation given to mother charged with immorality). Undoubtedly, there are cases in which circumstances warrant the termination of a parent's visitation rights. However, such action is a drastic one which our trial courts have cautiously employed and which our appellate courts have critically reviewed.

In *Lumpkin*, the court found the father forfeited his rights because he (1) made no support payments; (2) refused to bring his son home after visits, and he beat up appellee when she went to pick up the child; (3) took the child to a pool hall; and (4) exposed himself to appellee's teenage sister during his marriage to appellee. We find Mr. Buckley's behavior to be analogous to the father's behavior in *Lumpkin*, if not more egregious. Therefore, the current circumstances warrant the denial of his visitation rights. This court has stated the best interest of the child is the polestar for making judicial determinations concerning custody and visitation. *Welch, supra*. In this instance, the same evidence that warranted finding Mr. Buckley unfit supports the denial of his visitation rights.

Affirmed.

STROUD, C.J., and PITTMAN, J., agree.

Martha Ann LEWIS *v.* STATE of Arkansas

CA CR 00-844 44 S.W.3d 759

Court of Appeals of Arkansas
Division IV
Opinion delivered May 2, 2001

Robert L. Herzfeld, Jr., for appellant.

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

ANDREE LAYTON ROAF, Judge. Martha Lewis was convicted by a jury of second-degree terroristic threatening and of disorderly conduct. She was sentenced to concurrent jail terms of ninety days for the terroristic threatening and thirty days for the disorderly conduct, as well as to a fine of $100 for the latter offense. In her sole point on appeal, she contends that the trial court erred in allowing testimony about a prior incident of misconduct that was unrelated to her. We agree that the trial court erred; however, we conclude the error was harmless and affirm.

The charges against Lewis arose from a disturbance call at her mother's residence on the afternoon of January 10, 1999. When Benton Police Department officers arrived in response to the call, Lewis was standing on the porch, screaming. She cursed the officers and several times ordered her teenage son to "let the dogs out on these m—— f——." The young man walked towards a wire pen where two pit bulls were standing on their hind legs and jumping at the gate, but ultimately the dogs were not released.

Lewis objected both in a pretrial motion and at trial to testimony that the officers who answered the disturbance call had been present at the same residence over a year earlier when a state trooper shot and killed a pit bull that attacked the trooper and his dog.

In a hearing on Lewis's pretrial motion to suppress, her counsel informed the court of the basis of her objection:

> I want the Court to note my objection, because I'm thinking that the Prosecution is trying to use an incident of prior criminal or prejudicial behavior on the part of somebody else that they cannot even remotely tie to my client to inflame or prejudice the jury

> against my client. I mean, my client can testify right now that the time this prior incident happened she lived in the State of Indiana, did not live in the State of Arkansas. Those dogs which they're talking about were not her dogs.

The trial court ruled as follows:

> I understand, but it is permissible to ask a person about his present state of mind at the time that something is going on. If the present state of mind involves a fear, it is permissible to ask why you were afraid at that time. That is permissible. It may be a way of back-dooring it, but it is permissible to do it that way.

The court also ruled that counsel could ask the officers why they were afraid, and that if their testimony was that they were aware of a prior incident, he could "to a certain extent go into it for that reason."

Patrol Sergeant Darin Clay testified to the events that occurred when he and Officer Calvin answered the disturbance call. He said that as the officers stepped out of their vehicles, Lewis came out through her front door and yelled, "I'm right here. M—— f——, come on up." When the officers walked into the yard, Lewis looked to her left and yelled to her son, Arquis, "Let the dogs out on these m—— f——." The officers commanded Arquis to stop several times, but he walked to the gate and put his hand on the latch. The officers then drew their weapons and held them ready, pointed at the ground. They told Arquis they would shoot the dogs if he let them out, but Lewis continued to order him to let the dogs out "on" the officers. At one point Arquis stopped, but his mother again told him to let the dogs out, and he walked back and put his hand on the gate again. Finally, he obeyed the officers' orders and walked away from the gate.

Clay testified that he was concerned for the safety of bystanders, his fellow officer, and himself. His testimony continued:

> I perceived this as a threat because Officer Calvin and I had responded to the house before on a call, of dogs fighting, at which time we made contact with several individuals at the residence and several pit bulls which were engaged in a fight as we came up. The dogs had sustained several injuries. This was before the day in question. I had been there before.

Defense counsel objected to the testimony unless the prosecution could link it to his client "in some shape, form, or fashion." The objection was overruled. Clay then testified that over a year before the event involving Lewis, he and Calvin had been to the same residence to answer a disturbance call that involved fighting pit bulls. Regarding the earlier incident, Clay related that one pit bull had to be killed at the scene because it ripped the awning of the house, where it had been tied, and attacked a state police trooper and his Labrador retriever, the pit bull dragging the awning with him as he lunged and attacked. Clay further testified that Lewis was not there on the day of this incident and that the dogs belonged to her brother. He stated that although he could not prove it, he believed the dogs that were at the house before and after Lewis lived there were the same dogs.

Officer Calvin's testimony essentially matched that given by Officer Clay regarding the incident when the state trooper was attacked and the incident involving Lewis. He stated that he feared for his life when Lewis told her son to let the dogs out because he had answered calls where pit bulls had attacked people and had seen the injuries inflicted by the dogs. He testified that he did not want to take the chance of being maimed or killed and didn't want anyone else to be attacked. He testified that one thing that contributed to the reason for his fear was that he had responded to the previous call regarding fighting dogs at the residence and had been present with Officer Clay when the state trooper was attacked by one of the pit bulls.

Lewis argues on appeal that the previous incident was unrelated to her, or alternatively, that if the incident was relevant, it was more prejudicial than probative and should have been excluded. These arguments are based upon Ark. R. Evid. 401 and 403. Rule 401 states that relevant evidence is any evidence having the tendency to make the existence of a material fact more probable or less probable than it would be without the evidence. Under Rule 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Determining the relevancy of evidence and the probative value of that evidence against the unfair prejudice pursuant to Ark. R. Evid. 403 is within the trial court's discretion, the exercise of which will not be reversed on appeal absent a manifest abuse of that discretion. *McLennan v. State*, 337 Ark. 83, 987 S.W.2d 668 (1999).

The State contends that appellant cannot raise this argument on appeal because it was not made below. However, Lewis

objected at the pretrial hearing to the prosecution's solicitation of testimony regarding "prejudicial behavior . . . that they cannot even remotely tie to my client to inflame or prejudice the jury." We deem this objection sufficient to raise both the issue of relevancy as defined by Ark. R. Evid. 401 and of the balancing test of Rule 403. Thus, we find that Lewis has preserved her arguments for appeal. The testimony about which Lewis complains was offered by the State as proof of terroristic threatening in the second degree. Arkansas Code Annotated § 5-13-301(b)(1)(Repl. 1997) provides that, "A person commits the offense of terroristic threatening in the second degree if, with the purpose of terrorizing another person, he threatens to cause physical injury or property damage to another person." Thus, the conduct prohibited by this section is the communication of a threat with the purpose of terrorizing another. It is not necessary that the recipient of the threat actually be terrorized. *Smith v. State*, 296 Ark. 451, 757 S.W.2d 554 (1988). The witness's state of mind is simply not an element of the offense of terroristic threatening because it is not necessary that the recipient of the threat actually be terrorized. *Id.*

We agree that the trial court erred in admitting evidence of the prior act for two reasons. First, there is absolutely no evidence from which the jury could conclude that Lewis, who was not present during the earlier pit-bull attack, knew about the incident, much less that these two officers were involved. The prior "bad act" occurred at the same house but had no demonstrative connection to Lewis. Second, although the State contends that this evidence was relevant to show the officers' state of mind, this is simply not an element of the offense. *See Smith, supra.*

However, where the evidence of guilt is overwhelming and the error is slight, the appellate court can declare the error harmless and affirm. *Greene v. State*, 317 Ark. 350, 878 S.W.2d 384 (1994). Here, both officers testified with great detail about Lewis's words and acts during the incident in question. Threatening to loose two snarling pit-bull dogs "on" a person is hardly an ambiguous act. Moreover, Lewis's son, Arquis, testified on behalf of the defense. Arquis testified on both direct and cross-examination that his mother specifically told him to "turn the dogs loose" on the officers and that he did walk to the pen after she directed him to open it. The evidence of guilt is overwhelming and, under such circumstances, the trial court's error was harmless.

