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Frederick GOODMAN *v.* STATE of Arkansas

CA CR 00-1264 45 S.W.3d 399

Court of Appeals of Arkansas
Division I
Opinion delivered May 16, 2001

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*Robert L. Herzfeld, Jr.*, for appellant.

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

JOSEPHINE LINKER HART, Judge. A jury found Frederick Goodman guilty of attempted manufacture of a controlled substance (methamphetamine) and possession of drug paraphernalia and sentenced him to a total of 180 months in the Arkansas Department of Correction. For reversal, appellant argues that (1) there was insufficient evidence to sustain his convictions and, accordingly, the trial court erred by denying his directed-verdict motion; (2) his rights under the Fourth and Fourteenth Amendments were violated and the trial court erred in denying his suppression motion; and (3) the trial court erred by denying his motion for a continuance. Although we agree that appellee failed to demonstrate that there was apparent authority to justify the warrantless search, we conclude that the consenting party had actual authority, and because we do not find any other errors of law, we affirm.

A criminal information was filed on September 22, 1999, alleging that on March 4, 1999, appellant manufactured methamphetamine and possessed drug paraphernalia. Thereafter, appellant moved to suppress evidence seized at his trailer home. On May 11, 2000, prior to the trial, the court heard appellant's motions for a continuance and suppression of evidence.

The trial court addressed the continuance motion first. Appellant told the court that he was dissatisfied with his legal counsel[1] and thought that he had failed to prepare for the trial. His attorney responded by telling the court that appellant had failed to be cooperative in the preparation of a defense and, as such, asked to be relieved as counsel. The trial court, while acknowledging the attorney's predicament, denied the request to be relieved as counsel. In addition, the trial court noted that appellant had more than six months to work with his attorney to organize a viable defense and had failed to do so. Accordingly, the trial court also denied the continuance motion.

Thereafter, the trial court considered the motion for suppression and heard the testimonies of Corporal Allen Brand, Cecilia Mashburn, and appellant.

Corporal Brand testified that he arrived at appellant's home on March 4, 1999, in response to a terminated 911 call in which a woman was screaming for help and, upon arrival, found Cecilia Mashburn in the front yard. Although Mashburn lacked any visible signs of injury and appellant only stood in his doorway, Brand forced appellant to the ground at gunpoint and restrained him with handcuffs. Brand then stated that Mashburn told him that appellant had been "cooking the meth" in the home, verbally consented to a search, and led him to the back bedroom in the trailer. While in this bedroom, Brand, without direction from Mashburn, searched underneath a mattress and found a "meth lab."

Mashburn told the court that she had lived at appellant's residence off-and-on for approximately nine months, and although she did not have a permanent residence, she considered herself a guest in appellant's home. She further testified that when the police arrived at appellant's home, she informed the police that appellant was "cooking dope" and consented to the search of the trailer.

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[1] Appellant was represented on appeal by a different attorney.

Appellant testified last and stated that Mashburn was merely a guest in his home and did not have authority to consent to a search by police. In fact, according to appellant, he specifically told Mashburn that she did not have permission to consent to such a search.

The trial court denied the suppression motion, reasoning that it was reasonable for the police to believe that Mashburn possessed authority to grant the search and that, additionally, she in fact had such authority in light of the amount of time she resided at appellant's trailer and the fact that she had no other residence. The case immediately proceeded to trial.

At trial, in addition to the testimony she gave at the suppression hearing, Mashburn testified that prior to March 3, 1999, the day before appellant's arrest, she had lived in his home while he had been incarcerated. Moreover, with regard to March 3rd, she testified that she, Craig DePriest, and appellant were living in appellant's home. During that evening, appellant admitted to Mashburn that he and DePriest were producing drugs in the trailer's back bedroom. Sometime during the night, appellant's daughter called, reporting that she was having a baby. When appellant was awakened, he thought that DePriest and Mashburn were engaging in sexual activity and became angry. Both Mashburn and DePriest fled from the trailer, but appellant was able to catch Mashburn and brought her back to the trailer. Appellant then began to hit and curse her periodically until Mashburn called 911, said "help," hung up the telephone, and turned it off. Thereafter, the police arrived at which time Mashburn told the police about appellant's drug manufacturing and consented to the police search.

In addition to giving testimony substantially similar to the testimony he gave during the suppression hearing, Corporal Brand testified that he and Officer Chris Moore found the following in the bedroom: a hot plate, pair of scales, two soda bottles connected by a hose taped to both bottles, a substance that was growing in one of the two soda bottles, and a gallon container containing a substance. Officer Moore then testified and confirmed much of what Brand told the jury. Moore, however, confirmed that Brand had sought consent to search the trailer from Mashburn, who, in fact, gave her consent. Finally, Dan Hedges, a forensic chemist at the Arkansas State Crime Laboratory, testified that based on his expertise, training, and experience, the contents of the trailer found by the police comprised a working methamphetamine laboratory.

At that time, the State rested, and appellant moved for a directed verdict, arguing that the State had failed to prove that appellant was the person who actually manufactured the illegal substances. The trial court, without comment, simply denied the directed-verdict motion. Whereupon, appellant renewed his suppression motion, which was also summarily denied.

Appellant's sister, Ginger Gunner, was the only witness called for the defense. She testified that she and her sister owned the property where appellant was living and that Mashburn had been living with appellant off and on for the last five or six years. Gunner also stated that prior to March 3rd, Mashburn had lived in the trailer with her children for approximately four months while appellant had been incarcerated.

Following Gunner's testimony, appellant rested. Thereafter, a jury found appellant guilty and sentenced him to serve concurrent terms of 120 months for attempted manufacture of a controlled substance and sixty months for possession of drug paraphernalia. From these convictions, comes this appeal.

*I. Sufficiency of the evidence*

In an effort to avoid potential double-jeopardy concerns on remand, we do not consider errors by the trial court until we first consider a challenge to the sufficiency of the evidence. *See Harris v. State*, 284 Ark. 247, 249-250, 681 S.W.2d 334, 335 (1984). On this point, appellant argues for reversal that the trial court erred by denying his directed-verdict motion because there was insufficient evidence to sustain the convictions of attempted manufacture of methamphetamine or possession of drug paraphernalia. Our review is governed by the standard expressed in *Flowers v. State*, 342 Ark. 45, 48, 25 S.W.3d 422, 425 (2000) (citations omitted), which stated:

> A motion for a directed verdict is a challenge to the sufficiency of the evidence. The test for such motions is whether the verdict is supported by substantial evidence, direct or circumstantial. Substantial evidence is evidence of sufficient certainty and precision to compel a conclusion one way or another and pass beyond mere suspicion or conjecture. On appeal, we review the evidence in the light most favorable to the appellee and consider only the evidence that supports the verdict.

The trial judge plainly denied appellant's directed-verdict motion; however, he did so without stating the basis for his determination. Accordingly, we must ascertain whether the evidence offered in light of the applicable standard of review presented a viable question of fact to be decided by the jury. We conclude that a viable question of fact existed and agree that denial of the directed-verdict motion was proper.

Rule 801(d)(2)(i) of the Ark. R. Evid. provides that a statement of a party that is "his own statement, in either his individual or representative capacity . . ." constitutes nonhearsay. While appellant concedes that Mashburn's testimony concerning his admission is evidence that he committed the crimes, he argues that pursuant to *King v. State*, 323 Ark. 671, 916 S.W.2d 732 (1996), this evidence was insufficient because it constituted uncorroborated accomplice testimony. In response, appellee argues that appellant is procedurally barred from raising this argument, commensurate with *Jones v. State*, 318 Ark. 704, 712, 889 S.W.2d 706, 709 (1994), inasmuch as it is being raised for the first time on appeal. We agree with appellee. While it is true that appellant argued in his directed-verdict motion that the State failed to prove that he actually manufactured the illegal substance, it is also true that appellant failed to raise the issue of uncorroborated accomplice testimony at that time. As such, we are disposed to conclude that the nonhearsay testimony was sufficient evidence to present the matter to the jury and affirm on this point.

*II. Unreasonable search and seizure*

For his next argument, appellant contends that he was denied his right to be free from unreasonable searches and seizures. Specifically, he argues that the trial court erred by denying his motion to suppress the items seized as a result of the warrantless search. Appellee, however, argues that the search and seizure was reasonable inasmuch as it was conducted commensurate with a lawful consent of a third party.

Our standard of review of suppression motions is well-settled — if, following an independent determination based on the totality of the circumstances, we conclude that a denial of a suppression motion was not clearly against the preponderance of the evidence, then we will affirm. *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 reasonable was not clearly erroneous. Thus, we affirm.

The right to be free from unreasonable searches and seizures is guaranteed by both the Bill of Rights, U.S. Const., amend. 4, and the Arkansas Constitution, Ark. Const. art. 2, § 15. This right is 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 [and] . . . [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, 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 voluntary third-party consent can be considered reasonable. *See United States v. Matlock*, 415 U.S. 164 (1974).

Under *Matlock*, however, for the consent to be valid, the party giving the consent must have "common authority" over the premises. *Matlock*, 415 U.S. at 171. Moreover, this "common authority" requirement cannot be inferred because "the burden of establishing . . . common authority rests upon the State." *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990). As the high Court went on to explain:

> [W]hat we hold today does not suggest that law enforcement officers may always accept a person's invitation to enter premises. Even 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. As with other factual determinations bearing upon search and seizure, determinations 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?" *Terry v. Ohio*, 392 U.S. 1 (1968). If not, then warrantless entry without further inquiry is unlawful unless authority actually exists. But if so, the search is valid.

*Rodriguez*, 497 U.S. at 188-189. Accordingly, for appellee to prevail, it must demonstrate that the facts available to the officer at the

moment would warrant a person of reasonable caution in the belief that the consenting party had authority over the premises or, alternatively, that the consenting party had actual authority to grant the consent.[2]

*1. Apparent authority*

To determine whether the police officers had a reasonable caution in the belief that Mashburn had authority over the premises (*i.e.*, apparent authority), we must first establish that the warrantless search was based on a mistake of fact, not a mistake of law. *See United States v. Whitfield*, 939 F.2d 1071, 1073 (1991). Stated differently, *Rodriguez* "applies to situations in which an officer would have had a valid consent to search if the facts were as he reasonably believed them to be." *Whitfield*, 939 F.2d at 1074. *See also Grant v. State*, 267 Ark. 50, 589 S.W.2d 11 (1979). The measure of reasonableness requires, of course, a review of the information available to the officer at the moment the third-party consent was given. While it is possible that the officer's observations alone can substantiate a determination that an officer reasonably believed that the consenting party had common authority, "sometimes the facts known by the police cry out for further inquiry, and when this is the case it is not reasonable for the police to proceed on the theory that 'ignorance is bliss.' " 3 Wayne R. LaFave, *Search and Seizure* § 8.3(g) at 749 (3rd ed. 1996).

Here, the observations of the officer who received the third-party consent were insufficient to sustain a conclusion that he reasonably believed that the consenting party had common authority over the premises that was searched. According to the officer's testimony, the only matters he observed were: (1) a woman who was standing in the front yard of appellant's house, (2) who he may have reasonably believed made a terminated 911 telephone call, and (3) who stated that appellant was manufacturing a controlled substance in a certain room in the house. We conclude that these scant pieces of information were legally insufficient to sustain a warrantless search based on apparent authority. Whether purposefully or innocently, the officer remained ignorant of critical information that would have provided a better insight into whether a third-party

[2] This standard, which is an objective/subjective mixture, is reflected in Ark. R. Crim. P. 11.2(c), which provides that for a third-party consent to search a premises to be effective, it must be made "by a person, [who,] by ownersliip or otherwise, is apparently entitled to give or withhold consent."

consent would be valid or whether a search warrant should be obtained.

The better practice in this case would have been for the officer to make additional inquiries to determine the consenting party's relationship to the premises. Because that was not done, we can only consider the officer's observations to which he testified in reaching a conclusion as to whether a person of reasonable caution would have also believed that the consenting party had authority over the premises. Accordingly, on a review of the entire evidence, we are left with a definite and firm conviction that the finding that Mashburn had apparent authority was clearly against the preponderance of the evidence. We, therefore, hold that under the Fourth Amendment and Ark. Const. art. 2, § 15, there was a lack of apparent authority to justify the government's warrantless search of appellant's home. As such, we now turn to the question of whether the consenting party had actual authority.

*2. Actual authority*

A conclusion that the consenting third party had actual authority rests on a determination of whether this party had common authority over the premises that was subject to the warrantless search. Moreover, as stated in *Matlock*, 415 U.S. at 172 n.7 (citations omitted):

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize 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.

Here, the general consensus was that Mashburn lived in appellant's home[3] for an extended period of time. That evidence

[3] Whether appellant actually owned the trailer in which he lived is unclear. Gunner testified that she and her sister owned "the property," but she did not state that they also owned the trailer. Our decision, however, is not colored by appellant's potential lack of ownership of the trailer because it is unquestioned that appellant - either as owner, lessee,

alone, however, is ordinarily insufficient because the simple statement that one is "living" in a particular place does not by itself provide sufficient insight into the nature of the living arrangement, which under *Matlock* is critical to determine whether one's mutual use is sufficient to permit a warrantless search. Nevertheless, we are satisfied that appellee has met its burden. The testimony of Mashburn and Gunner reveals that prior to March 3, 1999, Mashburn lived in the trailer for at least two months while appellant was incarcerated on a different matter. This evidence is in direct conflict with appellant's contention that Mashburn was a mere guest in his home. The evidence demonstrates that the living arrangement was such that Mashburn did in fact have mutual use of the property. To conclude otherwise could not be reconciled with her exclusive use of the trailer. Accordingly, we do not conclude that the trial court's determination that Mashburn had actual authority was clearly erroneous. We, therefore, affirm on this point.

### *III. Continuance*

For his final argument, appellant argues that the trial court erred by denying his motion for a continuance. We, however, disagree with appellant and affirm on this point.

Rule 27.3 of the Arkansas Rules of Criminal Procedure provides that "[t]he court shall grant a continuance only upon a showing of good cause and only for so long as is necessary, taking into account not only the request or consent of the prosecuting attorney or defense counsel, but also the public interest in prompt disposition of the case." Moreover, absent an abuse of discretion, we will affirm a trial court's denial of a motion for continuance. *See Morgan v. State*, 333 Ark. 294, 971 S.W.2d 219 (1998).

Here, appellant sought a continuance because he had failed to communicate with his attorney in order to prepare for trial. However, the record reveals that the trial court had previously granted a continuance motion because the appellant was unprepared to present his defense. Although the trial court shall grant a continuance upon a showing of good cause, the court must also endeavor to bring about a prompt resolution of the case. In this

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licensee, or otherwise - made this trailer his home, and "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961).

regard, we do not conclude that the trial court abused its discretion by denying appellant's motion and requiring the matter to proceed to trial on the scheduled date. To conclude otherwise would reward appellant for his unreasonable inaction and be contrary to the well-settled principle that "failure to exercise due diligence alone can be the basis to deny a motion for a continuance." *Jones v. State*, 317 Ark. 131, 137, 876 S.W.2d 262, 265 (1994). Accordingly, we also affirm on this point.

Affirmed.

STROUD, C.J., and CRABTREE, J., agree.

WHITE CONSOLIDATED INDUSTRIES *v.*
Denise GALLOWAY

CA 00-1199 45 S.W.3d 396

Court of Appeals of Arkansas
Division II
Opinion delivered May 16, 2001

*Laser Law Firm, P.A.*, by: *Keith M. McPherson*, for appellant.

*Davis, Mitchell & Davis*, by: *Gary Davis*, for appellee.

JOHN B. ROBBINS, Judge. Appellee Denise Galloway has been employed on an assembly line by appellant White Consolidated Industries for fourteen years. On June 5, 1989, she sustained a compensable low back injury while handling heavy refrigeration equipment in the course and scope of her employment. Mrs. Galloway suffered a recurrence of her compensable injury on May 10, 1998, while hanging clothes in her home. The appellant covered related medical treatment, which included diagnostic testing, prescription medications, and physical therapy. However, in 1999 appellant controverted Mrs. Galloway's claim that she was entitled to undergo intradiscal electrothermal treatment (IDET), a procedure introduced in 1997 as an alternative to spinal fusion. The appellant argued that the procedure was experimental and not reasonably necessary for the treatment of Mrs. Galloway's back condition. After a hearing, the Commission disagreed, finding that the IDET procedure constitutes reasonable and necessary treatment. For reversal, appellant argues that the Commission's decision is not supported by substantial evidence. We find no error and affirm.

This court affirms findings of fact by the Commission if the decision is supported by substantial evidence. *Branscum v. RNR Constr. Co.*, 60 Ark. App. 116, 959 S.W.2d 429 (1998). Substantial evidence exists if reasonable minds could have reached the same conclusion without resort to speculation or conjecture. *Arkansas Dep't of Correction v. Glover*, 35 Ark. App. 32, 812 S.W.2d 692 (1991).

Mrs. Galloway testified on her own behalf and stated that, since the June 1989 injury, she has continued to work but has been given restrictions limiting her bending, stooping, and lifting. She stated that she has been on constant medication and has undergone periodic physical therapy. Despite her treatments, Mrs. Galloway experiences daily problems related to her low back condition, including backache, pain and numbness in her legs and feet, and sleepless nights. She stated that for several years she has been under the care of Drs. Edward Saer and J. Tod Ghormley, and that both doctors have recommended the IDET procedure. According to Mrs. Galloway, her doctors informed her that the only other option was fusion surgery, but neither recommended it. Mrs. Galloway testified that, after speaking with her doctors, she has decided that she wants to undergo the IDET procedure.

In a medical report prepared on May 18, 1999, Dr. Saer indicated that Mrs. Galloway has two abnormal discs and that, although her condition cannot be cured, there are procedures that may help alleviate her pain. Dr. Saer stated further in the report:

> Unfortunately, with two level disc disease, a fusion is not really a good option. If L4-5 was the only symptomatic level then I think that would be an option. The L3-4 level does not look like it is "bad enough" to warrant fusion. I did discuss the IDET procedure (intradiscal electrothermal treatment) with her. This could be done at two levels and I think she would be a candidate for that. She's had symptoms for many years and is having predominantly back pain. I did discuss this with her and gave her some information about this. She's going to think about this and let us know how she wants to proceed.

In a report authored by Dr. Ghormley on July 19, 1999, he stated, "I agree that sending [Mrs. Galloway] to Dr. Saer for the intradiscal electrothermal treatment would be helpful," and that, "Risks I believe would be minimal."

On appeal, White Consolidated Industries argues that, notwithstanding the opinions of Drs. Saer and Ghormley, Mrs. Galloway failed to establish that the IDET procedure is a reasonably necessary treatment for her compensable injury. The appellant submits that the testimony of Mrs. Galloway, as well as the opinions of her doctors, were refuted by documentary medical literature that it collected and presented to the Commission. This literature reveals that the IDET procedure was pioneered in 1997, and that while short-term studies have been conducted, there has been insufficient

time to study the long-term effects of the treatment. The appellant notes that the documentary evidence indicates that the IDET procedure may not alleviate the symptoms of some patients and may need to be repeated. This uncertainty was acknowledged by Dr. Saer in his August 26, 1999, report when he stated, "She asked what would happen if she had this procedure and was still symptomatic and I think that is something we would just have to evaluate at that time."

The appellant also makes reference to a pamphlet introduced by Mrs. Galloway, entitled "An Introduction to SpineCath Intradiscal Electrothermal Therapy." The pamphlet indicates that many factors may prevent a physician from recommending IDET therapy, including "very narrow disc height, severe disc herniation, spinal instability, very advanced stages of disc degeneration, or various general health concerns." The appellant points out that the opinions expressed by Drs. Saer and Ghormley do not address any of the above concerns. In addition, the pamphlet states it is "very important for your physician to diagnose that the disc is the primary source of your back pain," and appellant notes that Dr. Saer reported in April 1999 that it was "difficult to pinpoint any one specific area as the cause of her symptoms."

The appellant contends that the medical opinions relied on by the Commission in awarding compensation for the IDET procedure were insufficient because they amounted to mere conclusions, without any medical explanation as to why the procedure is necessary in treating Mrs. Galloway's specific condition. Moreover, appellant urges that the medical opinions were faulty in that they failed to address the probability of success of the procedure, and further failed to discuss the effect of the procedure on other back problems afflicting Mrs. Galloway, such as degenerative disc disease. Particularly in light of the fact that the IDET procedure is new in the Arkansas medical and legal communities, the appellant contends that the procedure was erroneously authorized by the Commission.

The appellant correctly asserts that it is only required to provide medical services that are reasonably necessary in treatment of the compensable injury. *See* Ark. Code Ann. § 11-9-508(a) (Repl. 1996). What constitutes reasonably necessary medical treatment is a question to be determined by the Commission. *Gansky v. Hi-Tech Engineering*, 325 Ark. 163, 924 S.W.2d 790 (1996). In the instant case, we hold that there was substantial evidence to support the Commission's finding that the IDET procedure is reasonably necessary in treating Mrs. Galloway's compensable low back condition.

In its opinion, the Commission specifically stated that it gave greater weight to the opinions of Mrs. Galloway's treating physicians than the documentary evidence offered by appellant. Indeed, it is the function of the Commission to weigh medical evidence, *Continental Express v. Harris*, 61 Ark. App. 198, 965 S.W.2d 811 (1998), and in this case the medical opinions of Drs. Saer and Ghormley supported the Commission's decision, and these were the only opinions addressing the issue of whether or not the IDET procedure was necessary in this case. The appellant cites no authority, and we know of none, that requires a 100 percent success rate before a procedure may be deemed reasonably necessary under workers' compensation law. Nor does it cite authority or convincing argument for the proposition that the opinions of medical experts must be accompanied by specific details underlying and supporting their opinions. In the instant case, Drs. Saer and Ghormley treated Mrs. Galloway for her compensable back condition for a number of years, and both recommended the IDET procedure as an alternative to fusion surgery. The procedure is designed to alleviate Mrs. Galloway's chronic back pain, and after weighing her alternatives she consented to her doctors' recommendation. The Commission was free to accept the only medical opinions offered in this case, and they amounted to substantial evidence supporting its decision.

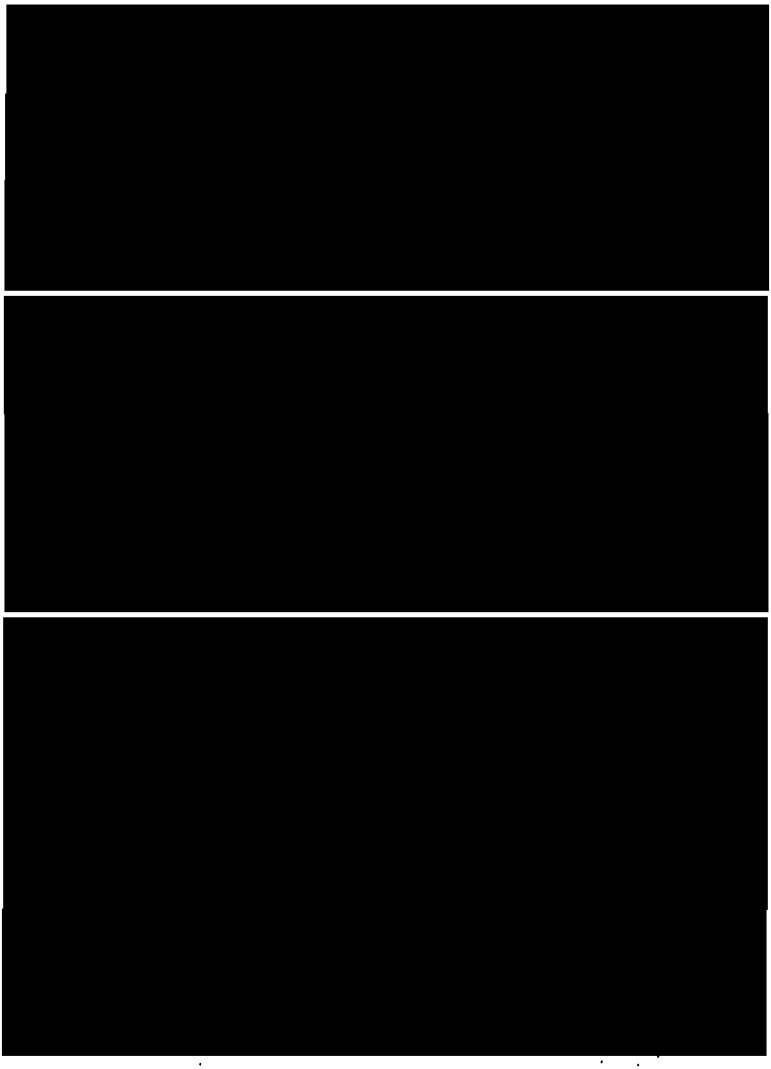
Affirmed.

JENNINGS and BAKER, JJ., agree.

Carrey BARKER *v.* ROGERS GROUP, INC.

CA 00-985 45 S.W.3d 389

Court of Appeals of Arkansas
Division I
Opinion delivered May 16, 2001



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*Jones & Granger*, by: *H. Chris Christy*, *Stephen B. Whiting*, and *Chester H. Lauck, III*, for appellant.

*Laser, Wilson, Bufford & Watts, P.A.*, by: *Sam Laser* and *Brian A. Brown*, for appellee.

SAM BIRD, Judge. This is a second appeal by appellant Carey Barker from the Faulkner County Circuit Court's grant of summary judgment in favor of appellee Rogers Group, Inc. Barker asks this court to overturn the acquired-immunity doctrine or, in the alternative, she argues that her complaint against Rogers alleged that Rogers performed its contractual responsibilities in a negligent manner. Barker also contends that the court's order granting summary judgment was in error because genuine issues of material fact existed. Rogers asks this court to dismiss Barker's appeal, contending that we lack subject-matter jurisdiction to hear it because Barker filed this appeal prematurely. We hold that we do have subject-matter jurisdiction. Therefore, we reach the merits of the case, and we affirm.

Rogers was awarded a contract by the Arkansas Highway and Transportation Department (AHTD) to resurface a portion of Arkansas Highway 65 in Faulkner County. The contract specified that Rogers was to use Type 3 asphalt in resurfacing the highway. In verifying that Rogers complied with the contract's specifications, AHTD monitored daily the application of the asphalt to the highway surface. The work was completed in September 1996 and was approved and accepted by the highway department.

Two years later, Barker was a passenger in Heath Loftin's vehicle, which was involved in a collision with a vehicle driven by James C. Evans on a part of Highway 65 that had been resurfaced by Rogers. The accident resulted in the death of Loftin and serious injuries to Barker. Barker contends that the accident was caused when Loftin's car hydroplaned because of the slick surface of the roadway due to the use of Type 3 asphalt.

On February 12, 1999, Barker filed suit against Rogers, Evans, and Loftin's estate. She alleged that Rogers was negligent in resurfacing the roadway with Type 3 asphalt, which it knew was dangerous; in failing to warn the driving public or public officials of the dangerous conditions; in failing to take steps necessary to cure the imminently dangerous conditions that it had created; in undertaking a project in which the wrong asphalt mix was called for; and in creating an unsafe condition, failing to warn and to cure the hazard.

Rogers filed an answer denying Barker's contentions and pleading the acquired-immunity doctrine as an affirmative defense. Marilyn K. Loftin, administratrix of Loftin's estate, filed a cross-claim against Rogers.

On June 28, 1999, Rogers filed a motion for summary judgment in which it maintained that it had acquired immunity because it was required to comply with the contract in which AHTD specified the use of Type 3 asphalt. In support of its motion for summary judgment, Rogers attached affidavits of C.W. McMillian, the resident engineer for AHTD on the project performed by Rogers, and Eddie Reidmueller, a quality control manager for Rogers.

In his affidavit, McMillian stated that the AHTD specified that Type 3 asphalt be used in the resurfacing project and that Rogers was required by the department to comply with the specifications. He stated that in addition to specifying the type of asphalt, the department specified the procedures used in preparing the surface and applying it. McMillian stated that it was his responsibility to oversee the project and to make sure that it met the specifications of the contract. He stated that had Rogers not been in compliance, he would have required Rogers to promptly correct the noncompliance. He then stated:

> The Department determined that Type 3 asphalt was suitable and appropriate for this job. Had Rogers Group employees advised the Department that they were informed that Type 3 asphalt was not suitable for this job, we would have told them that it was suitable and directed that they continue using Type 3 asphalt.

In his affidavit, Eddie Riedmueller stated that he was involved in Rogers's performance of the contract with AHTD regarding the resurfacing of part of Highway 65. He stated that an inspector with AHTD was present at the site everyday and that, periodically, a supervisor or an engineer would be present at the site to inspect the work. The supervisor or the engineer had the authority to order the correction of any defects that they found in the work. However, Riedmueller stated that AHTD never ordered any corrections pertaining to the asphalt. In addition, Riedmueller stated that Rogers had no input with AHTD concerning its choice of the type of asphalt to be used.

Barker responded to Rogers's motion, stating that she could show that Rogers was negligent in resurfacing the road and in using

Type 3 asphalt, which causes vehicles to hydroplane. She also contended that the affirmative defense of acquired immunity relied upon by Rogers is directly related to the accepted-work doctrine, which was abolished by the Arkansas Supreme Court in *Suneson v. Holloway Constr. Co.*, 337 Ark. 571, 992 S.W.2d 79 (1999). Therefore, she argued, Rogers could be liable for its negligence in using Type 3 asphalt. However, she presented no affidavits, deposition testimony, or any other evidence opposing Rogers's motion.

On August 18, 1999, the court granted summary judgment and dismissed Barker's complaint against Rogers with prejudice. The court held that the only allegation of negligence in Barker's complaint was that Rogers was negligent in using Type 3 asphalt, the material that AHTD required. Therefore, the court held that since Barker was not contending that Rogers was negligent in its performance of the contract, but, rather, that it was negligent in using Type 3 asphalt, Rogers acquired the immunity that the highway department would enjoy from tort liability.

Barker filed her first notice of appeal on September 7, 1999. On May 10, 2000, we dismissed Barker's first appeal because the order from which she appealed did not dispose of her claim against the Loftin estate and the Loftin estate's cross-claim against Rogers. The order dismissing the cross-claim by Loftin was entered May 1.

Our mandate dismissing Barker's first appeal for want of a final order was issued on May 31, 2000. On that same day, Barker filed her second notice of appeal. On June 1, 2000, our mandate dismissing Barker's first appeal was filed in Faulkner County Circuit Court. A final order disposing of Barker's claim against the Loftin estate and the Loftin estate's cross-claim against Rogers, and also granting Rogers's motion for summary judgment, was entered on June 2, 2000.

After the second notice of appeal was filed with this court, Rogers filed a motion asking us to dismiss Barker's second appeal, contending that the notice of appeal was filed too early and that this court lacked subject-matter jurisdiction. We denied the motion. Rogers, in its brief in the appeal at bar, renewed its motion to dismiss, asserting that this court lacked subject-matter jurisdiction because the circuit court did not reacquire jurisdiction until the mandate of this court was filed on June 1, and that since Barker's notice of appeal, filed May 31, was filed before the circuit court reacquired jurisdiction, the early filing made the notice invalid. We do not agree.

Subject-matter jurisdiction is the power of a court to adjudge certain matters and to act on facts alleged. *Timmons v. McCauley*, 71 Ark. App. 97, 27 S.W.3d 437 (2000). Rule 5-3 of the Rules of the Supreme Court states:

> (a) *Mandate to be issued in all cases.* In all cases, civil and criminal, the Clerk will issue a mandate when the decision becomes final and will mail it to the clerk of the trial court for filing and recording. A decision is not final until the time for filing of petition for rehearing, or, in the case of a decision of the Court of Appeals, the time for filing a petition for review has expired or, in the event of the filing of such petition, until there has been a final disposition thereof.

The supreme court recently addressed the question of when a mandate becomes final in *Barclay v. Farm Credit Servs.*, 340 Ark. 65, 68-69, 8 S.W.3d 517, 519 (2000), stating:

> It is axiomatic that this court takes jurisdiction of a matter once the record on appeal is filed with the Clerk of the Supreme Court. [The supreme court] loses jurisdiction to the trial court once the mandate is *issued* from this court to the trial court. A mandate is the official notice of the action taken by the appellate court. The mandate is directed to the trial court, and it instructs the court to recognize, obey, and execute the appellate court's decision. (Citations omitted and emphasis added.)

Here, because the mandate was issued on May 31, becoming effective on that date rather than on the date it was filed with the circuit court, Barker's notice of appeal was not filed prematurely, and we have subject-matter jurisdiction to reach the merits of the case.

In reviewing a trial court's grant of summary judgment, we need only decide if the granting of the motion 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. *Mashburn v. Meeker Sharkey Fin. Group, Inc.*, 339 Ark. 411, 5 S.W.3d 469 (1999). 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.* Summary judgment is proper when a claiming party fails to show that there is a genuine issue as to a material fact and when the moving party is entitled to

summary judgment as a matter of law. *Id.* Once a moving party establishes a prima facie entitlement to the summary judgment by affidavits, depositions, or other supporting documents, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of its pleadings, but its response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Ark. R. Civ. P. 52.

For her first point on appeal, Barker contends that because the supreme court in *Suneson v. Holloway Const. Co., supra,* abolished the accepted-work doctrine, this court should, based upon the reasoning in *Suneson,* abolish the acquired-immunity doctrine. We are not persuaded by Barker's argument that the supreme court's abolition of the accepted-work doctrine in *Suneson, supra,* also had the effect of abolishing the acquired-immunity doctrine. The accepted-work doctrine was based upon a different public policy and rationale than the acquired-immunity doctrine. The general rule of the accepted-work doctrine was that after the contractor turned the work over to and it had been accepted by the proprietor, the contractor incurred no further liability to third parties by reason of the condition for the work, but the responsibility, if any, for maintaining or using it in its defective condition is shifted to the proprietor. *Suneson v. Holloway Const. Co., supra.* This is not analogous to the case at bar. The acquired-immunity doctrine shields a contractor from damages resulting from its performance of the contract, where the contract has been performed in accordance with the terms of its contract with a governmental agency that is immune from tort liability. *Jordan v. Jerry D. Sweetser, Inc.*, 64 Ark. App. 58, 977 S.W.2d 244 (1998). The theory behind the acquired-immunity doctrine is that a contractor for a public agency shares the sovereign immunity of the public body from liability for damages necessarily involved in the performance of the contract. *Guerin Contractors v. Reaves Food Ctr*, 270 Ark. 710, 606 S.W.2d 143 (Ark. App. 1980). The acquired-immunity doctrine does not protect a contractor who performs work in a negligent manner, and such negligence results in damages to others. *Id.* At *Southeast Constr. Co. Inc. v. Ellis*, 233 Ark. 72, 77, 342 S.W.2d 485, 488 (1961), the supreme court stated the public policy rationale behind the acquired-immunity doctrine:

> If the contractor was required, at its peril, to check and double check all plans given it and required to keep an engineering force

> for the purpose of interpreting these plans, and was not permitted to follow the orders of the engineering force of its superior, then the cost of public improvement would be so increased as to make them almost prohibitive.

Based upon the pleadings and affidavits, we find that the court did not err in granting summary judgment and finding that Rogers has acquired immunity by complying with the AHTD contract specifications, which required the application of Type 3 asphalt.

Barker also argues that this case falls within an exception to the acquired-immunity doctrine that applies when a person suffers damages as a result of the contractor's negligence in the performance of a contract with a public agency that is immune from liability for negligence. We do not find this exception to be applicable here because the theory of liability asserted in Barker's complaint is that Rogers was negligent in its use of Type 3 asphalt that was specified in its contract with AHTD, not that Rogers was negligent in its performance of the contract. Although Barker argues that she did plead negligence on the part of Rogers in its performance of the contract, from our careful review of her complaint we find that the only negligence referred to in the complaint was that Rogers was negligent in its application of Type 3 asphalt. Nowhere in the complaint did Barker allege that Rogers was negligent in the performance of the contract other than by its use of Type 3 asphalt.

Barker also contends that the court was in error in granting summary judgment because genuine issues of material fact remain. These issues include whether Rogers had a duty to warn of imminently dangerous conditions, whether it had a duty to correct a dangerous situation it created, whether it used the appropriate type of asphalt, and whether it strictly adhered to the contract. As stated above, because Rogers strictly adhered to the contract specifications, it cannot be held liable. Therefore, there are no genuine issues of material fact on which a jury could determine that Rogers was liable. Without Barker's contention that Rogers negligently performed the contract, the only issue before the jury would be whether Rogers complied with the contract. In its motion for summary judgment, evidence in the form of affidavits was introduced that showed Rogers had in fact strictly complied with the contract. Barker did not meet proof with proof and has presented no evidence that Rogers did anything other than comply with the contract.

Finally, Barker argues that if even this court should find that the trial court did not err in granting summary judgment, we should modify the trial court's judgment, which dismissed Barker's complaint with prejudice, to a dismissal without prejudice so as to allow her to amend her complaint to plead with specificity that Barker was negligent in the performance of the contract. She cites *Bushong v. Garman Co.*, 311 Ark. 228, 235, 843 S.W.2d 807, 811 (1992), for support of her position that "when summary judgment is granted because of a failure to state a claim, the dismissal should be without prejudice in order to afford the plaintiff-appellant a chance to plead further."

In *Bushong*, the trial court granted summary judgment, with prejudice, upon finding that there was no genuine issue of any material fact. On appeal, the supreme court concluded that the trial court's grant of summary judgment was error but, rather, that the case should have been dismissed because of the failure of the complaint to state a claim upon which relief could be granted. In modifying the trial court's summary judgment order to be a dismissal for failure to state a claim, the supreme court also modified the order to provide that the dismissal would be without prejudice.

We do not believe that *Bushong* is applicable to this case, and we disagree with Barker's argument. Rule 52 of the Arkansas Rules of Civil Procedure states:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving part is entitled to a *judgment as a matter of law.* (Emphasis added.)

In *Bushong*, the court made a distinction between the grant of summary judgment for failure to state a claim and grant of summary judgment when there is no genuine issue of material fact. Unlike in *Bushong*, we hold that the trial court in the case at bar did not err in granting summary judgment because we agree that, based on the pleadings filed, along with the affidavits submitted by Rogers with its motion for summary judgment, there are no genuine issues of material fact and that Rogers is entitled to judgment as a matter of law.

Affirmed.

JENNINGS and GRIFFEN, JJ., agree.

Travis HILL *v.* STATE of Arkansas

CA CR 00-1134 45 S.W.3d 406

Court of Appeals of Arkansas
Division II
Opinion delivered May 16, 2001

*Evans & Evans Law Firm*, by: *James E. Evans, Jr.*, for appellant.

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

TERRY CRABTREE, Judge. A jury sitting in the Washington County Circuit Court convicted the appellant, Travis

Hill, of two counts of rape and three counts of sexual abuse in the first degree. The trial court sentenced him to twenty-nine years' imprisonment in the Arkansas Department of Correction. On appeal, appellant argues that the trial court erred by refusing to allow him to present testimony of the victim's family regarding prior allegations of sexual conduct. We find no error and affirm.

On November 13, 2000, appellant was charged with three counts of rape and three counts of sexual abuse of his daughter, occurring between 1995 and 1999. During the trial, the circuit court refused to allow the victim's mother and grandmother to testify about the victim's prior inconsistent statements concerning events occurring within the four-year period. The defense argued that the prior inconsistent statements were offered to rebut the credibility of the victim. The victim's mother and grandmother sought to testify that the victim had accused other men, rather than her father, of perpetrating sexual abuse upon her. The lower court would not allow the testimony because it characterized the testimony as hearsay. After the circuit court made its ruling, defense counsel proffered the victim's mother's testimony.

We believe that the proffered testimony would have violated Arkansas's rape-shield statute contained in Ark. Code Ann. § 16-42-101 (Repl. 1999). The statute makes inadmissible:

> evidence of a victim's prior allegations of sexual conduct with the defendant or any other person, which allegations the victim asserts to be true, or evidence offered by the defendant concerning prior allegations of sexual conduct by the victim with the defendant or any other person if the victim denies making the allegation[.]

Ark. Code Ann. § 16-42-101(b). The defendant is precluded from eliciting such testimony "through direct examination of any defense witnesses or through cross-examination of the victim or other prosecution witness, to attack the credibility of the victim, to prove consent or any other defense, or for any other purpose." *Id.*

The rape-shield statute is not a total bar to evidence of a victim's sexual conduct but instead makes its admissibility discretionary with the trial judge pursuant to the procedures set out at Ark. Code Ann. § 16-42-101(c)(1-3). *Gaines v. State*, 313 Ark. 561, 855 S.W.2d 956 (1993). Subsection (c) of the statute provides that evidence of a victim's prior sexual conduct may be admitted if its relevancy is determined in accordance with the provisions found in the subsequent subsections. Subsection (c)(1) requires a written

motion to be made by the defendant wishing to present such evidence, and subsection (c)(2) provides for a subsequent hearing on the motion to be held *in camera*. Upon motion of the defendant in *Lindsey v. State*, 54 Ark. App. 266, 925 S.W.2d 441 (1996), the trial court properly held a pretrial hearing to decide whether certain testimony was barred under the rape-shield statute. Here, however, appellant did not file any such written motion, so the trial court held no separate hearing, and thus the provisions of the statute were not invoked.

We are convinced that the testimony proffered was properly excluded as appellant failed to make a written motion below pursuant to Ark. Code Ann. § 16-42-101(c). Even though the circuit court did not rely on the rape-shield statute when making its ruling, this court will affirm a trial court's decision if it reached the right result but for a different reason. *McKenzie v. State*, 69 Ark. App. 186, 12 S.W.3d 250 (2000).

Affirmed.

ROBBINS and VAUGHT, JJ., agree.

Marilyn Gayle DIAL *v.* Jesse Randal DIAL

CA 00-864 44 S.W.3d 768

Court of Appeals of Arkansas
Division II
Opinion delivered May 23, 2001

[redacted]

*Michael E. Todd, P.A.*, by: *Michael E. Todd*, for appellant.

*Donis B. Hamilton*, for appellee.

ANDREE LAYTON ROAF, Judge. In this case, we are asked to review the chancellor's division of property pursuant to a divorce. Two particular matters are at issue: 1) whether appellant Marilyn Dial is entitled to an interest in appellee Jesse Dial's deferred retirement option plan, and 2) whether Marilyn Dial is entitled to an interest in a home owned by Jesse Dial prior to the marriage. We affirm the chancellor's ruling with regard to the home, but reverse his ruling on the deferred retirement option plan.

Marilyn and Jesse Dial were divorced on April 5, 2000, after fourteen years of marriage. In the divorce decree, the chancellor divided the couple's marital and nonmarital property in a relatively equal manner. Among the items designated as nonmarital property were a home owned by Mrs. Dial prior to marriage and a home owned by Mr. Dial prior to marriage. Each party was awarded his or her home, free and clear of the other's interest. Most of the other property that had been owned by Mr. and Mrs. Dial was divided as marital property, including a checking account, certain funds in a credit union account, a certificate of deposit, a prepaid burial account, and each party's retirement benefits. Mr. Dial was awarded a 50 percent interest in Mrs. Dial's monthly retirement benefits, and Mrs. Dial was awarded a 22.5 percent interest in Mr. Dial's monthly retirement benefits, which represented her one-half interest in those benefits that accrued during the marriage. However, Mrs. Dial was awarded no interest in Mr. Dial's deferred retirement option plan (DROP) account. On appeal, she contends that the chancellor erred in failing to award her a share of the DROP account and that he erred in failing to award her any interest in the home Mr. Dial owned prior to marriage.

Before reaching the merits of the case, we address the issues presented by appellee Jesse Dial's motion to dismiss the appeal. According to Mr. Dial, Mrs. Dial has accepted certain benefits under the divorce decree, thereby rendering moot the issues she now raises on appeal. In particular, he refers to her receipt of $13,019.83, representing her share of the above-mentioned cash accounts, and her procurement of a qualified domestic relations order (QDRO) entitling her to 22.5 percent of his monthly retirement benefits.

In support of his motion, Mr. Dial cites the cases of *Hendrix v. Winter*, 70 Ark. App. 229, 16 S.W.3d 272 (2000), *DeHaven v. T & D Dev., Inc.*, 50 Ark. App. 193, 901 S.W.2d 30 (1995), and *Lyle v. Citizen's Bank of Batesville*, 4 Ark. App. 294, 630 S.W.2d 546 (1982), all of which stand for the proposition that if an appellant voluntarily pays a judgment, then an appeal from that judgment is moot. These cases are not applicable, however, because Mrs. Dial is not appealing from a judgment she has paid. More on point are those cases that recognize that an appellant waives her right to appeal once she accepts a benefit that is inconsistent with the relief she seeks on appeal. *See Wilson v. Fullerton*, 332 Ark. 111, 964 S.W.2d 208 (1998); *Shepherd v. State Auto Prop. & Cas. Ins. Co.*, 312 Ark. 502, 850 S.W.2d 324 (1993); *Thomas v. Thomas*, 68 Ark. App. 196, 4 S.W.3d 517 (1999). The general purpose behind the rule set forth in *Wilson, Shepherd,* and *Thomas* is that a party should not be able to enjoy the fruits of a judgment and at the same time appeal that judgment. *See Reynolds v. Reynolds*, 861 S.W.2d 825 (Mo. App. 1993). However, courts have applied this rule less strictly in divorce cases. *See id.*; *see also* 5 AM. JUR. 2D *Appellate Review* § 636 (2d ed. 1995).

In *Thomas v. Thomas, supra*, we held that a person may accept part of the benefits of a divorce decree and appeal the remainder, if the part accepted and the part appealed from are independent. Here, the issues appealed from are undoubtedly independent of the cash benefits that Mrs. Dial has accepted as her share of certain marital accounts. The question is closer as to the retirement benefits awarded to her by the QDRO. Nevertheless, we do not find Mrs. Dial's action in seeking the QDRO to be inconsistent with her arguments on appeal. There is no question that she is entitled to receive 22.5 percent of Mr. Dial's *general* retirement benefits, no matter what the outcome of this appeal. Therefore, she was within her rights to ensure her ability to begin receiving those benefits upon Mr. Dial's retirement.

Mr. Dial argues further that, by accepting benefits under the judgment, Mrs. Dial has restricted our ability and the chancellor's ability to exercise flexibility in property division, should we determine that error occurred below. In reviewing this case, we have not found that to be a concern. The chancellor divided all marital property equally, returned to each party the property he or she owned prior to marriage, and awarded no alimony or child support that might be affected by a change in property division. Under the facts of this particular case, Mrs. Dial's acceptance of benefits pending appeal has not impeded our ability, nor should it impede the chancellor's ability, to effect an equitable division of property upon reversal. The motion to dismiss is denied.

Turning now to the merits of the case, the first issue concerns Mrs. Dial's claim to a share of Mr. Dial's DROP account. During the parties' marriage, Mr. Dial was an employee of the Arkansas State Highway and Transportation Department. On October 21, 1998, after thirty years of service, Mr. Dial became eligible for retirement. However, instead of retiring, he continued to work for the Highway Department and began participating in the Arkansas State Highway Employees' Deferred Retirement Option Plan. This plan allows an employee to continue working for up to five years while receiving retirement benefits as though he were retired. *See* Ark. Code Ann. §§ 24-5-201 to 204 (Repl. 2000). Those benefits are placed into an account and, when the employee actually retires, he may withdraw the accumulated benefits either as a lump sum or in annuity payments. Beginning in October 1998, monthly payments of $1,768.97 were placed into Mr. Dial's DROP account. As of December 31, 1999, the balance in the account was $25,609.10.

With respect to the division of property in a divorce case, we review the chancellor's findings of fact and affirm unless those findings are clearly erroneous. *Jablonski v. Jablonski*, 71 Ark. App. 33, 25 S.W.3d 433 (2000). A finding is clearly erroneous when, although there is evidence to support it, we are left, on the entire evidence, with a firm conviction that a mistake has been committed. *Hoover v. Hoover*, 70 Ark. App. 215, 16 S.W.3d 560 (2000).

In his initial letter ruling, the chancellor did not refer to the funds in Mr. Dial's DROP account. Instead, he simply divided Mr. Dial's retirement benefits by splitting them proportionally according to the number of years of marriage (fourteen) that coincided with the number of years of Mr. Dial's service (thirty), resulting in a figure of 45 percent. Mrs. Dial's one-half share was then determined to be 22.5 percent. This is the method approved by our supreme court in *Young v. Young*, 288 Ark. 33, 701 S.W.2d 369

(1986), and *Marshall v. Marshall*, 285 Ark. 426, 688 S.W.2d 279 (1985). Following entry of judgment, Mrs. Dial apparently asked for clarification regarding the funds in the DROP account. The chancellor then addressed the issue and declined to award her a separate interest in the account.

Mrs. Dial argues on appeal that she should have been awarded 50 percent of the funds held by Mr. Dial in his DROP account at the time of the divorce. We agree. Had the funds in the DROP account been paid directly to Mr. Dial during the marriage and placed by him into an ordinary savings account, they would unquestionably be considered marital property subject to division. The fact that Mr. Dial has chosen to postpone enjoyment of those funds does not destroy Mrs. Dial's interest in them. *See Day v. Day*, 281 Ark. 261, 663 S.W.2d 719 (1984). We therefore hold that any money accumulated in the DROP account during the marriage, that is, prior to entry of the April 5, 2000 divorce decree, constitutes marital property of which Mrs. Dial is entitled to a 50 percent interest. Marital property means all property acquired subsequent to marriage, with certain exceptions not applicable here. *See* Ark. Code Ann. § 9-12-315(b) (Repl. 1998). Further, it is proper to ascertain the extent of marital property and evaluate it as of the time of divorce. *See Wilson v. Wilson*, 294 Ark. 194, 741 S.W.2d 640 (1987).

In light of our holding, we reverse and remand with directions to the chancellor to award Mrs. Dial her 50 percent interest in the money accumulated in the DROP account as of April 5, 2000, and to amend any orders or decrees, including QDROs, to the extent necessary to comply with this opinion.

The remaining issue on appeal concerns the chancellor's decision not to award Mrs. Dial any interest in Mr. Dial's home that he owned prior to the marriage. Mr. Dial and his former wife (now deceased) purchased their home in 1977, with the aid of a twenty-year, $25,000 mortgage. Mrs. Dial and her former husband purchased their home in 1980. Mrs. Dial obtained the home in a divorce in 1984 and refinanced it with a $23,000 mortgage in 1985. Upon the marriage of Mr. and Mrs. Dial, they decided to live in Mr. Dial's home. Mrs. Dial rented her home for $300 to $400 per month throughout the marriage. The monthly rent payments were enough to cover the mortgage payments and the house's insurance and taxes.

Several improvements were made to Mrs. Dial's house during the marriage, including the installation of a concrete slab and awning in the backyard, installation of central heat and air, new carpet and linoleum, repainting four times, and installation of a new roof (for which insurance paid one-half). Improvements were also made to Mr. Dial's house during the marriage, including the construction of a shop building, installation of central heat and air, new carpet, refinishing of walls and cabinets, enclosing the carport, and new windows and doors. In addition, there was considerable debt reduction on both houses. Mr. Dial's mortgage was paid off in 1997; Mrs. Dial's was nearly paid off at the time of the divorce.

The chancellor found that both parties' homes were of nearly equal value with about equal debt reduction and that approximately the same amount of marital funds had been expended on each house. He therefore ordered that each party have the house that he or she owned prior to marriage free from the other's interest. Mrs. Dial contends that the chancellor erred because, while the debt reduction and improvements on her house were paid for by rentals generated by the house, the debt reduction and improvements on Mr. Dial's house were paid for with marital funds.[1]

A chancellor is given broad powers to distribute both marital and nonmarital property to achieve an equitable division. *Box v. Box*, 312 Ark. 550, 851 S.W.2d 437 (1993). At the time of the divorce, all nonmarital property shall be returned to the party who owned it prior to marriage unless the court shall make some other division it deems equitable. *See* Ark. Code Ann. § 9-12-315(a)(1)(B)(2) (Repl. 1998). However, a chancellor may find that a non-owning spouse is entitled to some benefit by reason of marital funds having been used to pay off debts on the owning spouse's property, *Box v. Box, supra*, or by reason of marital funds having been used to improve the owning spouse's property. *See Camp v. Camp*, 18 Ark. App. 87, 710 S.W.2d 842 (1986). Our property division statute does not require mathematical precision in property distribution but only that property be distributed equitably. *See Hoover v. Hoover, supra*. The statute applies to the distribution of both marital and nonmarital property.

We cannot say that the chancellor's division of nonmarital property in this case was clearly erroneous. There was testimony from Mr. Dial that, at times, the rentals generated by Mrs. Dial's house were not enough to pay for the improvements and repairs to

[1] It is noted that Mrs. Dial also had the benefit of living in the house.

the house. Further, the parties maintained separate checking accounts beginning five or six years into the marriage and, according to Mr. Dial, the debt reduction and improvements on his home were paid for strictly by him from that time forward. The chancellor's balancing of equities on this matter will not be disturbed.

Affirmed in part; reversed and remanded in part.

GRIFFEN and VAUGHT, JJ., agree.

Daniel DILLARD *v.* Mayme Curry WADE, *et al.*

CA 00-1200 45 S.W.3d 848

Court of Appeals of Arkansas
Division III
Opinion delivered May 23, 2001

*Dunn Nutter Morgan & Shaw*, by: *Lisa B. Shoalmire*, for appellant.

*Severns & Long*, by: *Fredye Mac Long*, for appellees.

ANDREE LAYTON ROAF, Judge. Appellees, Mayme Curry Wade, Sherman Wade, Bishop Curry, Cynthia Moore, Veronica Stitt, Alton Stitt, Jr., and Alton Stitt, Sr. ("the heirs"), are owners of a forty-acre tract in Lafayette County. The heirs sued appellant, Daniel Dillard, owner of a two-thirds interest in the timber on the tract, alleging that Dillard wrongfully clear-cut and sold all of the timber on the property. A jury awarded the heirs $41,594.91, which represented one-third of the value of the timber and costs of restoration. Dillard appeals, and argues that the trial court erred in denying his motion for directed verdict and in giving

jury instructions concerning conversion and wrongful cutting of timber. We affirm.

The appellees are the heirs of D.H. Rankin, who acquired the property in question in 1925, and who died intestate in 1939. Dillard, who owns a forty-acre tract adjoining the Rankin property, began contacting the heirs in 1992 in the attempt to purchase their interests in the property. Two of the heirs, Mayme Curry Wade and Cynthia Moore, refused to sell Dillard their interests, but he was successful in acquiring the one-ninth interest of Moore's brother, Clarence Curry, and a one-third timber interest from Paul Rankin, Jr., in 1992 or 1993.

At trial, Mayme Curry Wade testified that when she and her brother, Bishop Curry, went to Lafayette County in early October 1993 to pay the property taxes, they observed that timber was being cut on their tract. Wade testified that she reported the matter to the sheriff and consulted with an attorney, who advised her that Dillard, as a co-tenant, could sue for partition and sale of the property. Consequently, because they did not want to lose the family's land and home place, Wade and her brother agreed to convey their two-ninths timber interest to Dillard in exchange for a deed to the interest he held in the "dirt." There was conflicting testimony about when those deeds were signed; Wade testified that the deeds were signed after she observed timber being cut from the property in early October, however, the deeds were dated and acknowledged in mid-September and on October 1, and Wade's attorney testified that the dates were correct. Nevertheless, after this exchange, Dillard held as co-tenant only a two-thirds undivided timber interest in the property.

Dillard, who testified that he had the timber appraised for $19,000 in June 1993, subsequently wrote the heirs that he would cut the timber on the property by December 31, 1993. He testified that he had paid the heirs $5,333 for their interests and sold his timber interest to Tim Rowe for $9,000.[1] Rowe testified that he paid Dillard $9,000 for his interest, clear-cut all of the timber, knew that Dillard did not own all of the timber interest in the property but did not know the amount he owned, had bought tracts of timber from Dillard in the past, and did not share the sawmill profits

[1] Arkansas Code Annotated section 15-32-501 (Repl. 2000) enacted by the legislature in 1995, now provides that a buyer may purchase and remove timber without consent of unknown or unlocatable co-owners or co-heirs when at least eighty percent of the ownership interest in the land has consented.

from the transaction with Dillard. Rowe did not state what these profits were, and the timber deed from Dillard to Rowe introduced into evidence was not dated, acknowledged or recorded. Dillard's expert testified that he did a cruise of the property and assessed the total value of the timber at $19,708.20. The heirs' expert witness testified that he conducted a stump cruise two years after the timber was cut and estimated the value of the timber at $116,784.75, and the restoration costs to be $8,000. The heirs' appraiser also testified that there was a mathematical error in the work-sheet calculations made by Dillard's expert such that his total value of $19,708.20 should be doubled. The jury awarded the heirs one-third of the sum provided by their expert.

On appeal, Dillard first argues that the trial court erred in denying his motion for a directed verdict on the basis that there was no evidence that he was responsible for the cutting of the timber on the Rankin estate. When deciding whether the trial court erred in denying a motion of a directed verdict, this court must determine whether there is substantial evidence to support the jury's verdict. *Dobie v. Rogers*, 339 Ark. 242, 5 S.W.3d 30 (1999). Substantial evidence is that degree of evidence sufficient to compel a person to a conclusion without resort to speculation or conjecture. *Id.* This court reviews the evidence and all reasonable inferences in the light most favorable to the party who is awarded the judgment. *Id.*

The heirs sued Dillard for conversion and the wrongful cutting of timber. The tort of conversion is committed when "a party wrongfully commits a distinct act of dominion over the property of another which is inconsistent with the owner's rights." *Dent v. Wright*, 322 Ark. 256, 909 S.W.2d 302 (1995). Dillard asserts that in a wrongful-cutting-of-timber action, the plaintiff must show that he owned the timber in dispute, that the defendant had no authority to sell the timber, and the defendant either cut and removed the timber himself or conveyed the timber which is then cut and removed by another in contradiction of the plaintiff's rights. In support of his argument, Dillard cites *Parker v. Turner*, 219 Ark. 194, 242 S.W.2d 148 (1951). However, *Parker* is a trespass case and does not deal with either the tort of wrongful cutting of timber or conversion by a co-tenant. In *Harnwell v. Arkansas Rice Grower's Co-Op. Ass'n,* 169 Ark. 622, 276 S.W. 371 (1925), involving tenants in common of a rice crop, the supreme court held that, "where one tenant in common of a chattel sells it without the consent of the other, he and the purchasers have converted the property by the act of sale and retention of the proceeds to the exclusion of the rights of the tenant in common who did not authorize the sale." *Id.* In

*Fitzhugh v. Norwood*, 153 Ark. 412, 241 S.W. 8 (1922), the supreme court likewise held that if a tenant in common cuts timber without the consent of one co-tenant, the latter could recover actual damages, as opposed to the treble damages recoverable in an action for trespass against a stranger to the land. Moreover, an interest in timber is an interest in the land. *See Henry Quellmalz Lumber & Mfg. Co. v. Roche*, 145 Ark. 38, 223 S.W. 376 (1920) (holding that a deed to growing trees authorizing the grantee to cut and remove the same within a specified time conveys an interest in the lands). Consequently, it is irrelevant whether the timber was cut after Dillard conveyed his interest in the land back to the heirs as he was a co-tenant with respect to the timber and was liable for conversion, not trespass.

There was sufficient evidence presented from which the jury could conclude that Dillard wrongfully cut or caused all of the timber to be cut from the property, including Dillard's prior business dealings with Rowe, the unrecorded and undated timber deed, and Dillard's failure to advise Rowe of the amount of his ownership interest. Moreover, the jury need not have accepted Dillard's testimony and could have concluded that the sale to Rowe was not an arm's length transaction. The credibility of a witness is a question for the jury to resolve. *Woodward v. State*, 16 Ark. App. 18, 696 S.W.2d 759 (1985).

Dillard also argues that the trial court erred in giving jury instructions concerning conversion and wrongful cutting of timber. However, Dillard objected to the instruction on the basis that a co-tenant could not wrongfully cut or convert the timber interest of another co-tenant and that he thus had the right to cut the timber without the heirs' consent. Dillard does not challenge the substance or wording of the instructions as given, but contends that giving the conversion instruction was improper. Dillard further argues that he was only liable to the heirs for a proportionate share of the profits and benefits he derived from the property pursuant to Arkansas Code Annotated § 18-60-101 (1987). Dillard additionally contends that the jury instructions were improper because there was insufficient evidence from which the jury could conclude that he was a participant in the cutting of the timber, or received any of the proceeds of the sale of the timber cut by Rowe.

This argument must fail because of our resolution of Dillard's first point. We do not agree that there was insufficient evidence for the case to go to the jury, as discussed in the previous point, or that the heirs did not have a cause of action against Dillard

for conversion. Moreover, Dillard did not challenge the measure of damages to be awarded the heirs at trial and does so for the first time on appeal. The appellate court does not address an issue that is raised the first time on appeal. *Beal Bank v. Thornton*, 70 Ark. App. 336, 19 S.W.3d 48 (2000). As the jury instruction was a correct statement of the law, we can not say that the trial court erred in giving it.

Affirmed.

GRIFFEN and VAUGHT, JJ., agree.

Timothy C. LEE *v.* DR. PEPPER BOTTLING COMPANY

CA 00-1088 47 S.W.3d 263

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered May 30, 2001

*Baim, Gunti, Mouser, Robinson & Havner, PLC*, by: *William Kirby Mouser*, for appellant.

*Barber, McCaskill, Jones & Hale, P.A.*, by: *Robert L. Henry, III*, and *Richard A. Smith*, for appellee.

JOHN F. STROUD, JR., Chief Judge. Appellant, Timothy C. Lee, appeals from a decision of the Workers' Compensation Commission that denied him benefits for a back injury. We affirm.

Appellant was hired by Dr. Pepper Bottling Company as a driver-delivery person for a bottled-water delivery route. He started work on May 4, 1998. According to appellant, on or about May 6, 1998, he was delivering water to a state building in downtown Little Rock, and he "heard something pop" as he was bending down to unload fifty-pound bottles of water. He stated that he slowed down when he heard the pop, that he did not grab his back or scream, that he did not really know what was wrong, and that he continued to work until quitting time that day and all subsequent

days until he was terminated. He also stated that the pain "did not come on all at once"; that every time he lifted something it got worse; and that he told his immediate supervisor, Jeff Aerosmith, on the day of the incident that he had heard something pop, but did not know what it was. He said that Aerosmith told him he was just sore and that he would be all right. Appellant never told Aerosmith that he was not able to do his job, nor that he wanted to file a workers' compensation claim. He said that he went to the VA Hospital clinic on approximately May 9 and told Aerosmith the next day that he had been to the doctor, was on medication, and was soaking his back. He acknowledged knowing that he was supposed to file a claim if he had a work-related injury, but he waited approximately a year before filing his workers' compensation claim.

Medical records of May 9, 1998, memorialize appellant's attribution of the injury to lifting heavy water bottles at work. The emergency care and treatment medical record provides in pertinent part: "37 year old black male who was lifting heavy water bottles two days ago and pulled something in lower back. Has had pain since then, not relieved by soaking back." The emergency nurse's progress notes of May 9 provide in part: "Chief Complaint — low back pain — lifted heavy object earlier in week, now complaining of lower back pain for the last three to four days." The spine-lumbrosacral series of the same date provide in part: "Clinical history — lifting heavy water jugs and felt pull in his back. Complained of ongoing pain in lumbar area. Report — the vertebral heights, the disc spaces and the pedicles are intact. No definite acute radiographic abnormalities are noted. Diagnostic Code — no code given. Suboptimal film. Abnormal results."

Aerosmith acknowledged that appellant told him during his first week of work that he was having problems with his back and that his back was sore. Aerosmith stated that he asked appellant if he wanted to report an injury, but that he did not ever supply him with a form or tell him where to get one. He did not recall appellant telling him that he was taking aspirin, using a heating pad, or going to the doctor. He stated that he worked closely with appellant while he was at Dr. Pepper; that other than the speed with which he worked, he was a good employee; and that the only thing that led to his discharge was that he was too slow. He said appellant worked every day that he was regularly scheduled to be there.

In denying benefits, the Commission affirmed and adopted the decision of the ALJ, including all findings and conclusions therein, which included:

> 3. The claimant has failed to prove by a preponderance of the evidence, that he sustained an injury arising out of and during the course of his employment with Dr. Pepper Bottling Company.
>
> 4. The claimant has failed to prove, by a preponderance of the evidence, that his alleged injury was caused by a specific incident identifiable by time and place of occurrence on May 6, 1998.
>
> 5. Claimant has failed to prove, by a preponderance of the evidence, that his need for medical services was directly and causally related to his employment with the respondent/employer.
>
> 6. Claimant has failed to prove, by a preponderance of the credible evidence, that his alleged injury resulted in disability within the meaning of the Arkansas Workers' Compensation Laws.

For his first point of appeal, appellant contends that there was no substantial evidence to support the Commission's decision to deny him benefits. We disagree.

On appeal, we view the evidence in the light most favorable to the Commission's decision and affirm when that decision is supported by substantial evidence. *Howell v. Scroll Technologies,* 343 Ark. 297, 35 S.W.3d 800 (2001). Substantial evidence exists if reasonable minds could reach the same conclusion. *Id.* Moreover, we will not reverse the Commission's decision unless fair-minded persons could not have reached the same conclusion when considering the same facts. *Id.* Where the Commission denies benefits because the claimant has failed to meet his burden of proof, the substantial-evidence standard of review requires us to affirm if the Commission's decision displays a substantial basis for the denial of relief. *Id.*

Here, the ALJ's decision, which was affirmed and adopted as the Commission's decision, based the entire case upon appellant's credibility, and found in pertinent part:

> The record in this case is replete with inconsistencies and contradictions. The Claimant's course of conduct is totally inconsistent with a work-related injury, as well as entitlement to disability benefits. The Claimant worked from May 4 to May 29 without

reporting a specific injury identifiable in time and place of occurrence and without requesting medical treatment. The Claimant did not report any injury, even after he was terminated, and did draw unemployment compensation from November 1998 through March 1999. The Claimant conceded that he was physically able to work at all times so long as he could avoid heavy lifting, which is totally inconsistent with his contentions. The Claimant is presently working at the VA Hospital through a vocational rehabilitation program.

The Claimant maintained that in addition to working under the supervision of Aerosmith, he also worked under the supervision of Humphrey. Aerosmith, the Claimant's supervisor, stated his drivers never worked on the soft drink side of the business and that he worked with the Claimant every day. The health insurance claim forms filled out by the VA are contradictory, reciting both a workers' compensation connection and that the accident was unrelated to his employment.

The record fails to reflect the Claimant was at any time disabled within the meaning of the compensation laws. Even if there was objective evidence of the injury and a period of disability, the record does not support the conclusion that it was the result of a specific event identifiable in time and place of occurrence arising out of Claimant's employment. The claimant's testimony was self-contradictory and even after he heard his back pop, he did not feel any immediate pain at the time.

The determination of the credibility and weight to be given a witness's testimony is within the sole province of the Commission. *Thompson v. Washington Reg. Med. Ctr.,* 71 Ark. App. 126, 27 S.W.3d 459 (2000). There may be substantial evidence to support the Commission's decision even though we might have reached a different conclusion if we had sat as the trier of fact or heard the case *de novo. Patterson v. Ins. Dep't,* 343 Ark. 255, 33 S.W.3d 151 (2000). Here, we are not convinced that fair-minded persons with the same facts before them could not have reached the conclusion arrived at by the Commission.

For his second point of appeal, appellant contends that lack of notice was not a basis for denying his claim for benefits; and for his third point of appeal, he contends that his acceptance of unemployment benefits was not a bar to his receiving benefits nor an issue of his credibility. We dispose of these issues briefly by merely

pointing out that the Commission's decision did not rely upon either basis in denying appellant's claim.

Affirmed.

PITTMAN, HART, and BAKER, JJ., agree.

NEAL and ROAF, JJ., dissent.

ANDREE LAYTON ROAF, Judge, dissenting. The majority opinion has correctly set out the relevant facts of this case, and I will not repeat them. The ALJ found that this case turned "entirely" upon Timothy Lee's credibility, that the record was "replete" with inconsistencies and contradictions, and that Lee's conduct was "totally inconsistent" with a work-related injury. These "inconsistencies" in essence revolve around Lee's failure to promptly submit a workers' compensation claim for the injury, his decision to seek medical attention from the V.A. hospital, and his filing for and subsequent receipt of unemployment compensation. The ALJ also made much of Lee's testimony that he worked one day on the "soft drink" side with a different supervisor; Aerosmith, Lee's immediate supervisor during the three weeks he worked for Dr. Pepper, testified that Lee worked exclusively in delivering water. However, this so-called discrepancy is equivocal at best because the other supervisor testified at deposition only that he did not remember Lee at all and failed to testify at the hearing before the ALJ.

Neither Lee's failure to give prompt formal notice to Dr. Pepper of his claim nor his receipt of unemployment benefits is a bar to his eligibility for workers' compensation benefits, and the Commission did not deny his claim on either basis. It instead found that Lee's contemporaneous, precise description of the mechanism of his injury found in the medical records at the V.A., and corroborated by his supervisor's testimony, was rendered not credible by Lee's subsequent actions in not pursuing a claim until after the seriousness of his injury was determined. This delay may have been foolish on Lee's part, but it has little bearing on the credibility of these earlier corroborated reports to the V.A. of what was clearly a work-related injury. How this later conduct renders the earlier medical records not credible is beyond my comprehension, and the Commission certainly does not explain it other than to label it "inconsistent."

I am mindful of the fact that it is so well settled as to be axiomatic that it is the function of the Commission to determine the credibility of witnesses and the weight to be afforded their testimony. However, even credibility determinations are not completely insulated from appellate review. Where the Commission errs when it translates the evidence into findings of fact, and the error is expressly relied upon in reaching its decision, the reviewing court must reverse. *Tucker v. Roberts-McNutt, Inc.*, 342 Ark. 511, 29 S.W.3d 706 (2000). Additionally, when fair-minded persons cannot agree that alleged inconsistencies in a claimant's testimony constitute a substantial basis for the denial of workers' compensation benefits, this court will reverse. *Cooper v. Hiland Dairy*, 69 Ark. App. 200, 11 S.W.3d 5 (2000). This is one of those rare cases where a credibility determination cannot and should not be upheld on appeal.

I would reverse and remand this case for award of benefits.

NEAL, J., joins.

Judith Rebecca HASS *v.* Farrell DeWitt HASS, M.D.

CA 00-1432 44 S.W.3d 773

Court of Appeals of Arkansas
Division III
Opinion delivered May 30, 2001

*Law Office of Thomas B. Burke*, by: *Thomas J. Olmstead* and *Thomas B. Burke*, for appellant.

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

JOHN MAUZY PITTMAN, Judge. The appellant in this child-custody and parental-relocation case was granted custody of

the parties' child pursuant to their divorce decree. Approximately two years later, appellant graduated with honors from the University of Arkansas Law School and was offered a position as a law clerk for a federal judge in her home town, El Dorado. She notified appellee that she intended to accept the offer and relocate from Fayetteville to El Dorado with the child, who was then in preschool. Appellee, a physician, filed a petition to modify the divorce decree in which he sought a change in custody, asserting that the planned relocation constituted a material change in circumstances and that the 300-mile move was not in the child's best interest in that it would disrupt visitation and family relationships. After a hearing, the chancellor found that appellant had failed to meet her threshold burden of establishing some real advantage to the child in relocating to El Dorado, and prospectively ordered that custody would be changed to appellee in the event that appellant took the clerkship and relocated. Appellant contends that the chancellor, in so finding, misapplied our holding in *Staab v. Hurst*, 44 Ark. App. 128, 868 S.W.2d 517 (1994). We agree, and we reverse.

The chancellor's finding that the planned relocation would not be in the child's best interest was based on an erroneous reading of *Staab*. It is apparent from the chancellor's remarks from the bench that he believed that appellant was required to show that the move to El Dorado would offer some advantage unique to the minor child, as opposed to the custodial parent and child as a family unit. This is clearly contrary to our decision in *Staab*, where we wrote:

> While we agree with the chancellor that achieving the "best interests of the child" remains the ultimate objective in resolving all child custody and related matters, we believe that the standard must be more specific and instructive to address relocation disputes. In particular, we think it important to note that determining a child's best interests in the context of a relocation dispute requires consideration of issues that are not necessarily the same as in custody cases or more ordinary visitation cases.
>
> *After a divorce and an initial custody determination, the determination of a child's best interests cannot be made in a vacuum, but requires that the interests of the custodial parent also be taken into account.* In *D'Onofrio v. D'Onofrio*, 144 N.J. Super. 200, 365 A.2d 27, *aff'd* 144 N.J. Super. 352, 365 A.2d 716 (App. Div. 1976), perhaps the leading case on custodial parent relocation and which we find persuasive, the court discussed this issue as follows:

> The children, after the parents' divorce or separation, belong to a different family unit than they did when the parents lived together. *The new family unit consists only of the children and the custodial parent, and what is advantageous to that unit as a whole, to each of its members individually and to the way they relate to each other and function together is obviously in the best interest of the children.* It is in the context of what is best for that family unit that the precise nature and terms of visitation and changes in visitation by the noncustodial parent must be considered.

*D'Onofrio,* 365 A.2d at 29-30. See also *Antonacci v. Antonacci,* 222 Ark. 881, 263 S.W.2d 484 (1954) (in approving the custodial parent's move from Arkansas to California, the supreme court specifically considered that she "prefer[ed]" to live in California and was "happy" there). The court in *D'Onofrio* was careful not to equate the best interest of the child with the best interest of the custodial parent. The court specifically recognized the importance of developing and maintaining a relationship with the non-custodial parent and the importance of visitation:

> Where the residence of the new family unit and that of the non-custodial parent are geographically close, some variation of visitation on a weekly basis is traditionally viewed as being most consistent with maintaining the parental relationship, and where, as here, that has been the visitation pattern, a court should be loathe to interfere with it by permitting removal of the children for frivolous or unpersuasive or inadequate reasons. . . .[Nevertheless,] *the court should not insist that the advantages of the move be sacrificed and the opportunity for a better and more comfortable lifestyle for the [custodial parent] and children be forfeited solely to maintain weekly visitation by the [noncustodial parent] where reasonable alternative visitation is available and where the advantages of the move are substantial.*

*D'Onofrio,* 365 A.2d at 30.

*D'Onofrio* also attempted to articulate a framework by which courts should be guided in deciding relocation disputes. It provides that, where the custodial parent seeks to move with the parties' children to a place so geographically distant as to render weekly visitation impossible or impractical, and where the noncustodial parent objects to the move, the custodial parent should have the burden of first demonstrating that some real advantage will result to the new family unit from the move. *D'Onofrio* further provides that, where the custodial parent meets this threshold burden, the

> court should then consider a number of factors in order to accommodate the compelling interests of all the family members. These factors should include: (1) the prospective advantages of the move in terms of its likely capacity for improving the general quality of life for both the custodial parent and the children; (2) the integrity of the motives of the custodial parent in seeking the move in order to determine whether the removal is inspired primarily by the desire to defeat or frustrate visitation by the non-custodial parent; (3) whether the custodial parent is likely to comply with substitute visitation orders; (4) the integrity of the non-custodial parent's motives in resisting the removal; and (5) whether, if removal is allowed, there will be a realistic opportunity for visitation in lieu of the weekly pattern which can provide an adequate basis for preserving and fostering the parent relationship with the non-custodial parent. *See also Cooper v. Cooper*, 99 N.J. 42, 491 A.2d 606 (1984).
>
> We conclude that the criteria adopted in *D'Onofrio* are sound. We also conclude, from our review of the chancellor's ruling, that he made his determination of the child's best interests without appropriate consideration of the interests and well-being of the custodial parent. It would also appear that no consideration was given to the possibility of alternatives to the existing visitation schedule.

*Staab v. Hurst*, 44 Ark. App. at 133-35, 868 S.W.2d at 519-20 (emphasis added).

■ The advantages to the family unit in the present case are clear: as the chancellor recognized, the offer of a federal clerkship is a splendid opportunity for a lawyer entering practice. Furthermore, both mother and child would be enabled to go from a state of dependence upon appellee's payments of child support and alimony to a situation where the custodial parent is not only self-supporting, but is employed in a position that enhances her further career opportunity. No matter how successful or wealthy appellee may be, there is no guarantee that his financial situation will remain good, and it is obviously a real advantage for a child to have *both parents* be financially independent professionals capable of giving material support. *See generally Jones v. Jones*, 326 Ark. 481, 931 S.W.2d 767 (1996). It is impossible, under the standard adopted in *Staab*, to say that the move to El Dorado does not offer some real advantage to the child.

■ Furthermore, the chancellor erred in finding there would be no reasonable alternative to the existing visitation schedule if

relocation were allowed. It is clear from the record that appellant was quite willing to facilitate the child's visitation with appellee, and was willing to employ a charter air service, if necessary, to do so. Although the latter option would not be practical for Wednesday evening visitation, *Staab* does not hold that the existing visitation schedule be maintained inviolate, but instead requires only that there be a reasonable *alternative* to the existing visitation arrangement. We reverse the chancellor's decree and note that appellant is free to relocate with the child to El Dorado for the purpose of accepting the federal clerkship. We remand for further consistent proceedings.

Reversed and remanded.

STROUD, C.J., and ROAF, J., agree.

Vicky CARMAN *v.* HAWORTH, INC.

CA 00-1267 45 S.W.3d 408

Court of Appeals of Arkansas
Division II
Opinion delivered May 30, 2001

*Blackman Law Firm*, by: *Keith Blackman*, for appellant.

*Phillip Cuffman*, for appellee.

LARRY D. VAUGHT, Judge. This is an appeal from a decision of the Workers' Compensation Commission finding that appellant, Vicky Carman, failed to prove by a preponderance of the evidence that she suffered a compensable injury while employed by appellee, Haworth, Inc. Appellant contends that the Commission erred in finding that she failed to prove by a preponderance of the

evidence that she suffered a gradual shoulder injury caused by rapid repetitive motion arising out of and in the course of her employment, and that the injury produced physical bodily harm, supported by objective findings, which was the major cause of her need for treatment. We disagree and affirm the Commission's decision.

Appellant began working for appellee in September 1998. Her position as an assembler required her to assemble fabric over panels for office cubicle walls. She would complete ten to fifteen panels per hour. This job required extensive hand and arm movements, use of a screw gun, and use of a heated knife to trim the fabric. Appellant's job also required her to lift rails or frames weighing five to fifteen pounds. In April 1999, appellant began to experience pain in her wrists, arms, and shoulders, with numbness and tingling across both shoulders. She felt that her hands were "asleep all the time." One Saturday in April, appellant was returning from lunch when her supervisor, Mike Hart, grabbed her purse strap as she passed him, jerking her arm back and causing excruciating pain in her left upper arm. Hart sent appellant to the company nurse, where appellant indicated that she was having symptoms of carpal tunnel syndrome. The nurse could not diagnose carpal tunnel and scheduled an appointment for her with the company doctor, who referred appellant to Dr. Michael Lack, a family practitioner. Appellant was also seen by Drs. Eric Hatley, Ron South, and Kip Owen.

Appellant was referred by Dr. Lack to Dr. South at the Internal Medicine Associates Neurology Clinic for EMG/NCV of both upper extremities for carpal tunnel syndrome. Dr. South's May 12, 1999, office notes indicate that he diagnosed moderate to severe carpal tunnel syndrome of the right upper extremity with mild to moderate carpal tunnel syndrome of the left upper extremity.

Dr. Hatley's office records indicate that he saw appellant on May 11, 1999. She complained of pain in both hands and upper arms. The records indicate that appellant was treated for carpal tunnel syndrome four to six years earlier. Dr. Hatley found a new problem of cervicalgia and carpal tunnel syndrome. Dr. Hatley prescribed Naproxin. Dr. Hatley's September 23, 1999, report indicates that appellant complained of left upper extremity pain, including mild increased shoulder pain. His notes stated that she was being treated by Dr. Owen for carpal tunnel syndrome. Dr. Hatley found her left shoulder to be tender. He noted that there was no adduction problem and no evidence of rotator-cuff problem. Dr. Hatley made an assessment of bursitis and prescribed Vioxx. Appellant was

to remain off work for one day and avoid repetitive work with the left shoulder, and to follow-up in two weeks.

Appellant was seen for follow-up on September 28 and complained of swelling in her hands and ankles while taking Vioxx. The swelling resolved after she ceased taking the medication. The report indicated that appellant continued to complain of upper left extremity pain, including pain in the upper biceps and left shoulder. Dr. Hatley assessed left shoulder pain with possible biceps tendonitis or possible rotator cuff tear. Appellant was seen again on October 12, 1999, for a follow-up of continuing shoulder pain. Dr. Hatley's report states that x-rays were normal and that physical therapy benefitted appellant. Dr. Hatley released her to work with restrictions not to lift more than five pounds. Appellant returned to Dr. Hatley on October 22, 1999, again complaining of shoulder pain. Dr. Hatley's assessment was left shoulder pain, and he prescribed trigger point injections of Decadron and Lidocaine. She was to return for follow-up in two weeks, but the records indicate that she returned on October 25, 1999, stating that the injections only helped for a few hours and that her left shoulder pain remained. Dr. Hatley's notes indicate a referral to a neurologist for possible brachioplexis injury.

Appellant was also seen by Dr. Owen, an orthopedic surgeon. Dr. Owen's treatment of appellant consisted of carpal tunnel release surgery on both the right and left hands. Dr. Owen's August 18, 1999, office notes reflect that appellant was seen after the left carpal tunnel release surgery and that she expressed concern about returning to work too soon after the surgery and about the neck and shoulder pain. Dr. Owen's notes stated that he explained to her that musculoskeletal pain and spasm, rotator cuff tendonitis or root nerve impingement could give those types of symptoms. He ordered an MRI of appellant's c-spine to look for nerve root impingement. An MRI report prepared by St. Bernard's Regional Medical Center was unremarkable and indicated no herniation or stenosis.

St. Bernard's Rehabilitation Services therapy evaluation of September 28, 1999, as abstracted, includes the following findings:

> Muscle length on the shoulder is severely tight on the left and moderately tight on the right on the major and minor pectoralis with the trapezius on the left being extremely tight and on the right moderately tight. The sternocelidomastoid moderately tight on the left and minimally tight on the right.

The abstract of the therapist's report also contains the following assessment: "[P]atient presents with a tight shoulder and upper thoracic musculature along with mild forward head and elevated shoulder posture and excessive bilateral shoulders, but significant on left. Pain in the upper left arm appears to be secondary to impingement...."

Appellant filed a claim for benefits, alleging that she sustained a gradual onset injury caused by rapid repetitive motion. The administrative law judge found that appellant failed to meet her burden of proof based on the lack of medical evidence substantiating a shoulder injury and the absence of evidence causally relating the shoulder injury to any on-the-job injury. The administrative law judge specifically found:

> The claimant has failed to prove by a preponderance of the credible evidence of record that she developed a gradual shoulder injury, caused by rapid repetitive motion arising out of and in the course of her employment which produced physical bodily harm, supported by objective findings, which was the major cause of disability or the need for medical treatment.

The Commission affirmed and adopted the decision of the administrative law judge.

The employee has the burden of proving a compensable injury. Ark. Code Ann. § 11-9-102(4)(E) (Supp. 1999). In reviewing decisions from the Workers' Compensation Commission, the appellate court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirms if supported by substantial evidence. *Superior Indus. v. Thomaston*, 72 Ark. App. 7, 32 S.W.3d 52 (2000). Substantial evidence is that which a reasonable person might accept as adequate to support a conclusion. *Byars Constr. Co. v. Byars*, 72 Ark. App. 158, 34 S.W.3d 797 (2000). A decision by the Workers' Compensation Commission will not be reversed unless it is determined that fair-minded persons could not have reached the same conclusions if presented with the same facts. *Stiger v. State Line Tire Serv.*, 72 Ark. App. 250, 35 S.W.3d 335 (2000). Where the Commission denies a claim because of the claimant's failure to meet her burden of proof, the substantial-evidence standard of review requires that we affirm if its decision displays a substantial basis for the denial of relief. *Rice v. Georgia-Pacific Corp.*, 72 Ark. App. 148, 35 S.W.3d 328 (2000).

The main thrust of appellant's argument is that the Commission erred in finding that she failed to offer sufficient medical evidence, supported by objective findings, to substantiate a shoulder injury. Arkansas Code Annotated section 11-9-102(4)(D) provides: "A compensable injury must be established by medical evidence supported by 'objective findings' as defined in subdivision (16) of this section." "Objective findings" are "those findings which cannot come under the voluntary control of the patient." Ark. Code Ann. § 11-9-102(16).

Appellant suggests that the Commission has overlooked objective medical findings contained in the rehabilitation report. A September 28, 1999, report prepared by a physical therapist states:

> Muscle length on the shoulder is severely tight on the left and moderately tight on the right on the major and minor pectoralis with the trapezius on the left being extremely tight and on the right moderately tight. The sternocelidomastoid moderately tight on the left and minimally tight on the right.... The clinical assessment is that the patient presents with a tight shoulder and thoracic musculature with mild forward head and elevated shoulder posture and excessive bilateral shoulders, but significant on the left.

Appellant argues that the therapist's findings of muscle tightness are evidence of muscle spasm.

This court has held that muscle spasms constitute objective findings. *Kimbrell v. Arkansas Dep't of Health*, 66 Ark. App. 245, 989 S.W.2d 570 (1999). The definition of muscle spasm approved by this court in *University of Ark. Med. Sciences v. Hart*, 60 Ark. App. 13, 19, 958 S.W.2d 546, 549 (1997) is as follows: "1. An involuntary muscular contraction. . . . 2. Increased muscular tension and shortness which cannot be released voluntarily and which prevent lengthening of the muscles involved; [spasm] is due to pain stimuli to the lower motor neuron." *See also Kimbrell, supra.* Appellant, citing *Continental Express v. Freeman*, 339 Ark. 142, 4 S.W.3d 124 (1999), correctly asserts that a physical therapist can make objective findings. However, appellant has not presented us with convincing argument or authority that "muscle tightness" can be equated with "muscle spasms" in this situation. There is no evidence to suggest that the physical therapist's findings of muscle tightness were actually muscle spasms or that the tightness was involuntary. Certainly, muscle tightness can come under the voluntary control of the

patient. Without evidence of objective medical findings, the Commission had a substantial basis for denying appellant's claim, and we affirm that denial.

Appellant also summarily contends that she established a gradual injury caused by rapid repetitive motion, that the injury arose out of and in the course of her employment, and that the injury was the major cause of her need for treatment. It is not necessary to address these arguments because we agree with the Commission that appellant failed to establish a compensable injury by medical evidence supported by objective findings.

Affirmed.

GRIFFEN and ROAF, JJ., agree.

Robert LEWIS, Jr. *v.* STATE of Arkansas

CA CR 00-1031 48 S.W.3d 535

Court of Appeals of Arkansas
Division II
Opinion delivered May 30, 2001

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

*Mark Pryor*, Att'y Gen., by: *David R. Raupp*, Sr. Ass't Att'y Gen., for appellee.

LARRY D. VAUGHT, Judge. Appellant was convicted of rape and sentenced to fifteen years in the Arkansas Department of Correction. On appeal, he contends that the trial court erred in allowing the State to introduce the child victim's statement about the incident through her mother, pursuant to the excited-utterance exception to the hearsay rule. Although we agree that the statement is inadmissible, we affirm because the error was harmless.

The State charged appellant with rape in violation of Ark. Code Ann. § 5-14-103 (Repl. 1997), alleging that on May 2, 1999, appellant engaged in sexual intercourse or deviate sexual activity with E.W., who was less than fourteen years old. A nonjury trial was held on May 8, 2000. The State called three witnesses at trial — Darlene Richards, Dr. James Nesmith, and Detective Mike Shepard. The State called the victim to testify; however, she became upset and was excused before the court ruled on her competency.

