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Eddie E. WYATT, Jr. *v.* STATE of Arkansas

CA CR 00-1117 54 S.W.3d 549

Court of Appeals of Arkansas
Division I
Opinion delivered August 29, 2001
[Petition for rehearing denied October 10, 2001.]

*Montgomery, Adams & Wyatt, PLC*, by: *Dale E. Adams*, for appellant.

*Mark Pryor*, Att'y Gen., by: *Kent G. Holt*, Ass't Att'y Gen., for appellee.

JOSEPHINE LINKER HART, Judge. Having been convicted of the crimes of manufacturing methamphetamine, possession of drug paraphernalia, second-degree endangering the welfare of a minor, and possession of marijuana, appellant, Eddie E. Wyatt, Jr., was sentenced to a total of forty-five years' imprisonment in the Arkansas Department of Correction. On appeal, he argues that the circuit court erred in refusing to suppress evidence seized during the search of the home where appellant resided because the affidavit supporting the search warrant included material misstatements of fact regarding the reliability of a confidential informant. Also, he argues that he should not have been sentenced for both the offense of possession of drug paraphernalia and the offense of manufacture of a controlled substance because the former is a lesser offense included in the latter. We affirm on the first point after reaching the merits. However, because the record is deficient, we are unable to reach the merits of the second point, and we affirm on this point as well.

The affidavit for the search warrant, dated June 9, 1999, and signed by Ken Whillock of the Arkansas State Police and by Afton Fletcher of the Fourteenth Judicial District Drug Task Force, provided that the officers had reason to believe that both methamphetamine and items used in the manufacture and consumption of methamphetamine were being concealed at the residence of Connie Ward. In support of their belief, the affiants stated that on May 2, 1999, as police approached the Ward residence, appellant fled. After appellant's capture, a box containing a methamphetamine laboratory was found in the edge of the woods on the Ward property. The affiants further noted that on May 19, 1999, an officer received a signed statement from Carol Lackey, who stated that Ward had told her that appellant had a methamphetamine laboratory behind her house. Lackey further stated that Ward told her that she and appellant had purchased pills and anhydrous ammonia for the purpose of making methamphetamine.

The affiants then noted that on June 9, 1999, at approximately 3:15 p.m., a "cooperating individual" working under the supervision of law enforcement authorities went to the Ward residence to set up a methamphetamine purchase from appellant. The confidential informant reported that he believed that appellant was manufacturing methamphetamine in the back bedroom of the residence, noting that appellant kept entering the back bedroom, on one occasion carrying a bowl of ice cubes into the room and exiting with an empty bowl. The confidential informant also noted a

strong, "fumy-type," chemical odor that burned his eyes and nose. When he asked appellant if he could obtain some methamphetamine, appellant told him that it was not ready, but that "when it is, it's gonna have legs," meaning that it would be very good. At 5:45 p.m., the confidential informant called appellant at Ward's residence, and appellant stated, "It's not finished, but I'm working on it. When it's done, I'll bring it to you." The affiants noted that a strong, "fumy," chemical smell is consistent with a methamphetamine laboratory and that ice is often used in the manufacturing process to control certain stages of the reaction. The affiants further stated that appellant was a convicted felon out on bond for manufacturing methamphetamine and that he had "numerous drug violations."

The affiants also stated as follows:

> Reliability of said informant, has been established by:
>
> This cooperating individual has provided Affiants with reliable information regarding illegal drug dealers, in Van Buren County, this information has proved to be accurate, in that numerous controlled drug buys have been made from these dealers. Arrests based on these drug buys, and information, are pending.

Based on the affidavit, a search warrant was issued on June 9, 1999, at 7:05 p.m., and was served approximately thirty minutes later.

At the hearing on the motion to suppress, however, Whillock testified that the informant had made only one buy for him and several buys for another narcotics officer. No arrest or conviction had occurred in his case, and he did not know if any arrests or convictions had followed the other buys. Whillock further testified that he was not sure who the other officer was and that of his "own personal knowledge," he did not know if the informant had made any buys or sales for anyone else. Fletcher testified that he knew that the informant had made several controlled buys for two particular officers, and he checked with the officers to determine the reliability of the individual. He further testified that the individual had made a buy for him, Whillock, and another officer on June 2 for what was purported to be methamphetamine.

At the hearing on the motion to suppress, both appellant's counsel and counsel for appellant's codefendants argued that the affidavit contained false or misleading information because it provided that the informant had "provided Affiants with reliable information regarding illegal drug dealers" while both affiants testified that the individual had assisted them in only one buy. They argued

that if the misleading information is disregarded, the remaining portions of the affidavit were insufficient to establish probable cause to issue a search warrant. The judge denied appellant's motion to suppress, stating that while he agreed that the affidavit could have been worded more clearly, he did not find this to be a fatal flaw. The judge concluded that the affidavit still provided probable cause to issue a search warrant, noting particularly that "there had been recovered a drug lab before," that "statements had been made about the drug lab," and that appellant told the informant that methamphetamine was being cooked and the informant smelled chemicals.

On appeal, appellant argues that the "veracity of the confidential informant was attempted to be made on the basis of false statements that the informant had made numerous controlled buys from other drug dealers and supplied information of such on many occasions, when in reality one of the affiants had used the informant but once before this. . . ." He argues that statements made by the confidential informant should be stricken, and he further argues that without these statements, the affidavit does not supply reasonable cause to support the issuance of a search warrant.

Appellant's argument requires that we examine the holding of *Franks v. Delaware*, 438 U.S. 154 (1978). There, the United States Supreme Court concluded that if a defendant shows by a preponderance of the evidence that the affidavit contained a false statement by the affiant that was made knowingly and intentionally or with reckless disregard for the truth, then the false material is excised, and if the remaining content does not establish probable cause to support a search warrant, then the search warrant must be voided and the fruits of the search suppressed. *Franks*, 438 U.S. at 155-56.

We note that appellant argues that the statements made by the confidential informant should be stricken in their entirety. However, contrary to appellant's argument, we conclude that even if the first prong of the *Franks* test has been met and that the statement regarding the reliability of the informant should be excised, the affiants' statement regarding what they were told by the informant would still be considered, as there is no evidence suggesting that the officers were untruthful in reporting what they were told by the informant.

As concluded by the trial court, the affidavit could have been written more clearly. Nevertheless, as found by the court, even if we do not consider the affiants' statements regarding the reliability of the confidential informant, probable cause supported the issuance of the search warrant. The United States Supreme Court has stated as follows:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

*Illinois v. Gates*, 462 U.S. 213, 238-39 (1983)(citations omitted). Furthermore, a deficiency in the informant's "veracity" or "reliability" and his "basis of knowledge" "may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." *Gates*, 462 U.S. at 233. For instance, "even if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles his tip to greater weight than might otherwise be the case." *Gates*, 462 U.S. at 234.

Here, the informant provided an explicit and detailed first-hand account of the events of June 9, describing both the strong chemical odor and how appellant carried a bowl of ice cubes into a back bedroom and exited with an empty bowl. The informant also noted appellant's remarks to him regarding his manufacture of methamphetamine. Corroborating this account is appellant's flight from the residence as the police approached on May 2, 1999, and the signed statement of Carol Lackey from May 19, 1999, who stated that Ward had told her appellant had a methamphetamine laboratory behind her house and that Ward and appellant had purchased pills and anhydrous ammonia for the purpose of making methamphetamine. As set forth in *Gates*, given all the circumstances set forth in the affidavit before him, the issuing judge had a substantial basis for concluding that probable cause existed to support issuance of the search warrant.

In addition to other crimes, according to the judgment and commitment order appellant was sentenced for both the crime of manufacturing methamphetamine as a Class Y felony and the crime of possession of drug paraphernalia with the intent to manufacture as a Class B felony. At the sentencing hearing, appellant's counsel (who was not the same as appellant's counsel at trial) argued that appellant should not be sentenced for committing the crime of possession of drug paraphernalia with the intent to manufacture because that crime is a lesser-included offense of the crime of manufacturing metamphetamine. In denying appellant's motion, the court noted that appellant also had in his possession a number of

items, including needles, scales, spoons, and corners of baggies, that were "not necessarily required" to manufacture methamphetamine, and that as such, the crime constituted a separate offense.

"[I]t is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver a controlled substance." Ark. Code Ann. § 5-64-401(a) (Supp. 1999). Also, "[i]t is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to manufacture methamphetamine in violation of this chapter." Ark. Code Ann. § 5-64-403(c)(5) (Supp. 1999). Commission of this latter offense is a Class B felony. *Id.* Further, "[i]t is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance," and doing so constitutes a Class C felony. Ark. Code Ann. § 5-64-403(c)(1) (Supp. 1999).

A person may not be convicted of more than one offense if "[o]ne offense is included in the other. . . ." Ark. Code Ann. § 5-1-110(a)(1) (Repl. 1997). An offense is included in another offense if "[i]t is established by proof of the same or less than all the elements required to establish the commission of the offense charged. . . ." Ark. Code Ann. § 5-1-110(b)(1) (Repl. 1997). Appellant argues on appeal that "[b]ecause the appellant could not have committed the offense of manufacture without also possessing drug paraphernalia used in the manufacture of that controlled substance, possession of drug paraphernalia used in manufacturing the drug is necessarily included in the offense of manufacturing here and cannot stand pursuant to [section] 5-1-110(a)(1)."