Affirmed.

ROBBINS, J., agrees.

BIRD, J., concurs.

SAM BIRD, Judge, concurring. I agree with the majority in affirming the conviction for terroristic threatening, stemming from Lewis's ordering her son to release pit bulls upon the police officers. I write separately, however, because I do not agree that the trial court erred in admitting the officers' testimony that they witnessed the previous attack by pit bulls at the residence where Lewis engaged in the behavior that led to the conviction.

It is not necessary that the State prove that the victims of second-degree terroristic threatening actually were terrorized, and the state of mind of the recipient of the threat is not an element of the offense. *Smith v. State*, 296 Ark. 451, 757 S.W.2d 554 (1988). The majority incorrectly expands the holding of *Smith*, in my view, to defeat the State's contention that the evidence at issue was admissible as relevant to the victims' state of mind.

In order to prove the elements of terroristic threatening, the State was required to prove that Lewis's purpose in telling her son to release the pit bulls upon the police officers was to terrorize them. *See* Ark. Code Ann. § 5-13-301(b)(1) (Repl. 1997). This court discussed the elements of terroristic threatening in *Knight v. State*, 25 Ark. App. 353, 758 S.W.2d 12 (1988), where we stated:

> We agree with the State that the gravamen of the offense of terroristic threatening is communication, not utterance. The statute does not require that the threat be communicated by the accused directly to the person threatened. There is no requirement that the terrorizing continue over a prolonged period of time. Nor does the statute require that it be shown that the accused has the immediate ability to carry out the threats. (1979). We do agree, however, with the statement of the court in *State v. Morgan*, 128 Ariz. 362, 625 P.2d 951 (1981), that to be found guilty of threatening the defendant must intend to fill the victim with intense fright. Under our statute it is an element of the offense that the defendant act with the purpose of terrorizing another person, i.e., it must be his "conscious object" to cause fright.

25 Ark. App. at 356-57, 758 S.W.2d at 14 (some citations omitted). In *Knight*, a deputy sheriff listening by intercom to an inmates' jail cell overheard the defendant say that some deputies would not die of natural causes because he would be out of the "pen" someday.

The *Knight* court considered as part of the sufficiency of the evidence the deputy's testimony that he "felt terrorized," and we noted the State's proof that he was, in fact, "put in fear."[1]

The fear of the victim has also been considered as part of the sufficiency of the evidence for kidnapping, although it is not an element of that crime. *See Hickey v. State*, 14 Ark. App. 50, 684 S.W.2d 830 (1985). In *Brooks v. State*, 308 Ark. 660, 827 S.W.2d 119 (1992), the supreme court referred to the victim's fear although it is not an element of kidnapping, aggravated robbery, and rape, for which the appellant was convicted. The *Brooks* court wrote the following in addressing the argument that a knife found in the car where the attack occurred could not be tied directly to the attack and that its admission unduly prejudiced the jury:

> The knife was found in the car, which was the site of the crime, and the victim was cut by a knife. The instrumentality used to inflict fear is patently relevant to the crimes for which the appellant is charged, all of which include an element of force for perpetration. Whether this was the actual knife used was a matter for the jury to decide, but it was relevant to corroborate the testimony of the victim concerning the stabbings.

308 Ark. at 669, 827 S.W.2d at 124.

Purpose and intent are frequently not subject to proof by direct evidence and may be inferred from the facts and circumstances of the case. *Edwards v. State*, 40 Ark. App. 114, 842 S.W.2d 459 (1992); *see Russey v. State*, 322 Ark. 786, 912 S.W.2d 420 (1995). Here, the State was required to prove that Lewis's purpose was to terrorize the officers, and it introduced proof that the instrumentality she intended to employ was the pit bulls. I would view the officers' testimony that they had witnessed a previous attack by a pit bull at the same residence where Lewis ordered pit bulls to be released upon them as relevant proof that the officers were fearful of her order, and as circumstantial, relevant proof that her purpose in ordering their release upon the officers was to terrorize them.

For the reasons stated, I concur.

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[1] Knight's conviction was reversed because we did not think that the evidence was sufficient to establish that the appellant, even if aware that he might be overheard, had made the statement with the conscious object of terrorizing the deputy.

Patricia PENN *v.* STATE of Arkansas

CA CR 00-560 44 S.W.3d 746

Court of Appeals of Arkansas
Division III
Opinion delivered May 2, 2001

[redacted]

John Wesley Hall, for appellant.

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

JOHN E. JENNINGS, Judge. Patricia Penn, an attorney licensed in the State of Tennessee, was charged in Crittenden County Circuit Court with interference with custody, a class D felony, under Ark. Code Ann. § 5-26-502. Penn filed a motion to dismiss on the grounds that her prosecution would violate the federal constitutional prohibition against double jeopardy. The circuit court denied the motion, and Penn appeals. We agree that the circuit court erred in denying the motion and reverse.

The case at bar has its origins in a domestic dispute between Randy and Vicki Watkins. They were divorced in Tennessee in 1990, and the decree awarded custody of their two children to Randy Watkins. They subsequently reconciled and remarried, but in 1992 they were divorced again, this time by the Craighead County Chancery Court in Arkansas. This time the custody of the children was awarded to Vicki Watkins.

In November 1996, the Craighead County chancellor entered an ex parte order suspending Randy Watkins' visitation. Randy's attorneys, Terrance Tatum and the appellant, Patricia Penn, filed a notice of appeal from the ex parte order.

On April 11, 1997, Mr. Watkins, through his attorneys Tatum and Penn, obtained an order from a chancellor in Crittenden County, Arkansas, approving the registration of the 1990 Tennessee divorce decree that vested custody of the children in Mr. Watkins. Using that registered decree, the three persuaded the police in Marion, Arkansas, to help them obtain custody of the parties' children. The children were taken out of school in Marion and across the state line into Tennessee.

On April 15, 1997, Vicki Watkins filed a motion for contempt. Randy Watkins, Tatum, and Penn were ordered to appear on April 28 at 11:00 a.m. to show cause why they should not be held in contempt. At 11:24 the court was notified that the clerk's office had received a call that Watkins, Tatum, and Penn were on their way. They arrived at noon, but in the meantime the court had already held them in contempt, sentenced them to five days in jail, and imposed an $8,500.00 attorney's fee as a sanction.