Darlene Richards, E.W.'s mother, testified that E.W. was five years old at the time of the alleged incident. She stated that on May 2 or 3, 1999, she left her two children in appellant's care while she went to do laundry. When she arrived home, she noticed E.W. leaving her bedroom. At first, Richards thought nothing of it but then began to wonder why E.W. was leaving her bedroom. She then asked appellant, her live-in boyfriend, about E.W.'s leaving her bedroom, and he said that he had been disciplining her. Richards testified that she thought E.W. was acting strange, so the following day she asked E.W. whether anything was wrong or whether anybody "mess[ed]" with her.

Appellant's counsel objected to Richards's testimony on the basis of hearsay about what E.W. said in response to her mother's questioning. The trial court overruled the objection, stating that it was within the excited utterance exception. Richards stated that E.W. eventually told her that something happened, but that she was crying and did not say anything at first because she was so scared. Richards testified that when she asked E.W. whether someone was "messing with her," E.W. responded affirmatively and gave Robert's name. Richards recalled that E.W. was looking down and crying, and kept repeating, "He did it." Richards testified that E.W. said that "he got his thing and put it in her." Richards confronted appellant the same day. While he first denied doing anything, appellant admitted to "committing this incident" the second time Richards confronted him, as she threatened him with a knife. Richards then took E.W. to the hospital and notified the police. Richards also testified that she had spanked E.W. the day before the alleged incident and that E.W. had a habit of lying like "every kid has a habit of lying."

Dr. James Nesmith, a physician at Arkansas Children's Hospital, testified that he examined E.W. on May 3, 1999. Dr. Nesmith testified that he found bruises over the lower part of the her body. The bruises were on the buttocks, thighs, and groin area. In addition, Dr. Nesmith testified that there was a bruise on the right labia

majora of the vaginal area, which could be consistent with sexual abuse. Dr. Nesmith stated that the bruises on the buttocks could be consistent with a child that had been spanked. On cross-examination, the doctor testified that he usually requests a history before performing the examination and did not recall receiving a history of anal penetration. Dr. Nesmith found no indication of rectal penetration.

The last witness called by the State was Mike Shepard, a juvenile sex-crimes detective in North Little Rock. Shepard stated that he first came into contact with appellant on May 18. Shepard read appellant his Miranda rights and went over them with him. Shepard took a taped statement from appellant, and appellant never asked him to stop and never requested counsel. Shepard testified that there was no indication that appellant's statement was not completely voluntary. Shepard stated that appellant told him about the incident involving E.W. Appellant explained that when he was watching E.W. and her younger brother, the children began to fight. Appellant ordered them to stop fighting and to sit down, which they did for a short time. Appellant told Shepard that after the children began fighting again, he took E.W. to the bedroom and told her to pull her pants down, and he stuck his penis in her buttocks. Appellant stated to Shepard that it did not happen very long because E.W.'s mother returned home, so he pulled up E.W.'s pants and sent her back in the living room. Shepard also testified that during his interview of appellant, appellant expressed a desire to get help. At trial, Shepard read from appellant's statement wherein he said:

> Then hitting her, even though he is young, he is one, so she — well then, I told her to get in the bed, bend over, and I pulled down her pants and panties down, and I inserted by [*sic*] penis into her anus. I didn't do it long enough. I don't recall doing it long enough for semen to come out. Soon I heard the door open. I hurried up. I pulled up her clothes back up, her pajamas and panties back on her and hurried up, and put my penis back in my pants.

At the close of the evidence, appellant's counsel moved for directed verdict on the grounds that the State failed to prove penetration and that the State failed to corroborate appellant's confession. The trial court denied the motion for directed verdict and found appellant guilty of rape. Appellant was sentenced to fifteen years in the Arkansas Department of Correction. From that conviction, comes this appeal. Appellant contends that the trial court

erred in allowing the victim's mother to testify, pursuant to the excited-utterance exception to the rule against hearsay, about statements her child made to her about the alleged incident. Appellant argues that the State failed to establish that the statements met the criteria for admission under this exception.

A trial court's ruling on matters pertaining to the admission of evidence is within the discretion of the trial court and will not be set aside absent abuse of discretion. *Jameson v. State*, 333 Ark. 128, 970 S.W.2d 785 (1998). Rule 803(2) of the Arkansas Rules of Evidence provides that excited utterances are excepted from the hearsay rule. An excited utterance is defined as a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." The supreme court recently addressed the excited-utterance exception:

> In *United States v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980), the federal court of appeals listed several factors to consider when determining if a statement falls under this exception: the lapse of time (which is relevant, but not dispositive), the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event, and the subject matter of the statement. In addition, "[i]n order to find that 803(2) applies, it must appear that the declarant's condition at the time was such that the statement was spontaneous, excited or impulsive rather than the product of reflection and deliberation." *Iron Shell*, 633 F.2d at 85-86.
>
> This court adopted these factors in *Moore v. State*, 317 Ark. 630, 882 S.W.2d 667 (1994), where we also said that, "[f]or the . . . exception to apply, there must be an event which excites the declarant. Also, the statements must be uttered during the period of excitement and must express the declarant's reaction to the event." *Moore*, 317 Ark. at 633. We added that it is within the trial court's discretion to determine whether a statement was made under the stress of excitement or after the declarant has calmed down and had an opportunity to reflect. *Id.* at 634 (citing *Marx v. State*, 291 Ark. 325, 724 S.W.2d 456 (1987)).

*Fudge v. State*, 341 Ark. 759, 768, 20 S.W.3d 315, 320 (2000), *cert. denied,* 121 S. Ct. 585 (2000). The mere fact that the declarant makes a statement in response to questioning is not determinative of whether they are the product of the event. *See Jackson v. State*, 290 Ark. 375, 720 S.W.2d 282 (1986). In addition to the above factors, the supreme court has followed the trend toward expansion of the time interval after an exciting event when the declarant is a child.

*See Smith v. State*, 303 Ark. 524, 798 S.W.2d 94 (1990). *See also Johnson v. State*, 326 Ark. 430, 934 S.W.2d 179 (1996), *cert. denied*, 520 U.S. 1242 (1997).

The statements in this case were made the day after the event, and after questioning by the mother. While these facts are indications that the child was no longer under the influence of the incident and must be considered in determining admissibility, they alone are not dispositive. The most significant element of an excited utterance is that it is a statement made "under the stress of excitement." The evidence must reflect that the statement was spontaneous, excited, or impulsive as a direct product of the event itself. Based on the evidence in this case, we conclude that allowing this hearsay testimony as an excited utterance was an abuse of discretion because the facts do not establish that E.W.'s statement was spontaneous, excited, or impulsive, as opposed to the product of reflection and deliberation.

Finding the statement inadmissible, however, does not conclude our analysis. An evidentiary error may be declared harmless if the error is slight, and the remaining evidence of a defendant's guilt is overwhelming. *Green v. State*, 59 Ark. App. 1, 953 S.W.2d 60 (1997). This court has repeatedly held that prejudice is not presumed and no prejudice results where the evidence erroneously admitted was merely cumulative. *Gaines v. State*, 340 Ark. 99, 8 S.W.3d 547 (2000). Appellant's confession, if corroborated, would present overwhelming evidence of his guilt, rendering the inadmissible statement of E.W. cumulative and harmless. However, appellant contends that in the absence of this hearsay testimony, there was not sufficient corroboration of appellant's out-of-court confession to support his conviction. We disagree.

Arkansas Code Annotated section § 16-89-111(d) (1987) provides that a "confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that the offense was committed." In *Tinsely v. State*, 338 Ark. 342, 345, 993 S.W.2d 898, 900 (1999), the supreme court stated:

> This requirement for other proof, sometimes referred to as the corpus delicti rule, mandates only proof that the offense occurred and nothing more. *Mills v. State*, 322 Ark. 647, 910 S.W.2d 682 (1995). In other words, under the corpus delicti rule, the State must prove (1) the existence of an injury or harm constituting a crime and (2) that the injury or harm was caused by someone's

> criminal activity. *Ferrell v. State*, 325 Ark. 455, 929 S.W.2d 697 (1996). It is not necessary to establish any further connection between the crime and the particular defendant. *Rucker v. State*, 320 Ark. 643, 899 S.W.2d 447 (1995). Accordingly, we must determine whether, setting aside Appellant's confession, the evidence demonstrates that the crime of rape was committed by someone.

Arkansas Code Annotated section 5-14-103 provides that a "person commits rape if he engages in sexual intercourse or deviate sexual activity with another person . . . [w]ho is less than fourteen (14) years of age. . . ." "Sexual intercourse" is defined as "penetration, however slight, of the labia majora by a penis." Ark. Code Ann. § 5-14-101(8) (Repl. 1997). "Deviate sexual activity" is defined as "any act of sexual gratification involving: (A) The penetration, however slight, of the anus or mouth of one person by the penis of another person; or (B) The penetration, however slight, of the labia majora or anus of one person by any body member or foreign instrument manipulated by another person." Ark. Code Ann. § 5-14-101(1).

Dr. Nesmith, the physician who examined E.W. the day after the incident, testified that he found bruises over the lower part of the body. The bruises were on the buttocks, thighs, and groin area. In addition, Dr. Nesmith testified that there was a bruise on the right labia majora of the vaginal area, which could be consistent with sexual abuse. As the State points out, penetration may be proven by circumstantial evidence. " 'Penetration can be shown by circumstantial evidence, and if that evidence gives rise to more than a mere suspicion, and the inference that might reasonably have been deduced from it would leave little room for doubt, that is sufficient.' " *Tinsley v. State*, 338 Ark. 342, 346, 993 S.W.2d 898, 900 (1999) (citations omitted). Dr. Nesmith testified that E.W.'s labia majora was bruised. Based on the facts of this case, we find that the medical evidence in this case was sufficient to corroborate the appellant's confession.

Appellant's corroborated and unchallenged confession, along with the medical evidence, is overwhelming evidence of his guilt. In this case, the appellant confessed to both the victim's mother and to the police. The inadmissible statement of the victim is merely cumulative to the appellant's confession. Based on the foregoing facts, we find the trial court's admission of E.W.'s statement is harmless error.

Affirmed.

GRIFFEN and ROAF, JJ., agree.

Howard Randy BALDWIN *v.* STATE of Arkansas

CA CR 00-970 45 S.W.3d 412

Court of Appeals of Arkansas
Division I
Opinion delivered May 30, 2001

*David H. Williams*, for appellant.

*Mark Pryor*, Att'y Gen., by: *David R. Raupp, Sr.* Ass't Att'y Gen., for appellee.

TERRY CRABTREE, Judge. The appellant, Howard Randy Baldwin, appeals from an order of the Saline County Circuit Court granting the State's motion to vacate. By granting the motion to vacate, the circuit court reinstated the municipal court's conviction of appellant for driving while intoxicated and improper lane change. On appeal, appellant claims that the circuit court erred in granting the motion to vacate and finding that he failed to perfect his appeal from municipal court. We affirm.

On November 19, 1998, the Bryant Municipal Court convicted appellant of his offenses for driving while intoxicated and improper lane change. He purported to appeal those convictions by filing a notice of appeal and an appeal bond in circuit court. After a bench trial, the circuit court entered a judgment on December 15, 1999, finding appellant guilty of driving while intoxicated and improper lane change. He was sentenced to one day of jail time for the DWI, with credit for time served. On January 12, 2000, appellant filed a motion for new trial, claiming his counsel had been ineffective. On January 18, 2000, the State filed a response to the motion for new trial arguing that because appellant was not in custody, his ineffective-assistance claim could not be heard by circuit court.

On February 11, 2000, the circuit court entered a judgment stating that it had jurisdiction to consider appellant's new-trial motion and set a hearing date of March 27, 2000. Prior to the hearing, on February 23, 2000, the State filed a motion to vacate the December 15, 1999 judgment of guilt because appellant's municipal appeal was not perfected. On March 27, 2000, the circuit court held its previously scheduled hearing and found that appellant failed to perfect his municipal appeal. Accordingly, the circuit court granted the State's motion to vacate, thereby reinstating the municipal-court conviction.

First, we recognize that the issue of jurisdiction is one that can be raised at any time, even for the first time on appeal. *Ibsen v. Plegge*, 341 Ark. 225, 15 S.W.3d 686 (2000). In this case, the State raised the issue of jurisdiction after the circuit court convicted appellant. In order for the circuit court to obtain jurisdiction, an appellant must comply with Arkansas Inferior Court Rule 9 (2000). *Lineberry v. State*, 322 Ark. 84, 907 S.W.2d 705 (1995). It governs appeals from municipal court to circuit court and requires that such appeals be filed within thirty days of the entry of the judgment by filing a record of the inferior court proceedings with the clerk of the circuit court. Under this rule, a filing of a notice of appeal is not required in an appeal from municipal court to circuit court. *Ottens v. State*, 316, Ark. 1, 871 S.W.2d 329 (1994). In fact, merely filing such a notice of appeal within thirty days of the municipal court judgment does not suffice to perfect the appeal. *Id.*

Appellant has the burden of requesting the clerk to prepare and certify the record of the inferior court proceedings. *Id.* Appellant is also charged with the responsibility of filing said record in the office of the circuit clerk. Inferior Ct. R. 9(b). Otherwise, appellant must file an affidavit in the office of the circuit court clerk showing that he has requested the clerk of the inferior court to prepare and certify the record for purposes of appeal and that the clerk has neglected to prepare and certify such record for purposes of appeal. *Id.* Failure to do so precludes the circuit court from having jurisdiction over the appeal. *Pace v. Castleberry*, 68 Ark. App. 342, 7 S.W.3d 347 (1999).

We do not believe that the appeal bond signed by the municipal judge and filed by appellant is sufficient to perfect appellant's municipal appeal. Appellant maintains that his appeal bond contained the same information as the transcript. Even if it did, the appeal bond cannot serve as a replacement of the record. Appellant

simply failed to file either the transcript or the affidavit required by Rule 9.

Appellant argues that his efforts amount to substantial compliance. This argument was also made in *Pace*, and we rejected it. Arkansas Inferior Court Rule 9 is clear. It provides that appellant must either actually lodge the record in the circuit court, or file an affidavit with the circuit court clerk stating that he has requested the inferior court clerk to prepare the record and the clerk has neglected to prepare and certify that record for purposes of appeal.

As we stated in *Pace*, we are unable to dismiss the clear language of Rule 9. We hold that appellant failed to comply with the rule by only filing a notice of appeal and an appeal bond signed by the municipal judge.

Affirmed.

STROUD, C.J., and HART, J., agree.

Willie HUTCHERSON *v.* STATE of Arkansas

CA CR 00-645 47 S.W.3d 267

Court of Appeals of Arkansas
Division I
Opinion delivered June 6, 2001

*Hampton, Larkowski & Benca*, by: *Jerry Larkowski*, for appellant.

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

JOHN F. STROUD, JR., Chief Judge. A Pulaski County Circuit Court jury found appellant, Willie Hutcherson, guilty of four counts of aggravated robbery and four counts of theft of property. He was sentenced to a total of 240 years' imprisonment in the Arkansas Department of Correction.

Hutcherson raises three arguments on appeal: (1) the evidence was insufficient to support his convictions for four counts of aggravated robbery and four counts of theft of property; (2) the trial court erred in denying his motion to suppress photo spreads shown to two of the victims as overly suggestive; and (3) the trial court erred in denying his motion to declare Ark. Code Ann. § 16-90-803(b)(4) and (a)(1) unconstitutional and by refusing to instruct the jury on the sentencing guidelines. We affirm.

The facts giving rise to appellant's convictions are as follows. On the night of April 2, 1999, Sally Rhinehold was robbed while working at a Conoco gas station on Baseline Road. At trial, Rhinehold identified appellant as the person who came into the store, shopped around for fifteen to twenty minutes until the other customers left the store, and then pulled a gun on her and demanded that she give him all of the money from her register. Rhinehold complied with the demand. Appellant then made her go to the store's restroom, where she stayed until she heard someone come into the store. Rhinehold testified that she had no doubt appellant was the person who robbed her because he was the same person who had given her a check a couple of days before and she had required proof of identification at that time.

On the morning of April 3, 1999, Cindy West was robbed as she was working at a Texaco gas station on Dixon Road. West testified that a man, whom she identified as appellant in a security videotape, a pretrial photo spread, and again at trial, attempted to pay for three dollars worth of gas with a credit or debit card, but that the card was declined. She said that although she did not notice the first name on the card, the last name was either Hutchinson or Hutcherson. Appellant left and then came back in and asked for cigarettes. West turned to get the cigarettes, and when she turned back around, appellant was standing in front of her with a gun. Appellant told her to give him all of the money, and West did as he demanded. Appellant then told West to go to the back of the store. As she was complying with his order, another customer pulled into the station for gas; appellant then walked out the door and left.

On the night of April 3, 1999, Hyonsuk Fusaro was working at a Texaco station on Ninth Street when she was robbed by a person she identified as appellant both in a pretrial photo spread and at trial. Fusaro testified that she and appellant were alone in the store when he pointed a gun at her and told her to put all of the money in a brown bag. He also made her put her three rings in the bag. He made Fusaro lie down on the restroom floor and asked her to take her clothes off; when she refused, appellant left. Fusaro came out of the bathroom when she heard another customer in the store.

On the afternoon of April 5, 1999, Michael Vickery was robbed while working at the Dixon Road Wine & Spirits liquor store. Vickery testified that a man came in and asked the price of a bottle of liquor, he turned around to check the price, and when he turned back around, the man was pointing a gun at him. The man told him that he wanted all of the money out of the register; Vickery complied. He also demanded all of Vickery's jewelry, which consisted of two rings and a bracelet. The man made Vickery go into the cooler and lie down on the floor, but the door would not lock, so he put Vickery in the restroom. Vickery locked himself inside, coming out when he heard the store door open. Vickery went outside, saw appellant through a car window, and fired four shots at the car. Although Vickery could not identify appellant in a photo spread, he identified appellant at trial as the person who had robbed him. Timothy Hibbs, an investigator with the Pulaski County Sheriff's Office, testified that at the time he was arrested, appellant was wearing a ring and bracelet that closely matched the description of the items taken from Michael Vickery in the robbery at Dixon Road Wine and Spirits. At trial, Vickery identified the ring and bracelet taken from appellant as the jewelry that was taken from him during the robbery.

Nihissa Dixon testified that she had driven appellant to the liquor store, appellant had gone into the store, and when appellant returned, shots were being fired at the car. Dixon testified that appellant told her that he had robbed the store with his gun, although she said that she never saw a gun. Sergeant Jim Dixon testified that after appellant had been read his *Miranda* rights, he confessed that he had robbed Dixon Wine & Spirits in order to repay a drug debt.

Hutcherson's first argument is that there was insufficient evidence to sustain the convictions. 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 evidence that 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.*

Appellant's argument is not preserved for appeal. At the close of the State's evidence, Hutcherson's attorney stated, "I have a motion for directed verdict based on insufficiency of the evidence. I would ask the Court to direct a verdict in our favor on all counts in that there is not sufficient evidence for this to go forward to a jury." After appellant presented his case and rested, his attorney said, "I would also renew my motion for directed verdict based on insufficiency of the evidence pursuant to Arkansas law at this point at the close of all evidence."

Rule 33.1(a) of the Arkansas Rules of Criminal Procedure provides, "In a jury trial, if a motion for directed verdict is to be made, it shall be made at the close of the evidence offered by the prosecution and at the close of all of the evidence. A motion for directed verdict shall state the specific grounds therefor." Subsection (c) of that rule provides, in pertinent part, "A motion for directed verdict . . . must specify the respect in which the evidence is deficient. A motion merely stating that the evidence is insufficient does not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the offense."

Hutcherson's motions for directed verdict fail to specify the respect in which the evidence was deficient. Instead, they are simply general motions stating that the evidence is insufficient, which is not adequate to comply with the requirements of Rule 33.1. Nevertheless, if we were to address appellant's sufficiency arguments, we would find the evidence sufficient to support all of appellant's convictions.

Hutcherson's next contention of error is the trial court's denial of his motion to suppress the photo spreads shown to crime victims Cindy West and Hyonsuk Fusaro. He argues that the photo spreads were unduly suggestive because in the one shown to West, his was the only head in which the scalp was cut off in the picture, and in the one shown to Fusaro, he was the only person wearing a necklace.

In order for a pretrial identification to violate the Due Process Clause, its elements must be so suggestive as to make it all but inevitable that the victim will identify one person as the criminal. *Bishop v. State*, 310 Ark. 479, 839 S.W.2d 6 (1992).

Hutcherson's argument on appeal concerning the photo spread shown to West was not made to the trial court and is being made for the first time on appeal. The objection made to the trial court concerning the photo spread shown to West was that it was unduly suggestive because the background of the other pictures was different, not because the top of appellant's head was cut off in the photo. Our law is well established that arguments not raised at trial will not be addressed for the first time on appeal, and that parties cannot change the grounds for an objection on appeal, but are bound on appeal by the scope and nature of the objections and arguments presented at trial. *Nix v. State*, 54 Ark. App. 302, 925 S.W.2d 802 (1996). Therefore, Hutcherson's argument as it pertains to the photo spread shown to West was not preserved for appeal.

Nevertheless, even if we were to reach the merits of the argument, we would affirm. We do not reverse a trial court's ruling on the admissibility of identification evidence unless it is clearly erroneous, and do not inject ourselves into the process of determining reliability unless there is a very substantial likelihood of irreparable misidentification. *Moore v. State*, 304 Ark. 558, 803 S.W.2d 553 (1991). A review of the photo spread shown to West reveals that all of the photos were close-ups of young African-American men with mustaches and similar facial features. West testified that it took her less than thirty seconds to identify appellant in the photo spread as the person who had robbed her, and she was positive of his identity. She further stated that no one suggested who she should select from the photos. This testimony was corroborated by both of the police officers who showed West the photo spread. There was nothing unduly suggestive in the photo spread shown to West, and the trial court did not err in allowing this pretrial identification into evidence.

As for the photo spread shown to Fusaro, Hutcherson contends that the photo spread was unduly suggestive because he was the only person who was wearing a necklace. Again, all of the persons in the photo spread were young, African-American men with similar facial features. Fusaro testified that she was able to observe appellant at close range, she was positive in her identification of him, and the fact that he was wearing a necklace in the photo spread did not suggest to her that he was the person who had

robbed her. The photo spread shown to Fusaro was not unduly suggestive, and the trial court did not err in admitting the pretrial identification into evidence.

Hutcherson's last point on appeal is that the trial court erred by not ruling Ark. Code Ann. § 16-90-803(a)(1) and (b)(4) (Supp. 1999), which establishes presumptive sentencing standards, unconstitutional as violative of the Due Process and Equal Protection Clauses. Subsection (a)(1) of this statute provides:

> When a person charged with a felony enters a plea of guilty or no contest, enters a negotiated plea, or is found guilty in a trial before the judge, or when the trial judge is authorized to fix punishment following an adjudication of guilt by a jury pursuant to § 5-4-103, sentencing shall follow the procedures provided in this chapter.

Subsection (b)(4) of this statute provides, "This section shall not apply when a jury has recommended a sentence to the trial judge."

Appellant contends that this statute creates two classes of defendants, one whose punishment is determined by a jury and one whose punishment is determined by the trial judge, and encourages defendants to waive their right to a jury trial. However, a trial judge is not required to impose the presumptive sentence in Ark. Code Ann. § 16-90-803; subsection (a)(2)(A) of that section clearly provides trial judges with the authority to depart from the presumptive sentence pursuant to Ark. Code Ann. § 16-90-804 (Supp. 1999). Furthermore, our supreme court held in *Pickett v. State*, 321 Ark. 224, 226, 902 S.W.2d 208, 209 (1995), "The sentencing guidelines do not burden the fundamental right to a jury trial because the statutory minimum and maximum ranges for a sentence always override the presumptive sentences." The trial court did not err in denying appellant's request to declare these statutory provisions unconstitutional.

Affirmed.

CRABTREE, J., agrees.

HART, J., concurs.

JOSEPHINE LINKER HART, Judge, concurring. Alexander Hamilton rightly argued that "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and

point out their duty in every particular case that comes before them. . . ." *The Federalist* No. 78 (June 1788). After all, a judge, and by implication a court, is "not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness." Benjamin N. Cardozo, *The Nature of the Judicial Process* 141 (1921). Accordingly, we, the court of appeals, must adhere to the true holdings of our supreme court when that court has made an unequivocal pronouncement concerning the relevant law. *See Freeman v. Con-Agra Frozen Foods*, 70 Ark. App. 306, 27 S.W.3d 762 (2000), *rev'd on other grounds*, 344 Ark. 296, 40 S.W.3d 760 (2001). However, the law is ever-changing, and, in my view, these restraints do not and should not prevent a judge from interjecting respectful commentary in order to shape the developing law. Inasmuch as I conclude that the trial court's actions were consistent with the present law, I cannot agree with appellant that this matter should be reversed. However, because I believe that the precedent by which we are bound is not consistent with the sense of justice or social welfare, I respectfully offer this concurrence.

I write separately to express my opinion concerning our sentencing guidelines that are available only to those defendants who either enter pleas of guilty or no contest or are permitted to have a bench trial, Ark. R. Crim. P. 31.1, and the effect these guidelines have on a defendant's rights as guaranteed by the Sixth Amendment. As explained in the majority opinion, appellant challenged the constitutionality of Ark. Code Ann. § 16-90-803 (Supp. 1999), which establishes the method for determining the presumptive sentences for criminal defendants whose pleas of guilty are accepted by the trial court. Specifically, appellant cites *United States v. Jackson*, 390 U.S. 570 (1968), and argues that the aforementioned statute is unconstitutional because it encourages him to waive his fundamental right to a trial by jury as guaranteed by the Sixth Amendment and made applicable to the respective states by the Fourteenth Amendment.

The State counters by citing *Pickett v. State*, 321 Ark. 224, 226, 902 S.W.2d 208, 209 (1995), in which our supreme court held that "[t]he sentencing guidelines do not burden the fundamental right to a jury trial. . . ." Although the State is correct that in this case and commensurate with the law in its current form the trial court should be affirmed, this case, nonetheless, reveals a number of disturbing facets in the law that should not go unaddressed.

The genesis of the sentencing guidelines for those criminal defendants who enter pleas of either guilty or *nolo contendere* is Act

532 of 1993, which is currently codified at Ark. Code Ann. § 16-90-803. In Section 1(B) of the Act, the Arkansas General Assembly stated that "the purpose of establishing rational and consistent sentencing standards is to seek to ensure that sanctions imposed following conviction are proportional to the seriousness of the offense of conviction and the extent of the offender's criminal history. . . ." These sentences, of course, are generally less severe than the various sentences that the General Assembly has sanctioned for the various crimes enumerated throughout the criminal code. For example, in this case, appellant's sentence under the sentencing guidelines would have been twenty-two years' imprisonment; however, his sentence under the criminal code was 240 years' imprisonment. To state this sobering fact is to expose the fallacy in the law.

Accordingly, these presumably "proportional" sentences are available only to those criminal defendants who are found guilty by some means other than a jury. *See* Ark. Code Ann. § 16-90-803(b)(4). Therefore, it would be logical to conclude that criminal defendants would endeavor to have their cases disposed of by some means other than a Sixth Amendment-sanctioned jury trial.

The Sixth Amendment provides, *inter alia*, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury of the state. . . ." This constitutional right can be waived, *Schick v. United States*, 195 U.S. 65 (1904); however, it is permissible for the government to impose a rule that this waiver be subject to the approval of both the government and trial court, *Singer v. United States*, 380 U.S. 24 (1965). Commensurate with that authority, Arkansas has adopted Ark. R. Crim. P. 31.1, which provides that "[n]o defendant in any criminal cause may waive a trial by jury unless the waiver is assented to by the prosecuting attorney. . . ." Thus, a defendant does not have an absolute right to elect a non-jury trial even if his action of waiving a jury trial was guided by his attempt to obtain the benefits of the sentencing guidelines.

Accordingly, the government, for apparently any reason, can deny a defendant's request for a non-jury trial and have a criminal defendant subjected to a potential sentence that is something other than the "proportional" sentence endorsed by Act 532. Stated differently, Ark. R. Crim. P. 31.1, together with Act 532, operates to ensure a dual criminal-justice system that provides unfettered discretion to the government to select those criminal defendants who should be exposed to greater punishments and those defendants who should be exposed to lesser punishments.

While I agree that it is inevitable that in a system that encourages negotiated pleas, a criminal defendant will be faced with the possibility of less severe punishment in consideration for a waiver of a constitutional right to a jury trial, *Corbitt v. New Jersey*, 439 U.S. 212, 220-221 (1978), I see no need to codify two different types of sentencing schemes for the State to successfully negotiate a plea bargain. In fact, to do so unnecessarily invites legal challenges and appears strange. After all, if the sentence given to a criminal defendant who negotiated a plea bargain or is found guilty by a trial judge is "proportional," does the sentence for the criminal defendant who is found guilty by a jury lack proportion?

Furthermore, could this doublespeak, which is so apparent when one views our sentencing laws as a whole, be clarified if the jury was made aware of the more "proportional" sentence? After all, would the policy reasons that undergird Act 532 — proportionality and uniformity — also be furthered by the jury's awareness of the sentencing guidelines? What is the compelling reason for the principle that a judge, who is acting in the capacity of a finder-of-fact by determining a sentence, should be more informed about what the legislature considers as being a "proportional" sentence than a jury when undertaking precisely the same task? If there is no significant reason, then is it not fair to say that there is no rational basis for treating criminal defendants who either negotiate a settlement or are allowed to have their case tried before the trial judge differently from those defendants who are forced to have their case tried before a jury? Regretfully, that avenue has been successfully blocked by *Pickett*, 321 Ark. at 226, 902 S.W.2d at 209, which in effect stated that the defendant in that case was not entitled to the "proportional" sentence "because the statutory minimum [was] ten years, and a trial court should not give an instruction that incorrectly states the law."

In any event, the current state of the law simply does not permit this court to reverse the jury's sentence. The jury sentenced a person commensurate with the laws that they undoubtedly thought expressed the General Assembly's assessment as to what would be a proper punishment without knowing that, in fact, their legislature had determined that another sentence would be more "proportional." This legally-sanctioned process will deprive individuals of personal liberties and can result in a vast difference in the sentence imposed by the jury and the court.

Justice Cardozo opined:

> I think that adherence to precedent should be the rule and not the exception. . . . [However,] when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment.

Cardozo, *supra* at 149-150. Here, the *Pickett* principle has been tested, and inconsistencies with simple justice and social welfare are plain. However, we are bound by that principle, and, accordingly, I concur.

Terrence D. BOX *v.* STATE of Arkansas

CA CR 00-802 45 S.W.3d 415

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered June 6, 2001

*James H. Phillips*, for appellant.

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

JOSEPHINE LINKER HART, Judge. A jury found Terrence D. Box guilty of aggravated robbery and battery in the first degree and sentenced him to a total of 420 months in the Arkansas Department of Correction ("ADC"). For reversal, appellant argues that (1) there was insufficient evidence to sustain his conviction and, accordingly, the trial court erred by denying his directed-verdict motion; (2) his right under the United States Constitution to a fair trial was violated because the trial court forced him to appear at trial and before the jury in his prison uniform; (3) the trial court violated the Arkansas Constitution by commenting on a critical piece of the State's evidence; and (4) the trial court erred by admitting into evidence a letter and envelope in violation of Ark.

R. Evid. 901-902. We agree with appellant on his second and last points, and, therefore, we reverse and remand.

The State filed a criminal information on May 25, 1999, alleging that on April 14, 1999, appellant, while armed with a .22 caliber rifle, robbed Geisla Cantrell and shot Tommy Cantrell. The matter proceeded to trial on November 16-17, 1999, when appellant, who was incarcerated at ADC, appeared before the court and jury in his prison uniform. Despite the fact that the matter had been raised, the trial court ordered appellant to stand for the jury trial while wearing his prison uniform, reasoning that it was appellant's responsibility to dress himself in civilian clothing. At trial, included among the witnesses that testified were Eli Hudson, who had been a suspect in the robbery, and Tommy Cantrell, who was one of the two victims.

Hudson gave incriminating testimony against appellant. According to Hudson, he was told "everything" concerning the robbery by Travell Lawson, his cousin and participant in the robbery, in appellant's presence; however, appellant did not deny his involvement. Following cross-examination by appellant's attorney, the trial judge inquired into the specifics of Lawson's conversation with Hudson. At that time, Hudson stated that in appellant's presence he was told by Lawson that while he was grabbing and trying to take Geisla Cantrell's purse, Tommy Cantrell appeared and was shot by appellant.

Tommy Cantrell, one of the two victims, testified regarding the events of the evening of April 14, and a letter dated November 3, 1999, that he purportedly received from appellant. Although the letter was unsigned, the envelope in which it was located had "correctional" stamped across it. Over appellant's authentication objection, the letter was admitted into evidence and read into the record by Cantrell. In the letter, appellant admitted to having a camera that was located in Geisla Cantrell's purse, but denied having anything to do with the robbery.

*I. Sufficiency of the evidence*

In an effort to avoid potential double-jeopardy concerns on remand, we do not consider errors by the trial court until we first consider a challenge to the sufficiency of the evidence. *See Harris v. State*, 284 Ark. 247, 249-250, 681 S.W.2d 334, 335 (1984). On this point, appellant argues for reversal that the trial court erred

by denying his directed-verdict motion because there was insufficient evidence to sustain the conviction of aggravated robbery.[1] Our review is governed by the standard expressed in *Flowers v. State*, 342 Ark. 45, 48, 25 S.W.3d 422, 425 (2000) (citations omitted), which stated:

> A motion for a directed verdict is a challenge to the sufficiency of the evidence. The test for such motions is whether the verdict is supported by substantial evidence, direct or circumstantial. Substantial evidence is evidence of sufficient certainty and precision to compel a conclusion one way or another and pass beyond mere suspicion or conjecture. On appeal, we review the evidence in the light most favorable to the appellee and consider only the evidence that supports the verdict.

The trial court denied appellant's directed-verdict motion, reasoning that Hudson's testimony presented a valid jury question of whether appellant had admitted to committing the crime. We agree with the trial court.

Rule 801(d)(2)(ii) of the Arkansas Rules of Evidence provides that "a statement of which [a party] has manifested his adoption or belief in its truth . . ." constitutes nonhearsay. "[T]he admissibility is tested by whether a reasonable person, under the circumstances, would have been expected to deny the statements if they were in fact untrue." *Morris v. State*, 302 Ark. 532, 537, 792 S.W.2d 288, 291 (1990). Here, Hudson testified that he was told by Lawson that appellant was involved in the robbery and shot Tommy Cantrell. Despite the fact that this story was told in appellant's presence, he did not deny the truthfulness of the story.

Pursuant to Ark. Code Ann. § 5-12-103 (Repl. 1997):

> (a) A person commits aggravated robbery if he commits robbery as defined in § 5-12-102, and he:
>
> (1) Is armed with a deadly weapon or represented by word or conduct that he is so armed; or
>
> (2) Inflicts or attempts to inflict death or serious physical injury upon another person.

[1] According to the abstract, the direct-verdict motions pertained only to the aggravated robbery charge and, therefore, we only consider whether there was sufficient evidence to sustain that charge. *E.g., Hutts v. State*, 342 Ark. 278, 278-280, 28 S.W.3d 265, 267 (2000).

Furthermore, a person commits robbery as defined in Ark. Code Ann. § 5-12-102 (Repl. 1997), "if, with the purpose of committing a felony or misdemeanor theft . . . he employs or threatens to immediately employ physical force upon another."

In light of these matters, we conclude that Hudson's testimony presented a valid jury question as to whether appellant had committed aggravated robbery. Viewing the evidence in a light most favorable to appellee, the proof suggests that appellant used a deadly weapon and attempted to cause either death or serious physical harm while also trying to commit a theft. Accordingly, we affirm the trial court's denial of appellant's directed-verdict motion.

*II. Fair trial*

For his next argument, appellant contends that his Fourteenth Amendment right to a fair trial was violated because the trial court ordered that he stand trial while wearing his ADC uniform. As we review this matter, we are mindful that:

> The responsibility of striving for an atmosphere of impartiality during the course of a trial rests upon the trial judge. . . . Even though the trial judge runs the court, the right of an accused to a fair trial, although not perfect, is paramount. If the exercise of discretion results in the denial of a fair trial to a defendant, the discretion is certainly abused.

75 AM. JUR. 2D *Trial* § 193 (1991). Furthermore, as the United States Supreme Court stated in *Estelle v. Williams*, 425 U.S. 501, 503 (1976), "The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment." Despite the fact that this critical term is left undefined by our United States Constitution, we consider the term "fair trial" to consist of the following:

> A fair trial is a legal trial; one conducted according to the rules of common law except in so far as it has been changed by statute; one where the accused's legal rights are safeguarded and respected. A fair trial is a proceeding which hears before it condemns, which proceeds on inquiry, and renders judgment only after trial. A fair trial is that which is such in contemplation of law, namely, that which the law secures to the party, and a fair trial before an impartial jury means one where the jurors are entirely indifferent between the parties. The necessary factors in a fair trial are an adequate hearing and an impartial tribunal, free from any interest,

> bias, or prejudice. A fair trial is only likely to accomplish full justice within human limitations.

88 C.J.S. *Trial* § 1 (1955). Accordingly, on review we must determine whether the trial court's order requiring appellant to stand trial in his prison uniform constituted an abuse of discretion inasmuch as it denied appellant a fair trial. For the reasons expressed below, we conclude that the lower court's actions constituted such an abuse.

It is well settled that under the Fourteenth Amendment, a State cannot "compel an accused to stand trial before a jury while dressed in identifiable prison clothing . . . ." *Estelle*, 425 U.S. at 512. Such a prohibition is necessary because, although not stated in the Constitution, a defendant is presumed innocent, and "an accused should not be compelled to go to trial in prison or jail clothing because of the possible impairment of the presumption so basic to the adversary system." *Estelle*, 425 U.S. at 503-504. However, " '[a] defendant may not remain silent and willingly go to trial in prison garb and thereafter claim error.' " *Estelle*, 425 U.S. at 508 (quoting *Hernandez v. Beto*, 443 F.2d 634, 637 (5th Cir. 1971)). Accordingly, to determine whether appellant was denied a fair trial in this matter, we must conclude whether there is anything in the record on appeal that "warrants a conclusion that [appellant] was compelled to stand trial in jail garb or that there was sufficient reason to excuse the failure to raise the issue before trial." *Estelle*, 425 U.S. at 512.

We conclude that the abstract plainly reveals that the issue was sufficiently brought to the trial court's attention and that appellant was made to stand trial in his ADC uniform. Prior to the beginning of the trial, the State alerted the trial judge to the fact that appellant was wearing his ADC uniform, and appellant, thereafter, also raised the issue to the trial judge. Nonetheless, the trial judge ordered appellant to stand trial while wearing his prison uniform.

The relevant colloquy was as follows:

> PROSECUTOR: The defendant has been brought in his prison whites.
>
> COURT: I instructed the sheriff to bring him in that way.
>
> PROSECUTOR: Oh, okay.

COURT: And the reason I did this — I'll rule for the record later on when [appellant's attorney] makes his record, but he was instructed and had a chance to dress unless otherwise, and I think that's his responsibility, and he had the opportunity. We'll make a record later.

DEFENSE: I do have two motions to present to the court when you are ready.

COURT: We will proceed with jury selection. You will get the opportunity to make those later. . . .

[*following jury selection*]

DEFENSE: My second motion is that [appellant] is present in his jail garb. . . . Anybody seeing [appellant] here today in ADC garb should understand that he has a prior conviction. That, alone, is prejudicial . . . .

COURT: Do you want me to ask the jury about?

DEFENSE: I think that would almost be an inference of guilt right here, your honor.

COURT: Do you want me to ask the jury about it, yes or no?

DEFENSE: No, I think that would be even more highly prejudicial.

COURT: Here's the situation the court is in. Before [appellant] was brought up the stairs, I asked his attorney if he had discussed this matter with [appellant] about wearing civilian clothes, if they were available. He said he had. [Appellant] showed up from the regional jail without any. None had been supplied over at the sheriff's office for him to change into. He's been given that opportunity. It's [appellant's] obligation, in my opinion, to have those available, unless it's impossible. It has not been shown to have been impossible. I could have delayed this matter, but I do not think I'm required to delay this matter to search down and hunt for [appellant] some clothes that he wants to wear. That is not the Court's obligation, and the motion is denied. . . .

DEFENSE: He was not arrested in the garb he's wearing today. Somewhere there is civilian clothing available that he has been locked up and arrested in . . . .

> COURT: It has not been shown that those are unavailable. . . . I have an obligation to move his case along, and that's what I'm trying to do.

We hold that this action constituted reversible error inasmuch as it ordered appellant to stand trial in his prison uniform after all the parties had raised the issue and appellant specifically made it known to the trial court that he did not want to proceed while wearing prison clothes. Such an order, in our view, denied appellant a fair trial because it deprived him of the opportunity to defend the case against him in an environment that was reasonably free of any interest, bias, or prejudice. To hold otherwise would require that we also conclude that a reasonable jury would, after seeing appellant in his prison uniform, be indifferent to his case, which, for the reasons expressed in *Estelle*, we will not do. More importantly, however, we conclude that such an order violated the Fourteenth Amendment because it compelled appellant to stand trial while wearing prison garb, and, therefore, denied appellant a fair trial.

We specifically disagree with appellee's argument that appellant is entitled to no relief on appeal because he failed to ask the trial court for a mistrial. Such an argument fails to recognize that it is the trial judge who ordered appellant to stand trial in his prison garb. However, assuming, *arguendo*, that appellee's argument has merit, we conclude that, commensurate with *Estelle*, there was sufficient reason to excuse such an omission in light of the trial judge's pre-motion comments that he was going to require appellant to stand trial in his prison garb and his plainly stating that appellant's motion was "denied" after appellant expressed his desire to the trial court that he did not want to be tried in prison garb. Furthermore, the denied motion established the trial court's view that no misconduct had occurred, and it is unnecessary to request further relief in order to preserve the issue for appellate review. *See Leaks v. State*, 339 Ark. 348, 355-356, 5 S.W.3d 448, 453 (1999). In any event, whether viewed as either an appeal of the trial court's order or an omission for which there is sufficient excuse, we conclude on review that the trial court's actions constituted an abuse of discretion and reverse on this issue.

### *III. Trial judge's comments*

We, however, affirm on appellant's next point on appeal concerning the trial judge's questioning of Hudson. Appellant

argues that the trial court's actions constituted a violation of Ark. Const. art. 7, § 23, which provides that "[j]udges shall not charge juries with regard to matters of fact, but shall declare the law, and in jury trial shall reduce their charge or instructions to writing on the request of either party." While we have cautioned trial judges not to assume the role of an advocate when they question witnesses,[2] in this case we are simply unable to engage in any meaningful appellate review because there was no objection to the trial judge's actions in this regard. *E.g., Jones v. State*, 340 Ark. 390, 397, 10 S.W.3d 449, 453 (2000) ("We have frequently held that a contemporaneous objection must be made to the trial court before we will review an alleged error on appeal.").

*IV. Admission of letter*

For his final point on appeal, appellant argues that the trial court erred by admitting into evidence the letter that was purportedly from appellant to Mr. Cantrell. Specifically, appellant argues that appellee failed to properly authenticate the letter because the foundation that was laid was not "sufficient to support a finding that the matter in question [was] what its proponent claim[ed]." Ark. R. Evid. 901(a). To prevail, however, appellant must demonstrate that the trial court abused its discretion by determining that the proffered evidence satisfied the Rule 901 requirements. *E.g., Monk v. State*, 320 Ark. 189, 198, 895 S.W.2d 904, 909 (1995). We find that appellant has met that burden.

The authentication of a letter is subject to Ark. R. Evid. 901(a), and as such:

> [A] letter alleged to have been received from a particular source ordinarily is not admissible until its authenticity and genuineness have been sufficiently shown. There must be sufficient proof that the letter was written by the person by whom it purports and is claimed to have been written, or under the authority of the person claimed to have authorized it.

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[2] We stated in *Oliver v. State*, 268 Ark. 579, 590, 594 S.W.2d 261, 266 (Ark. App. 1980), that:

> While a trial judge is not a mere umpire and may interrogate witnesses in an action before him, he may not act in a dual capacity as judge and advocate. The two roles are not concentric. The presentation of a litigant's case in an adversary proceeding should be left to the initiative of counsel who has the responsibility to represent the interest of his client.

32A C.J.S. *Evidence* § 982(a) (1996). In the case at bar, we conclude that the documentary evidence offered lacked a reasonable certainty of genuineness and authenticity.

At issue is an envelope on which purportedly appeared appellant's return address and the word "correctional" and which contained an unsigned letter that stated it was from appellant. The letter lacked appellant's signature, the State failed to offer any evidence to prove that the letter was in appellant's handwriting, and there was no evidence that it was improbable that the letter was authored and sent by anyone other than appellant. We are unable to conclude that appellee provided sufficient proof that the document was a letter from appellant to Mr. Cantrell, and, therefore, we hold that the trial court abused its discretion.

Furthermore, while it is true, as stated in the dissenting opinion, that in appellant's case-in-chief a witness testified to many of the factual elements that were admitted into evidence *via* the letter, we are unpersuaded that this has the effect of waiving his objection to the admission of the letter for purposes of appellate review.[3] Under the dissenting opinion, for appellant to preserve his objection on appeal he would have to forego the presentation of a trial defense designed to respond to the evidence offered by the State over appellant's objection.[4]

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[3] We agree with the dissent's position that the admission of incompetent evidence constitutes harmless error when said evidence is cumulative; however, we disagree that the evidence here was cumulative. Evidence is cumulative if and only if it is "[a]dditional evidence of the same character as existing evidence and that supports a fact established by the existing evidence . . . ." *Black's Law Dictionary* 577 (7th ed. 1999). The dissent focuses on the testimony of appellant's witness to reach the conclusion that the letter, which was offered during appellee's case-in-chief, was cumulative. In our view, that approaches the question from the wrong direction. The issue is whether the *letter* was cumulative evidence, and it is plain that the letter was not additional evidence that was of the same character as it existed at that stage of the trial.

[4] The authorities relied upon by the dissent to conclude otherwise comprise either *obiter dictum* or are plainly distinguishable from the case at bar. *See Stephens v. State*, 328 Ark. 81, 941 S.W.2d 411 (1997) (affirming admission of testimonial evidence because appellant failed to properly object, not simply because evidence might have been cumulative); *Isbell v. State*, 326 Ark. 17, 931 S.W.2d 74 (1996) (affirming admission of defendant's pre-trial confession; accordingly, the confession could not be considered cumulative inasmuch as it was not evidence in addition to the existing evidence at trial); *Griffin v. State*, 322 Ark. 206, 909 S.W.2d 625 (1995) (affirming denial of motion for mistrial because appellant failed to see that trial judge gave cautionary instruction, not simply because evidence might have been cumulative); *Schalski v. State*, 322 Ark. 63, 907 S.W.2d 693 (1995) (affirming admission of testimonial evidence when others testified during State's case-in-chief without objection to materially same evidence, not merely because defendant admitted to same); *Cage v. State*, 73 Ark. 484, 84 S.W. 631 (1905) (affirming admission of testimonial evidence that was given *after*

It is true that the general rule is that "[i]f a party who has objected to evidence of a certain fact himself produces evidence from his own witness of the same fact, he has waived his objection." 1 John W. Strong, *McCormick on Evidence* § 55, at 246 (5th ed. 1999). Here, however, it is plain that appellant did not attempt to produce the letter from his own witness. While it may be tempting to simply conclude that there was no material difference between the contents of the letter and the testimony of appellant's witness, to do so would simply be untrue. The letter contained information that was different from the material that was offered into evidence *via* appellant's witness, and this witness testified to matters that were different from the material that was offered into evidence *via* the letter. We cannot assume that the jury found these differences immaterial.[5] Accordingly, it would be incorrect to hold that the letter and the testimony constituted, as a matter of law, the same evidence.

If appellant's witness had testified prior to the admission of the letter, then he could be in a different position inasmuch as he would not be compelled to reintroduce the evidence in a light more favorable to his theory of the case. The conclusion reached by the dissenting opinion would, in our view, unduly place defendants in an unjust dilemma — one can present either a zealous trial defense or a zealous appellate defense, but not both. We respectfully disagree with the view that the law places litigants in such an untenable position.

Reversed and remanded.

GRIFFEN, VAUGHT, and BAKER, JJ., agree.

PITTMAN and CRABTREE, JJ., concur in part and dissent in part.

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testimony given during defendant's case-in-chief on direct examination); *McDonald v. State*, 37 Ark. App. 61, 824 S.W.2d 396 (1992) (affirming admission of testimonial evidence because court held permissible to do so under Ark. R. Evid. 404(b), not simply because evidence might have been cumulative); *Brown v. State*, 5 Ark. App. 181, 636 S.W.2d 286 (1982) (affirming admission of testimonial evidence because said evidence concerned a matter that was not at issue, not simply because evidence might have been cumulative).

[5] This stands in stark contrast to *Aaron v. State*, 300 Ark. 13, 775 S.W.2d 894 (1989), which is relied upon by the dissent, wherein the difference was between an I.D. card and a driver's license. In our view, there would in all likelihood be no difference between an I.D. card and a driver's license. However, the jury may have found material differences between a letter that was allegedly written by an inmate in a correctional facility and testimony that a person sold a camera to the defendant. To reach a contrary conclusion would require that we speculate on what the jury found valuable in the admitted evidence, which we cannot do.

JOHN MAUZY PITTMAN, Judge, concurring in part; dissenting in part. I disagree with those parts of the majority opinion that find reversible error and remand this case for a new trial.

With respect to the prison-garb issue, I first think that appellant failed to preserve for appeal the argument that the trial court should have granted a mistrial. While appellant's counsel prefaced his remarks to the trial court on this issue by stating that he had a "motion" to present, he made no request for a mistrial or any other specific form of relief. Generally, when an appellant does not request a mistrial, he cannot argue on appeal that the trial court's failure to grant one constitutes reversible error. *See Rankin v. State,* 329 Ark. 379, 948 S.W.2d 397 (1997). While the majority states that any such failure by appellant was excused by the trial court's comments, I note that our supreme court recently held, in effect, that a trial court's statement indicating that it clearly understands and refuses an appellant's request for relief will not suffice to preserve the issue for appeal where the request itself is not clear from a reading of the record. *See Bearden v. Arkansas Dep't of Human Servs.,* 344 Ark. 317, 325-27, 42 S.W.3d 397, 402-3 (2001).

Even had appellant's motion been sufficient to constitute a mistrial motion, however, I still could not agree that its denial amounts to reversible error. I have no particular quarrel with the majority's abstract statements of substantive law on this point. However, I have considerable difficulty with the conclusion that the trial court compelled this appellant to appear in prison garb. While a trial court is not to compel a defendant to stand trial before a jury in identifiable prison clothing, I firmly believe that the right not to be so attired can be waived by failure to make a timely objection or request for assistance. *See Estelle v. Williams,* 425 U.S. 501 (1976); *Young v. State,* 283 Ark. 435, 678 S.W.2d 329 (1984). Here, both appellant's argument on appeal and the timing of his attempt to make his "mistrial" motion below (*i.e.*, soon after appellant's arrival in the courtroom) indicate that he believes that the damage was complete upon his being seen by the jury venire when he was first brought into the courtroom.[1] However, I find nothing in the abstract to indicate that the trial court was ever asked, prior to appellant's appearance before the jury venire the day of trial, to assist in securing clothing for appellant to wear at trial. According to appellant's counsel, appellant had made arrangements well before

[1] The majority opinion fails to point out that appellant was allowed to change as soon as his parents arrived at the courthouse with his civilian clothes, and that this occurred before jury selection was complete.

trial for his parents to bring clothes for him to wear at his trial. Nor do I find anything to indicate that, when appellant's parents were delayed in getting to the courthouse, the court was asked to continue the proceedings prior to appellant's being brought into the courtroom. Clearly, the trial court had no duty to make any inquiry. *Young v. State, supra.* Rather, the duty was on appellant's counsel to make the problem and his client's desires known to the court in time for the damage to be avoided. In short, I do not see the "compulsion" on the part of the trial court that is required for a reversal.

I also disagree with the majority's conclusion that admission of the letter constituted prejudicial error. Assuming, for the sake of argument, that the trial court erred in finding that the letter was sufficiently authenticated, I fail to see how appellant can now claim that he suffered any prejudice as a result of its admission.

As the majority states, appellant was tried for and convicted of aggravated robbery and first-degree battery. One of the items stolen during the crimes was a camera. The letter in question was addressed to one of the victims, identified the writer as appellant, and denied that he committed the crimes. The letter further stated that the writer had possessed a camera but maintained that he obtained it by purchasing it from Phillip Gober. Later, during appellant's case-in-chief, appellant called Phillip Gober as a witness. On direct examination, appellant's counsel elicited testimony from Mr. Gober that he found a camera in an alley, met appellant on the street while walking home, and sold the camera to appellant for $35.00.

The only way in which appellant could have been prejudiced by the introduction of the letter is that it could be read as an admission that he possessed a piece of property that had been stolen from the victim. However, appellant called a defense witness who testified on direct examination to the very same information contained in the letter.[2] The law is well settled that prejudice is not presumed, and we will not reverse absent a showing of prejudice. *Donovan v. State,* 71 Ark. App. 226, 32 S.W.3d 1 (2000); *Camp v. State,* 66 Ark. App. 134, 991 S.W.2d 611 (1999). It is also clear that evidence that is merely cumulative of other evidence admitted

[2] This proof was in addition to evidence of appellant's adoptive admission of his participation in the crimes, proof that the victim's camera was found by the police at the apartment "shared by" appellant and his girlfriend, and proof that appellant's girlfriend denied that the camera was hers.

without objection is not prejudicial. *Griffin v. State,* 322 Ark. 206, 909 S.W.2d 625 (1995); *Brown v. State,* 66 Ark. App. 215, 991 S.W.2d 137 (1999); *Camp v. State, supra.* Additionally, as the majority concedes, "If a party who has objected to evidence of a fact himself produces evidence from his own witness of the same fact, he has waived his objection." 1 JOHN W. STRONG, MCCORMICK ON EVIDENCE § 55, at 246 (5th ed. 1999); *see Aaron v. State,* 300 Ark. 13, 775 S.W.2d 894 (1989); *McDonald v. State,* 37 Ark. App. 61, 824 S.W.2d 396 (1992).

The majority argues that, because the letter was introduced first, appellant then had free rein to repeat the evidence before the jury and still retain the right to complain about the letter's admission on appeal. Nothing is cited for this proposition, and it is not the law. *See, e.g., Stephens v. State,* 328 Ark. 81, 89, 941 S.W.2d 411, 415 (1997) (State's witness's testimony not prejudicial because it was cumulative of appellant's own, later testimony); *Griffin v. State,* 322 Ark. 206, 217, 909 S.W.2d 625, 631 (1995) (appellant suffered no prejudice from State's witness's mention of appellant's crack cocaine purchase because later, during appellant's case-in-chief, he testified that he had visited a "dope house" and smoked crack cocaine); *Aaron v. State,* 300 Ark. 13, 15, 775 S.W.2d 894, 895 (1989) (appellant waived his objection to a State's witness's testimony about information contained on appellant's driver's license when appellant later introduced an "I.D. card" containing the same information); *McDonald v. State,* 37 Ark. App. 61, 66-67, 824 S.W.2d 396, 400 (1992) (appellant waived any objection he may have had regarding the State's evidence about a planned drug transaction between appellant and a third person when appellant later introduced the transcript of a witness's testimony at an earlier trial, which contained references to the planned drug transaction); *Brown v. State,* 5 Ark. App. 181, 189, 636 S.W.2d 286, 290 (1982) (no reversible error in admitting sheriff's testimony because it was cumulative to testimony of others, *including the appellants*); *cf. Cage v. State,* 73 Ark. 484, 485, 84 S.W. 631, 632 (1905) ("[Appellant] certainly had no right to object to that which the witness testified at [appellant's] instance").[3] Our supreme court has found errors not prejudicial on account of subsequent repetition of the challenged information even where, unlike in the case now before us, the error complained of is of constitutional dimension, which requires that

[3] I trust that the reader will note the different introductory signal preceding the *Cage* citation and the parenthetical following it, and will realize that it is not being cited as presenting facts like the other referenced cases but is cited for the statement appearing in the parenthetical.

the error be "harmless beyond a reasonable doubt." *See, e.g., Isbell v. State,* 326 Ark. 17, 22, 931 S.W.2d 74, 77 (1996) (admission of allegedly illegally obtained confession "was harmless beyond a reasonable doubt in view of the fact that [appellant] testified at his trial and repeated every material aspect of his pretrial statement"); *Schalski v. State,* 322 Ark. 63, 69-70, 907 S.W.2d 693, 697 (1995) (evidence of police officer's observations and photographs of appellant's truck, obtained as a result of an allegedly illegal search in violation of appellant's Fourth Amendment rights, was cumulative, and its admission was harmless beyond a reasonable doubt given that a description of appellant's truck and its contents was admitted at trial through several other witnesses, *including appellant himself*). I can only conclude that appellant waived his objection to, and in any event suffered no prejudice from, admission of the letter in light of his own witness's cumulative testimony.[4]

The majority also mentions that appellant was somehow "compelled to reintroduce the evidence in a light more favorable to his theory of the case." However, appellant made no argument, either at trial or on appeal, that he was forced to have his witness repeat the evidence because the letter was admitted, and this court cannot assume that he was so compelled. *See Isbell v. State,* 326 Ark. at 22, 931 S.W.2d at 77-78. Moreover, the witness's testimony was in no way more favorable to his theory of the case. Mr. Gober's

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[4] The majority states in its footnote 3 that evidence is cumulative "if and only if" it is in addition to evidence that has previously been admitted. *Black's Law Dictionary* is cited for the timing aspect of the word's definition; the "if and only if" language is added by the majority without any citation. Nevertheless, however instructive the dictionary may be in certain situations, it does not control over a contrary view held by the highest court in this state on a matter of state law. And it is quite clear that the Arkansas Supreme Court determines whether objected-to evidence is "cumulative" to other evidence admitted without objection *by reference to the state of the record at the close of the case* and not at the time that the objectionable evidence was introduced. In other words, evidence admitted over objection most certainly can be rendered "cumulative" and non-prejudicial by other, *later* evidence of the fact admitted without objection. *Schalski, Stephens, Griffin,* and *Brown* all use the word "cumulative" in this very way.

In any event, the point involved here is the legal principle, not the correct use of a single word. The principle is that one cannot simply repeat the substance of objectionable evidence and continue to maintain that admission of the objectionable evidence unfairly prejudiced his case, whether because he has waived his earlier objection or because he has, in the end, suffered no prejudice. All of the cases cited in the textual paragraph above (except *Cage,* see footnote 3, *supra*) stand for this principle.

The majority also attempts to distinguish some of the cases that I have cited by pointing out additional reasons why no prejudicial error was found in those cases. Of course, that is a distinction without a difference inasmuch as the point for which I have cited the cases was stated in each of them as a separate, independent reason why any error was not prejudicial.

testimony was not responsive to the contents of the letter in terms of explaining or rebutting them; his testimony was, in substance, nothing other than a simple repetition of the letter's contents. Even appellant admits in his brief that Mr. Gober's testimony "tracks with what the 'jail letter' says happened."[5] I would affirm appellant's convictions.

CRABTREE, J., joins in this opinion.

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[5] To the extent that the majority refers to, without reciting, matters in the letter that the majority believes were "different" from those in the witness's testimony and *vice versa*, two things bear repeating: (1) neither the letter nor the witness's testimony contained anything of a material nature that the other did not contain; moreover, whether the witness's testimony contained additional information not in the letter is immaterial (at least where his testimony did not serve to rebut or explain away the contents of the letter) because he was appellant's witness and testified without objection; and (2) in any event, the only way in which appellant could have been prejudiced by the letter was its admission that the writer possessed a camera that may have been stolen from the victim, and appellant does not contend otherwise; appellant is not concerned about any other matters in the letter, and the majority should not be making arguments for him.

The next-to-last paragraph and last footnote of the majority opinion also say that the letter and Mr. Gober's testimony are not the "same evidence" because they take different forms and, therefore, that one cannot be cumulative to the other and that appellant's introduction of the one cannot constitute a waiver of his objection to the other. The only reason given for their position that the two items of evidence are materially different seems to be that one is a letter written by one person while the other is live testimony of another person. However, even the quotation from MCCORMICK ON EVIDENCE, *supra,* which is cited by the majority, makes it clear that a waiver results from introduction of *evidence of the same fact,* without regard to the *form* that the repetition of the evidence may take. Of course, it is the substance of the evidence that matters. Moreover, here, the repetition of the objected-to evidence came from appellant's own witness on direct examination; to say that its character makes it less convincing than an unsigned letter containing evidence of the same fact would border on the absurd. Finally, it bears mentioning that the supreme court has applied the principle that I am advocating despite the fact that the repetition of the objectionable evidence has taken a different form than that in which the proof was originally offered. See *Schalski v. State*, supra (photographs and testimony); *Aaron v. State, supra* (a driver's license and an I.D. card).

Nicie Ann DILLEHAY *v.* STATE of Arkansas

CA CR 00-1205 46 S.W.3d 545

Court of Appeals of Arkansas
Division I
Opinion delivered June 6, 2001

[redacted]

*James P. Clouette*, for appellant.

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

JOSEPHINE LINKER HART, Judge. A jury found Nicie Ann Dillehay guilty of aggravated assault and carrying a weapon and sentenced her to a total of eighteen months in the Arkansas Department of Correction. For reversal, appellant argues that (1) there was insufficient evidence to sustain her convictions and, accordingly, the trial court erred by denying her directed-verdict motion; and (2) she was denied a speedy trial and, therefore, the trial court erred by denying her motion to dismiss the criminal information commensurate with Ark. R. Crim. P. 28.1. We affirm.

On December 26, 1998, appellant was arrested and placed into custody. A criminal information was later filed on August 4, 1999, alleging that on or about December 26, 1998, appellant committed the offenses of aggravated assault, Ark. Code Ann. § 5-13-204 (Repl. 1997), and carrying a weapon, Ark. Code Ann. § 5-73-120 (Repl. 1997). The case was scheduled for a jury trial on March 16, 2000. On that date, appellant moved to dismiss the charges against

her, alleging a violation of her right to a speedy trial commensurate with Ark. R. Crim. P. 28.1. The trial court denied appellant's motion, and the case proceeded to trial.

The State's first witness was Joshua Pinkerton, the victim, who testified that on December 26, 1998, he was driving his vehicle on Bracey Road when a woman in a truck "flipped [him] off." According to his testimony, he first thought that the person making the gesture was a friend teasing him, and he pulled off the road. At that time, the driver, identified at trial as appellant, exited the truck and pointed a gun at him. Realizing that appellant was not a friend, Pinkerton drove away, but was then pursued by appellant. Pinkerton then pulled into a gas station, and appellant again pointed the gun at him. He called the 911 operator and described what had transpired. At that time, appellant began to drive away, and Pinkerton followed and obtained an exact car-tag number. Later that day, a law enforcement officer found and arrested appellant.

Deputy Sheriff Eric Frazier testified that at approximately five o'clock p.m. on December 26, 1998, he received a mobile telephone call from a person stating that someone had pointed a weapon at him while he was on the roadway. After he obtained the tag number, the officer made contact with appellant, who denied having a gun in her vehicle. However, the officer, following a consensual search of the truck, found in the glove box of the vehicle a chrome-plated .25 semi-automatic weapon with a loaded magazine and one round chambered. The safety on the gun was off, and it was ready to be fired. The officer determined that appellant did not have a permit to carry the weapon.

Following Officer Frazier's testimony, the State rested, and appellant moved for a directed verdict. Specifically, appellant argued that the State had failed to prove beyond a reasonable doubt that the event occurred or that she acted with extreme indifference to the value of human life with the purpose of endangering a person's life. The trial court denied appellant's directed-verdict motion.

In her case-in-chief, appellant called the victim as a witness. Following his testimony, appellant rested and renewed her directed-verdict motion, which was also denied by the trial court. A jury found appellant guilty and sentenced her to serve eighteen months for aggravated assault and carrying a weapon. From these convictions, comes this appeal.

*I. Sufficiency of the evidence*

In an effort to avoid potential double-jeopardy concerns on remand, we do not consider errors by the trial court until we first consider a challenge to the sufficiency of the evidence. *See Harris v. State*, 284 Ark. 247, 249-250, 681 S.W.2d 334, 335 (1984). On this point, appellant argues for reversal that the trial court erred by denying her directed-verdict motion because there was insufficient evidence to sustain the convictions of aggravated assault and carrying a weapon. Our review is governed by the standard expressed in *Flowers v. State*, 342 Ark. 45, 48, 25 S.W.3d 422, 425 (2000) (citations omitted), which stated:

> A motion for a directed verdict is a challenge to the sufficiency of the evidence. The test for such motions is whether the verdict is supported by substantial evidence, direct or circumstantial. Substantial evidence is evidence of sufficient certainty and precision to compel a conclusion one way or another and pass beyond mere suspicion or conjecture. On appeal, we review the evidence in the light most favorable to the appellee and consider only the evidence that supports the verdict.

The trial court denied appellant's directed-verdict motion, reasoning that the State had made a *prima facie* case for the alleged charges. Upon review, we conclude that the denial of the directed-verdict motion was proper.

*1. Aggravated assault*

The crime of aggravated assault is defined by Ark. Code Ann. § 5-13-204, as a crime that occurs when "[a] person . . . under circumstances manifesting extreme indifference to the value of human life, . . . purposely engages in conduct that creates a substantial danger of death or serious physical injury to another person." The evidence presented at trial, when viewed in a light most favorable to the State, reveals that appellant pointed a gun at another person. In addition, the evidence reveals that soon thereafter a police officer found a loaded gun in appellant's possession in which the safety feature was disengaged. We conclude that under the facts and circumstances of this case, there was a viable jury question of whether appellant had committed the crime of aggravated assault and conclude that the denial of the directed-verdict

motion for this charge was proper. *See Harris v. State*, 72 Ark. App. 227, 35 S.W.3d 819 (2000).

*2. Carrying a weapon*

The crime of carrying a weapon is defined by Ark. Code Ann. § 5-73-120(a), as a crime that occurs when "[a] person . . . [who] possesses a handgun . . . on or about his person in a vehicle occupied by him, or otherwise readily available for use with a purpose to employ it as a weapon against a person." The evidence presented at trial, when viewed in a light most favorable to the State, reveals that appellant, without a permit, had in her vehicle and in her possession a handgun.[1] Furthermore, the evidence reveals that appellant, in fact, pointed a gun at another person, which could be evidence that the purpose of the handgun was for use against a person. Therefore, we conclude that under the facts and circumstances of this case, there was a viable jury question of whether appellant had committed the crime of carrying a weapon and that the denial of the directed-verdict motion for this charge was proper. *See Nesdahl v. State*, 319 Ark. 277, 890 S.W.2d 596 (1995); *McGuire v. State*, 265 Ark. 621, 580 S.W.2d 198 (1979); *Clark v. State*, 253 Ark. 454, 486 S.W.2d 67 (1972).

*II. Speedy trial*

For her next argument, appellant contends that she was denied a speedy trial in violation of Ark. R. Crim. P. 28.1 and, therefore, the trial court erred by denying her motion to dismiss. While appellee agrees that appellant was brought to trial more than twelve months from the time of her arrest, the State contends that a sufficient period of time should be excluded from the speedy-trial calculation to warrant an affirmance of the trial court's decision. We agree with appellee.

The right to a speedy trial is expressed in the Bill of Rights, U.S. Const. amend. 6, and guaranteed to state criminal defendants by the Fourteenth Amendment, *Klopfer v. North Carolina*, 386 U.S.

[1] State's exhibit 1 (a photograph of the weapon in appellant's possession) plainly reveals that the weapon at issue was a handgun, as defined by Ark. Code Ann. § 5-73-120(b)(1), which provides that a handgun "means any firearm with a barrel length of less than twelve inches (12") that is designed, made, or adapted to be fired with one (1) hand . . . ."

213 (1967). In Arkansas, this right is further defined by Ark. R. Crim. P. 28.1(c), which in pertinent part provides:

> Any defendant charged after October 1, 1987, in circuit court and held to bail, or otherwise lawfully set at liberty . . . shall be entitled to have the charge dismissed with an absolute bar to prosecution if not brought to trial within twelve (12) months from the time provided in Rule 28.2, excluding only such periods of necessary delay as are authorized in Rule 28.3. . . .

Time, for these purposes, commences to run in accordance with Ark. R. Crim. P. 28.2, which in pertinent part provides:

> [F]rom the date the charge is filed, except that if prior to that time the defendant has been continuously held in custody or on bail or lawfully at liberty to answer for the same offense or an offense based on the same conduct or arising from the same criminal episode, then the time for trial shall commence running from the date of arrest . . . .

However, there are certain periods of time that are excluded from the calculation, and such exclusions are governed by Ark. R. Crim. P. 28.3, which states: "The period of delay resulting from other proceedings concerning the defendant, including but not limited to an examination and hearing on the competency of the defendant. . . ."

Appellant was arrested on December 26, 1998, and her trial was conducted 446 days later on March 6, 2000. While both parties agree that appellant's mental evaluation[2] requires a modification of the initial speedy-trial calculation, they are in disagreement with regard to the exact number of days that should be excluded. Their dispute centers on whether the excluded period began on the day the trial judge ruled from the bench that appellant was to undergo mental evaluation, November 29, 1999, or the day the order for her mental evaluation was entered, December 16, 1999. Under the

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[2] According to the register of actions found in the record, this was deemed an "Act III" request; however, the authority upon which the examination was based, according to the entered order, is found at Ark. Code Ann. § 5-2-305 (Repl. 1997), which is the codification of several acts, none of which are designated as "Act 3." Apparently, the vernacular "Act III" comes from Initiated Act 3 of 1936, which, in Section Eleven, permits the commitment of criminal defendants to the state hospital for evaluations when the defense of insanity is either raised or "the circuit judge has reason to belief that the defense of insanity will be raised . . . ."

former calculation, there would be no speedy-trial violation. However, under the latter calculation, which is championed by appellant, the trial would have been conducted 372 days following her arrest and, consequently, would have been in violation of her right to a speedy trial.

We conclude that the excluded period of time, as defined by Ark. R. Crim. P. 28.3, began to run on the day the trial judge ruled from the bench that appellant was to undergo a mental evaluation. While it is true that the order embodying this determination was entered seventeen days after the hearing in which the motion was granted, we are not disposed to conclude that the entry of the order is critical to a speedy-trial determination in this case. The Rule merely requires that speedy trial can be tolled by a "period of delay resulting from . . . an examination and hearing on the competency of the defendant . . . ." Ark. R. Crim. P. 28.3. Arguably the trial judge's order was not effective until it was entered; however, the question of whether the order was enforceable is not before us. Instead, we must merely determine whether the proceedings at issue constituted a permissible period of delay that tolled the speedy-trial period.

Here, the trial judge's order from the bench began a period of delay that is specifically recognized under the law. We note that Rule 28.3 neither requires that the trial judge's orders be entered to constitute a period of delay nor does it require that the request for a mental evaluation be made by the defendant[3] in order for the speedy-trial calculation to be tolled. Accordingly, we hold that the trial court did not err by denying appellant's motion to dismiss.

However, in so holding, we are not establishing a principle that there can never be a speedy-trial violation if the State seeks a mental evaluation of a criminal defendant and, thereafter, fails to have the trial court's order reduced to writing and entered. A criminal defendant is guaranteed a speedy trial, and the State cannot unreasonably delay a defendant's trial by purposefully failing to enter orders that reflect the trial judge's will. To conclude otherwise would expose criminal defendants to potential abuse, which we must endeavor to avoid. However, in this instance, it has neither been argued nor do we conclude that the State's actions constituted a violation of this principle.

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[3] The record reveals that the State made the request for appellant's mental evaluation.

Affirmed.

STROUD, C.J., and CRABTREE, J., agree.

Rose TURNBOUGH *v.* MAMMOTH SPRING SCHOOL

CA 00-1207 45 S.W.3d 430

Court of Appeals of Arkansas
Division IV
Opinion delivered June 6, 2001

*Larry Dean Kissee*, for appellant.

*Laser Law Firm, P.A.*, by: *Dan F. Bufford* and *Brian A. Brown*, for appellee.

JOHN B. ROBBINS, Judge. This is an appeal from the Fulton County Circuit Court's dismissal of appellant Rose Turnbough's complaint for the monetary value of the unused sick leave that she accumulated before resigning from her teaching position with appellee Mammoth Spring School District Number Two. We find no error in the circuit judge's decision and affirm.

After twenty years' employment with appellee, appellant resigned in 1999 to take a job in Missouri. At the time of her resignation, appellant requested payment for her ninety days of unused sick leave. After appellee refused to pay her, appellant filed this action for a declaration of her rights under the Teachers' Minimum Sick Leave Law, Ark. Code Ann. §§ 6-17-1201 through 6-17-1209 (Repl. 1999), and under the terms of her contract with appellee. Finding that the statutes and the contract did not support her claim, the circuit judge dismissed her complaint.

On appeal, appellant argues that the trial judge erred in holding that she is not entitled to payment for her unused sick leave under the terms of the Teachers' Minimum Sick Leave Law; that appellee's sick-leave policy is more restrictive than the statutes permit and is against public policy; and that appellee's sick-leave policy violates the Privileges and Immunities Clause of the United States Constitution.[1] We need not address appellant's third argument because she did not obtain a ruling on it by the trial court. A ruling by the trial court 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. *Office of Child Support Enfcmt. v. Neely*, 73 Ark. App. 198, 41 S.W.3d 423 (2001).

*The Teachers' Minimum Sick Leave Law*

Addressing appellant's first argument on the merits, we find no error in the circuit judge's construction of the relevant statutes. Appellant argues that, according to Ark. Code Ann. §§ 6-17-1204(a) and 6-17-1207 (Repl. 1999), appellee was required to pay her the value of her accumulated sick leave, in which she asserts a vested right. In considering the meaning of a statute, we consider it

[1] Appellant includes in her listing of points on appeal the novel issue that "the trial court erred in denying the appellant's claim of adverse possession"; however, she does not follow with any novel argument in support of this contention, nor can we conceive of how this point could possibly be relevant on this appeal.

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.* All statutes on the same subject are in *pari materia* and must be construed together. *Boothe v. Boothe,* 341 Ark. 381, 17 S.W.3d 464 (2000).

Section 6-17-1204 provides:

> (a) Each school district in the state shall provide sick leave for each of its teachers at a minimum rate of one (1) day per month or major portion thereof that the teacher is contracted, at full pay.
>
> (b) Such leave shall be in force beginning with the first day of the first school term for which each teacher is employed.
>
> (c) If a teacher resigns or leaves his teaching position for any reason before the end of the school term, the employing district may deduct from his last paycheck full compensation for any days of sick leave used in excess of the number of days earned.
>
> (d) A teacher shall be entitled to sick leave only for reasons of personal illness or illness in his immediate family.

Section 6-17-1206 states that, whenever an employee of a school district leaves that district and accepts employment in another district within this state, he shall be granted credit by the new school district for any unused sick leave, not to exceed ninety days, that he accumulated while employed by the former district. According to section 6-17-1205, unused sick leave shall be accumulated at a rate of one day per month until ninety days have been accumulated. Under the terms of section 6-17-1208, school districts are free to provide more liberal sick-leave benefits to their employees:

> The number of days of sick leave provided by this subchapter are minimums only, and nothing in this subchapter shall prohibit any school district from providing more days of sick leave or from having a more liberal policy for the administration of sick leave, including, but not limited to, the establishment of sick leave pools or banks and allowing district employees who are husband and wife to each utilize the other's accumulated sick leave.

Section 6-17-1207 states that "[p]ayment for unused sick leave shall be made from the salary fund of the district, and these moneys shall be included in meeting the annual requirements for payment of teachers' salaries." As appellant points out, the Teachers' Minimum Sick Leave Law, as enacted by Act 137 of 1971, provided in section five that "[n]o payment for unused sick leave shall be made to teachers." *See* Ark. Stat. Ann. § 80-1253 (Supp. 1977). In Act 1016 of 1979, the General Assembly repealed section 80-1253 and substituted a new version of it, Ark. Stat. Ann. § 80-1253 (Supp. 1979), which is now codified at Ark. Code Ann. § 6-17-1207. Appellant argues that, in the 1979 act, the General Assembly made it clear that payment for unused sick leave is required. We disagree.

In our view, the 1979 act simply repealed the prohibition against paying teachers for unused sick leave but did not require it or dictate the circumstances under which payment is made. It does, however, permit such payments and establishes their source, if they are made. A logical construction of the amended Teachers' Minimum Sick Leave Law, in its entirety, is that school districts are free to decide whether to compensate teachers for unused sick leave; however, if they choose to do so, they must make these payments from their salary funds. If the General Assembly had intended to require school districts to pay teachers for unused sick leave, it could have expressly stated so. We will not read language into a statute that is not there. *Conagra Frozen Foods, Inc. v. Director,* 34 Ark. App. 108, 806 S.W.2d 27 (1991). Our construction of the Teachers' Minimum Sick Leave Law, as amended, is in harmony with its obvious purpose: to prevent employees from losing compensation and suffering financial hardship in the event of personal illness or the illness of an immediate family member. Even if an employee has not utilized all of the sick leave to which he is entitled, the purpose of the law has been served — this "safety net" was available to him if needed. 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. Arkansas Sch. for the Blind, supra; Moore v. Pulaski Co. Special Sch. Dist.*, 73 Ark. App. 366, 43 S.W.3d 204 (2001). Accordingly, we cannot say that the circuit judge erred in construing these statutes as he did.

*Appellant's Contract with Appellee*

Due to our conclusion that the Teachers' Minimum Sick Leave Law does not mandate that school districts ever pay teachers

for unused sick leave, the appellant's argument that appellee's policy regarding payment for unused sick leave is more restrictive than the statute permits becomes moot. Consequently, the only question remaining is whether appellant's teaching contract required appellee to pay her for her unused sick leave. Traditional contract principles apply to teachers' employment contracts. *Maddox v. St. Paul Sch. Dist.*, 16 Ark. App. 112, 697 S.W.2d 130 (1985). A contract is unambiguous and its construction and legal effect are questions of law when its terms are not susceptible to more than one equally reasonable construction. *Fryer v. Boyett*, 64 Ark. App. 7, 978 S.W.2d 304 (1998). When contracting parties express their intention in a written instrument in clear and unambiguous language, it is the court's duty to construe the writing in accordance with the plain meaning of the language employed. *Id.*

Appellant's contract incorporated appellee's personnel policies within its terms. Appellee's sick-leave policy provided:

> All full time personnel of the Mammoth Spring School District will be provided with one (1) day of sick leave for each month they are under contract. The sick leave that is not used by an employee may be accumulated up to a total of ninety (90) days. If an employee is absent only in the morning or afternoon, he will have used only one-half day sick leave. Sick leave days may be used only for the reasons of personal illness of the immediate family. Sick leave may also be used in case of a death in the immediate family. In case of doubt, the administration may require a doctor's statement to verify illness. Immediate family is defined as spouse, child, parent, grandparent, brother, sister, uncle or aunt, either by blood or marriage.
>
> An employee who is absent from school except for these reasons outlined in Act 818 of 1989 [which amended the Teachers' Minimum Sick Leave Law] will have deducted from his salary one day's salary for each day absent.
>
> Whenever a certified person employed by another School District in this state shall accept employment in this School District, he/she shall be granted credit for any unused sick leave accumulated in the former School District, not to exceed a maximum of 90 days. Said accumulated and unused sick leave credit shall be granted to teacher upon furnishing proof in writing thereof from the School District of former employment of the teacher.

PAY FOR UNUSED SICK LEAVE

> Certified personnel will be paid for unused sick leave in excess of ninety (90) days at the rate of a substitute teacher pay.
>
> Any certified employee who is eligible and files for Arkansas Teacher retirement will be paid at the current rate paid for substitute teachers, for any unused sick leave, not to exceed 90 days.

It is undisputed that appellant was not eligible for retirement when she resigned from employment with appellee. Additionally, she is not seeking payment for unused sick leave in excess of ninety days. Accordingly, it is clear that she did not satisfy the terms of appellee's sick-leave policy that provide for the payment of unused sick leave and that the circuit judge correctly construed the contract as providing her with no basis for relief.

Affirmed.

JENNINGS and BAKER, JJ., agree.

William HADL *v.* STATE of Arkansas

CA CR 00-903 47 S.W.3d 897

Court of Appeals of Arkansas
Division I
Opinion delivered June 6, 2001

*Terry Goodwin Jones*, for appellant.

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

SAM BIRD, Judge. William Hadl was charged by felony information with attempting to manufacture methamphetamine, possessing drug paraphernalia with intent to use, and possessing drug paraphernalia with intent to manufacture methamphetamine. He filed a pretrial motion to suppress evidence of items that police officers seized in a warrantless search of his home and the surrounding premises. The trial court denied the motion after conducting a suppression hearing, and the case proceeded to a jury trial. At trial Hadl renewed his motion to suppress, and it was again denied. At the close of all the evidence the trial court granted a motion for a directed verdict on the charge of attempting to manufacture methamphetamine. The remaining counts were submitted to the jury.

Hadl was convicted of possessing drug paraphernalia with intent to use, for which he was sentenced to ten years' probation, and of possessing drug paraphernalia with intent to manufacture methamphetamine, for which he was sentenced to six years' imprisonment in the Arkansas Department of Correction and assessed a fine of $100. On appeal he raises two points: (1) that the trial court erred in refusing to suppress evidence because it was obtained by

the police tactic of "knock and talk," and (2) that the trial court erred in refusing to suppress evidence that had been seized by police during the search but that the prosecuting attorney was unable to make available for examination by appellant. We affirm.

*Whether the trial court erred in refusing to suppress evidence obtained by the police tactic of "knock and talk"*

In reviewing a trial court's denial of a motion to suppress, the appellate court makes an independent examination based on the totality of the circumstances and will reverse only if the ruling was clearly against the preponderance of the evidence. *Muhammad v. State*, 337 Ark. 291, 988 S.W.2d 17 (1999); *Burris v. State*, 330 Ark. 66, 954 S.W.2d 209 (1997). "Knock and talk" is a method used by police officers to obtain valid consent to search. *See, e.g.*, *United States v. Powell*, 929 F. Supp. 231, 232 (S.D. W.Va. 1996); *United States v. Cruz*, 838 F. Supp. 535, 543 (D. Utah 1993). The tactic has been used by police officers when there is information that drugs can be found in a residence but probable cause for a search warrant is lacking. *See State v. Smith*, 488 S.E.2d 210 (N.C. 1997). In *Smith*, the trial court explained the procedure as follows:

> The officers . . . proceed to the residence, knock on the door, and ask to be admitted inside. Thereafter gaining entry, the officers inform the person that they're investigating information that drugs are in the house. The officers then ask for permission to search and apparently are successful in many cases in getting the occupant's "apparent consent".

488 S.E.2d 210, 212 (N.C. 1997).

Under Ark. R. Crim. P. 11.1, an officer may conduct searches and make seizures without a search warrant or other color of authority if consent is given to the search or seizure. The consent for a warrantless search of an individual's home must be given freely and voluntarily, and the burden rests upon the State to prove by clear and positive evidence that consent was given freely and voluntarily. *Burdyshaw v. State*, 69 Ark. App. 243, 10 S.W.3d 918 (2000). On appeal, the reviewing court makes an independent determination based on the totality of the circumstances to determine if the State has met its burden. *Id.* Although we have stated that the State must prove that consent was not the product of duress or coercion, we have declined to say that mere acquiescence to lawful authority

is not consent. *See Evans v. State*, 33 Ark. App. 184, 804 S.W.2d 730 (1991), citing *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), and *Bumper v. North Carolina,* 391 U.S. 543 (1968).

Hadl concedes on appeal, as he did below, that he gave the officers permission to conduct the search and that he never revoked the consent. He argues, however, that the "knock and talk" search is inherently coercive, and that it therefore violates the Fourth and Fourteenth Amendments of the United States Constitution as well as Arkansas Rules of Criminal Procedure governing arrest. Hadl also points to the rule of *State v. Ferrier*, 960 P.2d 927 (Wash. 1998), that prior to entering a house, police officers who conduct a "knock and talk" procedure to gain consent for a warrantless search of a home must inform a person that he or she may lawfully refuse to consent and may revoke the consent at any time. However, the Arkansas Supreme Court has stated that knowledge of the right to refuse consent to search is not a requirement to prove the voluntariness of consent, and that a finding of voluntariness will be affirmed unless that finding is clearly against the preponderance of the evidence. *Chism v. State,* 312 Ark. 559, 853 S.W.2d 255 (1993).

Officer Chris Poe of the Jonesboro Police Department testified at both the suppression hearing and at trial. Poe stated that he and Officer Weaver, acting on information about a possible methamphetamine lab, went to a house on Willow Road that turned out to be William Hadl's home. Poe said that he initially went to the rear of the house and Weaver went to the front, but that Weaver called him to the front of the house after Hadl's son answered the door. Poe testified that he told Mr. Hadl about the officers' information, that Hadl denied having a lab at the house, that Poe asked Hadl for consent to search his house, and that Hadl assented and also gave permission for Poe to go to the back of the house. Poe stated that he spent at least an hour in the house, that he found in Mr. Hadl's bedroom marijuana seeds and drug paraphernalia, and that he found an HCL generator beside the back porch at the rear of the house. Both officers testified that items pertaining to methamphetamine were found outside.

Arkansas case law and rules of criminal procedure do not require police officers who gain consent for a warrantless search of a home to first inform a person that he or she may lawfully refuse to consent and may revoke the consent at any time. In the present case, Officer Poe testified that after he and Officer Weaver approached Hadl's house, Hadl's son consented to the officers' search of the house, and Hadl consented to further search of the

premises. The search resulted in seizure of items that led to the charges against Hadl and, ultimately, to his convictions. We find that the officers' testimony constitutes clear and positive evidence that consent was given freely and voluntarily, and was not the product of duress or coercion. Therefore, we affirm the trial court's denial of Hadl's motion to suppress the items that were found as a result of the warrantless search.

*Whether the trial court erred in refusing to suppress evidence because the prosecutor was unable to produce certain seized evidence*

At trial, the State introduced into evidence photographs of the seized items rather than the actual items that were seized. Hadl argues that his motion to suppress the photographs of the evidence should have been granted on the basis that the State destroyed the evidence. He argues that the items could have been subjected to fingerprint identification, and that such fingerprint evidence could have proved exculpatory if the fingerprints were found to belong to someone else. He concedes that the photographs accurately depict the items seized.

At the pretrial suppression hearing, the trial court ruled that Hadl could argue to the jury that fingerprints could have been taken as proof of who owned the items but that prints were not taken. At trial the court also ruled that Hadl's argument of prejudicial destruction of evidence could be made to the jury, and that the absence of items could be the subject of cross-examination. Officer J. P. French of the Jonesboro Police Department and the Second Judicial District Drug Task Force then testified that he took the photographs of the evidentiary items because the chemicals were considered to be hazardous waste. He testified that the hazardous-waste contractor was contacted after the items were tested at the state crime lab, and that the police department had no control of the items after the contractor seized them.

The Supreme Court held in *Brady v. Maryland*, 373 U.S. 83 (1963), that the prosecution's suppression of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. In *Strickler v. Greene*, 527 U.S. 263 (1999), the *Brady* holding was extended to encompass impeachment evidence as well as exculpatory evidence, and the duty to disclose was held to apply even in the absence of a request by the accused.