We are, however, unable to address appellant's argument because it is not clear from the record whether he was convicted of violating section 5-64-403(c)(1) or section 5-64-403(c)(5). We note that the information contained in the record is ambiguous, as is the unabstracted verdict form. Both note that appellant was charged with a Class B felony, which would suggest that he was charged with violating section 5-64-403(c)(5), but the language contained in each suggests that appellant was charged with violating section 5-64-403(c)(1). We also note that the unabstracted prosecutor's affidavit clearly refers to section 5-64-403(c)(1). While the judgment and commitment order notes that appellant was convicted of a Class B felony and that he was convicted of "[p]ossession of [d]rug [p]araphernalia w/intent to manufacture," that order does not specify which particular subsection of the statute appellant violated. Without knowing which subsection of the statute he was convicted

of violating, it is impossible to determine whether the crime was a lesser-included offense. It is appellant's duty to provide a record demonstrating that reversible error occurred. *See, e.g., McGhee v. State*, 330 Ark. 38, 42, 954 S.W.2d 206, 208 (1997). Consequently, we affirm on this point. We also note that appellant argues that the crimes constitute a "continuing course of conduct." *See* Ark. Code Ann. § 5-1-110(a)(5) (Repl. 1997). This specific issue was not raised below, and because we will not consider issues raised for the first time on appeal, we affirm this portion of his argument for this reason as well. *See Brown v. State*, 74 Ark. App. 281, 286, 47 S.W.3d 314, 319 (2001).

Affirmed.

NEAL and VAUGHT, JJ., agree.

Tracie Loudon CARTER *v.* Cary REDDELL

CA 00-1473 52 S.W.3d 506

Court of Appeals of Arkansas
Division III
Opinion delivered August 29, 2001

*Skelton & Clark*, by: *William Douglas Skelton* and *Kristin Clark*, for appellant.

*Ramey Law Firm, P.A.*, by: *Jerry Don Ramey*, for appellee.

WENDELL L. GRIFFEN, Judge. Tracie Loudon Carter appeals from a chancery court order changing the surname of her minor daughter to that of the child's father. She argues that the father failed to present any compelling facts to show that it would be in the child's best interest to change her name. We disagree and affirm the chancellor's order.

Appellant and appellee Cary Reddell had one child, Merritt Ann Loudon, in August 1996. In September 1996, the parties entered an agreed judgment of paternity that acknowledged appellee as Merritt's father, awarded custody to appellant, set forth the level of appellee's child support obligation, and ordered that the Bureau of Vital Statistics correct Merritt's birth certificate to indicate appellee as her father. However, the agreed judgment of paternity did not order specific visitation or change Merritt's last name.

Visitation was conducted by mutual agreement from 1996 to July 2000, at which time appellee filed a petition requesting that the

court grant him standard visitation and that Merritt's last name be changed from Loudon to Reddell. Appellant objected to the order and requested that Merritt's child support be increased. A hearing on the matter was held on September 14, 2000. Appellant and appellee were the only witnesses who testified. Appellant moved for a directed verdict on the issue of the name change on the basis that appellee failed to prove that the name change would be in the child's best interest. She also argued that appellee failed to offer evidence to support any of the six factors enunciated in *Huffman v. Fisher*, 337 Ark. 58, 987 S.W.2d 269 (1999), which a court must consider when determining whether a name change is in the child's best interest. The chancery judge denied the motion.

In a letter opinion issued September 14, 2000, the chancery judge ordered that appellee receive standard visitation, that child support would be awarded as requested, and that Merritt's last name be changed to Reddell. The chancellor listed the *Huffman* factors, and stated that in considering those factors, it was in Merritt's best interest that her last name be changed. The chancellor subsequently entered an order to that effect on October 4, 2000. This appeal followed.

Appellant raises two points on appeal, but each relates to the sufficiency of the evidence. She argues that the chancellor's finding was clearly erroneous because appellee failed to present any compelling facts to show that a name change would be in Merritt's best interest. The best interest of the child is the dispositive consideration in determining whether a child's surname should be changed. *See Huffman v. Fisher, supra.* Where a full inquiry is made by the chancellor regarding the implication of these factors and a determination is made with due regard to the best interest of the child, the chancellor's decision will be upheld where it is not clearly erroneous. *See Huffman v. Fisher, supra.* A finding is clearly erroneous when, although there is evidence to support it, upon reviewing the entire evidence, the court is left with a definite and firm conviction that a mistake has been committed. *See Huffman v. Fisher, supra.*

Pursuant to *Huffman*, the moving party has the burden to demonstrate that a change is in the best interest of the child. In making this determination, the trial court should take the following six factors into consideration: 1) the child's preference; 2) the effect of the change of the child's surname on the preservation and development of the child's relationship with each parent; 3) the length of time the child has borne a given name; 4) the degree of community

respect associated with the present and proposed surnames; 5) the difficulties, harassment, or embarrassment that the child may experience from bearing the present or proposed surname; and 6) the existence of any parental misconduct or neglect. *Id.* at 68, 987 S.W.2d at 274.

Appellant asserts that appellee offered no testimony during the presentation of his case regarding these six factors. She maintains that he merely asked the court to change Merritt's last name. We disagree with appellant's characterization of appellee's testimony and hold that the chancellor was presented with sufficient testimony regarding the *Huffman* factors.

Appellee conceded that there was no provision for a name change in the agreed order of paternity. He testified that he has visited regularly with Merritt since she was born, although the duration of the visits has varied. His testimony in this regard was confusing, but apparently his visitation with Merritt has graduated from an overnight stay every two to three weeks to every other Saturday from 9:00 a.m. to 6:00 p.m. to regular weekend visits from Friday night until Sunday morning. Appellee stated that visitation has largely been determined by appellant and that she would not allow Merritt to visit him if appellant was upset with him.

Appellee also testified that Merritt was familiar with him and his family. He stated that visitation took place either at his house, his fiancé's house, or his parents' house. He stated he was capable of providing a clean and loving environment for her. Appellee said that Merritt loved staying with him and asked to stay the night when there was no overnight visitation allowed. Appellee pays for Merritt's health insurance. He testified that he had regularly paid child support and would agree to paying an increased amount of child support.

Appellant also testified. She is married to Jason Carter but indicated that she had no intention to have Merritt use Carter as her last name. She did not object to appellee's visitation or to Merritt staying overnight with his parents. However, she objected to changing Merritt's last name. She stated that she and appellee were no longer dating when she discovered that she was pregnant. She testified that appellant signed his name on Merritt's birth certificate, without objection, when that certificate reflected Merritt's last name as Loudon. However, appellant admitted that at that time, appellee also asked when Merritt's last name would be changed to

Reddell and she told him that Merritt's last name would be Loudon.

We hold that the chancellor did not err in finding that it was in Merritt's best interest to change her surname to Reddell. Arkansas Code Annotated section 20-18-401(f)(3) (Repl. 2000) provides that where paternity of a child is determined by a court of competent jurisdiction, the name of the father and the surname of the child shall be entered on the certificate of birth in accordance with the finding and order of the court. However, this statute does not require that a child's surname be changed to that of the child's father. *See McCullough v. Henderson*, 304 Ark. 689, 804 S.W.2d 368 (1991).

Appellant appears to rely on *Reaves v. Herman*, 309 Ark. 370, 830 S.W.2d 860 (1992), in which our supreme court held that there must be compelling facts to show that it is in the best interest of the child to change his surname. She argues that there are no compelling facts here. However, this standard was subsequently modified by the Arkansas Supreme Court in *Huffman v. Fisher*, 337 Ark. 58, 987 S.W.2d 269 (1999), where the court stated the proper question on appeal is whether the party has demonstrated that such a change is in the best interest of the child, considering the *Huffman* factors previously noted.

Despite appellant's assertion, there was sufficient evidence presented pertaining to the *Huffman* factors. The factors that are most relevant in this case are the length of time that Merritt has borne her given name; the effect of the change of her surname on the preservation and development of her relationship with each parent; and the difficulties, harassment, or embarrassment that she may experience from bearing the present or proposed surname.

It does not appear from the evidence that the name change will affect Merritt's relationship with either parent. Each parent has established a bond with her since birth and that is unlikely to change based on the surname she uses. Thus, the dispositive factors in this case are those relating to the stigma or benefit to Merritt in changing her surname. Merritt was four years old at the time of the hearing and was registered to attend kindergarten at Montessori School. Although she has borne the Loudon name for four years, it appears that there would be very little stigma attached if she changes her last name now, at the beginning of her school attendance, where her classmates will subsequently know her as Reddell.

In addition, appellant's primary reason for objecting to the name change appeared to be that she desired Merritt's name to be the same as her maiden name, because she was not married when Merritt was born. However, appellant has since remarried and has legally changed her last name to Carter. She testified that she has no plans to change Merritt's last name to Carter. Merritt has no siblings; therefore, she is the only person in her immediate family known as Loudon. Moreover, her father's name will not change; thus, until she marries, Merritt will always have the same last name as one of her parents if she adopts her father's surname. *See Clinton v. Morrow*, 220 Ark. 377, 247 S.W.2d 1015 (1952) (affirming where chancellor found it was in the best interest of children to change their surname from their biological father's name to their mother's married surname to avoid confusion and embarrassment at school). Therefore, we hold that the chancellor did not err in finding that it was in Merritt's best interest to change her surname.