The chancellor's order stated:

> The Court finds that defendant, Randy Watkins, and attorneys Terrance Tatum and Patricia Penn are in contempt of court for their conduct in filing a fraudulent document and using said fraudulent document to take physical custody of the two minor children of the parties, Randy Wayne Watkins, born September 22, 1985, and Richard Steven Watkins, born February 8, 1988, contrary to legal orders of this Court vesting custody in the plaintiff, Vicki Watkins.

Penn is now charged with violating Ark. Code Ann. § 5-26-502 (Repl. 1997), which provides in pertinent part:

> (a)(1) A person commits the offense of interference with court-ordered custody if, knowing that he or she has no lawful right to do so, he or she takes, entices, or keeps any minor child from any person entitled by a court decree or order to the right of custody of the minor.
>
> (2)(A) Interference with court-ordered custody is a Class D felony if the minor is taken, enticed, or kept without the State of Arkansas.

The order denying the motion to dismiss, though interlocutory, is appealable. *Zawodniak v. State*, 339 Ark. 66, 3 S.W.3d 292 (1999). Appellant contends, and the State agrees, that she was

found guilty of criminal contempt. *See, e.g., Fitzhugh v. State*, 296 Ark. 137, 752 S.W.2d 275 (1988). Both parties also agree that the double jeopardy clause of the Fifth Amendment to the United States Constitution is applicable in this context. *See United States v. Dixon*, 509 U.S. 688 (1993). In *Blockburger v. United States*, 284 U.S. 299 (1932), the Court held:

> The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.... 'A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.'

Blockburger, 284 U.S. at 304.

In *Grady v. Corbin*, 495 U.S. 508 (1990), the Supreme Court held that in addition to passing the *Blockburger* test, a subsequent prosecution must satisfy a "same-conduct" test to avoid the double jeopardy bar. In *United States v. Dixon, supra*, the Court overruled *Grady* and held that the *Blockburger* test was the only one to be applied.

> In both the multiple punishment and multiple prosecution contexts, this Court has concluded that where the two offenses for which the defendant is punished or tried cannot survive the "same-elements" test, the double jeopardy bar applies. The same-elements test, sometimes referred to as the "Blockburger" test, inquires whether each offense contains an element not contained in the other; if not, they are the "same offence" and double jeopardy bars additional punishment and successive prosecution.

Dixon, 509 U.S. at 696 (citations omitted). *See also Beasley v. State*, 47 Ark. App. 92, 885 S.W.2d 906 (1994).

Ex parte Rhodes, 974 S.W.2d 735 (Tex. Crim. App. 1998), bears some similarity to the case at bar. In that case, David Rhodes was found in contempt for violating an order that prohibited him from removing the parties' child from Harris County, Texas, without prior court approval. In August 1994, he removed the child to Malaysia. In 1995 he was found in contempt of court, fined $100.00 and assessed $2,500.00 in legal fees. He was subsequently

indicted for interference with child custody. The Court of Criminal Appeals of Texas held that the prosecution was barred by the double jeopardy clause.

The Texas court engaged in a complex analysis of the plurality decision in *Dixon*, but it finally concluded that under Justice Scalia's analysis the order finding Rhodes in contempt would be a "lesser-included offense" of the statutory crime. We reach the same conclusion here. When the issue of double jeopardy arises in the context of a judgment of criminal contempt followed by a prosecution for a violation of the criminal law, the application of the *Blockburger* "same elements" test has obvious difficulties. Criminal contempt does not have "elements" in the same sense as a statutory offense does. Nevertheless, as the Texas court concluded, we must follow *Dixon* as best we can.

In the case at bar the State's position is that the criminal contempt and the statutory criminal offense each have elements not found in the other. The State argues that the filing of the void Tennessee divorce decree is an "element" of the criminal contempt but not of the statutory offense and that the removal of the children from the State of Arkansas is an element of the statutory offense but not of the criminal contempt. The second point is arguable. Although the chancellor's order finding Penn in contempt does not recite that the children were taken to Tennessee, the court did make such a finding on the record at the conclusion of the contempt hearing. As to the filing of the Tennessee divorce, we conclude that this was not an "element" of the contempt charge. Ms. Penn was found in contempt of court for interfering with custody — the filing of the document was merely the means to an end. We therefore conclude under *Dixon* that the judgment of contempt was, at the very least, a lesser-included offense of the crime with which appellant is now charged.

For the reasons stated, the judgment of the circuit court is reversed.

Reversed.

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

Kenneth LEE and Sandy Lee *v.* Julia KONKEL-SWAIM

CA 99-1191 43 S.W.3d 767

Court of Appeals of Arkansas
Division III
Opinion delivered May 9, 2001
[Petition for rehearing denied June 13, 2001.]

Jon R. Sanford, for appellants.

Eddy & Kelley, P.A., by: *David L. Eddy* and *Roy Beth Kelley*, for appellee.

JOHN F. STROUD, JR., Chief Judge. Appellants, Kenneth Lee and Sandy Lee, and appellee, Julia Konkel-Swaim, are involved in an acrimonious property dispute, asserting several claims and counterclaims against each other. Procedural rules prevent us from reaching the merits of this appeal, and we therefore dismiss.

On June 28, 1999, the chancellor entered an order that resolved some, but not all, of the issues that had been raised by the parties. This order did not contain a Rule 54(b) certification. On July 13, 1999, appellants filed a motion for clarification, asking the court to respond to their petition for declaratory judgment. On July 15, 1999, appellee filed a motion to amend the June 28, 1999, decree. On July 26, 1999, appellants filed their notice of appeal with respect to the June 28, 1999, order. On August 13, 1999, the chancellor heard the two posttrial motions, and entered his order with respect to both on September 30, 1999. The July 26, 1999, notice of appeal was not amended to include the September 30, 1999, order.

An order is not final when it adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties. *Norman v. Norman,* 342 Ark. 493, 30 S.W.3d 83 (2000). For an order to be final, it must dismiss the parties from the trial court, discharge them from the action, or conclude their rights to the subject matter in controversy. *Reed v. Arkansas State Highway Comm'n,* 341 Ark. 470, 17 S.W.3d 488 (2000). 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. *Id.*

Here, the June 28, 1999, order was not final, as evidenced in part by the fact that appellants filed their July 13, 1999, motion, asking the court to rule on their earlier petition for declaratory judgment, and neither did the trial judge make a Rule 54(b) certification. Consequently, the order does not satisfy Rule 2 of the Arkansas Rules of Appellate Procedure—Civil, and we must dismiss the appeal with respect to it.

Furthermore, although the September 30, 1999, order seems to have resolved all of the issues and although appellants refer

to it in their brief as one from which they are appealing, there is no notice of appeal from that order, and neither was the July 26, 1999, notice of appeal amended to include it. The failure to file a timely notice of appeal deprives the appellate court of jurisdiction. *Ives Trucking Co. v. Pro Transp.*, 341 Ark. 735, 19 S.W.3d 600 (2000).