*Larimore v. State*, 341 Ark. 397, 17 S.W.3d 87 (2000). Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," and the rule encompasses evidence "known only to police investigators and not to the prosecutor." 341 Ark. at 404, 17 S.W.3d at 91 (quoting *Strickler, supra*).

Hadl states on appeal that he "feels that there is a reasonable probability" that the missing evidence "would have resulted in a different outcome" of his case. We do not view his bare allegation as rising to a reasonable probability that impeachment or exculpatory evidence would have been favorable to his defense. Thus, we find no merit in his contention that the trial court erred in refusing to suppress evidence because the prosecutor was unable to produce the seized items.

Affirmed.

JENNINGS, J., agrees.

GRIFFEN, J., concurs.

WENDELL L. GRIFFEN, Judge, concurring. I agree with the majority to affirm appellant's conviction. Nonetheless, I write separately to express my view that our law should require police officers conducting a "knock and talk" to inform individuals that they have a right to refuse or to revoke their consent to search.

The Fourth Amendment, which is applicable to the states through the due process clause of the Fourteenth Amendment, protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *See* U. S. Const. amend. IV. *See also Terry v. Ohio*, 392 U.S. 1 (1968). In a similar vein, article 2, section 15, of the Arkansas Constitution provides that "the right of the people of this State to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated."

As often stated, Fourth Amendment rights are personal and the primary focus of the amendment is on the protection of persons, not the protection of locations. *See Katz v. United States*, 389 U.S. 347 (1967). However, because individuals have a high expectation of privacy in their homes, our courts require voluntary consent absent other grounds to effectuate a warrantless search of the home. *See Payton v. New York*, 445 U.S. 573 (1979). Indeed, physical

intrusion into the privacy of a person's residence absent a warrant is the primary evil that the Fourth Amendment seeks to eradicate. *See United States v. Miller*, 933 F. Supp. 501 (M.D. N.C. 1996).

Although our appellate courts have not had the opportunity to extensively address "knock and talk," this procedure is recognized as a legitimate police method to obtain valid consent to search a residence. *See United States v. Powell*, 929 F. Supp. 231 (S.D.W.V. 1996). In a typical "knock and talk" situation, the police will receive information that drugs are within a residence. However, because the police do not have probable cause to obtain a warrant, they will approach the residence, knock on the door, and ask for permission to enter. Once inside, the officers will tell the resident that they are following up on information that drugs are inside the home. The officers will then ask the resident for permission to search the residence. *See, generally, State v. Smith*, 488 S.E.2d 210 (N.C. 1997).

Consent to conduct a search of a person's home without a warrant is a recognized exception to the presumption that searches and seizures inside a home without a warrant are unreasonable. *See United States v. Miller*, 933 F. Supp. 501 (1996) (M.D. N.C.) Whether a person is considered to have given voluntary consent is not contingent upon the person's being informed in advance of his right to refuse to give consent. *See United States v. Mendenhall*, 446 U.S. 544 (1980). However, whether a person had knowledge of the right to refuse consent is recognized as a factor to take into account when determining from the totality of the circumstances whether the person voluntarily consented to the search. *See Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Because the legitimacy of a "knock and talk" procedure hinges on whether the police gained voluntary consent to search the residence, the relatively few jurisdictions that have reviewed the appropriateness of this procedure have discussed consent.

In the seminal case of *State v. Ferrier*, 960 P.2d 927 (Wash. 1998), the Washington Supreme Court determined that police officers conducting a "knock and talk" procedure must inform a person that he may refuse consent, revoke consent, or limit the scope of the consent. In *Ferrier, supra*, the police went to Ferrier's residence to follow-up on information received by her son that Ferrier was conducting a marijuana grow operation at her home. Because the officers were unsure that the information was credible, they decided to conduct a "knock and talk." Four armed officers,

wearing raid jackets, knocked on Ferrier's door. After they identified themselves, Ferrier allowed the officers entry. The officers told Ferrier about the information they had obtained. They then asked Ferrier for consent to search the premises and asked her to sign a written consent form. However, the written form did not indicate that Ferrier had the right to refuse consent, and the officers admitted at trial that Ferrier was not told she had such a right. The *Ferrier* court noted that warrantless searches are presumptively invalid, and that Washington law provided additional protection against unlawful government intrusions. It then held that under the enhanced privacy expectation of the state constitution, the police violated Ferrier's right to privacy by failing to inform her that she had a right to refuse consent. *See Ferrier, supra.*

The Mississippi Supreme Court recently reviewed the issue of "knock and talk," and held that consent requires a knowledgeable waiver. *See Graves v. State*, 708 So.2d 858 (Miss. 1997). In other words, the defendant must know that he has a right to refuse to give consent, and must be cognizant of his rights in the premises.

As noted by appellant, "knock and talk" is a successful police tool because many individuals will not question the absence of a search warrant, either because they are unaware that the police must have a warrant to search the home absent exigent circumstances, or because they are "too stunned by the circumstances to make a reasoned decision about whether or not to consent to a warrantless search." *See Ferrier, supra.*

Under Arkansas law, police officers may search a residence without a warrant when the resident freely and voluntarily consents to the search. *See Burdyshaw v. State*, 69 Ark. App. 243, 10 S.W.3d 918 (2000). Although the State bears the burden of proving by clear and convincing evidence that the resident freely gave consent to search, the State does not bear the burden of proving that the resident knew that he was free to refuse consent in order for the consent to be deemed voluntary. *See id.* Regrettably, Arkansas law simply does not require that police inform a resident that he has a right to refuse to give consent and the right to revoke consent after a search begins. Thus, there is no guarantee that an individual who voluntarily consents to a warrantless search had the requisite knowledge to make an informed decision. Hopefully, our supreme court will remedy this shortcoming by holding that the State must prove that consent to a search has been knowingly and intelligently given.

Alton OVERTON *v.* Jason JONES

CA 00-642 45 S.W.3d 427

Court of Appeals of Arkansas
Division I
Opinion delivered June 6, 2001

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

*Gary J. Mitchusson, P.A.*, by: *Gary J. Mitchusson*, for appellee.

SAM BIRD, Judge. This case arises from a paternity determination and custody award by the Chancery Court of St. Francis County regarding the minor child Spencer Lewis Jones, who was born out of wedlock on December 23, 1998. His mother, Nicole Overton, was killed in a car accident on April 10, 1999. Appellant Alton Overton, who is Nicole's father and Spencer's maternal grandfather, appeals the chancery court order that awarded custody of the child to appellee Jason Jones after determining that Jones was his biological father. Overton contends that the trial court erred (1) in denying his motion to dismiss, based on improper venue and a lack of jurisdiction, and (2) in awarding custody to appellee Jones, because the child's interests would be best served by awarding custody to Overton. We hold that the St. Francis County Chancery Court was not the proper venue for matters relating to the paternity and custody of the minor child. Therefore, we reverse on the first point and vacate the trial court's orders. In view of this disposition, we find it unnecessary to address the merits of the second point.

It is helpful to set forth the factual and procedural history of this case before turning to the issues on appeal. On April 13, 1999, three days after Nicole Overton's death, Jason Jones filed a petition in St. Francis County Chancery Court seeking a determination that he was Jason's father and asking that custody be awarded to him. On April 29, Alton and his new wife, Mary, filed in Saline County Chancery Court a petition for guardianship, and an order awarding guardianship was entered on that date.

On May 6, Alton and Barbara Overton moved to dismiss the St. Francis County Chancery Court action, contending that the court did not have jurisdiction over the minor child, that St. Francis County was not the proper venue for the cause of action, and that the petition before the court failed to state facts upon which relief could be granted. They also contend that the Saline County Probate Court had assumed jurisdiction of the child and had appointed a guardian, that the minor child resided in Saline County, and that the best interests of the child required that the litigation take place in Saline County. On May 18, the St. Francis County Chancery Court denied the Overtons' motion to dismiss and conducted a paternity hearing, at which it considered the testimony of the parties and the results of a DNA test that had been performed before Nicole's death. In an order of June 24, 1999, the court found that Jason Jones was the father of the child. On June 25, the

Overtons filed a counter-petition alleging that Jason Jones was not a fit and proper person to have custody, and asking that Alton Overton be awarded custody. On September 30, the St. Francis County Chancery Court conducted a hearing to decide who should be awarded custody of the child. By order of December 13, the St. Francis County Chancery Court awarded custody to Jason Jones and visitation privileges to the Overtons.

*Whether the trial court erred in denying Alton Overton's motion to dismiss, based upon improper venue and lack of jurisdiction*

Venue and jurisdiction, though sometimes used interchangeably, are two distinct legal concepts. Venue refers to the geographic area, like a county, where an action is brought to trial. *Meny v. Norris*, 340 Ark. 418, 13 S.W.3d 143 (2000). Jurisdiction is the power of a court to decide cases and presupposes control over the subject matter and parties. *Id.*

Alton Overton contends that proper venue for the paternity and custody determinations relating to the child involved here was in Saline County, where the minor child resided, and that venue was improper in St. Francis County, where the father resided. Jason Jones contends that this issue should not be addressed because Overton did not raise his argument below. We disagree. Overton's motion to dismiss as abstracted in his brief, specifically states that St. Francis County was not the proper venue for the paternity and custody determinations, and that the minor child had resided in Saline County for his entire lifetime and continued to reside there. Additionally, the abstracted order by which the court denied Overton's motion to dismiss includes the finding that the court "has jurisdiction over the parties and cause of action and is the proper venue." From the allegations contained in the motion to dismiss and the court's finding of "proper venue" in the order denying the motion, we find that the issue of venue was properly raised below.

Venue of paternity actions shall be in the county in which the plaintiff resides or, *in cases involving a juvenile*, in the county in which the juvenile resides. Ark. Code Ann. § 9-10-102(c) (Supp. 1999) (emphasis added). As Overton points out, Spencer was first cared for at his home in Saline County by his mother; by his maternal step-grandmother, Mary J. Overton; and by his maternal grandparents, Alton and Barbara Overton. Furthermore, the Overtons continued to care for the child after his mother's death.

There is no dispute that the county of residence of Spencer Jones, the juvenile, was Saline County. Therefore, under the mandate of section 9-10-102(c), the proper venue for the paternity determination of Spencer Jones was in Saline County. Therefore, we reverse and vacate the St. Francis County Chancery Court order entered in this cause on June 24, 1999.

Arkansas Code Annotated section 9-10-113(b) (Repl. 1998) provides that a biological father who has established paternity in a court of competent jurisdiction may petition the chancery court, or other court of competent jurisdiction, *wherein the child resides*, for custody of the child (emphasis added). Thus it is equally clear that Saline County, and not St. Francis County, was the proper venue for the custody determination in this case. Therefore, we reverse and vacate the St. Francis County Chancery Court order entered in this cause on December 13, 1999.

The St. Francis County Chancery Court orders relating to the paternity and custody of Spencer Jones are reversed and vacated.

NEAL, J., concurs.

PITTMAN, J., agrees.

OLLY NEAL, Judge, concurring. I concur with the decision to reverse because venue for custody determinations lies exclusively in the county in which the child resides. I disagree, however, with the holding that Section 9-10-102(c) fixes venue of a paternity action involving a juvenile in the county in which the juvenile resides.

Section 9-10-102(c) provides, "Venue of paternity actions shall be in the county in which the plaintiff resides or, in cases involving a juvenile, in the county in which the juvenile resides." The use of the word "or" does not place limitation on venue to the county in which the juvenile resides; it would have used the word "but" instead of "or," allowing the statute to read, "Venue of paternity actions shall be in the county in which the plaintiff resides *but,* in cases involving a juvenile, in the county in which the juvenile resides."

It is not beyond the realm of logic that the legislature would allow venue of paternity action to lie in two counties. A prior statute allowed a man seeking to establish paternity to bring the action in either the county in which the mother resided or the

county in which the child resided. See Ark. Stat. Ann. 34-716 (Supp. 1981). *See also Fuller v. Robinson,* 279 Ark. 252, 650 S.W.2d 585 (1983).

Robert HUGHES *v.* STATE of Arkansas

CA CR 00-748 46 S.W.3d 538

Court of Appeals of Arkansas
Division II
Opinion delivered June 6, 2001

*Phillip A. McGough, P.A.*, by: *Phillip A. McGough*, for appellant.

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

LARRY D. VAUGHT, Judge. Appellant was arrested and charged with: 1) possession of a schedule II controlled substance — methamphetamine; 2) manufacture of a schedule II controlled substance — methamphetamine; and 3) possession of drug paraphernalia. He was convicted of possession of methamphetamine, attempted manufacture of methamphetamine, and possession of drug paraphernalia. Appellant's first point on appeal is that the trial court erred in admitting the alleged drug paraphernalia. We disagree and affirm appellant's paraphernalia conviction. Appellant also argues that the trial court erred in allowing the State to amend its information that originally charged manufacture of a controlled substance to attempted manufacture a controlled substance after a directed verdict on the original charge had been entered in his favor. We agree and reverse appellant's conviction of attempted manufacture.

Appellant was arrested after an anonymous call was placed to the Greene County Sheriff's Office, indicating that there were two

suspicious men near a wooded area in Greene County. Appellant and his co-defendant were observed by police leaving a wooded area and getting into a green Geo Metro. The appellant was observed driving the car and the police pulled him over in a driveway near the location where they first entered the vehicle. Both appellant and his co-defendant were asked to produce identification. After appellant presented his identification, the officer determined he had multiple outstanding city warrants and a parole revocation warrant. The vehicle registration indicated the vehicle belonged to Wayne Wilson. Appellant was then arrested by Sheriff Langston.

Sergeant Toby Carpenter arrived at the scene to assist the arresting officer. When Carpenter arrived at the scene, appellant was in the Sheriff's pickup and the co-defendant was standing near the Geo Metro. Prior to the car being towed, Carpenter inventoried the vehicle. The inventory indicated the following items had been recovered from the vehicle: a black garden hose, burnt tinfoil, two bottles of pseudoephedrine, moist coffee filters, and a white substance (later identified as methamphetamine). After taking the co-defendant to jail, Carpenter returned to an area just south of the scene of the arrest. Photographs taken by Carpenter showed a trash bag, which was found partially covered by brush and trees, that contained an altered flashlight, a drain opener, salt, coffee filters, several baggies, a soda bottle lid, a glass measuring cup, and several muddy shoe prints. The area also contained two bottles of anhydrous ammonia, four punched cans of starter fluid, and an HCI generator.

At trial, appellant moved for a directed verdict on all three counts. The trial court denied his motion as to the counts related to possession of a controlled substance and possession of drug paraphernalia, but granted the directed verdict on the manufacture count. After granting the directed verdict on the manufacture, the trial court allowed the State to amend the information to attempted manufacture, over appellant's double-jeopardy objection. Appellant was convicted of: 1) possession of methamphetamine and sentenced to a term of ten years; 2) possession of drug paraphernalia and sentenced to a term of ten years; and 3) attempted manufacture methamphetamine and sentenced to a term of thirty years. All sentences were ordered to run concurrently. Appellant does not challenge his possession-of-methamphetamine conviction on appeal.

*Sufficiency of the Evidence*

On appeal, Hughes's first point heading challenges the admissibility of the evidence in support of possession of drug paraphernalia; however, the actual argument contained in the appeal has elements of a sufficiency of the evidence argument. Additionally, appellant has met the minimum threshold of citing authority or convincing argument in support of the point. The argument section of appellant's brief contains phrases like "no evidence presented"; "the jury had to leap to the conclusion"; "was there any proof"; and "the State failed to prove." Also, the State concedes in its brief that much of the authority appellant cites in his first point of appeal goes to sufficiency of the evidence. While it is true that the appellant's sufficiency of the evidence argument could have been offered in a much more straight-forward manner, the argument was preserved for appeal and will be considered by this court.

A directed-verdict motion is treated as a challenge to the sufficiency of the evidence and will be considered before all other arguments on appeal. *Burmingham v. State*, 342 Ark. 95, 27 S.W.3d 351 (2000). When reviewing a denial of a directed verdict, we look at the evidence in the light most favorable to the State, considering only the evidence that supports the judgment or verdict. *Darrough v. State*, 330 Ark. 808, 810, 957 S.W.2d 707, 708 (1997); *Killian v. State*, 60 Ark. App. 127, 128, 959 S.W.2d 432, 433 (1998). We will affirm if there is substantial evidence to support a verdict. *Ryan v. State*, 30 Ark. App. 196, 786 S.W.2d 835 (1990). Evidence is sufficient to support a verdict if it is forceful enough to compel a conclusion one way or another. *Hall v. State*, 315 Ark. 385, 868 S.W.2d 453 (1993). Where the evidence is circumstantial, the appellate court must consider whether the evidence was sufficient to exclude all other reasonable hypotheses. *Carter v. State*, 324 Ark. 395, 398, 921 S.W.2d 924, 925 (1996).

After appellant's arrest, the Geo Metro belonging to Wayne Wilson was inventoried. A black rubber hose with blue residue on one end was found in the "backseat or back portion" of the vehicle.[1] The hose was introduced into evidence over appellant's objection. A piece of burnt aluminum foil was also introduced over appellant's objection. The officer that conducted the inventory of

[1] The officer testified that it may have been on the floorboard of the vehicle, but that it was in the back of the vehicle.

the vehicle testified that the tinfoil was beside the passenger's seat, in the console of the vehicle.[2] The testimony indicates that both of these items were in plain view. Also, damp coffee filters containing a "large amount of moist white powder" were found under the driver's seat and were admitted into evidence without objection. The coffee filters and the white powder (subsequently identified as methamphetamine) both smelled strongly of ether. Finally, a bottle of pseudoephedrine was found under the driver's seat. Under the passenger's seat the inventory revealed another bottle of pseudoephedrine and a police scanner.

A report written by Toby Carpenter, regarding what the arresting officer had observed at the time of arrest was introduced into evidence, without a hearsay objection. The report placed appellant in the driver's seat of the vehicle registered to Wayne Wilson. The report, authored by Toby Carpenter, recounted what Sheriff Langston observed when he responded to a call regarding two suspicious men.[3] Specifically, Carpenter's statement said, "Langston asked both subjects for their ID and learned that the driver, Robert Hughes, had multiple warrants . . . ."

No drug paraphernalia was found on the appellant's person at the time of his arrest; therefore, we must consider whether appellant had constructive possession of the various items of drug paraphernalia found in the Geo Metro.

Constructive possession may be imputed when the contraband is found in a place that is either accessible to the defendant and subject to his exclusive dominion and control, or subject to the joint dominion and control by the defendant and another. *Cary v. State*, 259 Ark. 510, 534 S.W.2d 230 (1976). In order to prove constructive possession, the State must establish beyond a reasonable doubt that 1) the defendant exercised care, control, and management over the contraband, and 2) that the accused knew the matter possessed was contraband. *See Fultz v. State*, 333 Ark. 586, 972 S.W.2d 222 (1998); *Darrough v. State*, 322 Ark. 251, 908 S.W.2d 325 (1995). In *Mings v. State*, 318 Ark. 201, 884 S.W.2d 596 (1994) the supreme court outlined a five-part analysis to determine if constructive possession had been established:

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[2] The officer later testified that the tinfoil was "between the passenger seat and the console."

[3] Interestingly, Langston did not testify at trial. While Carpenter's statement regarding what Langston observed is clearly hearsay, no objection was made by appellant contesting the introduction of this statement below.

> It is not necessary for the State to prove literal physical possession of drugs in order to prove possession. *Osborne v. State*, 278 Ark. 45, 643 S.W.2d 251 (1982). Possession of drugs can be proved by constructive possession. *Littlepage v. State*, 314 Ark. 361, 863 S.W.2d 276 (1993). Constructive possession can be implied when the drugs are in the joint control of the accused and another. However, joint occupancy of a vehicle, standing alone, is not sufficient to establish possession or joint possession. There must be some other factor linking the accused to the drugs. *Osborne*, 278 Ark. at 50, 643 S.W.2d at 253. Other factors to be considered in cases involving automobiles occupied by more than one person are: (1) whether the contraband is in plain view; (2) whether the contraband is found with the accused's personal effects; (3) whether it is found on the same side of the car seat as the accused was sitting or in near proximity to it; (4) whether the accused is the owner of the automobile, or exercises dominion and control over it; and (5) whether the accused acted suspiciously before or during the arrest. *Plotts v. State*, 297 Ark. 66, 69, 759 S.W.2d 793, 795 (1988).

In considering if sufficient evidence exists to support a charge of possession of the drug paraphernalia, we first note that appellant was placed in the driver's seat of the vehicle by Carpenter's report. Second, moist coffee filters and the methamphetamine located under the driver's seat were admitted into evidence without objection. Third, a bottle of pseudoephedrine was found under the driver's seat and was admitted into evidence without objection. Fourth, the hose and tinfoil were in plain view and were admitted into evidence and must be considered (even if erroneously admitted) in a sufficiency review. Fifth, Carpenter testified that the car smelled of ether. Sixth, Carpenter testified that the vehicle belonged to a person that was related to appellant. Finally, Carpenter testified that appellant stated his reason for being in the woods was that he would receive "approximately ten grams of meth for helping them cook."

Based on this evidence, we conclude that the State offered sufficient evidence to support the charge of possession of drug paraphernalia.

*Admission of Evidence*

Appellant also argues that the evidence, consisting of a black rubber hose and a sheet of burnt tinfoil that was discovered in the

vehicle and introduced, over appellant's objection, is not relevant because no foundation connecting appellant to the vehicle had been laid at the time the information was introduced.

The State correctly cites *Dansby v. State*, 338 Ark. 697, 1 S.W.3d. 403 (1999), for the proposition that a decision whether to admit relevant evidence rests in the sound discretion of the trial court and that decision will not be disturbed absent an abuse of discretion. Additionally, "relevant evidence" is defined as "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.

Appellant argues that the trial court erred in allowing the rubber hose and the burnt tinfoil to be introduced because the items were found in a vehicle that did not belong to appellant and there was no evidence introduced *at the time* the questionable items were introduced connecting appellant to the vehicle. While the Carpenter report (which is the only evidence placing appellant in the driver's seat of the Geo Metro) had not been introduced into evidence when the items were offered, the evidence is clearly relevant to the charge of possession of drug paraphernalia, and the State, albeit later in the testimony, did establish a proper foundation for its admission. The trial court's decision to allow the rubber hose and the burnt tinfoil to be introduced into evidence was not an abuse of discretion.

*Double Jeopardy*

The trial court directed a verdict in favor of appellant on the manufacture of a controlled substance (a class Y felony) and then allowed the State to amend the information to attempt to manufacture methamphetamine (a class A felony). The State argues that appellant failed to cite any authority for this portion of his argument and it should not be considered on appeal. In the alternative the State argues that the trial court's action is proper since attempt to manufacture is a lesser-included offense and the original charge was not yet submitted to the jury.

Appellant argues on appeal "that when the greater charge of manufacturing was directed by the Court, the charge had gone away." This is in essence a "double-jeopardy" argument. The

proper objections were made below, and the double-jeopardy argument that appellant offered below is included in the abstract. While the State is correct that appellant presents no authority for the proposition that double jeopardy prevents the trial court from allowing the information to be amended after a verdict has been directed, appellant does, however, present convincing argument in support of his position which will allow appellate review. *See Williams v. State*, 325 Ark. 432, 930 S.W.2d 297 (1996).

We need look no further than *Hanner v. State*, 41 Ark. App. 8, 847 S.W.2d 43 (1993), to dispose of this issue. Hanner was charged with two counts of rape. At trial, following the conclusion of the State's case, Hanner moved for a directed verdict of an acquittal with respect to one of the charges of rape. The trial court granted the motion. The State conceded that the evidence was insufficient to support that charge, but asked that the jury be instructed on first-degree sexual abuse. The court allowed the State to amend the information, over the double-jeopardy objection of Hanner. On appeal, this court held that after a directed-verdict motion is granted "the State bears the burden to demonstrate that it will rely on conduct other than that for which the defendant has already been prosecuted." *Hanner*, 41 Ark. App. at 10, 847 S.W.2d at 44.

In the case at bar, the State has failed to carry its burden. No new evidence was introduced, no new trial was requested, instead the information was merely amended. Once the trial court entered a directed verdict in favor of appellant on the charge of manufacture of a controlled substance, any new charge, relying on the same evidence, is barred by double jeopardy.

The appellant's possession-of-drug-paraphernalia conviction is affirmed; the appellant's attempted-manufacture conviction is reversed.

Affirmed in part; reversed in part.

GRIFFEN, J., agrees.

ROAF, J., concurs.

ANDREE LAYTON ROAF, Judge, concurring. I concur in the result reached in this case, but do not agree that we should address Hughes's first point on appeal as a sufficiency argument. Hughes's argument on appeal is "that the trial court erred in

allowing the introduction of certain physical evidence that was not directly tied to the appellant." Moreover, Hughes's abstract is not adequate for us to consider a sufficiency argument. However, I concur in the discussion and disposition of the evidentiary aspect of this argument and agree that we should affirm on this point.

## SUPPLEMENTAL OPINION ON DENIAL OF REHEARING

CA CR 00-748 46 SW3d 538

Court of Appeals of Arkansas
Division III
Opinion delivered October 3, 2001

SAM BIRD, Judge, concurring. In *Hughes v. State*, 74 Ark. App. 126, 46 S.W.3d 538 (2001), handed down on June 6, 2001, this court reversed the trial court's grant of leave to the State to amend its information to include a charge of attempt to manufacture a controlled substance. This amendment was subsequent to the trial court's grant of a directed verdict in favor of the defendant on the charge of manufacturing a controlled substance. We reversed on double-jeopardy grounds.

The court relied on *Hanner v. State*, 41 Ark. App. 8, 847 S.W.2d 43 (1993), and held the State to the burden of showing that the new charge would not be proven with the same conduct as the charge on which the trial court granted a directed verdict. *Hughes v. State*, *supra*. The same-conduct test was articulated by the United States Supreme Court in *Grady v. Corbin*, 495 U.S. 508 (1990). However, in *United States v. Dixon*, 509 U.S. 688 (1993), the United States Supreme Court abandoned the same-conduct test, returning to the *Blockburger* same-elements test as the sole constitutional test for double jeopardy. *Blockburger v. United States*, 284 U.S. 299 (1932). This court has acknowledged the return to *Blockburger* as the sole constitutional test for double jeopardy. *Penn v. State*, 73 Ark. App. 424, 44 S.W.3d 746 (2001); *Beasley v. State*, 47 Ark. App. 92, 885 S.W.2d 906 (1994).

I concur in the denial of the State's petition for rehearing because under either the same-conduct or the same-elements test, the charge of attempt to manufacture a controlled substance would be barred by double jeopardy in this case. However, I write separately to express my belief that the State was held to the wrong burden because of the court's application of the same-conduct test.

Nathanel WAGNER *v.* Angelique WAGNER

CA 00-1244 45 S.W.3d 852

Court of Appeals of Arkansas
Division I
Opinion delivered June 6, 2001

*King Benson*, for appellant.

*Mooney Law Firm, P.A.*, by: *Christopher R. Thyer*, for appellee.

TERRY CRABTREE, Judge. The appellant, Nathanael Wagner, appeals from an order of the Craighead County Chancery Court granting the appellee, Angelique Wagner, permission to move from Jonesboro, Arkansas, to Naples, Florida, with the parties' minor child. On appeal, appellant alleges that the chancellor erred in granting appellee's motion to relocate with their minor child to Naples, Florida. We affirm.

On July 18, 1996, the parties were divorced by decree of the Craighead County Chancery Court. Appellee was granted custody of the parties' minor child, Sierra Danielle Wagner, born on September 23, 1991, during the parties' marriage. Appellant was awarded visitation and ordered to pay child support. On July 31, 1998, appellant filed for a modification of child custody. On July 12, 1999, an agreed order was entered which granted appellant

additional visitation by allowing him one weeknight of overnight visitation. Custody remained with appellee.

On October 12, 1999, appellee filed a motion requesting permission to relocate with the minor child to Naples, Florida. Appellee stated in her petition that she had a job opportunity in Florida, and as such it was in the best interest of the child to allow the relocation. Appellant answered the motion and objected to appellee's proposed relocation. Appellant stated that appellee's desire to relocate was motivated by her desire to limit his visitation. On October 28, 1999, appellant filed a petition to change custody. On November 9, 1999, appellee filed an answer to appellant's petition to change custody, and on November 19, 1999, appellee filed an amended answer, which affirmatively requested an increase in child support.

On August 15, 2000, an order was entered in which the chancellor ruled as follows: 1) he granted appellee's motion to relocate with the parties' minor child to Naples, Florida, and awarded appellant visitation with the child each school spring break, one-half of the Christmas break, and extended summer visitation, including having the child every summer from one week after school is out until one week before school commences with the exception that appellee is entitled to one week during this time for vacation, and all other reasonable visitation; 2) he denied appellant's petition to change custody; 3) he granted appellee's motion to increase child support; and 4) he granted appellee attorney's fees in the amount of $750 in defending the change-of-custody petition. It is from this order that appellant brings this appeal.

■■ In chancery cases we review the case de novo, 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). In child-custody cases we give special deference to the chancellor's position to evaluate what is in the best interests of the child. *Thompson v. Thompson*, 63 Ark. App. 89, 974 S.W.2d 494 (1998). The best interests of the child remains the ultimate objective in resolving child custody and related matters. *Staab v. Hurst*, 44 Ark. App. 128, 868 S.W.2d 517 (1994).

In *Staab v. Hurst, supra*, this court set forth five factors that should be considered in determining whether to allow a custodial parent to move from the state of the noncustodial parent. These factors are:

> (1) the prospective advantages of the move in terms of its likely capacity for improving the general quality of life for both the custodial parent and the children; (2) the integrity of the motives of the custodial parent in seeking the move in order to determine whether the removal is inspired primarily by the desire to defeat or frustrate visitation by the non-custodial parent; (3) whether the custodial parent is likely to comply with substitute visitation orders; (4) the integrity of the non-custodial parent's motives in resisting the removal; and (5) whether, if removal is allowed, there will be a realistic opportunity for visitation in lieu of the weekly pattern which can provide an adequate basis for preserving and fostering the parent relationship with the non-custodial parent.

*Id.* Before a chancellor is to consider the *Staab* factors, the custodial parent bears the threshold burden to prove some real advantage to the children and himself or herself in the move. *Wilson v. Wilson*, 67 Ark. App. 48, 991 S.W.2d 48 (1999).

On the threshold question, appellant argues that appellee failed to prove any real advantage to their minor child for appellee to move to Florida. Appellee testified that she wants to move to Naples, Florida, because she has been offered a job as manager of a dry-cleaning business owned by her mother. This job would pay her ten dollars per hour, almost doubling her current income. Appellee also testified that she intends to enroll at Edison Community College in Naples, Florida, where she would take courses to become a dental hygienist. We hold that the fact that appellee would have a job making almost twice as much income as she is currently making taken together with the educational opportunity is enough to show that the chancellor was not clearly erroneous in finding that the move would have a real advantage for appellee and the child.

As for the first *Staab* factor, appellee, testified that along with almost doubling her income, the job in Florida would allow her more time to spend with her child. Appellee, or appellee's mother, would care for the child during after-school hours, thus the child will no longer have to go to day-care. Appellee's mother

testified that appellee would be given bonuses based on performance, and would be given the opportunity to own the dry-cleaning business. Appellee's mother has further offered to arrange appellee's work schedule around appellee's school, and the child's school, allowing appellee the opportunity to attend college, and to spend more time with her child. There was ample evidence supporting the chancellor's conclusion that the relocation would be a resulting advantage, and that both appellee's life, and that of the child, would be improved with the move.

As for the second factor, appellant argues that the chancellor erred in his finding that the motives of the appellee were not inspired by the desire to defeat or frustrate appellant's visitation. Appellant points to the fact that appellee filed her motion to relocate three months after an order was entered expanding his visitation to include one weeknight of overnight visitation. Appellant also points out that appellee testified that she wants to move to Florida to get away from appellant. We cannot say that the parties' past problems with visitation are alone dispositive of the questions of the integrity of appellee's motives for seeking the move. *See Friedrich v. Bevis*, 69 Ark. App. 56, 9 S.W.3d 556 (2000). As such we must defer to the superior position of the chancellor to evaluate the witnesses and their testimony. *See id.* Thus, we find no error.

As for the third factor, the chancellor found that appellee will likely comply with the substitute visitation order. There was no evidence that appellee has ever interfered with any court orders, including visitation orders.

As for the fourth factor, the chancellor found that appellant's motives in resisting the move were reasonable and not inspired by any desire to prevent appellee from progressing or enjoying an improvement in her quality of life. Appellant stated that he opposes the child moving to Florida, because the child has always lived in Jonesboro, the child has always lived close to him and his family, and because the move would separate the child from him. As such, we find no error with respect to this factor.

With respect to the fifth factor, the chancellor properly awarded appellant extended summer visitation, one-half Christmas visitation, spring break visitation, and all other reasonable visitation. He further ordered that the costs of transportation be shared equally between the parties for the specific visitation periods noted, with appellant being responsible for all costs incurred in

exercising other visitation, and appellee being responsible for transportation should she exercise the one week vacation period during the summer. Giving due regard to the factors presented in *Staab*, we find that the chancellor's decision to allow appellee to move with the parties' child to Florida was not clearly against the preponderance of the evidence.

Affirmed.

STROUD, C.J., and HART, J., agree.

James W. BERRY *v.* STATE of Arkansas

CA CR 00-1004 45 S.W.3d 435

Court of Appeals of Arkansas
Division IV
Opinion delivered June 6, 2001

*Jim Petty* and *Patrick J. Benca*, for appellant.

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

KAREN R. BAKER, Judge. The appellant, James W. Berry, was convicted of felony driving while intoxicated in violation of Ark. Code Ann. § 5-65-103 (Repl. 1997). At the conclusion of a bench trial, the circuit court sentenced appellant to twelve months in the Arkansas Department of Correction, fined him $1,000, required him to pay court costs of $300, and suspended his driver's license for four years. Appellant raises two points on appeal. First, appellant argues that Officer King of the Pangburn Police Department was not authorized to detain him outside the officer's jurisdiction and doing so amounted to an illegal arrest. Second, appellant argues that enhancing punishment for the offense of driving under the influence of intoxicants by reference to prior convictions before the effective date of the enhancement statute, as applied to appellant's facts, violates the constitutional prohibition against *ex post facto* law. We affirm.

On September 11, 1999, Officer Robbie King of the Pangburn Police Department was traveling on State Highway 16, returning to his department in Pangburn. Approximately one mile out of Searcy, and ten to twelve miles outside of Pangburn, Officer King arrived upon an accident. A car, which had apparently lost control, struck a tree, and was in the ditch on the side of the road. When Officer King stopped to investigate, he realized it was his sister's car, and he immediately called for assistance from the White County Sheriff's Department. Deputy John Smith of the White County Sheriff's Department arrived, and he called dispatch to send Trooper Ray Ervin of the Arkansas State Police. A wrecker was called to remove the vehicle. During removal of the vehicle, the wrecker completely blocked the roadway. Trooper Ervin asked Deputy Smith and Officer King to assist with traffic control by setting up a temporary road block at each end of the accident scene while the roadway was obstructed. As appellant approached the road block, Officer King waved his arms and yelled for appellant to stop. When appellant finally stopped the vehicle, Officer King advised him of the road block.

During the encounter, Officer King noticed the smell of intoxicants and saw a beer can on the passenger seat. Officer King detained appellant and radioed Deputy Smith to inform him of the situation. Deputy Smith asked Officer King to hold the driver until he could get to that end of the accident and requested that Officer King check his sobriety. Upon noticing appellant's bloodshot eyes and the manner in which he was staggering, Officer King performed a breath test on appellant and waited for Deputy Smith. Officer King's involvement with appellant ended when Deputy Smith arrived and assumed responsibility. After the wrecker cleared the roadway and another wrecker service picked up appellant's car, Officer King returned to Pangburn. Officer King testified that his department had a written policy allowing officers to assist other departments outside Pangburn's jurisdiction with a supervisor's authorization. Officer King further testified that he was the supervisor on duty that evening.

Appellant was charged with driving while intoxicated in violation of Ark. Code Ann. § 5-65-103. The State proved that appellant had three prior DWI convictions on November 19, 1994; April 16, 1995; and August 29, 1999, to enhance the punishment for the September 11, 1999, DWI offense, making it a felony. As a result, appellant was convicted of felony driving while intoxicated on June 12, 2000.

■ ■ It is unclear what remedy appellant seeks on appeal. Appellant merely requests that this court find that "the detention of the appellant by Officer King amounted to an illegal arrest or, in the alternative, that Act 1077 as applied to the appellant violated the *ex post facto* law." Even assuming that appellant is correct in that he was illegally arrested, an invalid arrest may call for the suppression of a confession or other evidence, but it does not discharge a defendant from the responsibility of the offense. *Urquhart v. State*, 30 Ark. App. 63, 782 S.W.2d 591 (1990) (citing *Clark v. State*, 26 Ark. App. 268, 764 S.W.2d 458 (1989)), *see also Lamb v. State*, 21 Ark. App. 111, 730 S.W.2d 252 (1987) (affirming defendant's conviction of driving while intoxicated where an officer had the authority to issue a citation even though outside her jurisdiction). Appellant makes no argument to this court which would support overturning his conviction based upon an allegedly illegal arrest. Thus, we do not reach the merits of appellant's first point because appellant failed to request any form of proper relief. *Cf. Hall v. State*, 314 Ark. 402, 862 S.W.2d 268 (1993) (affirming appellant's conviction where appellant improperly requested a mistrial rather than admonition to the jury).

Appellant's second point is equally unavailing. Appellant argues that Ark. Code Ann. § 5-65-111(b)(3) (Supp. 1999), which allows the State to use prior DWI convictions within five years of a subsequent DWI arrest to enhance the penalty, as applied to appellant's facts, violates the prohibition against *ex post facto* law. For enhancement purposes, the prior law only allowed the State to consider DWI convictions from the past three years. Ark. Code Ann. § 5-65-111(b)(3) (Repl. 1997). The current revision of Ark. Code Ann. § 5-65-111(b)(3) allows the State to consider DWI convictions over the previous five years. Pursuant to the statute, the State used appellant's prior convictions on November 19, 1994; April 16, 1995; and August 29, 1999, to enhance the punishment for the September 11, 1999, DWI offense. The prior convictions resulted in a felony for appellant's fourth offense of driving while intoxicated.

Appellant contends that the State is attempting to revive the previous convictions of November 19, 1994, and April 16, 1995, and that they had expired under the old law and cannot be revived or brought back to life to be used against appellant by the State once these convictions were gone. However, our supreme court has addressed a similar issue in *Sims v. State*, 262 Ark. 288, 556 S.W.2d 141 (1977). In *Sims*, the court held that enhancement of punishment for the offense of driving while under the influence of intoxicants by reference to prior convictions occurring before the sentence enhancement statute was effective did not involve prohibited application of *ex post facto* law. *Id.* In *Sims*, the defendant had been convicted of DWI on July 9, 1974, and November 2, 1974. *Id.* at 288, 262 S.W.2d at 141-42. He was charged with DWI again on March 26, 1976, and pursuant to Act 931 of 1975, he was charged as a third-time violator. *Id.* The defendant argued that because the two prior offenses were committed before the effective date of the Act, enhancing the penalty was an *ex post facto* law as to him. *Id.* at 142, 262 S.W.2d at 289. The court rejected the argument, noting that the offense for which he was being charged occurred after the effective date of the Act and that the Act gave notice that any future offense would subject offenders to increased penalties. *Id.*

The same is true in the case at hand. Appellant was charged with his fourth DWI on September 11, 1999. The effective date of the amendment to the statute was July 30, 1999. Therefore, appellant had notice that any future offense would subject him to increased penalties, and the enhancement of penalties in this case for appellant's fourth DWI offense did not violate the prohibition against *ex post facto* law.

Affirmed.

ROBBINS and VAUGHT, JJ., agree.

CORAN AUTO SALES *v.* Peter Scott HARRIS

CA 00-1058 45 S.W.3d 856

Court of Appeals of Arkansas
Division II
Opinion delivered June 6, 2001

*McNutt Law Firm*, by: *Mona J. McNutt*, for appellant.

*George H. Stephens, II*, for appellee.

ANDREE LAYTON ROAF, Judge. Coran Auto Sales ("Coran") appeals the circuit court's award of a judgment for $4,660 in a bench trial. Appellee, Peter Scott Harris, successfully sued Coran for fraud in municipal court, alleging that Coran sold him a vehicle with an incompatible replacement engine, and had told him the engines were the same. On *de novo* appeal, the circuit court awarded judgment to Harris, but did so on the basis of revocation of acceptance. On appeal, Coran argues that the circuit court erred because revocation of acceptance was neither pled nor proven, and by awarding Harris the full purchase price while

allowing him to also retain the vehicle. We agree that the trial court erred in finding that there was a revocation of acceptance and reverse and dismiss.

On October 28, 1997, Scott Harris purchased a 1991 Mitsubishi Eclipse from Coran Auto Sales for $4,950. Coran had had the engine replaced with an engine from a 1996 Hyundai Sonata. At trial, Harris and his father, David Harris, both testified that Richard Coran, the owner of Coran Auto Sales, told them that the engine had been replaced. David Harris stated that when he asked Coran if the engine was compatible, Coran said, "You bet, they are the same engine." David stated that he was originally told that the new engine had a ninety-day warranty, but when they were signing the papers to purchase the car, Coran told them he had the engine too long on the lot, so the warranty had expired. Scott Harris purchased an extended warranty at Coran's suggestion.

Approximately twenty-eight days later, Harris began experiencing problems with the car. Harris testified that he contacted Coran, who told him to contact the company that issued the warranty. When the warranty company did not provide coverage, Harris again told Coran he was having problems. Coran told him to go to Conway Imports where the engine had been installed. David Harris said he went with Harris to Conway Imports and were told that they did not honor any kind of warranty. Approximately six weeks after he purchased the car, Harris took it to Larry Reynolds, a mechanic at L&L Auto Service.

Reynolds testified that he ran a computer diagnostic check that discovered electronic problems with the sensors as a result of an incompatible engine, and that eventually, the computer system would be ruined if the engine was not replaced. Though the car was drivable, Reynolds testified that it would be very difficult to drive because it was getting too much fuel. Reynolds further testified that he did not think that Coran "would be out of line to rely on their (Conway Imports) representations in regard to foreign car parts and motors."

Fred Spikes, the Conway Imports mechanic who installed the replacement engine, testified that when he installed the motor, he changed the sensors on the engine, and the car ran "fine." He admitted that he represented under oath, on January 27, 1998, that the engine was compatible with the car and then said, "[s]ometimes it will work out, sometimes it won't." He stated if he was brought an engine that would not work appropriately in a car, he would

normally notify the customer, and he did not notify Coran that there was a problem.

Coran testified that neither Harris nor his father inquired about the compatibility of the engine when Harris bought the car. Coran stated the only problem Harris had with the car was with two tires, which Coran replaced. He stated Conway Imports found an engine for the car, that he paid $1350 for it and that he relied on Conway Imports' representation that the engine was compatible because he was not a mechanic. Coran stated he thought Conway Imports should be the party in court because he sold the car "as is" to Harris. Coran also said that he gave Harris all the paperwork on the engine when he sold him the car. Coran stated that he did not know the nature of the problems with the car until the small-claims court case, and Daniel Harris also testified that they did not advise Coran that the engine was incompatible.

At the close of Harris's case, Coran moved for a directed verdict arguing Harris had not proven fraud. Harris's counsel responded that Harris relied on statements Coran made about the engine and Coran breached the implied warranty of merchantability. The trial court stated that other parties needed to be brought into the lawsuit and that was a problem when people represent themselves in small-claims cases. The parties agreed to continue the case, however, no additional parties were added. The trial court ultimately awarded judgment to Harris and stated in a letter opinion:

> It is my conclusion that Mr. Harris should prevail on this Complaint against Coran Auto Sales. My reasons for that finding are that Mr. Coran directed that a new engine be placed into the vehicle. He sold it as a vehicle with a new engine. However, it is clear from the testimony that the engine which was installed in the vehicle lacked the appropriate wiring harness and other accessories to make it operate in a proper manner. The case law is clear that a automobile dealer is responsible for the product which he sells. See specifically, *Currier v. Spencer*, 299 Ark. 182 (1989), *O'Neal Ford, Inc. v. Early*, 13 Ark. App. 189 (1985), and *Union Motors, Inc. v. Phillips*, 241 Ark. 857 (1967).
>
> These cases are replete with language indicating the responsibility of the dealer even in spite of contractual attempts to negate any warranties on a claim of revocation of acceptance. It is my conclusion that revocation for acceptance should be granted and

the plaintiff restored the purchase price of the automobile plus the costs of this action.

The standard of review in civil cases where the trial judge, rather than a jury, sits as trier of fact is whether the judge's findings were clearly erroneous or clearly against preponderance of evidence. *Schueck v. Burris*, 330 Ark. 780, 957 S.W.2d 702 (1997). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Wade v. Arkansas Dep't of Human Servs.*, 337 Ark. 353, 990 S.W.2d 509 (1999).

Coran argues that the trial court committed error in finding revocation of acceptance because Harris only pled fraud in his complaint. Coran asserts this amounted to unfair surprise as he did not have notice that Harris was claiming revocation of acceptance. In his small-claims complaint, Harris alleged fraud, and the facts he stated in support of the claim were that he had problems with the engine because it was not compatible, that Coran said the engine was compatible, and the warranty he purchased from Coran did not cover the engine problems. There were no further pleadings filed in circuit court, and Harris did not amend his complaint.

Arkansas Rule of Civil Procedure 8(a) provides that a pleading "shall contain (1) a statement in ordinary and concise language of facts showing that the court has jurisdiction of the claim and is the proper venue and that the pleader is entitled to relief, and (2) a demand for the relief to which the pleader considers himself entitled." In addition, it is well recognized that pleadings are to be liberally construed and are sufficient if they advise a party of its obligations and allege a breach of them. *Deitsch v. Tillery,* 309 Ark. 401, 405, 833 S.W.2d 760 (1992). This court has held that, although pleadings are required so that each party will know the issues to be tried and be prepared to offer his proof, Rule 15(b) of the Arkansas Rules of Civil Procedure provides that issues not raised in the pleadings but tried by express or implied consent of the parties shall be treated in all respects as if they had been pled. *In re Estate of Tucker*, 46 Ark. App. 322, 881 S.W.2d 226 (1994). However, this court 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 Coran did not expressly consent to litigating the issue of revocation of acceptance, the basis for the trial

court's judgment. Further, the small-claims complaint did not advise Coran of any claim other than fraud.

Arkansas Code Annotated section 4-2-608 (Repl. 1991) provides:

> (1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it:
>
> (a) On the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or
>
> (b) Without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.
>
> (2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.
>
> (3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

Here, while Harris did present testimony that the car was nonconforming, he presented no testimony that he revoked his acceptance of the car. In fact, none of the abstracted testimony establishes that Harris attempted to revoke acceptance of the car. The only evidence presented about contacts that Harris had with Coran after he purchased the car was that Harris and his father called Coran to tell him the engine did not work properly and attempted unsuccessfully to utilize the extended warranty purchased by Harris to address the problems. In the record before us, the issue of revocation of acceptance was neither pled, tried by express or implied consent of the parties, nor proven by the evidence, and the trial court erred in awarding judgment on this basis.

Harris asks us, alternatively, to affirm the trial court's judgment based on the fraud or misrepresentation theory that was pled. However, Harris is asking for affirmative relief. The trial court's letter opinion is silent in regard to this cause of action. Harris did not request further findings from the trial court on the issue and did not file a contingent cross-appeal should this court reverse on direct appeal. Consequently, we cannot address this argument. *See Schrader v. Bell*, 301 Ark. 38, 781 S.W.2d 466 (1989). Although this court can affirm a trial court's ruling if it reaches the right result for the wrong reason, *Marine Servs. Unlimited, Inc. v.*

*Rakes*, 323 Ark. 757, 918 S.W.2d 132 (1996), we cannot act as a fact-finder in cases appealed from circuit court. *Wildman Stores v. Carlisle Dist. Co.*, 15 Ark. App. 11, 688 S.W.2d 748 (1985). Here, the evidence presented on the issue of fraud was controverted. When there are issues of credibility and conflicting testimony, we defer to the superior position of the factfinder to resolve those questions. *Maloy v. Stuttgart Mem'l Hosp.*, 316 Ark. 447, 872 S.W.2d 401 (1994). The trial court not only made no findings of fraud in this case, but held for Harris on another theory not pled, creating the inference that Harris failed to persuade the trial court in regard to the fraud allegation. *Cf. Maloy, supra* (holding trial court's failure to make findings in ruling for plaintiff created inference that defendant's testimony failed to persuade the court). Accordingly, we must reverse and dismiss this case.

GRIFFEN and VAUGHT, JJ., agree.

Derrick Lamont WITHERSPOON *v.* STATE of Arkansas

CA CR 00-1288 46 S.W.3d 549

Court of Appeals of Arkansas
Division I
Opinion delivered June 13, 2001

*William R. Simpson, Jr.*, Public Defender, by: *Courtney McLarty*, Deputy Public Defender.

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

JOSEPHINE LINKER HART, Judge. Appellant, Derrick Lamont Witherspoon, who was charged by an information filed in circuit court with the crimes of capital murder and first-degree battery, brings this interlocutory appeal from the circuit court's denial of his motion to transfer the case to juvenile court. Appellant argues on appeal that the circuit court clearly erred in denying his motion to transfer because the decision was not supported by clear and convincing evidence and because the circuit court considered improper evidence in making the decision. We affirm.

The felony information charged appellant, appellant's two brothers, Lonnie Beulah and Eric Beulah, and Erik Bullock with capital murder, asserting that, with premeditated and deliberated purpose, they caused the death of Heaven Pace. The information

further charged that they committed the crime of first-degree battery by causing physical injury to a pregnant woman, Shiwona Pace, causing her to suffer a miscarriage or stillbirth as a result of the injury. At the juvenile-transfer hearing, Charles Weaver, a homicide detective with the Little Rock Police Department, testified that he investigated the death of the unborn child. He stated that, on August 26, 1999, at 11:59 p.m., police responded to a report of a home-intrusion robbery. Shiwona Pace, who was expected to deliver her child the next day, was taken to a hospital for her injuries, where it was determined that her child was dead.

After learning of the child's death, Weaver went to the crime scene and spoke to Erik Bullock. Appellant objected to Weaver's testimony regarding what he was told by Bullock, arguing that such testimony was hearsay and its admission violated his right to confront witnesses against him. The State noted that Bullock was a codefendant, and the court overruled appellant's objections. According to Weaver, Bullock told him that when he and Shiwona Pace entered the residence, three or four black males who were in the residence removed him to the bedroom and left Pace in the living room, and they were both beaten.

Weaver testified that his investigation led him to appellant, appellant's older brother, Eric Beulah, and appellant's younger brother, Lonnie Beulah.[1] Weaver told the court that during an interview with appellant at the Pine Bluff Police Department, appellant gave a statement to police regarding the homicide. When appellant objected to Weaver's testimony, arguing that his statement to police should not be admitted into evidence because it was not voluntarily, knowingly, and intelligently given, the circuit court overruled the objection.

According to Weaver, appellant explained that he was approached by Eric Beulah, who told him that Bullock wanted them to beat up a woman because the woman was attempting to obtain money from Bullock by claiming that Bullock was the father of her child. Appellant was to go to Little Rock and wait for Bullock and Pace at Bullock's residence. Once there, they were to beat Pace. Appellant admitted that he pulled Bullock and Pace into the house, forced them to the ground, and "slapped on" Pace. Appellant stated that they possessed a BB gun and he wore a mask

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[1] Lonnie Beulah was also charged in circuit court with these crimes and sought transfer of his case to juvenile court. The Arkansas Supreme Court recently affirmed the circuit court's denial of Beulah's motion to transfer. *See Beulah v. State*, 344 Ark. 528, 42 S.W.3d 461 (2001).

that resembled pantyhose and was black in color. Further, he thought he would be compensated by Bullock and he participated because he believed he would be paid.

On cross-examination, Weaver testified that Detective Eric Knowles was also present during the taking of appellant's statement. Appellant then argued that the court should not consider appellant's statement because the statement was involuntarily obtained, and the State had the burden of producing Detective Knowles at the hearing. The court overruled the objection, noting that a motion to suppress had not been filed.

The State established appellant's date of birth as December 15, 1981; thus, appellant was seventeen years of age at the time of the crime and eighteen at the time of the hearing. Through various exhibits, the State established that appellant was adjudicated a delinquent on three separate occasions. His first adjudication occurred on May 2, 1997, for theft of property, and he was placed on probation. On October 14, 1997, he was adjudicated a delinquent for aggravated robbery, and, on the same day, he was adjudicated a delinquent for theft of property. Appellant was placed on probation for two years for the two adjudications. On November 18, 1998, appellant's probation was revoked for failure to comply with the conditions of his probation, and, on December 1, 1998, appellant was committed to the Division of Youth Services for an indeterminate period of time, with a recommendation that he be placed in the serious-offender program. The commitment order noted that appellant "has been on intensive probation, refuses to obey probation rules, refuses to report for drug screens, [and] is missing school." The order further noted that appellant had been to drug treatment but had not gone to Alcoholic or Narcotics Anonymous meetings.

At the conclusion of the hearing, the circuit court denied appellant's motion to transfer. In a written order denying the motion to transfer, the court stated that because of "the seriousness of the offense and the degree of violence employed in the commission of the offense, combined with [appellant's] juvenile record which indicates that he has previously been adjudicated delinquent, this Court finds by clear and convincing evidence that [appellant] should be tried as an adult ... and hereby denies the Motion to Transfer to Juvenile Court."

On appeal from the circuit court's denial of his motion to transfer, appellant argues that he was denied a meaningful hearing

because there was no evidence to substantiate the serious and violent nature of the charges, noting that the victim did not testify at the hearing "and all other testimony was improperly admitted and considered by the trial court over objection." He argues that the circuit court should not have considered Weaver's testimony regarding what he was told by Bullock because such testimony was hearsay and denied appellant his right to confront witnesses against him. He contends that such testimony went not only to the seriousness of the offense but also to the degree of violence employed, both of which were reasons cited by the circuit court for retaining jurisdiction. He also argues that Weaver's testimony regarding appellant's statement to the detectives should not have been considered because Detective Knowles was present during the taking of the statement and the State failed to produce Knowles at the hearing on the motion to transfer. Finally, he argues that the court did not consider other factors which he contends were favorable to him.

In determining whether to retain jurisdiction or to transfer the case, the circuit court considers all of the following factors:

> (1) The seriousness of the alleged offense and whether the protection of society requires prosecution as an extended juvenile jurisdiction offender or in circuit court;
>
> (2) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner;
>
> (3) Whether the offense was against a person or property, with greater weight being given to offenses against persons, especially if personal injury resulted;
>
> (4) The culpability of the juvenile, including the level of planning and participation in the alleged offense;
>
> (5) The previous history of the juvenile, including whether the juvenile had been adjudicated a juvenile offender and, if so, whether the offenses were against persons or property, and any other previous history of antisocial behavior or patterns of physical violence;
>
> (6) The sophistication or maturity of the juvenile as determined by consideration of the juvenile's home, environment, emotional attitude, pattern of living, or desire to be treated as an adult;
>
> (7) Whether there are facilities or programs available to the court which are likely to rehabilitate the juvenile prior to the expiration of the court's jurisdiction;
>
> (8) Whether the juvenile acted alone or was part of a group in the commission of the alleged offense;
>
> (9) Written reports and other materials relating to the juvenile's mental, physical, educational, and social history; and
>
> (10) Any other factors deemed relevant by the court.

Ark. Code Ann. § 9-27-318(g) (Supp. 1999). The circuit court is not required to enumerate all ten factors in its written findings. *See Beulah v. State*, 344 Ark. 528, 535, 42 S.W.3d 461, 466 (2001). "The circuit court's failure to specifically mention certain evidence presented by the appellant in its order does not mean that the court ignored the evidence or failed to consider it." *Id.* "Upon a finding by clear and convincing evidence that a juvenile should be tried as an adult, the court shall enter an order to that effect." Ark. Code Ann. § 9-27-318(h) (Supp. 1999); *see also* Ark. Code Ann. § 9-27-325(h)(2)(C) (Supp. 1999). The circuit court's decision on whether to transfer the case to juvenile court will not be reversed unless the decision is clearly erroneous. *See Beulah*, 344 Ark. at 533, 42 SW.3d at 464. And, generally, the Arkansas Rules of Evidence apply to juvenile proceedings. *See* Ark. Code Ann. § 9-27-325(e) (Supp. 1999).

Even assuming, *arguendo*, that Weaver's testimony regarding what he was told by Bullock and his testimony regarding appellant's statement should not have been considered by the circuit court, we would still consider whether prejudice resulted from the admission of such evidence. *See Ring v. State*, 320 Ark. 128, 132, 894 S.W.2d 944, 946 (1995)(determining that there was no prejudice resulting from the circuit court's admission of a confession at the transfer hearing). Even though the victim did not testify, and despite appellant's contention that all other testimony was improperly admitted and considered by the circuit court over objection, Detective Weaver did present testimony regarding the seriousness of the offense and the degree of violence employed. Specifically, Weaver testified, without appellant's objection, that the case involved a home intrusion that resulted in injuries to one victim and the death of the victim's unborn child. That testimony alone sufficed to establish the serious and violent nature of the crimes. *See Brown v. State*, 330 Ark. 603, 607, 954 S.W.2d 273, 275 (1997)(finding there was a "meaningful hearing" when the evidence was presented through the testimony of police officers). Moreover, we also note that Weaver's testimony regarding what he was told by Bullock did not, as appellant contends, pertain to either the seriousness of the offense or the degree of violence employed. Bullock told Weaver that three or four black males entered the residence and beat Pace, and he did not describe in any detail the degree of violence employed or the seriousness of the offense. Again, even if we consider this testimony, we fail to see how appellant was prejudiced by it. Thus, the circuit court did not clearly err in denying appellant's motion to transfer.

Furthermore, the State presented, without objection from appellant, evidence regarding appellant's prior juvenile adjudications. We note that appellant's age, his three adjudications as a delinquent, his failure to comply with the conditions of his probation, and his commitment to the Division of Youth Services, amply shows the unlikelihood of rehabilitation through treatment of appellant as a juvenile. *See Jongewaard v. State*, 71 Ark. App. 269, 277-78, 29 S.W.3d 758, 762-63 (2000)(discussing the juvenile's previous history, his likelihood of rehabilitation, and his age). While appellant argues that the circuit court did not consider factors favorable to him, as we previously noted, the Arkansas Supreme Court has stated that the circuit court's failure to mention evidence does not mean that the court failed to consider it. For this reason also, we conclude that the circuit court's decision to deny appellant's motion to transfer the case to juvenile court was not clearly erroneous.

Finally, we also conclude that it was not error for the circuit court to consider the allegedly involuntary confession at the hearing, and that, in any event, we would not have had jurisdiction to consider whether a motion to suppress was improperly granted. Juvenile transfer hearings are held for the purpose of "determin[ing] whether to retain jurisdiction or to transfer the case to another court having jurisdiction." Ark. Code Ann. § 9-27-318(e) (Supp. 1999). The statute does not suggest that the court should also consider at that time motions to suppress. As the Arkansas Supreme Court has previously noted, not even matters such as a determination of probable cause are to be determined at juvenile-transfer hearings. *See Brown*, 330 Ark. at 607, 954 S.W.2d at 275. Clearly, the record in this case is not adequately developed for a determination of whether the confession was given involuntarily, and no motion to suppress was presented to the court prior to the hearing. We note that objections to the use of any evidence, including evidence of involuntary confessions or admissions of a defendant, on the grounds that the evidence was illegally obtained, are to be made by a motion to suppress filed not later than ten days before the date set for the trial. *See* Ark. R. Crim. P. 16.2(a)(3), (b) (2000).

Moreover, on appeal from the denial of a motion for transfer, this court may not consider a denial of an oral motion to suppress made at the hearing. The statute providing for appeals describes only appeals "from an order granting or denying the transfer of a case from one court to another court having jurisdiction over the matter." Ark. Code Ann. § 9-27-318(l) (Supp. 1999).

Affirmed.

NEAL and VAUGHT, JJ., agree.

POLK COUNTY *v.* Carl JONES

CA 00-1195 47 S.W.3d 904

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered June 13, 2001

*Roberts, Roberts & Russell, P.A.*, by: *Mike Roberts* and *Ben Cormack*, for appellant.

*Walters, Hamby & Verkamp*, by: *Michael Hamby*, for appellee.

JOHN B. ROBBINS, Judge. On September 30, 1997, appellee Carl Jones sustained an injury to his head and neck when he fell forward into a large piece of timber while working for appellant Polk County. Polk County accepted his injuries as compensable, and paid all reasonable medical expenses as well as temporary total disability benefits. However, Polk County controverted Mr. Jones' claim that he was entitled to benefits for a permanent partial impairment. A hearing was held, and the only permanent partial impairment rating introduced into evidence was a ten-percent rating assigned by Dr. Thomas Florian. The Workers' Compensation Commission refused to consider the rating assigned by Dr. Florian because it was not supported by objective findings as required by Ark. Code Ann. § 11-9-704(c)(1)(B) (Repl. 1996), and further because, in arriving at the rating, Dr. Florian considered complaints of pain in violation of Ark. Code Ann. § 11-9-102(16)(A)(ii) (Repl. 1996).[1] However, the Commission consulted the *AMI Guides* and determined that, based primarily on objective findings of disc herniations or bulges at the C3-C4, C4-C5, and C6-C7 levels, Mr. Jones was entitled to compensation for an eight-percent permanent-impairment rating. Polk County now appeals from this award.

For reversal, Polk County first argues that the Commission committed reversible error in independently assessing a permanent-impairment rating based on a document that was not in the record. Next, it contends that, even if the extrajudicial review of the AMA *Guides* was permissible, the eight-percent rating assigned by the Commission was not supported by substantial evidence. We affirm.

Mr. Jones testified on his own behalf at the hearing. He stated that, on September 30, 1997, he was loading timber into a truck at a lumber yard, and the next thing he remembered was waking up at the hospital. He was told that he had fallen and struck his head and was unconscious for more than four hours. Subsequent to the accident, Mr. Jones was treated by several doctors, and Dr. Florian found that he reached maximum medical improvement on October

[1] There is no dispute on appeal regarding the rating assigned by Dr. Florian. He correctly consulted the AMA *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) in arriving at the 10% aggregate rating. However, he assigned a 5% rating as a result of the neck injury based on "continuous muscle guarding" but "no evidence of radiculopathy and no loss of structural integrity," and the remaining 5% rating was for moderate to marked headaches. The Commission properly refused to accept the ratings offered by Dr. Florian because they were based on subjective criteria and not objective findings as mandated by the Workers' Compensation Act.

27, 1998. Mr. Jones was returned to work with restrictions on April 1, 1999.

A CT scan and myelogram were performed on January 21, 1999. Subsequent to the tests, Dr. J. Michael Standefer reported:

> Radiographic studies: Previous studies have been reviewed including the patient's recent myelogram and post myelogram CT scan, the results of which are basically normal. There is mild disc bulging at several levels, but this does not appear to be of any pathological significance. Degenerative change is modest.

However, Dr. Ismail H. Ihmeidan expressed a contrary view, noting small central disc herniations at the C3-C4, C4-C5, and C6-C7 levels. Dr. Robert Fisher reported, "The myelogram is interpreted as showing mild ventral indentation of the secal sac at CS-4, 4-5, and possibly C6-7." He further reported, "CT of the cervical spine in the post myelogram state was obtained and interpreted by Dr. Ihmeidan as 'small focal disc herniations at CS-4, 4-5, and C6-7.' "

In its opinion awarding the permanent impairment rating, the Commission reasoned:

> [T]he absence of any appropriate medically assessed degree of permanent physical impairment does not automatically preclude the claimant from being entitled to benefits for permanent physical impairment. Under the current Act, as amended by Act 796 of 1993, it is the duty and obligation of this Commission to determine the existence and appropriately assess the extent of permanent physical impairment, rather than the medical experts.
>
> The medical evidence does show the presence of "objective and measurable physical findings" sufficient to support the existence of permanent physical impairment. These findings are in the form of small central focal disc herniations or bulges at the levels of C3-4, C4-5, and C6-7 with mild ventral indention of the thecal sack. These findings are noted on the myelogram and post CT myelogram performed on January 21, 1999.
>
> The American Medical Association's *Guides to the Evaluation of Permanent Impairment* (Fourth Edition), provide a method for the assessment of a specific percentage or degree of permanent physical impairment based solely upon these objective and measurable physical findings. Table 75, Section II. C. and F. on page 113 provides for a permanent physical impairment of 8% to the body as a whole

> for the observed findings of unoperated herniated discs at multiple levels.

Polk County's first point on appeal is that the Commission went beyond the scope of its statutory powers when it engaged in extrajudicial review of a document neither included nor referenced in the record. It is undisputed that the section of the AMA *Guides* relied on by the Commission was not introduced into evidence by either party.

The appellant cites Ark. Code Ann. § 11-9-704(c)(2) (Repl. 1996), which provides, "When deciding any issue, administrative law judges and the Commission shall determine, on the basis of the record as a whole, whether the party having the burden of proof on the issue has established it by a preponderance of the evidence." It also cites Ark. Code Ann. § 11-9-711(b)(4)(A) (1996), which gives this court the authority to reverse the Commission's decision if the Commission acted without or in excess of its powers. Arkansas Code Annotated section 11-9-704(c)(3) (Repl. 1996) provides that, "Administrative Law Judges, the Commission, and any reviewing court shall construe the provisions of this chapter strictly." The appellant submits that, construing the statutes strictly, we must reverse the Commission's decision because it was not based on the record as a whole, and because the Commission exceeded its authority in going beyond the record.

The Commission correctly stated in its opinion that the AMA *Guides* must be used in assessing an anatomical impairment. *See* Ark. Code Ann. § 11-9-522(g)(1)(A) (Repl. 1996); Arkansas Workers' Compensation Rule 34. However, in the instant case, the section of the AMA *Guides* upon which the Commission relied in assessing an anatomical-impairment rating was not part of the record, and was not referenced in any of the medical opinions. Notwithstanding this fact, we hold that the Commission did not err in relying on the AMA *Guides*.

In arriving at our decision, we are cognizant of the precedent we set in *Hope Livestock Auction Co. v. Knighton*, 62 Ark. App. 74, 966 S.W.2d 943 (1998). In that case, the claimant sought benefits for a bipolar disorder and thus was required to comply with Ark. Code Ann. § 11-9-113(2) (Repl. 1996), which provides:

> No mental injury or illness under this section shall be compensable unless it is also diagnosed by a licensed psychiatrist or psychologist

> and unless the diagnosis of the condition meets the criteria established in the most current issue of the Diagnostic and Statistical Manual of Mental Disorders.

In its opinion awarding benefits for the mental illness, the Commission stated:

> [A]lthough the psychiatrist never testified claimant's diagnosis of bipolar specifically meets the Diagnostic and Statistical Manual of Mental Disorders, when we review this manual we find that the diagnosis of bipolar I disorder satisfies this statutory requirement.

However, we reversed, announcing:

> The Commission's *de novo* review is confined to the record established by the ALJ. The extrajudicial review of documentation not introduced into evidence was error. We reverse and remand for further findings.

62 Ark. App. at 78, 966 S.W.2d at 946.

We now overrule *Hope Livestock Auction Co. v. Knighton, supra*, to the extent that it prohibits the Commission from referring to a manual that is not in the record when by law the manual must be consulted to decide an issue in dispute. The Workers' Compensation Act of 1993 directed the Commission to adopt an impairment-rating guide to be used in the assessment of anatomical impairment, and the Commission adopted the AMA *Guides*. Thus, in all cases where entitlement to a permanent impairment is sought by the claimant but controverted by the employer, it is the Commission's duty to determine, using the AMA *Guides*, whether the claimant met his burden of proof. This being the case, we hold that the Commission can, and indeed, should, consult the AMA *Guides* when determining the existence and extent of permanent impairment, whether or not the relevant portions of the *Guides* have been offered into evidence by either party.

Polk County also contends that the Commission exceeded the scope of its authority when it assessed its own impairment rating rather than relying solely on its determination of the validity of ratings assigned by physicians. We disagree. It is the duty of the Commission to translate evidence into findings of fact. *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994). In the instant case, the Commission was authorized to decide which portions of the medical evidence to credit, and translate this medical

evidence into a finding of permanent impairment using the AMA *Guides*.

Polk Country's remaining argument is that, even if the Commission was authorized to consult the AMA *Guides*, substantial evidence does not support its assignment of an eight-percent permanent-impairment rating. It notes that there were conflicting medical opinions as to the existence of herniated discs, and submits that there was no medical opinion stated within a reasonable degree of medical certainty as required by Ark. Code Ann. § 11-9-102(16)(B) (Repl. 1996). Polk County further asserts that Mr. Jones failed to establish that his compensable injury was the major cause of his impairment as required by Ark. Code Ann. § 11-9-102(5)(F)(ii)(a) (Repl. 1997). Finally, appellant contends that, even if a permanent impairment raring was warranted, the Commission erred in awarding an eight-percent rating instead of a six-percent rating.

Polk County's remaining argument is without merit. It correctly asserts that an award by the Commission will not be affirmed on appeal unless it is supported by substantial evidence. *See Continental Express v. Harris*, 61 Ark. App. 198, 965 S.W.2d 811 (1998). However, we find that substantial evidence supports the Commission's ruling.

While there was conflicting medical evidence in this case, it is well settled that it is the Commission's duty to resolve such conflicts. *See Inskeep v. Emerson Elec. Co.*, 64 Ark. App. 101, 983 S.W.2d 132 (1998); *Chamberlain Group v. Rios*, 45 Ark. App. 144, 871 S.W.2d 595 (1994). Dr. Ihmeidan diagnosed disc herniations at three levels, and the Commission was free to give weight to his opinion. While it is true that medical opinions addressing permanent impairment must be stated within a reasonable degree of medical certainty, Dr. Ihmeidan's opinion met this requirement in that he was not equivocal in his assessment of permanent impairment in the form of herniations.

We also reject appellant's contention that Mr. Jones failed to prove that his compensable injury was the major cause of his impairment. As the Commission correctly noted, there was not evidence as to any other possible causes for the herniations, and no evidence that Mr. Jones experienced any significant neck problems prior to the work-related accident. Thus, the Commission did not err in finding that Mr. Jones satisfied the "major cause" requirement.

Finally, we find that the eight-percent rating arrived at by the Commission is supported by substantial evidence. The Commission based this award on an excerpt from page 113 of the AMA *Guides*, where it indicates that three-level, unoperated-on disc lesions constitute an eight-percent impairment when associated with moderate to severe degenerative changes. The appellant urges that, at most, the *Guides* authorize a six-percent rating because Mr. Jones' degenerative changes were none to minimal. Mr. Jones was diagnosed with "modest" degenerative changes, and this supports the rating assigned by the Commission.

Affirmed.

STROUD, C.J., HART, JENNINGS, CRABTREE, and BAKER, JJ., agree.

COLUMBIA MUTUAL INSURANCE COMPANY *v.* HOME MUTUAL FIRE INSURANCE COMPANY

CA 00-1154 47 S.W.3d 909

Court of Appeals of Arkansas
Division II
Opinion delivered June 13, 2001

*Daggett, Van Dover. Donovan & Perry, PLLC*, by: *Robert J. Donovan*, for appellant.

*Dover & Dixon, P.A.*, by: *Thomas S. Stone* and *Patrick E. Hollingsworth*, for appellee.

WENDELL L. GRIFFEN, Judge. Columbia Mutual Insurance Company (Columbia) appeals a decision by a Washington County chancellor that dismissed appellant's complaint with prejudice after concluding as a matter of law that 1) the statutory definition of policy cancellation did not apply to unilateral terminations or cancellations by a policyholder, 2) Columbia was not entitled to contribution, indemnity, or subrogation against appellee Home Mutual Fire Insurance Company (Home) because Home's policy was effectively terminated prior to a fire loss, and 3) Columbia lacked standing to complain. We affirm.

*Factual and Procedural History*

This matter was submitted to the chancellor on stipulated facts that were jointly agreed to by the parties and adopted by the chancellor as his findings of fact.

Home issued an insurance policy to Vernon or Lynn Scantling that became effective on July 8, 1997, and covered the period from August 12, 1997, to August 12, 1998. The policy named Farmers Bank of Greenwood (Farmers) as the mortgagee of the premises, and included coverage of $60,000 for the residence as well as $18,000 for the Scantlings' personal property. On June 17, 1998, Vernon Scantling directed his insurance agent, Hughes Insurance Agency, to immediately cancel the Home policy. The agent did so, and Home prepared a notice of cancellation that was to take effect at 12:01 a.m. on June 17, 1998. Home mailed the notice to Farmers on June 18, 1998, and Farmers received it the next day. On the same date, Home mailed the Scantlings' agent a full refund of the

unearned premium. The agent issued the refund to the Scantlings on June 23, 1998.

Using Steve Standridge Insurance, Inc., the Scantlings completed an application on June 19, 1998, to insure the property with Columbia. Standridge issued a binder to the Scantlings that listed Farmers as the mortgagee on the Columbia policy. The binder covered the period from June 19, 1998, to June 18, 1999. It bound Columbia to cover $90,000 on the Scantlings' dwelling with a $500 deductible and to cover the Scantlings' personal property in the amount of $45,000. Farmers received notice of the issuance of the Columbia policy and did not object.

On June 28, 1998, the property, which was insured pursuant to the Columbia policy that listed Farmers as lienholder, was totally destroyed by fire. At the time of the fire, an outstanding mortgage in the amount of $85,426.09 was owed to Farmers. Columbia satisfied its obligation to Farmers as loss payee, but denied payment to the Scantlings, contending that the policy was *void ab initio* because of fraudulent and material misrepresentations in the Scantlings' application for insurance.[1] Although Home was notified of the loss, neither Farmers nor Columbia submitted a proof of loss or other written verification of the loss to Home, which denied any liability to the Scantlings, Farmers, or Columbia. Both the policy issued by Columbia and the policy issued by Home included pro-rata clauses that provided for payment of only a pro-rata share of the loss in the event there was other valid insurance in force at the time of the loss.

After satisfying its obligation to Farmers, Columbia instituted this action against Home, claiming it was entitled to contribution, indemnity and subrogation against Home for the pro-rata share of the loss because the cancellation was not timely under the terms of appellee's policy. Following an August 17, 2000, hearing, the chancellor dismissed appellant's complaint with prejudice after concluding as a matter of law that 1) the statutory definition of policy cancellation was only applicable to unilateral cancellations and

[1] Although a dispute arose between Farmers and Columbia regarding Columbia's entitlement to receive a full assignment and transfer of the mortgage and all securities held as collateral, the dispute was resolved by settlement. Also, a settlement was reached between the Scantlings, Columbia, Steve Standridge Insurance Agency, Steve Standridge individually, and Utica Mutual Insurance Company (the liability insurance carrier for Steve Standridge Insurance Agency).

therefore did not apply to termination or cancellation by the policyholder, 2) that Columbia was not entitled to contribution, indemnity, or subrogation, equitable or contractual against Home because Home's policy was effectively terminated prior to a fire loss, and 3) that Columbia lacked standing to complain regarding Home's failure to meet cancellation requirements because Farmers had not sought to enforce any interest it might have had as a third-party beneficiary of the insurance contract. Columbia now appeals.

*Standard of Review*

Chancery decisions are reviewed *de novo*. While we do not set aside a chancellor's findings of fact unless we determine that the findings are clearly erroneous, a chancellor's conclusions of law are not afforded the same deference. *See Duhac v. City of Hot Springs*, 67 Ark. App. 98, 992 S.W.2d 174 (1999). This is so because a chancellor stands in no better position to apply the law than we do. *See id.* Thus, when we decide that a chancellor erroneously applied the law and that an appellant suffered prejudice as a result, we will reverse the erroneous ruling. *See id.*

*Finality*

Before beginning our analysis, we initially address the issue of finality. Rule 54(b) of our Rules of Civil Procedure requires that when multiple claims or multiple parties are involved, the court may direct the entry of a final judgment as to one or fewer claims or parties provided that the court makes an express determination, based on specific findings of fact, that there is no sound reason for the delay. In the present case, appellant sued appellee for contribution, indemnity, and subrogation. The Scantlings moved to intervene, and the motion was granted. Next, the Scantlings filed a complaint in intervention, claiming an interest in any proceeds, and stating that they had pending litigation against appellant that would entitle them to certain proceeds.

The parties submitted the case to the chancellor based on stipulated facts. Among the stipulated facts were the parties' agreement that 1) although a dispute arose between Farmers and Columbia regarding Columbia's entitlement to receive a full assignment and transfer of the mortgage and all securities held as collateral, the dispute was resolved by settlement, and 2) a settlement was reached

between the Scantlings, Columbia, Steve Standridge Insurance Agency, Steve Standridge individually, and Utica Mutual Insurance Company (the liability insurance carrier for Steve Standridge Insurance Agency).

The chancellor's order dismissing the complaint with prejudice makes no mention of the Scantlings' complaint and the chancellor also failed to make an express determination as required by Rule 54(b). Although the better practice would have been for the judge to place an order in the record, the stipulation recites the settlement. Thus, no outstanding issue remains that would create piecemeal litigation.

*Effectiveness of Policy Cancellation*

Appellant initially argues that the Home policy was in effect at the time of the fire loss because 1) the terms of Home's policy required a ten-day written notice to Farmers prior to the Scantlings' unilateral cancellation, and 2) Arkansas Code Annotated section 23-66-206(11)(B) (Supp. 1999) mandates that Home provide a twenty-day notice to Farmers prior to the cancellation becoming effective.

*Policy Language*

In reviewing an insurance policy, we submit to the principle that when the terms of the policy are clear, the language in the policy controls. *See Vincent v. Prudential Ins. Brokerage*, 333 Ark. 414, 970 S.W.2d 215 (1998). There is no need to apply rules of construction when a clause is not ambiguous. *See id.*

Generally, a standard mortgage clause serves as a separate contract between the mortgagee and the insurer, as if the mortgagee had independently applied for insurance. *See Fireman's Fund Ins. Co. v. Rogers*, 18 Ark. App. 142, 712 S.W.2d 311 (1986). Thus, the rights of a named mortgagee in an insurance policy are not affected by any act of the insured, including improper and negligent acts. *See Hatley v. Payne*, 25 Ark. App. 8, 751 S.W.2d 20 (1988).

Rule 52(a) of the Arkansas Rules of Civil Procedure allows a party to request findings of fact and mandates that a court issue specific findings of fact and state separately its conclusions of law

when a party requests the court to do so. A party may also request that a court amend its findings of fact or make additional findings no later than ten days after the court enters its judgment.

Here, Home's policy contained a mortgage clause,[2] which reads as follows:

> This insurance, as to the interest of the mortgagee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property.
>
> . . .
>
> This Company reserves the right to cancel this policy at any time, as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee for ten days after notice to the mortgagee of such cancellation and shall then cease.

Based on the above language, appellant advances the argument that because the mortgage clause precluded any act by the Scantlings from impairing the rights of Farmers, Home effectively canceled the Scantlings' policy as it pertained to Farmers' interest. Appellant asserts that once Home canceled the policy, it was required to continue to provide coverage to Farmers for ten days after it notified Farmers. While appellant acknowledges on appeal that the chancellor did not decide whether Home's policy was effectively canceled prior to the fire, a review of the chancellor's order indicates that the chancellor actually made no determination as to whether Home's policy required Home to give five or ten days' notice to Farmers and instead found that, based on the stipulation of facts, appellant lacked standing to complain because Farmers did not seek to enforce any interest it might have exercised as a third-party beneficiary. Thus, the chancellor made no ruling as to 1)

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[2] The policy also stated in its standard provision section as follows:

**Cancellation of Policy.** This policy shall be canceled in whole or in part at any time at the request of the insured upon the return of this Policy to the Home Office of this Company, provided, that no unearned premium amounting to less than one quarterly monthly payment shall be refunded by this Company. This Policy may also be canceled by the Company by giving five days' notice of such cancellation.

**Mortgage Interest.** If loss or damage is made payable, in whole or in part, to a mortgagee not named herein as the insured, this Policy may be canceled as to such interest by giving to such mortgagee a ten days' written notice of cancellation.

when Home effectively canceled its policy, or 2) what notice, if any, Home was required to give Farmers. Because appellant failed to request that the chancellor amend his findings to address these issues, we decline to address them on appeal.

*Applicability of Arkansas Code Annotated section 23-66-206(11)(B)*

Chapter 66 of Title 23, titled the Trade Practices Act, governs the trade practices of individuals engaged in the business of insurance. *See* Ark. Code Ann. § 23-66-203 (Repl. 1994). The Act, which is designed to protect the public, prohibits unfair methods of competition and unfair trade acts or practices. *See* Ark. Code Ann. § 23-66-202(a) (Repl. 1994). However, the Act does not establish or extinguish a private right of action based on a violation of its provisions. *See* Ark. Code Ann. § 23-66-202(b) (Repl. 1994).

Under a subsection titled "Unfair methods of competition and unfair or deceptive acts or practices defined," Arkansas Code Annotated section 23-66-206(11)(B) (Supp. 1999) provides as follows:

> Cancellations of property and casualty policies shall only be effective when notice of cancellation is mailed or delivered by the insurer to the named insured and to any lien-holder or loss payee named in the policy at least twenty (20) days prior to the effective date of cancellation.

Notice of a cancellation provides an insured the opportunity to seek insurance elsewhere prior to the insured having no protection. *See Grubbs v. Credit General Ins. Co.*, 327 Ark. 479, 939 S.W.2d 290 (1997). Because notice serves to protect the public, many jurisdictions have held that when the insured requests that an insurer cancel the policy and shortly thereafter obtains replacement coverage, statutes regarding notice of cancellation are not applicable. *See* 2 *Couch on Insurance*, § 30:8 (3d ed. 2000). Whenever notice is an issue, the plain language of the governing statute or the insurance policy must be strictly adhered to.

In *American States Ins. Co. v. Southern Guar. Ins. Co.*, 53 Ark. App. 84, 919 S.W.2d 221 (1996), the insured canceled his insurance with the first insurance carrier in order to obtain coverage with a second insurer, and the agent issued a binder for automobile coverage with the second insurance carrier. Following an accident, the

second carrier paid the damages, but filed suit against the first carrier, alleging that the first carrier's insurance was still in effect. The trial court disagreed and granted summary judgment after finding that the first policy had been canceled and was not in effect at the time of the accident. We affirmed the trial court, finding that although an insured seeking to cancel a policy must request the cancellation in an unequivocal and absolute manner, there was no uncertainty that the insured had exercised his right to cancel the policy and had canceled it. *See American States, supra.*

A straightforward reading of the Trade Practices Act leaves little doubt that the Act is designed to regulate the activities of those engaged in the business of insurance. As such, the Act is not applicable to cancellations by a policyholder. Thus, the instant case is not analogous to cases concerning an insurer who unilaterally canceled the insurance policy of an insured.

Similar to the facts present in *American States, supra,* the Scantlings unilaterally and unequivocally canceled their policy with appellee, who in turn notified Farmers. Home then returned the unearned premium to the Scantlings. The Scantlings immediately obtained replacement insurance through Columbia, who accepted their application, took their premium, and issued a policy. These actions all occurred prior to the date of the fire.

Because the Scantlings requested that Home terminate their policy and simultaneously obtained greater replacement insurance coverage, we hold that the chancellor correctly concluded that the notice requirement of subsection 11(B) does not apply and that Home's policy was effectively terminated prior to the fire loss.

*Standing*

Columbia asserts that the statutory provisions of Arkansas Code Annotated section 23-66-206(11)(B) (Supp. 1999) provide a basis for it to assert a claim against Home for failure to follow the statutory notice provisions in regards to Farmers. However, as previously discussed, the Trade Practices Act expressly states that it provides no private right of action, and the Act applies to cancellations by an insurer, not unilateral cancellations by an insured. As such, the chancellor correctly determined that Columbia lacked standing.

*Entitlement to Equitable or Contractual Contribution or Subrogation*

Next, appellant argues that because the residence was primarily covered by Home as well as appellant, Farmers could have sought to collect from either insurer. Appellee responds that because Farmers waived any complaint regarding Home's cancellation of the Scantlings' policy, Columbia has no rights as a subrogee. It also contends that Columbia had no subrogee rights as to Farmers because its payment to Farmers arose out of a discharge of its direct contractual obligation to Farmers. It argues that because Home's policy was not in force at the time of the fire loss, Columbia is not entitled to contribution. We hold that because the chancellor correctly concluded that Home's policy was not in effect at the time of the fire loss, and that Columbia lacked standing to challenge Home's failure to provide statutory notice to Farmers, appellant's arguments are moot.

Alternatively, the arguments are not persuasive. Subrogation allows an insurer to step in the shoes of an insured. *See Shelter Ins. Co. v. Arnold*, 57 Ark. App. 8, 940 S.W.2d 505 (1997) (quoting with approval *Williams v. Globe Indemnity Co.*, 507 F.2d 837 (8th Cir. 1974)). In order for equitable subrogation to apply, a debt or obligation must exist for which someone other than the subrogee is primarily liable and whom the subrogee discharges to protect the subrogee's rights. *See Moon Realty Co. v. Arkansas Real Estate Co.*, 262 Ark. 703, 560 S.W.2d 800 (1978).

The parties in the matter at hand stipulated that "Farmers Bank of Greenwood was entitled under the terms of the Columbia Mutual Insurance Company policy to receive payment made to it by Columbia Mutual Insurance Company." This being so, Colum-

bia could not have been subrogated to the rights of Farmers, because Columbia's payment to Farmers arose out of a primary obligation that Columbia owed Farmers.

*Contribution*

Equitable contribution occurs when two or more valid insurance policies cover a particular risk of loss and a particular accident. *See Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 65 Cal. App. 4th 1279 (1998). As previously discussed, Home's policy was not in effect at the time of the fire. Nothing in the record indicates that Columbia knew of the existence of the Home policy prior to its decision to issue a policy to the Scantlings, that the issuance of the policy or the premium rates were contingent on the existence of other insurance, or that Home gained a profit at the expense of Columbia. There is no indication that Columbia expected another insurance carrier to share its risk of loss. Because equitable contribution serves to guarantee that each insurer pay its equitable share of a loss and that one insurer not profit at the expense of another, the right of equitable contribution does not exist in this case.

Affirmed.

VAUGHT and ROAF, JJ., agree.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING

CA 00-1154 ___ S.W.3d ___

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered August 29, 2001

*Daggett, Van Dover, Donovan & Perry, PLLC*, by: *Robert J. Donovan*, for appellant.

*Dover & Dixon, P.A.*, by: *Thomas S. Stone* and *Patrick E. Hollingsworth*, for appellee.

WENDELL L. GRIFFEN, Judge. We delivered our opinion in this appeal from chancery court on June 13, 2001. Appellant has petitioned for rehearing, asserting that we erred in interpreting Rule 52(b) of the Arkansas Rules of Civil Procedure as requiring that an appellant move the trial court to amend or make additional findings for purposes of review. We deny the petition.

Appellant is correct that it was not required to request that the chancellor amend his findings to address the issues of when

Home Mutual effectively canceled its policy or what notice, if any, Home Mutual was required to give to the mortgagee, Farmers Bank, for the purposes of review. Given our holding that the statute relied upon by appellant for recovery is not applicable to unilateral cancellation by an insured, we should have simply held that the trial court's decision was not clearly erroneous. Because an error in an opinion that does not affect the outcome of an appeal is not a ground for rehearing, we deny appellant's petition. *See Butler Manufacturing Co. v. Hughes*, 292 Ark. 198, 731 S.W.2d 214 (1987).