In addition, we note that the other relevant evidence in this case supports the chancellor's finding. The chancellor has the discretion to consider other relevant factors in addition to the *Huffman* factors when determining what surname would be in the best interest of the child. *See, e.g., Bell v. Wardell,* 72 Ark. App. 94, 34 S.W.3d 745 (2000). In addition to the *Huffman* factors, the chancellor in *Bell* considered the fact that the father filed a paternity action only nineteen days after the child was born, that he offered to pay child support and medical expenses, and that he and his mother have sought visitation with the child. *See Bell, supra.* Similarly here, the other factors that support the chancellor's finding in this case are that appellant voluntarily acknowledged paternity shortly after Merritt's birth and expressed an interest at that time that Merritt's name be Reddell; he and his family have exercised visitation as regularly as appellant has allowed; he has paid child support and agreed to pay increased child support when requested; and he pays for Merritt's health insurance.

On these facts, we hold that the chancellor did not err in determining that it was in Merritt's best interest to change her surname to reflect that of her father, Reddell.

Affirmed.

ROBBINS and CRABTREE, JJ., agree.

Larry BALLARD *v.* STATE of Arkansas

CA CR 01-115 53 S.W.3d 53

Court of Appeals of Arkansas
Division II
Opinion delivered August 29, 2001

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

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

KAREN BAKER, Judge. Appellant, Larry Ballard, was convicted of terroristic threatening in the first degree, a Class D felony. Following a bench trial, he was sentenced to three years' probation, a fine of $300, and court costs. Appellant argues that the trial court erred in denying his motion to dismiss for lack of a speedy trial. We reverse and dismiss.

A felony information was filed on April 9, 1999, alleging that appellant had committed the act of terroristic threatening in violation of Ark. Code Ann. § 5-13-301 (Repl. 1997). Appellant was arrested and taken into custody on October 27, 1998, and released on bond. He was granted a motion for continuance on December 27, 1999; a continuance was also granted on a joint motion by appellant and the State on May 22, 2000. A bench trial was held on July 10, 2000. On that date, appellant moved to dismiss the charges against him, alleging a violation of his right to a speedy trial pursuant to Ark. R. Crim. P. 28.2(a) and (c). Specifically, appellant argued that he did not appear at his arraignment on April 26, 1999, because he was not given notice of his plea and arraignment. Therefore, the time period between April 26, 1999, and September 20, 1999, when appellant appeared for his plea and arraignment, should not be excluded from the one-year statutory requirement for a speedy trial. The trial court denied his motion.

Sandra Gaisbauer, case coordinator, testified as to the procedure for notifying a defendant to appear for plea and arraignment. She stated that once a felony information is filed in circuit court, a card is sent to the circuit court clerk's office stating the defendant's name and address, and a computer generated form letter is created from the information on the card. Gaisbauer then places the letter in the mailbox, and the bailiff is responsible for taking the mail. Gaisbauer testified that appellant's card stated that appellant's address

was 3212 Whitfield in Little Rock, and that in accordance with general procedure, a letter would have been sent to appellant at that address. Because the letter was not returned, she presumed it was received. According to Gaisbauer, although it was not her practice to keep a copy of the letter, a copy of the letter should have been placed in the defendant's file. However, there was no copy of the letter in appellant's file. Appellant and his mother both testified that appellant was living at 3212 Whitfield in Little Rock in April 1999, and that appellant never received notice to appear at his plea and arraignment on April 26, 1999.

Appellant argues that he was denied a speedy trial in violation of Ark. R. Crim. P. 28.1. He claims that his right to a speedy trial was violated because he never received notice of his plea-and-arraignment date, and as a result, he failed to appear. Thus, the trial court erred by denying his motion to dismiss. The State contends that appellant's right to a speedy trial was not violated because evidence was provided that proved that the letter notifying appellant of the plea and arraignment was sent to him, and that the trial court did not err by denying appellant's motion to dismiss. We disagree.

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. 213 (1967). Arkansas Rules of Criminal Procedure 28.1(c) and 28.2(a) require the State to bring a defendant to trial within twelve months from the date the charge is filed in circuit court or, if the defendant has been lawfully set at liberty pending trial, from the date of arrest. *See also Rose v. State*, 72 Ark. App. 175, 35 S.W.3d 365 (2000). We have placed responsibility on the defendant to be available for trial; therefore, such time delays which result from a failure to appear for trial are excluded. *Henson v. State*, 38 Ark. App. 155, 832 S.W.2d 269 (1992); *see also* Ark. R. Crim. P. 28.3(e). However, the State has the burden to show that any delay was the result of the defendant's conduct or was otherwise justified. *Scott v. State*, 337 Ark. 320, 989 S.W.2d 891 (1999). The State also has the duty to show that it made diligent, good-faith effort to bring the accused to trial. *Brown v. State*, 330 Ark. 239, 952 S.W.2d 673 (1997); *Duncan v. Wright*, 318 Ark. 153, 883 S.W.2d 834 (1994); *Chandler v. State*, 284 Ark. 560, 683 S.W.2d 928 (1985).

Appellant challenges only the time period from April 26, 1999, to September 20, 1999. In support of his assertion that this time period should not be excluded, he contends that the State has failed to demonstrate that notice of his plea and arraignment was actually

sent. Testimony from Gaisbauer showed that it is standard policy to send a letter to appear for plea and arraignment; however, the State's case lacked any independent evidence that notice was actually sent to appellant. Without a copy of the letter in appellant's file, it was impossible to determine whether a mistake was made in the contents of the letter, the date and address of the letter, or whether a letter was actually sent. Appellant asserts that the State has failed to meet its burden of proof in this case. We agree.

Appellant relies on the case of *Glover v. State*, 287 Ark. 19, 695 S.W.2d 829 (1985). In *Glover*, our supreme court held that the State failed to meet its burden of proving that it did not know the whereabouts of Glover, for purposes of justifying untimely delay under speedy-trial rules. The State in *Glover* provided testimony that a deputy sheriff mailed a letter to Glover at the address Glover had given, and the letter was never returned. *Id.* at 20-21, S.W.2d at 380.

*Glover* is similar to the case at hand. Appellant and his mother both testified that in April 1999, at the time the notice was allegedly sent, appellant was living at 3212 Whitfield in Little Rock. This fact is undisputed. Appellant and his mother both testified that appellant never received a letter at 3212 Whitfield in Little Rock regarding his plea-and-arraignment date. The State relied solely on the testimony of Gaisbauer that it was her standard policy to send a notice to appellant, but as in *Glover*, the State's reliance on Gaisbauer's testimony that a letter was sent and not returned is simply insufficient. At a minimum, a copy of the notice should remain in appellant's file in order to demonstrate that a letter was actually sent. Furthermore, it is troublesome that no further effort was made to contact appellant in the five months following his failure to appear on April 26, 1999. Here, the State has not met its burden of proof that notice of the plea-and-arraignment date was sent to appellant. Instead, the State has only proven that it is standard procedure to send such notices. Likewise, the State has failed to prove that the delay was the result of appellant's conduct, and that the State made a diligent, good-faith effort to bring appellant to trial.

Accordingly, we hold that the trial court erred by denying appellant's motion to dismiss.

Reversed and dismissed.

BIRD and ROAF, JJ., agree.

Cheryl PASLAY *v.* ARKANSAS DEPARTMENT of HUMAN SERVICES

CA 00-850 53 S.W.3d 67

Court of Appeals of Arkansas
Division II
Opinion delivered September 5, 2001

*James G. Petty, Jr.*, for appellant.

Office of Chief Counsel, by: *Kathy L. Hall*, for appellee.

JOHN E. JENNINGS, Judge. Cheryl Paslay brings this appeal from an order terminating her parental rights in her son, L.B., who was born on August 26, 1999. For reversal of that decision, appellant contends that the chancellor erred in using the previous termination of her rights in another child as the basis for terminating her rights in L.B., because the prior termination was pending on appeal. We find no error and affirm.

This is the second appeal involving appellant and L.B. In the first, we affirmed the chancellor's decision that L.B. was dependent-neglected based on a finding that appellant was unfit. *Brewer v. Arkansas Dep't of Human Servs.*, 71 Ark. App. 364, 32 S.W.3d 22 (2000). Appellant was deemed unfit because of severe physical abuse suffered by appellant's daughter, M.P. On December 30, 1999, appellee filed a petition to terminate appellant's parental rights in L.B. Termination was sought under Ark. Code Ann. § 9-27-341(b)(3)(B)(ix)(a)(4) (Supp. 1999), which provides that parental rights in a child may be terminated if the child's parent has had her rights involuntarily terminated as to a sibling of the child.

At the hearing held on March 28, 2000, it was established that appellant's parental rights in M.P. had been terminated by order dated December 6, 1999. Appellant argued, however, that the order terminating her rights in M.P. could not serve as the predicate for terminating her rights in L.B. because she had taken an appeal of that decision. She contended that, because the order had been appealed, it could not be considered "final." The chancellor disagreed and entered an order on April 17, 2000, terminating her rights in L.B. based on the previous termination of her rights in M.P.

As argued below, appellant contends that the chancellor erred in basing his decision on the prior termination because it had been appealed. As an initial matter, the appellee argues that this case is now moot because we have since affirmed the termination of appellant's rights in M.P. *Paslay v. Arkansas Dep't of Human Servs.*, CA00-268 (December 20, 2000). It is true that we do not ordinarily decide moot issues. However, there is an exception to the mootness doctrine for cases that are capable of repetition yet evading review. *See Arkansas State Game & Fish Comm'n v. Sledge*, 344 Ark. 505, 42 S.W.3d 427 (2001). When a case involves the public interest, or tends to become moot before litigation can run its course, we have, with some regularity, refused to let mootness become the determinant. *Campbell v. State*, 311 Ark. 641, 846 S.W.2d 639 (1993). Because it is likely that this scenario may arise

in future cases, we consider it appropriate to address the merits of appellant's argument.