Rule 4(b) of the Arkansas Rules of Appellate Procedure—Civil provides in pertinent part:

> (1) Upon timely filing in the trial court of a motion for judgment notwithstanding the verdict under Rule 50(b) of the Arkansas Rules of Civil Procedure, a motion to amend the court's findings of fact or to make additional findings under Rule 52(b), or a motion for a new trial under Rule 59(a), the time for filing a notice of appeal shall be extended for all parties. The notice of appeal shall be filed within thirty (30) days from entry of the order disposing of the last motion outstanding. However, if the trial court neither grants nor denies the motion within thirty (30) days of its filing, the motion shall be deemed denied by operation of law as of the thirtieth day, and the notice of appeal shall be filed within thirty (30) days from that date.
>
> (2) *A notice of appeal filed before disposition of any of the motions listed in paragraph (1) of this subdivision shall be treated as filed on the day after the entry of an order disposing of the last motion outstanding or the day after the motion is deemed denied by operation of law. Such a notice is effective to appeal the underlying judgment, decree, or order. A party who also seeks to appeal from the grant or denial of the motion shall within thirty (30) days amend the previously filed notice, complying with Rule 3(e).* No additional fees will be required for filing an amended notice of appeal.

(Emphasis added.) It is not necessary for us to determine whether the two posttrial motions that were filed in this case qualified as any of those designated in subsection (b)(1) of Rule 4; and neither is it necessary for us to determine if those motions were timely filed because in order to appeal from the September order that dealt with those motions, it was necessary either to amend the previously filed notice of appeal or to file a new notice. This was not done.

Consequently, the only notice of appeal was filed on July 26, 1999, and appealed from the order of June 28, 1999, which is not final and appealable. Moreover, with respect to the September 30, 1999, order that disposes of the post-trial motions, the July

notice of appeal was not amended and neither was a new notice of appeal filed. We, therefore, dismiss this appeal.

Dismissed.

PITTMAN and ROAF, JJ., agree.

Tommy Wayne JONES *v.* STATE of Arkansas

CA CR 00-284 44 S.W.3d 765

Court of Appeals of Arkansas
Division IV
Opinion delivered May 9, 2001

J. Blake Hendrix, for appellant.

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

JOSEPHINE LINKER HART, Judge. Appellant, Tommy Wayne Jones, was convicted of the crime of rape and sentenced to forty years' imprisonment in the Arkansas Department of Correction. Appellant raises three issues on appeal. First, appellant argues that because his blood and saliva samples were the product of an unlawful search and seizure, the trial court erred in refusing to suppress the results of DNA tests performed on the samples. Second, in an issue not preserved for appellate review, appellant argues that the trial court erred in refusing to suppress the same DNA test results as the product of a violation of his right to counsel. Third, appellant argues that the trial court erred in refusing to grant a mistrial after the State mentioned during voir dire that the victim was mentally impaired. We conclude that there is merit to appellant's first point and reverse and remand.

On June 21, 1996, appellant was charged by a sworn information with rape, having engaged in sexual intercourse or deviate sexual activity with another person who is less than fourteen years of age. *See* Ark. Code Ann. § 5-14-103(a)(4) (Repl. 1997). At the bottom of the information was the signature of a circuit judge dated that same day. The judge concluded that "[a]fter a preliminary examination I find probable cause exists for the issuance of an arrest warrant against named defendant." On that same day, the judge issued an order directing appellant to submit samples of his blood for testing by the Arkansas State Crime Laboratory. On July 31, 1996, the State presented to the judge a motion in which it noted that the judge had previously made a probable cause determination and that it had received the test results from the laboratory. The State requested that it be allowed to take additional samples of appellant's blood and saliva in order to conduct DNA and other comparisons to evidence related to the crime. In his order signed that same day, the judge found probable cause to require appellant to submit to the taking of the samples.

At a hearing on appellant's subsequent motion to suppress, Kimberly Warren, a child-abuse investigator for the Arkansas State Police, testified that on July 31, 1996, she presented to the issuing judge, who also was presiding over the hearing on the motion to suppress, an order for the taking of appellant's blood and saliva. Warren testified that while she recalled that the judge asked her questions regarding the case, she did not recall the gist of the questions or recall whether she was placed under oath. She further testified that the judge "already had knowledge of what was going on in the case."

After hearing the arguments of counsel, the court denied appellant's motion to suppress. The court stated as follows:

> The Fourth Amendment requirements with respect to probable cause, factual determinations, affidavit or any other thing which an issuing magistrate relies upon is obviously required to be documented or recorded. The Fourth Amendment arguments of probable cause versus reasonable cause, which is a requirement of 18.1 I think on the discovery matters that the Court is required to do, are two different things.
>
> I think the Court by its finding that an order was issued and signed has made that finding, I don't think there's near as strict requirements of making that determination of reasonable cause as a Fourth Amendment requirement of probable cause. The taking of

> blood, saliva, these are things that are allowed by discovery. These are not considered the types of intrusions that are in violation of the constitution.
>
> The procedures followed here, as testified by Ms. Warren, this Court feels is in compliance with the statute. So the motion to suppress with respect to the taking of the blood and the order entered with respect to that, the Court will deny that.
>
> ....
>
> While it is, quote, technically a search, I don't think it's the search that is provided with the full Fourth Amendment guarantees such as a house and other items that the Fourth Amendment was designed for.

Appellant argues that the blood and saliva samples should be suppressed because no affidavit or recorded testimony under oath supported the warrants authorizing the taking of the samples. The Fourth Amendment to the United States Constitution provides in part that "[n]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation ...." The taking of blood by a law enforcement officer constitutes a search and seizure. *See Mills v. State*, 322 Ark. 647, 660, 910 S.W.2d 682, 689 (1995).[1] In this case, each "order," as they were designated by the judge, permitted the taking of such samples from appellant and were tantamount to search warrants. As reflected by the record and as conceded by the State during oral arguments, neither a written affidavit nor recorded oral testimony supported the issuance of either search warrant. Moreover, "[u]nrecorded oral testimony may not be considered, by the trial court or appellate courts, when determining whether there was sufficient probable cause to issue a search warrant." *Moya v. State*, 335 Ark. 193, 202, 981 S.W.2d 521, 525 (1998). Furthermore, "[w]here there is neither a written affidavit nor sworn, recorded testimony in support of a search warrant, this court will not apply the good-faith exception to uphold the search warrant." *Id.*; *see United States v. Leon*, 468 U.S. 897 (1984). Thus, because neither search warrant was supported by either a written affidavit or sworn, recorded testimony, the warrants failed to meet the requirements set forth in the United States Constitution, and the warrants

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[1] We note that, "*subject to constitutional limitations*, a judicial officer may require a defendant to ... permit the taking of samples of his blood, hair[,] and other materials of his body which involve no unreasonable intrusion thereof ...." Ark.R.Crim.P. 18.1(a)(vii) (2000)(emphasis added).

may not be upheld by a good-faith analysis. Consequently, we must reverse on this point.

Appellant also argues that the DNA test results should have been suppressed because he was denied his Sixth Amendment right to counsel. Even assuming appellant raised this argument at the suppression hearing, he did not receive a ruling thereon. Thus, appellant has waived this issue for purposes of appeal. *See Walls v. State*, 341 Ark. 787, 793, 20 S.W.3d 322, 325 (2000).

Finally, appellant contends that the judge erred in refusing to declare a mistrial when, during voir dire, the State told potential jurors that the victim was mentally impaired and further asked whether they would be willing to be patient when she testified. As noted by appellant, the rape statute provides that a person commits rape if he engages in sexual intercourse or deviate sexual activity with another person "[n]ot his spouse who is less than sixteen (16) years of age and who is incapable of consent because he is mentally defective or mentally incapacitated." Ark. Code Ann. § 5-14-103(a)(5) (Repl. 1997). Appellant observes that he was charged with rape for having engaged in sexual intercourse or deviate sexual activity with another person who is less than fourteen years of age and argues that the question posed by the State "raised the specter that the appellant was also guilty of having sexual intercourse with a person who was mentally defective, a formulation under which the appellant was not charged."