VAUGHT, ROAF, HART, BIRD, and NEAL, JJ., agree.

DALLAS COUNTY HOSPITAL, *Employer*;
Virginia Reciprocal Exchange, *Carrier*
*v.* Judy DANIELS

CA 00-1403 47 S.W.3d 283

Court of Appeals of Arkansas
Division III
Opinion delivered June 13, 2001

*Bridges, Young, Matthews & Drake PLC*, by: *Michael J. Dennis*, for appellants.

*Compton, Prewett, Thomas & Hickey, P.A.*, by: *Floyd M. Thomas, Jr.*, for appellee.

WENDELL L. GRIFFEN, Judge. Dallas County Hospital, appellant employer, and Virginia Reciprocal Exchange, its workers' compensation insurance carrier, appeal a decision by the Workers' Compensation Commission that found appellee Judy Daniels was entitled to an open-ended award of temporary total disability benefits and that the performance of an intradiscal electrothermal treatment (IDET) was reasonably necessary to treat appellee's compensable back injury. Appellants argue that the Commission's decision is clearly erroneous. We hold under the substantial evidence standard of review, the Commission's decision is supported by substantial evidence. Therefore, we affirm.

The parties agree that on April 24, 1998, appellee sustained a compensable injury to her back while performing housekeeping duties in the employ of Dallas County Hospital. Appellee received temporary-total-disability benefits until October 31, 1998, when her employer contended that she had reached maximum medical benefit and that all appropriate benefits were paid. A hearing was held before an administrative law judge (ALJ), who was asked to consider 1) whether appellee was entitled to an open award of temporary-total-disability benefits as of November 1, 1998, 2) whether a referral to Dr. John Wilson was warranted, and 3) whether appellee should undergo an IDET procedure.

At the hearing, appellee testified that she injured her back as she picked up a chair while waxing floors for the employer. Prior to this incident, she had not experienced any back problems. Appellee reported the injury to her supervisor, who sent her to lie on a heating pad. The next morning, her supervisor sent her to Dr. Hugh Nutt, a general practitioner. During the next two years, appellee received treatment from Drs. Nutt, Simpson, Safman and Hart. Dr. Nutt initially told appellee to stay off her feet. However, due to appellee's increased pain, Dr. Nutt admitted her into Dallas County Hospital, where he ran CAT scans and administered pain medication. Dr. Nutt referred appellee to Dr. Simpson, who hospitalized her in Jefferson Regional for a day. Dr. Simpson subsequently treated appellee by giving her pain medication and muscle relaxers. He then sent appellee to Dr. Nutt, who took her off work

and placed her back in the hospital. Appellee was next sent to pain clinics and seen by Dr. Safman, who sent her back to work.

Dr. Nutt eventually referred appellee to the Little Rock Pain Clinic and Dr. Thomas Hart, who recommended that she undergo an IDET procedure. She testified that she was willing to undergo the procedure because she had not been able to work and was in pain on a daily basis. On cross-examination, appellee stated that she had also seen Dr. Lipke, an orthopaedic surgeon who referred her to Dr. Wilson. She stated she had not seen Dr. Wilson. Appellee testified she had three MRIs, three CAT scans, a discogram, a myelogram, and an electro-nerve study.

Although appellee attempted to return to work twice, she was not successful. She stated that her back had not stopped hurting since her injury although she had sought treatment from various physicians, taken different pain medications, wore a back brace, and had a TENS unit. Appellee testified that the persistent pain in her back resulted in her inability to work, and that she currently sought treatment from Dr. Hart as her budget permitted.

Various medical notes were also introduced. The first medical evidence, the results of a CT scan ordered by Dr. Nutt and dated March 30, 1998, indicated "spinal stenosis L4-5 with mild posterior disc herniation, more marked on the left side and ligamentum flavum hypertrophy." The scan also showed a bulging disc at L5-S1 that was present but not significant. Next, an MRI, which was ordered by Dr. Simpson on April 1, 1998, demonstrated no abnormalities. At the direction of Dr. Simpson, appellee underwent physical therapy, which was not effective. Dr. Simpson then ordered a myleogram and post-myelogram CT scan, which were performed on May 12, 1998, and revealed a "mild symmetrical bulging of the L4 disc with a component extending into the foramen on the left." On May 18, 1998, appellee was released by Dr. Simpson to return to Dr. Nutt, who hospitalized her on July 28, 1998, after determining that appellee had severe back pain that was not controllable through medication. Dr. Nutt also indicated in his notes that appellee had a partially ruptured disc.

Appellee was next examined by Dr. Richard Peek on August 4, 1998, who recommended conservative treatment in the form of physical therapy, lumbar epidural steroid injections, and oral medications. Dr. Peek also diagnosed appellee with 1) lumbar annular tear, 2) left-sided sciatica, and 3) bulging disc, L4-5, left. She was next examined by Dr. Bruce Safman on September 19, 1998, and

she reported no improvement. Because a previously administered injection was not effective, appellee visited the emergency room for treatment. Afterward, Dr. Safman changed appellee's medication and prescribed Prozac for her pain. Appellee returned to the emergency room, and Dr. Safman readjusted her medication after she informed him that she was experiencing headaches. On November 2, appellee went to visit Dr. Safman and reported that she had visited the emergency room on two separate occasions. However, Dr. Safman determined that appellee had reached maximum medical improvement and released her without restrictions.

On November 4, 1998, appellee was admitted to the hospital after visiting the emergency room for back pain. After receiving conservative treatment, she was released on November 8, 1998. Appellee was next seen by Dr. Lipke, who reported to appellants the results of a CT scan that demonstrated a left sided herniation at 4-5 and mild stenosis. Dr. Lipke also noted in a March 30, 1999, report that appellee had been unable to work since the injury as a result of the failure of conservative measures. Dr. Lipke referred appellee to Dr. Wilson for further evaluation and additional medical treatment. Although appellants approved the referral, an appointment was not scheduled. Appellee was next evaluated on July 7, 1999, by Dr. Thomas Hart, who observed that past treatments were not successful and recommended discography to determine the source of appellee's pain and if there was internal disc disruption. Dr. Hart performed the discography on September 9, 1999, and recommended IDET based on the test results.

The ALJ also received into evidence the deposition testimony of Drs. Simpson and Hart. Both physicians testified about discography and intradiscal electrothermal therapy. Dr. Simpson, a neurosurgeon, testified that he had not examined appellee since May 18, 1998, and characterized discography as "worthless," and IDET as "hocus-pocus." Dr. Simpson testified that he was not aware of any peer-reviewed studies that have occurred that indicate heating a disc will repair an annular tear, and that in his opinion, heating up a disc will absolutely not repair an annular tear. He also stated that he had not seen any peer-reviewed study or randomized peer-reviewed studies of IDET that would indicate that IDET is beneficial. Dr. Simpson testified that ninety-percent of his practice was spine surgery and that he kept up with literature dealing with treatment of the spine. He opined that appellee did not need an operation on any discs in her back. On cross-examination, Dr. Simpson acknowledged that he had not attended an American Association of Neurological Surgeons meeting within the last year.

In his deposition testimony, Dr. Hart testified his sub-specialty was pain management and that he was board certified in pain management. Hart testified that IDET was a new technology that had come out within the last two years. He stated that IDET was FDA approved, had a seventy percent national success rating, and consisted of a minor outpatient non-surgical procedure. Hart testified that he had performed approximately eighty IDET procedures. He also testified that appellee had circumferential disruption on her disc, and that taking out a portion from the back part of the disc might help alleviate her pain. Hart testified that the procedure was reasonable and that there was a good chance that appellee would receive improvement.

The ALJ found that appellee was entitled to an open-ended award of temporary-total-disability benefits beginning on November 1, 1998 and that appellee proved entitlement to a referral to Dr. Wilson. However, the ALJ denied appellee's request for an IDET procedure. Both parties appealed the ALJ's decision to the Commission, who reviewed the record *de novo*. The Commission agreed with the ALJ's findings regarding the open-ended award of temporary-total-disability benefits and the referral to Dr. Wilson. However, it found that appellee proved that the IDET was reasonably necessary for the treatment of her compensable back injury. This appeal follows.[1]

*Standard of Review*

When considering whether the evidence is sufficient to support the Commission's conclusion, we view all evidence and reasonable inferences in a light most favorable toward the Commission's decision. *See Ester v. National Home Ctrs., Inc.*, 335 Ark. 356, 981 S.W.2d 91 (1998). The decision is affirmed when it is supported by substantial evidence, *i.e.*, when reasonable minds viewing the same evidence as presented to the Commission could reach the same conclusion as the Commission. *See id.* The critical question is not whether we might have concluded differently than the Commission or whether the evidence supports a different finding. *See Barnett v. Natural Gas Pipeline Co.*, 62 Ark. App. 265, 970 S.W.2d 319 (1998). Rather, the question remains whether reasonable minds

[1] Although appellants challenge the Commission's decision regarding appellee's entitlement to temporary total disability benefits and electro thermal therapy on appeal, it does not refute the Commission's decision that appellee is entitled to a referral to Dr. Wilson.

could arrive at the Commission's conclusion. *See id.* at 268, 970 S.W.2d 321. When the answer is yes, we affirm. *See id.*

*Entitlement to Temporary Total Disability Benefits*

Temporary total disability represents that interval of time within the healing period in which a claimant suffers a complete inability to earn wages. *See Georgia-Pacific Corp. v. Carter*, 62 Ark. App. 162, 969 S.W.2d 677 (1998). The healing period is statutorily defined as "that period for healing of an injury resulting from an accident." *See* Ark. Code Ann. § 11-9-102(13) (Supp. 1998). We have interpreted this period as including the time until the employee is as far restored as the permanent character of the injury will permit. *See Roberson v. Waste Management*, 58 Ark. App. 11, 944 S.W.2d 858 (1997). Once the underlying condition is more stable and will not improve with further treatment, the healing period is over. *See id.* Whether a claimant's healing period has ended is a factual question that is resolved by the Commission. *See id.*

In the present case, appellants argue that appellee was not diagnosed with disc herniation until after November 2, 1998, when Dr. Safman indicated that appellee had reached maximum medical improvement. The record clearly indicates that appellee was diagnosed with spinal stenosis at L4-5, with mild posterior disc herniation[2] as early as March 30, 1998. She was also diagnosed by Dr. Nutt on July 28, 1998, with acute, severe back pain secondary to a partially ruptured disc. This diagnosis was echoed by Dr. Lipke in his medical note, dated March 30, 1999, which indicated that a CT of appellee's lumbar spine showed a left sided herniation at L4-5 and mild spinal stenosis. Further, in a medical note dated October 1, 1999, Dr. Hart stated "post CT imaging after the [discography] procedure also demonstrated at L4-5 and L5-S1 levels, disc degeneration with posterior annular tears. A small central herniation at both levels, for L4-5 and L5-S1."

The record also does not support appellants' assertion that Dr. Lipke's March 30, 1999, medical record "does not address appellee's work status." Indeed, Dr. Lipke plainly states in the March 30,

[2] A herniated disc is described as protrusion of the nucleus pulposus or annulus fibrosus of the disk, which may impinge on nerve roots. It is also described as one that has protruded and then ruptured. *See Sloane-Dorland Annotated Medical-Legal Dictionary*, 344 (1987).

1999, medical record "she's been unable to work since the time of injury, although several attempts have been made for her to return to work."

Of the many physicians who treated appellee, only Dr. Safman determined that she had reached maximum medical improvement. It is significant that Dr. Safman made this determination on November 2, 1998, and two days later appellee was admitted into the hospital for treatment. Based on the foregoing, fair-minded individuals could agree with the Commission's finding that appellee was still within her healing period and entitled to an award of temporary total disability benefits beginning on November 1, 1998.

*Entitlement to IDET Procedure*

We recently considered intradiscal electrothermal treatment (IDET) in *White Consol. Indus. v. Galloway*, 74 Ark. App. 13, 45 S.W.3d 396 (2001). In *Galloway*, the employer argued that IDET was experimental and not reasonably necessary to treat Galloway's back condition. After a *de novo* review, the Commission disagreed and found that the procedure was reasonable and necessary. On appeal, we agreed with the Commission, noting that whether a procedure is a reasonably necessary medical treatment is an issue for the Commission to resolve. *See Galloway, supra.* After recognizing that an employee is not required to prove a one-hundred percent success rate in order for a procedure to be considered reasonably necessary, we affirmed the Commission. *See Galloway, supra.*

Here, substantial evidence exists to support the Commission's finding that appellee met her burden of proving that the IDET procedure was reasonably necessary to treat her compensable back injury. In its opinion, the Commission noted that it was aware of IDET and that, while the procedure was relatively new, the procedure was not experimental. Although appellants urge that the Commission mischaracterized Dr. Simpson's testimony as based on a limited amount of information, the record demonstrates that Dr. Simpson testified that he had read "what little literature that has passed before me." The Commission contrasted Simpson's testimony with that of Dr. Hart, who had performed roughly eighty IDET procedures and testified that the procedure, which was pioneered in 1997, was FDA approved and had a national success rate of seventy percent. It specifically stated that it gave significant weight to Dr. Hart's testimony because of Hart's experience in

performing IDETs and because Hart articulated sound reasons for his recommendation that appellee was a likely candidate, including the ineffectiveness of conservative treatment and appellee's inability to tolerate constant pain. Credibility issues, as well as the weight to give conflicting medical testimony, are factual determinations for the Commission to resolve. Based on our standard of review, we hold that the Commission's finding that the IDET procedure was reasonable and necessary is supported by substantial evidence. Accordingly, we affirm.

Affirmed.

ROBBINS and CRABTREE, JJ., agree.

HAYGOOD LIMITED PARTNERSHIP *v.*
Michael L. WHISENANT

CA 00-1253 47 S.W.3d 277

Court of Appeals of Arkansas
Division II
Opinion delivered June 13, 2001

*Baxter, Jensen, Payne & Young*, by: *Terence C. Jensen*, for appellant.

*Hart, Shaw & Freeze, L.L.P.*, by: *Nelson V. Shaw*, for appellee.

WENDELL L. GRIFFEN, Judge. Appellant Haygood Limited Partnership challenges a decision by the Arkansas Workers' Compensation Commission that appellee Michael L. Whisenant's 1993 injury is not barred by the statute of limitations prescribed in Arkansas Code Annotated section 11-9-702 (1987), because he did not suffer a loss in earnings on account of the injury he sustained in 1993. As its sole point on appeal, appellant argues

that the Commission's ruling is erroneous. We affirm the Commission.

*Factual and Procedural History*

On January 8, 1993, Michael L. Whisenant sustained a compensable injury when he fell over the side of a delivery pick-up truck, which was approximately five feet from the ground, while working for appellant. Whisenant notified appellant of the accident, but did not seek treatment until January 11, 1993. He initially saw Dr. David McKay, a family practitioner, and complained of a skinned left elbow, contusions of his low back and left hip, and neck pain. Dr. McKay prescribed medication and directed appellee to return for a follow-up visit. Dr. McKay also referred appellee to Dr. Chris Alkire, an orthopedic surgeon who performed diagnostic studies including x-rays and MRI's of appellee's neck and lower back. Appellee was next examined by Dr. Warren Boop, a neurosurgeon. Appellee admitted that when he saw Dr. Boop, he relayed complaints of pain that increased when he rode in his truck or with any significant physical activity. However, he denied that he had any right hip pain following the injury. Throughout appellee's medical treatment, he did not lose time from work relative to his injury. Rather, he continued working for appellant, who paid the cost of the treatment by Drs. McKay, Alkire and Boop, as well as referrals and physical therapy. Appellee testified that he did not remember being placed on any work restrictions, but that he would not disagree with what was indicated in the medical reports. His job consisted of delivering heavy-duty truck parts to customers. The work required a lot of lifting, but appellee testified he was able to continue his duties without limitations after the accident because there were no restrictions.

Appellee worked for appellant until October 1993, when he was laid off due to a reduction in business. He received unemployment benefits for six months, and then began working for Stovall Fabrication and Machine Shop. Appellee's job with Stovall consisted of traveling, however it did not involve lifting.

A May 24, 1993, entry in Dr. Alkire's chart notes shows that he informed appellant that appellee was continuing to work full duty, that he had placed no restrictions on appellee, and that due to appellee's continued symptoms, he was scheduling an appointment in three months. On February 7, 1994, appellee saw Dr. Alkire

regarding his 1993 injury. Dr. Alkire's chart notes reflect that appellee was seen at the request of appellant to obtain a final report. Alkire's notes indicate that appellee had met his maximum medical improvement and pursuant to AMA Guidelines, he assigned appellee an impairment rating of 13% to the body as a whole. The notes indicate that a courtesy copy was forwarded to appellant. Appellant paid the cost of the February 7, 1994, visit, but did not pay any disability benefits associated with the impairment rating. Appellee testified that Dr. Alkire did not tell him that he had a disability from his back or neck and that he was not informed that he had a disability rating. He stated that he first became aware of the rating when he read Dr. Alkire's February 7, 1994 report.

Appellee continued working for Stovall for approximately two years. He testified that during this time, he did not seek or obtain medical treatment relative to his neck, back, or hip. Appellee testified that he did not experience pain in his neck, back or hip until late 1998 when he began to experience problems in both hips, problems with stooping, bending over, popping in the joint area of the hip and pelvis and a lot of pain on the right side. After he began experiencing pain, appellee telephoned appellant, who referred him to the Commission. Appellee testified that the reason he contacted appellant was because he had not had any injuries other than the January 8, 1993 incident.

On April 22, 1999, appellee sought treatment from Dr. Joseph Greenspan, who provided physical therapy, injections into his SI joint, and furnished appellee with a SI belt. Dr. Greenspan also recommended a discogram. Appellee sought compensation, alleging that his injury, which occurred prior to the enactment of Act 796 of 1993, was a latent condition. Appellant responded that appellee's condition was not latent and that his claim was barred by the statute of limitations. Following a hearing, the ALJ found that appellee sustained an injury on January 8, 1993, arising out of and in the course of his employment and held that appellee's claim was not barred by the two-year limitation period because he experienced no loss of wages from it. After a *de novo* review, the Commission affirmed and adopted the ALJ's findings and conclusions of law. This appeal follows.

*Standard of Review*

Decisions by the Commission are affirmed when we determine that the decision is supported by substantial evidence, *i.e.*, that reasonable minds could have reached the same conclusion. *See Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999). The key factor is not whether we would have reached a different outcome or whether the proof supports a conflicting result. *See id.* Instead, if reasonable minds could have reached the same conclusion as the Commission, we will affirm. *See id.*

*Analysis*

Arkansas Code Annotated section 11-9-702 (1987) mandates that "a claim for compensation for disability on account of an injury other than an occupational disease and occupational infection shall be barred unless filed within two (2) years from the date of injury." Appellee's fall occurred January 8, 1993. He now seeks medical treatment provided by Dr. Greenspan on April 22, 1999, more than six years after the fall. Appellant asserts that because appellee suffered an injury and was placed on a "no lifting" work restriction by his physician, appellee suffered a compensable injury that was barred by statute of limitations. We see no reason to accept appellant's novel and narrow position.

On the date of appellee's fall, the statute of limitations for workers' compensation claims commenced at the time of the injury rather than the time of the accident. *See Calion Lumber Co. v. Goff*, 14 Ark. App. 18, 684 S.W.2d 272 (1985). At the time of appellee's injury, Arkansas was and still is a "compensable-injury state," meaning an injury becomes compensable when 1) the claimant learns the extent of his injuries and 2) the claimant is off work for a period of time that entitles him to benefits for a compensable injury. *See Calion, supra.*

In *Donaldson v. Calvert McBride Ptg. Co.*, 217 Ark. 625, 232 S.W.2d 651 (1950), our supreme court held that the terms "time of injury" and "time of accident" are not synonymous. It observed that while an injury may result from an accident, an accident may or may not result in an injury. The court noted that our statutory law defines disability as stemming from an employee's inability to earn the same or similar wages that the employee was earning at the time of the injury. *See id.* In *Donaldson, supra*, the parties stipulated that

the claimant sustained an accidental injury in March 1947 that resulted in him being off work, without compensation, for one week. However, the court reasoned that claimant's injury did not become compensable in March 1947 because his loss of ability to earn wages did not continue for the period required to qualify for benefits. The court held that the claimant's injury was not compensable until October 1948 when he actually suffered a loss in earning capacity due to the injury that continued for the requisite period. It also noted that the employer's medical payment was not a payment of compensation that would render the injury compensable. *See id.*

This court reached a similar result in *Calion, supra,* when the claimant sustained a back injury in 1980 and did not notify his employer or miss any work because of his injury until 1981. We noted that because appellant's condition gradually worsened and did not cause him to lose time or a capacity to earn wages until 1981, the injury was not compensable until 1981. *See id.*

While we have consistently recognized that the statute-of-limitations period does not begin until the extent of the injury manifests itself *and* the injury causes a loss of wages, *Arkansas Louisiana Gas Co. v. Grooms,* 10 Ark. App. 92, 661 S.W.2d 433 (1983), presented our court with an opportunity to interpret what constitutes an incapacity to earn because of an injury. In *Grooms, supra,* the claimant hurt his back in 1977, was treated with a cortisone shot, and returned to work after two weeks. While Grooms was off work, his employer paid him full wages and paid the medical bill. Over the next three years, Grooms missed work but was paid full wages until his back condition forced him to completely stop work in June 1980. He subsequently filed a workers' compensation claim, which was granted by the Commission. The employer appealed, contending that the statute of limitations barred the claim. We reversed the Commission, holding that Grooms suffered a compensable injury because he was incapacitated to earn the wages he received at the time of the incident. We reasoned that the "payment of full wages during a compensable disability does not negate the incapacity to earn." *See Grooms,* 10 Ark. App. at 100, 661 S.W.2d 433 at 438.

Documentary medical evidence supports the Commission finding that appellee's initial complaint was of contusions to his low back and left hip, and that he received physical therapy and medication for treatment of his low back and hip complaints from January

8, 1993, to August 1993. Thus, the Commission correctly concluded the first element to commence the statute of limitations was satisfied.

Appellant relies on *Grooms, supra,* as support for its argument that because the treating physician's notes indicate that appellee was given work restrictions, appellee suffered an incapacity to earn wages. Thus, appellant argues that the second prong of the requirements to begin the statute of limitations was met. However, appellant's reliance on *Grooms* is misplaced because the circumstances presented in *Grooms* are clearly distinguishable from the case at bar. Appellee presented uncontroverted testimony that he did not miss work as a result of the 1993 accident. His testimony was supported by notes from three physicians. First, Dr. McKay, who initially saw appellee on January 11, 1993, indicated in his notes that "patient will be able to resume light work on 1-11-93." Next, Dr. Alkire indicated on April 12, 1993, "[patient] says he is still working and hasn't stopped working." Lastly, Dr. Boop, in a letter dated August 20, 1993, indicated "still he is to return to work and has continued to work delivering truck parts and the like."

While the fact that appellee did not miss work would theoretically dispose of appellant's argument that the instant case is factually similar to *Grooms*, appellant argues that *Grooms* is analogous because *the value* of appellee's work diminished through his performance of light duty work. Although appellant's argument is interesting, the record is devoid of any evidence supporting it. First, the only evidence presented at the hearing regarding appellant's alleged work restrictions concerned physician notes from Dr. McKay, which indicated that Dr. McKay placed work restrictions upon appellee of no lifting. However, appellee testified at the hearing that he continued to perform his normal job, with no restrictions until he was laid off in October. Appellant's testimony was buttressed by physician notes. The first note, from Dr. Alkire, dated April 29, 1993, states "the patient tells me he is *still able* to do his normal job." Another note from Dr. Alkire, dated May 20, 1993, states "He has been doing his normal job *still.*" Additionally, a note from Dr. Boop, dated August 20, 1993, states "Overall though his pain has continued and he has not improved much. Still he is to return to work and *has continued to work delivering truck parts* and the like." Second, the record contains no evidence that appellant provided appellee with light duty work, or that the work appellee performed was of such diminished value as to render him incapable of earning wages.

In sum, the law in force when appellee suffered his January 8, 1993, work accident clearly required incapacity to earn wages in order for a worker to be found to have sustained an injury that triggers the statute of limitations for purposes of workers' compensation benefit analysis. The record contains substantial evidence that appellee suffered no incapacity to earn wages during the six years between the accident and his April 22, 1999, examination by Dr. Greenspan. Therefore, we affirm the Commission's decision that appellee's claim for additional medical benefits is not barred by the statute of limitations.

Affirmed.

VAUGHT, J., agrees.

ROAF, J., concurs.

ANDREE LAYTON ROAF, Judge, concurring. I concur in affirming the case. However, I write to clarify that, while pre-Act 796 Workers' Compensation law compels the result reached, the statutory loophole that existed with respect to statute of limitations issues under the prior law has now been closed.

I agree that Ark. Code Ann. § 11-9-702 (1987), at the time of this appellant's 1993 injury, mandated only that "a claim for compensation for *disability* on account of an injury... shall be barred unless filed within two (2) years...," and that there was no other relevant statute of limitations provision applicable to this claim. However, this appeal involves a claim for medical benefits, not disability. Section 702(b)(1) now provides that, where "any compensation, including disability *or medical*, has been paid on account of an injury," a claim for additional compensation must be filed within the greater of either one year from the last payment of compensation or two years from the date of injury. Clearly, appellant's claim falls outside both of these periods because he last received medical benefits payments in 1994 and did not file a further claim until 1999.

Moreover, although it is accurate to state, as does the majority, that Arkansas is still a "compensable injury state," the definition of when an injury becomes compensable has changed dramatically, and is no longer the definition provided in *Calion Lumber Co. v. Goff*, 14 Ark. App. 18, 682 S.W.2d 272 (1985). Instead, Ark. Code Ann. § 11-9-102(4)(A)(i)(Supp. 1999) now defines "compensable

injury" in relevant part as, "an accidental injury ... arising out of and in the course of employment ... which requires *medical services* or results in disability or death." Thus, the receipt of any medical services is now the benchmark for a compensable injury rather than time missed from work.

John LEE *v.* Ashley MARTIN and
Sears, Roebuck & Company

CA 00-1247 45 S.W.3d 860

Court of Appeals of Arkansas
Division I
Opinion delivered June 13, 2001

*Grider Law Firm* and *Dick Jarboe*, for appellant.

*Trammell Rogers, PLC*, by: *Gill A. Rogers* and *Michael McCarty-Harrison*, for appellee Ashley Martin.

OLLY NEAL, Judge. This is a negligence and products-liability case. On May 6, 1992, appellant John Lee, who was age eighteen, attended a party hosted by appellee Ashley Martin, age seventeen. Upon leaving the party, Lee accidently backed a borrowed car into a concrete bridge. When the car came to rest, one of its tires was suspended over a ditch. Lee sought the assistance of those at the party to extricate the vehicle from its precarious position. At Lee's request and direction, Ashley Martin sat in the driver's seat and accelerated the vehicle while Lee and others attempted to push it free. When Martin accelerated, the suspended

tire began spinning at a high rate of speed and exploded, seriously injuring Lee. He filed suit against Martin for negligence and against Sears, the supplier of the tire, on the theories of strict liability, breach of warranty, and failure to warn. Martin and Sears filed motions for summary judgment, which were granted by the trial court. On appeal, Lee contends that summary judgment was improperly granted. We disagree and affirm.

In summary-judgment cases, 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 unanswered. *See Regions Bank & Trust v. Stone County Skilled Nursing Facility,* 73 Ark. App. 17, 38 S.W.3d 916 (2001). 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. *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.* Once a moving party establishes a prima facie entitlement to summary judgment by affidavits, depositions, or other supporting documents, the opposing party must meet proof with proof and demonstrate the existence of a genuine issue of material fact. *Id.* Summary judgment is no longer considered a drastic remedy but is regarded as simply one of the tools in the trial court's efficiency arsenal. *See Wallace v. Broyles,* 332 Ark. 189, 961 S.W.2d 712 (1998).

We address first the summary judgment entered in favor of Martin. Lee contended that Martin was negligent in over-accelerating the vehicle, which caused the free-spinning tire to explode. Lee's expert, Loren Forney, explained in his deposition that, in his opinion, excessive centrifugal force caused the tire to come apart in this case. His opinion was bolstered by a page from a sample car owner's manual and by the affidavit of a mechanic, each of which recognized that, when one drive wheel is stationary and the other is not, the free wheel spins twice as fast upon acceleration as it normally would. This rapid acceleration subjects the freely spinning tire to great centrifugal force, causing it to explode. This phenomenon is known as over-spinning or spin break. *See Benoit v. Ryan Chevrolet,* 428 So.2d 489 (La. Ct. App. 1982); *Firestone Tire & Rubber Co. v. Battle,* 745 S.W.2d 909 (Tex. Ct. App. 1988).

Martin moved for summary judgment arguing that she was unaware that a tire might explode under such circumstances, thus

making the risk unforeseeable. To support her argument, she relied on Lee's deposition in which he testified as follows:

> Q.: [W]hat proof do you have that acceleration was the cause of this accident at all?
>
> A.: I have no proof.
>
> Q.: Given the allegations that Ashley Martin applied excessive acceleration ... did you know at that time or did you think at that time that excessive acceleration could cause a tire to explode?
>
> A.: No, I had no idea.
>
> Q.: Do you have any information that Ashley Martin should know any more than you about excessive acceleration in spinning a tire?
>
> Q.: No.

Martin also relied on the testimony of Lee's expert, Forney, who said that Martin had no way of knowing that the tire could explode under the circumstances and that the majority of the population would not be aware of such a possibility.

Foreseeability is a necessary ingredient of actionable negligence in this state. *See Benson v. Shuler Drilling Co.*, 316 Ark. 101, 871 S.W.2d 552 (1994). There is no negligence in not guarding against a danger which there is no reason to anticipate. *Id.* Although a jury question is presented where there is a reasonable difference of opinion as to the foreseeability of a particular risk, *see Keck v. American Employment Agency, Inc.*, 279 Ark. 294, 652 S.W.2d 2 (1983), where no difference of opinion exists, the question is decided by the trial court or appellate court. *See McDaniel v. Linder*, 66 Ark. App. 362, 990 S.W.2d 593 (1999).

Martin established, through Lee's and Forney's deposition testimony, that she had no reason to anticipate that acceleration of the vehicle would create a risk of harm. It was therefore incumbent upon Lee to meet proof with proof and show that a genuine issue of fact remained as to whether the risk was foreseeable. Lee's proof fell short in this regard. To establish the foreseeability of the risk, he relied primarily on the fact that the car owner's manual warned drivers that, when one wheel is spinning, acceleration should not exceed thirty-five miles per hour. However, Martin did not own the car that was involved in the incident; it was owned by a third

person not a party to this case. Further, Lee offered no proof that Martin had ever driven the car or seen the manual, nor did he offer proof that the manual was in the car at the time of the incident. Under these circumstances, we uphold the grant of summary judgment as to Martin.

Next, we consider Lee's argument that factual issues remain to be decided on each of the three theories he pled against Sears: strict liability for an alleged defect in the tire, breach of the implied warranty of merchantability, and negligent failure to warn. To recover under a strict liability theory, a plaintiff must prove, *inter alia*, that the defendant supplied the product in a defective condition that rendered it unreasonably dangerous and that the defective condition was the proximate cause of the plaintiff's harm. *See* Ark. Code Ann. § 4-86-102(a) (Repl. 1996); *E.I. Du Pont de Nemours & Co. v. Dillaha*, 280 Ark. 477, 659 S.W.2d 756 (1983). A "defective condition" is a condition that renders a product unsafe for reasonably foreseeable use and consumption. Ark. Code Ann. § 16-116-102(4) (1987). A product is "unreasonably dangerous" if it is dangerous to an extent beyond that which would be contemplated by the ordinary and reasonable user, assuming the ordinary knowledge of the community or similar users as to its characteristics, propensities, risks, dangers, and proper and improper uses, as well as any special knowledge, training, or experience possessed by the user. *See* Ark. Code Ann. § 16-116-102(7) (1987).

Lee's expert, Forney, testified unequivocally in his deposition that there was no manufacturing defect in the tire, no evidence of malfunction of the tire, nor any evidence that it was defectively designed. In fact, he stated that Sears had no responsibility at all for the tire explosion. Despite this testimony, Lee argues on appeal as follows:

> Even though the tire has no design defect identified by John Forney and there was no negligence in the manufacturing process as such, still the tire in question did not meet the expectations of John Lee or any other average or ordinary consumer and consequently that makes the tire defective.

According to Lee, Arkansas has adopted a consumer expectations test with respect to defectively designed products. Under this test, a plaintiff must demonstrate that the defective product disappointed the expectations of either a reasonable consumer or the plaintiff at bar before the product will be considered unreasonably dangerous. *See* Robert Thompson *The Arkansas Products Liability Statute: What*

*Does "Unreasonably Dangerous" Mean In Arkansas?* 50 ARK. L. REV. 663 (1998).

Lee argues that, because he did not expect the tire to explode, the tire is defective under the consumer-expectation test. However, he misunderstands the purpose of the test. Even if we agree that Arkansas has adopted the consumer-expectation standard, and no state court case has expressly held that we have,[1] the standard is relevant to only one prong of the proof needed in a strict-liability case, *i.e.*, whether the product is unreasonably dangerous. *See* Thompson, 50 ARK. L. REV. at 664-67. A plaintiff in a strict-liability case must prove that the product is unreasonably dangerous *and* defective. *See O'Mara v. Dykema*, 328 Ark. 310, 942 S.W.2d 854 (1997). Proof that the product was defective is an essential element of a strict-liability cause of action. *See Lakeview Country Club, Inc. v. Superior Prods.*, 325 Ark. 218, 926 S.W.2d 428 (1996). Lee's own expert offered his opinion that the tire was not defective, and Lee did not meet proof with proof to dispel that opinion. If a respondent cannot meet proof with proof on an essential element of his claim, the movant is entitled to judgment as a matter of law. *See Caplener v. Bluebonnet Milling Co.*, 322 Ark. 751, 911 S.W.2d 586 (1995).

Next, we address Lee's claim for breach of the implied warranty of merchantability. The gravamen of such a claim is that the product is not suited for its ordinary purpose. *See Lakeview Country Club, Inc. v. Superior Prods., supra*; *Purina Mills, Inc. v. Askins*, 317 Ark. 58, 875 S.W.2d 843 (1994). As we have already stated, Lee's expert found that the tire was not defective and did not malfunction. He further found that any tire would have exploded under the conditions present in this case, based upon the laws of physics. Sears relied on these opinions in filing its motion for summary judgment on this issue and, again, Lee did not meet proof with proof to show that a genuine issue of fact existed. He offered no proof that the tire was unfit, that it malfunctioned, or that it was inadequate to serve its ordinary purpose. The expert's opinion stood unrebutted on this point, making summary judgment proper.

Finally, we address Lee's claim that Sears failed to warn users of the hazard of centrifugal-force explosions. As a general rule, there is a duty to warn the ultimate user of a product of the risk of the product. *See West v. Searle & Co.*, 305 Ark. 33, 806

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[1] *But see French v. Grove Mfg. Co.*, 656 F.2d 295 (8th Cir. 1981).

S.W.2d 608 (1991). This duty exists under either a negligence theory or a strict-liability theory.[2] *Id.* The record reveals that, other than the warning contained in the sample car owner's manual referred to earlier, which was provided by the car manufacturer, the only other warning provided as to the danger of over-spinning a tire was contained on the back of a Sears tire warranty card. It read as follows:

> When in mud, sand, or ice conditions, do not indulge in excessive wheel spin. In such conditions, with automatic transmission vehicles, by accelerating the motor excessively, it is possible to spin one of the drive tires beyond its speed capability. This is also true when balancing a drive tire/wheel assembly using the engine of the vehicle to spin the wheel.

Lee argues that the warnings were not adequate and that a proper warning should have been placed on the wheel itself or on the dashboard of the car or that warnings should have been displayed in retail tire stores. Sears did not base its motion for summary judgment on the claim that the warnings provided were adequate as a matter of law. Rather, it contended that Lee could not prove that lack of a warning proximately caused his injuries. This contention was based on the theory that it would have been futile to provide further warnings because Lee would not have seen them.

In *Bushong v. Garman Co.*, 311 Ark. 228, 843 S.W.2d 807 (1992), the supreme court held that, if a plaintiff meets his initial burden of proving that a warning is inadequate, a presumption arises that he would have read and heeded an adequate warning; however, the presumption may be rebutted by evidence that an adequate warning would have been futile under the circumstances. In *Bushong*, the court upheld the entry of summary judgment on a failure-to-warn claim because the plaintiff admittedly did not read a warning label on the chemical cleaning product that allegedly caused his injury. Likewise, in the case at bar, appellant, by his own admission, did not look at the tire or inspect it before going into the ditch to free the vehicle, nor was it likely that he ever would have. The hour was late when the incident occurred, and the vehicle did not belong to appellant. Further, appellant's expert, Forney, testified that, in his opinion, a warning on the tire would have made no

[2] In his brief in opposition to Sears's summary judgment motion, Lee stated that his failure-to-warn claim was for negligent failure-to-warn. However, the distinction makes no difference for purposes of this appeal.

difference. Thus, as in *Bushong*, it would have been futile as a matter of law for Sears to provide further warnings. Summary judgment was therefore proper on this issue.

Affirmed.

HART and VAUGHT, JJ., agree.

Marilyn Sue McGrew MOORE *v.*
WAUSAU INSURANCE COMPANY

CA 00-1282 47 S.W.3d 274

Court of Appeals of Arkansas
Division IV
Opinion delivered June 13, 2001

*Rush, Rush & Cook*, by: *R. Gunner Delay*, for appellant.

*Daily & Woods, P.L.L.C.*, by: *Douglas M. Carson*, for appellee.

KAREN R. BAKER, Judge. Appellant, Marilyn Sue McGrew Moore, has appealed a Crawford County Circuit Court order granting a motion to dismiss on the basis that the circuit court lacked jurisdiction over a joint petition approved by the Administrative Law Judge. Appellant has five arguments on appeal. First, appellant argues that the trial court erred in granting the appellee's motion to dismiss because it is the only forum that has jurisdiction over the matter. Second, appellant argues this action was appropriately filed as an action for breach of contract. Third, appellant argues the trial court erred in dismissing this action because the existence of a contract is a question of fact. Fourth, appellant argues that the trial court erred in dismissing this action because she is entitled to relief under Ark. Code Ann. § 23-79-208 (Repl. 1999). Fifth, appellant argues that in the event the court finds that the plaintiff cannot proceed under Ark. Code Ann. § 23-79-208, she is still entitled to recover an attorney's fee under Ark. Code Ann. § 16-22-308. We affirm.

Appellant was employed by Health Management Associates (HMA) on May 2, 1997, when she sustained an injury. As a result, appellant incurred two surgeries, one on the lower back and one to the neck. The Workers' Compensation Commission required that appellee, Wausau Insurance Company, as the workers' compensation carrier for HMA, pay appellant the benefits she was entitled. Subsequently, the two parties entered into a joint petition agreement.

The joint petition agreement stated that appellant was to receive a sum of $25,000, attorney's fees of $6,000, and all related and authorized medical expenses. The Administrative Law Judge approved the petition, and both the award and the attorney's fee were paid directly to appellant. However, the medical expenses were not paid, allegedly because the bills were misplaced by appellee.

Appellant then brought this action in Crawford County Circuit Court for breach of contract. Appellee responded by filing a motion to dismiss arguing the circuit court lacked jurisdiction. The motion was granted and this appeal followed.

Appellant first argues that the trial court erred in granting the appellee's motion to dismiss because it is the only forum that has jurisdiction over this matter. She is incorrect. Arkansas

Code Annotated section 11-9-805(b)(1) and (2) (Repl. 1996) states that, "[i]f the commission decides it is for the best interests of the claimant that a final award be made, it may order an award that shall be final as to the rights of all parties to the petition. Thereafter, the commission shall not have jurisdiction over any claim for the same injury or any results arising from it." Thus, it is only when a final award is made by the Commission in approving a joint petition that the Commission loses its jurisdiction over "any claim for the same injury or any results arising from it." *Stratton v. Death & Permanent Total Disability Trust Fund*, 28 Ark. App. 86, 770 S.W.2d 678 (1989) (citing *Sayre v. Second Injury Fund*, 12 Ark. App. 238, 674 S.W.2d 941 (1984)). Our supreme court in *Jacob Hartz Seed Co. v. Thomas*, 253 Ark. 176, 485 S.W.2d 200 (1972) noted that,

> [t]he necessity for extreme caution in approving such settlements . . . lies in the fact that *any award based thereon finally concludes all rights of the parties*, even foreclosing any right of appeal from the order of approval. This is the only procedure under our act which leaves the claimant without any further remedy, regardless of subsequent developments.

253 Ark. at 179, 485 S.W.2d at 202. (Emphasis supplied.)

The language quoted above makes it clear that the finality of a joint petition settlement is viewed from the claimant's standpoint, and it is the claimant's right to proceed further that is extinguished. *Stratton, supra*. However, there must be finality before claimant's right to proceed is extinguished and the jurisdiction of the Commission ends.

The Commission has continuing jurisdiction over orders which are not final, because there is not a specific award. To be final, the order must dismiss the parties from the court, discharge them from the action, or conclude their rights as to the subject matter of the controversy. *American Mut. Ins. Co. v. Argonaut Ins. Co.*, 33 Ark. App. 82, 801 S.W.2d 55 (1991). When the Commission makes findings only with respect to the issue of causation without determining questions relating to the amount and duration of compensation, such as healing period, disability, or reasonable medical expenses, the order is not final. *St. Paul Ins. Co. v. Desota*, 30 Ark. App. 45, 782 S.W.2d 374 (1990). Our supreme court has further pointed out that an order "which establishes the plaintiff's right to recover, but leaves for future determination the exact amount of his recovery, is not final." *Farms v. Jones*, 28 Ark. App. 90, 770 S.W.2d 680 (1989) (quoting *Ark. State Highway Comm. v.*

*Kesner*, 239 Ark. 270, 278, 388 S.W.2d 905, 911 (1965)). In the case at hand, the order required appellee to pay "outstanding medical bills related to the lumbar and cervical injuries and the foot up to the date of this joint petition." The order failed to provide an amount that appellant was to receive; thus, it was not a final order. In this situation, the Commission retains jurisdiction for any further proceedings necessary to achieve finality.

Furthermore, this court discussed the purpose of Ark. Code Ann. § 11-9-805 stating that,

> [c]onceding entirely that one avowed and worthwhile objective of Section 19(l) is to protect the claimant in joint petition settlements, it should be noted that there is another objection of Section 19, also to be valued, and that is the achieving of finality where the parties have reached a fair compromise-hence, the proviso that the Commission will have no further jurisdiction.

*Bradford v. Arkansas State Hospital*, 270 Ark. 99, 105-06, 603 S.W.2d 896, 900 (Ark. App. 1980). In this case, appellant and appellee entered into a joint petition, which was subsequently approved by the Administrative Law Judge. However, finality was not achieved because the joint petition did not specify what medical expenses were to be paid, nor did it set out a specific award relating to those expenses.

We hold that the circuit court, in this instance, correctly concluded that it is without jurisdiction. Our supreme court in *Baldwin v. Club Products Co.*, 302 Ark. 404, 790 S.W.2d 166 (1990), held that the circuit court did not have jurisdiction to determine what was a "reasonable and necessary" expense pursuant to an order or award of the Commission. In *Baldwin*, the parties could not resolve a dispute over whether the employer and its carrier in a workers' compensation case were required to pay certain bills under an earlier order requiring it to pay "any and all reasonable and necessary medical and related expenses." 302 Ark. at 405, 790 S.W.2d at 167. The claimant filed a motion to enforce the Commission's order in circuit court. 302 Ark. at 406, 790 S.W.2d at 167. The circuit court ruled that it was without jurisdiction to settle the dispute and the Arkansas Supreme Court affirmed. *Id.* Here, just as in *Baldwin*, the circuit court correctly determined that it did not have jurisdiction.

Because we hold the circuit court was correct in finding that it lacked jurisdiction, we do not address appellant's remaining arguments.

Affirmed.

JENNINGS and ROBBINS, JJ., agree.

Jimmy STRICKLAND *v.* STATE of Arkansas

CA CR 00-1061 46 S.W.3d 554

Court of Appeals of Arkansas
Divisions I, II, and IV
Opinion delivered June 13, 2001

*John Joplin*, for appellant.

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

KAREN R. BAKER, Judge. This is an appeal from a jury verdict of manslaughter resulting in a sentence of ten years in the Arkansas Department of Correction and a ten thousand dollar fine. Appellant was tried for second-degree murder and convicted of manslaughter upon the jury's finding that he had pushed the victim from a moving vehicle causing her death. Appellant asserts two errors: (1) that the trial court erred in the removal of a juror after the jury had been selected, impaneled and sworn; and (2) the trial court erred in allowing the testimony of a tainted witness. We find no error and affirm.

Appellant first argues that the trial court erred in removing a juror, Mr. Black, after the jury had been selected, impaneled, and sworn. At *voir dire*, the trial judge asked the State to announce the identity of its witnesses. The State called a list of nineteen names, including the name of Detective Mark Hallum from the Fort Smith Police Department. None of the witnesses were present when the names were called. When the court asked the potential jurors if any of them knew the State's witnesses or had dealings with any of the police officers, no one responded. The attorneys for both the State and the defense questioned Mr. Black prior to his being seated.

After the prosecution had presented most of its case, the deputy prosecutor approached the court and informed it that one of the prosecution's witnesses, Detective Hallum from the Fort Smith Police Department, had informed him that he knew one of the jurors, Mr. Black. The court deferred acting on the issue until other witnesses for the prosecution testified.

At the close of the prosecution's case, which included Detective Hallum's testimony, Detective Hallum testified outside the presence of the jury concerning his knowledge of Mr. Black. He stated that, about a year or a year and a half before, he arrested Mr. Black's son, Joshua, a couple of times. One of those times was at Mr. Black's house. When the Detective attempted to arrest Joshua, Mr. Black stated, "You are not going to arrest my son." The Detective replied, "Yes, sir; I am. I am going to take him to jail." The detective testified that it was not a friendly conversation and that it lasted several moments. Although Joshua was ultimately prosecuted on two separate felony charges and Detective Hallum appeared in court with respect to those charges, he did not have any more contact with Mr. Black until he saw him in the jury box in this case.

In light of Detective Hallum's testimony about his confrontation with Mr. Black, the court excused Mr. Black from the jury and replaced him with an alternate juror, Ms. Brown, before the jury began deliberation. The court stated that Mr. Black had an obligation to speak up during *voir dire*, if he knew Detective Hallum and concluded that the defense was not prejudiced by the replacement of Mr. Black.

Appellant maintains that because Ark. Code Ann. § 16-33-303(b) (Repl. 1999) provides that a trial court may permit a challenge for good cause to be made at any time before a jury is completed that there is an implication that the statute forbids a

challenge for cause once a jury is impaneled and sworn. He further contends that Ark. Code Ann. § 16-31-102 sets out the circumstances that allow an alternate to replace a juror and that there was no showing that Mr. Black was disqualified under that statute.

We first note that Ark. Code Ann. § 16-31-102(c) provides that "[n]othing in this section shall limit a court's discretion and obligation to strike jurors for cause for any reason . . . ."

Secondly, appellant's position that the statute forbids a challenge for cause once a jury is impaneled and sworn directly contradicts our case law and would impermissibly limit a judge's obligation to ensure that a defendant receives a trial with an impartial jury. In *Bradley v. State*, 320 Ark. 100, 896 S.W.2d 425 (1995), the trial court replaced a seated juror with an alternate juror. On the third day of trial and after the State had rested, the trial court received a report that the juror was riding to court each day with a spectator and that the spectator's son dated the defendant's mother. The juror had not mentioned this during *voir dire*. The trial court conducted a hearing and, in order to avoid any appearance of impropriety, seated an alternate juror. The Arkansas Supreme Court held that the trial court did not err in excusing the juror and seating the alternate juror in order to avoid an appearance of impropriety. *Id.* (citing *Ruiz v. State*, 273 Ark. 94, 617 S.W.2d 6, *cert. denied*, 454 U.S. 1093, 102 S.Ct.659, 70 L.Ed.2d 631 (1981)).

The Arkansas Supreme Court similarly found no abuse of discretion where a judge removed a seated juror and replaced him with an alternate after accepting the word of a jail trusty over the word of the removed juror. *Lee v. State*, 340 Ark. 504, 11 S.W.3d 553 (2000). The court explained that it "is true that this matter was decided largely as one of credibility, but this court has consistently held that the trial court is in the best position to judge the credibility of the witnesses and to resolve any conflicts in that testimony." *Id.* At 515, 11 S.W.3d at 559-60.

Appellant fails to demonstrate that the trial judge's removal of Mr. Black was an abuse of discretion. The trial judge was faced with a conflict between Mr. Black's silence during voir dire concerning his knowledge of and dealings with a prosecution witness, and the detective's testimony that he had arrested Mr. Black's son in Mr. Black's presence and that there was a confrontation that was unpleasant.

The impartiality of a juror is a question of fact for the trial court to determine in its sound discretion. *See Urquhart v. State*, 275 Ark. 486, 631 S.W.2d 304 (1982). The trial court has much latitude and discretion in passing on the qualifications of jurors, and unless abused, its action will not be reversed on appeal. *Franklin v. Griffith Estate*, 11 Ark. App. 124, 666 S.W.2d 723 (1984). The trial court had no duty to determine that Mr. Black had been untruthful in *voir dire* before removing him. *See Arkansas Power & Light Co. v. Bolls*, 48 Ark. App. 23, 888 S.W.2d 319 (1994) (holding that a trial court did not abuse its discretion in granting a new trial although juror's apparently unintentional failure to disclose disqualifying information was not done knowingly); *cf.* Ark. Code Ann. § 16-31-107 (Repl. 1999) (effect of unqualified juror upon verdict or indictment); *see also Bradley v. State*, 320 Ark. 100, 896 S.W.2d 425 (1995) (finding no abuse of discretion to remove juror and replace with alternate to avoid appearance of impropriety).

Therefore, we conclude that the trial court did not abuse its discretion in removing Mr. Black from the jury. Furthermore, it has been held that an appellant must show prejudice when the trial court removes a juror and seats an alternate in a juror's place because we will not reverse for harmless error. *Heinze v. State*, 309 Ark. 162, 827 S.W.2d 658 (1992). A litigant is not entitled to the service of a particular juror and the erroneous rejection of a competent juror is not prejudicial, unless it is shown that a biased or incompetent juror replaced the rejected juror. *E.g. Strode v. State*, 259 Ark. 859, 537 S.W.2d 162 (1976). Appellant's failure to demonstrate prejudice would therefore preclude reversal even had the trial court's action in replacing Mr. Black been error.

Appellant's second argument is that he is entitled to reversal because his right to due process was violated when the prosecution allegedly committed misconduct in an attempt to taint witnesses. On January 13, 1999, Carl Strickland, appellant's brother, stated under oath that appellant told him he had pushed the victim from his truck while driving thirty miles per hour. On that same date, appellant's mother made a similar statement. Later, when speaking with appellant's counsel, the Stricklands recanted the statements that they had given.

When the prosecution learned from defense counsel that the Stricklands had changed their stories from what they had previously stated under oath, he subpoenaed them and questioned them again under oath. This time, they said that appellant had not told them

that he pushed the victim from his truck. The prosecutor had them arrested for perjury but did not file charges against them.

Before testifying at trial, the Stricklands testified outside the presence of the jury that they were willing to testify truthfully at trial. At trial, both testified that appellant said the victim jumped from his truck. The prosecution impeached them with their prior inconsistent statements, where they said appellant had told them that he pushed the victim from the truck. The trial judge instructed the jury that they were to consider those statements only for impeachment purposes. Appellant insists that "the situation was fraught with coercion" and that it "is hard to imagine a more oppressive atmosphere under which to call a witness." He urges that this circumstance on its own is enough to shock the conscience and warrant a retrial of the matter. We disagree.

The record does not support appellant's claim that the witnesses felt coerced to testify in a manner sought by the prosecution. Both witnesses testified in favor of appellant and in contrast to sworn statements they made soon after the incident. We find no prejudice to the appellant and no abuse of discretion on behalf of the trial judge.

Accordingly, we affirm.

JENNINGS, ROBBINS, BIRD, VAUGHT, and CRABTREE, JJ., agree.

HART, GRIFFEN and NEAL, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. I join Judge Neal's challenge to the majority's decision to affirm in the face of the longstanding legal principle in Arkansas that jurors are presumed to be unbiased unless shown to be biased by the party challenging the juror. *See Fleming v. State*, 284 Ark. 307, 681 S.W.2d 390 (1984); *Blann v. State*, 15 Ark. App. 364, 695 S.W.2d 382 (1985). However, I write separately to express my additional concerns that today's holding unnecessarily restricts our standard of review regarding juror challenges and permits sworn jurors to be removed outside the time permitted by Section 16-33-303(b) (1987) without a demonstration of bias. Further, the majority's position is legally unsound, manifests a flawed and narrow perspective regarding how jurors are selected and removed, and undermines the essential political function that juries serve in our political system.

*I. Standard of Review and Presumption of Bias*

First, I strongly disagree with the view that our task on appellate review of the legal issues in this case is limited to determining whether a biased or incompetent juror replaced the removed juror. Our review must include an assessment regarding whether the trial court followed the proper procedure in determining whether the juror should have been removed. While our current law, as cited by the majority, allows and even requires a trial judge to unseat a juror to avoid the appearance of impropriety, the trial court here unseated a sworn juror based on the one-sided allegation by a police officer, a witness for the State, without conducting a legally sufficient inquiry to determine whether the unseated juror's continued service even presented an appearance of impropriety.

I can think of few things more harmful to the integrity of the judicial process than for judges to allow government witnesses to make allegations against jurors sworn to be fair and impartial and, based on the allegations alone, remove the jurors without even giving them a chance to know they were being challenged, let alone knowing the reason for the challenge and given a fair chance to answer it. The majority opinion does great harm to the notion of democracy by permitting a government witness to have a juror unseated based on the witness's distrust of a juror rather than the trial court's independently reached sound conclusion that the juror was unfit to serve due to actual bias.

While it is certainly true that the law guarantees one the right to a trial by competent jurors rather than specific persons, that truism begs the specific question presented by this case. Here, the trial court had sworn the jury. Arkansas Code Annotated section 16-33-303(b) requires that a challenge to an individual member of the panel "be taken before he is sworn in chief, but the court, for a good cause, may permit it to be made at any time *before the jury is completed*." (Emphasis added.) The trial court plainly deviated from the statute when it allowed a sworn juror to be challenged *after* the panel had been accepted and begun to hear proof. However, pursuant to *Bradley v. State*, 320 Ark. 100, 896 S.W.2d 425 (1995), it appears that the trial court did not err *per se* by doing so.

Rather, the error lies with the trial court's failure to make a fair and even-handed inquiry to determine the validity or credibility of a police officer's allegation and to determine whether the juror in this case, Mr. Black, was biased. The longstanding law is that jurors

are presumed to be unbiased, and the burden of proving bias is on the party challenging the juror. *See Fleming v. State, supra*; *Blann v. State, supra.* Further, the mere fact that a juror knows a police officer who is a witness for the State does not *per se* require the juror's removal. *See Gammel & Spann v. State*, 259 Ark. 96, 531 S.W.2d 474 (1976)(affirming the trial court's refusal to allow a juror to be dismissed for cause where the juror was acquainted with a police officer who was a witness in the case).

Here, the trial court conducted an *in-camera* examination of the officer who asserted that he had arrested Mr. Black's son and had exchanged words with Mr. Black, who allegedly insisted that the officer was not going to arrest his son. The court informed Mr. Black that he was being removed because one of the witnesses stated that he knew him. However, the officer was not examined by trial counsel, nor was Mr. Black ever questioned to confirm or contradict the officer's allegation. It is especially disturbing that the majority holds the trial court did not abuse its discretion when it departed from the established legal procedure for allowing challenges given the glaring absence of any evidence in the record showing that Mr. Black was given anything approaching notice that his fitness to serve had been questioned. When the court informed Mr. Black that he was being removed and why, Mr. Black stated that he did not understand the reason for his removal and that to the best of his knowledge, he did not know any of the witnesses. Without further inquiry, the trial court determined that the officer's allegation about his encounter with Mr. Black when arresting his son demonstrated cause for removal because Mr. Black's service under those circumstances created an appearance of impropriety.

The majority ignores the trial court's disturbing failure to make sufficient inquiries to provide itself a basis upon which to make a reasoned decision. I am also concerned that the majority disregards the glaring fact that the trial court made no attempt to determine why the prosecution did not raise the allegation by the police officer until several hours after the witness testified and the juror had heard other evidence in the case. The identities of persons summoned for jury service on specific sessions of court are readily available to trial counsel before the date of trial in all cases. This is certainly true for murder trials. The prosecution had access to that information. Counsel for the prosecution knew that it would call the police officer to testify in the case. Given the nature of the prosecution's challenge to a sworn juror in the middle of trial hours after the witness testified, the trial court should have at least

inquired why the prosecution failed to ascertain whether the officer had dealt with any persons summoned for jury service in the case. Had the prosecution done so, it could have promptly asserted its concern about the propriety of the juror's service before the jurors were sworn. Yet the record shows the trial court did not require the prosecution to explain why its apparent lack of diligence in this matter should have been excused.

Thus, today's decision will undermine confidence in the integrity of the jury trial. Unless the presumed impartiality of sworn jurors is mere legal fiction or empty rhetoric, jurors deserve more respect, from trial and appellate judges most of all, than to be summarily disqualified based on unsubstantiated stories concerning out-of-court encounters with witnesses associated with one of the litigants.

*II. The Majority View is Legally Unsound*

The majority opinion fails to fully discern the magnitude of the trial court's error because it ignores the manner in which jurors are selected in criminal trials. The trial court conducts *voir dire* of the venire by making general inquiries. Then the prosecution and defense counsel conduct *voir dire* of the panel and of individual members of the venire. An individual member of the venire may be challenged either for cause or peremptorily. Section 16-33-303 plainly provides that the challenge to an individual member of the venire, whether it be peremptory or for cause "must be taken before he is sworn in chief, but the court, for a good cause, may permit it to be made at any time before the jury is completed." Arkansas Code Annotated Section 16-33-303(c) states: "*The challenge to the juror shall first be made by the state and then by the defendant, and the state must exhaust its challenges to each particular juror before the juror is passed to the defendant for challenge or acceptance.*" (Emphasis added.)

Challenges to a trial juror may be general, *i.e.*, that the juror is disqualified in serving on any case, or particular, *i.e.*, that he is disqualified from serving in the case being tried. *See* Ark. Code Ann. § 16-33-304(b). A general challenge may be based on the fact that the person 1) is a legally unqualified person; 2) has a felony conviction; or 3) suffers from mental or physical unfitness or an inability to perform juror duties. *See* Ark. Code Ann. § 16-33-304(b)(1). Particular causes of challenge are based on actual and implied bias. *See* Ark. Code Ann. § 16-33-304(b)(2). Actual bias is

the existence of such a state of mind on the part of the juror regarding the case or either party which satisfies the trial court, in the exercise of its sound discretion, that the juror cannot try the case impartially and without prejudice to the substantial rights of the party challenging the juror. *See* Ark. Code Ann. § 16-33-304(b)(2)(A).

Section 16-33-304(b)(2)(B) states the conditions for a challenge of implied bias as follows:

> (B) A challenge for implied bias may be taken in the case of the juror; (i) Being related by consanguinity, or affinity, or who stands in the relation of guardian and ward, attorney and client, master and servant, landlord and tenant, employer and employed on wages, or who is a member of the family of the defendant or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted;
> (ii) Being adverse to the defendant in a civil suit, or having complained against or being accused by him in a criminal prosecution;
> (iii) Having served on the grand jury that found the indictment or on the coroner's jury that inquired into the death of the party, whose death is the subject of the indictment;
> (iv) Having served on a trial jury which has tried another person for the offense charged in the indictment;
> (v) Having been one of the former jury sworn to try the same indictment and whose verdict was set aside, or who were discharged without indictment;
> (vi) Having served as a juror in a civil action brought against the defendant for the act charged in the indictment;
> (vii) When the offense is punishable with death, the entertaining of such conscientious opinions as would preclude him from finding the defendant guilty.

The trial court made no finding of actual bias; in fact, the trial court made no findings at all for the record. But a juror may be challenged either peremptorily or for cause. Challenges for cause must be based on either actual or implied bias. None of the implied-bias conditions apply to appellant's case. Thus, it necessarily follows that the trial court either removed the seated juror in the middle of trial after the entire panel had been sworn on a finding of actual bias; otherwise the trial court removed the juror based on what amounted to a peremptory challenge by the State in the middle of trial. In either instance, appellate review based on the abuse-of-discretion standard demands that we analyze the trial

court's action in the context of existing legal requirements and the established procedure for selecting and qualifying jurors for service.

Even if one assumes, for sake of discussion, that the witness had a confrontation with a person identified among those summoned for appellant's trial, it does not follow that the confrontation created such a state of mind on the part of the juror, in regard to appellant's case or to either party, that the juror could not try the case impartially and without prejudice to the substantial rights of the prosecution. That is, after all, the legal standard for finding actual juror bias. As the party challenging the impartiality of the seated juror, the prosecution was obligated to show the juror could not try the case impartially. If one accepts the allegation that the juror had a confrontation with the police officer in connection with something unrelated to the trial at hand and failed to disclose that fact during *voir dire*, that non-disclosure plainly is not necessarily evidence of actual bias in favor of the defense or against the prosecution.

The trial court's action and the majority position to affirm are even more disquieting if one analyzes the prosecution's challenge as a peremptory challenge. If the State could not satisfy the requirements of demonstrating actual bias, its allegation against the juror must be viewed as a belated effort to exercise a peremptory challenge to a seated juror in the middle of a murder trial, hours after counsel for the prosecution had been informed about an unrelated pretrial confrontation with a prosecution witness. The State has advanced no argument and cited no authority for the proposition that a peremptory challenge to a seated juror can be made after the entire panel of jurors has been accepted and sworn, let alone heard hours of proof. Thus, the majority decision affirming the trial court's removal of the juror based on what amounts to an untimely peremptory challenge is unprecedented.

### *III. The Integrity of the Jury as a Political Entity*

Finally, the trial court's action must also be understood as an insult to the integrity of the jury within the context of our political system, especially in cases where the government is a litigant. Since the Magna Carta was signed at Runnymede in June of 1215, the notion of trial by one's peers has been fundamental to the democratic ideal.

The role of the jury is especially significant to the American experience in criminal cases because more is at stake than simply the life and liberty of an accused person, as serious as that must be. That is because in our system the government has the burden of proof; *when one is accused of a crime, what is on trial is the government's proof against the accused.* Our United States Supreme Court has recognized the vital role that a jury plays as a check on governmental power. As stated by the Court in *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968): "The petit jury has occupied a central position in our system of justice by safeguarding a person accused of a crime against the arbitrary exercise of power by prosecutor or judge." *See also Batson v. Kentucky*, 476 U.S. 79 (1986). Therefore, while a jury is to be neither biased nor prejudiced toward the accused or the government, it nonetheless acts as a representative of the governed.

Alexis de Tocqueville, the French historian and philosopher, examined the role of juries in *Democracy in America*, the classic work based on his two-year study of democracy in the United States in 1831 and 1832. He wrote:

> It would be a very narrow view to look upon the jury as a mere judicial institution; for however great its influence may be upon the decisions of the courts, it is still greater on the destinies of society at large. The jury is, above all, a political institution, and it must be regarded in this light in order to be duly appreciated. . . . *The institution of the jury may be aristocratic or democratic, according to the class from which the jurors are taken; but it always preserves its republican character, in that it places the real direction of society in the hands of the governed, and not in that of the government.* Force is never more than a transient element of success, and after force comes the notion of right. A government able to reach its enemies only upon a field of battle would soon be destroyed. The true sanction of political laws is to be found in penal legislation; and if that sanction is wanting, the law will sooner or later lose its cogency. *He who punishes the criminal is therefore the real master of society. Now the institution of the jury raises the people itself, or at least a class of citizens, to the bench of judges. The institution of the jury consequently invests the people, or that class of citizens, with the direction of society.*

*Democracy in America*, ed. Phillips Bradley, Vol. 1, p. 282 (Vintage Books, 1990) (emphasis added).

Thus, as Tocqueville recognized, a jury cannot serve its vital function unless it retains its republican character. That republican

character is undermined, if not eviscerated, when the State unilaterally determines whether a seated juror will serve. Such conduct is plainly antithetical to the notion that the jury "places the real direction of society in the hands of the governed, . . ., and not in that of the government." If a king unilaterally removed a seated juror, we would say that such conduct was inimical to a republican form of government. I do not find the conduct here to be less so, simply because here the conduct involved an agent of the government. To the contrary, the conduct in this case is even more disturbing. A police officer witness for the State in a criminal trial is unmistakably an agent of the State.

It is simply contrary to a republican form of government for a governmental agent to unilaterally dictate whether a sworn representative of the governed (the juror) will serve. If a police officer can influence trials by deciding who remains on a jury merely by alleging that he had a previous encounter with a juror, the prosecution obtains an unfair advantage at trial. As the Supreme Court stated in *Hayes v. Missouri*, 120 U.S. 68, 70 (1887), our judicial system should guarantee "not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held." For all practical purposes, the decision to affirm what the trial court did means that the ability of a juror to serve after being sworn is wholly dependent on the whim of persons who, according to our fundamental notions of the vital role that juries serve in a democratic society, should never be allowed to make such a determination.

I respectfully dissent.

OLLY NEAL, Judge, dissenting. I would reverse and remand this case for a new trial because the trial court committed reversible error by removing Mr. Black after the jury had been selected, impaneled, and sworn. The trial judge made no inquiry as to whether Mr. Black was a qualified juror, and accordingly, I do not agree with the majority that Strickland has not shown prejudice under these circumstances.

Jurors are presumed unbiased and the burden of proving actual bias is on the party challenging the juror. *Gardner v. State*, 296 Ark. 41, 754 S.W.2d 518 (1988). A potential juror may be challenged for cause if he or she is actually biased. *Henry v. State*, 309 Ark. 1, 828 S.W.2d 346 (1992). A venire person is actually biased if he or she cannot try the case impartially and without prejudice to the substantial rights of the party challenging. *Id.* This determination lies

within the sound discretion of the trial court. Further, the trial court is in a superior position to access the demeanor of prospective jurors. *Id.*

Our statute addressing the challenge to individual jurors provides that such challenges are to be taken prior to the juror being sworn. Ark. Code Ann. § 16-33-303(b) (Repl. 1999). The trial court, however, may permit a challenge to be made at any time before the jury is completed if good cause is shown. *Id.* This statute does not forbid a challenge for cause once a jury is impaneled and sworn, but does place limits on such a practice. Principally, a record must be made showing that the challenged juror was either not a qualified juror at the time that the panel was sworn or the juror has since become unqualified.[1]

In the instant case, no such record was made. Unlike the cases of *Bradley v. State*, 320 Ark. 100, 896 S.W.2d 425 (1995), and *Lee v. State*, 340 Ark. 504, 11 S.W.3d 553 (2000), cited by the majority in support of its decision, where the trial court held a hearing to determine whether the challenged juror was indeed unable to carry out the duties of a juror, in this case no such hearing was held.

Although the majority wishes to construe it as such, this case does not present a situation in which Mr. Black made representations that conflicted with Detective Hallum's testimony that he had a prior confrontation with Mr. Black. Instead, the record reveals that during voir dire the State asked if any of the venire persons had any dealings with or knowledge of any of the persons named in the prosecution's witness list. In light of the fact that the venire persons had no way of matching a face with a name it is not surprising that Mr. Black could not remember the name of a person he allegedly had a single contact with over a year earlier. It was only as the trial approached the end of the State's case-in-chief, that Detective Hallum, after seeing Mr. Black, informed the court that he had a prior

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[1] 16-33-303 Challenge to trial jurors - Individual juror generally.

(a) The challenge to the individual juror is:

(1) For cause;

(2) Peremptory.

(b) The challenge must be taken before his is sworn in chief, but the court, for a good cause, may permit it to be made at any time before the jury is completed.

(c) The challenge to the juror shall first be made by the state and then by the defendant, and the state must exhaust its challenges to each particular juror before the juror is passed to the defendant for challenge or acceptance.

confrontation with Mr. Black. Based solely on this testimony, without even asking Mr. Black if he recognized Detective Hallum or if he recalled the incident of which Detective Hallum testified, the trial court excused Mr. Black from the jury.[2]

By excusing Mr. Black without any inquiry into his alleged bias halfway through the trial, the court in effect gave the State another peremptory strike. It bears restating that my disagreement with the actions of the trial court is by no means intended to imply that an unqualified juror, once sworn, has an irrevocable vested right to remain on the jury. Rather, once the parties have had their opportunity to uncover bias and have accepted a juror and that juror has been properly sworn, that juror should not be removed absent an inquiry into that juror's bias. The prejudicial error in this case was not that the trial court merely abused its discretion in striking Mr. Black, but that the trial court completely failed to exercise its discretion by aborting its responsibility to determine if the challenged juror was indeed biased.

I respectfully dissent.

HART and GRIFFEN, JJ., join.

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[2] THE COURT: Mr. Black, could you step up here for a moment. You are probably wondering what we are doing. In the course of this trial a matter came up through one of the witnesses relative to you and it was just felt that it would be better for the trial of this case to excuse you and not have you sit in deliberations. So, I guess you are one of the lucky ones, you get to go home and you don't have to decide. Larry, could you find out if he needs to check in tonight about tomorrow.

MR. BLACK: Your Honor, what was the reason? I don't understand.

THE COURT: Well, it was just one of the people that were involved in this case had advised the Court that they know you and we discussed it with the attorneys and it was felt that it was better to excuse you because we had alternates rather than having you give the appearance that there might be something.

MR. BLACK: To the best of my knowledge I don't know anybody, your Honor. That is what I don't understand. (R. 407-408)

THE COURT: Well, that may well be, but one of them said that they knew you. Don't leave yet.

ARKANSAS ALCOHOLIC BEVERAGE CONTROL and Pearcy Grocery, Inc. *v.* Deborah MUNCRIEF

CA 00-721 45 S.W.3d 438

Court of Appeals of Arkansas
Division II
Opinion delivered June 13, 2001

*Morely Law Firm*, by: *Stephen E. Morley*; and *Milton Lueken*, for appellant.

*Q. Byrum Hurst, Jr.*, for appellee.

ANDREE LAYTON ROAF, Judge. The Arkansas Alcoholic Beverage Control Board (hereinafter "ABC") and Pearcy Grocery, Inc., (hereinafter "Pearcy Grocery") appeal from an order of the Garland County Circuit Court reversing the granting of a retail off-premises beer permit to Pearcy Grocery. On appeal, they argue that the trial court erred in finding that appellee Deborah

Muncrief had standing to appeal ABC's decision and in determining that ABC's decision to grant the permit was not supported by substantial evidence. We reverse.

Pearcy Grocery applied to ABC for an off-premises beer permit for the convenience store that it operates on Airport Road in the community of Pearcy in Garland County. Objection to Pearcy Grocery's permit request was received in the form of a petition bearing 379 signatures and three letters of opposition. The Alcoholic Beverage Control Division's director denied Pearcy Grocery a permit, and it appealed to the ABC.

At a regularly scheduled monthly meeting of the ABC on April 15, 1998, Curtis Garner, the owner of Pearcy Grocery, described the store as a "market" in which a variety of items were sold, including groceries, gas, feed, snacks, and deli sandwiches. He stated that it was staffed by him, his parents, and a "part timer," and although the store operated 6:00 a.m. to 7:00 p.m. Monday through Friday, 7:00 a.m. to 7:00 p.m. on Saturday and 10:00 a.m. to 4:00 p.m. on Sunday, "someone named Garner" was always on duty in the store. Garner stated that he anticipated that beer sales would complement his current stock. Garner testified that the nearest beer outlet on Airport Road was Rovin Ramblers, which operated as an RV park and package beer store, some 2.4 miles west of his store. East of his store were five other outlets selling beer within ten miles, the closest of which was Miller's Liquor Store. Garner asserted that he submitted a petition signed by more than 300 people who were in favor of his receiving a permit. He stated that his store was "kind of the hub" of the Pearcy community, and it would benefit the community if he had a beer permit.

Joe Goslee, Jr., testified that granting a beer permit to Pearcy Grocery would be a "welcomed addition to the community." He stated that the population is moving west out to this area and that there are a lot of nice homes in the vicinity. Goslee opined that it would be safer if beer was sold in the store because the trip to get a six-pack would be shorter for the people who lived in more remote areas and would not be tempted to start drinking on the return trip.

Ned Bass testified that he lived about three miles from the store and stated that Garner and his family are "fine people" and run an "upstanding business." He stated that if Pearcy Grocery got a beer permit, it would be much more convenient for him to get his gas, chips, and "what not," and also his beer "in one place." He also discounted the validity of the petitions circulated by the opponents

of the permit, claiming that it was his experience that when he put petitions out at his convenience store, people would sign them without reading them simply because they knew him.

Muncrief testified that she owns Miller's Liquor on Airport Road, about three miles east of the proposed location. She stated that she was familiar with the other permits in the area and opined that they adequately served the area. Muncrief stated that she opposed the permit because she feared that Pearcy Grocery would undercut her prices. She stated that the last time a convenience store was permitted in the area it took away a "tremendous" amount of her business. Muncrief stated that with all of the permits on Airport Road, she did not believe that law enforcement could adequately enforce all the regulations. She also introduced a petition signed by fifty-three persons opposing the permit. She claimed that she simply left the petition on the counter for her customers. Muncrief also testified that she had attempted to move her store closer to the county line in 1989 or 1990, and her petition had been denied.

Shirley Janiese, the owner of Rovin Ramblers, testified that she opposed granting the permit because she also feared that Pearcy Grocery could undercut her beer prices. She asserted that it would hurt her business, that there were already a number of existing outlets that adequately served the area, and that the intersection of Pearcy Road and Highway 70 West was not a suitable location for a beer outlet, because if there was a wreck, "it takes a good 20 minutes for the sheriff to get out there." She also had a petition signed by a number of her customers who opposed the granting of the permit.

In addition to the petitions submitted by Muncrief and Janiese, a petition circulated by a local Baptist church was brought before ABC. Also, letters from the Garland County Sheriff and Prosecuting Attorney opposing the permit were entered into evidence.

ABC granted the permit by unanimous vote. In its findings of fact, ABC stated that Mr. Garner appeared to be a "good applicant," that it did not find that the location of the store presented any danger to the customers, that the letter submitted by the Garland County Sheriff opposing the permit did not state that granting the permit would put "undue pressure" on law enforcement, and that Garner deserved a chance to compete with other beer outlets. Under the conclusions of law, it stated that "public convenience

and advantage" would be "promoted and enhanced" by granting the permit.

Muncrief then filed for judicial review in Garland County Circuit Court. In her petition, she stated that she "considers herself injured by the action of the agency" and she alleged that granting the permit was in violation of constitutional or statutory provisions; in excess of the agency's statutory authority; made upon unlawful procedure; affected by other error or law; not supported by substantial evidence of record; and arbitrary, capricious, or characterized by abuse of discretion. Pearcy Grocery successfully moved to intervene, and subsequently moved to dismiss. Citing *Estes v. Walters*, 269 Ark. 891, 601 S.W.2d 252 (Ark. App. 1980), Pearcy Grocery alleged that Muncrief did not have standing to petition for judicial review.

The circuit court denied the motion to dismiss and ultimately reversed ABC's decision granting the permit. In reversing, the circuit court found that ABC based its decision on its factual findings that Garner was a good applicant who deserved the right to compete with other outlets that had beer permits, which was the incorrect test as none of the findings addressed public convenience or advantage. It also found that ABC disregarded the legislature's mandate that the number of permits be limited. The court also found that the record indicates that beer prices are already extremely low in the area where Pearcy Grocery had made its application and there is nothing to indicate that the increased competition created by the granting of another permit would lower prices any further or make new products available. Finally, the court noted that both Pearcy Grocery and the opposition submitted a substantial number of signatures supporting and opposing their respective positions and found that, contrary to the law, ABC failed to focus on the reasons for these endorsements.

ABC first argues that the trial court erred in finding that the appellee had standing to appeal the decision of the ABC board. It contends that the record is void of any evidence that Muncrief has sustained a real, concrete, or specific injury or that she was in immediate danger of sustaining a real, concrete, or specific injury to her person, business, or property as a result of ABC granting the permit to Pearcy, and accordingly, she did not have standing to invoke the jurisdiction of the circuit court. Furthermore, ABC cites *Estes v. Walters, supra*, and asserts that because Muncrief failed to set out in her petition for judicial review in circuit court specific allegations as to how she has sustained or is in immediate danger of

sustaining injury, it was insufficient to invoke the court's jurisdiction under the Administrative Procedures Act, and the circuit court erred in finding that she had standing. We find this argument persuasive.

We are mindful of the fact that the Administrative Procedures Act confers standing to seek judicial review of a final agency action on "any person who considers himself injured in his person, business, or property." Ark. Code Ann. § 25-15-212(a) (Repl. 1996). However, to have standing, a petitioner must assert in her pleadings how she has "already sustained or is immediately in danger of sustaining injury either in his 'person, business or property' as a consequence of the final action of [ABC] in issuing the new permit." *Estes v. Walters, supra.*

We note that Muncrief argues that the instant case is distinguishable from *Estes* because she appeared at all stages of this proceeding and testified that as a neighboring business owner, she was threatened by increased competition and therefore she had standing because she considered herself to be "injured" by ABC's decision. She urges us to hold that the "general rule" that "emerges" from *Estes* is that "when an individual does not appear in the proceedings below, seeks to appeal a final action under the administrative procedures act, he must set out in his petition how the issuance of the permit will harm him." However, this interpretation cannot be reconciled with the plain wording of *Estes;* the fact that the appellant in *Estes* was not a protestant in the action before the ABC Division Director, was not a dispositive fact in our decision in that case. Accepting Muncrief's interpretation would therefore require us to overrule *Estes*, which we decline to do. Accordingly, we hold that Muncrief failed to establish her standing to seek judicial review of the ABC decision, and therefore, we reverse and dismiss.

Reversed and dismissed.

BIRD and BAKER, JJ., agree.

Christine CASSAT *v.* Allison HENNIS

CA 00-1314 45 S.W.3d 866

Court of Appeals of Arkansas
Division IV
Opinion delivered June 20, 2001

*Kelli S. Cashion*, for appellant.

*Treeca J. Dyer*, for appellee.

JOHN F. STROUD, JR., Chief Judge. Christine Cassat appeals the probate judge's denial of her petition for adoption of Taylor and Raegan Cassat on the basis that the consent of appellee, Allison Hennis, the mother of the children, was required for the adoption but was not given. On appeal, Christine argues that her petition for adoption should have been granted because Allison had failed to maintain significant contact with the children without justifiable cause and because the adoption is in the children's best interest. We affirm the probate court's denial of the petition for adoption upon the finding that Allison's consent to the adoption was required but was not given.

Probate proceedings are reviewed *de novo* on the record. *Dale v. Franklin*, 22 Ark. App. 98, 733 S.W.2d 747 (1987). The decision of a probate judge will not be disturbed unless it is clearly erroneous, giving due regard to the opportunity and superior position of the trial judge to determine the credibility of the witnesses. *Id.*

Arkansas Code Annotated section 9-9-207(a)(2) (Repl. 1998) provides:

> Consent to adoption is not required of a parent of a child in the custody of another, if the parent for a period of at least one (1) year has failed significantly without justifiable cause (i) to communicate

with the child or (ii) to provide for the care and support of the child as required by law or judicial decree.[1]

A party seeking to adopt a child without the consent of the natural parent must prove by clear and convincing evidence that the parent failed significantly and without justifiable cause to communicate with the child. *Vier v. Vier*, 62 Ark. App. 89, 968 S.W.2d 657 (1998). A finding that consent is unnecessary on account of a failure to support or communicate with the child is not reversed unless clearly erroneous. *In re Adoption of Lybrand*, 329 Ark. 163, 946 S.W.2d 946 (1997).

In the present case, Allison and Michael Cassat were divorced on October 28, 1997, and custody of the parties' two children, Taylor and Raegan, was vested with Michael. On November 5, 1999, Michael married Christine, and on November 16, 1999, eleven days after the marriage, Christine filed her petition for adoption. Allison opposed the petition for adoption, and a hearing on the matter was conducted on May 25, 2000.

At the hearing, Allison testified that she entered the Army on November 6, 1997, nine days after the divorce, with Michael's blessing and promise that he would help her see the children. She chose to be stationed as close to Little Rock as possible, even giving up an opportunity to go to Germany because of her children. She admitted that since the end of October 1997, she had only seen the children twice, once around Christmas 1997 and again in July of 1998. She testified that from July 1998 until Christmas 1999 she was unable to leave the base. She said that she had attempted to schedule visitation with the children during her "block leave," but it was never a convenient time for Michael. Furthermore, Michael told her that he would not allow her to leave Arkansas with the children.

Allison testified that she spoke with the children quite frequently during basic training until Michael changed his phone number to an unlisted number. He refused to give her the number, giving her instead his pager number, which he also subsequently changed. After she had no way to make direct telephone contact, Allison resorted to sending telephone cards so the children could call her. Additionally, she testified that she sent letters once or twice

[1] Support is not disputed as an allotment of $397 per month is deducted from Allison's military pay as an enlisted person and sent to her ex-husband.

a week, even sending disposable cameras and self-addressed stamped envelopes in which to return the cameras to her.

Michael admitted that he had changed his telephone number; he said it was due to Allison's abusive phone calls. He said he changed his pager number because Allison's calls were "unreasonable" and were interfering with his work. He admitted that Allison had sent Christmas presents for the children in December 1999; however, he and Christine did not tell the children that the presents were from Allison but rather told them they were from Santa Claus. He said that he and Allison had discussed her visiting, but he told her that she was not allowed to come to Raegan's birthday party, even though that was a time that her schedule permitted her to exercise visitation. When he and Christine went to Texas to visit relatives, Michael refused to stop and let Allison see the children because he did not deem it "appropriate." He also refused to allow Allison to take the children with her in December 1997 to visit her family because he did not think her family provided an appropriate environment.

On appeal, Christine argues that this case is analogous to *Shorter v. Reeves*, 72 Ark. App. 71, 32 S.W.3d 758 (2000). In that case, the probate judge found that biweekly or monthly telephone communication for one year did not constitute significant communication, held that the mother's consent for adoption was not required, and granted the paternal grandparents' petition for adoption. With regard to the finding that the natural parent's consent was not necessary for the adoption, this court held that, based upon the probate court's factual determinations, it could not be said that this determination was clearly against the preponderance of the evidence.

■ While some of the communication in the case at bar is similar to the facts of *Shorter*, the present case is clearly distinguishable. First, in the present case, the probate judge made the finding of fact that although personal contact was preferable, the contacts Allison had with the children were significant enough to require her consent for adoption, unlike the finding made in *Shorter* that the communication was not significant. Moreover, Allison also testified that in addition to the phone calls, she also mailed letters to the children weekly and occasionally sent packages. Our standard of review in probate cases does not mandate reversal unless the trial judge's findings of fact were clearly erroneous. We cannot say that the findings of fact in the present case were clearly erroneous.

Furthermore, there was evidence that when Allison made contact or attempted to see the children, her efforts were thwarted by her ex-husband. In *Shorter, supra*, this court defined "failure to communicate without justifiable cause" as one that is "voluntary, willful, arbitrary, and without adequate excuse." 72 Ark. App. at 75, 32 S.W.3d at 760. Unlike in *Shorter*, much of Allison's failure to communicate with her children was a direct result of Michael's actions. When she had leave time and asked to visit the children, Michael refused to let her see them. When Michael and Christine were taking the children to visit relatives in Texas and were traveling in close proximity to where Allison was stationed, Michael refused to stop and let the children see Allison because he deemed it "inappropriate." The most egregious conduct was when Michael changed his telephone number to an unlisted number and refused to give Allison the number and then changed his pager number as well. Allison resorted to sending phone cards so the children could call her, as she had no ability to contact them as a direct result of Michael's actions.

Christine also cites *Vier, supra*, for the proposition that a trial court may consider as a factor the parent's failure to seek enforcement of his or her visitation rights during the one-year period in determining whether he or she intended to maintain his or her parental role. Although Allison had not made an attempt to have her visitation enforced through the courts, she testified that she had been financially unable to do so and that she had also been through a high-risk pregnancy and was unable to travel. The probate judge, in her determination of credibility of the witnesses, was entitled to believe this testimony.

Given the probate judge's findings of fact, we cannot hold that her denial of the petition for adoption on the basis that Allison's consent for adoption was required but not given was clearly erroneous.

Affirmed.

PITTMAN and JENNINGS, JJ., agree.

WAL-MART STORES, INC. *v.* Judy LEACH

CA 00-1457 48 S.W.3d 540

Court of Appeals of Arkansas
Division IV
Opinion delivered June 20, 2001

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

*Conrad T. Odom*, for appellee/cross-appellant.

JOHN F. STROUD, JR., Chief Judge. This is a workers' compensation case. Appellee, Judy Leach, suffered a back injury in 1993 for which she underwent surgery. She had worked for appellant, Wal-Mart Stores, Inc., for almost twenty years at that time, but she did not claim that the injury was work-related and therefore she did not claim workers' compensation benefits. She left

her employment with appellant for approximately three years following the back surgery; however, she returned to work for appellant in 1996, working at different jobs and eventually returning to warehouse work.

On May 29, 1998, she visited her doctors with symptoms related to her back. She continued to submit her medical bills under her group health coverage. She did not make a workers' compensation claim at that time. Her last visit to Dr. Tony Raben associated with those particular symptoms was July 11, 1998.

On March 29, 1999, she returned to Dr. Raben with similar complaints, and he took her off work until June 14, 1999. She reported that her work required bending, twisting, and lifting. An April 1, 1999, MRI scan revealed a reherniation at level L5-S1 as well as a disc herniation at the L4-5 level on the right. On April 5, 1999, appellee reported to her employer that she had suffered a low-back work injury based on a gradual-onset theory. Appellant contested the claim. The ALJ found that appellee sustained a gradual-onset type aggravation to a pre-existing condition, which exacerbated her previous low back problems; that the repetitive lifting, bending, twisting, pushing, pulling, and standing of her job caused appellee's pre-existing back condition to become symptomatic, requiring medical treatment; that her medical-treatment program resolved her symptoms to the point of her previous status as of June 14, 1999; and that appellant should pay for medical treatment and temporary total disability from March 29, 1999, to June 14, 1999. The Commission affirmed and adopted the ALJ's decision. Both parties have appealed from the decision. We affirm on the direct appeal and on the cross-appeal.

For its sole point of appeal, appellant contends that the Commission's grant of benefits was not supported by substantial evidence. We disagree.

■ ■ On appeal, this court views the evidence in the light most favorable to the Commission's decision and affirms when that decision is supported by substantial evidence. *Frances v. Gaylord Container Corp.*, 341 Ark. 527, 20 S.W.3d 280 (2000). Substantial evidence exists if reasonable minds could reach the same conclusion. *Id.* Moreover, we will not reverse the Commission's decision

unless fair-minded persons could not have reached the same conclusion when considering the same facts. *Id.* We defer to the Commission in determining the weight of the evidence and the credibility of the witnesses. *Freeman v. Con-Agra Frozen Foods,* 344 Ark. 296, 40 S.W.3d 760 (2001).

When a claimant requests benefits for an injury characterized by gradual onset, Arkansas Code Annotated section 11-9-102(4)(A)(ii) (Supp. 1999) controls, defining "compensable injury" as follows:

> (4)(A)(ii) An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not caused by a specific incident or is not identifiable by time and place of occurrence, if the injury is:
>
> . . . .
>
> (b) A back injury which is not caused by a specific incident or which is not identifiable by time and place of occurrence[.]