In making her argument, appellant refers to *John Cheeseman Trucking, Inc. v. Pinson*, 313 Ark. 632, 855 S.W.2d 941 (1993), which states the rule that a judgment is considered final for purposes of issue preclusion, despite a pending appeal for a review of the judgment, unless the appeal actually consists of a trial *de novo*. As a corollary to that rule, appellant reasons that, because this court conducts a *de novo* review of chancery cases including those that involve termination, *see Dinkins v. Arkansas Dep't of Human Servs.*, 344 Ark. 207, 40 S.W.3d 286 (2001), it was error to rely on the previous termination because the decision had been appealed. This argument fails to recognize that there is a difference between a trial *de novo*, and a *de novo* review.

In *Pinson, supra*, the court cited *Boynton v. Chicago Mill & Lumber Co.*, 84 Ark. 203, 105 S.W. 77 (1907), where the court made the rule clear:

> [T]he weight of judicial opinion, as well as sound reason, is that, when a case which is removed to an appellate court by a writ of error or an appeal *is not there tried de novo, but the record made below is simply re-examined, and the judgment either reversed or affirmed,* such an appeal or writ of error does not vacate the judgment below or prevent it from being pleaded and given in evidence as an estoppel upon issues which were tried and determined, unless some local statute provides that it shall not be so used pending an appeal.

*Boynton* at 213. While our appellate review is *de novo*, it is conducted on a record already made, and we may reverse, affirm, or modify the judgment either in whole or in part. *See* Ark. Code Ann. § 16-67-325 (1987). It is not a trial *de novo*, such as appeals from municipal to circuit court, where cases appealed are tried anew. *See* Ark. Code Ann. § 16-17-703 (Repl. 1999). Thus, the rule appellant relies upon has no application here. We hold, then, that the chancellor did not err in basing his decision on the prior termination, even though it had been appealed.

Affirmed.

CRABTREE and BAKER, JJ., agree.

David Eric WOOD *v.* STATE of Arkansas

CA CR 00-1273 53 S.W.3d 56

Court of Appeals of Arkansas
Division III
Opinion delivered September 5, 2001

[redacted]

*Lynn Frank Plemmons*, for appellant.

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

WENDELL L. GRIFFEN, Judge. David Eric Wood was convicted by a jury of raping his two stepsons and sentenced to forty years' imprisonment in the Arkansas Department of Correction. Wood now challenges the rulings of the trial court to 1) grant the State's motion to exclude the testimony of his expert witness, and 2) deny his motion for a continuance to secure another expert witness. The trial court did not abuse its discretion in excluding Dr. Tracy's testimony or in denying appellant's motion for continuance. Therefore, we affirm.

*Factual and Procedural History*

On March 8, 2000, the State filed a felony information alleging that appellant committed two counts of rape of a person less than fourteen years of age. The matter was set for trial on May 22, 2000. Appellant subsequently raised the defense of mental disease or defect, and on May 19, 2000, the court granted a continuance until June 20, 2000. Another continuance was granted following a defense motion on June 19, 2000, which reset the trial to July 12, 2000.

Appellant underwent a court-ordered psychiatric evaluation at the Ozark Guidance Center. In a letter to the court dated May 26, 2000, Dr. Travis Jenkins, the chief medical officer of the Ozark Guidance Center, wrote that appellant had the capacity to understand the proceedings against him and to effectively assist in his own defense. Dr. Jenkins also opined that appellant had the capacity to appreciate the criminality of his conduct and could have conformed his conduct to the requirements of the law.

In response to a discovery request filed by the State on June 29, 2000, appellant formally informed the State on the last day before trial — July 11, 2000 — that he intended to introduce Dr. Ann B. Tracy as an expert witness to testify about the effect of the prescription drug Paxil as part of his defense. Later that day, the State filed a motion to exclude the testimony of Tracy, arguing that Tracy had not conducted laboratory research on neurotransmitters, or conducted laboratory research on the effects of any drug on human beings.

The State also filed a motion to exclude evidence and testimony that appellant planned to offer to show that his use or disuse of Paxil was an affirmative or general defense to the crimes with which he was charged. The State argued that the evidence was

based on a novel scientific theory that had not been accepted by the relevant scientific community or subjected to serious scientific analysis. The State also contended that the evidence was not sufficiently tied to the facts and would only confuse and mislead the jury.

The next day, July 12, 2000, a hearing was held on the State's motion to exclude. The State conducted a voir dire examination of Dr. Tracy, who testified that she received a bachelor's degree in psychology and biblical studies from Coral Ridge Baptist University in Utah. She also holds a Ph.D. degree in health sciences, with emphasis on psychology, from George Wythe College. Dr. Tracy testified that she wrote a book entitled *Prozac: Panacea or Pandora? The Rest of the Story*, and that half of her research was based on drug experience reports, and the other half reviewed medical literature. She testified that she did not conduct the clinical studies herself, and that she had done no laboratory research. Dr. Tracy opined that Paxil, Zoloft, Prozac, and other SSRI antidepressants were terribly dangerous and should be discontinued.

At the conclusion of the hearing, the trial court granted the State's motion to exclude Dr. Tracy's testimony. The court ruled that her intended testimony was not reliable and that the methodology she used was suspect.

Appellant also argued that Rule 702 allowed someone with specialized knowledge to testify as an expert, and that Dr. Tracy had specialized knowledge that would be helpful to the finder of fact. Counsel for appellant noted the court's displeasure with late filings by both parties, and observed that the State was aware of appellant's defense strategy and of his plans to use Dr. Tracy for over a month prior to trial. Appellant's counsel told the court that the State filed its motion to exclude the previous day, and that if an expert was not allowed to testify, appellant would have no defense to present and would be prejudiced in his right to a fair trial. Counsel for appellant asked the court to grant a continuance to allow the defense to find an expert with different qualifications that the court would find acceptable.

The State agreed that the parties discussed appellant's defense and plans to use Dr. Tracy. However, the State noted that appellant never replied to the State's several requests for Dr. Tracy's resumé until July 11, 2000. Counsel for appellant asserted that he informally provided information about Dr. Tracy to the State prior to the State filing its motion for discovery, including Dr. Tracy's name, phone number, the title of the book she had written, and the name

of her publisher. After noting that the case had been continued on two separate occasions at the request of the defense, the court denied appellant's motion for a continuance and a jury trial commenced.

Appellant testified in his defense that he was taking Paxil when he raped his stepchildren in 1999. He initially began taking the drug without a prescription in September 1997, after he moved to Springdale, and continued using it until November 1997. Appellant began taking Paxil again in September 1998. In March 1999, appellant saw a physician who prescribed Paxil. Appellant had the prescription filled, refilled the prescription on six occasions, but discontinued using Paxil after his arrest. Appellant testified that while taking Paxil, his alcohol consumption changed dramatically, that he had difficulty sleeping, became more aggressive with people, quickly lost his temper, and seemed more sensitive to light. Appellant testified that he never molested children before taking Paxil.

In rebuttal, the State presented testimony from Dr. Jenkins, who testified that he conducted a psychiatric interview on appellant. Dr. Jenkins testified that appellant told him that he was taking Paxil when he raped his stepsons. However, Dr. Jenkins opined that, in general, the side effects of Paxil in men and women included *decreased* sexual interest and *decreased* sexual ability. Dr. Jenkins also testified that some men who took Paxil became impotent, and that he knew of no studies saying that taking Paxil or discontinuing the use of Paxil would cause a person to engage in deviant sexual activity. On cross-examination, Dr. Jenkins acknowledged that the insert included in the packaging of Paxil listed *increased* interest in sexual activities as a possible side effect of Paxil.

Following deliberations, the jury returned with a verdict of guilty of two counts of rape and sentenced appellant to forty years' imprisonment for each count. Appellant now argues that the trial court erred in prohibiting Dr. Tracy's testimony and erred in refusing to grant his motion for continuance.

*Admissibility of Expert Witness Testimony*

Generally, whether expert testimony is admissible depends on whether the testimony will aid the fact finder in comprehending the evidence presented or resolving a fact in dispute. *See Smith v. State*, 330 Ark. 50, 953 S.W.2d 870 (1997). The weakness or strength of an expert's testimony goes toward the weight and

credibility to give the testimony and not toward the admissibility of the testimony. *See Killian v. Hill*, 32 Ark. App. 25, 795 S.W.2d 369 (1990).

In *Farm Bureau Mut. Ins. Co. v. Foote*, 341 Ark. 105, 14 S.W.3d 512 (2000), our supreme court adopted the holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), which set out the following guidelines for trial courts to use when considering expert scientific testimony:

> [T]he trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether the reasoning or methodology properly can be applied to the facts in issue.

*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. at 592-93 (footnotes omitted).

The *Foote* court noted that a primary factor for a trial court to consider in determining the admissibility of scientific evidence is whether the scientific theory can be or has been tested. *See Foote, supra.* Other factors include whether the theory has been subjected to peer review and publication, the potential error rate, and the existence and maintenance of standards controlling the technique's operation. It is also significant whether the scientific community has generally accepted the theory. *See Foote, supra.*

In her proffered testimony, Dr. Tracy testified that her intended testimony was widely accepted within the scientific community and was included in medical literature. She testified that her opinion that the side effects of Paxil caused deviant sexual behavior was documented in medical research and throughout medical studies. As proof, Dr. Tracy referred to the insert provided by the manufacturer of Paxil that listed increased libido as a significant side effect of using the drug. Dr. Tracy testified that the insert discussed the possible effect of serotonin re-uptake inhibitors causing problems with sexual performance and also the paradoxical effect of an increased compulsion for sex.