We note that evidence was adduced at trial that the victim had "limited mental abilities," which provided a basis for the State's inquiry. Moreover, the jury was not instructed regarding the portion of the rape statute having to do with sexual intercourse or deviate sexual activity with a person who is mentally defective or mentally incapacitated and was instead instructed only regarding sexual intercourse or deviate sexual activity with another person who is less than fourteen years of age. Consequently, we fail to see how the jury could have convicted him of rape on any basis other than as described in the jury's instructions. A jury is presumed to follow the court's instructions. *See Hall v. State*, 315 Ark. 385, 392, 868 S.W.2d 453, 456-57 (1993). Thus, we find no prejudice on this point.

Reversed and remanded.

NEAL and BAKER, JJ., agree.

David W. JACKS and Doris Jacks *v.*
WESTERN SECURED INVESTMENTS COMPANY
and Steven Miller

CA 00-995 43 S.W.3d 229

Court of Appeals of Arkansas
Division I
Opinion delivered May 9, 2001

Charles Peden, for appellants.

Robert S. Coleman, Jr., for appellee Western Secured Investments Company.

Grayson & Grayson, P.A., by: *Keith L. Grayson*, for appellee/intervenor Steven Miller.

SAM BIRD, Judge. This action stems from a contract for the sale of real and personal property. In October 1996, appellants David and Doris Jacks entered into a contract for the sale of commercial property with appellee/intervenor Steven Miller. Miller agreed to purchase real property for $250,000 and personal property for $15,000. The evidence suggests that Miller tendered $20,000 cash as a down payment. The $245,000 balance was to be financed with two promissory notes to the Jackses in the amounts of $70,000 and $175,000, both bearing interest at the rate of ten percent per annum. The notes were to be secured by two separate mortgages on the real property. Following the closing of the sale to Miller, the Jackses were to sell the $175,000 promissory note and corresponding mortgage to appellee Western Secured Investments Company for $134,000. The Jackses executed a commitment letter memorializing the sale of the note and setting forth the terms of the sale to Western. A closing date was scheduled for January 21, 1997, and all the necessary documents for the closing were prepared by an abstract company. Miller stood ready to close on the agreement by executing the promissory notes and corresponding mortgages, and Western stood ready to purchase the $175,000 note and mortgage. However, the Jackses refused to close.

Western filed a complaint contending that the Jackses had breached the contract by refusing to close the sale to Miller and, consequently, failing to sell the $175,000 promissory note and mortgage to Western. Western prayed for either specific performance or damages, and for its attorney's fees and costs. Miller intervened, alleging that he had paid the $20,000 cash down payment to

the Jackses, and seeking recission of the contract, judgment against the Jackses for his $20,000 cash down payment, and for his attorney's fees and costs. By way of an amended answer, the Jackses raised the affirmative defense that their contract of sale with Miller was void *ab initio* because it was an illegal contract. The Jackses specifically alleged that because Miller had pled guilty to federal charges of possession and conspiracy to distribute illegal drugs and conducting financial transactions with the intent to promote drug distribution, then anyone receiving money from Miller "very likely" would be the recipient of proceeds from the sale of drugs.

The court found that the Jackses had entered into a contract with Miller for the sale of the property, that the Jackses had breached that contract, and that Miller was entitled to rescission of the contract, the return of his $20,000 down payment, and attorney's fees and costs. The court also found that under the terms of the commitment letter signed by the Jackses, they had agreed to sell the $175,000 promissory note to Western for $134,000. The court concluded that the Jackses had breached their contract with Western by failing to close, thereby causing Western to lose profits of $77,134.47. The court also awarded attorney's fees and costs to Western.

The Jackses' sole point on appeal is that the court abused its discretion in refusing to admit evidence of Miller's admitted criminal activity involving the sale of illegal drugs, stating that it was irrelevant. Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Ark. R. Evid. 401. This court will not reverse the court's decision to exclude evidence in the absence of an abuse of discretion. *Dooley v. Cecil Edwards Constr. Co.*, 13 Ark. App. 170, 681 S.W.2d 399 (1984).

The Jackses argue that because they had pled as an affirmative defense the illegality of the contract, they should have been entitled to present evidence in the form of a transcript of the 1999 testimony of Miller in United States District Court wherein Miller admitted: (1) that he was guilty of the charge of conspiracy to distribute cocaine; (2) that the majority of the money he made during 1994 through 1997 was from selling drugs; (3) that in 1997 he invested $130,000 from drug proceeds in a night club, which was later forfeited to the United States; (4) that dozens of individuals to whom he provided drugs also sold drugs; and (5) that he had

lost as much as $97,000 in illegal drug sales proceeds during a police raid in Chicago.

They contend that even though the terms and subject matter of their contract of sale with Miller are legal, because the money to be paid by Miller as consideration for the purchase was to be derived from illegal funds, the contract is void, and to enforce the contract would force the parties to commit an illegal act. They maintain that by closing the transaction, they would have violated Ark. Code Ann. § 5-42-204 (Repl. 1997) and committed a Class C felony.

Arkansas Code Annotated section 5-42-204 states:

> (a) A person commits the offense of criminal use of property and/or laundering criminal proceeds when he knowingly:
>
> (1) conducts, or attempts to conduct, a transaction involving criminal proceeds which were derived from any predicate criminal offense, or which were represented to be criminal proceeds from any predicate criminal offense, with the intent to:
>
> (A) Conceal the location, source, ownership, or control of the criminal proceeds.

Also, in support of their argument regarding illegality, the Jackses cite cases for the proposition that every contract made for or about any matter or thing that is prohibited and made unlawful by statute is a void contract. We find those cases distinguishable from the present one.

The Jackses rely on *Edwards v. Randle*, 63 Ark. 318, 38 S.W. 343 (1896), for the proposition that the illegal contract there involved was indivisible, meaning that the lawful and the unlawful parts of the contract cannot be separated so as to enforce the one and annul the other. However, in *Randle, supra,* the subject matter of the contract consisted, in part, of an agreement for the sale of the furnishings of a post office by the postmaster and, in part, an agreement by the postmaster to resign his position and recommend the purchaser of the furnishings as his successor, with the purchaser also to receive all the fees and emoluments of the postmaster position. Noting that a promise to secure the appointment of another as the postmaster is illegal, as against public policy, the court concluded that the lawful part of the contract (the sale of furnishings) was not divisible from the unlawful part (the attempt to fill a

vacancy in a public office through methods not permitted by the law).

The Jackses also rely on *Randle v. Interstate Grocer Co.*, 147 Ark. 402, 227 S.W. 760 (1921), that involved an attempt to enforce promissory notes given as consideration for the sale of securities in Arkansas by Interstate Grocer Company, a foreign corporation, where the sale had not been approved by the State Bank Commissioner prior to the sale, which sale was therefore illegal. Interstate sought to enforce the notes and uphold the judgment that had been granted in its favor by the trial court on the strength of cases holding that a foreign corporation's failure to comply with the statutory requirements for doing business in this state does not render its contracts void, but merely renders them unenforceable until there is compliance with the statutory requirements. The supreme court distinguished the cases upon which Interstate relied, noting that the statute requiring prior approval of the sale of securities by a foreign corporation expressly makes such sales unlawful, classifies such sales as a misdemeanor, and imposes penalties. Although in *Interstate, supra*, the promissory notes given by the purchaser of the securities were apparently lawful on their faces, the notes were unenforceable and the transaction was void because the notes were given as consideration for an unlawful transaction, the unapproved sale of securities by a foreign corporation.