A claimant seeking benefits for a gradual-onset injury must prove by a preponderance of the evidence that: (1) the injury arose out of and in the course of his or her employment; (2) the injury caused internal or external physical harm to the body that required medical services or resulted in disability or death; and (3) the injury was a major cause of the disability or need for treatment. *Freeman, supra.* Furthermore, objective medical evidence is necessary to establish the existence and extent of an injury, but it is not essential to establish the causal relationship between the injury and the job. *Wal-Mart Stores, Inc. v. VanWagner,* 337 Ark. 443, 990 S.W.2d 522 (1999).

In support of its contention that the Commission's grant of benefits was not supported by substantial evidence, appellant raises the following sub-points: 1) that appellee failed to establish a causal connection between her low-back injury and her work activities, arguing that "while it is undisputed that appellee suffered from a herniated disc revealed in an April 1999 MRI, no *credible* evidence has been presented connecting this disc injury with appellee's work for appellant"; and 2) that appellee "failed to provide objective findings establishing that the *major cause* of her need for additional treatment was a March 1999 aggravation, as opposed to continued symptoms stemming from her 1993 treatment," and in particular

that the language employed by Dr. Raben in his clinic note of May 5, 1999, was too speculative to demonstrate the necessary objective medical findings to establish major cause. We do not agree.

Matters of credibility are for the Commission to determine. *Wal-Mart Stores, Inc. v. Van Wagner, supra.* Moreover, we conclude that there was substantial evidence presented to connect appellee's disc injury to her job. Appellant described her job of watch scanner as a much more physical job than others that she had performed. She stated that the boxes on the conveyer were very large boxes; that she had to scoot the boxes to the back of the conveyor belt and flip them over to cut off the tops; that she would then take a watch from a box, scan it, and place the watch in another box that sat immediately to her right; that she then had to pick up the box and move it to another conveyor; and that her biggest complaint with these jobs was the twisting.

Furthermore, although appellee had continued to experience problems from her 1993 injury, the April 1999 MRI showed a herniated disc, and there was no indication that she had the herniated disc before returning to work with appellant. Clearly, the herniated disc was the injury causing the need for treatment, and its existence was established by the MRI of April 1, 1999, which was objective medical evidence.

Finally, the language employed by Dr. Raben that is challenged by appellant provides in pertinent part:

> I think within a reasonable degree of medical certainty that she will be able to get back to a light and/or sedentary position. I am not sure that she will be able to do repetitive bend/lift/twist. *In fact, this type of work could very well within a reasonable degree of medical certainty have been the cause of this extruded disc herniation that gave her right lower extremity pain.*

(Emphasis added.) However, in making its argument that this language was too speculative, appellant relies in part upon our opinion in *Freeman v. Con-Agra Frozen Foods*, 70 Ark. App. 306, 27 S.W.3d 732 (2000), which was subsequently reversed by our supreme court in *Freeman v. Con-Agra Frozen Foods*, 344 Ark. 296, 40 S.W.3d 760 (2001). The more recent supreme court opinion in *Freeman* does not support appellant's position. Furthermore, we need not decide whether Dr. Raben's use of the phrase, "*could very well within a reasonable degree of medical certainty* have been the cause of this extruded disc herniation . . . ," is speculative under *Crudup v. Regal*

*Ware, Inc.*, 341 Ark. 804, 20 S.W.3d 900 (2000), or whether it satisfies the requirements established by *Freeman v. Con-Agra Frozen Foods,* 344 Ark. 296, 40 S.W.3d 760 (2001), because the opinion of the ALJ that was adopted by the Commission does not indicate that Dr. Raben's surmise was critical to its determination of causation, and because there were sufficient other matters enumerated to support the Commission's decision.

In short, reasonable minds could reach the same conclusion as the Commission. We therefore conclude that its decision was supported by substantial evidence.

For her sole point on cross-appeal, appellee contends that there is not substantial evidence to support the decision of the Commission that the aggravation was only temporary in nature. We disagree.

Appellee testified that she last saw Dr. Raben on July 1, 1999, and that she did not have a return appointment; that her lower back is much better; that she still has some pain, but "nothing like before." She has been off work since July 1, 1999, but that is because of her shoulder, not her low-back injury. We conclude that reasonable minds could reach the same conclusion as that reached by the Commission that appellee's aggravation was only temporary in nature.

Affirmed on direct appeal and on cross-appeal.

PITTMAN and JENNINGS, JJ., agree.

Patrick MILLER *v.* TRANSAMERICA COMMERCIAL FINANCE CORPORATION

Ca 00-1465 47 S.W.3d 288

Court of Appeals of Arkansas
Division IV
Opinion delivered June 20, 2001

*Samuel A. Perroni* and *Patrick R. James*, for appellant.

*Buzbee & Hawk, PLC*, by: *J. R. Buzbee*, for appellee.

JOHN MAUZY PITTMAN, Judge. Appellant Patrick Miller appeals from the trial court's denial of his motion to set aside a default judgment. He makes several arguments, none of which have merit. We therefore affirm.

Patrick Miller was president and a shareholder of Diamond Lakes Marine, Inc. Diamond Lakes was engaged in the business of selling boats and other marine equipment in Garland County. Its inventory financing was provided by appellee Transamerica Commercial Finance Corporation by virtue of a 1997 inventory security agreement. The agreement provided that appellee would advance money to Diamond Lakes to acquire inventory and that Diamond Lakes would grant appellee a security interest in the inventory and other items.

On the same day that the corporation executed the inventory security agreement, appellant and his wife, Terri Miller, executed a guaranty contract that permitted appellee to proceed against them should Diamond Lakes default on its obligations. Such a default occurred in 1999, causing appellee to file suit against the Millers, Diamond Lakes, and another marine dealer, North Malvern Marine. The complaint sought repossession of collateral from Diamond Lakes and North Malvern Marine and judgment for $2,809,907.33 against the Millers on their guaranty agreement. As

an exhibit to the complaint, appellee appended an exhibit labeled "Outstandings," consisting of approximately 450 inventory items totaling over $2.6 million in value. Appellee also filed, contemporaneously with the complaint, the affidavit of its regional manager Bryan Alsobrooks, the person responsible for the Diamond Lakes account. Alsobrooks stated that Diamond Lakes was in default in the amount of $2,809,907.33, and was in possession of collateral believed to have a value of $2,607.881.52.

Within ten days of the lawsuit being filed, Diamond Lakes filed for bankruptcy. The Millers never answered the complaint. As a result, a default judgment was entered against them on July 26, 1999, for $2,701,708.72 (certain credits were allowed). On September 16, 1999, Patrick Miller moved to set aside the default judgment. The trial court refused to do so, and Miller appeals from that ruling.[1]

When a party against whom a judgment for affirmative relief is sought fails to plead or otherwise defend as provided by the Rules of Civil Procedure, a default judgment may be entered against him. *See* Ark. R. Civ. P. 55(a). Default judgments are not favorites of the law and should be avoided when possible. *B&F Engineering v. Cotroneo*, 309 Ark. 175, 830 S.W.2d 835 (1992). When a trial judge denies a motion to set aside a default judgment, we must determine on appeal whether the trial judge abused his discretion. *See id.*

Appellant argues first that the default judgment entered against him is void because appellee failed to serve him with the summons and complaint. He bases his argument on an affidavit in which he stated that he had no recollection of being served and did not believe he was personally served. Default judgments rendered without proper service are judgments rendered without jurisdiction, and are therefore void. *See Lawson v. Edmondson*, 302 Ark. 46, 786 S.W.2d 823 (1990); *Wilburn v. Keenan Cos., Inc.*, 298 Ark. 461, 768 S.W.2d 531 (1989).

We hold that there was sufficient evidence in this case to prove that appellant was served. Appellant did not appear and testify at the hearing on his motion, but the deputy who served him did, and he testified as follows:

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[1] We dismissed Miller's first appeal pursuant to Ark. R. Civ. P. 54(b) because the claims against Diamond Lakes and North Malvern Marine remained pending. Miller returned to circuit court and obtained an order that complies with Rule 54(b).

Q.: Do you know a gentleman named Patrick Miller?

A.: Yes, I do.

Q.: I'm showing you from the Court file here a document that purports to be a summons to Patrick Miller. Could you tell me if you've seen this document before?

A.: Yes, I have.

Q.: Okay, and what were the circumstances?

A.: I served Mr. Patrick Miller a copy of this on the 22nd of June at 10:40 a.m. and I have signed it.

Q.: Okay, and do you recall doing this?

A.: Yes, sir, I do.

Q.: Okay, and was it just this one page or what was with this?

A.: It was a Restraining Order...

Q.: Was there a complaint with it?

A.: ... and a complaint. Yes, sir.

The deputy's testimony that he served the complaint and summons on Miller was unequivocal. Whether his testimony was believable was a matter for the trial judge to decide. The judge obviously found the deputy to be a credible witness, and we defer to his superior ability in that regard. *See Eagle Bank & Trust Co. v. Dixon*, 70 Ark. App. 146, 15 S.W.3d 695 (2000). Appellant attempts to reduce the impact of the deputy's testimony by pointing out that, on cross-examination, he stated that he had served appellant so many times that he could not identify each and every instance. That testimony does little to impeach the deputy's precise recollection of his service upon appellant in this instance.

Appellant also contends that the default judgment should have been set aside because appellee failed to serve him with Bryan Alsobrooks's affidavit. It is true that the affidavit was not served on

appellant, though it should have been, pursuant to Ark. R. Civ. P. 5(a).[2] However, appellant is unable to show how appellee's failure to serve him with this affidavit justifies relief from the operation of the default judgment. He points to nothing in Ark. R. Civ. P. 55 or Arkansas case law to the effect that failure of a plaintiff to serve any papers filed after the complaint requires a default judgment to be set aside. Additionally, there is nothing in the affidavit that could not have been gleaned from the complaint that was served on appellant on June 22. The affidavit, like the complaint, stated that Diamond Lakes was in default in the amount of $2,809,907.33, and both referred to the possibility that a deficiency judgment could exist upon the sale of collateral. Thus, appellant has not shown how appellee's failure to serve the affidavit on him affected the entry of the default judgment. We do not consider assignments of error that are unsupported by convincing authority or argument. *Edwards v. Stills*, 335 Ark. 470, 984 S.W.2d 366 (1998).

The sufficiency of the Alsobrooks affidavit, as proof of damages, is also challenged by appellant. Generally, a default judgment establishes liability but not the extent of damages. *See Tharp v. Smith*, 326 Ark. 260, 930 S.W.2d 350 (1996). Thus, proof must be presented as to the amount of damages. *Id.* However, there is an exception to the proof requirement in a suit on an account where a verified statement of the account is filed with the complaint. *Id.*; Ark. Code Ann. § 16-45-104 (Repl. 1999). Here, appellee filed a statement listing the outstanding inventory items and an affidavit certifying the amount of the debt. In a suit on an account, the affidavit of the plaintiff, duly taken and certified, that the account is just and correct shall be sufficient to establish the account unless the defendant denies under oath the correctness of the account, in which case the plaintiff must prove the account by other evidence. *See* Ark. Code Ann. § 16-45-104 (Repl. 1999). Appellant did not deny the correctness of appellee's verification (although he did state in an affidavit that the judgment against him was "grossly inflated"); therefore, the verification was sufficient to support the default judgment award.

Appellant further complains that the affidavit was insufficient because it did not state the amount of a possible deficiency judgment. This is incorrect because the affidavit reflects an approximate $200,000 difference between the amount owed and the value

[2] Rule 5(a) provides that all papers filed subsequent to the complaint shall be served on each party. Although the rule does not require service on parties that are in default, appellant was not in default when the affidavit was filed on June 21.

of collateral. Appellant also points to the fact that, while substantial collateral existed that could reduce the total amount owed, judgment was entered against him for over $2,700,000. First, there is evidence that appellant's liability on the judgment will be reduced by the sale of collateral. Appellee's attorney assured the trial judge of this in open court. In fact, a partial satisfaction of judgment was entered on April 11, 2000, as the result of the sale of collateral, and the balance due was reduced to $1,039,163.63. Secondly, the guaranty agreement executed by appellant permits appellee to seek judgment against him for the full amount of the debt, irrespective of any attempts to realize on collateral.

Next, we address appellant's argument that he is entitled to the benefit of the automatic stay obtained by Diamond Lakes in its bankruptcy action. Diamond Lakes filed its petition for Chapter 11 bankruptcy (later converted to Chapter 7) on June 30, 1999. Thereafter, a stay was imposed, prohibiting creditors from the continuation of any judicial proceedings "against the debtor." *See* 11 U.S.C. § 362 (1994 and Supp. V 1999). Appellant claims that appellee should have obtained relief from the stay before obtaining a default judgment against him. However, appellant was not the debtor in the bankruptcy action, so the stay was not applicable to an action against him. We have held that an automatic stay in bankruptcy is not for the benefit of a guarantor. *See Aluminum Co. of America v. Higgins*, 5 Ark. App. 296, 635 S.W.2d 290 (1982); *Van Balen v. Peoples Bank & Trust Co.*, 3 Ark. App. 243, 626 S.W.2d 205 (1981).

Appellant's next argument is that an answer filed by Diamond Lakes inured to his benefit. Diamond Lakes, despite its bankruptcy filing, remained a named defendant in the circuit court case. On September 16, 1999, the same day that appellant moved to set aside the default judgment, Diamond Lakes filed an answer denying the allegations in appellee's complaint. Appellant now hopes to take advantage of the common-defense doctrine, which provides that a timely answer filed by a co-defendant inures to the benefit of a defaulting co-defendant. *See Sutter v. Payne*, 337 Ark. 330, 989 S.W.2d 887 (1999).

We hold that the common-defense doctrine is not applicable in this case because appellant did not show that his co-defendant's answer was timely. Diamond Lakes's answer was filed approximately eighty-six days after Diamond Lakes was served, making it untimely under our Rules of Civil Procedure, as the trial judge specifically found. The common defense doctrine applies

when a co-defendant files a *timely* answer. Although federal law provides bankruptcy trustees an extension of time to file pleadings on behalf of a debtor, *see* 11 U.S.C. § 108(b) (1994), we are unable to determine, given the record before us, if Diamond Lakes met the requirements of that statute. The issue was not developed below, nor does appellant raise the issue on appeal. Failure to make an argument on appeal constitutes a waiver of that argument. *Seay v. Wildlife Farms, Inc.*, 342 Ark. 503, 29 S.W.3d 711 (2000). Further, when an argument is not raised in the trial court, it is not considered on appeal. *Luedemann v. Wade*, 323 Ark. 161, 913 S.W.2d 773 (1996).

Finally, appellant argues that the default judgment should have been set aside on the grounds of inadvertence and excusable neglect. He claims that attorney David Goldman, who represented Diamond Lakes, represented him also, and that he relied on Goldman to protect his interests in the case. Goldman's failure to do so, he says, constituted excusable neglect. As proof of his contention, appellant refers to a bankruptcy court order, which mentions that Goldman had an unspecified conflict of interest in representing Diamond Lakes. Appellant cannot show how Goldman's conflict concerning Diamond Lakes prevented him from filing a timely answer on behalf of appellant. Appellant also refers to a comment made by the bankruptcy judge from the bench that Goldman was negligent in his representation of appellant. We do not consider that comment because it is not in the record before us. The only relevant matter that appellant has shown is the statement in his affidavit that he had been represented by Goldman since 1994. There is no showing that he actively sought Goldman's representation in this case, nor is there any showing of the circumstances surrounding the failure to file an answer. These factors distinguish this case from *Burns v. Shamrock Club*, 271 Ark. 572, 609 S.W.2d 55 (1980), upon which appellant relies. In light of this lack of proof, we cannot say that the trial judge abused his discretion in refusing to set aside the default judgment.

Affirmed.

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

Jimmie LAMB *v.* STATE of Arkansas

CA CR 00-1056 45 S.W.3d 869

Court of Appeals of Arkansas
Divisions I, II, and III
Opinion delivered June 20, 2001

*Chris Tarver*, for appellant.

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

JOHN E. JENNINGS, Judge. The sole issue in this revocation case is whether the evidence is sufficient to support the trial court's decision. We conclude that it is and affirm.

In May 1999, Jimmie Lamb pled guilty to arson in the burning of a stolen truck. The St. Francis County Circuit Court suspended imposition of sentence for a period of five years. On February 7, 2000, the State filed a petition to revoke Lamb's suspended sentence, alleging that he had committed theft by receiving, a class B felony. At the hearing on the petition to revoke, Melva Edens testified that she was in the commercial contracting business and had been for twenty years. She lived in Germantown, Tennessee, and her business was located in Memphis. She testified that Mr. Lamb had been employed by her but was fired on May 10, 1999, for not reporting to work. She testified that a white 1991 Ford truck disappeared from her place of business on September 17, 1999. Lamb had driven this truck in connection with his employment with the company. Ms. Edens also testified that the truck had been washed inside and out in July and August of 1999.

Douglas Wall, a sergeant with the Forrest City Police Department, testified that on October 2, 1999, he located the stolen truck in a driveway of a vacant house on Brookside Drive in Forrest City. While waiting on a wrecker, he was approached by a man he knew, Alan Kimble, and from his conversation with Kimble, Mr. Lamb was developed as a suspect. Sergeant Wall testified that the truck was found one-half block from Mr. Lamb's parents' house and that Lamb sometimes stayed with them.

Dwight Duch, a Forrest City police officer, testified that Mr. Lamb's palm print was found on the inside of the passenger-side window of the stolen truck.

Mr. Lamb testified that he had been convicted of theft, burglary, and forgery dating back to 1989. He could not say how many felonies he had been convicted of but conceded that it was "too many." He testified that he had been in the truck since the date he was fired "approximately twice." He testified he thought this was in September or October 1999. He testified that he had just been riding around in the truck, drinking beer, with two men connected with the company. Lamb admitted that he received his mail at his parents' house. He testified that he went to Memphis in October and stayed in a motel and would not come back to Forrest City during that time because he knew the police were looking for him.

On this evidence the trial court found that Lamb had violated the terms of his suspended sentence, revoked his probation, and sentenced him to ten years' imprisonment.

In a revocation proceeding the burden is on the State to prove the violation of a condition of the suspension by a preponderance of the evidence. Ark. Code Ann. § 5-4-309 (Supp. 1999). On appeal, the trial court's findings will be upheld unless they are clearly against a preponderance of the evidence. *Lemons v. State*, 310 Ark. 381, 836 S.W.2d 861 (1992). Evidence that is insufficient for a criminal conviction may be sufficient for the revocation of probation or suspended sentence. *See Lemons v. State*, 310 Ark. at 383. Since the determination of a preponderance of the evidence turns on questions of credibility and the weight to be given testimony, we defer to the trial judge's superior position. *Lemons, supra*; *Hoffman v. State*, 289 Ark. 184, 711 S.W.2d 151 (1986). Circumstantial evidence may be sufficient to warrant revocation. *See Needham v. State*, 270 Ark. 131, 603 S.W.2d 412 (Ark. App. 1980).

While the evidence in the case at bar is circumstantial, we cannot conclude that the trial court's decision was clearly against a preponderance of the evidence. Mr. Lamb's own testimony places him in the stolen vehicle shortly before it was found within a block of his parents' home. Lamb's testimony that he went to Tennessee and stayed in a motel because he was aware the police were looking for him is also relevant. *See Flowers v. State*, 342 Ark. 45, 25 S.W.3d 422 (2000). This is not a case where the trial court's judgment rests solely on the strength of a fingerprint.

For the reasons stated, the decision of the circuit court is affirmed.

STROUD, C.J., ROBBINS, CRABTREE, PITTMAN, and ROAF, JJ., agree.

GRIFFEN, BIRD, and VAUGHT, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. The majority would affirm appellant's revocation based on testimony that appellant's palm print was found on the inside passenger window of the stolen truck, and despite testimony that appellant worked for the owners of the truck and had recently ridden in the truck. I respectfully dissent.

Our law is well established that defendants in a revocation hearing are not granted the full array of rights that accompany a criminal trial. *See Miner v. State*, 342 Ark. 283, 28 S.W.3d 280 (2000). As we have often observed, revocation hearings only require that the State prove, by a preponderance of the evidence, that the defendant has violated a term or condition of probation. *See Wade v. State*, 64 Ark. App. 108, 983 S.W.2d 147 (1998). Because of the different burden of proof, evidence that is not sufficient to sustain a criminal conviction may be sufficient to sustain a probation revocation. *See Palmer v. State*, 60 Ark. App. 97, 959 S.W.2d 420 (1998).

While the State is held to a lower degree of proof to sustain a revocation, it must still produce sufficient proof that a violation has occurred. Theft by receiving occurs when a person acquires possession, control, or title of stolen property when that person knew or had good reason to believe the property was stolen. *See* Ark. Code Ann. § 5-36-106 (Repl. 1997). Control is defined as the "power or authority to manage, direct, superintend, restrict, regulate, govern, administer or oversee." *See Black's Law Dictionary* 329 (6th ed. 1990). *Black's* describes possession as "that condition of facts under which one can exercise his power over a corporeal thing at his pleasure to the exclusion of all other persons." *See Black's* 1163.

We have held that in certain circumstances, fingerprints are sufficient to sustain a criminal conviction. *See Ashe v. State*, 57 Ark. App. 99, 942 S.W.2d 267 (1997). In *Ashe*, a fingerprint on a detached rearview mirror on the passenger side floorboard, coupled with the fact that the car was stolen within a few blocks of where Ashe's sister lived and the fact that the vehicle was found two months later in the complex where Ashe lived was sufficient to convict Ashe of theft by receiving. *See Ashe, supra.*

The record in this case simply does not support the trial court's finding that the State met its burden of proving by the greater weight of the evidence that appellant violated his probation by committing the offense of theft by receiving. Significantly, the record fails to demonstrate that appellant acquired control or possession of the truck or that appellant knew or should have known that the truck was stolen. First, the State presented evidence that appellant's palm print was found on the inside passenger window of the truck, even though appellant had not worked for the company for four months and the truck was washed inside and out at least two times after appellant left employment with the company. While this evidence is sufficient to place appellant in the truck, it cannot, acting alone support a finding that appellant acquired control or

possession of the truck without resort to speculation or conjecture. If anything, the location of appellant's palm print on the inside passenger door side of the vehicle corroborated his testimony that he was a passenger in the truck, and not the driver. Next, the State presented testimony that the truck was discovered two weeks after it was stolen approximately a half block from the home of appellant's parents and that appellant stayed away from his parents' home because he knew the police were looking for him. While this evidence may be considered relevant circumstantial evidence, it falls far short of the quantum of evidence presented in *Ashe*, which involved fingerprints, the close proximity of the theft from the home of Ashe's relative, and the vehicle being recovered in the apartment complex where Ashe lived. Simply put, even though the State had a lesser burden of proof, it failed to make its case that appellant had control or possession of the vehicle.

Likewise, the State failed to produce any evidence demonstrating that appellant knew the truck was stolen or had good reason to know the truck was stolen. The evidence in the record included testimony by Officer Wall that the truck bore no outward sign that it had been stolen, that the steering column was not broken, and that the truck was locked when he located it. There was also testimony that all keys to the truck were accounted for. While the trial court was not required to believe the testimony of any witness, it was precluded from resorting to speculation in making its ruling. Because the trial court's decision was clearly against the preponderance of the evidence, I would reverse.

I am authorized to state that Judges BIRD and VAUGHT join in this dissenting opinion.

Sheila HILL *v.* BAPTIST MEDICAL CENTER

CA 00-1177 48 S.W.3d 544

Court of Appeals of Arkansas
Division III
Opinion delivered June 20, 2001
[Substituted opinion upon grant of rehearing
delivered October 10, 2001]

[redacted]

*M. Keith Wren*, for appellant.

*Barber, McCaskill, Jones & Hale, P.A.*, by: *Gail Ponder Gaines* and *Wendy S. Wood*, for appellee.

JOHN B. ROBBINS, Judge. In our original opinion in this appeal, *Hill v. Baptist Medical Center*, 74 Ark. App. 250, 48 S.W.3d 544 (2001), we reversed the Workers' Compensation Commission's decision that held that appellant's laminectomy surgery was not reasonable and necessary treatment for her compensable injury; that appellee had failed to raise before the Commission the issue of whether the surgeon who performed this surgery, Dr. Fox, was an authorized physician; and remanded the case to the Commission for further proceedings, including a determination of whether appellant was entitled to additional temporary total disability benefits. Appellee timely filed a petition for rehearing. We have granted this petition. In this substituted opinion we direct the Commission on remand to also determine whether services rendered by Dr. Fox constituted authorized treatment.

Appellant Sheila Hill appeals the denial of workers' compensation benefits by the Workers' Compensation Commission in her claim against her employer, appellee Baptist Medical Center. Appellant raises two points on appeal: (1) that the Commission erred as a matter of law by refusing to consider appellant's post-surgical improvement when determining whether surgery was reasonable and necessary; and (2) that the Commission's denial of further benefits is not supported by substantial evidence. We reverse and remand because the finding that surgery was not reasonable and necessary is not supported by substantial evidence, and we remand to the Commission to make a finding as to which party bears the cost of this treatment.

The standard of review for appeals from the Workers' Compensation Commission is well-settled. On appeal, this court will view the evidence in the light most favorable to the Commission's decision and affirm when that decision is supported by substantial evidence. *Crudup v. Regal Ware, Inc.*, 341 Ark. 804, 20 S.W.3d 900 (2000). Where the Commission denies benefits because the claimant has failed to meet his burden of proof, the substantial-evidence standard of review requires us to affirm if the Commission's decision displays a substantial basis for the denial of relief. *Id.* A substantial basis exists if fair-minded persons could reach the same conclusion when considering the same facts. *Id.* The issue is not whether the appellate court 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, then we must affirm. *Green Bay Packing v. Bartlett*, 67 Ark. App. 332, 999 S.W.2d 692 (1999). The Commission is not required to believe the testimony of any witness, and it may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Holloway v. Ray White Lumber Co.*, 337 Ark. 524, 990 S.W.2d 526 (1999). The Commission has the authority to accept or reject medical opinion and the authority to determine its medical soundness and probative force. *Green Bay Packing v. Bartlett, supra.* The Commission has the duty to use its expertise in translating evidence of medical experts into findings of fact. *Id.* However, these standards must not totally insulate the Commission from judicial review because this would render this court's function meaningless in workers' compensation cases. *Inskeep v. Emerson Elec. Co.*, 64 Ark. App. 101, 983 S.W.2d 132 (1998).

On February 4, 1999, appellant suffered an admittedly compensable back injury, a herniation at L4-5, while at work for appellee in her capacity as a certified nurse's assistant as she escorted a psychiatric patient to his room. She sought medical treatment in the emergency room of her employer the following day, and she received a Toradol injection to relieve the discomfort she felt in her low back and radiating down her left leg. She returned to the emergency room three days later complaining of pain radiating down her lower left thigh. Appellant next presented to Dr. Barg, her family doctor, on February 11, who treated her conservatively and referred her to physical therapy. Dr. Barg ordered an MRI, but the workers' compensation insurance carrier would not approve this diagnostic test because Dr. Barg was not an approved provider.

The insurance carrier referred appellant to a neurosurgeon, Dr. Russell, who noted in his report of March 19 the lack of improvement in her symptoms. Dr. Russell opined that her symptoms and history were consistent with nerve root irritation, which is typically secondary to a ruptured disc. He ordered an MRI, and this test revealed the presence of a herniated disc at L4-5 that was compromising the nerve root at the left L4. In Dr. Russell's clinic note dated April 7, he stated that her pain had actually worsened somewhat and she continued to have quite a bit of pain behavior while sitting for the examination. Dr. Russell explained that the symptoms she expressed on April 7 did not match the expected distribution as shown by the MRI, but that, even so, not one of his patients in the last five years who was a workers' compensation claimant got any better after surgical intervention. Dr. Russell stated that even the patients he had seen who were "perfectly suited for surgical intervention do not seem to have a significant improvement." Dr.

Russell opined that she was better suited for pain management, and that if this course was unsuccessful, then she would need an impairment rating and release from treatment. Dr. Russell referred her for further conservative treatment under the care of Dr. Meador.

Appellant saw Dr. Meador of Arkansas Pain Centers, Ltd., on April 15, whose evaluation of appellant indicated a sacroiliac strain; Dr. Meador made no mention of herniation. She prescribed an injection at the pain site and physical therapy. Throughout the course of physical therapy, which consisted of approximately six sessions, appellant complained of low back and lower extremity pain. However, there were notes of improvement in her condition during the course of physical therapy. In Dr. Meador's progress note dated May 13, she stated that the strain had improved with the injection and physical therapy and that a work-conditioning program would be implemented. A physical therapist's progress report dated June 2 noted that appellant cried throughout her session, though the therapist could not find a sacral or lumbar problem. The therapist requested that Dr. Meador advise her how to proceed with the patient.

Appellant presented on June 3 to Dr. Meador, who stated that by her physical examination the sacroiliac strain had resolved. At that time, Dr. Meador released appellant to work with restrictions, but such work was unavailable, so appellant stayed off work. Dr. Meador anticipated that appellant would be released to work full duty in two months. No further medical care was administered, nor would the carrier authorize any upon written request because there were "no objective findings" and "Ms. Hill is seeking treatment for pain," per a letter from the carrier dated July 16.

On August 2, Dr. Meador recommended that appellant begin water aerobics for her general fitness and, as the doctor had earlier indicated, she released appellant to work without restrictions. Dr. Meador also remarked on that date that appellant exhibited exaggerated pain behavior.

Appellant maintained that she could not work due to pain. She presented to the UAMS emergency room on September 15 and was referred to a UAMS neurosurgeon and professor of neurosurgery, Dr. Fox. Dr. Fox recommended that she undergo a laminectomy, and appellant wanted to proceed as soon as possible. Dr. Fox explained to appellant the risks of the surgery, including death, paralysis, hemorrhage, infection, failure of pain relief, and spinal fluid leak. Appellant decided to undergo surgery, which was performed on September 17, 1999. In his surgical report, Dr. Fox

noted that the disc at L4-5 was obviously bulging and impinging both nerve roots per his visual exam of her spine during surgery. In a follow-up examination on November 10, Dr. Fox noted that appellant's leg pain was absent on that date and that he expected gradual but continued improvement in her back pain. In a December 1 letter in response to appellant's counsel, Dr. Fox expressed disagreement with Dr. Russell's opinion that appellant was not a surgical candidate to treat her herniation. Dr. Fox noted moderate back pain after surgery that required pain medication and the potential of physical therapy as she healed from the laminectomy.

Appellant requested a hearing to consider her claim for additional temporary total disability, additional medical treatment, and attorney's fees. Appellee contended that appellant's healing period ended on August 3 and that no treatment was reasonable or necessary after that date nor was any temporary total disability warranted after that date. The hearing was conducted on December 14, in which appellant testified that her back and leg pain was much improved after surgery and that she no longer suffered any falling incidents due to weakness in her leg as she had prior to surgery.

On this evidence, the Administrative Law Judge (ALJ) found that the physicians' opinions were, at best, equal evidence of whether the surgery was reasonable and necessary, and that because appellant had the burden of proving by a preponderance of the evidence that this was reasonable and necessary treatment, she had failed to do so. The ALJ further found that appellant failed to prove that she was still in her healing period subsequent to her release by Dr. Meador.

A motion to reconsider and a notice of appeal were lodged with the Commission. The motion to reconsider asked that the ALJ be ordered to reconsider the claim in light of appellant's post-surgical improvement as a relevant consideration in determining whether the surgery was reasonable and necessary, citing to *Winslow v. D & B Mech. Contractors*, 69 Ark. App. 285, 13 S.W.3d 180 (2000), a case handed down by our court subsequent to the hearing. Appellant's counsel asserted that there was new evidence to consider in that she had been able to return to work since the hearing, further supporting the validity of the surgery. The Commission issued an order denying the motion for reconsideration. It subsequently rendered a majority opinion affirming and adopting the opinion of the ALJ. It is from this order that appellant lodged the instant appeal.

Arkansas Code Annotated section 11-9-508 (Repl. 1996) states that employers must provide all medical treatment that is reasonably necessary for the treatment of a compensable injury. What constitutes reasonable and necessary treatment under this statute is a question of fact for the Commission. *Gansky v. Hi-Tech Eng'g*, 325 Ark. 163, 924 S.W.2d 790 (1996); *Geo Specialty Chem., Inc. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). We reverse because the finding that surgery was not reasonable and necessary treatment is not supported by substantial evidence.

We disagree with the finding that Drs. Fox and Russell had opinions that were, at best, even, as characterized by the ALJ. Dr. Russell specifically recognized the herniation as depicted on the MRI that he ordered and initially noted that appellant's symptoms were consistent with a herniation. He simply did not advocate surgical intervention. Then, Dr. Meador failed to recognize that appellant was referred to her for treatment of a herniation; Dr. Meador diagnosed appellant with a sacroiliac strain, treated her accordingly, and released her on schedule. Appellant presented to the emergency room when no further medical care was authorized, resulting in a referral to a professor of neurosurgery at UAMS, whose recommended surgery provided relief from her ongoing symptoms, and whose visual exam revealed more extensive nerve root compression than did the MRI.

Moreover, the Commission failed to make any comment about the uncontroverted evidence that appellant's symptoms significantly improved post-surgery. This is a relevant consideration when deciding whether treatment is reasonable and necessary. *See Winslow, supra*. While the Commission is empowered with the authority to weigh medical evidence and to examine the basis of an expert's opinion in deciding what weight to give it, it may not arbitrarily disregard the testimony of any witness. *See Crow v. Weyerhaeuser Co.*, 46 Ark. App. 295, 880 S.W.2d 320 (1994). It appears to have done just that by disregarding the substantial improvement enjoyed by appellant post-surgery. In sum, there is no substantial evidence that surgery was not reasonably necessary in this instance. We do not believe that fair-minded persons with the same facts before them could have reached the conclusion rendered by the Commission. *See Freeman v. Con-Agra Frozen Foods*, 344 Ark. 296, 40 S.W.3d 760 (2001). Inasmuch as her entitlement to additional temporary total disability benefits is dependent upon the resolution of facts not before us, we remand for proceedings consistent with our opinion on this issue.

Alternatively, appellee contends that appellant was not entitled to benefits for any medical care provided after she presented to the UAMS emergency room, even if it was reasonable and necessary, because she did not follow the procedures required to change physicians. We cannot, however, resolve this issue because the Commission failed to render a ruling on this issue, nor was it necessary, when it determined that the care provided by UAMS and Dr. Fox was not reasonable or necessary. Because we have held otherwise, this issue has become relevant to the responsibility for payment of medical services that were rendered. Consequently, it will be necessary for the Commission to find facts on this issue to determine whether appellant acted improvidently by failing to adhere to the change of physician rules or whether appellant acted appropriately by seeking care through the UAMS emergency room after her request for further treatment was denied. The Commission is not an appellate court but a fact-finding body. *See Cagle Fabricating & Steel, Inc. v. Patterson*, 309 Ark. 365, 830 S.W.2d 857 (1992). In carrying out its duty to find the facts, the Commission is required to make findings of fact, and those findings must contain all of the specific facts relevant to the contested issue or issues so that the reviewing court may determine whether the Commission has resolved these issues in conformity with the law. *Id; see also Lunsford v. Rich Mountain Elec. Co-op*, 33 Ark. App. 66, 800 S.W.2d 732 (1990); *Wright v. Amer. Transp.*, 18 Ark. App. 18, 709 S.W.2d 107 (1986).

Reversed in part and remanded for proceedings consistent with this substituted opinion upon grant of rehearing.

STROUD, C.J., JENNINGS, GRIFFEN, and CRABTREE, JJ., agree.

PITTMAN, J., dissents.

JOHN MAUZY PITTMAN, Judge, dissenting. I dissent from the denial of appellee's petition for rehearing. Although the majority opinion states that it is granting rehearing in this case, that is true only in a narrow and technical sense. The relief granted in the majority opinion was requested as a secondary and alternative remedy in the event that we were to deny the primary aspect of appellee's petition for rehearing, namely appellee's contention that our original opinion was erroneous because we improperly substituted our interpretation of medical evidence for that of the Commission, and because we usurped the Commission's function as fact-finder by weighing and giving credence to appellant's subjective statements that her symptoms had improved following the

surgical procedure. By granting the alternative request for relief, the majority is denying the primary request *sub silentio*.

The salient facts are few. Appellant requested surgery. Physicians differed in their predictions of whether surgery would improve her condition. The surgery was performed. Appellant told her surgeon and the Commission that her condition was improved by the surgery and requested that it be paid for by the appellee. The Commission denied the request on the grounds that appellant had failed to prove that the surgery was reasonable and necessary for treatment of her injury; the Commission viewed as evenly balanced, at best, the various physicians' predictions as to whether that surgery would help her. This court reversed, finding that she had been helped by the surgery and that the surgery was reasonable and necessary for treatment of appellant's injury.

Several errors are apparent. The Commission's opinion is flawed because the facts that it relies upon do not support its conclusion. A physician's *prediction* that surgery will not be therapeutic, standing alone, is not a substantial basis for denying relief when there is evidence before the Commission concerning the *actual outcome* of the surgery. In the absence of any discussion of the surgery's outcome, the Commission's findings in this case were insufficient to justify denial of relief, and we should therefore reverse and remand for more explicit findings consistent with *Wright v. American Transportation*, 18 Ark. App. 18, 709 S.W.2d 107 (1986); *see also Lowe v. Car Care Marketing*, 53 Ark. App. 100, 919 S.W.2d 520 (1996) (reversed and remanded for specific findings where, while Commission may have determined claimant was not a credible witness, the opinion did not so state).

The Commission committed an error of form: its opinion was too incomplete for us to determine whether it was made in accordance with the law. The majority, however, has committed errors of substance, and it is plain upon the face of its opinion that it has not conformed with the law.

First, the majority erroneously substitutes its interpretation of the conflicting, pre-surgical medical evidence. Our law is clear that the Commission has the duty of weighing medical evidence and, if the evidence is conflicting, its resolution is a question of fact for the Commission. *Geo Specialty Chemical v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). The interpretation given to medical evidence by the Commission has the weight and force of a jury verdict, *id.*, and this court is powerless to reverse the Commission's

decision regarding which medical evidence that it chooses to accept when that evidence is conflicting. *Whaley v. Hardee's*, 51 Ark. App. 166, 912 S.W.2d 14 (1995).

The majority then rightly concludes that the Commission's opinion does not explain its outcome, and correctly states that post-surgical improvement, or lack thereof, should be considered under *Winslow v. D & B Mechanical Contractors,* 69 Ark. App. 285, 13 S.W.3d 180 (2000). However, rather than remanding for the Commission to consider the evidence of post-surgical improvement, the majority proceeds to make findings of its own to the effect that appellant was, in fact, helped by the surgery. This is clearly in contravention of the law.

The evidence of post-surgical improvement in this case derives ultimately from the appellant herself in the form of her statements to her physician and her testimony before the Commission. The majority has not, and cannot, explain why the Commission must believe this evidence. It is axiomatic that the testimony of an interested party is never considered uncontroverted, but is instead considered to be disputed as a matter of law. *Ester v. National Home Centers, Inc.*, 335 Ark. 356, 981 S. W.2d 91 (1998); *Knoles v. Salazar*, 298 Ark. 281, 766 S.W.2d 613 (1989); *Waterfield v. Quimby*, 277 Ark. 472, 644 S.W.2d 241 (1982); *Lambert v. Gerber Products Co.*, 14 Ark. App. 88, 684 S.W.2d 842 (1985).

The rule that the Commission cannot arbitrarily reject the testimony of a witness has no application here. As stated, to the extent that appellant's surgeon mentioned appellant's post-surgical improvement, his statements were based on appellant's subjective statements to him that her pain had lessened. The assertion by appellant's attorney in his motion for reconsideration that post-surgical pain improvement had allowed appellant to return to work since the hearing is *not evidence*; it is, at most, a proffer in support of his motion and cannot be considered by this court as established fact to corroborate her testimony. Moreover, even if the substance of counsel's assertion were in evidence, it would have to be gauged against the medical evidence that appellant's *pre*-surgical complaints of pain were exaggerated, and that is the Commission's function, not this court's. To hold, as the majority apparently does, that it would have been "arbitrary" for the Commission to reject the uncorroborated, self-serving, controverted, subjective testimony of appellant, the person most interested in the outcome of the case, is patently wrong.

The Commission, then, was free to reject appellant's testimony if it was found to be incredible, and was likewise free to believe this testimony if it found it to be worthy of belief. *See Ringier America v. Combs,* 41 Ark. App. 47, 849 S.W.2d 1 (1993); *Norman v. Norman,* 268 Ark. 842, 596 S.W.2d 361 (Ark. App. 1980). The court of appeals, however, is not free to do either. It is the Commission's duty to make and enter findings of fact and to decide the issues before it by determining whether the party having the burden of proof on an issue has established it by a preponderance of the evidence. *S & S Construction, Inc. v. Coplin,* 65 Ark. App. 251, 986 S.W.2d 132 (1999). Appellate courts are not permitted to review decisions of the Commission *de novo* on the record or make findings of fact on matters that the Commission should have considered but did not. *See id.*

The majority opinion correctly states that the Commission is not an appellate court. It would be well for us to remember that we are not fact-finders.

I respectfully dissent.

Eve Elaine LAWSON *v.* STATE of Arkansas

CA CR 00-671 47 S.W.3d 294

Court of Appeals of Arkansas
Division II
Opinion delivered June 20, 2001

[redacted]

[redacted]

*Cathleen V. Compton*, for appellant.

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

SAM BIRD, Judge. Appellant Eve Elaine Lawson was charged with first-degree murder. A jury convicted her of second-degree murder, and she was sentenced to twenty years in the Arkansas Department of Correction. She appeals the conviction based upon the following alleged errors by the trial court. First, she contends that because she is deaf, she was entitled to the assistance of an interpreter before the police took her statement and at the

hearing on her motion to suppress her statement. She also contends that she was denied effective assistance of counsel because her attorneys failed to secure rights to the assistance of an interpreter and because her attorney did not present evidence during the sentencing phase. In addition, she contends that the prosecutor violated her Fifth Amendment rights against self-incrimination when he informed the jury during his opening statement that Lawson would be stating that the crime was committed in self-defense. She also contends that she is entitled to a new trial because improper contact between a juror and the family of the victim deprived her of her right to an impartial jury. And, she contends that her Sixth Amendment rights were violated because of her trial attorney's conflict of interest. We affirm.

On May 20, 1998, Lawson was arrested for the murder of Russell Lynn Rogers. She gave a statement to police that day admitting that she had shot Rogers in the head, but contending that she did so after he kidnapped her and mentally abused her. She stated that she was scared to leave Rogers's home because he would find her and kill her. After she shot him, she went to Rogers's neighbors' house and told them what had happened and asked to use the phone to call the police. In this statement, she contends that she called the police and told them what had happened. Before her trial, Lawson moved to suppress the statement, contending that the statement was not freely made because she was under extreme duress and confusion at the time she was interrogated by the police.

The court conducted a hearing on Lawson's motion to suppress. Alex Sylvester, a criminal investigator with the Arkansas State Police, was the first to testify and stated that prior to conducting the interview, in which Lawson's statement was made, he advised Lawson of her *Miranda* rights. He stated that Lawson freely and voluntarily discussed the shooting with him, describing in detail what occurred at Rogers's residence the night of the shooting. Sylvester stated that he took Lawson's statement in a small room and that he did not have any difficulty communicating with her and that she could hear him "fine." Sylvester stated that when Lawson made the statement, the tape recorder did not work initially and, therefore, only half of Lawson's statement was recorded.

Joan Demmitt, an Arkansas State Trooper, testified that she transported Lawson to jail on the night of the shooting, but that she did not question Lawson. She stated that she was present when Lawson's rights were read to her.

Dewayne Luter, an investigator with the state police, testified that he was present during Lawson's interview and was present when she was advised of her rights. He stated that Lawson did not ask for the interview to cease or request an attorney.

James Isham, the sheriff of Scott County, testified that he went to Rogers's home on May 20 to investigate the shooting after the dispatcher contacted him regarding the incident. He then read the dispatcher's report into evidence. The report stated that the dispatcher, Michael Oakes, had received a call about a homicide on May 20 from Nicole Falconer, in which Falconer informed Oakes that Lawson had told her that she shot Rogers. The dispatcher asked Falconer to ask Lawson to come to the phone. Lawson identified herself to Oakes and then asked him to speak louder, telling him that she was hearing-impaired. Lawson informed Oakes that she had been abducted by Rogers, that Rogers had been abusive, and that she had shot him in the head.

Lawson was present at the suppression hearing. Her counsel did not ask for, nor was she provided, the assistance of an interpreter. The court denied her motion to suppress.

In the prosecutor's opening statement, he stated to the jury:

> Now, as you're aware, the defendant in this case, Eve Lawson, is charged with the first-degree murder of Russell Rogers. The State alleges that on or about May 20th of 1998, the defendant, with the purpose of causing the death of another person, did in fact cause the death of Russell Rogers. The evidence is going to show that the defendant placed a .22 caliber four-shot Derringer to the victim's head, Russell Rogers, while he was asleep in his bed at his residence. Now the defendant would have you believe that this was in self-defense.

Lawson objected to this statement and moved for a mistrial, contending that she had not yet decided whether to testify and that the prosecutor's statement was going to force her to testify, in violation of her constitutional right not to have to testify. The court denied the motion, stating that the prosecutor should clarify that he was referring to what Lawson had said in her statement.

During the trial, Lawson was provided assistance for her hearing impairment. At the trial, there was testimony from Oakes, the dispatcher, who stated again that Lawson had informed him that she

had shot Rogers in the back of the head. Jason Daggs, a deputy sheriff for the Scott County Sheriff's office, testified that he responded to a call concerning a shooting at Rogers's residence. He testified that when he arrived at the scene, he was met by Lawson, who informed him that she had shot Rogers. James Isham, sheriff, testified that when he arrived at the trailer where Rogers lived, Lawson surrendered to the police.

Sylvester testified at trial, again stating that Lawson was advised of her *Miranda* rights and indicating that she understood them before giving her statement. Sylvester then testified regarding Lawson's statement. He stated that she had told him that Rogers had kidnapped her, that he had verbally abused her and had knocked her against a table, and that she admitted killing Rogers. He stated that at no time did Lawson state that she had been sexually abused by Rogers. In addition, she stated that Rogers had asked her "to take that gun and shoot him and take him out of all of his pain."

Jason Falconer, a neighbor of Rogers, testified that Lawson had come to his home asking to use the phone and stating that she had shot Rogers. Nicole Falconer, Jason's wife, also testified that Lawson had informed her that she had shot Rogers.

Lawson testified that she was abducted by Rogers and sexually abused for three days before she killed him. She also stated that she had a hearing impairment and that she had informed officials throughout the proceeding of her impairment. She stated that while she was giving her statement, the officers asked her questions that she could not really understand. She stated that part of the time, she could not hear the questions.

The jury found Lawson guilty of second-degree murder, and she filed a motion for a new trial. After moving for and being granted substitution of counsel, Lawson filed an amended motion for a new trial, contending that because she was deaf, she was entitled to an interpreter at the time of her arrest; that she was entitled to an interpreter at all stages of her criminal proceeding, including the suppression hearing; that during the trial, a juror was repeatedly speaking to members of the victim's family; that Lawson's trial attorney had a conflict of interest because of his concerns about his son's election to the office of prosecuting attorney; and that she had not received effective assistance of counsel as there were no witnesses presented on her behalf at the sentencing phase of the trial. Attached to the motion was an affidavit by Jerry Parker

in which he stated that during Lawson's trial he observed a juror talking to Rogers's family on several occasions.

A hearing on Lawson's motion for a new trial was held. John Everett, an attorney, testified that because Lawson's first attorney did not raise the issue of her hearing impairment at any stage of the proceeding, specifically in the motion to suppress, she received ineffective assistance of counsel. He also stated that it appeared that her second counsel, trial counsel, had a conflict of interest in representing her. In addition, Everett stated that it was "most unusual for some evidence not to be presented at the sentencing stage, assuming Lawson had no history of violence, no propensity for violence, and no record."

Everett testified that Lawson is deaf and that the only way someone is able to communicate with her is by speaking "directly and distinctly and loudly where she can see you, see your lips, she can pick it up, most of it. But if you're not facing her, if you're speaking in normal, conversational tones, and particularly if you're not facing her, she doesn't have a clue what you are saying."

Lawson's mother, Flora Belle Lawson, testified that her daughter contracted encephalitis that caused her hearing loss when she was a teenager. She said that she went to the police station the day of the shooting and informed the police that her daughter could not hear. She also testified that she was not in the courtroom when her daughter was found guilty because she expected to testify but was not called as a witness.

Juanita Scroggins, Lawson's aunt, testified that she saw a juror speak to members of the victim's family, but that she did not hear what was said. She also testified concerning Lawson's hearing impairment.

Tom Tatum, Sr., testified that he was Lawson's trial attorney. He stated that during his first meeting with Lawson, he learned that she had a hearing loss and that she could not hear certain tones, but that he would not consider her to be deaf. He stated:

> When we got down to trial time I wanted to make sure that Lawson was afforded the opportunity to hear everything that was going on in the courtroom. That's when I petitioned the court to

> ask the court for some special assistance. We tried the amplification, got the equipment. Eve told me that that wouldn't work. So I came up with this "real-time" idea, which worked real well for her.

He also stated that during the trial he made a statement to a friend of his, "Am I losing any votes?" He said that the statement was an "old joke that goes way, way back," and he stated that at the time of the trial, no election was taking place. In addition, he stated that the comment by the prosecuting attorney that Lawson was going to claim self-defense did not affect her decision to testify and that she had already decided to testify.

Sylvester testified at the hearing on the motion for a new trial that he was not made aware by dispatcher Oakes that Lawson had a hearing problem. He stated that she informed him that he needed to face her so that she could read his lips, but that she understood what he was saying. He stated that she did not indicate that she could not understand him. He stated that when she gave her statement, the room was quiet with no distractions, and Lawson was sitting real close to him. He stated that he felt that she could understand everything that he was saying. In addition, he stated that Lawson did not ask him to speak up. The court denied Lawson's motion for a new trial, and she brings this appeal.

For her first point on appeal, Lawson contends that because she was hearing-impaired, she was entitled to an interpreter before the police took her statement. She states that she informed the police that she had a hearing impairment and that her statutory rights under Ark. Code Ann. § 16-89-105 (1987) were violated when the police took her statement without providing her with the assistance of an interpreter.

■ When a denial of a motion to suppress is challenged, we make an independent determination based upon the totality of the circumstances. *Welch v. State*, 330 Ark. 158, 955 S.W.2d 181 (1987). We reverse only if the denial is clearly against the preponderance of the evidence. *Id.*

Arkansas Code Annotated section 16-89-105(c) states that a person is entitled to assistance when he is *deaf and in-custody*, rather than someone who is *hearing-impaired and the subject of a criminal trial*, which is covered under Ark. Code Ann. § 16-89-104(a) (1987) and will be discussed later in this opinion. Section 16-89-105(c) states:

> In the event a person who is deaf is arrested and taken into custody for any alleged violation of a criminal law of this state, the arresting officer and his superiors shall procure a qualified interpreter in order to properly interrogate the deaf person and to interpret the person's statement. No statement taken from the deaf person before an interpreter is present may be admissible in court.

Arkansas Code Annotated section 16-10-127(e)(1) (Repl. 1999) defines a deaf person as "a person with a hearing loss so great as to prevent his understanding language spoken in a normal tone." In *Hollamon v. State,* 312 Ark. 48, 55, 846 S.W.2d 663, 667 (1993), the supreme court found no error in the trial court's use of the *Black's Law Dictionary*, 6th ed. (1990), definition of a "deaf person" as "any person whose hearing is totally impaired or so seriously impaired as to prohibit the person from understanding oral communications when spoken in a normal conversational tone."

Lawson contends that she should have been provided the assistance of an interpreter when her statement was taken because she is considered to be deaf under the statutory definition and the definition in *Hollamon* and because she informed the police that she was hearing-impaired before her statement was taken and when her statement was taken. The State contends that she did not object to this below and, therefore, her argument is not preserved for appeal. We agree that her argument is not preserved. In her motion to suppress, she made no mention of the fact that her statement should be suppressed because she was hearing-impaired. *Britt v. State*, 334 Ark. 142, 974 S.W.2d 436 (1998); *McNeely v. State*, 54 Ark. App. 298, 925 S.W.2d 177 (1996).

Even if this argument were preserved for appeal, her abstract does not demonstrate that she presented proof that she is deaf. We agree that the abstract is replete with testimony that Lawson suffers from a hearing loss. However, she has offered no evidence that her hearing loss would qualify her as deaf under either the *Hollamon* or the statutory definition. Lawson has not shown that she could not understand oral communications when spoken in a normal conversational tone. Even though Lawson had stated to the dispatcher and the investigating officers that she was hearing-impaired, she gave no indication to the officers that she did not understand them or the proceedings. In addition, Sylvester, the investigating officer who took Lawson's statement, testified that even though she informed him that she was hearing-impaired, she

did not appear confused, she had no trouble communicating, and she appeared to be able to hear him. In addition, after she told the dispatcher that he needed to speak up, because she was hearing-impaired, she gave no indication that she had trouble answering the questions that followed. After her *Miranda* rights were read to her, Lawson initialed the form showing that she understood them. There was no testimony from any of these officers that they were not speaking in a normal conversational tone.

For Lawson's second point on appeal, she contends that because she was not provided the assistance of an interpreter during the hearing on her motion to suppress, her constitutional and statutory rights were violated. Arkansas Code Annotated section 16-89-104(a) states, in pertinent part,

> (a) Every person who cannot speak or understand the English language or who because of hearing, speaking, or other impairment has difficulty in communicating with other persons, and who is a defendant in any criminal action or a witness therein, shall be entitled to an interpreter to aid the person throughout the proceeding.

Lawson argues that because she informed the police officers that she had a hearing impairment, she was entitled to assistance at the suppression hearing. She argues that because she was not provided an interpreter, this court must reverse her conviction. She asserts that in *People v. Doe*, 602 N.Y.S.2d 507 (1993), the court reversed a conviction of an appellant who was not provided assistance and held, "A defendant is entitled to hear 100% of the proceedings." Lawson asserts that she had a hearing loss far greater than that suffered by the defendant in *People v. Doe, supra.*

The State contends that Lawson's argument is not preserved for appeal in that she did not make this argument below. We agree with the State because at no time did Lawson object to the proceedings, contending that she was deaf. An appellate court will not consider an argument that was not presented to the trial court. *Tucker v. State*, 336 Ark. 244, 983 S.W.2d 956 (1999); *Britt v. State, supra; Tabor v. State,* 333 Ark. 429, 971 S.W.2d 227 (1998); *McNeely v. State, supra.*

For her third point on appeal, Lawson contends that she was denied effective assistance of counsel because her attorneys did not

secure an interpreter at the suppression hearing, which was a violation of her statutory and constitutional rights, and that because of this violation she is entitled to a new trial. Lawson contends that an interpreter should have been secured for her during the suppression hearing and that her attorneys should have moved to suppress the statement because an interpreter was not secured. She argues, "The suppression of that statement would have completely altered the manner in which the state attempted to prosecute [her], and the absence of the statement in evidence would have rendered it likely that [she]would not have testified, and would not have been convicted."

In accordance with *Strickland v. Washington*, 466 U.S. 668 (1987), when claiming that she received ineffective assistance of counsel, an appellant must show that her counsel's conduct was deficient and that the deficient conduct was prejudicial. To prevail on a claim of ineffective assistance of counsel, the petitioner must show first that counsel's performance was deficient. *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000). This requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. *Id.* Petitioner must also show that the deficient performance prejudiced his defense; this requires a showing that counsel's errors were so serious as to deprive the petitioner of a fair trial. *Id.* Unless the petitioner makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversarial process that renders the result unreliable. *Id.*

The reviewing court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* To rebut this presumption, the appellant must show that there is a reasonable probability that, but for counsel's errors, the fact finder would have had a reasonable doubt respecting guilt, *i.e.*, that the decision reached would have been different absent the errors. *Id.* A reasonable probability is one that is sufficient to undermine confidence in the outcome of the trial. *Id.* In making a determination on a claim of ineffectiveness, the totality of the evidence before the fact-finder must be considered. *Id.* The reviewing court will not reverse the denial of postconviction relief unless the trial court's findings are clearly erroneous or clearly against the preponderance of the evidence. *Id.*

Under the test established in proving ineffective assistance of counsel, Lawson must show that her attorney was deficient,

making errors so serious that he was not functioning as counsel. We agree that because there was evidence that Lawson suffered from a hearing impairment, pursuant to Ark. Code Ann. § 16-89-104(a), she should have been provided an interpreter to aid throughout the proceeding. However, we cannot say that the outcome would have been different had an interpreter been provided. In other words, Lawson has not shown that there is a reasonable probability that the jury would have had a reasonable doubt respecting guilt. Lawson admitted to the Falconers, to the dispatcher, and to the police that she shot Rogers. Based upon the totality of the evidence before the jury, we cannot say that the absence of the interpreter undermined the confidence in the outcome of the trial.

Lawson also contends that she received ineffective assistance of counsel because her attorney failed to call any witnesses during the sentencing phase of the jury trial. She argues that her counsel was ineffective in that he did not provide witnesses during the sentencing phase that Lawson had no prior history of violence, had an excellent character, had overcome a serious illness, and had coped with a serious hearing disability. Decisions regarding witness testimony are matters of trial strategy. *Pyle v. State*, 340 Ark. 53, 8 S.W.3d 491 (2000). A lawyer's choice of trial strategy that proves ineffective is not a basis for meeting the test for ineffective assistance of counsel. *State v. Slocum*, 332 Ark. 207, 964 S.W.2d 388 (1998). In *Pyle v. State, supra*, the supreme court held that absent a showing of how the witnesses could have changed the outcome of the trial, there was not a claim for ineffective assistance of counsel when a defendant's attorney did not call certain witnesses during the sentencing phase. In the case at bar, Lawson has not shown that the testimony of the witnesses, including her mother and aunt who were ready to testify, would have changed the outcome of the trial.

For her fourth point on appeal, Lawson contends that her Fifth Amendment right against self-incrimination was violated when the prosecutor stated in his opening statement that she was relying on self-defense as a defense to the charge. Lawson objected, moving for a mistrial. The court denied the motion. On appeal, she contends that by making this statement, the prosecutor forced her to testify. Our standard of review in granting a mistrial was stated in *Gaines v. State*, 340 Ark. 99, 113, 8 S.W.3d 547, 556 (2000):

> A mistrial is a drastic remedy and should be declared only when there has been an error so prejudicial that justice cannot be served by continuing the trial, or when the fundamental fairness of

> the trial itself has been manifestly affected. The trial court has wide discretion in granting or denying a motion for a mistrial, and absent an abuse of that discretion, the trial court's decision will not be disturbed on appeal. [Citations omitted.]

The prosecution in a criminal case is prohibited from commenting on a defendant's post-arrest, post-*Miranda* warning silence. *Doyle v. Ohio*, 426 U.S. 610 (1976). However, we do not find that the prosecutor's comment in his opening statement was a violation of *Doyle*, in that the prosecutor's comment was based upon evidence that he expected to be produced at trial, *i.e.*, Lawson's statement given to the police in which she alleged that she was kidnapped and abused. *Esmeyer v. State*, 325 Ark. 491, 930 S.W.2d 302 (1996).

Also, as the State points out, even if we found that the prosecutor's comment was a *Doyle* violation, a mistrial should not be granted because a limiting instruction to the jury would cure any prejudice. *See Cagle v. State*, 68 Ark. App. 248, 6 S.W.3d 801 (1999). The failure to request a cautionary instruction should not inure to the appellant's benefit on appeal. *Id.* In the case at bar, Lawson did not request a cautionary instruction.

For her fifth point on appeal, Lawson argues that improper contact between a juror and a member of the victim's family deprived her of her right to an impartial jury. She argues that improper contact between a juror and a family member of the victim is presumptively prejudicial and requires a new trial. The burden was on the appellant to prove that a reasonable possibility of prejudice resulted from juror misconduct, and prejudice is not presumed in such situations. *Dillard v. State*, 313 Ark. 439, 855 S.W.2d 909 (1993). Whether unfair prejudice occurred is a matter for the sound discretion of the trial court. *Id.*

Lawson filed with her motion for new trial an affidavit given by Jerry Parker, who stated that he saw a member of the jury talk with the family of the victim on several occasions during the trial. He stated that he did not know what was being said and that he just assumed the communication was to members of the victim's family. Glen Stanfield, the victim's stepfather, testified that he was not aware that a juror spoke with any member of the family. Juanita Scroggins, Lawson's aunt, stated that she saw a juror talking with members of Rogers's family, but that she did not know the juror's name or what she said.

The testimony of these witnesses does not demonstrate that any prejudice resulted. In fact, it was not proven that a juror spoke with the family. Parker simply testified that he just assumed that the juror was talking to the family members. In addition, Scroggins did not know what the juror said to the family. Therefore, we find that the court did not abuse its discretion in finding that Lawson had failed to prove that the contact, if any, by a juror with the family of the victim was inappropriate or in violation of the court's admonishment to the jury.

For Lawson's sixth and final point on appeal, she contends that her Sixth Amendment rights were violated by a conflict of interest on the part of her trial counsel. She maintains that during a break at the trial, her counsel, Tom Tatum, Sr., was overheard asking Don Frost, a relative of the victim, "Am I losing any votes?" She states, "This [*sic*] significance of this comment arose from the fact that trial counsel's son was entering a contested race for the position of county prosecutor, and defense counsel was worried that his representation of Lawson might impact negatively on the success of his son's election campaign."

In order for Lawson to be granted postconviction relief when alleging a conflict of interest, she must prove that an actual conflict of interest existed and that the conflict adversely affected her. *Myers v. State*, 333 Ark. 706, 972 S.W.2d 227 (1998). Lawson notes that, for relief to be granted, she has to show that the established conflict of interest actually affected the adequacy of the representation. *Dawan v. Lockhart*, 31 F.3d 718 (8th Cir. 1994).

Tatum testified that he was not involved in a campaign at the time of the trial and that the comment was an old private joke between himself and a friend. We cannot say that the court erred in finding that Lawson has not proven that her trial counsel had an actual conflict or that she was prejudiced by the comment or the alleged conflict.

Affirmed.

BAKER and ROAF, JJ., agree.

Leanna NAPIER *v.* STATE of Arkansas

CA CR 00-1286 46 S.W.3d 565

Court of Appeals of Arkansas
Division I
Opinion delivered June 20, 2001

*Doug Norwood* and *Susan Lusby*, for appellant.

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

OLLY NEAL, Judge. Leanna Napier appeals her jury conviction for third-degree battery for which she was ordered to serve thirty days in the Benton County Jail and fined $1,000 with $500 suspended for twelve months. Appellant's sole point on appeal is that the trial court improperly instructed the jury in violation of the United States and Arkansas Constitutions's prohibitions against *ex post facto* laws. We agree and reverse.

The State charged appellant with committing battery in the third degree on September 24, 1998. The Rogers Municipal Court found appellant guilty of the offense and appellant appealed the judgment of the Rogers Municipal Court to the Benton County Circuit Court on February 24, 1999. At the jury trial in the circuit court, Laura Kozial testified that appellant hit her with her fist,

pulled out some of her hair and manipulated her previously injured shoulder causing her a "lot of pain." Detective Michael Patton of the Rogers Police Department testified that on September 24, 1998, he was called to St. Mary's Hospital to investigate a disturbance. Detective Patton stated that when he arrived he noticed that Ms. Kozial had a bald spot on her head that was visibly red. Detective Patton further testified that he found hair in another room of the hospital.

A person commits battery in the third degree if with the purpose of causing physical injury to another person, he causes physical injury to any person. Before the trial court charged the jury, appellant objected to the use of AMCI 2d 1307 which defines physical injury as "*the impairment of physical condition or the infliction of substantial pain, or infliction of bruising, swelling, or visible marks associated with physical trauma.*" This definition of physical injury is consistent with the definition of physical injury provided in the Arkansas Code. *See* Ark. Code Ann. § 5-1-102(14) (Supp. 1999). Appellant argued that because appellant was accused of committing the battery in 1998, the court should have defined physical injury as the Code defined it in 1998. In 1998 the Code defined "physical injury" as "*the impairment of physical condition or the infliction of substantial pain.*" The trial court denied appellant's objection to the instruction concluding that the instruction was procedural rather than substantive. From that ruling comes the present appeal.

The State responds that appellant has not preserved her argument for appeal. The State notes that appellant objected only on the basis that the court was giving the wrong definition of physical injury and did not explicitly state that giving the new instruction would violate the Arkansas and United States constitutions prohibitions against *ex post facto* laws.

Under our well-settled rule, this court does not consider issues raised for the first time on appeal. *Skiver v. State*, 37 Ark. App. 146, 826 S.W.2d 309 (1992). Even constitutional issues may not be raised for the first time on appeal. *Foster v. State*, 66 Ark. App. 183, 991 S.W.2d 135 (1999).

We disagree with the State's contention that appellant has failed to preserve her *ex post facto* argument for appeal. The record reveals that following colloquy between appellant's attorney and the trial judge:

COURT: Make your record.

MR. NORWOOD: Okay. The Court has told me in chambers that it is going to allow a- in the battery in the third degree, which AMCI 2d 1307, that you're going to allow the definition of physical injury to read as follows:

Physical injury means the impairment of physical condition or the infliction of substantial pain, or infliction of bruising, swelling or visible marks associated with physical trauma.

That wording of this statute came into effect as a result of the legislation in 1999. The — since the incident offense happened in 1998, the proper definition should be: Physical injury means the impairment of physical condition or the infliction of substantial pain.

I believe the Court is giving the wrong definition of what physical injury is and I want the Court to note my objection to the Court doing that.

COURT: Your objection is noted. The Court finds that the definition is procedural, not substantive, and merely a statement of what the law was.

Although appellant never explicitly stated the phrase "*ex post facto*," the record is clear that appellant was basing her objection on *ex post facto* grounds and that the court understood the objection as such.

Article 1, § 10, of the United States Constitution provides that "(n)o state shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts. . . ." Article 2, § 17, of the Arkansas Constitution similarly provides, "No . . . ex post facto law . . . shall ever be passed. . . ." A law is in violation of the ex post facto clause if it is retroactive and it disadvantages the accused by altering the definition of criminal conduct or by increasing the punishment for the crime. *Lynce v. Mathis*, 519 U.S. 433 (1997); *Collins v. Youngblood*, 497 U.S. 37 (1990); *Beazell v. Ohio*, 269 U.S. 167 (1925). *See also Calder v. Bull*, 3 Dall. 386 (1798).

The focus of the *ex post facto* inquiry is not on whether a legislative change produces some ambiguous sort of 'disadvantage,' ... but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable. *Snyder v. State*, 332 Ark. 279, 965 S.W.2d 121 (1998) (*citing California Dept. of Corrections v. Morales*, 514 U.S. 499 (1995)). In this case, the addition of the language "infliction of bruising, swelling, or visible marks associated with physical trauma," altered the definition

of criminal conduct to such a degree as to make it easier for the State to show that appellant committed battery in the third degree.

The State argues that appellant cannot demonstrate prejudice because the evidence presented at trial proved that Kozial suffered a physical injury under both the old and new definitions of the term. The State contends Kozial's testimony concerning the pain she felt in her shoulder and the pain that she obviously felt upon having her hair ripped from her scalp establishes that Kozial suffered substantial pain as required under the old statute. Our supreme court has said prejudice is presumed on the giving of erroneous instruction unless some additional factor makes it clear that the erroneous instruction was harmless. *See Arthur v. Zearley*, 337 Ark. 125, 992 S.W.2d 67 (1999).

In cases involving a trial court's giving of an erroneous instruction involving the trial mechanism to be used in deciding either a civil or criminal case, we will not require the appellant to demonstrate prejudice. *Skinner v. R.J. Griffen* & Co., 313 Ark. 430, 855 S.W.2d 913 (1993). Such a requirement is often an impossible burden, and the requirement of an impossible burden, in effect, renders the requirement of correct instructions on the law meaningless. *Hall v. State*, 326 Ark. 318, 933 S.W.2d 363 (1996). Said another way, prejudice will be presumed from the giving of an erroneous instruction unless some additional factor makes it clear that the erroneous instruction was harmless. If this were an attempt to make a finding as to whether appellant was prejudiced by the improper instruction, we would only engage in speculation, applying our view of what a reasonable jury would have done. *Skinner, supra.*

An appellee, however, may still demonstrate that the giving of an erroneous instruction was harmless, where the jury demonstrably was not misled because the jury rejected the theory of the erroneous instruction, and where the erroneous instruction was obviously cured by other instructions. *See e.g. Cates v. Brown*, 278 Ark. 242, 645 S.W.2d 658 (1983); *Moore v. State*, 252 Ark. 526, 479 S.W.2d 857 (1972). In this case, the State cannot demonstrate that the jury found appellant guilty because she caused *substantial pain* rather than because Detective Patton testified that he observed the red area (visible mark) on appellant's scalp.

Reversed and remanded.

HART and VAUGHT, JJ., agree.

Calvin Lashawn CAMPBELL *v.* STATE of Arkansas

CA CR 01-29 47 S.W.3d 915

Court of Appeals of Arkansas
Division IV
Opinion delivered June 27, 2001

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

No response.

JOHN F. STROUD, JR., Chief Judge. Calvin Campbell was convicted by a Pulaski County jury of residential burglary and battery in the first degree with regard to an incident that occurred on December 10, 1998; he was also charged with the rape of a nine-month-pregnant woman in connection with that incident, but the jury deadlocked on that charge, forcing the trial judge to declare a mistrial. In the second trial on the charge of rape, Campbell was convicted by a jury and sentenced to forty years in the Arkansas Department of Correction.

Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Rule 4-3(j) of the Arkansas Rules of the Supreme Court and Court of Appeals, appellant's counsel has filed a motion to withdraw on the grounds that the appeal is without merit. Counsel's motion was accompanied by a brief purportedly referring to everything in the record that might arguably support an appeal, including a list of all rulings adverse to appellant made by the trial court on all objections, motions and requests made by either party with an explanation as to why each adverse ruling is not a meritorious ground for reversal. The clerk of this court furnished appellant with a copy of his counsel's brief and notified him of his right to file *pro se* points; appellant has not filed any points. For the reason explained below, we must return this case to appellant's counsel to supplement the record.

In the notice of appeal, counsel for appellant designated "the entire record, including any audio or visual recordings, but excluding voir dire and opening and closing arguments, except for objections during same, as [the] record of appeal in this case." Rule 4-3(j)(1) of the Rules of the Supreme Court provides:

> Any motion by counsel for a defendant in a criminal or a juvenile delinquency case for permission to withdraw made after notice of appeal has been given shall be addressed to the Court, shall contain a statement of the reason for the request and shall be served upon

> the defendant personally by first-class mail. A request to withdraw on the ground that the appeal is wholly without merit shall be accompanied by a brief including an abstract. The brief shall contain an argument section that consists of a list of all rulings adverse to the defendant made by the trial court on all objections, motions and requests made by either party with an explanation as to why each adverse ruling is not a meritorious ground for reversal. The abstract section of the brief shall contain, in addition to the other material parts of the record, all rulings adverse to the defendant made by the trial court.

Although this rule does not specifically require that the entire record be provided on appeal, we must also look to *Anders, supra,* for guidance. In that case, our United States Supreme Court held:

> [I]f counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; *the court — not counsel — then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous.* If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

386 U.S. at 744. (Emphasis added.)

In *Smith v. Robbins*, 528 U.S. 259 (2000), the Supreme Court's most recent discussion regarding the procedures for withdrawing from a case that has no meritorious points to be raised on appeal, the Court held that the *Anders* framework is only one method of ensuring that indigents are afforded their Constitutional rights, and the states may craft procedures that are superior to, or at least as good as, the procedure outlined in *Anders*. 528 U.S. at 276. However, the Supreme Court, in discussing the various approved approaches to requests for withdrawing from appeals having no merit, appears to say that all of the methods require that both the attorney and the appellate court review the entire record as a component of affording the criminal defendant his Constitutional rights. *See, e.g., McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429 (1988) (holding that the appellate court must satisfy itself that the attorney has provided the client with a diligent and thorough search

of the record for any arguable claim that might support the client's appeal and has correctly concluded that the appeal is frivolous).

We are unable to conduct "a full examination of all the proceedings to decide whether the case is wholly frivolous" as required by *Anders* without the complete record before us on appeal. Consequently, we return this case to appellant's counsel to supplement the record on appeal to include the portions of the record originally omitted and, if necessary, to file a substitute brief that addresses any objections contained in those parts of the record.

Remanded to supplement record.

PITTMAN and JENNINGS, JJ., agree.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING

CA CR 01-29 ___ S.W.3d ___

Court of Appeals of Arkansas
Divisions IV and I
Opinion delivered August 29, 2001

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

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

JOHN F. STROUD, JR., Chief Judge. Calvin Campbell was convicted by a Pulaski County jury of the rape of a nine-

month-pregnant woman and sentenced to forty years in the Arkansas Department of Correction. This case was filed with this court pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Rule 4-3(j) of the Arkansas Rules of the Supreme Court and Court of Appeals, and appellant's counsel asked to be allowed to withdraw from the case on the ground that there was no merit to an appeal. On June 27, 2001, without determining whether or not there were meritorious issues for appeal, we remanded this case to supplement the record with the portions originally omitted by direction of appellant's counsel in the notice of appeal. Appellant's counsel filed a petition for rehearing and subsequently filed a motion to amend the petition for rehearing on the basis of changed circumstances. We deny the petition for rehearing.

In the petition for rehearing, appellant's counsel argues that our order of remand to supplement the record to include all portions of the record is based upon an erroneous interpretation of the law and the Rules of the Arkansas Supreme Court and Court of Appeals; that this court added a condition to *Anders* that is not required by that case or our state rules; and that inclusion in the record of portions of the trial omitted because no objections were raised would serve no practical purpose because reversal would be precluded by the failure to make an objection. Counsel also contends that other cases before the appellate courts in which *Anders* briefs were filed and decisions were issued excluded voir dire and opening and closing statements except for adverse objections made during those portions of the trial; that the record on appeal is that which is abstracted and that all matters not essential to the decision of the questions presented by appeal are to be omitted from the record; and that by requiring the entire record, this court is essentially adopting a "plain error" rule, which is not recognized in Arkansas, with limited exception. Additionally, the Attorney General filed a response to the original petition agreeing with appellant's position that requiring transcriptions of portions of the trial where there were no adverse rulings would serve no "practical purpose," would result in more costly appeals, and may cause public money to be spent unnecessarily.

Counsel for appellant contends that the record on appeal is that which is abstracted, *see Rabb v. State*, 72 Ark. App. 396, 39 S.W.3d 11 (2001), and that all matters not essential to the decision of the questions presented by appeal are to be omitted from the record. *See* Ark. R. App. P.—Civ. 6(c). It is true that these directives are applicable to appeals made based on the merits of the case. However, these rules are not applicable in *Anders* briefs, where the attorney contends that in spite of the appeal taken because his clients insists, there is no merit to the appeal and it is "wholly frivolous," that the attorney should be discharged, and that should

be the end of the pursuit of the appellant's rights unless he wants to file points on appeal *pro se*. This court has an entirely different obligation in a no-merit appeal. Instead of reviewing only the parts of the record that the lawyer puts before us, in a no-merit appeal we are bound to perform a full examination of all the proceedings to decide if the case is "wholly frivolous."

Rule 4-3(j)(1) of the Rules of the Supreme Court and Court of Appeals of the State of Arkansas governs the procedure for filing no-merit appeals, and that rule provides, in pertinent part:

> A request to withdraw on the ground that the appeal is wholly without merit shall be accompanied by a brief including an abstract. The brief shall contain an argument section that consists of a list of *all rulings adverse to the defendant made by the trial court on all objections, motions and requests made by either party* with an explanation as to why each adverse ruling is not a meritorious ground for reversal. The abstract section of the brief shall contain, in addition to the other material parts of the record, *all rulings adverse to the defendant* made by the trial court.

(Emphasis added.)

However, this rule is not the only framework we must follow in reviewing no-merit appeals; we are also bound by the United States Supreme Court case law of *Anders, supra,* and its progeny. This is made clear by our supreme court in *Buckley v. State*, 345 Ark. 570, 48 S.W.3d 534 (2001), in which it stated, "If appellant's counsel intended to withdraw, he should have filed a brief and a motion to be relieved as counsel, pursuant to *Anders v. California*, 386 U.S. 738 (1967) and our Rules 4-3(j)(1), stating that there is no merit to the appeal." 345 Ark. at 571, ___ S.W.3d at ___. *See also Johnson v. State*, 345 Ark. 357, 45 S.W.3d 844 (2001). Therefore, although Rule 4-3(j) does not specifically require that the entire record be provided on appeal, we must also look to *Anders, supra,* and the subsequent case law for guidance.

In *Anders*, our United States Supreme Court held:

> [I]f counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; *the court, not counsel, then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous.* If it so finds it may grant counsel's request to withdraw and dismiss

> the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

386 U.S. at 744. (Emphasis added.)

Counsel for appellant argues that requiring portions of the proceedings where no objections were made to be included in the record would serve no purpose because any such error would not be a basis for reversal if no objection was made. It is alleged that the practical effect of our ruling is to adopt the "plain error" rule in *Anders* briefs. This is incorrect.

We acknowledge that cases in which *Anders* briefs have been filed using the notice of appeal that designates less than the entire record on appeal have been previously decided by this court. However, the instant case is perfectly illustrative of the reason we must have the entire record before us to determine if indeed there are no meritorious issues and that the appeal would be "wholly frivolous." In the motion to amend petition for rehearing on the basis of changed circumstances, appellant's counsel states:

> In order to avoid delay in the resolution of the case, in the event the Court denied the petition for rehearing and the supreme court denied relief, counsel asked the court reporter to prepare the missing portion of the record as soon as possible so that it could be filed expeditiously. Counsel received the supplement to the record from the circuit clerk on July 19, 2001.
>
> Upon reviewing the supplement [of the previously omitted portions of the record], counsel has discovered that, despite Appellant's specific instruction in the notice of appeal that the record include all portions of the voir dire in which objections were raised, *the court reporter failed to include in the original record an objection that was decided adversely to Appellant during voir dire.* Consequently, counsel is prepared to file the supplement and a substituted brief to address this adverse ruling in the *Anders* brief, in accordance with this Court's directive.

(Emphasis added.)

Nevertheless, counsel still contends that the grounds asserted in her petition for rehearing are meritorious because our order constitutes unauthorized rulemaking. This argument has no merit. Clearly, as pointed out above, our supreme court demands

that we look at *Anders* and our Rule 4-3(j) together when reviewing no-merit appeals, and *Anders* likewise directs that the court determine whether a case is wholly frivolous after a "full examination of all the proceedings." 386 U.S. at 744.

Although not the basis for our remand, we must also note that the notice of appeal in the instant case does not even comply with our Rule 4-3(j)(1). The notice of appeal directs the court reporter to exclude "voir dire and opening and closing arguments, except for objections during same," while the rule is not limited solely to "objections." The rule directs that the abstract shall contain "all rulings adverse to the defendant." The prior sentence makes clear that this includes not only objections but also motions and requests.

In the present case, the omission of this adverse ruling against appellant during voir dire, discovered only after appellant's counsel was ordered by this court to obtain the entire record of the proceedings in appellant's case, is the perfect example of why the entire record is required to be presented to the court for review with *Anders* briefs. *Anders* requires that the appellate courts make a full examination of *all* proceedings in order to make a determination of whether the case is wholly frivolous. This directive ensures that there are indeed no issues that would support an appeal on the merits of the case before allowing an attorney to withdraw from representation of a criminal defendant. This crucial obligation can neither be delegated to the attorneys, nor can it be left to court reporters to determine whether an objection, motion, or request was decided adversely to the defendant. As to the position stated by the Attorney General, if compliance with the law as established by the United States Supreme Court to protect the rights of indigent defendants in criminal proceedings requires the expenditure of more public funds to provide a full record to this court, then so be it. For these reasons, the motion for rehearing is denied.

Motion for rehearing is denied.

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

PITTMAN, J., concurs.

JOHN MAUZY PITTMAN, Judge, concurring. I concur in the decision to deny the petition for rehearing. However, I wish to respond to counsel's argument that our decision to require that entire records be filed in no-merit criminal appeals does violence to this state's contemporaneous-objection rule.

Appellant's counsel filed a notice of appeal that provided, in pertinent part, that the record on appeal should exclude voir dire,

opening statements, and closing arguments except for objections made during those portions of the trial. Counsel argues that this designation of the record for appeal was sufficient to ensure that all rulings adverse to her client were brought before this court for consideration. She argues that the court reporter has, in effect, certified that all objections were transcribed. She contends that this court's only interest in the untranscribed portions of the record would be to search for errors that may have occurred at trial but to which no objections were interposed, and that no purpose could be served by inspection of those parts of the record because the appellate courts in this state act under a contemporaneous-objection rule that, ordinarily, proscribes consideration of matters not raised at trial. Therefore, counsel concludes, our decision has the effect of ignoring or undermining the holding in *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980), and could only be interpreted as the adoption of some form of a plain-error rule. Counsel is mistaken.

Counsel has missed the most obvious reason for our decision. As explained in our original opinion in this case, the Supreme Court's decisions in *Anders v. California*, 386 U.S. 738 (1967), and its progeny require that the attorneys complete certain duties before submitting a "no-merit" case, and then that *the court, not counsel*, fully examine all of the proceedings to decide whether an appeal would be, in fact, wholly frivolous. The mere assertion by counsel that the appeal is without merit is insufficient. *Bigham v. State*, 36 Ark. App. 22, 820 S.W.2d 462 (1991). When our courts discover that an attorney has failed to abstract and brief all adverse rulings, we order that the case be rebriefed in accordance with Sup. Ct. R. 4-3(j). *See, e.g., Skiver v. State*, 326 Ark. 914, 915-16, 935 S.W.2d 248, 249-50 (1996) (the record contained twelve adverse rulings but only eight were abstracted, and even fewer were discussed); *Eads v. State*, 74 Ark. App. 363, 365, 47 S.W.3d 918, 919 (2001) (sixteen adverse rulings were made at trial but only twelve were abstracted and discussed).[1] How does the court know in such cases that adverse rulings have not been abstracted? The answer is simple: *we examine the record to make certain that counsel has detected and dealt with all such rulings*.[2]

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[1] Such mistakes by attorneys are not at all uncommon. This court has disposed of a number of similar cases in precisely the same way; however, the vast majority of them have resulted in unpublished opinions.

[2] Contrary to counsel's argument, a no-merit case is a distinctly different animal than a case that is presented in an adversarial fashion; the rule that the record on appeal is limited to that which is abstracted simply does not apply in no-merit cases.

Inasmuch as attorneys sometimes overlook objections, whether through a lack of understanding or simple inadvertence, why would we think that court reporters might not sometimes do the same? If we cannot delegate our duties in this regard to the attorneys in a case, how can we delegate them to court reporters, who are not law-trained? We need the complete record that was made below to look for adversely decided objections, motions, and requests that counsel (and in this case, the court reporter) may have overlooked, not to look for plain error.

James BROWN *v.* STATE of Arkansas

CA CR 99-1092 47 S.W.3d 314

Court of Appeals of Arkansas
Divisions I, II, and III
Opinion delivered June 27, 2001

*B. Kenneth Johnson*, for appellant.

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

JOHN B. ROBBINS, Judge. James Brown appeals from his convictions for second-degree battery and committing a terroristic act. His points for reversal are: 1) his convictions on both charges arose from the same conduct and constitute double jeopardy, 2) the State failed to prove that he caused serious physical injury to the victim, and thus the trial court erred in denying his motions for directed verdict, and 3) the trial court erred in denying his motion for a mistrial. We find no error and affirm.

On October 27, 1997, appellant allegedly fired multiple shots from a rifle into a van that was being driven by his wife, Shirley Brown. He was charged with first-degree battery, a Class B felony (count 1), and committing a terroristic act, a Class Y felony (count 2), with regard to Shirley Brown.[1]

At the close of the State's case and at the close of all of the evidence, appellant moved for a directed verdict, asserting that the State failed to prove that Mrs. Brown suffered serious physical injury. He also moved at the close of the evidence to compel the State to elect between counts 1 and 2 so as to identify which alleged offense it wished to proceed on with regard to Mrs. Brown. Appellant argued that both charges were based on the same conduct. The trial court denied appellant's motions.

The trial court instructed the jury regarding first, second, and third-degree battery and committing a terroristic act. The jury retired, deliberated, and found appellant guilty of second-degree battery and committing a terroristic act. During the sentencing phase, the jury sent several notes to the trial judge questioning its sentencing options. Appellant moved for a mistrial, arguing that the jury was confused. The trial court denied the motion. Appellant was sentenced to serve 120 months for his conviction for committing a terroristic act, and was ordered to pay a $1.00 fine for second-degree battery.

[1] He was also charged and found guilty of another count of committing a terroristic act with respect to a second victim (count 3). Appellant appeals only his convictions for counts 1 and 2 involving Mrs. Brown.

*Arguments Not Preserved for Appeal*

Although appellant raises his double-jeopardy argument first, preservation of the appellant's right to freedom from double jeopardy requires us to examine the sufficiency of the evidence before we review trial errors. *See Byrum v. State*, 318 Ark. 87, 884 S.W.2d 248 (1994). Appellant argued in his motion for a directed verdict that the State failed to prove that he caused serious physical injury to Mrs. Brown, proof of which was necessary to sustain a conviction for both first-degree battery and a Class Y conviction for committing a terroristic act. The State maintains that appellant's argument is not preserved for appeal because he did not properly challenge the sufficiency of the evidence with regard to the elements of second-degree battery.

We agree. Appellant was originally charged with first-degree battery, but the jury was instructed with regard to first, second, and third-degree battery. First-degree battery requires proof of purposefully causing serious physical injury to another by means of a deadly weapon. *See* Ark. Code Ann. § 5-13-201 (a)(1) (Repl. 1997). Second-degree battery is a lesser-included offense of first-degree battery, and may be shown by proof of either purposefully causing physical injury to another, purposely causing serious physical injury to another person by means of a deadly weapon, or by recklessly causing physical injury to another person by means of a deadly weapon. *See* Ark. Code Ann. §§ 5-13-202(a)(1)-(3).

■ Under Arkansas law, in order to preserve for appeal the sufficiency of the evidence to support a conviction of a lesser-included offense, a defendant's motion for a directed verdict must address the elements of the lesser-included offense. *See Moore v. State*, 330 Ark. 514, 954 S.W.2d 932 (1997); *Webb v. State*, 328 Ark. 12, 941 S.W.2d 417 (1997). Appellant moved for a directed verdict only on the ground that there was insufficient proof of serious physical injury and did not address the remaining elements under the second-degree battery statute. Therefore, we hold that his challenge to the sufficiency of the evidence is not preserved for appeal.

■ Similarly, we hold that appellant's argument that his convictions for both committing a terroristic act and second-degree battery violate Arkansas Code Annotated section 5-1-110(4) and (5) (Repl. 1997) is not preserved for appeal. Subsection (a)(4) provides that a defendant may not be convicted of more than one offense if the offenses differ only in that one is designed to prohibit a designated kind of conduct generally and the other offense is

designed to prohibit a specific instance of that conduct. Subsection (a)(5) provides that a defendant may not be convicted of more than one offense "if the conduct constitutes an offense defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses."