When asked what particular field of science her book addressed, Dr. Tracy replied that it discussed pharmacology and the effects of SSRI antidepressants, Prozac, Zoloft, Paxil, Luvox, and

serotonin and how it affects people. She told the court that half of her research was based on drug experience reports and the other half on reviewing medical literature. Dr. Tracy acknowledged that she did not personally conduct the clinical studies, but she reviewed the clinical studies. She testified that she did not use double-blind or single-blind placebo controls in the research of her book. Also, she did not conduct laboratory research. In response to whether she felt that antidepressant SSRI drugs were terribly dangerous, whether the pharmaceutical companies who produced the drugs had misled the public, and whether the drugs ought to be done away with, Dr. Tracy responded yes.

As part of the proffer, Dr. Tracy also testified that one of the most dangerous things to do to the brain and to the body was to increase serotonin levels. She stated that her research revealed a correlation between increased serotonin levels and sexual misbehavior. Dr. Tracy testified that another side effect was amnesia. She also testified that she visited appellant and received his medical history. After listening to the testimony offered at trial, Dr. Tracy opined that appellant was acting out his worst nightmare while on Paxil. She was not surprised that appellant could not remember what happened. Dr. Tracy testified that appellant had many symptoms of someone with increased levels of serotonin, such as cravings for alcohol, sensitivity to light, irritability, aggression, memory loss, and insomnia. She testified that she had no doubt that appellant's conduct was affected by ingesting Paxil.

The record contains no testimony or evidence that Dr. Tracy cited to demonstrate that the use of Paxil would cause a person to engage in deviant sexual activity or that Paxil specifically caused appellant to rape his stepsons. Moreover, the record demonstrates that the trial judge considered the factors enumerated in *Foote* in making his decision to exclude Dr. Tracy's testimony. The court noted that Dr. Tracy's methodology in conducting studies and reaching her conclusions were suspect and did not follow any accepted scientific method. The court further stated that Dr. Tracy's proffered testimony displayed prejudice toward an entire series of drugs or classification of drugs, and that Dr. Tracy appeared to be on a crusade to eliminate the use of certain drugs, including Paxil. The court concluded that Dr. Tracy's testimony would not be reliable or relevant and that even if the evidence were relevant, the testimony would mislead and confuse the jury.

[redacted] Trial judges serve as evidentiary gatekeepers for ensuring the reliability of proposed expert testimony. In this case, appellant

failed to demonstrate 1) that the scientific community generally accepted Dr. Tracy's theory that Paxil would cause a person to engage in deviant sexual activity, 2) that the theory could be or had been tested, 3) that the theory had been subject to peer review and publication, 4) the potential error rate of the theory, and 5) the existence and maintenance of standards of control. We hold that the trial court did not abuse its discretion by excluding Dr. Tracy's testimony after finding that her methodology in conducting studies and reaching the conclusions on which her testimony was based were suspect and likely to mislead or confuse the jury.

*Denial of Motion for Continuance*

When considering a trial court's denial of a motion for continuance that is premised on a lack of time to prepare, we review the totality of the circumstances. *See Davis v. State*, 318 Ark. 212, 885 S.W.2d 292 (1994). The moving party bears the burden of proving prejudice, and we will not reverse absent a showing of abuse of discretion. *See id.* Prejudice is demonstrated by showing "what [an] attorney failed to do that could have been done, or what [an attorney] did that would not have [been] done, if . . . afforded more time." *See id.* at 216, 885 S.W.2d at 294. An absence of due diligence will suffice as grounds to deny a continuance. *See id.* Rule 27.3 of our Rules of Criminal Procedure mandates that a trial court grant a motion for continuance for as long as necessary after a party demonstrates good cause.

We hold that the trial court did not abuse its discretion in denying appellant's request for a continuance. The parties appear to agree that appellant did not provide Dr. Tracy's resum to the State until the day before trial. However, appellant argues that approximately one month before trial, the State knew that he planned to use Dr. Tracy's testimony and that his alleged drug reaction was the crux of his defense. He contends that without a continuance, he was severely prejudiced because he could not present his only defense. The State conceded at the hearing that it was aware of the defense strategy and that the defense planned to use the testimony of Dr. Tracy. It argued that although it requested Dr. Tracy's resumé several times, the defense failed to submit it until the day before trial. The State acknowledged that it filed a late discovery request, but stated that its late filing was the result of appellant not responding to its informal requests for information on Dr. Tracy.

The record indicates that the State formally requested a disclosure of appellant's experts, along with the nature and source of their information and testimony, on June 29, 2000. Appellant did not provide this information until July 11, 2000, the day before the trial. This fact, combined with the trial court's observation that it had granted two previous continuances at the request of the defense, support the conclusion that the trial court did not abuse its discretion in denying appellant's motion for continuance.

Affirmed.

ROBBINS and CRABTREE, JJ., agree.

B.S.G. FOODS, INC.,
William A. Thurman, and Bill Thurman, Jr. *v.*
MULTIFOODS DISTRIBUTION GROUP, INC.

CA 00-1390 54 S.W.3d 553

Court of Appeals of Arkansas
Division III
Opinion delivered September 5, 2001

[redacted]

[redacted]

*Everett Law Firm*, by: *John C. Everett* and *Elizabeth E. Story*, for appellants.

*Wright, Lindsey & Jennings LLP*, by: *J. Andrew Vines*, for appellee.

LARRY D. VAUGHT, Judge. This is an appeal from an order granting partial summary judgment in favor of appellee. Appellants, William A. Thurman and Bill Thurman, Jr., contend that the trial court erred as a matter of law in finding that personal guaranties executed by them to Leprino Foods for credit given to B.S.G. Foods extended to appellee Multifoods Distribution Group, who acquired the assets of Leprino Foods through an asset-purchase agreement. We affirm.

The facts of this case are undisputed. From 1992 until 1998, appellants, William A. Thurman and Bill Thurman, Jr. ("the Thurmans"), operated B.S.G. Foods, Inc. ("BSG"), a pizza manufacturing company. BSG purchased food and supplies from Leprino Foods Co. ("Leprino Foods") to prepare frozen pizzas. On July 13, 1993, William Thurman executed a personal guaranty for items purchased by BSG from Leprino Foods. The guaranty provided:

> For good and valuable consideration, the undersigned jointly and severally guarantees unconditionally the prompt payment of any and all credit that may be extended to BSG Foods Inc. by Leprino Foods Company from the date of the agreement until ten (10) days after receipt by Leprino Foods Company, at 1830 West 38th Avenue, Denver, Colorado 80211-2200, of written notification of the

> undersigned's desire to terminate this guaranty as to any credit extended after such notification. It is understood and agreed that credit is to be extended by Leprino Foods Company on a continuing basis, and Leprino Foods Company shall not be obligated to notify the undersigned of the dates or amounts of any such credit extended. The undersigned hereby waives demand, notice of default, and any extension of time of other forbearance which may be extended by Leprino Foods Company. The undersigned agree, jointly and severally, to pay in addition to the indebtedness hereby guaranteed, interest on said indebtedness at the rate of 18% per annum or the maximum allowable rate, whichever is less, from the date on which the indebtedness becomes due up to and including the date of its payment in full together with interest as promised herein, and reasonable costs of collection including attorney's fees. This Guaranty has been delivered at Denver, Colorado, and shall be construed in accordance with and governed by the laws of the State of Colorado.

Bill Thurman, Jr., executed an identical personal guaranty on August 27, 1993.

On July 29, 1994, appellee Multifoods Distribution Group, Inc. ("Multifoods"), acquired the assets of Leprino Foods pursuant to an asset-purchase agreement. BSG then began to purchase food and supplies from Multifoods and eventually became indebted to Multifoods. As a result of the indebtedness, BSG executed a promissory note to Multifoods in the amount of $70,691.60. BSG made payments totaling $22,455.37 and was given a credit of $4,416.12. In addition, BSG purchased $16,420.87 in products. At the time BSG defaulted on the note, it owed Multifoods $64,204.65.

Multifoods filed suit against BSG to recover the amount due under the note and against the Thurmans based on the personal guaranties they signed in 1993 in favor of Leprino Foods, plus $9,643.50 on a special food order. The trial court granted a motion for judgment on the pleadings with respect to BSG's liability on the promissory note. Multifoods then filed a motion for summary judgment on the Thurmans' liability on the promissory note and the special food order claim. The trial court granted partial summary judgment in favor of Multifoods, finding that the Thurmans were personally liable for the amount due on the note based on the personal guaranties they executed in favor of Leprino Foods. However, the trial court found that summary judgment was not appropriate on Multifoods's special food order claim because issues of fact remained. Multifoods nonsuited the special foods order claim, and

appellants appealed the trial court's grant of partial summary judgment, contending that the law does not support the trial court's findings.