Finally, the Jackses cite *Bourland v. First Nat'l Bank Bldg. Co.*, 152 Ark. 139, 149, 237 S.W. 681, 684 (1922), for the proposition "that if any part of the entire consideration for a promise or any part of an entire promise be illegal, whether by statute or by the Constitution or from consideration of public policy, the whole contract is void." In *Bourland*, the City of Fort Smith solicited bids from area banks for the interest rates that the banks would pay to the city for the deposit of the city's and its various improvement districts' funds. Several banks submitted bids. However, when the bids were opened, it was discovered that no provision had been made for the city to borrow money, which the city was required to do from time to time. Therefore, the mayor told the bidding banks that the city would have to consider loans and to obtain them from whatever bank was selected as the depository, that the city would borrow considerably more money than it would have on deposit, and that this was a consideration that would be expected from the depository. Each bank was asked to amend its bid to state what rate of interest it would charge to lend money to the city. After the amended bids were received from some of the banks, the city chose City National Bank as its depository because it offered a lower rate

of interest on funds to be borrowed by the city. The trial court held that while the action of the city in soliciting bids from the banks for the interest rate to be paid on deposits of the city's money is proper and legal, the city's action in soliciting bids from the banks for the interest rates to be charged to the city for loans ran afoul of Art. 16, § 1, of the Constitution. Inasmuch as the subject matter of the city's agreement with City National Bank involved the interest rate to be paid to the city for its deposits, which was lawful, and the interest rate to be charged to the city for its loans, which was illegal, the supreme court held that the entire contract, being indivisible, was void.

In *Randle*, *Interstate*, and *Bourland*, *supra*, the subject matters that formed the bases of the agreements were legal in part and illegal in part. In contrast, the subject matter of the contracts between the Jackses and Miller, and the Jackses and Western, involving the Jackses' sale of real and personal property, the purchase price for which was evidenced by Miller's promissory notes and secured by his mortgages, and the sale of the one of the notes and the related mortgage to Western, is entirely legal. And the transactions are not made illegal because Miller allegedly may subsequently pay portions of the installments on the promissory notes with funds that the Jackses suspect have been received from his illegal sale of drugs or other illegal activities.

Also we do not agree with the Jackses' argument that, by closing their legal contract to sell their property to Miller, they would be violating section 5-42-204. Their otherwise legal contract is not rendered illegal, and therefore void, merely because of their suspicion that the money Miller will use to pay the notes secured by a mortgage on the property may be derived by Miller, in whole or in part, from an illegal source. Section 5-42-204 makes it illegal to knowingly use the proceeds from criminal activity in a transaction with the intent to conceal the location, source, ownership, or control of those proceeds. The transaction involving the sale of the Jackses' property does not involve the use of any proceeds from criminal activity because neither the Jackses' building nor its contents are alleged to have been derived from criminal activities. Nor would the Jackses' transfer of the property to Miller have the effect of concealing its location, source, ownership, or control.

While it is true that Miller's payment of the mortgage notes with funds derived by him from an illegal source with the purpose to conceal the location, source, ownership, or control of those funds would render Miller criminally liable under Ark. Code Ann.

§ 5-42-204, the Jackses, who have committed no illegal act, may not raise Miller's illegal conduct as a defense to the enforcement against them of an otherwise legal contract. Just as the Jackses would not be precluded from enforcing the contract against Miller under the circumstance here existing, *Potomac Leasing Co. v. Vitality Centers, Inc.*, 290 Ark. 265, 718 S.W.2d 928 (1986), they cannot refuse to perform the contract because Miller's ability to pay the contract price may be derived from an illegal source.

In summary, the trial court's decision to exclude evidence of Miller's prior criminal activity as irrelevant is supportable on two bases. First, it is nothing more than speculation to assume that because Miller has engaged in criminal activity in the past, his source of funds to pay for the property will be derived from continued future criminal activity on his part. Secondly, and more importantly, the fact that Miller may derive funds from criminal activity to make payments of the mortgages that resulted from a legal contract for the sale of property is not a basis upon which the Jackses may rely to avoid their obligations under the contract.

Affirmed.

JENNINGS and GRIFFEN, JJ., agree.

ARKANSAS DEPARTMENT of HUMAN SERVICES
v. Ethel KEELING

CA 00-1075 43 S.W.3d 772

Court of Appeals of Arkansas
Division I
Opinion delivered May 9, 2001
[Petition for rehearing denied June 13, 2001.]

Terry Hays Swicegood, Office of Chief Counsel, for appellant.

Robert L. Thacker, 20th Judicial District Public Defender, for appellee.

WENDELL L. GRIFFEN, Judge. Appellant in this case is the Arkansas Department of Human Services (DHS). The appellee is Ethel Keeling, who is represented by an attorney ad litem. Appellant appeals from an order of the Searcy County Probate Court in which the probate judge granted the attorney ad litem's request to force appellant to reveal the name of the person or persons who initially reported the suspected neglect of Mrs. Keeling. We affirm the order of the probate court based on the holding that its findings are not clearly erroneous.

This case arises out of the suspected neglect of Mrs. Keeling, who is cared for by her son, Tom Keeling. Mrs. Keeling is in her mid-80s and has been diagnosed with end-stage Alzheimer's disease. She is not ambulatory and requires twenty-four-hour supervision. Her son removed her from a nursing home in 1996, and she lived with him in his home for approximately one year. In 1997, she was returned to her own home. After Mrs. Keeling returned to her home, appellant received four reports alleging that she was not receiving proper care. Workers from Adult Protective Services (APS) and home health workers visited Mrs. Keeling's home on several occasions and found her unsupervised for one or two hours or longer and not properly fed. She was also hospitalized several times in 1999 for dehydration and other ailments. On one occasion, she attempted to get outside, where her front porch has a three-foot drop-off, because she thought she heard her deceased husband calling to her. In short, Mrs. Keeling lacks the capacity to comprehend what her physical needs are or when a situation presents imminent danger to her health or safety.

The APS worked with Mr. Keeling for two years to keep his mother in her home. When those efforts failed, largely due to Mr. Keeling's hostility and refusal to cooperate, APS filed a petition with the probate court seeking court-ordered services to provide for her needs, or alternatively, to gain custody of her to ensure her safety. At the hearing, Mr. Keeling stipulated that probable cause existed to allow the State temporary custody of his mother or to mandate court-ordered services. However, he informed the court that he had hired a live-in caregiver for his mother the day prior to the hearing. The court allowed Mrs. Keeling to remain in her home, but ordered her son to cooperate with appellant regarding her care. The court kept the case open, during which time Mr. Keeling again refused to cooperate and during which time DHS

had reason to believe that Mrs. Keeling was again being left unattended. Because Mr. Keeling had acted hostile to the caseworker to the point where the caseworker feared for her safety, and had refused to let her come into Mrs. Keeling's home, DHS obtained an order for local law enforcement to accompany the caseworker when she checked on Mrs. Keeling.