Appellant argues in his brief that the second-degree battery statute specifically prohibits individuals with various mental states from causing injury to other persons, whereas the statute prohibiting the commission of a terroristic act prohibits the general act of shooting or projecting objects at structures and conveyances in order to protect both the property and the occupants. He further argues that, pursuant to section (a)(5), that the single act of shooting was a continuing course of conduct. However, appellant did not raise these specific objections below and we decline to address issues raised for the first time on appeal. *See Breedlove v. State*, 62 Ark. App. 219, 970 S.W.2d 313 (1998).

*Sufficiency of the Evidence*

We do address, however, the sufficiency of the evidence as to serious physical injury as it relates to committing a terroristic act, Class Y felony. This crime is defined in Ark. Code Ann. § 5-13-310 (Repl. 1997), and the jury was instructed to consider the following relevant portions of that statute:

> (a) For purposes of this section, a person commits a terroristic act when, while not in the commission of a lawful act:
>
> (1) He shoots at or in any manner projects an object with the purpose to cause injury to persons or property at a conveyance which is being operated or which is occupied by passengers[.]
>
> . . . .
>
> (b)(2) Any person who shall commit a terroristic act as defined in subsection (a) of this section shall be deemed guilty of a Class Y felony if the person, with the purpose of causing physical injury to another person, causes serious physical injury or death to any person.

A motion for directed verdict challenges the sufficiency of the evidence. *Ayers v. State*, 334 Ark. 258, 268, 975 S.W.2d 88, 93 (1998). On review, the appellate court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the appellee and affirms if there is substantial evidence to support the conviction. *Wilson v. State*, 56 Ark. App. 47, 48, 939 S.W.2d 313, 314 (1997). Substantial evidence is that which has sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion and conjecture. *Smith v. State*, 337 Ark. 239, 241, 988 S.W.2d 492, 493 (1999). Only evidence that supports the conviction will be considered. *McDole v. State*, 339 Ark. 391, 396, 6 S.W.3d 74, 77 (1999).

Serious physical injury is an injury that "creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ." Ark. Code Ann. § 5-1-102(19) (Repl. 1997). Ms. Brown testified that she was hit by gunfire in the buttocks area; that, as a result, part of her intestine was removed; that she had to wear a colostomy bag for three months after the shooting; that she stayed in the hospital for nine days; and that she incurred nearly $30,000 in medical expenses. Not only did she lose part of a bodily organ, her intestine, but she lost function, as well, to such an extent that she needed a colostomy bag for three months. That is substantial evidence of serious physical injury. *See also Henderson v. State*, 291 Ark. 138, 722 S.W.2d 842 (1987). Moreover, whether injuries are temporary or protracted is a question for the jury. *Lum v. State*, 281 Ark. 495, 499, 665 S.W.2d 265, 267 (1984); *Harmon v. State*, 260 Ark. 665, 670, 543 S.W.2d 43, 46 (1976). The trial court properly denied the appellant's motion.

*Double Jeopardy*

At the close of the State's case, appellant's attorney made the following argument:

> [W]e are at the point in this trial where the State must choose whether it's going forth with battery in the first degree and terroristic act. But the terroristic act count involving Mrs. Brown ... is based upon the same or - well, actually the same facts and circumstances as the battery in the first-degree charge, the distinction being one is a Class [B] felony and one is a Class Y.

> In other words, the same facts that you would use to convict someone of battery in the first-degree and the facts in this case are identical to those that you would use for a terroristic act.

At the conclusion of the evidence, appellant's attorney renewed his plea to the trial judge:

> We would move to dismiss, again and renew our motion stating that the terroristic act, the count describing the terroristic act, is a duplicate or duplicative of the first degree battery charges in-on the facts of this case; that in effect we are trying this man, we would be submitting it to the jury on two counts that would require the same identical facts for a conviction.
>
> . . . .
>
> [I]t's unfair to the defendant to-to have it submitted to the jury on both counts, when he could be convicted of both counts, when, in reality, it's one set of facts and one act and one act only.

While not expressly stated, it is implicit that appellant's counsel argued that he was being prosecuted twice based upon the same conduct. He maintains that the offense of committing a terroristic act includes all of the elements of committing second-degree battery.[2] Therefore, he argues, second-degree battery is a lesser-included offense of committing a terroristic act, and he cannot be prosecuted under both charges.

We disagree with appellant's argument. An accused may be charged and prosecuted for different criminal offenses, even though one offense is a lesser-included offense, or an underlying offense, of another offense. *Hill v. State*, 325 Ark. 419, 931 S.W.2d 64 (1996). However, a defendant so charged cannot be convicted of both the greater and the lesser offenses. *Id.*; *see also* Ark. Code Ann. § 5-1-110(a) (Repl. 1993). Under the statute, the trial court should enter the judgment of conviction only for the greater conviction. *See Hill v. State*, 314 Ark. 275, 862 S.W.2d 836 (1993). The trial court is clearly directed to allow prosecution on each charge. *Id.* It is when the jury returns guilty verdicts that the defense should

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[2] The State initially argues that this court cannot review the element's of second-degree battery because appellant did not abstract the second-degree battery instruction. However, each of the battery instructions, including the second-degree battery instruction, is clearly abstracted in appellant's brief.

move the trial court to limit the judgment of conviction to one charge. *Id.* "Only at that time will the trial court be required to determine whether convictions can be entered in both cases." *Id.* at 282. In the instant case, rather than waiting until the jury returned its verdicts and moving the trial court to limit conviction to only one charge, appellant attempted to prematurely force a selection on the State. The trial court did not err in denying his motions at the times that they were presented.

Even were we to consider appellant's double-jeopardy argument on the merits, we would hold that no violation occurred. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution protects a defendant from: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *See Muhammed v. State*, 67 Ark. App. 262, 998 S.W.2d 763 (1999). Appellant premises his argument on (3). It appears that appellant presumes that the only finding that could reasonably be reached from the evidence was that Mrs. Brown was shot only once. Therefore, for this one act, appellant is being punished twice.

We disagree because the State, in both its opening and closing statements, told the jury that it intended to prove, and did prove, that Mr. Brown fired multiple shots at Mrs. Brown's van and that Mrs. Brown was personally hit twice. The State introduced evidence of this through the testimony of the victim, Mrs. Brown. Consequently, appellant's convictions for second-degree battery and committing a terroristic act are not constitutionally infirm because they are based on two separate criminal acts.

Our supreme court held in *McLennan v. State*, 337 Ark. 83, 987 S.W.2d 668 (1999), that committing a terroristic act is not a continuous-course-of-conduct crime. That is, when multiple shots are fired, each shot poses a separate and distinct threat of serious harm to any individual within their range. Each of the defendant McLennan's shots required a separate conscious act or impulse in pulling the trigger and was, accordingly, punishable as a separate act. *Id.* McLennan was convicted of three counts of committing a terroristic act for firing a handgun three, quick, successive times into his former girlfriend's kitchen window, though no one was injured. The supreme court stated that had he fired his weapon and injured or killed three people, "there is no question that multiple charges would ensue." *Id.* at 89.

Likewise, in the instant appeal, the jury was presented with evidence from which it could conclude that Mr. Brown fired at least nine rounds from the vehicle he was driving, blowing out the windshield of his own vehicle, causing multiple gunshot holes and damage to the back, side, and front of Mrs. Brown's van, and successfully hitting his wife's body twice with gunfire. Indeed, Mr. Brown testified before the jury that he was not trying to tell them that this course of events did not happen; he just wanted them to take into consideration why it happened, which was because he was angry at her for having an affair with a co-worker and he just "snapped." It was for the jury to conclude what exactly occurred that day. Thus, each of the two bullets that penetrated Mrs. Brown would comport with each of the two guilty verdicts that the jury rendered. Thus, the prohibition against double jeopardy was not violated in this case.

*Motion for Mistrial*

During the sentencing phase of the trial, the jury sent four notes to the trial court. The first note concerned count 3, which is not part of this appeal. The second note asked what the minimum fine was for first-degree battery and committing a terroristic act. The third note asked with regard to committing a terroristic act (count 2) whether appellant could be sentenced to probation, a suspended sentence, or to a term fewer than ten years. The fourth note asked, with regard to count 2, what would happen if the jury failed to agree to a prison sentence. Appellant moved for and renewed a motion for mistrial based on the jury's confusion with regard to its sentencing options, also arguing that the notes indicated that he was not receiving a fair and impartial trial. The trial court denied his motions.

Appellant maintains that the jury tried to refuse sentencing and attempted to sentence him outside the statutory minimums. He argues that the only option left by the trial court was to either grant a mistrial or "force" the jury to sentence him to serve ten years, the minimum sentence for a Class Y felony. After appellant was sentenced, a handwritten note signed by all twelve jurors was delivered to the trial court recommending that count 2 be reduced or suspended. He argues this is "compelling evidence" that he did not receive a fair trial. The State maintains that appellant has not produced a record by which it is apparent that he suffered prejudice as a result of the questions asked by the jurors. *See Gatlin v. State*, 320 Ark. 120, 895 S.W.2d 526 (1995).

It is well-settled that a mistrial is an extreme remedy that should be granted only when the error is beyond repair and cannot be corrected by curative relief. *See Marta v. State*, 336 Ark. 67, 983 S.W.2d 924 (1999); *Rychtarik v. State*, 334 Ark. 492, 976 S.W.2d 374 (1998); *Willis v. State*, 334 Ark. 412, 977 S.W.2d 890 (1998). Our supreme court has held that a mistrial is a drastic remedy which should only be used when there has been an error so prejudicial that justice cannot be served by continuing the trial, or when fundamental fairness of the trial itself has been manifestly affected. *See Peeler v. State*, 326 Ark. 423, 932 S.W.2d 312 (1996). The trial court has wide discretion in granting or denying a motion for a mistrial, and the appellate court will not disturb the court's decision absent an abuse of discretion or manifest prejudice to the movant. *See Kemp v. State*, 335 Ark. 139, 983 S.W.2d 383 (1998).

It was appellant's burden to produce a record demonstrating that he suffered prejudice. *See Gatlin v. State, supra.* As the State argues, appellant has failed to do so. The trial court apparently refused to inform the jury that they could suspend appellant's sentence or place him on probation. However, the trial court did not err in this regard, as a court cannot suspend imposition of a sentence or place a defendant on probation for Class Y felonies. *See* Ark. Code Ann. § 5-4-301 (a)(1)(C).

It is obvious from the record that the jury was sympathetic toward appellant and was searching for a legal method by which to show him leniency. The record simply demonstrates that the trial judge properly did not allow the jury to attempt to sentence appellant to a term less than the statutory minimum or to a condition such as probation or a suspended sentence that is statutorily prohibited. Appellant cannot demonstrate prejudice under these circumstances. Therefore, we hold that the trial court did not err in refusing to grant appellant's motion for a mistrial.

Affirmed.

JENNINGS, CRABTREE, and BAKER, JJ., agree.

PITTMAN, J., concurs.

HART, GRIFFEN, NEAL, and ROAF, JJ., dissent.

JOHN MAUZY PITTMAN, Judge, concurring. I concur in the decision to affirm appellant's convictions. However, I do not join that part of the majority opinion that applies *McLennan v. State,*

337 Ark. 83, 987 S.W.2d 668 (1999), and holds that appellant's convictions and sentences for both Class Y terroristic act and second-degree battery do not violate the prohibition against double jeopardy. I do not think that it is necessary for us to reach the merits of that question.

Appellant argues under section (C) of his first point that the trial court erred in submitting both alleged offenses to the jury, and in ultimately entering judgments of conviction and sentences for both, because the battery was a lesser-included offense of the terroristic act. Both the timing and content of appellant's objections and motions at trial show that they were directed at forcing the State to elect between the two offenses before submission of the case to the jury and to prevent the jury from being instructed on both offenses.[1] However, appellant was entitled to neither form of relief. It was only if and when the jury returned guilty verdicts on both offenses that the trial court would be required to determine whether convictions could be entered as to both. *See* Ark. Code Ann. § 5-1-110(a)(1) (Repl. 1997); *Hill v. State,* 314 Ark. 275, 281-82, 862 S.W.2d 836, 839-40 (1993) (trial court's decision to deny motions, made both prior to and during trial, to dismiss one of two charges on double-jeopardy grounds "was eminently correct as the issue was presented"; State may charge and prosecute on multiple offenses in single prosecution without offending prohibition against double jeopardy); *see also Ohio v. Johnson,* 467 U.S. 493, 500 (1984) (even where Double Jeopardy Clause of federal constitution bars cumulative punishment for a group of offenses, "the Clause does not prohibit the State from prosecuting [the defendant] for such multiple offenses in a single prosecution"). Here, after the jury returned with guilty verdicts on both offenses, appellant said nothing. Nor did he thereafter move to set aside one of the convictions. Therefore, to the extent that appellant now argues that the jury should not have been instructed on both offenses, he is wrong. To the extent that he argues that the trial court should not have entered judgments of conviction and imposed sentences as to both offenses, it is my opinion that the issue is not preserved for appeal,[2] and I express no opinion on the question.

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[1] Appellant's first statement on the subject at trial came at the close of the State's case-in-chief and began, "[W]e are at the point in this trial where the State must choose whether it's going forth with battery . . . [or] terroristic act." His last comments came at the close of his own case-in-chief, before the jury was instructed, and concluded, "[I]t's unfair to the defendant to - to have it submitted to the jury on both counts, when he could be convicted of both counts, when, in reality, it's one set of facts and one act and one act only."

[2] It is important to note that the supreme court in *Hill* reversed Hill's conviction on different grounds, not on the double-jeopardy argument. Indeed, had the supreme court

WENDELL L. GRIFFEN, Judge, dissenting. Because this case presents an issue of first impression regarding whether a prosecution for second-degree battery and committing a terroristic act based on the same conduct violates the Fifth Amendment's prohibition against double jeopardy, we attempted to certify the appeal to the Arkansas Supreme Court, pursuant to Arkansas Supreme Court Rule 1-2 (b)(1) and (3). The supreme court declined to accept the case. Given the applicable federal case law governing double jeopardy, and because there is no clear legislative intent indicating that the offenses are to be punished cumulatively, pursuant to *Rowbottom v. State*, 341 Ark. 33, 13 S.W.3d 904 (2000), I would reverse appellant's conviction on the ground that his prosecution for both offenses constituted double jeopardy. Thus, I respectfully dissent.

The majority opinion purports to address appellant's double jeopardy argument by a reasoning process that is as fanciful as it is convoluted. First, the majority holds that the trial court did not err when it denied appellant's motion at the close of the State's case and at the close of all of the evidence to require the State to elect whether to submit the first degree-battery or the terroristic-act charge to the jury. That holding is based on the erroneous view that, pursuant to *Hill v. State*, 314 Ark. 275, 862 S.W.2d 836 (1996), appellant's motions were untimely because they were made before the jury returned guilty verdicts on both charges. However, *Hill* does not stand for the proposition that an appellant's constitutional double-jeopardy argument is procedurally barred because he does not wait until the jury returns both verdicts to move the trial court to limit the conviction to only one charge.

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found reversible error on double-jeopardy grounds, it would have reversed and dismissed the conviction and sentence for the less serious offense. *See Akins v. State*, 278 Ark. 180, 644 S.W.2d 273 (1983); *Wilson v. State*, 277 Ark. 219, 640 S.W.2d 440 (1982); *compare State v. Montague*, 341 Ark. 144, 14 S.W.3d 867 (2000) (conviction affirmed and double-jeopardy argument not addressed on appeal where no timely and appropriate objection was made in the trial court; court of appeals reversed). The discussion in *Hill* of the procedure to follow on remand regarding the double-jeopardy issue appears only because there was going to be a new trial on account of the other grounds, there was a possibility that multiple findings of guilt might again occur, and the supreme court was providing "guidance [to] the trial court upon retrial." *Hill*, 314 Ark. at 279, 862 S.W.2d at 838. While the dissenting judges maintain that *Hill* does not support the position that appellant's double-jeopardy argument is procedurally barred, they offer no explanation for how the trial judge's decision to deny the motions could be "eminently correct," as the supreme court found in the comparable case of *Hill*, and at the same time constitute reversible error, as the dissenting judges in this case would hold.

In *Hill*, the appellant made a pretrial motion requesting the trial court dismiss one of the charges on double jeopardy grounds and orally renewed the motion *during trial*. He argued that his conduct constituted a continuing course of conduct under Arkansas Code Annotated 5-1-110(a)(5) (Repl. 1997). The *Hill* court reversed and remanded on other grounds, but stated that the trial court correctly denied appellant's motions. *See id.* at 281, 862 S.W.2d at 839. The court also noted in *dicta*, that under section 5-1-110(a), the jury may find a defendant guilty of a greater and lesser offense, and if so, the trial court should enter the judgment of conviction only for the greater conviction. Finally, the *Hill* court noted that upon remand, if the defendant was convicted of both charges, he would likely move to limit the judgment of conviction to one charge and at that time, the trial court would be required to determine whether convictions could be entered on both charges. *See id.* at 314, 862 S.W.2d at 840.

The majority asserts that appellant's double jeopardy argument on appeal is procedurally barred. However, the *Hill* court did not find that appellant's double jeopardy argument was barred where he made a pretrial motion and orally renewed the motion during the trial. While *Hill* may stand for the unremarkable proposition that the trial court may allow the prosecution to proceed on both charges and is not required to limit the conviction to the greater offense until the jury returns with verdicts on both charges, it does not support the majority's position that appellant's double jeopardy argument is procedurally barred because he did not wait until the jury returned both verdicts to move the trial court to limit the conviction to only one charge.

Nevertheless, even though the majority holds that appellant's argument is procedurally barred, it asserts that "[e]ven were we to consider appellant's double-jeopardy argument on the merits, we would hold that no violation occurred." Proceeding from the State's contentions and proof that appellant "fired multiple shots at Mrs. Brown's van and that Mrs. Brown was personally hit twice," the majority opinion concludes that "appellant's convictions for second-degree battery and committing a terroristic act are not constitutionally infirm because they are based on two separate criminal acts."

The majority then treats appellant's double-jeopardy argument as if the dispositive issue is whether committing a terroristic act is a continuous-course-of-conduct crime, pursuant to *McLennan v. State*, 337 Ark. 83, 987 S.W.2d 668 (1999). Even a cursory reading of *McLennan* reveals that the case does not support the majority's

double jeopardy argument. In that case, the appellant argued that his conviction on multiple counts of committing a terroristic act-rather than a single count-violated his Fifth Amendment double jeopardy right. The supreme court rejected that argument because committing a terroristic act is not a continuing-course-of-conduct crime. Justice Smith's opinion is crystal clear on this subject:

> Appellant contends that a violation of Ark. Code Ann. § 5-13-310 "Terroristic Act" is a continuing-course-of-conduct crime which should limit the charges against him under this statute to one charge for shooting into the apartment three times. . . Nothing in this statute defines this crime as being a continuous-course-of-conduct crime, or even gives the impression that it was created with such a purpose. . . There is no question that one shot would be sufficient to constitute the offense. *Multiple shots, particularly where multiple persons are present, pose a separate and distinct threat of serious harm for each shot to any individual within their range. Moreover, had appellant fired his weapon and injured or killed three people there is no question that multiple charges would ensue. Each of appellant's shots required a separate conscious act or impulse in pulling the trigger and is accordingly punishable as a separate offense.*

*Id.* at 337 Ark. 89, 987 S.W.2d at 671-72 (emphasis added). The majority now cites *McLennan* in rejecting appellant's double jeopardy argument by asserting that "each of the two bullets that penetrated Mrs. Brown would comport with each of the two guilty verdicts that the jury rendered. Thus, the prohibition against double jeopardy was not violated in this case."

The issue before us is fundamentally different from that presented in *McLennan* because the charges are different. When Justice Smith wrote in *McLennan* that "there is no question multiple charges would ensue," he plainly referred to *multiple counts of the same terroristic act charge*, not separate charges for entirely different offenses. The appellant in this case was *not* convicted of multiple counts of committing a terroristic act with regard to shooting his wife. He was charged with first-degree battery, a Class B felony (count 1), and committing a terroristic act, a Class Y felony (count 2). He was convicted of second-degree battery, plainly a lesser-included-offense of first-degree battery. *McLennan* provides no authority for the majority's double jeopardy argument because the charges for which the instant appellant was convicted are different from the charges in the *McLennan* case.

Moreover, there has been no legislative or judicial determination prior to this case that second-degree battery is a lesser-included offense of committing a terroristic act. Yet, the majority's position is premised on the unresolved issue of whether second-degree battery is a lesser-included offense. The majority states: "[A]n accused may be charged and prosecuted for *different criminal offenses*, even though one offense is a lesser-included offense, or an underlying offense, of another offense. . . However, a defendant so charged cannot be convicted of both the greater and the lesser offenses." (Emphasis added.) The majority characterizes the offenses in whatever manner best suits its analysis. It acknowledges that the offenses are separate for purposes of implying that one offense is a lesser- included offense, but simultaneously attempts to treat them as multiple charges of the same offense when attempting to apply *McLennan*.

The majority's reasoning in this regard is untenable for at least two reasons. First, the majority appears to set new precedent without expressly doing so. In addition, if second-degree battery is a lesser-included offense of committing a terroristic act, as the majority implies, then the majority must concede that appellant's double jeopardy rights have been violated because appellant clearly could not be convicted of both offenses, as the majority opinion acknowledges in citing *Hill v. State*, 325 Ark. 419, 931 S.W.2d 64 (1996).

The majority's reliance on *McLennan* is especially troublesome because it also implies that appellant's double jeopardy rights could only be violated if he had been convicted of both charges based on a single bullet entering his wife's vehicle and striking her. The majority states: "Thus, each of the two bullets that penetrated Mrs. Brown would comport with each of the two guilty verdicts that the jury rendered. Thus, the prohibition against double jeopardy was not violated in this case." Nothing in the *McLennan* opinion supports that notion, nor does the majority opinion offer any other authority for it.

In sum, it appears that the majority has strained to affirm appellant's convictions of second-degree battery and committing a terroristic act by virtue of a flawed reasoning process and by relying on inapposite or nonexistent legal authority. The majority deems appellant's double jeopardy argument procedurally barred because his motions to compel the State to elect which charge it would proceed upon were untimely. *Hill v. State, supra*, clearly does not stand for the proposition that the majority asserts. Moreover, the majority analyzes appellant's double jeopardy challenge on the merits using the assumption that second-degree battery is a lesser-

included offense of committing a terroristic act. The majority impliedly does so with no authority for its conclusion. Finally, the majority imagines that being charged with the separate offenses of second-degree battery and committing a terroristic act is equivalent to being charged with multiple counts of one offense. That the majority opinion relies upon *McLennan* while so clearly recognizing that the appellant in this case has been not been charged with multiple counts of the same offense demonstrates the extraordinary lengths taken to justify a result I consider troublesome and unfair.

Further, the majority completely fails to apply the correct legal standard, because it failed to determine the legislative intent governing a defendant's conviction under both statutes at issue in this case. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution protects a defendant from: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *See Muhammed v. State*, 67 Ark. App. 262, 998 S.W.2d 763 (1999). The applicable rule under *Blockburger v. U.S.*, 284 U.S. 299, 304 (1932), 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.'

(Citations omitted.) Appellant was convicted of second-degree battery and committing a terroristic act. Pursuant to *Blockburger*, unless each of these offenses requires proof of an additional fact that the other does not, appellant's double jeopardy rights were violated.

A person commits second-degree battery under Arkansas Code Annotated section 5-13-202 (Supp. 1999) if:

> (a)(1) With the purpose of causing physical injury to another person, he causes serious physical injury to any person;
>
> . . .

> (a)(3) He recklessly causes serious physical injury to another person by means of a deadly weapon.

Second-degree battery is a Class D felony. *See* Ark. Code Ann. § 5-13-202(b) (Supp. 1999).

A person commits a terroristic act under Arkansas Code Annotated section 5-13-310 (Repl. 1997) if "[h]e shoots at or in any manner projects an object with the purpose to cause injury to persons or property at a conveyance which is being operated or which is occupied by passengers." Subsection (a)(2) defines this offense as a Class Y felony if the act is committed with the purpose of causing physical injury to another person, and causes serious physical injury or death to another person. Otherwise, the offense is a Class B felony under subsection (b)(1). Appellant was convicted of a Class Y felony because he shot the victim while she was in her car. Therefore, the double jeopardy analysis must be restricted to the elements of establishing second-degree battery and committing a Class Y terroristic act.

The offense of committing a Class Y terroristic act requires an additional element of proof beyond what must be shown to establish second-degree battery. This is because the State must show serious physical injury and the additional element of firing into a conveyance or occupiable structure. The elements for committing a second-degree battery under either section of the battery statute were met in this case where the State proved appellant committed a Class Y terroristic act.

Clearly, a person can commit a Class B terroristic act without committing second-degree battery because one commits a Class B terroristic act without causing physical injury or serious physical injury to a person. However, a person cannot commit a Class Y terroristic act without also committing second-degree battery because a person cannot commit a Class Y terroristic act without intending to cause physical injury to another person and without causing serious physical injury to another person. *See* Ark. Code Ann. § 5-13-202(a)(1) (Repl. 1997).

The converse is not true. Second-degree battery does not require proof of an additional element that committing a Class Y terroristic act does not require. Second-degree battery may be proved by means other than purposefully causing serious physical injury, i.e., by recklessly causing serious physical injury to another person by means of a deadly weapon. However, this does not

require proof of an additional element beyond proving the defendant caused serious physical injury. *See* Ark. Code Ann. § 5-13-202 (a)(3). Therefore, under the *Blockburger* test, because each offense does not require proof of additional elements, the two statutes punish the same conduct.

Our inquiry does not end simply because two statutes punish the same conduct. The Supreme Court has stated, "Because the substantive power to prescribe crimes and determine punishments is vested with the legislature, . . . the question under the Double Jeopardy Clause [of] whether punishments are 'multiple' is essentially one of legislative intent[.]" *Ohio v. Johnson*, 467 U.S. 493, 499 (1984). Thus, even though the majority fails to acknowledge this requirement, it is necessary, pursuant to our supreme court's holding in *Rowbottom v. State, supra*, to determine whether the Arkansas General Assembly intended to enact an additional penalty for conduct supporting convictions for both second-degree battery and committing a terroristic act.

In *Rowbottom*, our supreme court held that a defendant's conviction for possession of drugs and for simultaneous possession of drugs and firearms does not constitute double jeopardy. Citing *Missouri v. Hunter*, 459 U.S. 359 (1983), the *Rowbottom* court stated that when the same conduct violates two statutory provisions, the issue is whether the General Assembly intended for the two offenses to be separate offenses.[1] The *Rowbottom* court held that the intent of the General Assembly was clear because the legislature enacted a statute declaring its intent prohibiting the simultaneous possession of drugs and firearms. Arkansas Code Annotated section 5-74-102 (Repl. 1997) specifically refers to distributing a controlled substance while possessing a firearm. 341 Ark. at 40, 13 S.W.2d at 908. Therefore, the *Rowbottom* court reasoned, the General Assembly made it clear that it intended to provide an additional penalty for the separate offense of simultaneously possessing controlled substances and firearms. *Id. See also Sherman v. State*. 326 Ark. 153, 165,

[1] In *Missouri v. Hunter*, 459 U.S. 359 (1983), the United States Supreme Court held that convictions for first-degree robbery and armed criminal action did not constitute double jeopardy where the Missouri legislature intended that the punishment for violations of both statutes be cumulative. The Missouri statute defining armed criminal action provides that any person who commits a felony (such as first-degree robbery) by use of a dangerous or deadly weapon is *also* guilty of the crime of armed criminal action. The statute further specifies that the punishment imposed shall be *in addition to* the punishment for the underlying crime. 459 U.S. at 362. The *Hunter* court stated that "where a legislature specifically authorizes cumulative punishment under two statutes . . . regardless of whether those two statutes proscribe the same conduct, a court's task of statutory construction is at an end." *Id.* at 368.

931 S.W.2d 417, 425 (1996) (stating, "Given the clear legislative intent expressed in section 5-54-125(b) that fleeing is to be considered a separate offense, we have no doubt in concluding that the Double Jeopardy Clause does not bar Appellant's trial or punishment therefor.").

Here, the legislative intent is not clear. What little legislative intent we can glean supports a holding that the legislature intended only to prescribe additional punishment for the conduct leading to the charges in this case, rather than to proscribe separate, cumulative punishment for the two offenses. First, the two offenses are of the same generic class. The difference between the offenses is based upon the degree of risk or risk of injury to person or property, or else upon grades of intent or degrees of culpability. *See Ritchie v. State,* 31 Ark. App. 177, 790 S.W.2d 919 (1990). Moreover, the terroristic act statute contemplates conduct posing a greater degree of risk to persons because it contemplates death, whereas, second-degree battery is limited to serious physical injury. This is reflected in the fact that the same conduct which constitutes a Class D felony for second-degree battery also constitutes a Class Y felony for committing a terroristic act, which carries a more severe penalty.

Second, while there is no significant language indicating the legislature's intent regarding the second-degree battery statute, the emergency clause of 1979 Arkansas Act 428, Section 3, which amended the terroristic act statute, states that the *criminal punishment for sniping into cars should be increased immediately* to discourage further sniping incidents. This language suggests that the legislature intended to provide *enhanced sentencing* for such conduct comprising a terroristic act alone, not provide separate punishment for conduct comprising both a terroristic act and second-degree battery.

The effects of today's decision may be far-reaching.[2] The federal Constitution provides a floor below which our fundamental rights do not fall. The majority opinion lowers that floor with regard to the right against double jeopardy and reduces the protection against double jeopardy to a mere legal fiction because it allows the State to punish a person under two different statutes for the same conduct, absent a clear legislative rationale for doing so. If

[2] In the future, the double jeopardy issue may arise in conjunction with the terroristic act statute in another context. The terroristic act statute also contemplates conduct that results in the death of another person. Unless it is determined that a terroristic act was not meant to be a separate, chargeable offense, it is foreseeable that a prosecutor could elect to charge a defendant with committing a terroristic act *and* murder, or a lesser-included offense thereof.

prosecution under these circumstances does not constitute double jeopardy, I cannot imagine a scenario in which it would exist. Apparently, neither can the majority because they do not explain what more would be required in order for them to conclude that a defendant's right against double jeopardy has been violated. Because I believe that a fundamental constitutional right should not be so trivialized simply to permit prosecutors to compound charges against persons accused of crimes, I must respectfully dissent.

I am authorized to state that Judges HART, NEAL, and ROAF join in this opinion.

Marcus THREADGILL *v.* STATE of Arkansas

CA CR 00-758 47 S.W.3d 304

Court of Appeals of Arkansas
Divisions I, II, and III
Opinion delivered June 27, 2001

*Arkansas Public Defender Commission*, by: *Latrece Gray* and *Lott Rolfe*, for appellant.

*Mark Pryor*, Att'y Gen., by: *John Ray White*, Deputy Att'y Gen., for appellee.

JOHN E. JENNINGS, Judge. Marcus Threadgill was charged with capital murder in the shooting death of Larry Roberson. After a jury trial, he was convicted of first-degree murder and sentenced to thirty-three years in prison. For reversal, Threadgill makes two arguments: (1) that the trial court erred in permitting the State to impeach the testimony of the witness, Tequila Hall, and

(2) that the trial court erred in allowing the eyewitness testimony of Christopher Parker. We find no error and affirm.

On April 30, 1997, Larry Roberson was shot in the head as he sat in the driver's side of his own car. His body was dumped on the side of the road. There was evidence at trial that the shot was fired from the back seat of the car.

Some eighteen months later appellant, Marcus Threadgill, and his cousin, Christopher Parker, were arrested in connection with the murder. Parker, who was ultimately charged with hindering apprehension, gave a statement to the police. He said that he was riding on the passenger side of Roberson's vehicle when Threadgill shot Roberson from the back seat. At trial, appellant stipulated that he was in the car at the time of the shooting.

During the investigation, the police interviewed Tequila Hall. Hall told them that appellant and Parker came to her apartment, which was located near where Roberson's car was found, on the night of the shooting and asked her to take them home. On the way they stopped at Parker's sister's apartment, where the two men changed clothes. Hall also told the police that appellant said to her, with other people present, that he had "shot the dude." Threadgill does not argue on appeal that the evidence is insufficient to sustain his conviction.

Appellant's first argument is that the trial court erred in permitting the State to introduce into evidence the prior statement given by Tequila Hall. The argument is based on a line of cases which have held that once a witness admits making a prior inconsistent statement and admits that it was false, then the statement itself is not admissible. *Ford v. State*, 296 Ark. 8, 753 S.W.2d 258 (1988); *Hinzman v. State*, 53 Ark. App. 256, 922 S.W.2d 725 (1996); *Gross v. State*, 8 Ark. App. 241, 650 S.W.2d 603 (1983). The theory is that "an admitted liar need not be proved one." Appellant's argument must fail for two reasons.

The most critical portion of Hall's prior statement to the police was her statement that appellant had told her and others that he had "shot that dude." On cross-examination Hall testified that she had not heard appellant talking about the night of the shooting, hadn't overheard any conversation, and didn't remember talking to a police officer about it. She said, "I don't remember saying it, or if I did say it, it is not true."

In *Kennedy v. State*, 344 Ark. 433, 42 S.W.3d 407 (2001), the supreme court, faced with quite similar circumstances, held that it was not error to permit the State to impeach the witness by the introduction of the prior inconsistent statement. In *Kennedy* the witness admitted she had made a prior statement to the police, but professed a lack of memory about the particulars. The court said that "where ... the witness is asked about the prior statement and either denies making it or fails to remember making it, extrinsic evidence of the prior statement is admissible". *Kennedy*, 344 Ark. at 445 (citing 1 John W. Strong, *McCormick on Evidence* § 34 at 126 (5th ed. 1999)).

After examining the witness's statement as a whole, the court determined that "the only thing that she fully admitted was that she had given a statement or interview to the police." The court said that her answers were "hardly full and unequivocal admissions of having made the prior inconsistent statements." *Kennedy*, 344 Ark. at 448. *See also, Roseby v. State*, 329 Ark. 554, 953 S.W.2d 32 (1997); *Chism v. State*, 273 Ark. 1, 616 S.W.2d 728 (1981); *Billings v. State*, 52 Ark. 303, 12 S.W. 574 (1889). The court's language fairly describes the answers given by the witness in the case at bar.

Furthermore, the issue now raised on appeal was not preserved at trial. When Ms. Hall's prior inconsistent statement was offered the following colloquy took place:

> BY DEFENSE COUNSEL: We have an objection under Rule 613(b), where it states it is not permissible to impeach a witness by a statement.
>
> BY THE COURT: About past recollection recorded or present recollection refreshed or impeachment.
>
> BY PROSECUTING ATTORNEY: For impeachment.
>
> BY DEFENSE COUNSEL: He can take a look at the Rule. I'm only just looking at the black and white rules in the rule book.
>
> BY PROSECUTING ATTORNEY: It's a contradictory statement, also, by the witness.
>
> BY PROSECUTING ATTORNEY: It's a prior inconsistent statement given by the witness. It is clearly admissible.

BY THE COURT: Any response?

BY DEFENSE COUNSEL: Just note our objection, Judge.

BY THE COURT: On what basis?

BY DEFENSE COUNSEL: The basis of the objection is Rule 613(b).

Rule 613 of the Arkansas Rules of Evidence states:

> (a) *Examining Witness Concerning Prior Statement.* In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.
>
> (b) *Extrinsic Evidence of Prior Inconsistent Statement of Witness.* Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

Here, Rule 613(b) was not violated — the witness was afforded an opportunity to explain or deny the prior inconsistent statement. The rule relied upon by appellant for reversal, that an admitted liar need not be proven one, is not contained in Rule 613 of the Rules of Evidence but rather is a matter of case law, as appellant recognizes in relying on *Ford v. State* and *Hinzman v. State.* Although the Rules of Evidence have been codified in this state, there still remain rules which are purely a matter of case law.

Error may not be predicated upon a ruling by the trial court which admits evidence unless a timely objection appears in the record, stating the specific ground for the objection. *See* Ark. R. Evid. 103(a)(1). This is not a technical hurdle to be overcome but is rather a practical rule designed to give the trial judge a fair opportunity to decide whether the evidence is or is not admissible. A party cannot change the grounds for his objection on appeal. *Maxwell v. State*, 73 Ark. App. 45, 41 S.W.2d 402 (2001). This is what appellant attempts to do in the case at bar.

Appellant's second argument is that the trial court erred in not prohibiting Christopher Walker, an eyewitness to the crime, from testifying because of what appellant characterizes as a discovery violation. Two statements given by Parker to the police are at issue. On June 2, 1997, Parker gave a taped statement to Miller County Sheriff's deputies. The tape was subsequently lost and apparently never transcribed. On June 4, 1997, Parker gave a statement to Ocie Ratliff of the Arkansas State Police. This statement, in narrative form, was provided to the appellant and the State represented to the court that no other form of the statement was in existence.

In asking that the court bar Parker from testifying, defense counsel said:

> Your Honor, I guess I can sympathize to the dilemma Mr. Jones faces. However, according to the interview that Troy Gentry and Hays McWhirter generated, it says that this statement was taped by Officer Gentry. For one, we know there was a tape in existence at one point. Again, I'm not alleging any wrong-doing personally on the part of the prosecutor's office, but for the sheriff's office to just lose key pieces of co-defendant's testimony, with no explanation other than "We don't know," is not permissible.

The court then ruled:

> The defense will be allowed broad latitude to examine, and I'll presume them hostile, Officer Gentry and Trooper Ratliff, Detective Ratliff. The court finds no substantial evidence of a discovery violation, though there may well be a violation of the spirit of the discovery rule. You have every right to inquire of it, and the court believes that any impeachment that could be had from one of the series of verbal statements, can be had by a vigorous cross examination of Ratliff and Gentry and McWhirter as to the absent tape.

Rule 17.1 of the Rules of Criminal Procedure provides that the prosecuting attorney shall disclose certain information to defense counsel which is within his "possession, control, or knowledge..." This obligation extends to information within the possession of others who have participated in the investigation on behalf of the State. *See Browning v. State*, 274 Ark. 13, 621 S.W.2d 688 (1981); Commentary to Article V.

For reversal on this point appellant relies on *Williamson v. State*, 263 Ark. 401, 565 S.W.2d 415 (1978), and *Hamm v. State*, 296 Ark. 385, 757 S.W.2d 932 (1988). Neither case requires reversal.

*Williamson* is a leading case in this state on discovery in general and stands for two propositions: (1) when a party is entitled to information through discovery, he is entitled to have it within sufficient time to permit his counsel to make beneficial use of the information, and (2) when a defendant is entitled to a witness statement, he is also entitled to the tape recording of the statement. *Williamson* did not deal with the State's loss of evidence nor did it hold that the trial court should prohibit the live testimony of a witness.

In *Hamm* the supreme court held that when the State had erased the tape of the defendant's confession, the State was prohibited from introducing into evidence transcript of the confession. But the court also said:

> This does not mean, however, that upon retrial the trial court cannot allow oral testimony about the confession into evidence. It is the transcription itself which was admitted in violation of the Rules of Criminal Procedure.

*See also Mays v. State*, 57 Ark. App. 282, 944 S.W.2d 562 (1997).

The problem in the case at bar is not so much one of a discovery violation as it is one of the loss by the State of evidence potentially useful to the defendant. Here the defendant quite reasonably sought Parker's earlier statements for the purpose of cross-examination. The problem is really one of fundamental fairness under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[1]

In *Arizona v. Youngblood*, 488 U.S. 51 (1988), the Supreme Court held that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. *See also, State v. Burk*, 653 N.E.2d 242 (Ohio 1995); *Wenzel v. State*, 306 Ark. 527, 815 S.W.2d 938 (1991); *Terrell v. State*, 26 Ark. App. 8, 759 S.W.2d 46 (1988). In the case at bar, there was neither an allegation nor proof of bad faith.

We conclude that the trial court's ruling in the case at bar was a reasonable one. Compare *State v. Montijo*, 727 A.2d 533 (N.J. Super.

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[1] The due process issue was neither specifically raised in the trial court, nor made an issue on appeal.

Ct. Law Div. 1998). For the reasons stated the decision of the circuit court is affirmed.

Affirmed.

STROUD, C.J., ROBBINS, CRABTREE, and BAKER, JJ., agree.

ROAF, BIRD, and VAUGHT, JJ., concur in part, and dissent in part.

GRIFFEN, J., dissents.

SAM BIRD, Judge, concurring in part; dissenting in part. I agree that this case should be affirmed on the point involving the court's admission into evidence of the taped interview of Tequilla Hall, and I join in the majority opinion of Judge Jennings as to that point.

However, I dissent from the view expressed in the majority opinion that the trial court committed no error in not prohibiting the testimony of Christopher Parker because of the apparent loss by the sheriff's department of two recorded statements given by Parker to the Miller County Sheriff's Department. Consequently I join in the dissenting opinion of Judge GRIFFEN on that point.

Judge VAUGHT joins in this opinion.

ANDREE LAYTON ROAF, Judge, concurring in part; dissenting in part. I agree that this case should be affirmed on the point involving the court's admission into evidence of the taped interview of Tequila Hall, and I join in the majority opinion of Judge Jennings as to that point.

However, I conclude that the trial court committed error in failing to prohibit the testimony of Christopher Parker because of the apparent loss by the sheriff's office of Parker's two recorded statements. I join in Judge Griffen's dissent on this point, with the exception of the last paragraph before his conclusion, which suggests that our trial and appellate judges have been less than respectful of the rights of criminal defendants with regard to Ark. R. Crim. P. 17.1.

WENDELL L. GRIFFEN, Judge, dissenting. I respectfully disagree with the majority view that the trial court did not commit reversible error when it allowed the State to impeach

Tequila Hall over the objections of appellant's counsel by playing a tape of a statement Hall gave to investigators John Colridge and Alan Jordan of the Miller County Sheriff's Office on May 11, 1998. I also agree with appellant's contention that the trial court erred when it denied his request that Parker be prohibited from testifying after the State lost statements he gave on June 2 and 4, 1997, to Investigator Hays McWhirter and Deputy Troy Gentry of the sheriff's office. Therefore, I would reverse and remand on both points of the appeal.

*I. Admission of Hall's Statement as Extrinsic Evidence*

During the State's direct examination of Hall at trial, Hall testified that "I did not hear Marcus Threadgill talking about that night [the night of Roberson's death]. I didn't overhear some conversation and I don't remember talking to a police officer about that." After counsel for the State informed Hall that he would play a tape to refresh her memory, Hall testified that "I know I talked to white officers Alan Jordan and John Colridge . . . I don't remember telling any of those officers that this defendant told me he shot that dude. If I said it, it's not true." The prosecution then indicated its intention to play the taped interview, State's Exhibit No. 25, to the jury. Appellant's counsel objected, citing Rule 613(b) of the Arkansas Rules of Evidence. The trial court overruled the objection, and the taped interview with Hall was played in the presence of the jury. After the statement was played, Hall repeated her testimony that the assertion to the investigators concerning Threadgill telling her he shot Roberson was untrue. Nevertheless, the trial court permitted the State to introduce and play a tape of another recorded interview with Hall.

In that statement, Hall stated that on the night of April 30, 1997, Parker and appellant knocked on the door of her apartment and asked her to take them to the home of Parker's sister, April Ross. Hall indicated in her statement that she dropped Parker and appellant at appellant's residence and that Parker and appellant changed clothes in her car while she drove them home. The next day, Hall's grandmother told her about Roberson's body being found. Hall stated in her statement to the investigators that she surmised that appellant and Parker had come to her house from where Roberson's body was found. At pages 94 and 95 of the abstract, the following exchange occurred between Investigator Alan Jordan and Hall:

HALL: She (Hall's grandmother) told me where the car was found, over by Cooper Tire, so I figured they (appellant and Parker) had jumped the fence and came to my house, cause I'm the closest they knew and they knew I had a car, for me to take them home. So I waited until I seen them again, and I ask Marcus (appellant) what happened. Marcus said he didn't know. He didn't know nothing about it, so I think it was about a week later we went over there, and they got scare and everything, so me, Lucinda . . .

JORDAN: Lucinda who?

HALL: Lucinda, I think it's Florence. That's his girlfriend. Me, Lucinda, Tory, and Stacy, I think Stacy had just got out of jail.

JORDAN: Stacy Collins?

HALL: Yea. We was over there talking and stuff, and Marcus told us he killed that dude, and that D'Wayne helped move him to the side of the road. I don't know if Dante had anything to do with it.

. . .

JORDAN: All right. Who told you, or did Marcus tell you himself that he killed . . .

HALL: Yea, he shot that dude.

JORDAN: And said D'Wayne just helped move the body?

HALL: Yea. He said D'Wayne helped them get the body out the car or whatever.

Counsel for the State insisted that the taped statement was being offered "for impeachment" and because "it's a prior inconsistent statement given by the witness. It is clearly admissible." The trial court ruled the taped statement admissible over the Rule 613(b) objection raised by appellant's counsel, stating, "It's admissible for another purpose, and that purpose is to impeach with a prior inconsistent statement, which is allowed by the rules. She's been given every opportunity to explain or deny the same." The trial court later stated, "Even if it (Rule 613 (b)) applies, this is an admission of a party opponent, and subsection (b) of Rule 613 doesn't apply if it's a party opponent."

Hall was plainly not a party opponent. The prosecution was against appellant, not Hall. Therefore, her taped statement was not admissible as an admission by a party opponent.

However, some members of the majority maintain that appellant's counsel failed to properly object to Hall's taped statement being played. They contend that because Arkansas does not follow the plain error doctrine, evidentiary objections must be specific in order to alert the trial court that error is possible. I believe appellant's counsel made a sufficiently specific objection to the playing of Hall's taped statement in order to preserve error for appellate review. It was enough that appellant's counsel stated, "We have an objection under Rule 613(b), where it states it is not permissible to impeach a witness by a statement."

Granted, counsel could have been more specific. He might have said, "We object to the prosecution attempting to impeach this witness by use of a prior inconsistent statement after she has testified that if she told the investigators the defendant shot the victim, she was not telling the truth." But counsel was not required to be that specific. Rule 103(a)(1) of the Rules of Evidence requires that objections to the admission of evidence be made timely and that they state "the specific ground of objection, *if the specific ground was not apparent from the context* . . . ." The trial court plainly understood that the objection was based on improper impeachment as shown by its statement that Hall's taped statement was "admissible for another purpose, and that purpose is to impeach with a prior inconsistent statement." Counsel for the State urged admission on the same ground.

The majority apparently believes that Hall's taped statement was properly played to the jury to impeach her credibility because she testified that she did not remember telling "any of those officers that this defendant told me he shot that dude. If I said it, it's not true." I disagree. When Hall testified that she did not remember making the statement that appellant told her he shot Roberson, but that if she told the police that, she was not truthful, her credibility was impeached. By allowing the State to introduce the taped statement, the trial court permitted the State to prove, using extrinsic evidence, that Hall was a liar. But she had already admitted lying. A witness who admits during trial testimony that she made a prior inconsistent statement is impeached, and Rule 613(b) prohibits introduction of extrinsic evidence under these circumstances. *See Kennedy v. State*, 344 Ark. 433, 42 S.W.3d 407.

The trial court's error becomes even more apparent when one realizes that it allowed the State to play a second tape of a May 14, 1998, investigatory interview with Hall despite the fact Hall had acknowledged making the first recorded statement, renounced her statement as untruthful, and explained why she lied during the first statement. There was no justification for admitting a second taped statement after Hall acknowledged having made the first statement and denied its truthfulness. Appellant objected to the second tape recorded statement (State's Exhibit 26) as being cumulative and unnecessary. Appellant cannot change the grounds for a trial court objection on appeal and I do not refer to State's Exhibit 26 as being a Rule 613(b) objection. Rather, State's Exhibit 26 demonstrates the significance of the trial court's basic error in admitting Exhibit 25, the first taped-recorded statement.

If the trial court's evidentiary ruling was erroneous, we must consider whether the error was prejudicial to appellant, *i.e.*, whether the evidence of guilt was overwhelming and the error slight. The trial court allowed the State to play Hall's entire statement to the jury, not simply that portion dealing with the alleged admission by appellant about killing Roberson. The trial court also allowed the State to introduce the testimony of Sabrina Maxwell Herron that Hall told her the appellant had confessed to killing Roberson, despite appellant's timely hearsay objection. The State now admits that the trial court erred in admitting Herron's testimony because it was inadmissible hearsay. The prosecutor referred to Hall's unsworn statements in closing argument. If Hall's statement and Herron's hearsay testimony are excluded, the only overwhelming evidence of guilt is the testimony of Christopher D'Wayne Parker, appellant's co-defendant, who testified he saw appellant shoot Roberson. However, appellant emphatically objected to Parker's testimony because the State violated Rule 17.1(a)(ii) of the Arkansas Rules of Criminal Procedure. Because I believe the trial court erred in permitting Parker to testify, I would hold that its error in permitting Hall's taped statement to be played to the jury in its entirety was prejudicial so as to compel reversal.

*II. Violation of Rule 17.1(a)(ii)*

Rule 17.1(a)(ii) of the Arkansas Rules of Criminal Procedure mandates that the prosecuting attorney must disclose, upon timely request "any written or recorded statements and the substance of any oral statements made by the defendant or a co-defendant." In order to invoke this rule, the appellant must show (1) that a timely

request was made, (2) that the State failed to comply with the request, and (3) that there was resulting prejudice to the defense. *See Earl v. State*, 272 Ark. 5, 612 S.W.2d 98 (1981).

Following a substitution of counsel and two continuances, a pre-trial hearing was held on February 3, 2000, and counsel for appellant requested that the State produce two taped statements that Christopher Parker had given to the sheriff's department on June 2 and 4, 1997. The statements, although referenced in the prosecutor's file, were not physically part of the file. The prosecutor stated he would make a note of the request, but did not produce the statements before the date of trial. When the parties met for trial on February 22, 2000, twenty days later, counsel for appellant again requested the statements by Parker. Then the prosecutor disclosed, for the first time, that the sheriff's department no longer had the statements. Counsel for appellant asked the trial court to sanction the prosecution for the discovery violation by excluding Parker's testimony. Although the trial court agreed the State had violated the spirit of the discovery rule, it declined appellant's request to prohibit Parker's testimony. Instead, the trial court indicated that it would allow the defense "broad latitude" during cross examination of the sheriff's officers as a remedy for the violation. The State did not argue at trial or on appeal that appellant's discovery request was untimely. Rather, it contends appellant was not prejudiced by the discovery violation.

Our supreme court specifically addressed this problem in *Williamson v. State*, 263 Ark. 401, 565 S.W.2d 415 (1978), where the State failed to produce the statement of a witness that was available. The supreme court reversed the trial court's failure to require the State to disclose the statement. Writing for the court, Justice Howard stated:

> We are persuaded that Rule 17.1 imposes a duty upon the state to disclose to defense counsel, upon timely request, all material and information to which a party is entitled in sufficient time to permit his counsel to make beneficial use thereof. Any interpretation of Rule 17.1 to the contrary would indeed make a farce of a rule which has as its purpose to reduce delays during trial and taken as a whole lending more conclusiveness and completeness in the disposition of criminal cases and disclosure...
>
> We are further persuaded that appellant was not only entitled to the written transcription prepared by the state from the recorded statements, but appellant was entitled to discover the tapes not only

> because the tapes represented the best evidence, but without the tapes, appellant had no way of comparing the transcription in order to determine if the transcription was a correct reproduction of the recordings. Indeed, the statement as well as the tapes would have been most helpful to appellant in his cross-examination of state's witnesses.

*Id.* at 405, 565 S.W.2d at 418.

Parker was not merely a witness. He was a co-defendant in the murder prosecution and the only eyewitness to the homicide presented by the State. Because there was no way for the defense to compare Parker's trial testimony with his prior statements, appellant was prejudiced in cross-examination of Parker. No cross-examination of the sheriff's witnesses could replace the loss of Parker's statements because the statements and tapes were needed in order to establish the circumstances surrounding Parker's interrogation.

In *Hamm v. State*, 296 Ark. 385, 757 S.W.2d 932 (1988), the supreme court reversed and remanded a conviction for aggravated robbery after the trial court denied appellant's motion to suppress a statement containing his confession. The confession was recorded on a micro cassette and transcribed by a police secretary. However, the confession was erased when the tape was reused; thus, the State was unable to provide the appellant with the recording of the confession in order to compare the recording to the transcript. The appellant moved to suppress the statement, specifically citing Rule 17.1(a)(ii) and its decision in *Williamson, supra.* Rejecting the State's argument that the trial court error was harmless, Justice Dudley, writing for the supreme court, stated:

> The prejudice lies in the fact that the recording was the best evidence, and that without it, the defendant had no way of determining if the transcription was an accurate reproduction of his recorded statement. It was established that the transcription was not perfect, although the errors that were pointed out were admittedly only typographical. In any event, we do not require an appellant to show prejudice when it would be impossible as a practical matter for him to do so.

*Id.* at 389, 757 S.W.2d at 934.

Here, appellant's counsel was deprived of the actual recording of Parker's statements as well as any transcripts. Parker testified in a jury trial that began February 22, 2000, more than two and a half

years after the statements were made. Without the statements, counsel for appellant could not know whether Parker's trial testimony was consistent with anything he said earlier. Appellant's counsel certainly could not know whether the witnesses from the sheriff's department were testifying accurately, not to mention truthfully, concerning anything Parker told them in those statements.

There is no practical difference to the defense of a murder prosecution whether the State violated the discovery mandate of Rule 17.1(a)(ii) due to negligence, incompetence, or mendacity. The effect of the violation was to deny appellant and his counsel access to critical information obtained from the chief prosecution witness. Had the trial court determined that Rule 17.1 was violated by the prosecutors such that sanctions for contempt were appropriate, imposing that sanction would not have repaired the damage done to appellant's ability to cross examine Parker and the investigators who testified about Parker's statement. Rule 17.1 exists to ensure that the defense has access to information, not to uphold the trial court's power. I see no reason why the State should be allowed to violate the discovery requirement and deny persons accused of crimes vital information that is plainly essential to effective trial preparation and cross examination.

It is not unprecedented to preclude a party that violates discovery rules from introducing evidence or calling a witness. Rule 37(b)(2)(B) of the Arkansas Rules of Civil Procedure plainly permits the court to "make such orders in regard to the failure as are just . . ." including "[a]n order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence." That rule does not require a finding of willful or deliberate disregard under the circumstances before sanctions may be imposed for failure to comply with the discovery rules. *See Viking Ins. Co. v. Jester*, 310 Ark. 317, 836 S.W.2d 371 (1992); *Cook v. Wills*, 305 Ark. 442, 808 S.W.2d 758 (1991); *Tricou v. ACI Mgt., Inc.*, 37 Ark. App. 51, 823 S.W.2d 924 (1992).

There is no excuse whatsoever for trial and appellate judges to treat the discovery obligation prescribed by Rule 17.1 of the Arkansas Rules of Criminal Procedure with less respect or to otherwise operate as if the discovery interests of persons accused of crimes are somehow less important than those of persons involved in civil litigation. As long as the consequences of violating Rule 17.1 operate to disadvantage criminal defendants, we have no reason to

expect that the violations will decrease, whether they result from incompetence, negligence, honest mistake, bad faith, or inadvertence. If we were to reverse and remand this case for new trial with instructions that the prosecution be prohibited from calling Christopher Parker as a witness until the defense was provided the recordings and transcripts of his two pretrial statements, I suspect that the prosecution would be highly motivated to locate and produce the recordings and statements. While doing so might create other issues (such as explaining why the statements could not be produced earlier and why the recordings and transcripts should be deemed valid), those difficulties should properly be suffered by the prosecution as an indirect result of failure to comply with the discovery rule.

*Conclusion*

Therefore, I would reverse and remand on both points. Specifically, I would hold that the trial court abused its discretion and committed prejudicial error by allowing the State to introduce extrinsic evidence of a prior inconsistent statement by Tequila Hall after Hall testified that the prior statement was untrue. I would also hold that the trial court erred when it refused to exclude Parker's testimony.

Tim TUCKER *v.* Shawn TUCKER (now Monieca S. Cobbler)

CA 00-1394 49 S.W.3d 145

Court of Appeals of Arkansas
Division III
Opinion delivered June 27, 2001

*Jeff H. Watson*, for appellant.

*G. Keith Griffith*, for appellee.

SAM BIRD, Judge. Appellant Tim Tucker brings this appeal contending that the chancery court erred in increasing the amount of his weekly child-support obligation because appellee Shawn Tucker (now Monieca S. Cobler) and appellee Office of Child Support Enforcement have not shown the requisite change in circumstances to warrant such an increase. We affirm.

Tucker and Cobler were divorced on June 21, 1999, pursuant to a divorce decree entered in the Washington County Chancery Court. Cobler was awarded custody of the couple's three children, and Tucker was ordered to pay $40 per week in child support. On July 24, 2000, the OCSE intervened in the case and filed a motion to increase Tucker's child-support payments pursuant to Ark. Code Ann. § 9-14-107 (Repl. 1998), contending that Tucker's income had changed by more than twenty percent or had increased by more than $100 per month. OCSE stated that this change constituted a material change in circumstances sufficient to adjust Tucker's support obligation. Tucker denied the allegation that his income had increased by either twenty percent or $100 per month.

At a hearing on the petition to modify, counsel for OCSE argued that Tucker's child-support payments should be raised to $141.00 a week based upon a net income of $448.90 a week. It conceded that the affidavit of financial means filed with the court and stipulated to by the parties showed an income of $434.90 per week, which, according to the family-support chart called for $138.00 per week in child-support payments.

Tucker opposed the petition to modify child support on the basis that there had not been a material change in circumstances. He denied the allegation that his income had increased by twenty percent or by $100 per month. He argued that his gross income had actually decreased from $17,381 for the first six months of 1999 to $16,809 for the last six months of 2000. He explained that the decrease was based upon fluctuations in overtime pay. He stipulated that his net take-home pay was $434.90.

Tucker contended that the child-support award of $40 per week was not based upon the child-support chart, but was based upon an agreement that Tucker would be entitled to reasonable visitation, rather than specific visitation. He argued, "It was the understanding of all the parties at that time, that [I] would not exercise that visitation, and in fact [I have] not been allowed to exercise that visitation. That was the underlying background to the agreement between the parties." Tucker also called the court's

attention to the fact that the three children for whom he was paying child support were not his biological children; rather, they were his adopted children.

After the hearing, the chancery judge ordered an increase in support payments from the original $40 per week to $138 per week. From that order Tucker appeals, again contending that a change of circumstances, substantial enough to warrant an adjustment, has not occurred.

In reviewing chancery cases, we consider the evidence de novo, but will not reverse a chancellor's findings unless they are clearly erroneous or clearly against the preponderance of the evidence. *Hamilton v. Barrett*, 337 Ark. 460, 989 S.W.2d 520 (1999).

Arkansas Code Annotated section 9-14-107 (a), (b), and (c) (Repl. 1998) sets forth three of the bases upon which a party can petition the court for review and adjustment of the amount of the child-support obligation. Only subsections (a) and (c) are pertinent to our inquiry in this case. These two subsections provide as follows:

> (a) A change in gross income of the payor in an amount equal to or more than twenty percent (20%) or more than one hundred dollars ($100) per month shall constitute a material change of circumstances sufficient to petition the court for review and adjustment of the child support obligated amount according to the family support chart after appropriate deductions.
>
> . . .
>
> (c) An inconsistency between the existent child support award and the amount of child support that results from application of the family support chart shall constitute a material change of circumstances sufficient to petition the court for review and adjustment of the child support obligated amount according to the family support charge, after appropriate deductions, unless:
>
> (1) The inconsistency does not meet a reasonable quantitative standard established by the state, in accordance with subdivision (a)(1) of this section; or
>
> (2) The inconsistency is due to the fact that the amount of the current child support award resulted from a rebuttal of the guideline amount and there has not been a change of circumstances that resulted in the rebuttal of the guideline amount.

Tucker contended below and argues on appeal that only subsection (a) is applicable to this case, and he argues that since OCSE has not shown that his gross income has increased by more than twenty percent or more than $100 per month, it has not met its burden of proving a material change of circumstances, and that its petition should have been dismissed.

On the other hand, OCSE argues that subsection (c) is applicable and that it has proved a material change of circumstances because there is an inconsistency between the existent child-support award ($40) and the amount of child support that results from application of the family support chart ($138), and that the inconsistency meets the quantitative standard established by the state, as contained in subdivision (a) of section 9-14-107. OCSE also argues that neither of the exceptions contained in subdivisions (c)(1) and (c)(2) is applicable. In response to OCSE's argument, Tucker filed a reply brief contending that subsection (c) is inapplicable because subsection (a)(1) clearly states that the necessary change in circumstances is based on the payor's gross income, not the amount of child-support payments the payor is making.

We disagree with Tucker. We hold that subsection (c) of section 9-14-107 applies to this particular case and that it permits the filing of a petition for modification of support based upon the amount of child-support payments that Tucker was making. Further, we hold that the exceptions to subsection (c) are inapplicable to this case.

While it is true, as Tucker argues, that subsection (a) of section 9-14-107 refers to changes in the *gross income* of the payor as the basis for a modification, subsection (c), which is a separate basis for seeking a modification of the amount of child support, speaks in terms of an inconsistency between the existent *child-support award* and the *amount of child support* that results from application of the family-support chart. Tucker has not shown that the exception set forth in subdivision (c)(1) is applicable because, clearly, the inconsistency between the divorce decree's $40 per week award and the sum of $138 that would result from application of the child-support chart meets the reasonable quantitative standard of $100 per month or twenty percent, as set forth in subsection (a) of section 9-14-107.

In addition, Tucker has not shown that the exception in subdivision (c)(2) is applicable because there was no evidence that the inconsistency between the child-support payment originally ordered and the amount of child support called for by the family-

support chart resulted from a rebuttal of the guideline amount. Tucker's argument that $40 per week child support was based upon an agreement that he was not going to seek visitation is not supported by the record. The decree states that Cobler would have custody, subject to reasonable privileges of visitation, rather than specific visitation privileges, in favor of Tucker. Furthermore, the record reflects that Tucker filed a contempt petition stating that Cobler had not complied with his visitation requests, and asking the court to modify the decree to set forth specific visitation.

Because we find subsection (c) of section 9-14-107 applicable to the case at bar and because Tucker has not proven the applicability of one of the exceptions set forth in subsection (c) (1) or (2), we cannot say that the judge's finding that a material change of circumstances had occurred is clearly erroneous or clearly against the preponderance of the evidence, and we affirm.

Affirmed.

BAKER, J., agrees.

ROAF, J., concurs.

ANDREE LAYTON ROAF, Judge, concurring. I concur with both the result reached and the analysis of the majority opinion. However, the consequences of Ark. Code Ann. § 9-14-107(c)(Repl. 1998), a 1995 amendment to this statute, is that parties cannot with any security enter into agreements regarding child support that vary by even a small amount from the family support chart. Presumably, either the party who has agreed to accept less or one who has agreed to pay more may turn around and invoke this statute the very next day, unless the amount awarded *resulted* from a *rebuttal* of the chart amount. There are a number of reasons why parties would enter into such agreements, not the least of which would be to facilitate an uncontested divorce. Counsel for such parties should consider setting out in the support order reasons for the variance that would constitute a "rebuttal" of the chart, and obtaining the approval of the trial court before entering into such agreements in the future.

Erika MATLOCK *v.*
ARKANSAS BLUE CROSS BLUE SHIELD

CA 00-1153 49 S.W.3d 126

Court of Appeals of Arkansas
Divisions I, II, and III
Opinion delivered June 27, 2001

*Philip M. Wilson, P.A.*, for appellant.

*Walter A. Murray*, for appellee.

WENDELL L. GRIFFEN, Judge. Erika Matlock appeals a decision of the Workers' Compensation Commission that denied benefits for injuries suffered when she fell while returning to her work station at Arkansas Blue Cross Blue Shield after a trip to the restroom. Appellant argues that the Commission erroneously interpreted Act 796 of 1993 when it determined that she was not performing employment services when she was injured and, therefore, that her injury was not compensable. She also contends that the Commission's decision is not supported by substantial evidence. We hold that the Commission's finding that appellant was not performing employment services when she sustained injuries from the fall is not supported by substantial evidence, nor does the Commission's opinion display a substantial basis for denial of the relief sought. We specifically hold that the Commission erred in construing Arkansas Code Annotated section 11-9-102(4)(B)(iii) (Supp. 1999) to require a denial of benefits under the facts of this case. Thus, we reverse the Commission's decision and remand for a determination of appellant's benefits. In reaching this decision, we serve notice that our statement in *Beaver v. Benton County*, 66 Ark. App. 153, 156, 991 S.W.2d 618, 620 (1999), that "the personal-comfort doctrine is no longer the law," was *obiter dictum*. Finally, we take this opportunity to list some factors that should be instructive to the Commission, employers, workers, and their legal counsel in determining whether an employee's activity falls within the course of employment.

*Background Facts*

The parties strongly disagree on whether the Commission correctly found that appellant was not performing employment services when she fell on stairs while returning from the tenth-floor restroom to her ninth-floor workstation. However, appellant's account regarding the underlying facts is not controverted. Appellant testified that she began working for Blue Cross Blue Shield in January 1999 as an overpayment clerk. At around 9 o'clock a.m. on January 29, 1999, appellant left her desk on the ninth floor to use the restroom. The ninth-floor restroom was occupied, so she went to the restroom on the tenth floor. While returning to resume work on the ninth floor, appellant fell on the stairs and sustained a contusion to her left knee, strained her right ankle, and injured her back. The back injury was eventually diagnosed by Dr. David L. Reding, a Little Rock neurosurgeon, as a small disc rupture at L5-S1 on the right, for which Dr. Reding recommended conservative treatment. Appellant testified that she was off work for almost three months (from April 5 until July 6, 1999) for her back problem.

Appellant filed a workers' compensation claim. Her employer controverted the claim, contending that appellant was not performing employment services when the accident occurred. The record of the hearing before the Commission's Administrative Law Judge (ALJ) consists of appellant's testimony and medical exhibits. The ALJ denied the claim, and appellant appealed to the Commission. The Commission affirmed, relying on our statement in *Beaver v. Benton County, supra,* that "the personal-comfort doctrine is no longer the law." The Commission also found that "an alleged injury sustained while an employee is going to or from the bathroom, while no employment duties are being carried out, is not compensable under Act 796 of 1993." This appeal followed.

*I. Standard of Review and Relevant Legal Authority*

■ ■ When a workers' compensation claim is denied, the substantial-evidence standard of review requires us to affirm the Commission if its opinion displays a substantial basis for denial of the relief sought by the worker. *See McMillian v. United States Motors,* 59 Ark. App. 85, 953 S.W.2d 907 (1997); *see also Shaw v. Commercial Refrigeration,* 36 Ark. App. 76, 818 S.W.2d 589 (1991). In determining the sufficiency of the evidence to sustain the findings of the

Commission, we review the evidence in the light most favorable to the Commission's findings and affirm if they are supported by substantial evidence. *See Weldon v. Pierce Bros. Constr.*, 54 Ark. App. 344, 925 S.W.2d 179 (1996). The question is not whether the evidence would have supported findings contrary to the ones made by the Commission; there may be substantial evidence to support the Commission's decision even though we might have reached a different conclusion if we sat as the trier of fact or heard the case *de novo*. *See Tyson Foods, Inc. v. Disheroon*, 26 Ark. App. 145, 761 S.W.2d 617 (1988).

*II. "Employment Services" and the "Personal Comfort" Doctrine*

Our analysis begins with Arkansas Code Annotated section 11-9-102(4)(A)(i) which defines a "compensable injury" as follows:

> [a]n accidental injury causing internal or external physical harm to the body . . . arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence; . . . .

The parties apparently agree that appellant suffered an accident involving harm to her body. Their dispute centers on whether appellant's injury was one "arising out of and in the course of employment" in view of Arkansas Code Annotated section 11-9-102(4)(B), which prescribes what is *not* a "compensable injury." Specifically, the statute reads:

> (B) "Compensable injury" does not include:
>
> (iii) Injury which was inflicted upon the employee at a time when employment services were not being performed . . . .

Thus, the critical inquiry is whether appellant was performing "employment services" within the meaning of the statute when she fell while returning to her work station after using the restroom.

The "employment services" requirement was added to the Arkansas Workers' Compensation Law by Act 796 of 1993. The general rule precluding worker's compensation benefits for acts performed by employees solely for their own benefit does not apply to acts of personal convenience or comfort; in this regard, the

"personal comfort" doctrine — also sometimes referred to as the "personal convenience" exception — was developed to provide coverage when an employee is injured while taking a brief pause from labors to minister to the various life necessities such as satisfying thirst, eating, discharging bodily wastes, protecting oneself from excessive heat or cold, or cleansing oneself. Although technically the employee's actions do not contribute directly to the employer's profits, compensation is justified under the "personal comfort" exception on the rationale that the employer indirectly benefits in the form of better work from a happy and rested worker, and on the theory that such a minor deviation does not take the employee out of the employment. Under the doctrine, acts that do not conflict with specific instructions and that are normally expected for an employee to indulge in under the conditions of the work, are considered incidental to employment duties within the course of employment. *See* 1A Larson, *The Law of Workmen's Compensation*, § 21.10 (1990). *See also* 82 Am. Jur. 2d, *Workers' Compensation*, § 283.

In *Lytle v. Arkansas Trucking Services*, 54 Ark. App. 73, 923 S.W.2d 292 (1996), our court quoted Professor Larson's treatise concerning the "personal comfort" doctrine or exception as follows:

> Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred, or unless, in some jurisdictions, the method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment.

*Id.* at 54 Ark. App. at 79, 923 S.W.2d at 295.

The boundaries of the personal-comfort exception in Arkansas were blurred when Act 796 became effective on July 1, 1993. *See* Ark. Code Ann. § 11-9-704(c)(3) (Repl. 1996). Act 796 also contains the following declaration of legislative intent at Ark. Code Ann. § 11-9-1001:

> 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 of this act. In the future, if such things as the statute of

> limitations, the standard of review by the Workers' Compensation Commission or courts, the extent to which any physical condition, injury, or disease should be excluded from or added to coverage by the law, or the scope of the workers' compensation statutes need to be liberalized, broadened, or narrowed, those things shall be addressed by the General Assembly and should not be done by administrative law judges, the Workers' Compensation Commission, or the courts.

While our opinion in *Lytle* mentioned the "personal comfort" doctrine, it did so in the context of a claim that predated Act 796 (the *Lytle* worker was a truck driver who alleged an injury sustained on July 3, 1992). However, unlike pre-Act cases, post-Act cases require a determination that the worker was injured while performing "employment services," a requirement that is unique to Arkansas.[1]

We first addressed the meaning of "employment services" in, *Olsten Kimberly Quality Care v. Pettey*, 55 Ark. App. 343, 934 S.W.2d 956 (1996), a post-Act case involving a nurse's assistant whose job required her to care for patients in their homes. Pettey was injured in an automobile accident while en route from her employer's offices to the home of a patient. The Commission held that her accident constituted a compensable injury within the meaning of Act 796. We agreed with the Commission's reasoning that because "traveling was an inherent and necessary incident of the appellee's required employment activity, the appellee was performing employment services while en route from her employer's office to the patient's home." *Id.* at 55, 934 S.W.2d at 958. Our supreme court affirmed the decision and approved the reasoning we employed, as indicated by the following excerpt from Justice Corbin's opinion:

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[1] A review of the laws of other jurisdictions reveals that the personal-comfort doctrine is recognized as a general rule of workers' compensation law, and acts of personal comfort and convenience are typically held as incidental to employment and compensable. For instance, New York courts recognize that an injury may be work-related even when the employee is not actively engaged in the duties of employment. *See Kaplan v. Zodiac Watch Co.*, 232 N.E.2d 625 (1967). In resolving the issue of compensability, the New York courts determine whether the injury was in any way attributable to the *environment* into which the employee was brought into by the employment. *See id.* Also, Iowa courts consider the personal-comfort doctrine as satisfying a requirement that an injury occur within the course of employment. *See Miedema v. Dial Corp.*, 551 N.W.2d 309 (1996). Once an injury is proven to occur within the course of employment, Iowa law requires that the claimant also prove that the injury arose out of the employment. *See id.*

> The fact that Appellee had yet to begin her nursing duties that day does not preclude our conclusion that she was nonetheless performing employment services at the time of the accident. Whether she was being directly compensated for her travel is not pertinent to our decision, as *the facts of this case clearly demonstrate that travel was a necessary part of her employment.* Further, such travel was clearly for the benefit of Appellant, as its business livelihood depended upon the in-home care of patients provided by its nursing assistants.

328 Ark. 381, 386-87, 944 S.W.2d 524, 527 (1997) (emphasis added).

Next, we affirmed the Commission after it decided that a worker was not entitled to compensation for an injury sustained when she fell on ice in her employer's parking lot while walking from her car to begin work as a preschool day-care teacher. *See Hightower v. Newark Pub. Sch. Sys.*, 57 Ark. App. 159, 943 S.W.2d 608 (1997). Our decision in that case was premised on the going-and-coming rule which ordinarily denies compensation to an employee while he or she was traveling between home and the job based on the reasoning that employees with fixed hours and places of work are generally not considered to be in the course of their employment while traveling to and from work.

In *Harding v. City of Texarkana*, 62 Ark. App. 137, 970 S.W.2d 303 (1998), we affirmed the Commission's decision denying benefits for injuries sustained to a worker who tripped over a rolled-up carpet while walking to a designated smoking area. Our opinion cited the supreme court's decision in *Olsten Kimberly Quality Care v. Pettey, supra*, which affirmed our position that an employee performs "employment services" when the employee engages in the primary activity that he or she was hired to perform *or in incidental activities that are inherently necessary for the performance of the primary activity.* Regarding the claimant's argument that the smoking break advanced the employer's interest by allowing her to relax which, in turn, helped her to work more efficiently throughout the rest of her work shift, Judge Pittman wrote as follows:

> We are not unsympathetic to this argument. Under former law, the definition of compensable injury did not include a strict requirement that the injury occur while the worker was performing employment services, and a claimant's activities at the moment of injury were relevant only to the separate and broader question of whether the injury arose out of and in the course of the employment. . . . It is clear that, under former law, appellant's injury while

> en route to the break area would have been in the course of her employment pursuant to the personal-comfort doctrine. . . . It may be true that the interests of both workers and employers would be better served by a more uniform application of an administrative remedy than they would be by the uncertainty inherent in a tort claim based on premises liability. Nevertheless, the legislature, rather than the courts, is empowered to declare public policy, and whether a law is good or bad, wise or unwise, is a question for the legislature, rather than the courts. . . . In the present case, Act 796 of 1993 applies and, although appellant's break may have indirectly advanced her employer's interests, it was not inherently necessary for the performance of the job she was hired to do. Consequently, we hold that the Commission did not err in finding that appellant was not performing employment services when she was injured.

*Id.* at 138-39, 970 S.W.2d at 304 (citations omitted).

Our six-judge decision in *Beaver v. Benton County*, *supra*, also affirmed the Commission's finding that a worker hired as an investigator of noncustodial parents for enforcement of child-support obligations was not performing employment services when she slipped on a wet floor and fell as she was approaching the buffet during a lunch break while attending a work-related seminar at the Holiday Inn Civic Center in Fort Smith. Judge Rogers' majority opinion cited our decisions in *Hightower, supra*, and *Lytle, supra*, before adding the following statement:

> *However, the personal-comfort doctrine is no longer the law.* Now, Act 796 of 1993 applies and, although the claimant's break may have indirectly advanced her employer's interests, it was not inherently necessary for the performance of the job she was hired to do. Consequently, we held in *Harding* that the Commission did not err in finding that appellant was not performing employment services when she was injured.
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> . . .
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> We agree with the Commission that the fact that the appellee [employer] paid for the lunches is of no moment, and it was inconsequential that appellee encouraged the group to eat together when viewed against all of the other evidence. There is substantial evidence to support a finding that appellant was not advancing her employer's interest when she was on her lunch break walking to the buffet.

*Beaver v. Benton Co.*, 66 Ark. App. 156-57, 991 S.W.2d at 620-21 (emphasis added).

In a concurring opinion in *Beaver*, Judge Bird cited our decision in *Crossett School District v. Fulton*, 65 Ark. App. 63, 984 S.W.2d 833 (1999), where we affirmed the Commission's decision awarding benefits to a claimant who fell on ice in the employer's parking lot while retrieving her reading glasses from her car. The claimant was a reading media resource teacher whose duties required her to work on three different elementary campuses under the supervision of the librarian. Shortly before the bell rang to begin the school day, she went to her assigned library. The librarian directed claimant to make some puppets for use as an instructional aid. The instructions for this project were printed in very fine print. When claimant discovered that she did not have her reading glasses, she obtained permission from her supervisor to call her husband to bring her glasses to her. Upon calling her husband, she learned that her glasses were in her automobile. After retrieving the glasses from her automobile located on the school parking lot, claimant slipped on ice and fell, breaking her leg.

We affirmed the Commission's finding that appellee was "performing employment services" when walking from her car to the building after retrieving her glasses. Judge Crabtree set forth the following reasoning for our decision:

> Arkansas Code Annotated section 11-9-102(5)(B)(iii) states that compensable injury does not include an "injury which was inflicted upon the employee at a time when employment services were not being performed. . . ." The question before this court is whether retrieving reading glasses required to complete a duty of employment is an employment service.
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> The appellant relies on *Hightower v. Newark Public Sch. Sys.*, 57 Ark. App. 159, 943 S.W.2d 608 (1997), in which a day care worker slipped in the parking lot on her way to report to work. That case is distinguishable in that the claimant in *Hightower* was injured before she began her employment services that day. In this case, the appellee had reported to work, had supervised children before the bell rang beginning school, was given an assignment after reporting to the librarian, and injured herself in efforts taken to complete the assignment. Those facts constitute substantial evidence that appellee was performing employment services at the time of her injury.

*Id.* at 65-66, 984 S.W.2d at 834.

Judge Bird's concurring opinion in *Beaver, supra,* also cited our decision in *Fisher v. Poole Truck Line*, 57 Ark. App. 268, 944 S.W.2d 853 (1997). In that case we reversed the Commission's decision denying benefits, and held that a truck driver who was injured in an automobile accident while transporting the results of a mandatory urine test was performing employment services. Citing *Crossett Sch. Dist. v. Fulton, supra,* and *Fisher v. Poole Truck Line, supra,* Judge Bird emphasized that the employees in those cases were not "performing his or her assigned work tasks at the time of the injuries, yet the injuries were found to be compensable." *Beaver*, 66 Ark. App. at 158, 991 S.W.2d at 721 (Bird, J., concurring).

We affirmed the Commission's decision to deny benefits in *Coble v. Modern Bus. Sys.*, 62 Ark. App. 26, 966 S.W.2d 938 (1998). That case involved a corporate trainer whose job required her to travel to branch locations throughout the company. While on assignment in Peoria, Illinois, the trainer decided to locate a shopping mall on her lunch break to purchase a pair of pantyhose because the pair she was wearing had developed a noticeable run. Upon arriving at the mall, the trainer noticed that she lacked time to complete her purchase and attempted to return to the office. While trying to turn around on a highway, the trainer's vehicle was struck by a motor home, leaving her with multiple injuries, including a head injury that rendered her unable to work. Her employer contended that her claim was not compensable. The Commission agreed and denied benefits after finding that the trainer was not performing "employment services" at the time the accident occurred. In affirming that decision, then Chief Judge Robbins wrote:

> In the instant case, there was evidence that Ms. Coble was not required to replace hosiery during the workday in the event of a run, nor was she even expected to do so. In addition, she admitted that she would not have made the trip if her trainee had not requested a lunch break; she was prepared to continue the training despite the condition of her pantyhose. On her break from work, she was free to do whatever she wanted to do, and it was solely her decision to proceed to the mall. Under these circumstances, we agree that her decision to drive to the mall was personal in nature, was not a requirement or essential component of the services she provided, and did not constitute "employment services" for purposes of the new Act.

*Id.* at 31-32, 966 S.W.2d at 941.

However, we reversed the Commission and remanded for benefits in *Shults v. Pulaski County Sp. Sch. Dist.*, 63 Ark. App. 171, 976 S.W.2d 399 (1998). The worker in that case was a building custodian at an elementary school in Jacksonville, Arkansas, who fell while entering the building at the start of the workday, resulting in a fractured right knee cap. One of the worker's duties upon arriving at work was to disarm the building security system. He fell while running into the building after observing that the alarm system had already been disarmed. The Commission denied benefits, reasoning that merely entering onto the premises of one's employer was not sufficient to bring one within the employment services provision of Act 796. Judge Meads addressed that reasoning as follows:

> Although that is a correct statement of the law, we disagree that appellant was "merely entering upon" the employer's premises. Upon appellant's arrival at Tolleson Elementary School, his first duty as building custodian was to check the alarm system. We believe this duty was an activity that carried out the employer's purpose or advanced the employer's interests, and therefore constitutes employment services. Whether or not the alarm system had already been disarmed on the day of appellant's accident is not dispositive, because appellant did not know this until he stepped into the building to check the system for himself. Therefore, we find that appellant did sustain a compensable injury because he sustained an injury to his knee at a time when employment services were being performed.

*Id.*, at 173-74, 976 S.W.2d at 401.

We also reversed the Commission and remanded for an award of benefits in *Ray v. University of Arkansas*, 66 Ark. App. 177, 990 S.W.2d 558 (1999). There we held that a food-service worker was performing employment services when she suffered a fall during a paid break. The Commission denied benefits based on its view that the worker was not performing employment services because she was reaching for an apple to personally consume, and was not assisting student diners, or "otherwise benefitting the employer," when she slipped and fell. We held that decision to be without a substantial basis, stating as follows:

> We hold that appellant was performing employment services at the time she was injured based on the fact that *appellant was paid for her fifteen-minute breaks and was required to assist student diners if the need arose. Appellant's employer gleaned benefit from appellant being present and required to aid students on her break. . . .* Unlike the employer in

> *Harding*, the University of Arkansas required Ray to be available to work during her break and paid her for the time she was on break, presumably because she was required to help students. The University of Arkansas was clearly benefitted by Ray's being in the cafeteria and available for students during her paid break. The benefit was not tangential as in *Harding*, but was directly related to the job that Ray performed and for which she was paid. In distinguishing *Harding*, we specifically note that, unlike the break in *Harding*, the appellee employer in this case furnished food for its resting employees and paid them for the break to induce them to be available to serve students even during the break period.

*Id.* at 180-81, 990 S.W.2d at 560-61 (emphasis added).

Finally, the supreme court reversed and remanded our decision affirming the Commission's denial of benefits in *White v. Georgia-Pacific Corp.*, 339 Ark. 474, 6 S.W.3d 98 (1999). White was a forklift driver whose duties primarily consisted of continually loading four veneer dryers with lumber. While on his way to smoke a cigarette during a work break, he slipped and fell on a step covered with algae as he attempted to step through a door located in front of a dryer. The Commission denied benefits after finding that White failed to prove that he was performing employment services at the time of his injury. We affirmed, holding that there was a substantial basis for the Commission's decision to deny benefits on the finding that the worker was not performing employment services at the time of his injury and that the injury was not compensable under the personal-comfort doctrine.

On review by the Arkansas Supreme Court, the employer repeated its argument that the accident occurred when no employment services were being performed. Writing for a unanimous court, Justice Corbin addressed the employer's position as follows:

> In the present matter, Georgia-Pacific argues that White was on a personal break and not performing any employment services; thus, his injury is not compensable. This argument ignores the fact that someone had to monitor the dryers, whether it be White or a relief worker. Because there was no relief worker provided, White was forced to remain near his immediate work area in order to monitor those machines. If one of the dryers needed to be loaded or his supervisor needed him for some reason, White would have been forced to return to his forklift immediately. Georgia-Pacific's argument also ignores the fact that White's supervisor instructed him to take a break "when he could."

> We believe the present situation is analogous to the facts presented in *Ray*, 66 Ark. App. 177, 990 S.W.2d 558. In *Ray*, appellant was . . . entitled to two unpaid thirty-minute breaks and two paid fifteen-minute breaks each day. During one of her paid breaks, appellant slipped and fell as she was getting a snack from the cafeteria for her own personal consumption. The Commission denied appellant's claim for disability benefits after determining that she was not performing employment services at the time of her injury. The court of appeals reversed the Commission's decision, noting that White was paid for her fifteen-minute breaks and was required to assist student diners if the need arose. Based on those facts, the court of appeals held that the employer gleaned benefit from appellant being present and required to aid students on her break. *Likewise, in this matter Georgia-Pacific also gleaned benefit from White remaining near his work station in order to monitor the progress of the dryers and immediately return to work if necessary.*
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> . . .
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> *While it is true that White was not loading the dryers at these times, he was in fact monitoring them, which was a required part of his job duties. White testified that it was necessary to watch the dryers and load them as the need to do so arose. It was this fact that necessitated the presence of a relief worker. Due to the fact that Georgia-Pacific failed to provide such relief staff, it was necessary for White to monitor the dryers, even it was time for one of his breaks.*

*Id.*, at 479-80, 6 S.W.3d at 100-02 (emphasis added).

### *III. Principles Emerging From "Employment Services" Decisions and the Dictum in* Beaver v. Benton County

Our review of appellate decisions applying the "employment services" requirement of Act 796 demonstrates several principles. First, while the "personal comfort" or "personal convenience" cases involve disputes regarding whether the workers were performing "employment services" when their accidents occurred, the "employment services" requirement prescribed by Act 796 simply reflects the broader requirement that an accident must occur in the course of employment to be compensable. This involves deciding whether the accident occurred "within the time and space boundaries of the employment, when the employee is carrying out the

employer's purpose or advancing the employer's interest directly or indirectly." *White v. Georgia-Pacific Corp.*, 339 Ark. at 478, 6 S.W.3d at 100 (quoting *Olsten v. Kimberly Quality Care v. Pettey, supra.*)

Second, although it is true that "personal comfort" or "personal convenience" cases raise the "employment services" question, our court and the supreme court have held that workers are entitled to compensation benefits based on injuries from accidents that occurred when they are not performing actual job tasks, *see Ray v. University of Arkansas, supra*; *Crossett School District v. Fulton, supra,* and even when the accident occurred away from the employer's premises, *see Fisher v. Poole Truck Line, supra.* The fact that a worker is injured while attempting to satisfy a personal need is not, *per se*, dispositive regarding whether she was performing employment services when the accident occurred. *See Ray v. University of Arkansas, supra.* Similarly, the fact that a worker is not directly compensated for the activity engaged in when an accident occurs for which workers' compensation benefits are sought is not controlling as to whether the worker was performing employment services. *See Olsten Kimberly Quality Care v. Pettey, supra.* On the other hand, merely walking to and from one's car, even on the employer's premises, does not automatically constitute performing employment services. *See Hightower v. Newark Pub. Sch. Sys., supra.* In other words, whether a worker performs employment services and sustains an accident within the course of employment is a factual question which is to be resolved based upon the circumstances of each case, not on blanket notions of "personal comfort" or "personal convenience."

The decisions on the employment services question also compel us to acknowledge that the statement in *Beaver v. Benton County, supra*, "the personal-comfort doctrine is no longer the law," was unnecessary to our decision in that case. It is certainly understandable that the Commission quoted our statement; after all, it is part of the opinion in *Beaver.* Yet, as previously mentioned, the controlling inquiry is not whether an injury occurred while the worker was engaged in personal-comfort activity, *per se.* Thus, it is not conclusive that the accident occurred while the worker was returning from a personal errand to obtain reading glasses, going to get an apple to consume while on an authorized work break, or going to smoke. Rather, the critical inquiry is whether the activity advances the employer's interest.