Summary judgment is to be granted by a trial court only when there are no genuine issues of material fact to be litigated, and the moving party is entitled to judgment as a matter of law. *Majors v. American Premier Ins. Co.*, 334 Ark. 628, 977 S.W.2d 897 (1998). Where the pertinent facts of the case are undisputed, we simply determine on appeal whether the appellee was entitled to summary judgment as a matter of law. *Id.*

The Thurmans argue that they are not personally liable because the personal guaranties executed by them in favor of Leprino Foods do not extend to the amount due under the promissory note executed by BSG Foods in favor of Multifoods. In the recent case of *Morrilton Sec. Bank v. Kelemen*, 70 Ark. App. 246, 16 S.W.3d 567 (2000), we discussed the obligation of a guarantor:

> A guarantor, like a surety, is a favorite of the law, and her liability is not to be extended by implication beyond the expressed terms of the agreement or its plain intent. *National Bank of Eastern Arkansas v. Collins*, 236 Ark. 822, 370 S.W.2d 91 (1963); *Moore v. First National Bank of Hot Springs*, 3 Ark. App. 146, 623 S.W.2d 530 (1981). A guarantor is entitled to have her undertaking strictly construed and she cannot be held liable beyond the strict terms of her contract. *Inter-Sport, Inc. v. Wilson*, 281 Ark. 56, 661 S.W.2d 367 (1983); *Lee v. Vaughn*, 259 Ark. 424, 534 S.W.2d 221 (1976). Any material alteration of the obligation assumed, made without the consent of the guarantor, discharges her. *Wynne, Love & Co. v. Bunch*, 157 Ark. 395, 248 S.W.2d 286 (1923); *Continental Ozark, Inc. v. Lair*, 29 Ark. App. 25, 779 S.W.2d 187 (1989).

*Id.* at 247-48, 16 S.W.3d at 568. Further, alteration of a guaranty agreement is not material unless the guarantor is placed in the position of being required to do more than his original undertaking. *Vogel v. Simmons First Nat'l Bank*, 15 Ark. App. 69, 689 S.W.2d 576 (1985).

Guaranties are divided into two classes, general and special. A general guaranty is addressed to persons generally and may be enforced by anyone to whom it is presented. 38 AM. JUR. *Guaranty* § 17. A special guaranty is one addressed to particular persons and may not be enforced by any person other than to

whom it is addressed. *Id.* In *Periman v. Rogers*, 187 Ark. 565, 61 S.W.2d 59 (1933), the supreme court discussed special guaranties:

> At § 52 of Stearns on Suretyship (3d ed.), page 64, it is said: "A guaranty is special when it is addressed to a particular person, firm or corporation, and, when so addressed, only the promisee named in the instrument acquires any rights under it." . . .
>
> At 16 of the chapter on Guaranty in 28 C.J., page 897, it is said: "A special guaranty is one which is addressed to a particular person who alone can take advantage of it, and to whom only the guarantor can be held responsible; it usually, but not necessarily, contemplates a trust or reposes a confidence in the person to whom it is addressed."

*Id.* at 567, 61 S.W.2d at 59. Appellants suggest that the guaranties they executed are special guaranties because they were specifically addressed to Leprino Foods and did not contain "successors and assigns" language, indicating that they could be enforced by Leprino Foods' successor or assigns. Based on these facts, they contend that the guaranties are not enforceable by Multifoods and suggest that *Periman v. Rogers* is controlling.

In *Periman v. Rogers*, J.G. Rogers entered into a lease agreement with Butler & Sons to rent a gas station. Rogers's payment of rent was guaranteed by three men pursuant to a written contract. Rogers became ill and Ladd took possession of the property. During Ladd's possession, Butler & Sons sold the property to Hays and Periman. Ladd defaulted on the lease payments; Hays and Periman sued Rogers and his guarantors to recover past due rents. A default judgment was obtained against Rogers and one guarantor. The trial court entered a judgment in favor of the two other guarantors, which was affirmed on appeal, finding that the guaranty was special and only addressed the original lessors and did not run to their heirs or assigns.

Appellants' reliance on *Periman* is misplaced because an assignment of the guaranties was not at issue. There was no indication that Butler & Sons assigned the written contract signed by three men guaranteeing Roger's payment of rent when it sold the property to Hays and Periman. In the present case, Multifoods acquired the assets of Leprino Foods pursuant to an asset-purchase agreement, which included the guaranties signed by the Thurmans. Thus, the court reached its decision in *Periman* without deciding whether a special guaranty can be assigned.

In addition to *Periman v. Rogers*, appellant also cites *Flying J, Inc. v. Booth*, 773 P.2d 144 (Wyo. 1989). In *Booth*, the appellees Jacqueline and Elvin Booth owned one-half of the outstanding shares of Booth Livestock, Inc., which operated a truck stop named Husky Super Stop. Before Husky Oil Co. would extend credit to Booth Livestock on fuel purchases and other products, Husky required appellees to personally guarantee the payment of any obligation incurred by Booth Livestock. Appellees executed the guaranty, and Husky supplied Booth Livestock with products used to operate the truck stop. In 1983, the Booths subsequently sold their one-half interest to Joan and Paul Gillett, who already owned the other half. The Gilletts were allowed to continue to purchase products on credit from Husky based on personal guaranties they executed in 1984. In May 1984, Husky sold its assets to RMT Properties, which was acquired by Big West Oil Co. in December 1985. Big West then assigned its assets to its wholly owned subsidiary Flying J, Inc., appellant therein. In 1985, Booth Livestock, then owned wholly by the Gilletts, defaulted on payments due. Appellant sued the Booths and the Gilletts to recover under the guaranty. Before the Gilletts were served with the complaint, Paul Gillett died and Joan Gillett filed for bankruptcy.

The Wyoming Supreme Court found that the guaranty signed by appellees was a special guaranty since it was addressed to only one creditor, Husky. The court then addressed whether the guaranty was assignable, holding that it was not. Speaking of the guaranty agreement, the court stated:

> That language expressly and clearly indicates that the relationship and intent of these parties was rooted in appellees' reliance on Husky's ability and willingness to perform its contract with BL [Booth Livestock]. A guaranty expressly given in consideration of the extension of future credit by a specific individual is generally held to be non-transferable. . . . Even where obligee sells his business and his successors continue to extend credit, the guarantor is liable only for debts resulting which accrued prior to the transfer of the original obligee's assets but not after.

*Id.* at 148. The Wyoming court declined to join the other courts which permit the assignment of special guaranties in the absence of actual prejudice to the guarantor.

In support of its argument, appellee relies on *Kraft Foodservice, Inc. v. Hardee*, 340 N.C. 344, 457 S.E.2d 596 (N.C. Sup. Ct. 1995), where the North Carolina Supreme Court upheld an assignment of

a special guaranty. In *Kraft*, Charlie Hardee was the president of Quick Fill, Inc., which operated convenience stores. Quick Fill submitted an application in June 1984 to Seaboard Foods, Inc., in Rocky Mount to purchase restaurant supplies and other merchandise on an open account. Hardee signed a personal guaranty for the account, promising to pay any amounts owed by Quick Fill for goods sold and delivered on the open account. After receiving the credit application and the guaranty, Seaboard began to sell merchandise to Quick Fill. In December 1995, Seaboard sold and assigned substantially all of its assets, including its Rocky Mount warehouse and Hardee's personal guaranty to Kraft, Inc. Kraft continued to sell merchandise to Quick Fill on the open account guaranteed by Hardee. Kraft then merged with General Foods, Inc., in 1989, forming Kraft General Foods, Inc. In December 1990, certain corporate assets, including the Hardee guaranty, became vested in appellee Kraft Foodservice. The corporate changes did not affect Quick Fill's ability to purchase goods on the open account.

In January 1991, Quick Fill filed a petition for bankruptcy under Chapter 11 of the United States Bankruptcy Code. Quick Fill owed $18,120.44 on the open account. Kraft Foodservice filed an action to enforce Hardee's personal guaranty. The trial court entered summary judgment for Kraft Foodservice. The North Carolina Court of Appeals reversed, holding that the guaranty was special and extended only to Seaboard Foods and was not enforceable by Kraft Foodservice as Seaboard's successor or assignee. The North Carolina Supreme Court reversed the decision of the Court of Appeals, holding that the guaranty was assignable and enforceable by Kraft Foodservice as Seaboard's assignee.

The North Carolina Supreme Court discussed the difference between a special and a general guaranty. The court elaborated that a special guaranty usually contemplates a trust in the person to whom it is addressed. It was noted that state courts are split on the issue of whether a guaranty addressed to a corporation may be enforced by the corporations's successor. *Kraft*, 457 S.E.2d at 598 (citing 38 C.J.S. *Guaranty* § 41(b)(1), at 1186 (1943)). Relying on prior law, the North Carolina Supreme Court held that the rights under a special guaranty are assignable unless: the assignment is prohibited by statute, public policy, or the terms of the assignment; the assignment would materially alter the guarantor's risks, burdens or duties; or the guarantor executed the contract because of personal confidence in the obligee. It stated that such a rule "is consistent with the common law of contracts, accommodates modern

business practices, and fulfills the intent of the parties to ordinary business agreements." *Id.* at 348, 457 S.E.2d 596, 598-99.

The reasoning of the North Carolina Supreme Court in *Kraft Foodservice* is also consistent with the *Restatement (Third) of Suretyship and Guaranty* § 13 (1996), which provides in part:

> (1) The rights of the obligee against the secondary obligor arising out of the secondary obligation can be assigned unless:
>
> > (a) the substitution of a right of the assignee for the right of the obligee would materially change the duty of the secondary obligor or materially increase the burden or risk imposed on it by its contract; or
> > (b) the assignment is forbidden by statute or is otherwise ineffective as a matter of public policy; or
> > (c) the assignment is validly precluded by the contract.

Based on the Restatement and the reasoning of *Kraft Foodservice*, we conclude that the appellee, as Leprino Foods' assignee, could enforce the appellants' personal guaranties. The terms of the guaranty contracts do not prohibit assignment, nor does public policy or any statute preclude assignment under these facts. Leprino Foods' assignment of the guaranties to Multifoods does not alter appellants' obligations. Appellants vowed to be personally liable if BSG failed to pay its debts on the open account. The assignment merely substituted the payee. There is also no evidence that the Thurmans executed the guaranties based on personal confidence they had in Leprino Foods. The guaranties were executed so that BSG Foods could purchase products on a open account. Even after Leprino Foods assigned its assets to Multifoods, BSG continued to purchase goods from Multifoods on the open account.