Eventually, another caregiver was brought into the home, and DHS and the probate court were satisfied that Mr. Keeling would continue to provide reasonable care for his mother. Therefore, appellant moved that the case be dismissed. The probate court granted the motion for dismissal, but also granted, over appellant's objection, the request by Mrs. Keeling's attorney ad litem to order appellant to reveal the name(s) of the person(s) who gave the initial report in this case. Appellant subsequently filed a motion for reconsideration, again objecting to the court's order. The probate court denied appellant's motion for reconsideration. Appellant appeals only from the order dismissing the appeal and mandating that DHS release the name of the reporter.

The reporting of adult abuse is governed by statute in Arkansas. The right of a subject of an adult abuse report to receive information contained in the report is governed by Arkansas Code Annotated section 5-28-213(a)(4) (Supp. 1999), which provides that reports of adult abuse shall be confidential and shall be made available to any person who is the subject of a report. However, the release of certain information contained in the reports may be prohibited under certain circumstances. Arkansas Code Annotated section 5-28-111(a)(1) (Supp. 1999), states:

> (A) At any time, the subject of a report may receive, upon request, a report of all information contained in the central registry concerning completed founded investigations of which he or she is a subject.
> (B) However, the director of the department or his authorized agent is authorized to prohibit the release of data that would identify the person who made the report or cooperated in a subsequent investigation *if the director reasonably finds the data to be detrimental to the interest or safety of the person.*

(Emphasis added.)

The issue in this case is whether the probate judge erred in granting the attorney's request to force the appellant to reveal the name of the initial reporter(s) of Mrs. Keeling's neglect. Probate

cases are reviewed *de novo* on appeal, and we do not reverse the findings of the probate judge unless those findings are clearly erroneous. *See Gilbert v. Gilbert*, 47 Ark. App. 37, 883 S.W.2d 859 (1994). A finding of fact is clearly erroneous when, although there is evidence to support it, we are left with the definite and firm conviction that a mistake has been committed. *See Lammey v. Eckel*, 62 Ark. App. 208, 970 S.W.2d 307 (1998). We are left with no such conviction on the facts of this case. Because the director of the DHS never made a finding that releasing the information requested would be detrimental to the interest or safety of the person who made the report, we hold the probate judge did not err in ordering DHS to reveal the name of the reporter.

In this case, Mrs. Keeling's attorney requested the name of the reporter after he spoke with two of her neighbors who told him she was well cared for. He made the request, stating:

> If there's somebody out there that knows something I don't know, I need to know about it. From what I've seen, there's no basis for a complaint but I would like to speak to these persons and see just what it was that caused them to file this complaint. And, with that exception, I think I'm entitled to that information as her attorney.

He also stated, "And, if the complaint has a valid basis, I'll do some more investigation. If not, then I'll ask Mr. Daniel [the then deputy prosecutor] to look into it if it's false."

There are no Arkansas cases that have addressed the issue raised in this case. Nor is there any legislative commentary on these statutes that might shed light on the legislative intent in this regard. However, the case turns on a simple matter of statutory construction. The first rule in considering the meaning and effect of a statute is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *See Yamaha Motor Corp. v. Richard's Honda Yamaha*, 344 Ark. 44, 38 S.W.3d 356 (2001). When the language of a statute is plain and unambiguous, there is no need to resort to rules of statutory construction. *See Burcham v. City of Van Buren*, 330 Ark. 451, 954 S.W.2d 266 (1997). In other words, if the language of the statute is plain and unambiguous, the analysis need go no further. *Id.*

The language of the governing statute is unambiguous. Section 5-28-211(a)(1)(B) clearly authorizes the director of the department or his authorized agent to prohibit the release of data identifying the reporter *if* the director reasonably finds the data to be detrimental to

the interest or safety of the person. Appellee argued during the hearing in which the court first ordered that the reporter's identity be released that the record contained no such finding, and that the disclosure order should stand as issued unless the director presented evidence that disclosure would be detrimental. Appellant countered below that the statute also authorized the director's agent, in this case, the attorney for DHS, to prohibit the release of information identifying the reporter, and asserted that it objected to disclosure on behalf of the director on the ground that it would jeopardize the safety of the reporter. Thereafter, appellant submitted its motion for reconsideration, but again failed to include any evidence of such a finding by the director.

Section 5-28-211(a)(1)(B) is silent with regard to the specific manner in which the director must make his finding, but certainly *no* finding by the director was submitted in this case. Moreover, to hold that the objection by appellant's attorney was a finding by the director would be tantamount to nullifying the requirement of the statute. The statute allows the director or his agent to prohibit the release of information, but only upon a finding by the director. The statute neither allows the director's agent to make such a finding, nor to raise an objection in the absence of a finding, and thereby, prohibit the release of the information.

Appellant raises three arguments for reversal: 1) that compromising the name of the reporter under these noncompelling circumstances will have a chilling effect on those who would report elder neglect and abuse; 2) that the name of the reporter is of no benefit to appellee because no action was taken until DHS conducted its own investigation and made its own findings and because the initial conditions that were reported in 1997 have since been remedied; and 3) that ordering it to reveal the reporter's name might compromise the interests or safety of the reporter.

We note that appellant's arguments are well-founded on the facts of this case. We also concede that it is difficult to conceive how Mrs. Keeling will now benefit from knowing the name of the party who first reported her neglect at this late date, where the reports of neglect were substantiated but where the conditions that caused appellant to intervene have been remedied. Nonetheless, as the issue raised is a simple matter of statutory construction, and DHS did not comply with the minimal requirement of the statute, we must affirm.

Affirmed.

JENNINGS and BIRD, JJ., agree.

Jimmy McENTIRE and Nellie McEntire,
Husband and Wife; and M & M Land Company, Inc.
v. Alta WATKINS

CA 00-1082 43 S.W.3d 770

Court of Appeals of Arkansas
Division II
Opinion delivered May 9, 2001

John C. Aldworth, for appellants.

The Blagg Law Firm, by: *Ralph J. Blagg* and *Brad A. Cazort*, for appellee.

TERRY CRABTREE, Judge. This appeal arises from an order of the Van Buren Chancery Court in which the chancellor quieted title to a .60 acre strip of land in favor of the appellee, Alta Watkins, and against the appellants, Jimmy and Nellie McEntire.

The parties are adjoining landowners. An old fence runs along the southern boundary of appellee's 240 acre tract that she claims by deed. This fence, according to a survey filed by Charles Neal on June 14, 1996, overlaps onto land claimed by the appellants. Appellee exercised some dominion and control over a portion of the land located north of the fence including a house, yard, and various other buildings. In 1993, appellant, Jimmy McEntire, cut and harvested timber north of the fence and the roadway and the northeast corner of his property. Appellee filed suit to quiet title in the .60 acre strip of land. Appellee's claim was based on adverse possession. The chancellor found in favor of appellee and based her decision on the theory of acquiescence. However, appellee did not plead the issue of acquiescence, and never made a motion to conform the pleadings to the evidence. Appellants appeal this decision, arguing that it was improper for the chancellor to find in favor of appellee on the basis of acquiescence when appellee had not pled that issue. In the alternative, appellants argue that there was insufficient evidence to support a finding of the boundary line by acquiescence. We agree with appellant's first point and reverse.

We review chancery cases *de novo* on appeal, but we do not reverse the findings of the chancellor unless it is shown that they are clearly erroneous or clearly against the preponderance of the evidence. *Presley v. Presley*, 66 Ark. App. 316, 989 S.W.2d 938 (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).