*IV. Factors Relevant to Determining the Employment Services Question*

Whether a worker was performing employment services within the course of employment depends on the particular facts and circumstances of each case. The controlling test has not changed since our decision in *Olsten Kimberly Quality Care v. Pettey, supra* (stating the inquiry as whether the employee is "engaged in the primary activity that [s]he was hired to perform *or in incidental activities that are inherently necessary for the performance of the primary activity*.") The difficulty arises from the fact that Act 796 does not define factors to guide employers, workers, their legal counsel, and the Commission in determining what constitutes "employment services." That omission by the General Assembly may well have been intentional. After all, given the vagaries of industries, work settings, working conditions, and workers, any blanket definition would be either so imprecise as to be meaningless or unworkably rigid and narrow. Whatever "employment services" means must be determined within the context of individual cases, employments, and working relationships, not generalizations made devoid of practical working conditions.

Our decisions show that no single feature of the employment relationship is determinative of whether conduct falls within the meaning of "employment services." However, the factors that may be relevant in reaching that determination include:

1. Whether the accident occurs at a time, place, or under circumstances that facilitate or advance the employer's interests (*Shults v. Pulaski Cty. Sp. Sch. Dist.*; *Fisher v. Poole Truck Line*);

2. Whether the accident occurs when the employee is engaged in activity necessarily required in order to perform work (*Olsten Kimberly Quality Care v. Pettey*);

3. Whether the activity engaged in when the accident occurs is an expected part of the employment (*Shults v. Pulaski Cty. Sp. Sch. Dist.*);

4. Whether the activity constitutes an interruption or departure, known by or permitted by the employer, either temporally or spatially, from work activities (*White v. Georgia-Pacific Corp.*);

5. Whether the employee is compensated during the time that the activity occurs (*Ray v. University of Arkansas*);

6. Whether the employer expects the worker to cease or return from permitted non-work activity in order to advance some employment objective (*Ray v. University of Arkansas*).

As we said in *Franklin v. Arkansas Kraft, Inc.*, 5 Ark. App. 264, 270, 635 S.W.2d 286, 289 (1982), regarding the factors bearing on whether one is an independent contractor or an employee for purposes of determining workers' compensation coverage, "[t]hese are not all the factors which may conceivably be considered in a given case, and it may not be necessary in some cases for the Commission to consider all of these factors." 5 Ark. App 270, 635 S.W.2d 289. In some cases these and other factors will weigh more heavily than in others. It is the Commission's responsibility as trier of fact to determine whether and to what degree these or other factors demonstrate that the accident occurred when the employee was engaged in the primary activity that he or she was hired to perform or in incidental activities inherently necessary for the performance of the primary activity. On appellate review, our duty will be to determine whether the Commission's decision in a given case is supported by substantial evidence.

In setting forth these factors for analyzing disputed claims about whether employment services were performed, we are not engaging in judicial legislation in contravention of the legislative intent expressed at Ark. Code Ann. § 11-9-1001. We are neither liberalizing nor narrowing the meaning of "employment services." Our task is to review the record to determine whether substantial evidence exists to support the Commission's findings on that subject. But those findings must turn on facts and factors germane to the course-of-employment question. They cannot and should not be made in the abstract. It is patently improper to summarily pronounce that all claims involving "personal comfort" or "personal convenience" accidents are outside the course of employment and, therefore, are noncompensable without regard for the underlying facts. By the same logic, it is improper to hold that all personal-comfort or personal-convenience accidents are within the course of employment and are compensable, no matter what the facts in individual cases may be. By now, it should be common knowledge that determining the relevant factors for finding the facts in disputed cases is a singularly judicial function rather than legislation.

When we apply the factors set forth above to the case at hand, we are compelled to hold that the Commission erred in concluding that appellant was not performing employment services when she fell on the stairs of the employer's office building while returning to resume work for the employer after going to the restroom. The fact that Matlock was not performing a job task when she fell, while forcefully argued by the appellee and emphasized by the Commission in its opinion, is not controlling on whether she was within the course of the employment when she fell. Just as the teacher in *Fulton* was not performing a job task when she fell on ice while returning to resume work after retrieving her reading glasses from her automobile in the employer's parking lot, Matlock was not performing a job task when she fell while returning to resume work after going to the restroom.

Nevertheless, Matlock was manifestly advancing the employer's interest by returning to work after an authorized or permitted rest period. She had gone to a restroom provided by the employer on her floor, found it occupied, proceeded to another restroom provided by the employer on a nearby floor, and was returning to resume the employer's work when the accident occurred that resulted in her injuries. Her conduct in returning to her desk was entirely consistent with the employer's interest in advancing the work. Nothing about that conduct suggests an attempt to deviate from the employment, whether temporally (as in the duration of her stay in the restroom) or spatially (as in the proximity or remoteness in distance between appellant's fall and her work station). There is no fact that even remotely supports an inference, let alone a factual finding or conclusion of law, that appellant was violating or undermining any interest of the employer by going to the restroom or by returning to her work station. Everything in the record before us indicates that Matlock was engaged in conduct permitted by the employer, if not specifically authorized by the employer, and that the employer provided restroom facilities on its premises.

We should not forget as judges what we know as intelligent humans. Restroom facilities are provided in work settings because eliminating bodily toxins and wastes are natural and ordinary biological processes. Employers provide restroom facilities for the benefit of their customers, to be sure. But they also provide those facilities to accommodate their workers so as to avoid the work interruptions and delays that would certainly occur if workers were forced to leave the employment premises in order to find a public restroom at some distance from the work, their supervisors, and

customers. The strict-construction requirement of Act 796 does not obligate the Commission and courts to ignore biology, anatomy, or human physiology. Nor does it require that we review workers' compensation claims and appeals as simply a matter of determining whether the worker was performing a job task when the accident occurred.

We are also guided by Justice Corbin's observation in *White v. Georgia-Pacific Corp.* concerning the lack of evidence to support the Commission's decision. Justice Corbin wrote:

> We cannot ignore the fact that what seems to be lacking the most in this case is the type of substantial evidence needed to support the Commission's decision.
>
> This court has previously addressed the issue of what constitutes substantial evidence in the context of a workers' compensation case. In *Pickens-Bond Constr. Co. v. Case*, 266 Ark. 323, 584 S.W.2d 21 (1979), this court stated:
>
>> *Substantial evidence has been defined as "evidence that is of sufficient force and character that it will, with reasonable and material certainty and precision, compel a conclusion one way or the other. It must force or induce the mind to pass beyond a suspicion or conjecture."* Ford on Evidence, Vol. 4, § 549, page 2760. Substantial evidence has also been defined as "evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred; and *the test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences."*

*Id.* at 479-80, 6 S.W.3d at 101 (emphasis added, citations omitted) (quoting *Aluminum Co. of America v. McClendon,* 259 Ark. 675, 535 S.W.2d 832 (1976)).

In *White*, the supreme court mentioned that the employer presented no evidence to rebut the worker's testimony on several critical points. In this case, the employer presented no testimony to rebut appellant's testimony that (1) that she left her work to go to the restroom on the ninth floor about 9 o'clock a.m.; (2) that the restroom was occupied on the ninth floor; (3) that she went to the tenth floor to use the restroom; (4) that she slipped and fell on the stairs while returning from the tenth floor; (5) that there was no policy regarding whether and when she could or could not go to the restroom; (6) that she fell while "coming back to my work

station"; and (7) that she reported her accident to her unit leader when she returned to her desk ("because my supervisor was not there yet, and she told me she thought that I should tell him and then fill out a form, an accident form"). There is nothing in the record to suggest that appellant's restroom break was unauthorized, was taken for a purpose forbidden by the employer or contrary to the employer's interests, or that it was a sham or pretext for what was really a deviation or departure from the employment.

The strict-construction mandate of Act 796 and the requirement that we view the evidence in a light most favorable to the Commission's decision and uphold that decision if it is supported by a substantial basis for denying relief do not change the requirement that the Workers' Compensation Commission must have, in fact, a substantial basis for denying a claim for benefits. As the supreme court stated when it reversed our decision affirming the Commission's denial of benefits in *Georgia-Pacific Corp., supra*, the substantial-evidence test "is not satisfied by evidence which merely creates a suspicion . . . ." Based on the record in this case, we cannot say that there is substantial evidence supporting the Commission's decision. The Commission's opinion does not display a substantial basis for the denial of relief merely on the strength of a "finding" that an alleged injury sustained while an employee is going to or from a bathroom, while no employment duties are being carried out, is not compensable under Act 796 of 1993.

The rule of strict construction is not the enemy of common sense and does not require a literal interpretation leading to absurd consequences; such a reading should be discarded in favor of a more reasonable interpretation. *Aeroquip, Inc. v. Tilley*, 59 Ark. App. 163, 954 S.W.2d 305 (1997). This is especially true when the Commission's "finding" derived from such a literal interpretation has no evidentiary basis. Accordingly, we reverse the Commission's decision that appellant was not performing employment services when she fell while returning to her work station from the employer's restroom. The case is remanded to the Commission for determination of benefits.

HART, BIRD, NEAL, CRABTREE, and BAKER, JJ., agree.

ROBBINS, VAUGHT, and ROAF, JJ., dissent.

JOHN B. ROBBINS, Judge, dissenting. The real issue on appeal sometimes becomes obscured by all the rhetoric. The sole dispositive issue in this case is whether, under our present

employee-unfriendly workers' compensation law, an employee is performing employment services, *i.e.*, *performing a service for her employer*, when she is going to the toilet. *See* Ark. Code Ann. § 11-9-102(4)(B)(iii) (Supp. 1999). The majority holds that she is, and in doing so, violates the legislative mandate of Ark. Code Ann. § 11-9-704(c)(3) by applying a strained, liberal construction to this law.

ROAF, J., joins in this opinion.

LARRY D. VAUGHT, Judge, dissenting. While the decision reached by the majority in this case appears to be fair and just, I dissent because I believe that it is not supported by Act 796 of 1993 and the parameters established by the legislature and prior decisions of this court and the supreme court. This court has struggled with this case and two others currently under submission concerning the same issue. The majority in each case has reached the conclusion that I have sought and hoped for, but have failed to reach.

There is not one judge, or any reasonable person, who would not believe that the law *should* provide workers' compensation coverage for Ms. Matlock when she was injured after leaving her desk during regular work hours to use the restroom. As discussed by the majority, under prior Arkansas law personal comforts were an integral part of the work day and were covered routinely as necessary adjuncts to the work experience. Other jurisdictions universally recognize them and provide coverage. However, by Act 796 of 1993, the Arkansas General Assembly made a conscious decision to limit the rights of employees and to limit the liabilities of employers. Today this court begins to reverse that direction. I applaud my colleagues' activism and agree wholeheartedly in the result, but I conclude that the court has usurped the legislative function.

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

> 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 of this act. In the future, if such things as the statute of limitation, 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 scope of the workers' compensation statutes need to be liberalized, broadened or narrowed, those things shall be addressed by the General Assembly and should not be done by administrative law judges, the Workers' Compensation Commission, or the courts.

Act 796 excludes from the definition of "compensable injury" any injury sustained by an employee at a time when he is not performing employment services. Ark. Code Ann. § 11-9-102(4)(B)(iii) (Supp. 1999). Further, this section, as all of Act 796, must be strictly construed. Ark. Code Ann. § 11-9-704(c)(3) (Repl. 1996).

After recognizing these edicts, the majority concludes that the boundaries of the personal-comfort doctrine have been blurred by Act 796. However, I conclude that instead of blurring the boundaries, Act 796 made the boundaries rigidly clear. In order for a worker to be eligible for workers' compensation benefits, the injury must be sustained in the course of employment, while the employee is performing employment services. The test for determining whether an employee was acting within the "course of employment" at the time of injury requires that the injury occur within the time and space boundaries of the employment, when the employee is carrying out the employer's purpose or advancing the employer's interest directly or indirectly. *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997).

Appellant's trip to the restroom bears similarity to other types of personal comforts that have been subject to appellate review under the current Workers' Compensation Act. These cases are discussed at length in the majority opinion, and are the basis for the majority's conclusion that the court's assertion in *Beaver v. Benton County Child Support Unit,* 66 Ark. App. 153, 156, 991 S.W.2d 618, 620, that the "personal comfort doctrine is no longer the law" is merely dicta.

In *Beaver*, this court upheld the Workers' Compensation Commission's decision that an injury suffered by an employee while she was on a lunch break during an out-of-town training seminar was not compensable because she was not performing employment services at the time she was injured. Judy Beaver worked as an investigator charged with enforcement of child-support orders for the Benton County Child Support Unit. In April 1997, she was attending a work-related software-training seminar in Fort Smith, Arkansas. During a lunch break, Beaver slipped while approaching a

buffet line and fell to one knee. She ultimately sought treatment for her injury and was diagnosed with a lumbar disk herniation.

The Commission denied Beaver's claim for benefits. In reaching its decision, the Commission found that since Beaver was on a lunch break and not performing any work-related activity within her job description, she was not acting for the benefit of her employer. The Commission noted that for an injury to be compensable, by law, it must occur while the employee is acting in the course of her employment.

This court upheld the ruling of the Commission, finding that there was substantial evidence showing that at the time of the injury Beaver was not engaged in an activity that advanced her employer's interests. This court based its finding on the fact that she was injured while on a lunch break where attendance was not mandated and where the time was uncompensated. This court agreed with the Commission's ruling that for an injury to be compensable, it must have occurred at a time when the employee was performing employment services.

I agree with the majority that the blanket pronouncement in *Beaver* of the death of the personal-comfort doctrine is too simplistic and was unnecessary for the court's analysis. I also agree that the question of whether a worker performs employment services and sustains an accident within the course of employment are factual questions which are to be resolved based on the circumstances of each case. However, I am persuaded that this court concluded that Ms. Beaver's employer was receiving no direct or indirect benefit from her time at lunch, even though her employer encouraged her to attend the luncheon.

Based on the controlling workers' compensation law, my understanding of appropriate judicial authority, and the standard of review that this court is required to apply to a decision of the Workers' Compensation Commission, I believe that the facts of appellant's case support the Commission's conclusion that she was not performing employment services at the time of the accident. In reaching this conclusion, I am especially persuaded by the four cases discussed at length by the majority. *See White v. Georgia-Pacific Corp.,* 339 Ark. 474, 6 S.W.3d 98 (1999); *Olsten Kimberly Quality Care, supra*; *Ray v. University of Arkansas,* 66 Ark. App. 177, 990 S.W.2d 558 (1999); and *Crossett School District v. Fulton,* 65 Ark. App. 63, 984 S.W.2d 833 (1999).

The majority opinion relies heavily on *Olsten Kimberly Quality Care,* which gives the only clue to the definition of "employment services." In *Olsten Kimberly Quality Care,* the claimant, Cheri Pettey, was a nursing assistant who was required to travel to each patient's home to provide nursing services. She was injured in an automobile accident between the office of her employer and the home of her first patient of the day. The Commission awarded her benefits while noting that the definition of compensable injury excludes any injuries sustained when "employment services" are not being performed. *See* Ark. Code Ann. § 11-9-102 (5)(B)(iii). Because "employment services" are not defined in the statute, the Commission crafted the following guideline:

> an employee is performing employment services when she is engaging in an activity which carries out the employer's purpose or advances the employer's interests. Obviously, an employee carries out the employer's purpose or advances the employer's interests when she engages in the primary activity which she was hired to perform. However an employee also carries out the employer's purpose or advances the employer's interests when she engages in incidental activities which are inherently necessary for the performance of the primary activity.

*Olsten Kimberly Quality Care, supra* at 384, S.W.2d at 526. However, the Commission applied this guideline to Ms. Pettey's claim by holding that "employees are performing employment services when they are engaged in travel which is an inherent and necessary incident of a required employment activity." Finally, the supreme court, quoting from this court, reasoned that "[i]t is likewise clear that delivering nursing services to patients at their homes is the *raison d'etre* of the appellant's business, and that traveling to patients' homes is an essential component of that service." *Id.* at 384, S.W.2d at 526.

The principles of the employment-services analysis set forth in *Olsten Kimberly Quality Care* have been applied in other cases considered on appeal. In *White, supra,* because the claimant was required to keep an eye on his work, was not given any relief help, and was told to take a break when he was able to, the supreme court overruled this court and found that the claimant had not left his work and was not on a personal break when he was injured while stopping to smoke a cigarette. Similarly, in *Ray, supra,* this court held that in order to be compensable, claimant's injury must have occurred while the claimant was "performing employment services." In that case, the claimant was injured in a slip-and-fall

accident as she attempted to get a food item for her own consumption during a paid break. Ms. Ray was not only paid for the break time, she was subject to having the break interrupted if a student needed assistance. Those facts were a sufficient basis for concluding that the claimant was performing employment services at the time of the injury. Finally, in *Fulton, supra,* this court affirmed the Commission's decision awarding benefits to a claimant who fell on ice in the employer's parking lot while retrieving her reading glasses from her car. The claimant was a reading-media resources teacher who had, only moments before the accident, been assigned to read instructions that were in very fine print, and she was unable to perform this job function without the assistance of reading glasses, which were located in her car.

The connecting thread between *Olsten, White, Ray, and Fulton* is the direct nexus between the incidental activity and the job. Employment services may include incidental activities only if they are inherently necessary for the performance of the primary employment activity. In the instant case, there is not a sufficient nexus between Matlock's job and her trip from the restroom. Whether or not an employee is performing employment services is a factual determination to be made by the Commission. We cannot reverse if there is substantial evidence to support that finding.

I am mindful of the argument that necessary bodily functions require attention and are not under the voluntary control of the employee. It would certainly be unlawful to deny restroom breaks for employees, but that is not a workers' compensation issue. The only issue is whether the employee was providing employment services at the time of the injury. What is necessary for the employee is not necessarily advancing the employer's interests directly or indirectly.

Today's decision, for the first time, shifts the emphasis from the employer's interest to the employee's necessity. That may be progressive. It is certainly compassionate. But workers' compensation claimants cannot rely on this court to always make the compassionate call. The Arkansas General Assembly has retained the authority to make workers' compensation law. It has the ability to protect workers from the harsh results that I believe are mandated by the present statutory scheme.

The standard of review in workers' compensation cases is clear. The legislative history and intent of Act 796 are equally clear. *Olsten, White, Ray,* and *Fulton* bear important distinctions from the

facts of this case. While the majority result may seem more palatable, it is an inappropriate erosion of well-settled law and an improper intrusion into the province of the legislature. Act 796 was a response, at least in part, to perceived judicial activism. I am concerned for the workers' compensation claimant that decisions such as the majority opinion in this case may result in a legislative response that makes a claimant's burden even more difficult.

It is my opinion that the decision of the Commission is supported by substantial evidence. Accordingly, I would affirm.

I am authorized to state that Judge ROBBINS joins in this dissent.

Richard Wayne McCORMICK *v.* STATE of Arkansas

CA CR 00-246 48 S.W.3d 549

Court of Appeals of Arkansas
Divisions I, II, and III
Opinion delivered June 27, 2001

*John Wesley Hall*, for appellant.

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

OLLY NEAL, Judge. Richard Wayne McCormick entered a conditional plea of guilty to conspiracy to manufacture methamphetamine and simultaneous possession of drugs and firearms after a Washington County Circuit Court denied his motion to suppress. He attempted to reserve his right to appeal pursuant to Ark. R. Crim. P. 24.3, and argues on appeal that 1) this court should adopt a *de novo* standard of review for search and seizure cases; 2) the totality of circumstances in this case fail to adequately show the informant's basis of knowledge or reliability; and 3) the affidavit failed to demonstrate reasonable cause for a nighttime search. In an unpublished opinion, handed down on February 14, 2001, we held that McCormick failed to strictly comply with the requirements of Rule 24.3(b) of the Arkansas Rules of Criminal Procedure and dismissed his appeal for lack of jurisdiction. On rehearing, McCormick argues that the court of appeals erred in dismissing his appeal. We now grant rehearing, and affirm on the merits in a substituted opinion.

*Rehearing Facts*

On October 16, 1999, McCormick entered a conditional plea that was set aside because of a disagreement in the recommendation. On January 12, 2000, he entered a second conditional plea to the charges. The plea was accepted by the trial court and appellant received a sentence of 300 months in the Arkansas Department of Correction for the conspiracy charge with sixty months suspended, and 360 months of suspended sentence on the simultaneous possession charge.

At the time of the second entry, the trial court asked McCormick, "Do you understand the effect of a guilty plea if I accept it? One, there's no appeal. Second, you cannot withdraw your plea at a later date and be given a trial." McCormick responded, "Yes, sir." The trial court also told appellant, "in addition you waive any objection to errors in this proceeding, *with the exception of the suppression issue which you're preserving under Rule 24.3*, [emphasis added] I believe." Following appellant's counsel's affirmative answer, the trial court asked the prosecutor:

> Now it's my understanding that the defendant will appeal my decision on the suppression issue. What is the state recommending in terms of an appeal bond?

The prosecutor made a recommendation.

The prosecutor's only involvement in the proceeding appears to have been her recommendation of a sentence and her opinion on whether to allow an appeal bond. McCormick then filed a notice of appeal that reflected that he was appealing pursuant to Rule 24.3.

We reasoned, in our February 14, 2001 opinion, that although the trial court observed that it understood appellant would appeal its ruling on the motion to suppress, the record does not reveal that the prosecutor made any comments that demonstrated her consent to the conditional plea, and consequently, because we could not find that McCormick "strictly complied" with the requirements of Rule 24.3(b), we dismissed the appeal for lack of jurisdiction.

*Rehearing Argument*

McCormick argues that the prosecutor's silence must be taken as assent to the statement. Citing *Holifield v. Arkansas Alcoholic Beverage Control Bd.*, 273 Ark. 305, 619 S.W.2d 621 (1981), he analogizes the prosecutor's silence to Arkansas's invited-error doctrine where it is settled law that a party cannot acquiesce in silence and then raise an issue on appeal, and asserts that it is error for this court to raise this argument *sua sponte* on appeal where the State would be barred from raising it. McCormick contends that the court of appeals decision amounts to the imposition of new conditions for making a conditional guilty plea. He argues that the creation of this new procedural default is a "classic violation of due process of law," a violation of equal protection, and a deprivation of his Sixth Amendment right to be heard and assisted by counsel. We agree that to require more of the prosecutor to demonstrate consent amounts to imposing new conditions for making a "conditional guilty plea."

Rule 24.3(b) of the Arkansas Rules of Criminal Procedure reads as follows:

> With the approval of the court and the consent of the prosecuting attorney, a defendant may enter a conditional plea of guilty or *nolo contendre* [*contendere*], reserving in writing the right, on appeal from the judgment, to review of an adverse determination of a pretrial motion to suppress evidence. If the defendant prevails on appeal, he shall be allowed to withdraw his plea.

When Rule 24.3(b) is not strictly complied with, this court lacks jurisdiction to hear an appeal, even when the record reveals that the trial court attempted to enter a conditional plea. *See Ray v. State,* 328 Ark. 176, 178, 941 S.W.2d 427, 428 (1997). It has previously been held that Rule 24.3(b) requires a contemporaneous writing by the defendant, as well as proof that the conditional plea was approved by the trial court with the consent of the prosecuting attorney. *See Barnett v. State,* 336 Ark. 165, 984 S.W.2d 444 (1999).

Rule 24.3 does not specify the manner in which the State is to manifest its consent to the conditional guilty plea, so being present, contesting the objectionable aspects of the disposition of the case, and allowing the plea to be entered as a "negotiated plea of guilty" should be sufficient to preserve the suppression issue for appeal. Obviously, for a "negotiated" plea to exist it requires negotiation, and the only other interested party is the State. In

contract law, manifestation of assent may be made by spoken words or by conduct. *See Childs v. Adams*, 322 Ark. 424, 909 S.W.2d 641 (1995); *see also ERC Mortgage Group, Inc. v. Luper*, 32 Ark. App. 19, 795 S.W.2d 362 (1990) (citing Restatement (Second) of Contracts § 19 (1981)). Here assent was manifested by the prosecutor showing up in court and acquiescing to the entry of the negotiated plea agreement. To hold otherwise would be to give the State the benefit of the bargain while simultaneously relieving it of its obligation to consent. In dismissing this appeal we engaged in improper interpretation of Rule 24.3, liberally construing it *against* the appellant, rather than strictly construing it in favor of him. Accordingly, we grant rehearing and decide this case on the merits.

*Suppression Facts*

On October 14, 1999, McCormick moved to suppress evidence seized pursuant to a nighttime search warrant that was executed on April 30, 1999. He alleged that the warrant was obtained without probable cause.

At the suppression hearing, Detective Danny Halfacre, a nineteen-year veteran of the Washington County Sheriff's Department who was currently assigned as a DEA Drug Task Force officer, testified that on April 26, 1999, he received information from Lyle Johnson, an employee of the Spectrum Chemical Company of Fort Lauderdale, Florida. According to Det. Halfacre, Johnson had been indicted for drug offenses and was working with the DEA to obtain a lighter sentence. Johnson informed the DEA that Richard Osburn of Fayetteville had purchased 500 grams of red phosphorus. Det. Halfacre stated that the amount ordered was unusual; typical orders are either for smaller or much larger amounts. He also found that the order was being sent to a residential address in the name of a business that did not exist at that location. Det. Halfacre testified that while red phosphorus had some legitimate uses in the manufacture of flares, fireworks, or explosive devices, it was also commonly used as a catalyst in the manufacture of methamphetamine. Det. Halfacre learned from Osburn that he had ordered the chemical for McCormick, who was Osburn's methamphetamine supplier. Osburn told him that he had regularly purchased methamphetamine from McCormick over the previous six months, that McCormick had numerous firearms in his residence, and that he had installed surveillance cameras on three sides of McCormick's residence. Based on the information that they obtained from Osburn, Det. Halfacre stated that they sought to

find methamphetamine, a lab or lab components, firearms, records, and formulas, all items commonly associated with manufacturing and delivery of methamphetamine. According to Det. Halfacre, he presented the warrant to Judge Reynolds at approximately 9:30 p.m., the judge signed it after putting him under oath, and the DEA office executed the warrant approximately two hours later. The affidavit was entered into evidence as an exhibit, as was the return with inventory. Among the items seized was a meth lab, various drug recipes, a night-vision device, guns, and ammunition, including so-called "cop-killer" bullets.

On cross-examination, Det. Halfacre stated that when he made contact with Osburn, Osburn was "panic stricken." The detective admitted that Osburn initially insisted that he had ordered the red phosphorus to clean out drains in the apartment complex where he worked as a maintenance man, but "gradually," over the course of the hour that Det. Halfacre spent with him, abandoned that story and admitted that he was procuring the chemicals for McCormick. Det. Halfacre also admitted that he threatened Osburn with jail, but told him that if he cooperated, he would not be arrested and he would ask the prosecutor not to prosecute him. According to Det. Halfacre, Osburn was not an informant, but rather, an unindicted co-conspirator. Det. Halfacre specifically testified that he put in the affidavit the fact that Osburn told him that he had purchased methamphetamine from McCormick the day before.

Judge Ray A. Reynolds testified that he was not concerned about the reliability of Osburn's statements in the affidavit because he admitted to criminal activity, which was a statement against penal interest. He also stated that Det. Halfacre had confirmed the delivery of red phosphorus. Judge Reynolds stated that the affiant, Det. Halfacre, was well known by him, so his credibility was not an issue. He stated, however, that it would be important to him to know whether or not Osburn had made false statements to police, and it would be "nice" to know if Osburn was under the influence of drugs.

*Suppression Argument*

ARGUMENT I: THE ARKANSAS APPELLATE COURTS APPLY THE WRONG STANDARD OF REVIEW TO SEARCH AND SEIZURE ISSUES. THE COURT MUST REVIEW SEARCH AND SEIZURE QUESTIONS *DE NOVO* ON THE HISTORICAL FACTS UNDER THE FOURTH AMENDMENT

McCormick argues that the current standard of review is confusing and incorrectly applied. He contends that the required standard of review is *de novo* with independent review without virtual deference to the trial court's determination. He asserts that instituting *de novo* review in Arkansas search and seizure cases will clarify the law. This argument is without merit.

First, it would necessarily require overruling Arkansas Supreme Court precedent, which the court of appeals is powerless to do. *See Brewer v. State*, 68 Ark. App. 216, 6 S.W.3d 124 (1999). Second, a virtually identical argument was placed before the supreme court last year when this court certified *Stephens v. State*, 342 Ark. 151, 28 S.W.3d 260 (2000), to the supreme court to consider this issue. Although the supreme court found the issue not to be squarely before it because it was raised for the first time in a reply brief, in *dicta*, it nonetheless stated that it did not believe that the current standard of review failed to comport with the U.S. Supreme Court's holding in *Ornelas v. United States*, 517 U.S. 690 (1996). The supreme court declined a similar invitation to change the standard of review in *State v. Howard*, 341 Ark. 640, 19 S.W.3d 4 (2000), which they inexplicably did not reference in *Stephens*. We affirm on point I.

ARGUMENT II: THE TRIAL COURT ERRED IN FAILING TO GRANT THE MOTION TO SUPPRESS BASED UPON THE FACT THAT THE TOTALITY OF CIRCUMSTANCES REFLECTED IN THE AFFIDAVIT FOR THE SEARCH WARRANT IN THIS CASE DID NOT ADEQUATELY SHOW THE INFORMANT'S BASIS OF KNOWLEDGE OR RELIABILITY (VERACITY) OR THAT WHAT WAS DESIRED WOULD BE FOUND

McCormick argues that under *Illinois v. Gates,* 462 U.S. 213 (1983), search warrants based on informant hearsay must demonstrate facts under the totality of the circumstances test showing both the informant's basis for knowing what he claims and why the information is believable. McCormick criticizes the affidavit as containing "self-serving, and therefore, essentially meaningless, comments about what the affiant knows about drug dealers, their habits, banking practices, and possession of records, money, firearms, etc., based on his experience which was regurgitated off a computer hard drive where the officer uses it again and again." Citing Ark. R. Crim. P. 13.1(b), McCormick argues that the affidavit fails to satisfy the requirements of the Fourth Amendment because it does nothing to "set forth particular facts bearing on the informant's reliability and...[to] disclose, as far as practicable, the means by which the information was obtained" or show when he acquired some of the information. McCormick asserts that the mere fact that Osburn was

identified did not make him credible. He also contends that Osburn should not be deemed to be believable because he had a motive to falsify to save him from prison, had made false statements to police, and never "actually" made a true statement against penal interest. McCormick also claims that there was no stated "basis of knowledge" for most of the information except for the fact that Osburn claimed he delivered the red phosphorus and bought methamphetamine from McCormick for the last six months. Finally, McCormick asserts that Judge Reynolds was merely a "rubber stamp for the police." These arguments are without merit.

In reviewing a case involving the suppression of evidence, we make an independent determination based upon the totality of the circumstances and reverse only if the ruling is clearly erroneous or against the preponderance of the evidence. *Fouse v. State*, 337 Ark. 13, 989 S.W.2d 146 (1999). In making this determination, we view the evidence in the light most favorable to the State and determine under our totality-of-the-circumstances analysis whether the issuing magistrate had a substantial basis for concluding that probable cause existed. *Id.* Under Ark. R. Crim. P. 13.1(d), "If the judicial officer finds . . . there is reasonable cause to believe that the search will discover persons or things specified in the application and subject to seizure, he shall issue a search warrant." "Reasonable cause to believe" as defined in Rule 10.1(h) "means a basis for belief in the existence of facts which, in view of the circumstances under and purposes for which the standard is applied, is substantial, objective and sufficient to satisfy applicable constitutional requirements."

We do not find the affidavit to be deficient. It is settled law that the issuing judge was entitled to consider Det. Halfacre's experience when deciding to issue a warrant. *See Flaherty v. State*, 255 Ark. 187, 196, 500 S.W.2d 87, 93 (1973), *cert. denied,* 415 U.S. 995 (1974); *see also Hale v. State*, 61 Ark. App. 105, 111, 968 S.W.2d 627, 630 (1998). In the affidavit, Det. Halfacre stated that, on April 26, 1999, an employee of a chemical company in Florida told him that 500 grams of red phosphorus had been shipped to Osburn's residence and Det. Halfacre knew from his years of experience that red phosphorus was a catalyst in the methamphetamine manufacturing process. When Det. Halfacre contacted Osburn, Osburn told him that he brought the red phosphorus to McCormick's residence on April 28, 1999, and he admitted that he had purchased methamphetamine from McCormick "on a regular basis for six months or more."

Contrary to McCormick's bald assertions, the affidavit established that Mr. Osburn had provided accurate information. The self-incriminating nature of the information was alone sufficient to establish its accuracy. *See, e.g., Maxwell v. State*, 259 Ark. 86, 531 S.W.2d 468 (1976) ("[w]e unhesitatingly find that the mere fact that Hanis' statement was self-incriminating was an adequate basis for according reliability and credibility to the informant"); *Mock v. State*, 20 Ark. App. 72, 78, 723 S.W.2d 844, 848 (1987) ("[t]he incriminating nature of a statement is itself a sufficient basis for finding it to be reliable"). Osburn admitted that he had purchased methamphetamine from McCormick, had purchased the red phosphorus for him, and had installed surveillance cameras at McCormick's residence because McCormick feared a police raid. These admissions could have led to Osburn being prosecuted for possession of methamphetamine. Similarly unpersuasive is McCormick's bald assertion that Osburn had a motive to falsify. He does not explain how false or unreliable information would help Osburn; if anything, it would motivate the police to try to make a case against Osburn. Finally, McCormick's claim that Judge Reynolds was merely a "rubber stamp for the police" is completely baseless. The record indicates that the judge followed all procedures for the issuance of the warrant, and the judge's and Det. Halfacre's testimony that the judge rejected warrants when the affidavit did not articulate sufficient probable cause was uncontraverted. Accordingly, we affirm on point II.

ARGUMENT III: THE AFFIDAVIT FOR SEARCH FAILS TO SHOW REASONABLE CAUSE FOR A NIGHTTIME SEARCH, AND THE SEARCH SHOULD HAVE BEEN SUPPRESSED

Arkansas law allows for search warrants to be executed at night in three circumstances: 1) the place to be searched is difficult of speedy access; 2) the objects to be seized are in danger of imminent removal; or 3) the warrant can only be safely or successfully executed at night or under circumstances the occurrence of which is difficult to predict with accuracy. Ark. R. Crim. P. 13.2(c).

> Except as hereafter provided, the search warrant shall provide that it be executed between the hours of six a.m. and eight p.m., and within a reasonable time, not to exceed sixty (60) days. Upon a finding by the issuing judicial officer of reasonable cause to believe that:
>
> (i) the place to be searched is difficult of speedy access; or

(ii) the objects to be seized are in danger of imminent removal; or

(iii) the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy; the issuing judicial officer may, by appropriate provision in the warrant, authorize its execution at any time, day or night, and within a reasonable time not to exceed sixty (60) days from the date of issuance.

In *Townsend v. State*, 68 Ark. App. 269, 6 S.W.3d 133 (1999), this court stated that an affidavit must set out facts showing reasonable cause to believe that circumstances exist which justify a nighttime search and conclusory language that is unsupported by facts is not sufficient.

In this case the warrant allowed for a nighttime search because the objects to be seized are in danger of imminent removal and because the warrant could not be safely executed during the day. There appears little in the record to support a claim that the objects to be seized were in danger of removal. The affidavit merely states, "It is further believed that the above described illegal items are in danger of being removed from said premises or destroyed." The affidavit gives no reason for this belief. However, support is given for the claim that the warrant could safely be executed only at night. The affidavit stated that Osborn admitted to installing surveillance cameras around appellant's home because he feared a police raid. Osborn's statement that appellant had ordered motion detectors also indicates that appellant was aware that the cameras did not provide sufficient nighttime protection and that he was willing to correct their shortcomings. Moreover, Osborn told the officer that appellant had scattered weapons all over the house.

The question is whether the statement regarding security cameras and guns was sufficient to justify a nighttime search. Two cases are instructive on this point, *Langford v. State*, 332 Ark. 54, 962 S.W.2d 358 (1998) and *Townsend, supra*. In *Langford* the court found sufficient basis where among other claims the defendant was believed armed and dangerous after threatening an informant with a semi-automatic weapon within the past week and the residence to be searched was located on a hill overlooking the only road that provided access to the property. In *Townsend* the court noted that there was legitimate concern for officer safety where the magistrate knew that the house to be searched was located on a cul-de-sac

with only one way for the police officers to approach the house and that there were firearms and a vicious dog present at the house.

In light of *Townsend* and *Langford* there was a sufficient factual basis to support the execution of a nighttime search based on concern for officer safety.

Affirmed.

HART, CRABTREE, BAKER, and ROAF, JJ., agree.

JENNINGS, J., concurs.

PITTMAN, ROBBINS, and GRIFFEN, JJ., would deny.

JOHN E. JENNINGS, Judge, concurring. I agree with the majority's decision to grant rehearing and with its disposition of the case on the merits. I concur separately for two reasons.

First, we need not, and cannot, decide whether the prosecutor's mere presence at the hearing on the guilty plea is enough to establish her consent to the conditional nature of the plea. In the case at bar it is clear that the circuit judge discussed the fact that the plea was conditional. The prosecuting attorney was not only present but made a recommendation as to an appeal bond.

Second, the appellant's criticism of the original panel's decision to raise the issue of the validity of the conditional plea sua sponte is unfounded. While I generally oppose the raising of issues on our own motion,[1] this situation is clearly an exception. Absent strict compliance with Rule 24.3, we have no jurisdiction to hear an appeal from a guilty plea. *Ray v. State*, 328 Ark. 176, 941 S.W.2d 427 (1997); *Simmons v. State*, 72 Ark. App. 238, 34 S.W.3d 768 (2000). When the question is one that goes to our own jurisdiction, we have not only the right but the duty to raise it on our own motion. *State v. Gray*, 319 Ark. 356, 891 S.W.2d 376 (1995).

JOHN MAUZY PITTMAN, Judge, dissenting. I agree with appellant and the majority that, under the facts of this case, Ark. R. Crim. P. 24.3 does not require an affirmative statement of consent from the prosecuting attorney. Therefore, I agree that this court erred in dismissing appellant's appeal for the reason stated in

[1] See my dissent in *In re Estate of Puddy v. Gillam*, 30 Ark. App. 238, 778 S.W.2d 957 (1990).

its original opinion. However, I agree with Judge Robbins that appellant did fail to strictly comply with the Rule's requirement that he reserve in writing his right to appeal the suppression issue. *See Barnett v. State*, 336 Ark. 165, 984 S.W.2d 444 (1999); *Simmons v. State*, 72 Ark. App. 238, 34 S.W.3d 768 (2000). Because I believe that this failure alone requires that appellant's appeal be dismissed, I express no opinion on the merits of appellant's arguments concerning the trial court's denial of his motion to suppress.

JOHN B. ROBBINS, Judge, dissenting. I would deny appellant's petition for rehearing because McCormick failed to strictly comply with Rule 24.3(b), and thus we did not err when we dismissed his appeal after the case was initially submitted. In our unpublished opinion dismissing his appeal we held that there was noncompliance with Rule 24.3(b) because "the record does not reveal that the prosecutor made any comments that demonstrated her consent to the conditional plea." Because of our holding, it was unnecessary to address whether or not McCormick reserved his right to appeal in writing, which is also required by the rule. McCormick failed to adequately reserve his right to appeal in writing, and for this reason alone we lack jurisdiction to hear his appeal.

The record shows that McCormick signed a document entitled "Plea Questionnaire." He checked "yes" to the question, "Do you understand the effect of a plea of guilty to the charges against you, in that there is no appeal and you can't withdraw your appeal later on?" The only indication on the document of any intention to enter a conditional plea was the handwritten notation, "Reserve right to appeal suppression issues." The document was signed by neither the trial court nor the prosecutor.

In *Barnett v. State*, 336 Ark. 165, 984 S.W.2d 444 (1999), our supreme court dismissed the appellant's appeal from a guilty plea in part because a document signed by appellant failed to adequately reserve, in writing, his right to appeal the suppression issue. In that case, the appellant signed a plea statement with the heading, "GUILTY PLEA STATEMENT," with the handwritten word "conditional" above the heading and the handwritten words "per Rule 24.3(b)" beside the heading. However, the supreme court held that there was no strict compliance with Rule 24.3(b) because the statement also reflected that appellant understood that if he pleaded guilty, he would give up various legal rights, including his "right to appeal a verdict against [him] to a higher court for review for possible error made against [him]."

Similarly, in *Simmons v. State*, 72 Ark. App. 238, 34 S.W.3d 768 (2000), we held that the appellant's attempted conditional guilty plea was ineffective to reserve his right to appeal because his "Guilty Plea Statement" explicitly contradicted the notion that his plea was conditional and that he was reserving the right to appeal. In that case, the statement signed by the appellant included a waiver of "[t]he right to appeal from the verdict and judgment, challenging all issues of fact and law." We dismissed the appeal for lack of jurisdiction, notwithstanding the fact that a "Sentence Recommendation" attached to the "Guilty Plea Statement" contained the handwritten statement: "Conditional plea — re suppression — No objection to boot camp. No further charges to be filed. May appeal suppression pursuant to Rule 28 [*sic*] of Arkansas Rules of Criminal Procedure."

In the instant case, as is *Barnett v. State, supra*, and *Simmons v. State, supra*, the writing that purports to reserve appellant's right to appeal also demonstrates that appellant understands that he is waiving that right. In light of this contradiction, it is my view that McCormick failed to strictly comply with Rule 24.3(b) and that his appeal should be dismissed without reaching the merits.

On the merits of McCormick's appeal, I agree with the result reached by the majority.

GRIFFEN, J., joins in this opinion.

Joseph Wayne EADS *v.* STATE of Arkansas

CA CR 00-984 47 S.W.3d 918

Court of Appeals of Arkansas
Division II
Opinion delivered June 27, 2001

*Daniel D. Becker*, for appellant.

One brief only.

ANDREE LAYTON ROAF, Judge. Joseph Wayne Eads was convicted by jury of five counts of incest, found to be a habitual offender, and sentenced to two hundred years in the Department of Correction. 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, Eads's counsel filed a motion to withdraw as his attorney, alleging that this appeal is without merit. Counsel also filed a brief in which he contends that all

adverse rulings were abstracted and discussed. The clerk of this court furnished Eads with a copy of counsel's brief and notified him of his right to file a *pro se* statement of points for reversal within thirty days. Eads did not file a statement. Because Eads's counsel has failed to abstract and discuss all of the adverse rulings in this case, we order rebriefing.

An attorney's request to withdraw from appellate representation on the ground that the appeal is wholly without merit must be accompanied by a brief including an abstract. *Skiver v. State*, 330 Ark. 432, 954 S.W.2d 913 (1997). The brief must contain an argument section that consists of a list of all rulings adverse to the defendant made by the trial court on all objections, motions, and requests made by either party with an explanation concerning why each adverse ruling is not a meritorious ground for reversal. *Adaway v. State*, 62 Ark. App. 272, 972 S.W.2d 257 (1998).

Eads's counsel filed a brief pursuant to his motion to withdraw and submitted that no reversible errors were committed at the trial court level and that an appeal would be wholly without merit. While twelve adverse rulings are abstracted and discussed, counsel did not abstract or discuss four other adverse rulings.

In *Sweeney v. State*, 69 Ark. App. 7, 9 S.W.3d 529 (2000), this court ordered rebriefing in an *Anders* case where the appellant's counsel failed to discuss the sufficiency of the evidence. In so doing, we stated that *Anders v. California* "requires that after an appellant's counsel submits a no-merit brief, this court conduct a full examination of the proceedings to decide if the case is 'wholly frivolous.' . . . We undertake this thorough review of the full record regardless of whether or not the appellant identifies the trial court's errors." *Sweeney, supra.* Several months later, in *Dewberry v. State,* 341 Ark. 170, 15 S.W.3d 671 (2000), the supreme court likewise ordered rebriefing of an *Anders* case where, although the State had "cured" the abstracting deficiencies by supplemental abstract containing the omitted adverse rulings, counsel's argument failed to addressed these rulings. *Id.*

In accordance with this precedent, and because of counsel's failure to comply with Rule 4-3(j), we order rebriefing. However, we note that the United States Supreme Court has stated that an *Anders* brief may be submitted in lieu of a merit appeal only when such an appeal would be "wholly frivolous." This court has also ordered rebriefing in adversary form where we have found that not to be the case. *Tucker v. State*, 47 Ark. App. 96, 885 S.W.2d 904

(1994). The test is not whether counsel thinks the trial court committed no reversible error, but rather whether the points to be raised on appeal would be "wholly frivolous." *Ofochebe v. State,* 40 Ark. App. 92, 844 S.W.2d 373 (1992). If any of the issues raised are not wholly frivolous, we do not determine whether error was committed, but order rebriefing in adversary form. *Id.* Consequently, if an appeal from even one of the sixteen adverse rulings made in the instant case would not be wholly frivolous, the *Anders* procedure should not be employed.

On rebriefing, counsel may elect to either submit a brief in adversary form or one in compliance with Rule 4-3(j) as to all adverse rulings contained in the record.

Rebriefing ordered.

BIRD and BAKER, JJ., agree.

Sean William STARKS *v.* STATE of Arkansas

CA CR 00-1025 49 S.W.3d 122

Court of Appeals of Arkansas
Division II
Opinion delivered June 27, 2001

*John David Myers*, for appellant.

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

ANDREE LAYTON ROAF, Judge. Sean William Starks, a.k.a. Shawn Starks, was convicted in a Pulaski County jury trial of possession of cocaine with intent to deliver for which he was sentenced to forty years in the Arkansas Department of Correction. On appeal, Starks argues that the trial court erred in denying his motion to suppress evidence that was seized without a search warrant. We agree and reverse and remand for a new trial.

At Starks's suppression hearing, Ty Tyrell, a patrol sergeant with the Little Rock Police Department, testified that he was called to a shooting at a residence located at 905 Adams on February 9, 2000, at 8:15 p.m. He stated that upon his arrival, he observed a great deal of broken glass and numerous holes in both the window glass and walls, apparently from bullets entering and exiting the house. According to Sgt. Tyrell, he was met at the front door by an individual named Marcus Allen, who opened the door, pointed

toward the rear of the house, and stated, "He's in the back." Sgt. Tyrell entered the residence and saw Starks, who had been shot in the neck, lying in the doorway of the "back bedroom." Sgt. Tyrell began to "secure" the scene and immediately found a nine-millimeter pistol and several nine-millimeter shell casings. He then found a .40 caliber shell casing, and in the back bedroom he found a "medium" sized cloth pistol case that was unzipped and empty. An infant child was also found in the residence. Sgt. Tyrell stated that after the ambulance arrived and Starks was transported to the hospital, he went back into the back bedroom where he had found the pistol case to search for the .40 caliber pistol. He claimed that he was concerned that children would be reentering the residence and felt that he had to find the gun. According to Sgt. Tyrell, when he reentered the bedroom, he noticed that one corner of the bed was not laying flat. When he investigated, he found a silver shoe box holding up the corner of the bed. He opened the box and found several packages of what appeared to be cocaine and marijuana. He asserted that the box was so full of cocaine that it could not be completely closed.

Sgt. Tyrell stated that when he arrived, only two males, Starks and Allen, and an infant child were in the house. He also testified that he completed "processing the scene" before allowing the family members, which included at least one child, back into the house. The trial judge denied the suppression motion, and Starks proceeded to trial.

Stark's sole argument on appeal is that the trial court erred in denying his motion to suppress evidence seized without a search warrant. He contends that it is uncontroverted that the drugs in question were seized without a warrant, and it is well settled that every warrantless search and seizure is unreasonable unless it is shown that it fits within one of the enumerated exceptions. Starks argues that the purported search for the .40 caliber pistol was not justified pursuant to Rule 14.3 of the Arkansas Rules of Criminal Procedure because this was not a situation in which a delay in finding the gun would result in imminent loss of life or serious bodily injury. He notes that the premises were already secure and only contained police personnel. He also argues that the search was not justified pursuant to Rule 14.4, the plain-sight exception, because Sgt. Tyrell had to reenter the bedroom to find the contraband.

As a threshold issue, citing *Richard v. State*, 64 Ark. App. 177, 983 S.W.2d 438 (1998), and *Ramage v. State*, 61 Ark. App. 174, 966 S.W.2d 267 (1998), the State argues for the first time on appeal that

Starks failed to establish that he had standing to challenge the search. We find that the State's argument is not persuasive.

The rights secured by the Fourth Amendment are personal in nature. *Littlepage v. State*, 314 Ark. 361, 863 S.W.2d 276 (1993). Accordingly, before an appellant can challenge a search on Fourth Amendment grounds, he must have standing. *Id.* Whether an appellant has standing depends upon whether he manifested a subjective expectation of privacy in the area searched and whether society is prepared to recognize that expectation as reasonable. *Id.* There has evolved a line of cases that require an appellant to prove that he has standing to challenge a search. *See, e.g., id.; Whitham v. State*, 69 Ark. App. 62, 12 S.W.3d 638 (2000); *Richard v. State, supra;* and *Ramage v. State, supra.*

We are mindful that this court has held in *Richard v. State* and *Ramage v. State* that it is permissible to raise the issue of standing for the first time on appeal. However, having considered the issue, we cannot say that Starks has failed to establish that he had a subjective expectation of privacy in the residence. In *Davasher v. State*, 308 Ark. 154, 823 S.W.2d 863 (1992), the supreme court stated that an individual does not have standing to contest a warrantless search and seizure if there is no showing that the person owned or leased the searched premises or maintained any control over the premises. *See also Parette v. State*, 301 Ark. 607, 786 S.W.2d 817 (1990). Although Starks did not testify at his suppression hearing, his standing to challenge the search was nonetheless established through Sgt. Tyrell's testimony to the effect that Starks and Allen were in control of the dwelling on the night in question. Under these facts, both Starks and Allen could be found to have standing to challenge the search. Moreover, in *Fouse v. State*, 73 Ark. App. 134, 43 S.W.3d 158 (2001), we held that the State can waive the right to raise a standing challenge on appeal by making affirmative declarations to the trial court that are inconsistent with such a challenge. Here the State also prosecuted Starks for maintaining a drug premises, and pursuing this charge is entirely inconsistent with the position that the State now takes[1]. Furthermore, the instant case is distinguishable from *Richard v. State* and *Ramage v. State,* in that we cannot say from our review of the record as a whole that there

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[1] In pertinent part, the offense of maintaining a drug premises is codified as follows:

> It is unlawful for any person to . . . knowingly keep or maintain any store, shop, warehouse, or other structure or place or premise, which is resorted to by persons for the purpose of using or obtaining these substances or which is used for keeping them in violation of subchapter 1-6 of this chapter.

Ark. Code Ann. § 5-64-402(a)(3) (Repl. 1997).

was no basis for finding that Starks had a subjective expectation of privacy. Indeed, the facts clearly cut the other way in that Crystal Starks, who by the time of the trial had married Starks, testified that, on the night in question, Starks was babysitting their daughter in her residence. She stated that Starks did not live in the house that she was renting, but he was a frequent overnight guest. We therefore reject the State's standing argument and reach the merits of Starks's appeal.

When we review a ruling on a motion to suppress, we make an independent determination based on the totality of the circumstances, viewing the evidence in the light most favorable to the State, and reverse only if the ruling is clearly against the preponderance of the evidence. *Norman v. State*, 326 Ark. 210, 931 S.W.2d 96 (1996). The Fourth Amendment protects an individual's legitimate expectation of privacy against unreasonable searches and seizures, and entry into a dwelling in which an individual has a reasonable expectation of privacy must be viewed as illegal unless the State established the availability of an exception to the warrant requirement. *Wofford v. State*, 330 Ark. 8, 952 S.W.2d 646 (1997).

We find that the police unquestionably were justified in entering the dwelling as Starks lay bleeding on the floor. However, the circumstances changed when Starks was taken away by ambulance. After that point, Sgt. Tyrell's reentry into the back bedroom to look for the .40 caliber gun exceeded the scope of his emergency duties. While Sgt. Tyrell expressed his intention to make the premises safe for small children before he turned it over to the "family members" waiting outside, his motivation did not justify searching the house for a weapon under the supreme court's analysis of the emergency exception discussed in *Wofford v. State, supra.*

Under the emergency exception, a warrantless entry into a home may be upheld if the State shows that the intruding officer had "reasonable cause" to believe that the home contains:

> (a) individuals in imminent danger of death or serious bodily harm; or
>
> (b) things imminently likely to burn, explode, or otherwise cause death, serious bodily harm, or substantial destruction of property; or
>
> (c) things subject to seizure which will cause or be used to cause death or serious bodily harm if their seizure is delayed.

Ark. R. Crim. P. 14.3. Any search that follows the emergency entry may be upheld under this rule only if the search was "reasonably necessary for the prevention of such death, bodily harm, or destruction," *id.*, and is "strictly circumscribed by the exigencies" that necessitated the emergency entry in the first place. *Wofford v. State*, 330 Ark. at 19, 952 S.W.2d at 651. Moreover, there must be a direct relationship between the area to be searched and the emergency. *Id.*(citing with approval *People v. Mitchell*, 347 N.E.2d 607 (N.Y. 1976)). Here, we did not have imminent harm, but rather potential or speculative harm. Sgt. Tyrell was not searching for a time bomb, but rather a firearm, that may or may not be present, and if present, may or may not be loaded, and if present and loaded, may or may not have been later found by a child, who may or may not have been inclined to pick it up and fire it, if she was even physically able to do so. Because Sgt. Tyrell's search of the residence exceeded the scope of the intrusion that was authorized by Starks's need for emergency medical attention, the trial court erred in failing to suppress the evidence seized pursuant to that illegal search. *See Evans v. State*, 33 Ark. App. 184, 804 S.W.2d 730 (1991).

Reversed and remanded.

GRIFFEN and VAUGHT, JJ., agree.

Marion Belew DALRYMPLE *v.* Alwyn DALRYMPLE

CA 00-886 47 S.W.3d 920

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered July 5, 2001

*Tripcony Law Firm, P.A.*, by: *James L. Tripcony* and *Scott A. Scholl*, for appellant.

*Dover & Dixon, P.A.*, by: *M. Darren O'Quinn*, for appellee.

JOHN F. STROUD, JR., Chief Judge. In this appeal, we are asked to review the chancellor's findings regarding the division of property and the allocation of debts in a divorce case. Appellant makes three arguments: 1) that the chancellor erred in ruling that appellee's corporation, Dalrymple Insurance Agency, Inc., was nonmarital property; 2) that the chancellor erred in ruling that the agency's renewal commissions were nonmarital property; and 3) that the chancellor erred in ruling that two bank notes representing approximately $41,000 in debt were marital debts rather than corporate debts. We affirm on the first two points and reverse on the last.

Appellant and appellee were married in June 1987. Approximately thirty years prior to the marriage, appellee founded the Dalrymple Insurance Agency. He operated the business as a sole proprietorship until January 1989, eighteen months into the parties' marriage. In that year, he transferred the assets of the sole proprietorship to Dalrymple Insurance Agency, Inc., in exchange for corporate stock. The stock was issued in his name only.

In the divorce proceeding, filed in 1998, appellant asked the court to declare that the stock of Dalrymple Insurance Agency, Inc., was marital property. Appellee opposed appellant's request on the ground that the stock was acquired in exchange for nonmarital property, *i.e.*, the assets of the sole proprietorship. The chancellor ruled in favor of appellee and declared that the corporation was his separate property. The first issue on appeal is whether the chancellor's ruling was in error.

Our standard of review in chancery cases is well settled. Chancery cases are reviewed *de novo* on appeal. *See Hunt v. Hunt*, 341 Ark. 173, 15 S.W.3d 334 (2000). With respect to the division of

property in a divorce case, we affirm the chancellor's findings unless they are clearly erroneous. *See Jablonski v. Jablonski*, 71 Ark. App. 33, 25 S.W.3d 433 (2000). Due deference is given to the chancellor's superior ability to determine the credibility of the witnesses and the weight to be accorded their testimony. *Hunt v. Hunt, supra.*

Marital property is all property acquired by either spouse subsequent to the marriage, with certain exceptions listed in Ark. Code Ann. § 9-12-315(b) (Repl. 1998). The relevant exception in this case is contained in section 9-12-315(b)(2), which provides that property acquired in exchange for property acquired prior to the marriage is not marital property. Whether this exception applies depends upon whether appellee actually used nonmarital property to acquire the stock of Dalrymple Insurance Agency, Inc.

The facts relevant to the acquisition of the corporate stock are as follows. In 1989, appellee executed a document that assigned his business assets to Dalrymple Insurance Agency, Inc., in exchange for 100 shares of common stock.[1] The corporation's 1989 tax return reflected that, as a result of the exchange, assets valued at $14,568 were received by the corporation. A stock certificate was issued evidencing appellee's ownership of 100 shares in Dalrymple Insurance Agency, Inc. According to appellee, he used no marital assets to purchase the shares of stock.

Appellant argues on appeal that appellee did not prove that he acquired the corporate stock with nonmarital property.[2] She claims first that, in effecting the exchange of assets from the sole proprietorship to the corporation, appellee drew on an account in which marital and nonmarital funds were commingled. She bases her claim on the assertion that, just prior to the marriage in 1987, appellee had only one bank account. She deduces that, as a result, it is likely that business and personal funds were commingled in that one account between 1987 and 1989 and that those commingled funds were later used to acquire the corporate stock. However, appellant's argument is belied by her own testimony that, almost immediately after getting married, she and appellee opened a separate household account. Given that separate business and household

[1] While appellee was only issued one share of *preferred* stock in 1990, the assignment of assets reflects that he was issued 100 shares of common stock in 1989 in exchange for his business assets.

[2] Appellant does not argue that the value of the stock appreciated during the marriage or that she is entitled to a portion of such appreciation.

accounts existed between 1987 and 1989, it would be pure speculation to assume that business and personal funds were commingled in either.

Appellant claims further that appellee's evidence was simply insufficient to sustain his burden of proving that the stock was acquired in exchange for nonmarital property. We disagree. First, appellee testified that he used strictly nonmarital funds to acquire the stock. This testimony was not disputed by appellant. When the issue is whether a source of funds is marital or nonmarital, we defer to the chancellor's superior position to resolve credibility questions pertaining to the issue. *See Wright v. Wright*, 29 Ark. App. 20, 779 S.W.2d 183 (1989). Second, appellee had operated the business as his own for thirty years before he married the appellant. It is therefore unlikely that, by changing the business from a sole proprietorship to a closely held corporation for tax purposes, he intended to change its status from nonmarital to marital property. Third, the stock certificates were issued solely to appellee, a factor considered significant in *Cate v. Cate*, 35 Ark. App. 79, 812 S.W.2d 697 (1991). Fourth, as already discussed, there was no evidence that business and personal funds were commingled. Finally, the assignment and tax documents reflected appellee's intention that the acquisition of stock be accomplished solely by the transfer of business assets. In light of these factors, we affirm the chancellor's decision that the corporation was nonmarital property.

The dissent would have us apply the holding of *Layman v. Layman*, 292 Ark. 539, 731 S.W.2d 771 (1987), and declare that any increase in the value of the corporation became marital property by virtue of appellee's efforts. This point is not argued by appellant. It is well recognized that, if a party fails to make a particular argument on appeal, that argument is considered abandoned. *Texarkana Housing Auth. v. Johnson Constr. Co., Inc.*, 264 Ark. 523, 573 S.W.2d 316 (1978). Any basis for reversing a case on appeal should originate in the arguments advanced by the appellant, not from arguments created by appellate judges.

Appellant argues next that the agency's renewal commissions should have been declared marital property subject to division. At the time of the divorce, Dalrymple Insurance Agency, Inc., was authorized to sell life and disability policies for approximately eight companies. Expert testimony was given at trial to the effect that insurance companies commonly pay renewal commissions to agencies from the second through the tenth years following issuance of the policy, so long as premiums are paid and the policy remains in

force. Appellant's expert determined that the net present value of renewals collectible by the agency through 2008 was $330,094. Appellee's expert determined that the net present value of the renewals was $69,139. The chancellor, however, did not reach the issue of valuation because he found that "Dalrymple Insurance Agency, Inc., and its renewal commissions are non-marital property and [appellant] is not awarded any interest therein."

Having affirmed the chancellor's determination that the corporation was nonmarital property, it follows, under the facts of this case, that the corporation's renewal commissions are likewise nonmarital property. There is no showing that the corporation's assets have any marital-property value, given the fact that the corporation itself is nonmarital property.[3] Further, if the renewals are considered income rather than assets, they are income from property acquired in exchange for property acquired prior to marriage and thus are exempt from the definition of marital property. *See* Ark. Code Ann. § 9-12-315(b)(7) (Repl. 1998).

Appellant argues that such reasoning is faulty because appellee is the sole stockholder of Dalrymple Insurance Agency, Inc., and the corporation's earnings should be deemed his earnings. Appellant is, in effect, asking us to disregard the corporate form and treat appellee and the corporation as one. This is contrary to our law. The fact that one person owns all the stock in a corporation does not make him and the corporation one and the same. *Atkinson v. Reid*, 185 Ark. 301, 47 S.W.2d 571 (1932). A corporation and its stockholders are separate and distinct entities, even though a stockholder may own the majority of the stock. *Thomsen Family Trust v. Peterson Family Enters., Inc.*, 66 Ark. App. 294, 989 S.W.2d 934 (1999). A stockholder does not acquire any estate in the property of a corporation by virtue of his stock ownership; the full legal and equitable title thereto is in the corporation. *Id.*

In special circumstances, we will disregard the corporate facade when the corporate form has been illegally abused to the injury of a third party. *Id.* However, there is no evidence here that appellee abused the corporate form and therefore no basis for us to treat appellee and the corporation as one entity.

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[3] Although a spouse's contribution to an increase in the value of nonmarital property may be considered in making a property division, *see Smith v. Smith*, 32 Ark. App. 175, 798 S.W.2d 442 (1990), the chancellor in this case expressly found that no such contribution was made by appellant, and that finding is not challenged on appeal.

The dissent refers to testimony by appellee that "I," meaning appellee himself, was entitled to commissions from insurance companies. The first-person testimony by the sole shareholder of a corporation is not cause to disregard the corporate form and declare the corporate assets to be his assets.

Based upon the foregoing, we affirm the chancellor's ruling that the renewal commissions are not marital property. In doing so, we do not imply that an insurance agency's renewal commissions may never be considered marital property. Other jurisdictions have recognized that renewal commissions on policies sold during marriage may be considered marital property. *See Pangburn v. Pangburn*, 152 Ariz. 227, 731 P.2d 122 (Ct. App. 1986); *Niroo v. Niroo*, 313 Md. 226, 545 A.2d 35 (1988); *Bigbie v. Bigbie*, 898 P.2d 1271 (Okla. 1995); *Freeman v. Freeman*, 318 S.C. 265, 457 S.E.2d 3 (Ct. App. 1995). We do not reach that issue today, however. Our affirmance of the chancellor's ruling is based upon the particular facts of this case and the particular arguments made by appellant.

The remaining issue is whether the chancellor erred in declaring certain debts to be marital debts rather than corporate debts. In his decree, the chancellor found that the parties had $75,885 in marital debts, which included a $21,000 note to Metropolitan National Bank and a $19,999 note to Mercantile Bank. Appellant was ordered to pay $33,534.50 of the total debt. She argues that the Metropolitan and Mercantile debts should have been assigned to Dalrymple Insurance Agency, Inc., and that the chancellor erred in ordering her to pay any part of them. We agree.

A chancery court has the authority to consider allocation of debt in a divorce case. *Anderson v. Anderson*, 60 Ark. App. 221, 963 S.W.2d 604 (1998). Findings concerning the assignment of marital debts are not reversed unless they are clearly erroneous. *See Grace v. Grace*, 326 Ark. 312, 930 S.W.2d 362 (1996). A chancellor's finding will be deemed clearly erroneous when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Atkinson v. Atkinson*, 72 Ark. App. 15, 32 S.W.3d 41 (2000).

The Metropolitan Bank note reflects that it was executed in 1997 for the purpose of "short-term working capital for business purposes." The borrower was listed as "W. Alwyn Dalrymple and Dalrymple Insurance Agency, Inc." The note bore signature lines for appellee individually and as president of the corporation. It was

renewed in 1998 and stated its purpose as "to renew and increase line of credit ... for operating capital." It was renewed again in 1999 after the parties separated and was changed to remove the corporation's name. However, it still stated that the purpose of the loan was a "line of credit for operating capital." The Mercantile Bank note was executed in 1998. It listed appellee as the borrower and carried the following notation: "[r]enewal/line of credit originally used to carry insurance receivables." Despite the language clearly identifying the notes as pertaining to appellee's business, the agency's office manager, Laura Baldwin, testified that the loans were in fact used for the appellant's and appellee's personal living expenses.

Upon our *de novo* review, we disagree with the chancellor's decision to decide this issue on the basis of testimony that was directly contrary to what was shown on the written instruments. Baldwin's assertion that the bank documents were wrong is not sufficient in this case to contradict the plain language of those documents. We therefore reverse and remand on this point with directions that the Metropolitan and Mercantile notes be assigned to the Dalrymple Insurance Agency, Inc., rather than allocated between appellant and appellee.

Affirmed in part; reversed in part and remanded.

VAUGHT, CRABTREE, and ROAF, JJ., agree.

HART and GRIFFEN, JJ., dissent in part.

JOSEPHINE LINKER HART, Judge, dissenting. Even though the insurance agency was incorporated two years after the marriage and appellant worked full time selling insurance during the twelve years of the marriage, the majority concluded that the corporation was nonmarital property. The majority also reasoned that because "the corporation was nonmarital property, it follows, under the facts of this case," that the renewal commissions from the sale of insurance policies are "likewise nonmarital property."

I respectfully dissent because the majority's opinion is contrary to our supreme court's decision in *Layman v. Layman*, 292 Ark. 539, 731 S.W.2d 771 (1987), which held that passive appreciation of separate property should be classified as separate property, but active appreciation of the property resulting from spousal contribution of substantial effort or skill should be classified as marital property. *See also* Emily Osborn, *The Treatment of Unearned Separate Property at Divorce in Common Law Property Jurisdictions*, 1990 WIS. L. REV. 903,

992 (1990). In *Layman* our supreme court stated, "We conclude that when one spouse makes significant contributions of time, effort and skill which are directly attributable to the increase in value of nonmarital property, as in this case, the presumption arises that such increase belongs to the marital estate." *Layman*, 292 Ark. at 543, 731 S.W.2d at 774. In the case at bar, it is undisputed that appellee was the sole shareholder in the corporation and worked full time during the entire twelve years of marriage in the business. Thus, in my opinion, the increased value of Dalrymple Insurance Agency is marital property.

At issue in this case is whether the chancellor erred by determining that the corporation and the renewal commissions and other residuals from the sale of insurance policies during the marriage was pre-marital property and, therefore, not subject to division. The chancellor's specific statement of the law in open court was as follows: "The burden was on [appellant] to show that there was a significant contribution of capital, time, other resources to give her some sort of interest in the corporation. I don't feel that burden was met." Although that ruling was appealed indirectly, it is contrary to the holding in *Aldridge v. Aldridge,* 28 Ark. App. 175, 177, 773 S.W.2d 103, 104 (1989), which states that "[t]he burden is upon the party who asserts an interest in the property to establish that it is in fact separate property not subject to division." By implication, appellant appealed that ruling by citing as error the court's refusal to divide the stock of Dalrymple Insurance Agency, Inc.

The parties in this case were married in June of 1987, and divorced on February 9, 2000. Prior to and during the marriage, appellee operated a business that sold insurance policies. The business was originally a sole proprietorship that became a closely-held corporation after the marriage and appellee was the sole shareholder.[1] According to appellee's exhibits, there was transferred into the corporation at the time of incorporation a net value of $4,335 (cash in the amount $3,328 and a vehicle with a basis $11,240, and an assumption of an installment note of $10,233). Prior to marriage and thereafter, appellee had only one account, and he deposited $23,000 of his soon-to-be-wife's money into his account and wrote checks to pay his income taxes. Thus, the separate property of appellant and the earnings of the appellee were placed in that account for the duration of the sole proprietorship and transferred

[1] Rather than one hundred shares as stated by the majority, according to the record only one share of stock (preferred only) was tendered to appellee for a consideration of $100 in August of 1990.

to the corporation, which was established after two years of marriage.

Appellee asserts that he had no debts at the time of marriage; however, he also admits that but for appellant's giving him $23,000, he would have had to find financing elsewhere. Based on this admission, it appears that appellee had nothing in his business on the date of marriage other than the difference, if any, between appellant's $23,000 and the tax payment. Furthermore, appellee admits that after eighteen months of marriage, he incorporated the business, and all money in a new corporate account came from the old business account. In this regard he stated, "I did not know whether I could specifically identify any funds in the new account that were acquired prior to marriage." Appellee wholly failed to trace either the $100 payment for the preferred stock or the transferred asset to pre-marital monies. Thus, appellee has failed to establish that the transferred funds constituted a nonmarital asset or that the consideration paid for the stock came from nonmarital funds.

Moreover, it was appellee's work efforts of selling insurance policies during the marriage that generated the renewal commissions, which is the increase in value of the business and the corporation, and is a marital asset subject to division as an asset acquired during a marriage. *See* Ark. Code Ann. § 9-12-315 (Repl. 1998). To hold otherwise is to ignore the principle set out by our supreme court in *Layman*, 292 Ark. at 543, 731 S.W.2d at 773-74 (citations omitted), a case similar to the case at bar, as follows:

> The increase in the value of the nonmarital property, the stock in [Layman's, Incorporated], is attributable in part to the time, effort and skill of [the husband] over an extended period of time. Those endeavors belonging to the marital estate, it follows that [the wife] is entitled to a share in the fruits of such efforts .... We conclude that when one spouse makes significant contributions of time, effort and skill which are directly attributable to the increase in value of nonmarital property ... the presumption arises that such increase belongs to the marital estate.

This rationale is in accord with the general principle that "[w]here the appreciation in the value of separate property during the marriage is the result of efforts of either or both spouses, the appreciation is a marital asset." 75 AM. JUR. 2D *Divorce and Separation* § 511 (1998).

To find that the renewal commissions and other residuals are the property of the corporation and that appellant therefore is not entitled to one half of that value is plainly contrary to the law. Appellee failed to introduce into evidence even one contract to establish that the corporation rather than appellee is the recipient of such residuals. Our law requires that an insurance broker or salesman be licensed. *See* Ark. Code Ann. § 23-64-203 (Supp. 1999). Appellee failed to establish entitlement to the residuals from the sale of the policies in the corporation. In fact, the evidence clearly establishes entitlement to the commissions and residuals in appellee.

Appellee, in describing the renewals and commissions testified, as follows:

> When I refer to a lapse, that means that I do not get any more commissions, renewals or service fees. For example, a Prudential policy that he projected I would get, I think, about $100 a month renewals, lapses this year; that means I won't get anything on it. Additionally, my business is universal life policies in which you reach a point in paying premiums where you pay them out to keep the policy in force for as long as you want; and at that point you quit paying premiums. That means I don't get any more commissions. That's generally the 12 to 15 year area. I guess the guiding light on that is if there are no premiums paid on disability, term insurance, universal life or group insurance, I don't get any renewals. I remember a few years ago, some farmers in south Arkansas were having a difficult time, and they had enough cash in their policies to pay their premiums; so they skipped two or three years. If they didn't pay a premium, I didn't get a renewal commission. I have people do that every year.

The record does not support the chancellor's ruling nor this court's holdings that the commissions and fees from the sale of the insurance policies are the property of the corporation. However, the majority holds that the commissions and residuals are corporate assets and are thus unavailable for distribution without the necessity of piercing the corporate veil. This holding allows the court to ignore the supreme court's decision announced in *McDermott v. McDermott*, 336 Ark. 557, 986 S.W.2d 843 (1999). In *McDermott*, it was determined that attorney's fees earned pursuant to a contingency fee contract made during the marriage is marital property even though the fee is not collected until some time in the future. In my opinion, renewal fees from insurance policies sold during the marriage are similar to an attorney's contingency fee contract

entered into during marriage and is thus a marital asset subject to division.

Accordingly, as in *Layman* and *McDermott*, I would remand with instructions to determine the current fair-market value of the renewal fees, commissions and residuals from the sale of insurance policies and direct that an equal division of that value be made. Also, I would remand with instructions to determine the current fair-market value of the business reduced by the fair-market value of the business at the time of the marriage. The difference would be marital property, which would also be subject to equal division commensurate with Ark. Code Ann. § 9-12-315(a)(1)(A)(Repl. 1998). I agree with the majority in reversing the chancellor's allocation of debts.

GRIFFEN, J., joins.

Doug ADAMS *v.* NATIONSBANK
*f/k/a* Boatmen's Bank of Northeast Arkansas
*f/k/a* Citizens Bank of Jonesboro

CA 00-1365 49 S.W.3d 164

Court of Appeals of Arkansas
Divisions IV and I
Opinion delivered July 5, 2001

*Larry J. Hartsfield*, for appellant.

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

JOHN E. JENNINGS, Judge. In February 1988, Citizen's Bank of Jonesboro sued the appellant, Doug Adams, on a promissory note. In August 1988, the bank[1] obtained a default judgment against Adams for $13,500.00. In the early 1990's a series of garnishment actions were filed, and in 1992 the bank obtained an order directing one of the garnishees to pay it $1,100.00. Although served in each of the garnishment actions, Adams did not respond.

In June 1998, the bank filed a petition for a writ of *scire facias*. Adams was served but filed no response, and an order was entered reviving the judgment. In November 1999, Adams filed a motion to vacate the 1988 judgment on the grounds of insufficient service of process. The trial court denied the motion, and this appeal followed. We affirm the decision of the trial court.

Appellant argues that the original default judgment was void *ab initio* for lack of *in personam* jurisdiction. Arkansas Rule of Civil Procedure 4(d)(8)(A) provides:

> Service pursuant to this paragraph shall not be the basis for the entry of a default or judgment by default unless the record contains a return receipt signed by the addressee or the agent of the addressee or a returned envelope, postal document or affidavit by a postal employee reciting or showing refusal of the process by the addressee. If delivery of mailed process is refused, the plaintiff or attorney making such service, promptly upon receipt of notice of such refusal, shall mail to the defendant by first class mail a copy of the summons and complaint and a notice that despite such refusal the case will proceed and that judgment by default may be rendered against him unless he appears to defend the suit. Any such default or judgment by default may be set aside pursuant to Rule 55(c) if the addressee demonstrates to the court that the return receipt was signed or delivery was refused by someone other than the addressee.

[1] NationsBank, the appellee here, is the successor in interest to the original creditor.

When the circuit clerk's file was examined during the proceedings on the motion to vacate the judgment, it contained the following affidavit signed by the appellee's attorney:

> That service was made upon the Defendant, Doug Adams, by certified mail, return receipt requested, refused and served by first class mail on April 26, 1988. That said first-class letter has not been returned by the Post Office. (Attached hereto as Exhibits "A" and "B" are the original Summons and first-class letter return receipt showing service upon the Defendant.)

The file also contained the following letter from appellee's attorney to the appellant:

> Please be advised that Citizen's Bank of Jonesboro has filed suit against you for the balance due them in the amount of Thirteen Thousand Forty Two and 98/100 Dollars ($13,042.98) paid at the rate of Three and 78/100 Dollars ($3.78) per day. Your refusal to accept the certified letter will not stop the proceedings that have been filed against you. You have twenty (20) days in which to answer the complaint of Citizen's Bank of Jonesboro or a Default Judgment may be entered against you for this debt. If you would like to discuss this matter, please call me at your earliest convenience. Thank you for your cooperation. Sincerely/s/.

The 1988 default judgment recited:

> That service of summons upon the Defendant has been made in the manner and method prescribed by the laws of the State of Arkansas; that the Complaint and summons were served upon the Defendant by restricted delivery mail, refused and served by first class mail personally more than twenty (20) days prior hereto and the Defendant has not answered this Complaint nor filed any pleading herein; that the Defendant is in default; and that this Court has personal jurisdiction over the parties hereto and the cause of action herein.

In its order denying appellant's motion to vacate judgment in 1999, the court found:

> Service of process was had by certified mail effected by counsel for the plaintiff, which service was evidenced by a copy of a letter in the file dated April 26, 1988, directed to Mr. Doug Adams, c/o Jonesboro Fitness Center, 2223 Conrad Drive, Jonesboro, Arkansas, 72401, with pleadings, as evidenced by the affidavit

> of plaintiff's attorney, dated June 16, 1988, filed for record on June 16, 1988, which affidavit reflects service upon the defendant, Doug Adams, by certified mail, return receipt requested, "refused" and service of first class mail and recites that said first class letter has not been returned by the post office and referring to attached original summons, first class letter and return receipt, although no return receipt appears in the file.

Appellant contends that the absence from the clerk's file of a return receipt showing refusal by the addressee renders the default judgment void. Arkansas Code Annotated § 16-65-108 (1987) provides that all judgments rendered without notice, actual or constructive, "shall be absolutely null and void." Finally, appellant relies on *Pile et al. Ex Parte*, 9 Ark. 336 (1849), for the proposition that a judgment obtained without notice, being void, is not converted into a valid judgment by a subsequent writ of *scire facias.*

In the case at bar the required return receipt showing refusal of the certified letter, which is required by Rule 4(d)(8)(A) does not appear in the record. The question then is whether this absence renders the 1988 default judgment void or merely voidable.[2] We conclude that the trial court's determination that the judgment was not "void" was correct.

■ ■ The Arkansas Supreme Court has drawn a distinction between service and proof of service. In *Lyons v. Forrest City Machine Works, Inc.*, 301 Ark. 559, 785 S.W.2d 220 (1990), the court said that failure to make proof of service does not affect the validity of service because proof of service may be made by means other than demonstration on the return of the serving official. In *Webster v. Daniel & Straus*, 47 Ark. 131, 142-43, 14 S.W. 550 (1886), the court observed:

> There is a very clear and obvious distinction between a total want of service of process and a defective service of process, as to their effect in judicial proceedings. In the one case the defendant has no notice at all of the suit or proceeding against him. The judgment or decree in such case, it is conceded is *coram non judice* and void, upon the principles of law and justice. In the other case, the defective service of process gives the defendant actual notice of the suit or proceeding against him, and the judgment or decree in such case,

[2] For a cogent criticism of this traditional distinction see the introductory note to Chapter 5, *Restatement (Second) of Judgments* at pages 143 and 144.

> although erroneous, would be valid until reversed by a direct proceeding in an appellate jurisdiction, and its validity can not be collaterally called in question. And this view of the law is believed to be sustained by reason, principle and authority.

*See also, Raymond v. Raymond*, 343 Ark. 480, 36 S.W.3d 733 (2001) (drawing a distinction between insufficient service and a total lack of service).

In *Frazier v. Merrill*, 237 Ark. 242, 372 Ark. 264 (1963), the court held that:

> [A] judgment of a court of general jurisdiction cannot be collaterally attacked, unless the record affirmatively shows want of jurisdiction, and every fact not negatived by the record is presumed in support of the judgment of a court of general jurisdiction, and where the record of the court is silent upon the subject, it must be presumed in support of the proceedings that the court inquired into and found the existence of facts authorizing it to render the judgment which it did.

*Id.* at 245-46. *See also, Phillips v. Commonwealth Sav. & Loan Ass'n*, 308 Ark. 654, 826 S.W.2d 278 (1992); *Talkington v. Schmidt*, 219 Ark. 333, 242 S.W.2d 150 (1951); *Morgan v. Stocks*, 197 Ark. 368, 122 S.W.2d 953 (1938); *Winfrey v. People's Savings Bank*, 176 Ark. 941, 5 S.W.2d 360 (1928). When a judgment recites that the defendant was "duly served with summons herein as required by law," it must be taken as true unless there is something in the record to contradict it. *Kindrick, Curator v. Capps*, 196 Ark. 1169, 121 S.W.2d 515 (1938); *Austin-Western Rd. Machinery Co. v. Blair*, 190 Ark. 996, 82 S.W.2d 528 (1935); *Love v. Kaufman*, 72 Ark. 265, 80 S.W. 884 (1904).

An overly technical approach to problems such as the one in the case at bar is neither necessary nor advisable. As one commentator has said:

> A judgment rendered without jurisdiction is "void" and has no effect as res judicata or otherwise. ... But a rule that avoids a solemn judgment whenever one of the parties chooses to attack it is a rule asking for trouble. A judgment ought to settle a dispute, and rights and titles derived from a judgment today ought not to be overturned twenty years from now. No society can be stable if judicially secured rights are not secure at all. Courts, having created the rule of voidness, recognized its defects.

Dan B. Dobbs, *The Validation of Void Judgments: The Bootstrap Principle*, 53 VA. L. REV. 1003 (1967). *See also, Knox v. Knox*, 25 Ark. App. 107, 753 S.W.2d 290 (1988). Public policy dictates that there be an end of litigation. *Baldwin v. Traveling Men's Ass'n,* 283 U.S. 522 (1930).

In the case at bar, the defect complained of is one of proof of service as opposed to a lack of the notice required by the United States Constitution. *See Pennoyer v. Neff*, 95 U.S. 714 (1877). Clearly, the language of Rule 4(d)(8)(A) is mandatory and clearly the judgment against the appellant could have been set aside at some stage of the proceedings, but the defect complained of did not render the court's judgment absolutely void.

Here, the trial court concluded that the objection raised by the appellant to the default judgment had been waived. Waiver is the voluntary relinquishment of a known right. *Smith v. Walt Bennett Ford, Inc.*, 314 Ark. 591, 864 S.W.2d 817 (1993). The question of waiver is ordinarily one of fact for the trial court to decide. *Beal Bank v. Thornton*, 70 Ark. App. 336, 19 S.W.3d 48 (2000). Objections to the sufficiency of process can be waived. *See Southern Transit Co. v. Collums*, 333 Ark. 170, 996 S.W.2d 906 (1998). We hold that the trial court's decision that the objection had been waived is not clearly erroneous.

*Meeks v. Stevens*, 301 Ark. 464, 785 S.W.2d 18 (1990), is distinguishable. The holding in *Meeks* is that the trial court acquires no jurisdiction when the return of certified mail is marked "unclaimed" by the postal service. This is a problem of notice, not proof of notice. Beyond this, *Meeks* did not involve the passage of time and the intermittent reliance on the judgment present in the case at bar.[3]

Because we affirm the judgment of the trial court on the basis of waiver, we need not reach the question of estoppel. *See Wallace v. Hale*, 341 Ark. 898, 20 S.W.3d 392 (2000); *Farm Bureau Mut. Ins. Co. v. Campbell*, 315 Ark. 136, 865 S.W.2d 643 (1993); *Storey v. Brewer*, 232 Ark. 552, 339 S.W.2d 112 (1960); Restatement (Second) of Judgments § 66.

Affirmed.

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[3] *See Restatement (Second) of Judgments* § 74.

STROUD, C.J., HART, and CRABTREE, JJ., agree.

BAKER and NEAL, JJ., dissent.

KAREN R. BAKER, Judge, dissenting. Alexander Hamilton rightly argued that "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them...." *The Federalist* No. 78; *Willie Hutcherson v. State*, CA CR 00-645 (May 30, 2001) (J. Hart, concurring).

The majority opinion in this case departs from over 150 years of precedent established by the Arkansas Supreme Court. The majority relies upon the statement in the original judgment that proper service was effected. It further depends upon an affidavit filed in the original default-judgment action by the attorney for appellee containing the following language:

> That service was made upon the Defendant, Doug Adams, by certified mail, return receipt requested, refused and served by first class mail on April 26, 1988. That said first class letter has not been returned by the post office. (Attached hereto as Exhibits A and B are the original summons and first class letter return receipt showing service upon the Defendant.)

In support of their position, the majority states that "[w]hen a judgment recites that the defendant was 'duly served with summons herein as required by law,' it must be taken as true unless there is something in the record to contradict it." The record in this case contradicts the affidavit of the attorney and the finding that the summons was properly served.

A copy of the April 26, 1988, letter was file-marked by the circuit clerk on April 26, 1988. The attorney's affidavit was filed on June 16, 1988. The record contains no return receipt signed by the addressee or the agent of the addressee, no returned envelope, no postal document nor affidavit by a postal employee reciting or showing refusal of the process by the addressee.

Appellant did not answer the complaint nor make an entry of appearance in the proceeding. Subsequently, the trial court entered a default judgment on August 3, 1988. A series of garnishment attempts, one executed garnishment, and a writ of *scire facias* in 1998 followed. The appellant never appeared or answered any of those

actions. Then in 1999, following another garnishment attempt, appellant answered and through counsel asked the trial court to vacate the 1988 judgment asserting it was void *ab initio* for lack of in personam jurisdiction over appellant because no service was effected.

In its order denying appellant's 1999 motion to vacate, the trial court found that service was effected by counsel in the 1988 action as evidenced by the affidavit of appellee's attorney and that appellant had not demonstrated that delivery was refused by someone other than the addressee pursuant to Ark. R. Civ. P. 4(d)(8)(A). However, that finding was clearly erroneous as a matter of law. Rule 4(d)(8)(A), although allowing for service by mail with certain restrictions, specifically imposes an additional protection before a court may enter a default judgment against a defendant who has been served in accordance with this provision: "Service pursuant to this paragraph shall not be the basis for the entry of a default or judgment by default unless the record contains a return receipt signed by the addressee or the agent of the addressee, or a returned envelope, postal document or affidavit by a postal employee reciting or showing refusal of the process by the addressee. . . ." Rule 4(d)(8)(A).

The Arkansas Supreme Court expounded upon the rule's requirement of refusal in *Meeks v. Stevens*, 301 Ark. 464, 785 S.W.2d 18 (1990). The court emphasized that refusal is not passive in character:

> With respect to Rule 4(d)(8)(A), the active nature of refusal is spelled out with care. The record must contain 'a return receipt *signed by the addressee* or the agent of the addressee, or a returned envelope, postal document or affidavit by a postal employee *reciting* or *showing refusal* of the process by the addressee.' Silence or inaction, which elsewhere in the law may be presumed to be token consent, is not, in this instance, equivalent to refusal.

*Id.* at 468, 785 S.W.2d at 20 (emphasis in original).

The *Meeks* court held that "unclaimed" mail returned by the postal department failed to fulfill the rule's requirement of "refusal" of the mailed notice before default may be entered. In reaching their decision, the court focused on the potential deprivation of substantial rights in a default judgment action and the necessity of satisfying due process requirements in that context:

> Though Rule 55 of the Arkansas Rules of Civil Procedure provides for entry of default judgment when a party fails to appear or otherwise defend, the courts have made it abundantly clear that defaults are not favored and this court has so stated. Because of its harsh and drastic nature which can result in the deprivation of substantial rights, a default judgment should only be granted when strictly authorized and when the party affected should clearly know he is subject to default if he does not act in a required manner.

Service of process or a waiver of that service is necessary in order to satisfy the due process requirements of the United States Constitution. Therefore, where sufficient notice of an action has not been given, and a default judgment has followed, a motion to set aside the judgment must be granted. *Id.* at 466-67, 785 S.W.2d at 19-20 (citations omitted).

No one disputes that the record in this case contains none of the evidence required by the rule. Statutory service requirements, being in derogation of common law rights, must be strictly construed and compliance with them must be exact. *Cole v. First Nat'l Bank of Ft. Smith,* 304 Ark. 26, 800 S.W.2d 412 (1990) (citing *Wilburn v. Keenan Cos.*, 298 Ark. 461, 768 S.W.2d 531 (1989)). As the Arkansas Supreme Court emphasized in *Meeks*, this strict compliance is necessary to satisfy due process requirements. "It has long been established that when no sufficient service has been had, the court does not acquire jurisdiction of the person of the defendant." *Meeks* 1301 Ark. at 469, 785 S.W.2d at 21 (citing *Coffee v. Gates and Bro.*, 28 Ark. 43 (1872)).