Accordingly, we affirm the trial court's grant of partial summary judgment to appellee.

ROBBINS and BIRD, JJ., agree.

Ronald OWEN *v.* STATE of Arkansas

CA CR 00-820 53 S.W.3d 62

Court of Appeals of Arkansas
Division II
Opinion delivered September 5, 2001
[Supplemental opinion on denial of rehearing
delivered October 24, 2001.]

*Miller Law Firm*, by: *Randel Miller* and *Brenton Bryant*, for appellant.

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

ANDREE LAYTON ROAF, Judge. Ronald Owen was convicted in a Craighead County jury trial of possession of methamphetamine with intent to deliver, possession of drug paraphernalia with intent to manufacture, possession of marijuana with intent to deliver, and misdemeanor possession of paraphernalia with intent to use, for which he received concurrent sentences of 120, sixty, seventy-two, and twelve months, respectively, in the Arkansas Department of Correction. On appeal, Owen challenges a finding

by the trial court that he lacked standing to challenge the validity of the search of a motel room where he was staying as a "guest occupant." We affirm.

At a hearing on Owen's suppression motion, Jonesboro Best Western desk clerk Mary Cheney testified that on July 30, 1999, Room 222 was rented to Teresa Johnson of Paragould. Cheney stated that on the day in question she was sent to the room by the manager to rectify a telephone problem. According to Cheney, she knocked and was admitted to the room by a gentleman who was there alone. In the course of changing the phone from one jack to another, she noticed a large amount of cash on the bed and a "really bad smell . . . like ether." Cheney called the police, who arrived at the motel approximately thirty minutes later.

Jonesboro officers Tommy Crawford and Kevin Foust responded to Cheney's call. Officer Crawford testified that while Officer Foust knocked on the door, he stood at the window. Owen answered the door and stepped out of the room to speak with the officers, closing the door behind him. Officer Crawford stated that he turned his attention to the window itself and through a three-inch gap in the curtains, he observed loose marijuana on a tray that was sitting on a table that was just inside the room. He also observed a digital scale and a two-quart mason jar that contained a clear liquid. Officer Crawford asserted that based on his experience as a law-enforcement officer, the scales were commonly used for weighing narcotics. Additionally, he detected the smell of ether, which from his experience and training, he associated with the manufacture of methamphetamine. The next thing he observed was a female and a male quickly gathering the suspected contraband from the table. Officer Crawford feared that evidence would be destroyed and alerted Officer Foust of this fact. Officer Foust entered the room while Officer Crawford arrested Owen. Officer Foust secured the two suspects and called in drug task force officers. According to Officer Crawford, the officers made a quick sweep of the room for other suspects, during which he discovered in plain view what appeared to be methamphetamine, as well as coffee filters, tubing, and an open cooler that contained chemicals that were commonly used in the production of methamphetamine. Upon the arrival of drug task force agents, Officer Crawford transported the three suspects to the county jail and returned to await the return of Teresa Johnson.

Officer Foust corroborated the testimony of Officer Crawford and further testified that he observed the female suspect pouring

out a two-quart jar of liquid, and confirmed that there was an ice chest in plain view that contained several chemicals that he knew were commonly used in the manufacture of methamphetamine. He also observed some glassware, a blender, and some rubber tubing. When he arrested Owen, Officer Foust searched him and found a baggie containing what he believed was methamphetamine. When Johnson arrived, the officers confronted her and explained that three individuals had been arrested in the room she had rented and the police had observed what they believed was drug paraphernalia. Johnson then signed a consent-to-search form.

Drug task force officer Jerry Roth testified that when he arrived at the motel, Officers Foust and Crawford were already in Room 222 with the three suspects. He confirmed that there was a possible methamphetamine lab in plain sight in the room. He stated that he and Officer Foust were en route to get a search warrant when the officers on the scene got consent to search. Officer Roth stated that marijuana was found on the floor of the bathroom along with some residue in the toilet. He also stated that he detected an odor of ether in the room and, based on his experience and knowledge of the process, that the odor would be present during the later stages of cooking methamphetamine.

Testifying on his own behalf, Owen stated that when the police arrived, he had been in the room "no longer than an hour," and he admitted that the room was not his. He denied seeing any loose marijuana or digital scales, but admitted that he had seven bags of marijuana zipped up in an overnight bag. He disputed the police's ability to see inside the room, asserting that the blinds were closed. He also stated that he did not remember any smell of ether in the room and that he had never been present when methamphetamine was being made. According to Owen, he knew that Teresa Johnson had rented the room, and he got a key to the room so that he could stay with Johnson's sister, Erin Lizinby. Owen recalled that a man, who was dating Johnson at the time, and another female acquaintance were also present. Owen stated that Johnson had told him the night before that she would have the room and that she had brought her sister. At the close of all the evidence, the court found that Owen did not have standing to challenge the search of the premises and denied the motion to suppress.

Before we take up Owen's argument on appeal, we must first dispose of the State's assertion that this appeal is procedurally barred because Owen has not included trial proceedings in his abstract or transcript. Citing *Davis v. State*, 325 Ark. 194, 925 S.W.2d 402

(1996), the State claims that this omission is dispositive because it denies the court the ability to " 'assess the impact of the allegedly' illegally seized evidence 'on the trial and determine whether prejudice resulted[ ]' from the denial of the motion to suppress." We find this argument unpersuasive, and the State's reliance on *Davis* clearly misplaced.

In the first place, the instant case is clearly distinguishable from *Davis*. The suppression issue in *Davis* involved a pretrial and in-court identification of the defendant, whereas the issue here is whether Owen had standing to challenge the search of the motel room that he was occupying. The appellant in *Davis* argued that the pretrial and in-trial identification should be suppressed because the mug shot that was used to initially identify him was made pursuant to an arrest on an unrelated charge that was later declared invalid. In declining to reach the merits of that issue in *Davis*, the supreme court reasoned that with such a tenuous assignment of error, it required more of the proceedings to be abstracted for it to determine if the appellant was prejudiced. Conversely, we have no difficulty determining the importance of the evidence in question — without the items seized in the motel room, there is no case. Furthermore, the motion to suppress the identification in *Davis* was made at the trial, and apparently none of the proceedings were abstracted. In the instant case, the motion was made before trial, and the suppression hearing is completely abstracted. Rule 4-3(g) of the Rules of the Supreme Court and Court of Appeals states: "In all felony cases it is the duty of the appellant . . . to abstract such parts of the record, but only such parts of the record as are material to the points to be argued in the appellant's brief." Owen has fully and fairly abstracted all material parts of the suppression hearing; to require more would be contrary to our own rules.

As his only point on appeal, Owen asserts that the trial court erred in finding that he did not have standing to assert a violation of his Fourth Amendment protection against an unreasonable search by the police who searched the motel room where Mr. Owen was staying as a guest occupant. Owen contends that he had standing as defined in *Rankin v. State*, 57 Ark. App. 125, 942 S.W.2d 867 (1997), where this court stated that the "pertinent inquiry regarding standing to challenge a search is whether a defendant manifested a subjective expectation of privacy in the area searched and whether society is prepared to recognize that expectation as reasonable." He asserts that he had a subjective expectation of privacy in the motel room in that, at the invitation of Ms. Johnson, he packed an overnight bag and left his home town to stay with Ms. Lizinby,

Johnson's sister, whom he already knew. He notes that he arrived at the motel, got a key from the desk clerk, and was waiting in the room for Ms. Lizinby when the police arrived. He also states that when he answered the door, he stepped outside and shut the door behind him to speak to the officers. He contrasts his actions with the appellant in *Rankin v. State, supra*, where there was no showing that the appellant maintained any control over premises searched. Citing *Minnesota v. Olsen*, 495 U.S. 91 (1990), Owen argues that a motel room is entitled to the same constitutional protection as a home and that his prior relationships with Ms. Lizinby and Ms. Johnson suggested a "degree of acceptance" into the premises. He urges this court to find that it is of no moment that the room was not registered in his name. Finally, he contends that the trial court was simply wrong in basing its decision on standing on a finding that there was "no proof in the record of whether there was an attempt to stay overnight." We find merit in Owen's argument; nonetheless, we still must affirm.

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). When a person owns or is in possession of the property searched, he has standing to challenge the legality of the search. *See Mazepink v. State*, 336 Ark. 171, 987 S.W.2d 648 (1999).

The trial judge erred in finding that Owen lacked standing to challenge the search. The United States Supreme Court only requires a *subjective* expectation of privacy. *See Minnesota v. Olsen, supra*; *see also Rankin v. State, supra*. In *Davasher v. State*, 308 Ark. 154, 823 S.W.2d 863 (1992), under a subsection of the opinion entitled "Standing," the supreme court cited *Parette v. State*, 301 Ark. 607, 786 S.W.2d 817 (1990), for the proposition that an individual had no standing to contest a warrantless search and seizure because there was no showing that the person owned or leased the searched premises and there was no showing the person maintained any control over the premises; yet the court went on to hold that the mere fact that appellant stayed at his mother's home

did not give him a reasonable expectation of privacy in the premises. In the instant case, we have clear evidence that Owen exercised control over the room. According to the testimony of police, although three persons were present, it was Owen who answered the door, and he pulled it closed behind him when he spoke with police. Moreover, Teresa Johnson was not on the premises, and although we are required to view the evidence in the light most favorable to the State, Owen's testimony that he had retrieved a key to the room and intended to spend the night, apparently with Johnson's consent, was not disputed. Accordingly, we hold that the trial judge erred in failing to find that Owen had standing to challenge the search.