Appellants contend that since appellee only pled adverse possession, they were not given notice that appellee was claiming title

to the disputed property based on acquiescence. Arkansas Rule of Civil Procedure 15(b) provides as follows:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

Thus, Rule 15(b) provides that where an issue is tried by the express or implied consent of the parties, it shall be treated in all respects as if it had been raised in the pleadings. However, we will not imply consent to conforming the pleadings to the proof merely because evidence relevant to a properly pled issue incidentally tends to establish an unpled one. *Heartland Community Bank v. Holt*, 68 Ark. App. 30, 3 S.W.3d 694 (1999).

It is undisputed that appellants did not expressly consent to litigating the issue of acquiescence. Thus, our only concern is whether the appellants impliedly consented to the trial of this issue. We hold they did not.

There is not sufficient evidence to find that the issue of acquiescence was tried by agreement. At trial, there were only occasional comments concerning acquiescence. Charles Neal, a registered land surveyor, testified that appellee had a cabin, a well, a shed, a barn, a storage building, and a cemetery on her side of the fence, and that the underbrush had been cleared out on the fence line on appellee's side of the fence. Jo Hillyer, appellee's niece, testified that she always understood the fence line was the boundary line. Thurman Elliot, a neighboring landowner, testified that he assumed that the fence marked the boundary line. Appellant, Jimmy McEntire, testified that he never recognized the fence as the boundary line, but only thought of the fence as a containment fence. We hold that this testimony was insufficient to find that appellants impliedly consented to the trial of the issue of acquiescence. As we agree with appellants that it was improper for the chancellor to decide this case based on acquiescence, we need not address appellants' argument that there was insufficient evidence to support a finding of the boundary line by acquiescence.

Reversed.

ROBBINS and VAUGHT, JJ., agree.

William Jesse BARTLEY *v.* STATE of Arkansas

CA CR 00-958 45 S.W.3d 387

Court of Appeals of Arkansas
Division III
Opinion delivered May 9, 2001

Doug Norwood and *Susan Lusby*, for appellant.

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

ANDREE LAYTON ROAF, Judge. William Jesse Bartley was found in criminal contempt of court in Benton County Circuit Court for appearing without a lawyer at his arraignment on hot-check charges. Upon being released after his arrest, Bartley had signed a form entitled "Benton County Circuit Court Attorney Acknowledgment" that stated"you ***must*** have an attorney prior to appearing in court for arraignment." When he arrived at the arraignment without an attorney and acknowledged to the trial judge that he was able to read the notice and remembered doing so, Bartley was sentenced to three days in the Benton County Jail. On appeal, he argues that in finding him in contempt, the trial court violated his rights under the federal and state constitutions. The State has conceded error and we agree. We therefore reverse.

The Attorney Acknowledgment form at issue was further captioned: "*NOTICE TO ALL PERSONS BEING CHARGED WITH FELONY OFFENSES*," and provided in pertinent part,

> You are required to appear in Benton County Circuit Court, Division I for Arraignment on 5-15-00 at 8:00 a.m. You ***must*** have an attorney prior to appearing in court for arraignment. If you cannot afford an attorney, you ***must*** contact the Benton County Public Defender's Office at:

221 South Main Street
Bentonville, Arkansas 72712

Or call at (501) 271-1028

Bartley signed the form under the following statement: "I have read and understand that I must have an attorney present at my arraignment."

When Bartley appeared at his arraignment, the trial judge inquired whether Bartley had a lawyer, and when he told the judge that he did not, the judge asked if Bartley had made an effort to secure representation. Bartley replied that he spoke to a lawyer that day and that he thought that he needed to come to court to have one appointed. Bartley responded to the judge's questions that he was twenty-three years old, could read and write, had a ninth-grade education, and that he remembered reading the notice. However, when the judge asked Bartley whether he remembered what the notice said and if he had gone to the public defender's office prior to the arraignment, Bartley responded in the negative, and the trial judge found him in contempt.

Bartley argues that his rights under the Sixth Amendment of the United States Constitution and Article 2, Section 10, of the Arkansas Constitution were violated for three reasons: 1) he was never served with a signed and filed court order directing him to bring an attorney to the arraignment; 2) the document that he was given did not state the consequences for his failure to bring an attorney to the arraignment; and 3) even if the trial court had ordered him to bring an attorney to the arraignment, it was still error because he has a constitutional right to represent himself.

The standard of review in a case of criminal contempt requires this court to view the record in the light most favorable to the trial judge's decision and to sustain that decision if it is supported by substantial evidence and reasonable inferences. *Etoch v. State*, 332 Ark. 83, 964 S.W.2d 798 (1998). If an act interferes with the order of the court's business or proceedings or reflects upon the court's integrity, that act is deemed contemptuous. *Id.* A court's contempt power may be wielded to preserve the court's power and dignity, to punish disobedience of the court's orders, and to preserve and enforce the parties' rights. *Id.*

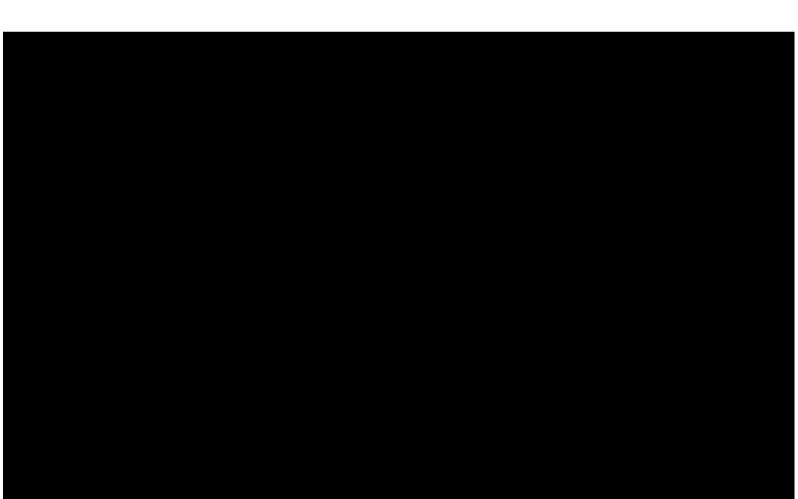
We agree that the notice that Bartley was given upon his release was not a court order, in that it was neither signed by a

judge nor filed for record. Moreover, while the notice contained what appeared to be mandatory language, Bartley was not informed of the consequences of his failure to comply with its terms. In *Fitzhugh v. State*, 296 Ark. 137, 752 S.W.2d 275 (1988), the supreme court held that criminal penalties may not be imposed on an alleged contemnor who has not been afforded the protections that the Constitution requires of criminal proceedings; the Due Process Clause requires that an alleged contemnor be notified that a charge of contempt is pending against him and be informed of the specific nature of that charge. Notice of the charge, indeed actual notice that failure to bring an attorney to the arraignment constituted a contemptuous act, was not given in this case. Therefore, the judgment of conviction for contempt must be reversed.

We further agree that Bartley has a right under our federal and state constitutions to waive representation by counsel and that it would be reversible error for the trial court not to allow Bartley to make a knowing and intelligent waiver of this right. *See Akins v. State*, 330 Ark. 228, 955 S.W.2d 483 (1997). However, it is apparent from the record that Bartley was not seeking to waive his right to counsel, but rather had not followed the stated procedures required to secure representation by the Benton County Public Defender's Office. Accordingly, we do not find this alleged constitutional deprivation to be of any moment.

Reversed and dismissed.

STROUD, C.J., and PITTMAN, J., agree.



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