Appellee's attempted service of process was defective. Even if appellant was aware of the 1988 proceeding, the Arkansas Supreme Court has "made it clear that actual knowledge of a proceeding does not validate defective service of process." *Green v. Yarbrough*, 299 Ark. 175, 771 S.W.2d 760 (1989); *Wilburn v. Keenan Companies, Inc.*, 298 Ark. 461, 768 S.W.2d 531 (1989); *Tucker v. Johnson*, 275 Ark. 61, 628 S.W.2d 281 (1982). Accordingly, the trial court erred in refusing to vacate the default judgment which had been entered based upon the defective service.

Because no notice sufficient to satisfy due process was obtained, the 1988 judgment was void. Void judgments have no legal effect. *Davis v. Office of Child Support Enforcement*, 322 Ark. 352, 357, 908 S.W.2d 649, 652 (1995) (citing *Rankin v. Schofield*, 81 Ark. 440, 98 S.W. 674 (1905)). They are worthless; no rights can be obtained from them and all proceedings founded upon them are

equally worthless. *Id.* Therefore, all subsequent orders, garnishments, attempts at revival, any and all actions flowing from the 1988 judgment are also void.

The majority holds that the trial court properly "concluded that the objection raised by the appellant to the default judgment had been waived." Appellant's objection was that the trial court had no jurisdiction to enter the default judgment. While I agree that it is possible for a party to waive the defense of personal jurisdiction, *see Arkansas Dep't of Human Servs. v. Farris*, 309 Ark. 575, 832 S.W.2d 482 (1992), I find no authority, and the majority cites none, for its proposition that personal jurisdiction is waived by a failure to appear in an action.

If anything, appellant preserved his defense by failing to appear. The majority cites *Raymond v. Raymond*, 343 Ark. 480, 36 S.W.3d 733 (2001), to support its reasoning that the Arkansas Supreme Court would find that the facts of this case merely show a failure to prove service. Yet both the majority and the dissenting opinions in *Raymond* require that we hold the trial court lacked jurisdiction over the appellant and that the default judgment is void.

The *Raymond* majority explained it simply. Service of valid process is necessary to give a court jurisdiction over a defendant. *Id.* A summons is necessary to satisfy due process requirements. *Id.* Statutory service requirements, being in derogation of common-law rights, must be strictly construed and compliance with them must be exact. *Id.* Proceedings conducted where the attempted service was invalid renders judgments arising therefrom *void ab initio*. *Id.* Even actual knowledge of a proceeding does not validate defective process. *Id.*

The dissent's reasoning in *Raymond* also supports that the case at bar be reversed. *Id.* at 489, 36 S.W.2d at 738 (Imber, J., dissenting). Rules 12(b)(5) and 12(h)(1) of the Rules of Civil Procedure clearly set forth the procedure for raising an insufficiency-of-service-of-process defense. *Id. (citing Sublett v. Hipps*, 330 Ark. 58, 63, 952 S.W.2d 140 (1997)). Where a defendant believes that the trial court lacks personal jurisdiction over him because of insufficient service of process, he *may take one of three actions to preserve that defense*: (1) he may file a motion to dismiss the complaint against him for failure to obtain service of process; (2) he may file a responsive pleading in which he asserts the defense of insufficient service; or (3) he *may simply choose not to appear* or to contest jurisdiction. *Id.* (emphasis added).

Therefore, the trial court's decision that appellant's objection had been waived is clearly erroneous as a matter of law.

The majority's reference to "the intermittent reliance on the judgment" has no effect on the trial court's lack of jurisdiction to enter a default judgment in this case. Even a writ of *scire facias* cannot breathe life into a void judgment:

> The legal effect of a judgment on a scire facias, where judgments remain without process or satisfaction, is to remove the presumption of payment arising from lapse of time. It adds nothing to the validity of the former judgment, but simply leaves it as it was when rendered. The scire facias is dependent for its legal existence upon a valid judgment; without it, the whole proceeding, by scire facias, is a nullity. It is, therefore, perfectly immaterial to the merits of this case whether the defendants appeared to the writ of scire facias or not.

*Pile et al.*, 9 Ark. 336, 4 Eng. 336 (1849).

Because the original default judgment is void due to lack of service, I would reverse and remand with instructions to vacate the 1988 judgment and all garnishments and orders entered pursuant to it.

NEAL, J., joins in this dissent.

Regina HISLIP *v.* HELENA/WEST HELENA SCHOOLS

CA 00-1389 48 S.W.3d 566

Court of Appeals of Arkansas
Division III
Opinion delivered July 5, 2001

*Philip M. Wilson, P.A.*, for appellant.

*Roberts, Roberts, & Russell, P.A.*, by: *Mike Roberts* and *Ben Cormack*, for appellee.

JOHN B. ROBBINS, Judge. Appellant Regina Hislip injured her neck when she slipped and fell while working for appellee Helena/West Helena Schools on October 14, 1998. The appellee accepted the injury as compensable, and in February 1999, Mrs. Hislip came under the care of Dr. Gregory Ricca. Dr. Ricca performed cervical fusion surgery on May 26, 1999, which the appellee covered. However, the fusion surgery was unsuccessful and, pursuant to Dr. Ricca's recommendation, Mrs. Hislip wanted to repeat the surgical procedure. The second surgery was controverted by the appellee, and after a hearing, the Workers' Compensation Commission denied Mrs. Hislip's claim for additional medical treatment. Specifically, the Commission ruled that Mrs. Hislip's continued smoking constituted an independent intervening cause, which prolonged her need for treatment in the form of another cervical fusion surgery. Mrs. Hislip now appeals, arguing that the Commission's decision to deny benefits for the subsequent surgery is not supported by substantial evidence. We agree, and we reverse.

■■ Where a claim is denied because the claimant has failed to show entitlement to compensation by a preponderance of the evidence, the substantial-evidence standard of review requires us to affirm the Commission if its opinion displays a substantial basis for the denial of relief. *Stephenson v. Tyson Foods, Inc.*, 70 Ark. App. 265, 19 S.W.3d 36 (2000). In determining the sufficiency of the evidence, we review the evidence in the light most favorable to the Commission's findings, and affirm if they are supported by substantial evidence. *Cooper v. Hiland Diary*, 69 Ark. App. 200, 11 S.W.3d 5 (2000). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.*

Dr. Ricca testified that Mrs. Hislip first presented with neck pain on February 23, 1999. He indicated that fusion surgery eventually became necessary due to bone spurs and a pinched nerve. According to Dr. Ricca, Mrs. Hislip had been a pack-a-day cigarette smoker for fifteen years, and on her first visit he advised her to quit. However, she continued to smoke both before and after the May 26, 1999, surgery, and Dr. Ricca's July 1999 notes indicate that at that time he again advised her to quit.

Dr. Ricca testified that x-rays taken several weeks after the surgery showed that instead of improving, the bones in Mrs. Hislip's neck were deteriorating and collapsing. He further stated that chronic smoking impairs the blood supply to bone and has an adverse effect on the human spine. Dr. Ricca testified that Mrs. Hislip's continuation of smoking cigarettes increased the odds that her fusion would fail. He stated that in his nine years of practice, the only failed fusions that he had performed were on smokers. Dr. Ricca acknowledged that failed fusions can occur for a variety of reasons. However, in the instant case he attributed the failure to Mrs. Hislip's smoking. In this regard, he testified:

> I do not think I can separate whether or not the smoking prior to the surgery or the smoking after the surgery was the major cause. I think that smoking is the major cause of this fusion to fail .... In my opinion a combination of both pre, before the accident and surgery, and post, after the accident and surgery, smoking would be the cause of the failed fusion.

Ms. Hislip testified on her own behalf. She stated that, prior to the surgery, Dr. Ricca advised her that if she stopped smoking it might help her, but also that it might not. She testified that, two weeks before the surgery, she cut her smoking back to a half-pack a day. She continued smoking a half-pack a day until July 1999, when she became aware that the second surgery was being controverted due to an independent intervening cause. Ms. Hislip maintained that Dr. Ricca told her to stop smoking after the fusion surgery failed, but not before.

For reversal, Mrs. Hislip argues that the Commission erred in denying compensation for the second surgery in reliance on Ark. Code Ann. § 11-9-102(4)(F)(iii) (Supp. 1999), which provides:

> Under this subsection (4)(F), benefits shall not be payable for a condition which results from a nonwork-related independent intervening cause following a compensable injury which causes or prolongs disability or a need for treatment. A nonwork-related independent intervening cause does not require negligence or recklessness on the part of the claimant.

Mrs. Hislip notes that, although Dr. Ricca attributed the failed fusion surgery to her smoking, he could not determine the extent to which her pre-operative and post-operative smoking contributed to the failure. Given the evidence presented, Mrs. Hislip submits that the primary cause of the failed surgery was her pre-injury

smoking, which could not have constituted a independent intervening cause. She contends that there was a failure of proof to support the Commission's decision in this regard, and that therefore its decision must be reversed.

In *Davis v. Old Dominion Freight Line Inc.*, 341 Ark. 751, 20 S.W.3d 326 (2000), our supreme court held that the legislature's enactment of Act 796 of 1993 did not change the prior existing law regarding independent intervening causes. In *Broadway v. B.A.S.S.*, 41 Ark. App. 111, 848 S.W.2d 445 (1993), we outlined the test for when an independent intervening cause relieves an employer from liability:

> In *Guidry v. J.R. Eads Constr. Co.*, 1 Ark. App. 219, 669 S.W.2d 483 (1984), we said that the question is whether there is a causal connection between the primary injury and the subsequent disability; and if there is such a connection, there is no independent intervening cause unless the subsequent disability was triggered by activity on the part of the claimant which was unreasonable under the circumstances. One of the circumstances to consider in deciding whether the "triggering activity" was reasonable is the claimant's knowledge of his condition. *See* 1 Larson, *The Law of Workmen's Compensation* § 13.11 (1986).

*Id.* at 114, 848 S.W.2d at 447-48.

In the instant case it is clear that there is a causal connection between the primary injury and the need for the second fusion surgery given that Mrs. Hislip would not have needed the first surgery but for her fall at work. Thus, pursuant to *Broadway v. B.A.S.S.*, *supra*, the Commission's duty was to determine whether Mrs. Hislip's continued smoking triggered the need for an additional surgery, and whether it was unreasonable under the circumstances. We hold that the Commission's opinion does not display a substantial basis for denying the relief sought because the evidence does not support the Commission's finding that Mrs. Hislip's post-accident smoking caused the failed fusion surgery. Thus, we need not address whether or not Mrs. Hislip's decision to continue smoking was unreasonable.

In its opinion, the Commission stated:

> [T]he medical evidence unequivocally reveals that claimant's need for additional medical treatment was caused by claimant's continued nicotine use both prior to and after surgery. As noted by Dr.

> Ricca, if claimant had quit smoking "it would have had a significant difference on the outcome." Although he could not distinguish between the effect of post-operative and pre-operative smoking, Dr. Ricca has consistently and unfailingly opined that smoking was a "significant cause" or "primary cause" of claimant's failed fusion.

The medical proof relied on by the Commission supports a finding that Mrs. Hislip's smoking triggered the need for the second surgery. However, it does not support the more specific finding that her smoking, after her doctor advised her to stop, triggered the need for the second surgery. In fact, the Commission acknowledged that Dr. Ricca could not distinguish between the effect of post-operative and pre-operative smoking on the failed fusion. Dr. Ricca's testimony indicated that he could not determine whether the pre-accident or post-accident smoking was the major cause of the failure. Consequently, the Commission's determination that the need for a second surgery was caused by an independent intervening cause is not supported by substantial evidence.

Reversed and remanded.

GRIFFEN and CRABTREE, JJ., agree.

Wendy A. COLLINS *v.* EXCEL SPECIALTY PRODUCTS

CA 01-102 49 S.W.3d 161

Court of Appeals of Arkansas
Divisions I, II, and IV
Opinion delivered July 5, 2001

*Stephen M. Sharum*, for appellant.

*Hardin, Jesson & Terry, PLC*, by: *J. Rodney Mills* and *J. Leslie Evitts, III*, for appellee.

OLLY NEAL, Judge. Appellant, Wendy Collins, appeals from the decision of the Workers' Compensation Commission, (hereinafter Commission) denying appellant's claim. The Commission adopted the administrative law judge's decision finding that appellant was not performing employment services at the time of her injury. We reverse and remand this case to the Commission for further consideration of appellant's claim in light of our decision last week in *Matlock v. Arkansas Blue Cross Blue Shield*, 74 Ark. App. 322, 49 S.W.3d 126 (2001).

Appellant was employed with appellee, Excel Specialty Products, as a production worker. Her job consisted of carving blocks of beef into beef steaks of sizes by weight as specified by her employer. Her production work included incentive pay for a certain production quota and the employees on her production line were required to clock in and out on a time clock. Appellant and her co-workers were given fifteen-minute breaks in the morning and in the afternoon and a thirty-minute lunch break.

On November 2, 1999, sometime between the morning break and the lunch break, appellant left the production line to go to the bathroom for the purpose of urination. Between the production line and the restroom, appellant suffered a fall sustaining a fracture to her right wrist and arm. This fall and resultant injury occurred while appellant remained "on the clock."

The Administrative Law Judge denied appellant's claim reasoning as follows:

> In the present case, the circumstances surrounding the claimant's alleged injury are not in dispute. The claimant testified that the respondent allowed employees to leave the line and go to the restroom whenever necessary and without "clocking out." She stated that the alleged accident and injury occurred after she had left her work station and while she was actually on her way to the restroom to relieve herself.
>
> Clearly, at the time of her alleged accident and injury, the claimant was not engaged in the performance of any employment tasks which she had been specifically assigned by her employer, nor was she engaged in any activity which would directly benefit or advance the interests of her employer. Nor would her actions be considered inherently necessary for the performance of her required tasks. At most, her actions would only indirectly benefit her employer. Under the Court's ruling in *Harding v. City of Texarkana*, 62 Ark. App. 137, 970 S.W.2d 303 (1998), this is not sufficient to cause the activity to be considered "employment services."
>
> Based upon existing precedent, I am compelled to find that the claimant's alleged accident and injuries occurred at a time when she was not performing "employment services" as required by Ark. Code Ann. § 11-9-102 (5)(B)(iii). Therefore, her alleged injury cannot be considered a "compensable injury" within the meaning of the Act.

[redacted] A "compensable injury" is defined as "[a]n accidental injury causing internal or external physical harm to the body ... arising out of and in the course of employment and which requires medical services or results in disability or death." Ark. Code Ann. § 11-9-102(4)(A)(i) (Supp. 1999). "Compensable injury," however, does not include an "[i]njury which was inflicted upon the employee at a time when employment services were not being performed...." Ark. Code Ann. §11-9-102(4)(B)(iii)(1999). Last week, this court handed down a decision in *Matlock v. Arkansas Blue*

*Cross Blue Shield*, 74 Ark. App. 322, 49 S.W.3d 126 (2001), that sets forth a list of factors to be considered when determining whether an employee is engaged in employment services. Because the Commission did not have the *Matlock* decision at its disposal when deciding whether appellant was performing employment services, we remand this case so that, after considering the factors listed in *Matlock*, the Commission may reconsider its holding that appellant was not engaged in employment services.

Reversed and remanded.

STROUD, C.J. and HART, BIRD, CRABTREE and BAKER, JJ., agree.

PITTMAN, JENNINGS, and ROBBINS, JJ., dissent.

JOHN MAUZY PITTMAN, Judge, dissenting. A cardinal rule of statutory construction is to give effect to the intent of the legislature. To do so we first look at the plain language of the statute and, giving the words their plain and ordinary meaning, construe the statute just as it reads. *Flowers v. Norman Oaks Construction*, 68 Ark. App. 239, 6 S.W.3d 118 (1999). If the language of the statute is not ambiguous and plainly states the intent of the legislature, then we will look no further. *Id.*

Act 796 of 1993 made sweeping changes to the Arkansas workers' compensation law. In so doing, the legislature, with crystalline clarity, expressed its intent to narrow the remedy provided by existing law. The legislature declared that:

> The Seventy-Ninth General Assembly realizes that the Arkansas workers' compensation statutes must be revised and amended from time to time. Unfortunately, many of the changes made by this act were necessary because administrative law judges, the Workers' Compensation Commission, and the Arkansas courts have continually broadened the scope and eroded the purpose of the workers' compensation statutes of this state. The Seventy-Ninth General Assembly intends to restate that the major and controlling purpose of workers' compensation is to pay timely temporary and permanent disability benefits to all legitimately injured workers that suffer an injury or disease arising out of and in the course of their employment, to pay reasonable and necessary medical expenses resulting therefrom, and then to return the worker to the work force. When, and if, the workers' compensation statutes of this state need to be changed, the General Assembly acknowledges its responsibility to do so. It is the specific intent of the Seventy-Ninth

> General Assembly to repeal, annul, and hold for naught all prior opinions or decisions of any administrative law judge, the Workers' Compensation Commission, or courts of this state contrary to or in conflict with any provision in this act. In the future, if such things as the statute of limitations, the standard of review by the Workers' Compensation Commission or courts, the extent to which any physical condition, injury, or disease should be excluded from or added to coverage by the law, or the scope of the workers' compensation statutes need to be liberalized, broadened, or narrowed, those things shall be addressed by the General Assembly and should not be done by administrative law judges, the Workers' Compensation Commission, or the courts.

Ark. Code Ann. § 11-9-1001 (Repl. 1996). The legislature also changed the law so as to require the Commission and the courts to construe the Act "strictly," Ark. Code Ann. § 11-9-704(c)(3) (Repl. 1996), rather than "liberally in accordance with the chapter's remedial purposes" as was the law prior to the 1993 amendment. *Olsten Kimberly Quality Care v. Pettey*, 55 Ark. App. 343, 934 S.W.2d 956 (1996), *aff'd,* 328 Ark. 381, 944 S.W.2d 524 (1997).

Prior to Act 796 of 1993, Arkansas courts had adopted the "personal-comfort doctrine," which provided that employees engaged in acts that minister to personal comfort, such as eating, drinking, sleeping, smoking, or using restroom facilities, do not thereby leave the course of employment so long as they remain within the time and space limits of their employment. *See Lytle v. Arkansas Trucking Services*, 54 Ark. App. 73, 923 S.W.2d 292 (1996). The effect of this doctrine was to render compensable injuries sustained by employees while engaged in these incidental activities. However, Act 796 of 1993 included a new provision that expressly excluded from the definition of "compensable injury" any injury received by an employee at a time when employment services are not being performed. Ark. Code Ann. § 11-9-102(4)(B)(iii) (Supp. 1999). In light of the simultaneous declaration of legislative intent and provision for strict construction of the Act, the inescapable conclusion is that the legislature thereby sought to "hold for naught all prior opinions or decisions" contrary to this provision, including those opinions whereby the personal-comfort doctrine was judicially established and developed.

The case on which the majority opinion turns, *Matlock v. Arkansas Blue Cross Blue Shield*, 74 Ark. App. 322, 49 S.W.3d 126 (2001), states that the express exclusion from the definition of "compensable injury" of any injury received by an employee at a time when employment services are not being performed simply

"reflects the broader requirement that an accident must occur in the course of employment to be compensable." I emphatically disagree. The addition of the employment-services requirement does not merely mirror the preexisting requirement that an injury must be incurred in the course of one's employment to be compensable. Instead, it refines and restricts the definition of "course of employment" to eliminate all activities (such as those ministering to personal comfort) that do not constitute the performance of employment services.

Although the *Matlock* opinion correctly states that the term "employment services" was not defined by the Act, it does not construe the statute just as it reads giving the words their plain and ordinary meaning, *see Flowers v. Norman Oaks Construction, supra,* but instead engages in an arcane discussion of general principles and subsequent case law to arrive at the conclusion that an employee who is on a restroom break is performing employment services within the meaning of the Act. I submit that *Matlock,* and many of the cases cited therein, are nothing more than poorly disguised exercises in the sort of judicial liberalization that the Act expressly condemns and prohibits.

In so saying, I do not mean to imply that I believe that the changes to the Workers' Compensation Law wrought by Act 796 of 1993 are wise, just, or humane. To the contrary, I believe that the revisions embodied in the Act are generally ill-advised and, in some instances, draconian. But the personal thoughts of judges regarding the wisdom of legislation are of no consequence when it comes to deciding what that legislation means. As Chief Justice John Marshall wrote, judicial power is never exercised for the purpose of giving effect to the will of the judge, but instead is always exercised for the purpose of giving effect to the will of the legislature — or, in other words, to the will of the law. *Osborn v. Bank of United States,* 9 Wheat. 738 (1824).

I respectfully dissent.

JENNINGS, J., joins in this opinion.

JOHN B. ROBBINS, Judge, dissenting. I dissent for the same reasons expressed in my dissent in *Matlock v. Arkansas Blue Cross Blue Shield,* 74 Ark. App. 322, 49 S.W.3d 126 (2001).

JENNINGS, J., joins in this opinion.

Keziah G. WATTS *v.* ST. EDWARD MERCY MEDICAL CENTER

CA 00-1222 49 S.W.3d 149

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered July 5, 2001

*Law Offices of Charles Karr, P.A.*, by: *Charles Karr* and *Shane Roughley*, for appellant.

*Pryor, Robertson & Barry, PLLC*, by: *Gregory G. Smith* and *Jacqueline J. Cravens*, for appellee.

OLLY NEAL, Judge. Appellant Keziah G. Watts appeals from the trial court's decision granting appellee summary judgment in her medical malpractice action. In her complaint, appellant alleged that appellee's failure to diagnose her broken hip for three days after she was admitted to the hospital caused a worsening of her injury, additional pain and suffering, and additional medical expenses. After a hearing on appellee's motion for

summary judgment, the trial court concluded that appellant "failed to present any evidence by a qualified medical expert that the delay, if any, was the proximate cause of damage to the plaintiff. Consequently the defendant has failed to meet proof with proof so as to create a genuine issue of material fact." From that ruling comes this appeal. We reverse.

For the most part, the facts of this case are accepted by both parties. Appellant alleges that on Saturday, October 19, 1996, she fell in her home and that after the fall she was unable to walk or stand. Appellant was transported to the appellee's emergency room where she was seen by Dr. Steve Nelson. At the insistence of her son-in-law, appellant was admitted from the emergency room to the hospital. Appellant never underwent a physical examination to determine whether she had a broken hip.

Appellant was to be released on Tuesday, October 22, 1996. As her daughter was helping her to put on her clothes, appellant "yelped" in pain. Appellant told her daughter that her leg was hurting and had been hurting since she was admitted to the hospital. An x-ray was subsequently taken that showed appellant had suffered a broken hip. Appellant was given her first dose of pain medication on October 22, but had to wait approximately three days for surgery because she was taking Coumadin, a blood thinner.

In her complaint appellant alleged that appellee's failure to timely diagnose her broken hip caused damages including medical expenses, injuries, pain and suffering; scars and disfigurement; and care-taking expenses. Appellee subsequently moved for a summary judgment, contending that appellant had failed to provide any expert testimony to prove that any breach of the applicable standards of care by any of appellee's employees was a proximate cause of injuries suffered by appellant. In support of its motion, appellee submitted the deposition testimony of Dr. Gary Edwards. Dr. Edwards testified that assuming that the fracture occurred prior to her admittance to the hospital, the delay from the evening of the 19th until the 22nd when the x-ray was taken, did not in any way cause her fracture to be worse than it would have been if it had been discovered in the emergency room, and that he was not aware of any damages that she suffered or sustained as a result of the delay. Dr. Edwards also testified appellant did not complain to him of any pain prior to the taking of the x-ray.

Appellee also presented the affidavit testimony of Dr. Nils K. Axelsen, an orthopedic surgeon, who stated that there are occasions

where a broken hip does not produce pain. Dr. Axelsen stated that it is not unusual for a patient who has suffered the type of injury as appellant not to experience any initial pain. Notably, the court supported its ruling with Dr. Axelsen's statement that a review of appellant's chart showed no indication that appellant complained of hip or groin pain during her first few days of hospitalization.

Appellant offered her daughter's testimony that appellant told her that her leg had been hurting since the 19th. Further, in deposition testimony, Dr. Steve Nelson testified "...more likely than not that it would be painful... I would think that generally hip fractures are painful."

Summary judgment is appropriate when there is no genuine question of material fact to be litigated. *Wallace v. Broyles*, 332 Ark. 189, 961 S.W.2d 712 (1998). The burden of proving that there is no genuine issue of material fact is upon the movant, and all proof submitted must be viewed favorably to the party resisting the motion. *Wyatt v. St. Paul Fire & Marine Ins. Co.*, 315 Ark. 547, 868 S.W.2d 660 (1997). Once the moving party established a *prima facie* entitlement to summary judgment by affidavits, depositions, or other supporting documents, the opposing party must meet "proof with proof" and demonstrate a genuine issue of material fact. *Sanders v. Bailey Community Human Services Public Facilities Board*, 330 Ark. 675, 956 S.W.2d 187 (1997). On appellate review, we determine if summary judgment was proper based on whether the evidence presented by the movant left a material question of fact unanswered. *Keller v. Safeco Ins. Co. of Am.*, 317 Ark. 308, 877 S.W.2d 90 (1994). Any doubts and inferences must be resolved against the moving party. *Kelly v. National Union Fire Ins. Co.*, 327 Ark. 329, 937 S.W.2d 660 (1997).

The Arkansas Medical Malpractice Act is codified at Ark. Code Ann. §§ 16-114-201 through 209 (1987). In *Blankenship v. Burnett,* 304 Ark. 469, 803 S.W.2d 539 (1991), our supreme court stated:

> Section 16-114-206(a) specifies that in any action for medical injury, the plaintiff must prove the applicable standard of care; that the medical provider failed to act in accordance with that standard; and that such failure was a proximate cause of the plaintiff's injuries.

The statute implements the traditional tort standard of requiring proof that "but for" the tortfeasor's negligence, the plaintiff's injury or death would not have occurred.

We have held that the proof required to survive a motion for summary judgment in a medical malpractice case must be in the form of expert testimony. *Oglesby v. Baptist Medical System*, 319 Ark. 280, 891 S.W.2d 48 (1995). It is simply not enough for an expert to opine that there was negligence that was the proximate cause of the alleged damages. *Aetna Casualty & Sur. Co. v. Pilcher*, 244 Ark. 11, 424 S.W.2d 181 (1968). The opinion must be stated within a reasonable degree of medical certainty or probability. *Montgomery v. Butler*, 309 Ark. 491, 834 S.W.2d 148 (1992).

Our courts have also held, however, that expert testimony is not necessary *per se* in every medical malpractice case. Our law is well-settled that expert testimony is required only when the asserted negligence does not lie within the jury's comprehension as a matter of common knowledge, when the applicable standard of care is not a matter of common knowledge, and when the jury must have the assistance of experts to decide the issue of negligence. *Robson v. Tinnin*, 322 Ark. 605, 911 S.W.2d 246 (1995) (citing *Prater v. St. Paul Ins. Co.*, 293 Ark. 547, 739 S.W.2d 676 (1987)). To emphasize that expert testimony is not required in every medical-malpractice case per se, the court in *Hasse v. Starnes, M.D.*, 323 Ark. 263, 915 S.W.2d 675 (1996) repeated a statement from *Graham v. Sisco*, 248 Ark. 6, 449 S.W.2d 949 (1970), that was quoted in *Davis v. Kemp*, 252 Ark. 925, 481 S.W.2d 712 (1972):

> The necessity for the introduction of expert medical testimony in malpractice cases was exhaustively considered in *Lanier v. Trammell*, 207 Ark. 372, 180 S.W.2d 818 (1944). There we held that expert testimony is not required when the asserted negligence lies within the comprehension of a jury of laymen, such as a surgeon's failure to sterilize his instruments or to remove a sponge from the incision before closing it. On the other hand, when the applicable standard of care is not a matter of common knowledge the jury must have the assistance of expert witnesses in coming to a conclusion upon the issue of negligence.

*Id.* at 926, 481 S.W.2d 712-13.

In this case, expert testimony is not needed to support appellant's argument that she suffered pain from October 19 to October

22. Here all the experts presented by appellee testified that appellant's injury was not worsened by the delay. Drs. Edwards and Axelsen testified that appellant's chart did not indicate that she complained of any pain prior to October 22, but that claim is refuted by the hospital record. The abstract reveals that on October 21, appellant told someone that her left leg and foot were still sore, indicating that she stated that they were sore previously. Moreover, Dr. Axelsen's statement that injuries of the type suffered by appellant do not always cause initial pain does not support the conclusion that appellant did not suffer any pain. Dr. Nelson testified: "...more likely than not that it would be painful... I would think that usually hip fractures are painful." In fact there was no reason for appellant to bring an expert to say that her type of injury sometimes causes initial pain because the opinions of Dr. Nelson and Dr. Axelsen state just that.

■ The evidence in support of this judgment decision comes down to the doctors saying no damage was caused by the three-day wait; appellant stating that she was in pain; her medical records providing some support for this claim; and the opinions of Dr. Nelson and Dr. Axelsen that these types of injuries generally cause pain. We hold a fact question was presented by this evidence, and reverse and remand.

Reversed and remanded.

JENNINGS, ROBBINS and BAKER, JJ., agree.

PITTMAN, J., concurs.

BIRD, J., dissents.

SAM BIRD, Judge, dissenting. I respectfully dissent from the majority opinion because I believe that the trial court was correct in finding that the appellant did not meet proof with proof and in finding that no genuine issue of material fact existed. Therefore, I would affirm the court's grant of appellee's motion for summary judgment.

The issue in this case is whether appellant met her burden of proof in establishing that a genuine issue of fact existed as to whether she suffered any pain as a result of appellee's failure to diagnose her broken hip. The majority argues that she met her burden even though no expert testimony was presented to support

her argument that she suffered pain. I do not agree with the majority opinion's position that it can be assumed that she suffered pain, without any medical testimony to support such a finding.

Proof required to survive a motion for summary judgment in a medical malpractice case must be in the form of expert testimony. *Ford v. St. Paul Fire & Marine Ins. Co.*, 339 Ark. 434, 5 S.W.3d 460 (1999). The expert testimony must be stated within a reasonable degree of medical certainty or probability. *Id.*

In finding that this case should be reversed and remanded, the majority opinion states that a fact question was presented because appellant stated that she was in pain, that her medical records support such a claim, and that two doctors in their depositions stated that "these types of injuries" generally cause pain.

I do not find that the abstract supports those findings. Viewing the evidence in the light most favorable to appellant, as this court must do, I do not find there to be anything in the abstract to suggest that any genuine issue remained. The testimony that appellant suffered pain came from her daughter, who stated that when appellant was getting dressed she yelped in pain. However, the medical records do not reflect that appellant, herself, complained of any hip pain. In fact, as the majority opinion points out, Dr. Edwards testified that she did not complain to him of any pain prior to the taking of the x-ray diagnosing the broken hip. Also, Dr. Axelsen testified that he was not aware of anything in her medical records that indicated that appellant ever complained of any pain. In addition, Dr. Axelsen stated that a broken hip does not always cause pain. Also, Watts's medical records reflect that she did not ask for, nor was she given, any pain medication during the three days preceding the diagnosis of her broken hip.

The majority opinion relies upon case law that states that expert testimony is not needed when the asserted negligence lies within the comprehension of a jury of laymen, such as the failure of a doctor to sterilize his instruments or to remove a sponge from an incision before closing it. I do not agree that expert testimony was not needed in this case. For its proposition that medical testimony was not needed, the majority relies upon *Robson v. Tinnin*, 322 Ark. 605, 911 S.W.2d 246 (1995). However, in *Robson*, the court upheld the trial court's grant of summary judgment, holding that expert testimony was needed to establish negligence. The court then wrote, "[T]he argument assumes that simply because treatment is available for medical injury, it follows that it is negligence for a

medical care provider not to provide the treatment. That is not and has never been the law of medical malpractice."

In the landmark case of *Lanier v. Trammell*, 207 Ark. 372, 180 S.W. 2d 818 (1944), the court held that when expert testimony will shed no light on the issue of medical malpractice alleged in the lawsuit, the testimony is not needed. In that case, the surgeon performing an eye operation failed to sterilize his instruments or wash his hands before performing the surgery. The appellant in that case, who suffered an infection as a result of the surgery, stated that the surgeon was guilty of negligence because of his failure to wash his hands and sterilize his instruments. The court held that expert testimony was not needed because "[t]here was no dispute whatever as to what was the proper course to be pursed by appellant in preparing for and performing the operation." *Id.* at 378, 180 S.W. 2d at 820-21. The court went on to state that "[i]t was not denied that it was necessary and proper for appellant to cleanse his hands thoroughly and to sterilize his instruments. The dispute in this case was as to whether or not appellant followed the course which is conceded to be necessary and proper." *Id.* However, the court noted, "If there could, under the testimony, be any dispute as to the method used in the operation or *in the treatment* of the patient it would be necessary to establish the correct method by expert witnesses ...." *Id.* (emphasis added). Further, this court has held that a jury should not be permitted to speculate whether or not the experts in the practice of their profession have pursued the proper course of procedure. *Id.* at 382, 180 S.W.2d at 822-23 (quoting from *Gray v. McDermott*, 188 Ark. 1, 64 S.W.2d 94 (1933)).

In the case at bar, we do not have a simple question like the one in *Lanier, supra.* Instead, we are faced with the question of whether the doctors treating appellant "pursued the proper course of procedure" and whether their failure to do so caused appellant to suffer pain. Even the doctors, as expert witnesses, disagreed on whether pain is readily associated with a broken hip. Assuming that appellant did suffer pain, the first time it was noted in her medical chart was the day it was diagnosed. And none of the doctors testified within a reasonable degree of medical certainty that appellant suffered pain. As stated above, there was testimony that she did not complain and was not on pain medication during the three days after she was brought to the emergency room.

In summary, we cannot simply assume that appellant suffered pain. Clearly no expert testimony was offered that stated, within a reasonable degree of medical certainty, that appellant suffered pain.

Cartrell Lewan McCOY *v.* STATE of Arkansas

CA CR 00-905 49 S.W.3d 154

Court of Appeals of Arkansas
Division I
Opinion delivered July 5, 2001

*William R. Simpson, Jr.*, Public Defender; *Brett Qualls* and *Steve Abed*, Deputy Public Defenders, by: *Deborah R. Sallings*, Deputy Public Defender, for appellant.

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

LARRY D. VAUGHT, Judge. Appellant Cartrell Lewan McCoy brings this appeal from Pulaski County Circuit Court where he was found guilty of attempted first-degree murder and burglary. In addition, based upon the convictions, the court revoked appellant's 1999 probation that was ordered after he pled guilty to possession of a controlled substance with intent to deliver. Appellant challenges his attempted first-degree murder conviction on the basis that the trial court erred in refusing to instruct the jury on the lesser included offense of attempted second-degree murder. His attorney also contends that there are no meritorious grounds that would support an appeal of the revocation of his probation. We reverse the attempted first-degree murder conviction and remand for a new trial, and we remand for supplementation of the record on the revocation of appellant's probation.

Appellant was charged with attempted first-degree murder and residential burglary. It was alleged that on August 11, 1999, appellant unlawfully entered the home of Rodney Wilson and, acting with the purpose of causing the death of another person, took a

substantial step in a course of conduct intended to culminate in the first-degree murder of Sarah Battung. Based on these charges, the State also filed a petition to revoke his probation in another case where he pled guilty to possession of a controlled substance (cocaine) with intent to deliver.

A jury trial was held on April 12, 2000. The jury found appellant guilty on both charges, and appellant was sentenced to thirty years' imprisonment for attempted first-degree murder and five years' imprisonment and a $5,000 fine for residential burglary. The trial court ordered the sentences to be served consecutively. The trial court heard the revocation case while the jury deliberated during the sentencing phase in the principal case. The parties stipulated that the evidence presented in the principal case could be considered in the revocation proceedings. In addition to that evidence, the State presented the testimony of appellant's probation officer, indicating that the conditions of appellant's probation required him to obey all state laws. Based upon the evidence introduced, the trial court found that appellant violated the conditions of his probation. The trial court sentenced him to fifteen years' imprisonment and ordered that it run concurrently with the other sentences.

*Attempted First-degree Murder Conviction*

Appellant brings this appeal contending the trial court committed reversible error in refusing to give his proffered jury instruction on the lesser included offense of criminal attempt to commit second-degree murder. It is reversible error to refuse to give an instruction on a lesser included offense when the instruction is supported by even the slightest evidence. *Britt v. State,* 344 Ark. 13, 38 S.W.3d 363 (2001). We will affirm a trial court's decision to exclude an instruction on a lesser included offense only if there is no rational basis for giving the instruction. *Id.* Thus, we must determine whether attempted second-degree murder under Ark. Code Ann. § 5-10-103(a)(1) (Repl. 1997) is a lesser-included offense of attempted first-degree murder under Ark. Code Ann. § 5-10-102(a)(2) (Repl. 1997), and, if so, whether there was sufficient evidence to warrant the instruction on attempted second-degree murder.

Arkansas Code Annotated section 5-1-110(b) (Repl. 1997) declares what constitutes a lesser included offense:

> (b) A defendant may be convicted of one offense included in another offense with which he is charged. An offense is so included if:
> (1) It is established by proof of the same or less than all the elements required to establish the commission of the offense charged; or
> (2) It consists of an attempt to commit the offense charged or to commit an offense otherwise included within it; or
> (3) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpable mental state suffices to establish its commission.

In addition, our caselaw has set out these same three basic requirements as essential to a determination of lesser-included-offense status. *Hill v. State*, 344 Ark. 216, 40 S.W.3d 751 (2001) (citing *Byrd v. State*, 337 Ark. 413, 992 S.W.2d 759 (1999); *Brown v. State*, 325 Ark. 504, 929 S.W.2d 146 (1996); *Tackett v. State*, 298 Ark. 20, 766 S.W.2d 410 (1989)). While it seems clear that second-degree murder under Ark. Code. Ann. § 5-10-103(a)(1) is a lesser included offense of Ark. Code Ann. § 5-10-102(a)(2), *see Britt v. State, supra*, the issue of whether attempted second-degree murder is a lesser included offense of attempted first-degree murder under these subsections appears to be an issue of first impression.

Under Ark. Code Ann. § 5-10-102(a)(2), a person commits first-degree murder if "with the purpose of causing the death of another person, he causes the death of another person." Second-degree murder under Ark. Code Ann. § 5-10-103(a)(1) is committed by a person if "[h]e knowingly thacauses the death of another person under circumstances manifesting extreme indifference to the value of human life." A person attempts to commit an offense if he "[p]urposely engages in conduct that constitutes a substantial step in a course of conduct intended to culminate in the commission of an offense whether or not the attendant circumstances are as he believes them to be." Ark. Code Ann. § 5-3-201(a)(2) (Repl. 1997). Section 5-3-201(b) provides:

> When causing a particular result is an element of the offense, a person commits the offense of criminal attempt if, acting with the kind of culpability otherwise required for the commission of the offense, he purposely engages in conduct that constitutes a substantial step in a course of conduct intended or known to cause such a result.

At trial, the State argued that appellant was not entitled to an instruction on attempted second-degree murder because an attempt crime requires a purposeful mental state and second-degree murder requires a knowing mental state. Based on these facts, the State reasoned that one cannot purposely do something that would require a less-than-purposeful mental state. However, the Original Commentary to Ark. Code Ann. § 5-3-201(b) suggests otherwise, providing:

> Subsection 5-3-201(b) makes it clear that, with respect to result oriented offenses, purposeful conduct constituting a substantial step in a chain of events intended or known to be capable of producing a result gives rise to liability if accompanied by the culpable mental state, respecting attendant circumstances, required by the definition of the object offense. This section is necessary to cover situations such as the following: A blows up an occupied building, not intending to cause the death of another person, but knowing or believing in the virtual inevitability of this result. If fortuitously no one is killed, A may nonetheless be prosecuted for attempted second degree murder under § 5-10-103(a)(2) despite the absence of any purpose on his part to cause a death. A's conduct would not be reached under subsection 5-3-201(a)(1) or (2) because of this absence of purpose. Accordingly, to reach this sort of conduct, subsection (b) relaxes somewhat the purposeful conduct requirement common to the Code's inchoate offenses: under § 5-3-201(b) knowledge regarding a result will generate liability when coupled with purposeful conduct.

Thus, under Ark. Code Ann. § 5-3-201(b), attempted second-degree murder requiring a knowing mental state can be a lesser included offense of attempted first-degree murder requiring a purposeful mental state. Here, the evidence at trial supported an instruction for attempted first-degree murder requiring a purposeful mental state. Arkansas Code Annotated section 5-2-203(c) (Repl. 1997) provides that "When acting knowingly suffices to establish an element, the element is also established if a person acts purposely." Thus, appellant, acting with the kind of culpability otherwise required for the commission of second-degree murder, purposely engaged in conduct constituting a substantial step (i.e., getting the gun and firing it into a room full of people) in a course of conduct intended or known to cause such a result (i.e., death).

The State also contends in its brief that attempted second-degree murder is not a lesser included offense of first-degree murder because the proffered instruction required proof of an additional

element — circumstances of extreme indifference — that is not required by attempted first-degree murder. The State cites *Byrd v. State*, 337 Ark. 413, 992 S.W.2d 759 (1999), in support of its argument. There, the supreme court stated that "Second-degree murder pursuant to Ark. Code Ann. § 5-10-103(a)(1) cannot be a lesser included offense of first-degree murder under Ark. Code Ann. § 5-10-102(a)(3) because that second-degree murder charge requires a showing that one knowingly caused the death of another person under circumstances manifesting extreme indifference to the value of human life, an element in addition to the requirements of the statute under which appellant was charged." *Byrd v. State*, *supra* at 427, 992 S.W.2d at 767. The court concluded:

> In the instant case, the information charged appellant with knowingly causing the death of Austin Davis, a person aged fourteen years or younger. The additional language of knowingly causing the death under circumstances manifesting extreme indifference to human life was not charged in the information, and was not required to be proven in order to sustain a conviction for first-degree murder. Because appellant was not so charged, there is no rational basis to justify charging the jury with the lesser offense of second-degree murder.

*Id.* at 428, 992 S.W.2d 767.

*Byrd* is clearly distinguishable. Here, appellant was charged with attempted first-degree murder under Ark. Code Ann. § 5-10-102(a)(2), requiring a purposeful mental state, not first-degree murder under Ark. Code Ann. § 5-10-102 (a)(3), requiring that the actor knowingly cause the death of a person fourteen years of age or younger. The additional language of "circumstances manifesting extreme indifference to the value of human life" found in Ark. Code Ann. § 5-10-103(a)(1) requires that the circumstances must be more dire and formidable in terms of affecting human life. *See Harmon v. State*, 340 Ark. 18, 8 S.W.3d 472 (2000), and *Tigue v. State*, 319 Ark. 147, 889 S.W.2d 760 (1994). Those circumstances, which indicate conduct beyond mere knowledge, are included in the purposeful mental state found in Ark. Code Ann. § 5-10-102(a)(2), but not Ark. Code Ann. § 5-10-102(a)(3), which only requires that the actor knowingly cause the death of another person fourteen years old or younger. We therefore hold that under the facts of this case, attempted second-degree murder under Ark. Code Ann. § 5-10-103(a)(1) is a lesser included offense of attempted first-degree murder under Ark. Code Ann. § 5-10-102(a)(2).

We must now address whether there was sufficient evidence to warrant the instruction on attempted second-degree murder. To be entitled to the instruction, appellant must be able to point to evidence in the record that supports a finding that appellant acted knowingly under circumstances manifesting extreme indifference to the value of human life rather than purposely. While we need not discuss all the evidence presented at appellant's trial, we will identify that relevant proof necessary to decide this issue.

The evidence introduced at trial revealed that appellant and the victim, Sarah Battung, dated for over two years before she broke off the relationship on June 30, 1999. After the break-up, appellant tried to get back together with Battung and continued to call her. She resisted his efforts. On the evening of August 11, 1999, Battung was staying at Rodney Wilson's apartment, when the appellant called repeatedly trying to apologize. Battung hung up on him several times. During one phone call, Battung cursed at appellant and then kissed another man. Appellant became aware of the kiss as a result of the reaction of the others in the apartment, and he threatened to kill Battung. After appellant's telephone calls, appellant's sister, Trineka McCoy, went out on the balcony of the apartment and found appellant sitting in a chair on the balcony. Trineka testified that appellant was "pretty upset" that night. She told him not to come inside, knowing Battung had a no-contact order against him. Appellant entered the apartment and began fighting with two men. Trineka told police after the incident that when appellant entered the apartment he was accusing Battung of sleeping with another man. Battung was walking from the kitchen to the couch when she saw appellant enter the apartment and begin fighting. Battung sat down on the couch and began to dial 911. Appellant asked her whether she was calling the police. When she responded affirmatively, appellant held the gun out in front of him and began shooting.

■ ■ When there is the slightest evidence to warrant an instruction on a lesser included offense, it is error to refuse to give it. *Hill, supra.* Based on the testimony presented at trial, there was some evidence to support a finding that appellant entered the apartment with the purpose to confront Battung or to confront the men he thought she was with, and not necessarily with the purpose to kill Battung. This would support a conclusion that he acted knowingly under circumstances manifesting extreme indifference to the value of human life. The jury had a right to consider that evidence. Therefore, the trial court erred by refusing to instruct the jury on the lesser included offense of attempted second-degree murder.

The State argues that if the attempted second-degree murder is a lesser included offense of attempted first-degree murder and if there was evidence to support an instruction, this court should affirm because appellant's proffered jury instruction did not accurately state the law. Appellant's proffered instruction followed the language of AMI Crim. 2d 501. When a trial court determines that the jury be instructed on an issue, the model criminal instructions shall be used unless the trial court determines that they do not accurately state the law. Webb v. State, 326 Ark. 878, 935 S.W.2d 250 (1996). We find the State's argument unpersuasive because, in the present case, the trial court concluded that the jury should not be instructed on attempted second-degree murder, and thus never addressed the issue of whether AMI Crim. 2d 501 accurately stated the law.

*Revocation of Probation*

On February 3, 1999, appellant pled guilty to possession of a controlled substance (cocaine) with the intent to deliver, a class Y felony. He was sentenced to forty-eight months of probation and fined $300. His driver's license was also suspended for six months. His probationary sentence was conditioned upon his compliance with written rules of conduct, which included a requirement that appellant obey all state and federal laws. The State filed a petition for revocation on October 21, 1999, alleging that he committed the offenses of criminal attempt to commit murder in the first degree and residential burglary during his probation.

The April 12, 2000, trial on the charges of attempted first-degree murder and burglary served as a basis for the revocation. The parties stipulated that the evidence introduced at the trial would also serve as the evidence in support of the revocation. In addition to this evidence, the State presented testimony of appellant's probation officer while the jury deliberated during the sentencing phase of trial.

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, appellant's counsel argues that appellant's appeal of his probation revocation lacks merit; however, appellant's counsel did not file a motion to withdraw. Although our supreme court has held that a petitioner's counsel must file a motion for permission to withdraw as counsel in order to file a no-merit brief, *Blue v. State*, 287 Ark. 345, 698 S.W.2d 302 (1985), this court has held that

> [I]t is not inconsistent with *Blue* to require that when, as in the case at bar, two cases are considered simultaneously by the trial court, one of which results in an appeal that defense counsel considers to be meritorious, and one of which results in an appeal that defense counsel considers to be without merit, the purpose and spirit of Rule 4-3(j) is best served by requiring that appellant be notified of her right to file points on appeal with respect to the 'no-merit' case, notwithstanding that defense counsel has not moved to withdraw from representation of the appellant in both cases.

*Harris v. State*, 72 Ark. App. 227, 234-35, 35 S.W.3d 819, 824 (2000). The no-merit portion of the brief purportedly refers to everything in the record that might arguably support an appeal and contains a statement of the reasons why counsel considers there to be no point that might arguably support an appeal. The State concurs that the appellant's counsel has complied with Rule 4-3(j) and that the appeal has no merit. The clerk of this court furnished the appellant with a copy of his counsel's brief and notified him of his right to file a list of points of appeal. The appellant has not filed such a list of pro se points.

We are not able to reach the merits of this issue, because the notice of appeal only designated specific portions of the record. Specifically, the notice designates "the entire trial record and revocation hearing, including any audio and visual recordings, but excluding voir dire and opening and closing arguments, except for objections during same, as his record of appeal in his case. Also requested is the omnibus hearing held on March 15, 2000." Our review in no-merit cases, pursuant to *Anders v. California*, *supra,* and Rule 4-3(j) of the Rules of the Arkansas Supreme Court and Court of Appeals, requires that we review the entire record for potential error in order to determine whether the appeal is wholly without merit. *Campbell v. State*, 74 Ark. App. 277, 47 S.W.3d 915 (2001). Therefore, in the absence of the entire record, we must return the case to appellant's counsel to supplement the record to include those parts originally omitted, and, if necessary, to file a substituted brief that addresses any objections contained in those parts of the record.

Reversed and remanded in part; and remanded in part for supplementation of the record.

HART and NEAL, JJ., agree.

SUPPLEMENTAL OPINION ON GRANT OF REHEARING

CA CR 00-905 ___ S.W.3d ___

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered August 29, 2001

*William R. Simpson, Jr.*, Public Defender, by: *Brett Qualls* and *Steve Abed*, Deputy Public Defenders, for appellant.

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

LARRY D. VAUGHT, Judge. Appellant petitions this court for rehearing of our decision of July 5, 2001, remanding the appeal of his probation revocation for supplementation of the record. Appellant argues that remand for supplementation of the record pursuant to *Campbell v. State*, 74 Ark. App. 277, 47 S.W.3d 915 (2001), was unnecessary. We agree.

After reviewing appellant's petition, we find that *Campbell* does not apply to this case. Here, unlike *Campbell,* there are two cases consolidated for appeal. One case is a jury trial on charges of attempted first-degree murder and residential burglary, and the other is a petition for revocation of probation, which was based on the attempted first-degree murder and residential burglary charges. The parties stipulated that the evidence introduced at the jury trial would also serve as the evidence in support of the revocation. In our July 5, 2001, opinion, we remanded the revocation case for supplementation of the record, based on *Campbell,* because the record failed to include all of the proceedings, including opening statements, closing arguments, and jury voir dire. *Campbell* did not involve a revocation, but rather a jury trial on a rape charge that resulted in a conviction. The instant revocation proceeding was a bench trial, which was held simultaneously with the jury trial on the charges of attempted first-degree murder and residential burglary. The opening statements, closing arguments, and jury voir dire related only to the jury trial. Because the portions of the proceedings omitted from the record were not relevant to the revocation of probation, they are unnecessary for our review of the no-merit brief filed with respect to the revocation.

The facts pertaining to the revocation and the law with respect to a no-merit brief were addressed in our original opinion, and thus do not need to be restated. From our review of the record and the briefs presented, we conclude that there has been full compliance with Rule 4-3(j) of the Rules of the Arkansas Supreme Court and Court of Appeals and that this appeal is without merit. Accordingly, we affirm the revocation of appellant's probation.

HART, BIRD, NEAL, BAKER, and ROAF, JJ., agree.

Laurie A. WALLS *v.* DIRECTOR, Employment Security Division, and JVA International, Inc.

E 01-50 49 S.W.3d 670

Court of Appeals of Arkansas
Division III
Opinion delivered July 5, 2001

[redacted]

*Otho Walls*, for appellant.

*Phyllis Edwards*, for appellee.

TERRY CRABTREE, Judge. The appellant, Laurie Walls, appeals a decision of the Arkansas Board of Review ("Board") that reversed the Appeal Tribunal's award of unemployment insurance benefits and concluded that she was disqualified from receiving those benefits because she was discharged for misconduct in connection with her work. We reverse and remand for an award of benefits.

Appellant worked for JVA International, Inc., on the "pleater" in the manufacturing area, and in other areas as necessary. Ms. Dora Courville, the employer's human resources director, testified before the Appeal Tribunal that appellant was discharged for absenteeism while still in her ninety-day probationary period. Ms. Courville stated that she and appellant's supervisor spoke with appellant on October 19, 2000, warning her about her attendance. They chose not to terminate appellant at that time. Apparently, appellant was absent the next day, and was then terminated.

The employer's attendance policy states in part that:

> Employees can help by notifying their Supervisors in advance when they know they must be absent or late. An employee is required to call his/her Supervisor promptly if unforseen circumstances will cause the employee to be absent or late. Call your Supervisor as soon as possible. This will enable the Supervisor to keep the department running smoothly. Absenteeism or tardiness beyond one (1) occurrence average per month for six (6) months without proof of illness will automatically lead to termination.

Ms. Courville stated that appellant did not provide doctor's statements for every day she was absent. Further, Ms. Courville testified that appellant's mother notified the employer by telephone on October 10, 2000, that appellant was absent due to illness, but that

the employer was not told that appellant would be absent the following day. Ms. Courville noted that appellant did not provide any information from her doctor which would give the employer notice of the severity of her medical problem.

Appellant testified that all of her absences from work, except one absence due to her son being sick, were due to her own illness. She said she was experiencing abdominal cramping and swelling, and it was eventually determined that she had an infected gall bladder. Appellant stated that her mother telephoned the employer from the doctor's office on October 10, 2000, to advise that appellant was sick and undergoing tests, and that appellant would not be at work on October 11, 2000, because she was to undergo a medical test. Appellant acknowledged that she did not provide a medical excuse for every absence, but stated that she had no insurance and could not always afford a physician. Appellant stated that she probably could have telephoned her doctor to obtain an extension to her medical excuses, but that she was under the impression that consecutive days of absence were considered one incident.

Our scope of appellate review is well settled:

> 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.

*Love v. Director*, 71 Ark. App. 396, 399, 30 S.W.3d 750, 752 (2000). The statutory authority on which the Board relied in denying appellant benefits was Ark. Code Ann. § 11-10-514(a)(1)-(2) (Supp. 1999). Ark. Code Ann. § 11-10-514(a)(1) provides that "an individual shall be disqualified for benefits if he was discharged from his last work for misconduct in connection with his work." Ark. Code Ann. § 11-10-514(a)(2) provides that "in all cases of discharge for absenteeism, the individual's attendance record for the twelve-month period immediately preceding the discharge and the reasons for the absenteeism shall be taken into consideration for purposes of determining whether the absenteeism constitutes misconduct." 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]iscoduct 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.

In the case at bar, we hold that the Board's finding that appellant was discharged from her last work for misconduct is not supported by substantial evidence. The Board found that appellant violated the employer's written policy requiring notice of absences, and that this constituted misconduct. It is true that appellant violated the employer's written policy requiring notice of absences. However, we hold that there is no evidence that appellant ever intentionally violated the rules so as to manifest wrongful intent or evil design. As such, we reverse and remand this case for an award of benefits.

Reversed and remanded.

ROBBINS and GRIFFEN, JJ., agree.

WAL-MART STORES, INC.,
and Claims Management, Inc. *v.* Judy STOTTS

CA 00-1468 49 S.W.3d 667

Court of Appeals of Arkansas
Division III
Opinion delivered July 5, 2001
[Substituted opinion upon denial of petition for rehearing
issued October 10, 2001]

[redacted]

*Mike Roberts* and *J.R. Wildman*, for appellant.

*John Bartlett*, for appellee.

TERRY CRABTREE, Judge. The appellants, Wal-Mart Stores, Inc. ("Wal-Mart"), and Claims Management, Inc., appeal from an order of the Arkansas Workers' Compensation Commission in which the Commission affirmed an Administrative Law Judge's (ALJ) finding that appellee, Judy Stotts, sustained a compensable injury. Appellee is employed in the accounting department of appellant, Wal-Mart. On September 10, 1999, while going to the back of the store to get supplies, appellee slipped on some water on the floor in front of the shoe department and fell on her face and left leg. Appellee sustained a busted lip and a visible bruise on her leg. Immediately after the fall, claimant began limping. Appellee continued working and did not seek medical treatment until October 6, 1999. Appellee has continued to work at all times. Appellee was examined by Dr. David Thrash, a chiropractor, who examined and x-rayed appellee. Appellee learned from Dr. Thrash that her problems were due to a back injury. One of Dr. Thrash's findings was that appellee suffered a lumbar subluxation. Appellee notified management that she required medical treatment. Appellee was then sent to Dr. James Meredith, at the request of Wal-Mart. Dr. Meredith diagnosed an acute lumbar strain and prescribed medications. Appellee then requested a change of physician. Appellants then controverted the claim in its entirety.

The ALJ found that on September 10, 1999, appellee sustained a compensable injury established by medical evidence supported by objective findings, that appellee's medical treatment was causally related to her September 10, 1999, injury, that the change of

physician provisions do not apply, and that there were no violations of appellant's due process rights with respect to the Medical Cost Containment Division's order of a change of physician prior to a determination of compensability. The Commission affirmed the ALJ's findings. Appellant appeals, arguing that there was not sufficient evidence to support the Commission's decision. We affirm.

When reviewing a decision of the Arkansas Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission and affirm that decision if it is supported by substantial evidence. *Clark v. Peabody Testing Serv.*, 265 Ark. 489, 579 S.W.2d 360 (1979). Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion. *Crossett Sch. Dist. v. Fulton*, 65 Ark. App. 63, 984 S.W.2d 833 (1999). 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). In making our review, we recognize that it is the function of the Commission to determine credibility of witnesses and the weight to be given their testimony. *Stephens Truck Lines v. Millican*, 58 Ark. App. 275, 950 S.W.2d 472 (1997).

Appellants argue that the Commission erred in finding appellee sustained a compensable injury as appellee failed to present medical evidence supported by objective findings. "A compensable injury must be established by medical evidence supported by 'objective findings.' " Ark. Code Ann. § 11-9-102(4)(D) (Supp. 1999). "Objective findings are those findings which cannot come under the voluntary control of the patient." Ark. Code Ann. § 11-9-102(16)(A)(I) (Supp. 1999). Objective medical evidence is necessary to establish the existence and extent of an injury but not essential to establish the casual relationship between the injury and work-related accident. *Wal-Mart Stores, Inc. v. VanWagner*, 337 Ark. 443, 990 S.W.2d 522 (1999).

In the present case, Dr. Thrash reported that appellee was "x-rayed and examined," and he diagnosed her with lumbar subluxation. A subluxation is a "partial dislocation." WEBSTER'S COLLEGIATE DICTIONARY 1175 (9th ed. 1991). Obviously, a dislocation cannot come under the voluntary control of a patient. Although not specifically stated in his report, it is implicitly clear that Dr. Thrash based his diagnosis on abnormalities observed in the x-ray results. Results of x-ray diagnostic studies are "objective findings" for purposes of the Workers' Compensation Act. *Smith v. County Market/Southeast Foods*, 73 Ark. App. 333, 44 S.W.3d 737

(2001). We, therefore, hold that there was substantial evidence to support the Commission's finding that appellee presented medical evidence supported by objective findings.

Next, appellants argue that the Commission erred in finding appellee's alleged injury was causally related to her work-related incident. A "compensable injury" is one "arising out of and in the course of employment . . . ." Ark. Code Ann. § 11-9-102(4)(A)(i). Thus, in order to prove a compensable injury appellee must prove, among other things, a causal relationship between the injury and the employment. *McMillan v. U.S. Motors*, 59 Ark. App. 85, 953 S.W.2d 907 (1997). It is not essential that the causal relationship between the accident and the disability be established by medical evidence. *Crain Burton Ford Co. v. Rogers*, 12 Ark. App. 246, 674 S.W.2d 944 (1984). There will be circumstances where medical evidence will be necessary to establish that a particular injury resulted from a work-related incident but not in every case. *Wal-Mart Stores, Inc. v. VanWagner, supra.* "On the case as a whole, 'if the claimant's disability arises soon after the accident and is logically attributable to it, with nothing to suggest any other explanation for the employee's condition, we may say without hesitation that there is no substantial evidence to sustain the commission's refusal to make an award.' " *Min-Ark Pallet Co. v. Lindsey*, 58 Ark. App. 309, 950 S.W.2d 468 (1997) (quoting *Hall v. Pittman Constr. Co.*, 235 Ark. 104, 357 S.W.2d 263 (1962)). The ALJ found that "the claimant's credible testimony, together with the observations of supervisory personnel that claimant began limping immediately after the September 10, 1999, slip and fall, together with the medical opinion on record clearly establishes the causal connection." We agree, and hold that there was substantial evidence to support the Commission's finding that appellee's need for medical treatment beginning October 7, 1999, was directly and causally related to the September 10, 1999, admitted incident.

Finally, appellants argue that the Medical Cost Containment Division's decision to grant a change of physician exceeded its authority and violated their constitutional rights. Appellants assert that after they controverted appellee's claim, the Medical Cost Containment Division granted appellee a change of physician without a hearing, and such a decision violated their constitutional right to due process. The Commission affirmed the ALJ's finding that there had been no violation of appellants' constitutional rights. Clearly, after a hearing on compensability was held, appellants would not have been responsible for Dr. Thrash's medical treatment if it was determined that appellee's injury was not compensable. Thus, we hold that appellants' constitutional rights were not violated. Appellants further assert that only ALJs or referees can order an award of a change of physician, and thus the Medical Cost

Containment Division was without authority to order such an award. We hold that this argument is without merit as appellants initially accepted appellee's claim as compensable, and even helped appellee fill out a change-of-physician form. Thus, appellants acquiesced to the change. Further, Ark. Code Ann. § 11-9-514(2)(B) (Supp. 1999), provides that if a claimant desires a change of physician to a chiropractic physician the claimant may make the change by giving advance written notification to the employer. In this case, appellee gave appellants advance written notice of her desire to change to Dr. Thrash. Therefore, the Commission committed no error.

Affirmed.

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

PITTMAN, J., dissents.

JOHN MAUZY PITTMAN, Judge, dissenting. The appellant has petitioned for rehearing in this case, arguing that we erred in holding that the mere diagnosis of an injury satisfied the claimant's burden of establishing a compensable injury by objective findings. I think that the petition should be granted.

In our original opinion in this case we stated that:

> *Appellants argue that* the Commission erred in finding that appellee sustained a compensable injury as *appellee failed to present medical evidence supported by objective findings.* "A compensable injury must be established by medical evidence supported by 'objective findings.' " Ark. Code Ann. § 11-9-102(4)(D)(Supp. 1999). "Objective findings are those findings which cannot come under the voluntary control of the patient." Ark. Code Ann. § 11-9-102(16)(A)(i) (Supp. 1999). Objective medical evidence is necessary to establish the existence and extent of an injury but not essential to establish the causal relationship between the injury and work-related accident. *Wal-Mart Stores, Inc. v. VanWagner*, 337 Ark. 443, 990 S.W.2d 522 (1999). In the present case, *Dr. Thrash diagnosed appellee with "lumbalgia, radiculitis, lumbar subluxation." Dr. Thrash's report contained no qualifying words, such as, maybe, or possibly, regarding appellee's injury.* Dr. Thrash simply found that appellee had suffered the injuries. *We hold that Dr. Thrash's report constitutes substantial evidence supporting the Commission's finding that appellee sustained a compensable injury.*

*Wal-Mart Stores, Inc. v. Stotts*, 74 Ark. App. 428, 431, 49 S.W.3d 667, 669 (2001) (emphasis supplied).

This opinion could not stand. The appellants posed one question (whether the medical evidence was supported by objective findings), and our opinion answered a different question (whether Dr. Thrash's opinion was stated to a reasonable degree of medical certainty). Clearly, a medical opinion in the form of a diagnosis is not itself an objective finding.[1]

Our substituted opinion on denial of rehearing is a modest improvement in that the majority now answers the question that appellants actually posed. With respect to whether the Commission's finding of a compensable injury was based on medical evidence supported by objective findings, the majority now writes that:

> Dr. Thrash reported that appellee was "x-rayed and examined," and he diagnosed her with lumbar subluxation. A subluxation is a "partial dislocation." Obviously, a dislocation cannot come under the voluntary control of the patient. Although not specifically stated in his report, it is implicitly clear that Dr. Thrash based his diagnosis on abnormalities observed in the x-ray results. Results of x-ray diagnostic studies are "objective findings" for purposes of the Workers' Compensation Act. We therefore hold that there was substantial evidence to support the Commission's findings that appellee presented medical evidence supported by objective findings.

There is a lot going on in this paragraph, and it will be helpful to break it down into its component parts for analysis. First, the facts:

1) Appellee was x-rayed and examined by Dr. Thrash.
2) Dr. Thrash diagnosed appellee with lumbar subluxation.
3) Dr. Thrash did not say what the x-ray results were.
4) Dr. Thrash did not say that his diagnosis was based on the x-ray results.

Next, the analysis:

1) Dr. Thrash took an x-ray before making his diagnosis. Therefore, his diagnosis was based on the x-ray results.

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[1] The only other "objective findings" which the Commission mentioned were an injured lip and a bruised leg. Although those observations are objective findings of an injured lip and bruised leg, they are not objective findings to support the existence or extent of the *back injury* at issue in this case.

2) X-ray results are objective findings. Therefore, the Commission properly found that appellee presented medical evidence supported by objective findings.

Although I think that the majority's substituted opinion is an improvement over the original opinion issued in this case, I must nevertheless dissent because the substituted opinion's conclusion is based on flawed logic. The crux of the majority's analysis is the conclusion that Dr. Thrash's diagnosis was based on the x-ray results. This conclusion is based solely on the fact that Dr. Thrash took x-rays before making his diagnosis. This conclusion confuses chronology with causality. It is, in fact, a classic example of the logical fallacy *post hoc, ergo propter hoc* (after this, therefore because of this), a leap to an unjustified conclusion based on the assumption that, because one thing preceded another, the former caused the latter. We have characterized this fallacy as a "legal heresy," and held that *post hoc ergo propter hoc* is not sound as evidence or argument. *Wirth v. Reynolds Metals Co.*, 58 Ark. App. 161, 947 S.W.2d 401 (1997).

Because the result obtained in the substituted opinion is based on nothing more than speculation that the x-ray test conducted by Dr. Thrash resulted in objective findings that were relied upon by that chiropractic physician in making his diagnosis, I must respectfully dissent.

Victor Mature JACKSON *v.*
EL DORADO SCHOOL DISTRICT

CA 00-859 48 S.W.3d 558

Court of Appeals of Arkansas
Divisions IV, I, and II
Opinion delivered July 5, 2001

*Mitchell, Blackstock, Barnes, Wagoner & Ivers*, by: *Emily Sneddon*, for appellant.

*Compton, Prewett, Thomas & Hickey, P.A.*, by: *William I. Prewett*, for appellee.

ANDREE LAYTON ROAF, Judge. Victor Mature Jackson appeals from an order of the Union County Circuit Court affirming his dismissal by the El Dorado School District, hereinafter "the District." On appeal, Jackson argues: 1) the circuit court erroneously applied a substantial compliance standard rather than strict compliance; 2) the District failed to comply with the law requiring a "simple but complete statement of the reasons" for a termination recommendation; and 3) the District failed to vote on the truth of each reason given to Jackson in support of the recommended termination. We conclude that the District failed to strictly comply with the procedural requirements of the Arkansas Teacher Fair Dismissal Act (ATFDA), and therefore, this case must be reversed.

Jackson had been a teacher with the District for twenty-two years. On February 3, 1999, a front-page article appeared in the local paper stating that Jackson had been arrested for theft by receiving and simultaneous possession of drugs with intent to deliver and handguns. The article also stated that police confiscated from Jackson's residence a quantity of marijuana, ten handguns, at least four "long guns,"and other consumer goods including televisions, VCRs, lawnmowers, and automobile parts and accessories.

The El Dorado Police Department prepared an incident report, dated February 2, 1999, that recited that Jackson's offenses were "theft by receiving" and "simultaneous possession of controlled substances w/int. to del/ handgun." In a section listing "types of criminal activity (max 3)," buying, distributing/selling, and possessing/concealing, were checked. A narrative by Detective Dykes recited that Jackson had consented to the search of his residence on February 2, 1999, and that a quantity of weapons and drugs were discovered in the search.

The day after the article appeared, the superintendent and another school official met with Jackson to discuss the charges in

the incident report. At the meeting, the superintendent gave Jackson a letter styled: "Notice of Termination and Suspension," notifying him of his immediate suspension as a teacher, and advising him that the superintendent would recommend to the school board that Jackson be terminated for the reasons stated in the police incident report and the February 3, 1999, newspaper article. Copies of the incident report and article were attached to the letter.

The District provided Jackson with a hearing before the school board on March 23, 1999. In a transcript of the school-board meeting that was made a part of the later hearing in circuit court, Detective Randy Dodd testified that after the department had received complaints about Jackson selling drugs and exchanging property for money, they approached Jackson at school and he admitted that he was running a loan business. They accompanied Jackson to his residence where he consented to a search, and they found a defaced handgun, a quantity of consumer merchandise, numerous cases of beer, and a bowl of "dime" bags of marijuana in plain view in a storage room. Detective Dodd stated that Jackson admitted that he had been running a pawn business for four years, but wanted to consult with an attorney before discussing the marijuana. Ultimately Jackson gave a statement to Detective Sgt. Phillips in which he admitted that he was selling drugs. The police department could not make a case that the pawned items were stolen and ultimately they were returned to Jackson. Jackson admitted that he did not have a pawn license, but claimed that he was unsure whether he needed one. Detective Dodd also testified that he had reports that someone was selling beer for Jackson on Sunday, but that investigation of that offense was outside the department's jurisdiction.

Doyle Woodall, principal at Northwest Elementary where Jackson taught, testified that he had to "talk to" Jackson about complaints of people "coming and going" on campus. Jackson's attorney objected to the presentation of "write-ups" concerning Jackson's visitors as being outside of what was contained in the notice, and the board was admonished not to consider them.

Jackson's brother, Grady Wayne Christopher, stated that he owned the marijuana found at Jackson's house and used it to manage his pain. Jackson admitted to operating what he called a "loan company,"denied knowing that the defaced firearm was defaced, claimed he did not know that there was marijuana in his store room, stated that his firearms were locked up, denied making the statement to Sgt. Phillips, claimed he bought the beer from an

acquaintance who had bought it on a credit card and needed cash and that he sold it to friends who came to his house to watch ball games on his big-screen TV. Jackson admitted that he pled guilty to two of the criminal charges filed against him, operating a pawn shop without a license, and possession of a defaced firearm. Jackson was acquitted of the charge of possession of a controlled substance with intent to deliver.

At the conclusion of the hearing, the school board went into executive session and discussed the evidence. When it returned to regular session, the board voted six-to-two to terminate. Subsequently all board members signed a letter dated March 30, 1999, that recited the evidence presented at the March 23 hearing and stated in pertinent part that "the Board found the reasons as contained in the notice to you ... to be true and by a vote of six to two terminated your contract effective immediately." The letter further stated that:

> Specifically, the Notice states that if the charges as reported in the front page article of the *El Dorado News Times* dated February 3, 1999, are true, then cause exists for your termination in the District. The Board specifically finds that you were arrested as stated in the newspaper article, you had in your possession marijuana sufficient to warrant charging you with possession with intent to deliver, you had in your possession a defaced firearm, and evidence indicated you were operating a pawn shop without a license. Accordingly, the Board found the charges as stated in the newspaper article and as set forth in the Notice of February 5, 1999, from the Superintendent to you to be true.
>
> Accordingly and pursuant to the vote taken in the presence of your attorney following the hearing on March 23, 1999, your contract with the El Dorado School District is terminated as of 9:00 p.m. on March 23, 1999.

The letter was signed by all eight school-board members with the two dissenting members indicating "no" beside their names.

Jackson filed a complaint in circuit court that alleged in pertinent part that his termination was void because the District failed to strictly comply with the ATFDA in regard to the notice and voting procedure of the board, and that the board's decision to terminate him was arbitrary, capricious, and discriminatory. Jackson requested reinstatement, back pay, and attorney fees.

At the circuit court hearing, Jackson introduced depositions of the school-board members along with documentary evidence of his notice of termination. In the depositions, two of the eight board members testified that they voted against termination in essence because they did not believe that there was enough evidence at the time to determine if Jackson was guilty of the charges levied against him. Of the remaining members, four stated that they concluded that Jackson owned the marijuana found in his home and also that he had committed some of the other offenses that were discussed at the meeting, one testified that she was unable to decide about the marijuana, but voted to terminate based on the "perception problem" that retaining Jackson would create, and one other member stated that his "final vote" was "in favor of the superintendent's recommendation." Several board members testified that no consensus was reached in executive session, that no "straw vote" was taken on the various issues considered, and that matters not specifically contained in Jackson's written termination notice were discussed, including the sale of beer on Sunday, operation of an illegal pawn shop, and possession of a defaced weapon.

The circuit court upheld the school board's decision, finding that the allegations of running an illegal pawn business, possessing a defaced weapon, and the sale of beer were "related matters." The court found that Jackson had adequate notice of the charges, including the pawn shop charge, and that, even though acquitted of the drug charges, Jackson was "well aware of the basis for the recommendation," and he had "ample opportunity" to prepare a defense. In the order affirming Jackson's dismissal, the circuit court opined that because a majority of the board members felt that the marijuana belonged to Jackson or that he had knowledge of it, the outcome would have been the same, and without a showing of "prejudice," the alleged error in considering matters outside the scope of the notice was harmless. The trial court further found that the action of the board was not arbitrary and capricious within the meaning of the ATFDA. Jackson appeals from this order.

The substantive portion of the Arkansas Teacher Fair Dismissal Act (ATFDA), Ark. Code Ann. § 6-17-1501 *et seq.* (Repl. 1993), allows a school district to terminate a teacher for any reason that is not arbitrary, capricious or discriminatory. Ark. Code Ann. § 6-17-1503 (Repl. 1993). A reason will be considered arbitrary and capricious only if it is not supportable on any rational basis. *Lee v. Big Flat Pub. Schs.*, 280 Ark. 377, 658 S.W.2d 389 (1983). The procedural part of the ATFDA mandates that a school district strictly comply with certain procedures in order to terminate or

non-renew a teacher. While it is not the function of the appellate court to substitute its judgment on renewal matters for either that of the circuit court or that of the School Board, whether or not a district has strictly complied is a question of law to be reviewed by the appellate court. *Hamilton v. Pulaski County Special School Dist.*, 321 Ark. 261, 266, 900 S.W.2d 205 (1995). If a school district fails to strictly comply with the procedures, then the termination is void. *Western Grove School Dist. v. Terry*, 318 Ark. 316, 885 S.W.2d 300 (1994).

We first address Jackson's argument that the district's termination notice failed to comply with the "simple but complete" notice requirement. He asserts that the notice only addressed two charges, theft by receiving and simultaneous possession of drugs with intent to deliver and handguns. However, other matters were considered by the board including: (1) incidents and reprimands in previous years in connection with persons coming on campus to communicate and engage in personal business with Jackson; (2) whether Jackson sold beer on Sundays; (3) whether Jackson was running a pawn shop without a license; (4) the perception that the publicity surrounding Jackson's arrest made it impossible to retain him as a teacher; (5) whether he was in possession of a defaced firearm; and (6) whether he was in possession of marijuana (regardless of whether there was an intent to deliver or simultaneous possession of a firearm). This argument has merit.

At all relevant times with regard to this case, the notice requirement of the Arkansas Teacher Fair Dismissal Act as set forth in Ark. Code Ann. § 6-17-1507 (Repl. 1993), provided:

> (a) A teacher may be terminated during the term of any contract for any cause which is not arbitrary, capricious, or discriminatory.
>
> (b) The superintendent shall notify the teacher of the termination recommendation.
>
> (c) The notice shall include a simple but complete statement of the grounds for the recommendation of termination and shall be sent by registered or certified mail to the teacher at the teacher's residence address as reflected in the teacher's personnel file.

As Jackson correctly notes, strict compliance with the notice provisions is required. *Hamilton v. Pulaski County Special School Dist., supra.*

Here, the notice document, consisting of the superintendent's letter and the attached February 3, 1999, newspaper article and police incident report, only gave Jackson notice that the District intended to dismiss him if the charges of theft by receiving and simultaneous possession of drugs with intent to deliver and firearms were "true." Jackson was not given notice about the illegal pawn business charge, the possession of a defaced firearm charge, or the illegal beer sale charge. The depositions of the school-board members and the board's letter to Jackson proved that these charges were discussed, included in the decision to terminate, and were at least as important as the charges of which Jackson had notice.

We are not unmindful of the dissent's contention that strict compliance with aspects of the ATFDA may be waived; however, we believe that their reliance on *Lester v. Mt. Vernon-Enola Sch. Dist.*, 323 Ark. 728, 917 S.W.2d 540 (1996) is misplaced. In *Lester*, the supreme court acknowledged that a waiver was *possible*, however, it rejected the argument that a waiver existed in that case because there was no evidence in the record that the appellant made a knowing and intelligent waiver of strict compliance with the time specified in the ATFDA in which to conduct a hearing before the school board. Significantly, the supreme court failed to find an effective waiver in *Lester* despite the fact that the appellant had requested a hearing "as soon as possible." Similarly, in the instant case, we can find no evidence whereby we can conclude that Jackson made a knowing and intelligent waiver of the notice requirement. Moreover, while it is true that Jackson admitted that officials from the District had discussed with him some of the additional charges that were to be presented to the school board, they apparently did not disclose all the charges, which would have rendered the notice infirm even under a substantial-compliance standard.

Jackson also argues that the termination vote is infirm because the District failed to vote on the truth of each reason given in support of the recommended termination. Citing *Nettleton Sch. Dist. v. Owens*, 329 Ark. 367, 948 S.W.2d 94 (1997), Jackson contends that the school board failed to strictly comply with the requirement that it make "specific written conclusions with respect to each of the reasons" for his termination and obtain a majority vote on each of the reasons. Jackson asserts that several board members voted to terminate based on reasons other than those that he received notice of in the superintendent's letter. Furthermore, he contends that the attempt to comply with the written-findings requirement by having the board sign a letter one week later did not

succeed because it was clear that there was not a vote on each reason, as required by *Nettleton*. This argument also has merit.

The portion of the ATFDA in question, Ark. Code Ann. § 6-17-1510(c) (Repl. 1993), provides as follows:

> Subsequent to any hearing granted a teacher by this subchapter, the board, by majority vote, shall make specific written conclusions with regard to the truth of each reason given the teacher in support of the recommended termination or nonrenewal.

In the instant case, it is apparent that the two reasons stated in the notice were not separately voted on. Moreover, as noted above, there were several additional reasons for Jackson's termination that were presented and considered at the hearing, which were also not separately voted on, and the only vote taken was when the board returned to open session. Once again, there was not strict compliance with the statute.

In *Nettleton Sch. Dist. v. Owens, supra*, the supreme court held that the school district did not strictly comply with Ark. Code Ann. § 6-17-1510(c), by "failing to obtain a majority vote with regard to the truth of each reason given to Owen in support of the recommended termination" and that this failure was "even more troublesome" in light of the District's consideration of incidents not included in her notice of termination in violation of Ark. Code Ann. § 6-17-1507(c). As in *Nettleton*, we have both the failure to give Jackson written notice of all the incidents considered at his termination hearing and the failure to conduct a separate vote on the truth of the reasons for his termination. Significantly, two of the three specific reasons listed in the Board's letter, possession of a defaced firearm and operation of a pawn shop without a license, were not included as grounds in the termination notice provided to Jackson. Accordingly, because the District failed to strictly comply with the ATFDA in both giving the required notice and in conducting a separate vote on each of the reasons for termination, we have no choice but to reverse the circuit court.

Reversed and remanded.

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

BIRD, ROBBINS, BAKER, and HART, JJ., dissent.

SAM BIRD, Judge, dissenting. I dissent from the majority's opinion reversing and remanding this case because I believe that the Union County Circuit Court's decision that the school-board action terminating appellant Victor Jackson, was not arbitrary, capricious, or discriminatory within the meaning of the Teacher Fair Dismissal Act, and I would affirm.

Arkansas Code Annotated section 6-17-1507 (Repl. 1993) requires that the notice of recommendation of a teacher's termination include "a simple but complete statement of the grounds for the recommendation of termination...." I disagree with the majority's conclusion that the notice given to Jackson did not meet that requirement. The notice, which was set forth in a letter from the superintendent to Jackson, stated, quite simply:

> You are hereby notified that El Dorado School District has received a copy of the attached Incident Report from the El Dorado Police Department and also reviewed the front page of the February 3, 1999, edition of the News Times (copy attached) with reference to your arrest on various charges. If these charges are true, cause exists for your termination in the District. Notice is hereby given that for the reasons stated in the Incident Report and newspaper article, as Superintendent I will recommend termination of your contract to the Board.

Attached to the letter was a copy of the referenced newspaper article and police incident report, which stated, quite simply, that Jackson had been arrested and charged with two offenses: (1) theft by receiving; and (2) simultaneous possession of a controlled substance with intent to deliver and handguns. The newspaper article noted that Jackson had been arrested after the police executed a search warrant at his home, where police confiscated marijuana, ten handguns, four long rifles, television sets, videocasette recorders, lawnmowers, automotive goods, and other items. Following the search, Jackson was transported to the police station for booking.

The majority concludes that the notice was not sufficient because neither the newspaper article nor the police incident report contained reference to the fact that Jackson was also charged with operating an illegal pawn business, possessing a defaced firearm, and the illegal sale of beer, and because these additional charges were discussed and considered important by the school-board members during their deliberations over whether to accept the superintendent's recommendation that Jackson be terminated.

I find nothing in the Teacher Fair Dismissal Act requiring that the school board, sitting in executive session, find that all of the reasons given by the superintendent in his notice to the teacher are true before it can vote to terminate a teacher's contract. Rather, the Act only requires that, subsequent to the hearing, "the board, by majority vote, shall make specific written conclusions with regard to the truth of each reason given the teacher in support of the recommended termination...." I would agree with the majority that the notice was insufficient if Jackson had been terminated solely on the basis of reasons not contained in the superintendent's notice. However, here, the majority of the school board found, specifically, that it was true that Jackson had in his possession a sufficient amount of marijuana to warrant charging him with possession of marijuana with intent to deliver. This is one of the reasons for recommending Jackson's termination that was given by the superintendent in his notice. The Board need only have found one of the superintendent's reasons for recommending Jackson's discharge to be "true" in order to accept his recommendation.

I also disagree with the majority's conclusion regarding the sufficiency of the notice because I believe that Jackson waived the requirement for strict compliance as to the notice. The supreme court has held that the requirement of strict compliance under the Teacher Fair Dismissal Act can be waived where there is proof that the party alleged to have waived the right has knowledge of the right. *Lester v. Mt. Vernon-Enola School Dist.*, 323 Ark. 728, 917 S.W.2d 540 (1996). Jackson testified before the circuit court that he met with Superintendent Watson, as well as director of personnel, Shirley Billingsley, and the principal of Jackson's school, Doyle Woodall, on February 4. Jackson said that they explained to him why he was being recommended for termination and that some of the reasons given to him at that meeting were in addition to the reasons set forth in the notice, including the fact that Jackson had been operating an illegal pawn business, that he had been selling beer out of his home and that Jackson was in possession of firearms, one of which had been defaced.

Jackson also testified at the circuit court hearing that he understood the charges that were being made against him that were not set out in the notice, stating, "There was no question in my mind about whether I understood it or didn't understand it. It didn't take a Philadelphia lawyer to understand it." Jackson did not object when testimony concerning his possession of a defaced firearm and operating a pawn business without a license was introduced. Jackson made no objection at the school-board hearing to the sufficiency of

the notice. Under these circumstances, I believe that Jackson has waived any objection to the sufficiency of the notice.

The majority opinion also relies upon *Nettleton Sch. Dist. v. Owens*, 329 Ark. 367, 948 S.W.2d 94 (1997), in reversing this case and in finding that the board failed to vote on the truth of each reason in support of the recommended termination. In *Nettleton*, the supreme court upheld the trial court's reversal of the school board's termination of a teacher's contract because the district did not strictly comply with section 6-17-1510(c) when the board failed to obtain a majority vote with regard to each reason given the teacher in support of the recommended termination.

I find *Nettleton* to be distinguishable from the case at bar. In *Nettleton*, evidence was presented regarding Owen's termination; the school board retired to executive session, then returned to open session to vote, taking one vote to accept the recommendation. Then the school-board president signed a letter outlining the reason's for Owen's termination. The president's signature was the only one on the letter.

In the case at bar, testimony was introduced by two board members that, although there was a vote taken in open session in support of accepting the superintendent's recommendation, the official vote was not recorded until the board members signed the letter stating their written findings as to why Jackson's contract was being terminated. Bob Watson, president of the board, stated:

> What my understanding is ... that what I was doing as a board member and each board member was doing was that we were voting on each individual charge or allegation that had been made against Mr. Jackson and that we were doing so by our signatures here on the last page.

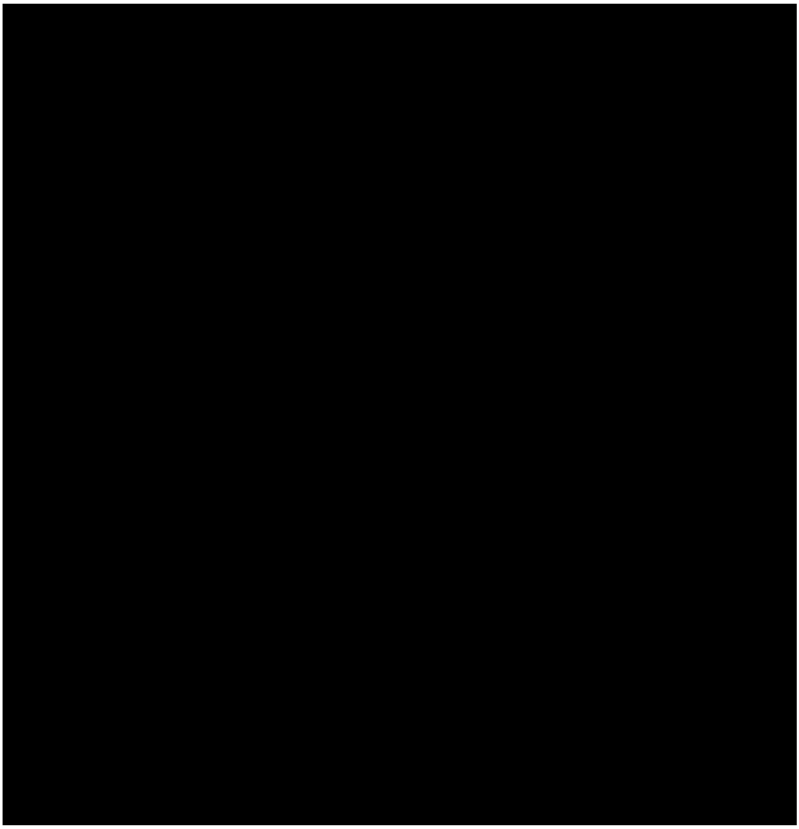
Further Charles Cobb, one of the two board members who voted against terminating Jackson's contract, testified in a deposition, "[A]s I understand it, we all had to cast our votes officially by writing and it was given to me probably the next day or so and I was asked to sign it as to agreeing or disagreeing with it and that's why I put 'no' after my name."

Thus, unlike in *Nettleton* where only one vote was taken, in the case at bar an initial vote was taken to accept the superintendent's recommendation to terminate Jackson. That vote was then followed by a second vote of the board, in the form of a letter, by which each

board member voted as to the truth of each of the reasons given in support of the superintendent's recommendation. That letter reflects that six of the members of the board voted to find that the reasons for the recommendation were true, including the charge of possession of marijuana with intent to deliver. Two of the board members voted to find that the reasons given were not true. I believe that this procedure satisfies the requirements of the Act.

Because I believe that the circuit court was not clearly erroneous in finding that the school board provided a simple but complete notice and because a majority vote was taken with regard to each reason given Jackson in support of the recommended termination, I respectfully dissent from the majority's opinion.

I am authorized to state that Judges HART, ROBBINS, and BAKER join in this opinion.



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