Nonetheless, we affirm the trial court because it reached the right result. *Kimery v. State*, 63 Ark. App. 52, 973 S.W.2d 836 (1998). Entry into the motel room was made after Officer Crawford observed contraband in plain view through the window and became aware that persons in the room were likely disposing of the evidence. Pursuant to the plain-view exception to the Fourth Amendment's warrant requirement, when police officers are legitimately at a location and acting without a search warrant, they may seize an object in plain view if they have probable cause to believe that the object is either evidence of a crime, fruit of a crime, or an instrumentality of a crime. *Fultz v. State*, 333 Ark. 586, 972 S.W.2d 222 (1998). Additionally, the subsequent reentry of the motel room by police was made with Johnson's consent. Owen does not argue, nor could he reasonably do so, that Johnson, the person who rented the room, did not have the authority to consent to the search.

Affirmed.

BIRD and BAKER, JJ., agree.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING

CA CR 00-820 53 S.W.3d 62

Opinion delivered October 24, 2001

Supplemental opinion on Denial of Rehearing.

*Miller Law Firm*, by: *Randel Miller* and *Brenton Bryant*, for appellant.

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

ANDREE LAYTON ROAF, Judge. On September 5, 2001, we affirmed the convictions of Ronald Owen for various drug charges. The State subsequently filed a petition for rehearing, requesting only that we correct a misstatement of the law within our opinion. We deny the State's petition, but issue this supplemental opinion on rehearing to avoid any misinterpretation of our original holding.

In our opinion, we cited *Rankin v. State*, 57 Ark. App. 125, 942 S.W.2d 867 (1997), for the proposition that a person has standing to challenge a search "if he manifested a subjective expectation of privacy in the area searched and society is prepared to recognize that expectation as reasonable." The State takes issue with our subsequent statement, "The United States Supreme Court only

requires a *subjective* expectation of privacy." It is implicit in the body of our opinion that the proper inquiry includes both whether there was a subjective expectation of privacy and whether society is prepared to recognize the expectation as reasonable. *See Minnesota v. Olsen*, 495 U.S. 91 (1990); *Rankin v. State, supra.*

PITTMAN, ROBBINS, BIRD, GRIFFEN, and BAKER, JJ., agree.

Perry Burton HOLMES *v.* STATE of Arkansas

CA CR 00-1214 54 S.W.3d 121

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered September 12, 2001

[redacted]

*Frank E. Shaw*, for appellant.

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

JOSEPHINE LINKER HART, Judge. Perry Burton Holmes appeals the trial court's denial of his motion to suppress certain items that were seized from his home. For reversal, appellant

argues that under the Fourth Amendment he has a right to be free from unreasonable search and seizure, and the trial court's conclusion that the officer's warrantless entry was reasonable is clearly against the preponderance of the evidence. We reverse and remand.

While responding to a call that David Ellis had a gun and was possibly violating a no-contact order, Officer Keith Srite found Ellis's vehicle parked at appellant's residence and stopped to investigate. At that time, appellant and then Ellis exited the house, and Srite conducted a pat-down of Ellis. At least two additional officers had arrived at the scene, and Srite ordered these officers to take Ellis and appellant to separate police vehicles to talk. At this time, Srite noticed that a woman, Rosa Beth Allen, was inside appellant's house, and she had come to the door. Srite told Allen that he needed to talk to her. According to Srite, she, without comment, opened the door, and he entered. After entering, he noticed the smell of marijuana and asked Allen "where's the marijuana." At that time, according to Srite, Allen pulled out a tray that contained marijuana and related materials. Srite then asked Allen whether she lived in the house, and she replied that she did not and that appellant lived there and it was his marijuana. Thereupon, Srite exited the house, found appellant, advised him of his Miranda rights, and sought a consent from appellant to search the house, which appellant gave. With the written consent secured, the officers reentered the house and seized butts of smoked marijuana cigarettes (*i.e.*, roaches), marijuana seeds, "bongs," and a "small amount of suspected" methamphetamine.

Appellant's suppression motion sought to exclude the seized items from evidence. Following the hearing, the trial court denied the motion, reasoning that in light of the fact that Ellis was reported to have had a weapon, the officers were justified in entering the house in order to ensure their safety. Appellant then entered a conditional guilty plea commensurate with Ark. R. Crim. P. 24.3(b), and was sentenced to sixty months' probation for possession of methamphetamine, drug paraphernalia, and marijuana. From the denial of the suppression motion, comes this appeal.

Our standard of review 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 clearly against the preponderance of the evidence, then we will reverse." *Mathis v. State*, 73 Ark. App. 90, 94, 40 S.W.3d 816, 818 (2001) (citing *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 is clearly against the preponderance of the evidence. Thus, we reverse and remand.

The issues, as argued by the respective parties, touch on several rules of criminal procedure and concern the government's warrantless entry into appellant's home. Specifically, the parties' arguments center on Ark. R. Crim. P. 3.1, 3.4, first-party consent, and third-party consent. Finally, the State offers the alternative theory of "logical progression of events," commensurate with *Adams v. State*, 26 Ark. App. 15, 758 S.W.2d 709 (1988), to justify an affirmance of the trial court's denial of appellant's suppression motion. We address each issue respectively.

*I. Ark. R. Crim. P. 3.1, 3.4*

Rule 3.1 of the Arkansas Rules of Criminal Procedure provides:

> A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct.

Furthermore, Rule 3.4 provides:

> If a law enforcement officer who has detained a person under Rule 3.1 reasonably suspects that the person is armed and presently dangerous to the officer or others, the officer or someone designated by him may search the outer clothing of such person and the immediate surroundings for, and seize, any weapon or other dangerous thing which may be used against the officer or others. In no event shall this search be more extensive than is reasonably necessary to ensure the safety of the officer or others.

The trial court's denial of the suppression motion was based, at least in part, on the theory that the entry into appellant's home was justified to ensure the officer's safety, which might have been compromised by the possibility that Ellis possessed a weapon. However, we conclude that while the law does provide for a limited search in order to protect the officers, Srite's actions went beyond that which was reasonably necessary to ensure his safety.

Assuming that the officer believed that Ellis possessed a gun and the focus of concern was for the officer's safety, Ellis was outside of the house when the officer came into contact with him and in the custody of another officer. As such, accepting as fact, *arguendo*, that Rule 3.1 was triggered, the officers could only search, under Rule 3.4, "the outer clothing of [Ellis] and the immediate surroundings." Inasmuch as it is uncontroverted that Ellis was completely out of appellant's house, to affirm based on these Rules would be contrary to the mandate in Rule 3.4 that "[i]n no event shall this search be more extensive than is reasonably necessary to ensure the safety of the officer or others." Accordingly, we conclude that the trial court's decision was clearly against the preponderance of the evidence.

*II. Unreasonable search and seizure*

For his next point on appeal, appellant contends that the government's actions constituted a violation of his rights under the Bill of Rights. Specifically, he argues that such actions violated the Fourth Amendment, which provides that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." *See also* Ark. Const. art. 2, § 15. Appellee, however, argues that the government's actions did not violate the Fourth Amendment in light of appellant's first-party consent or, alternatively, Allen's third-party consent.

The question presented is whether the government's actions constituted a search within the context of the Fourth Amendment and Ark. Const. art. 2, § 15. If not, then appellant cannot claim that his right to be free from unreasonable search and seizure was infringed. *Cf. Maryland v. Macon*, 472 U.S. 463, 468—469 (1985) ("Absent some action taken by government agents that can properly be classified as a 'search' or 'seizure,' the Fourth Amendment rules designed to safeguard First Amendment freedoms do not apply."). According to Srite's testimony, the principal reason for his first entry into appellant's house was to speak with Allen regarding Ellis. In other words, Srite entered a home without a warrant for an investigative purpose, not for the purpose of searching the premises.

Rule 10.1(a) of the Arkansas Rules of Criminal Procedure defines a "search" as follows:

> [A]ny intrusion other than an arrest, by an officer under color of authority, upon an individual's person, property, or privacy, for

> the purpose of seizing individuals or things or obtaining information by inspection or surveillance, if such intrusion, in the absence of legal authority or sufficient consent, would be a civil wrong, criminal offense, or violation of the individual's rights under the Constitution of the United States or this state.

The adopted commentary to this rule explains that:

> The definition of "search" is of critical importance since it determines the substantive scope of [this article]. There is no Arkansas statutory precedent for a definition of search, and judicial attempts to develop a definition have been piecemeal since the issue whether particular action did or did not constitute a "search" seldom arises. *The key word in the definition is "intrusion," a term sufficiently broad to encompass any legally cognizable interference with an individual's right to privacy.* The remainder of the definition limits the scope of this initial term. . . .
>
> Most searches are challenged as intrusions upon an individual's person or property. However, in *Katz v. United States*, 389 U.S. 347 (1967), the Supreme Court repudiated a Fourth Amendment analysis based on "constitutionally protected areas." Consequently, *the definition of "search" is extended to cover any intrusions upon the privacy of an individual.*

(Emphasis added.)

[redacted] Along these lines, the United States Supreme Court has defined this critical term as follows: "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). In resolving the question of whether such an expectation was infringed, we rely on *Payton v. New York*, 445 U.S. 573, 589—590 (1980), which stated:

> "[At] the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 [(1961)]. In 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. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

Here, the officer's purpose was to obtain information from Allen regarding Ellis, and in doing so, the officer intruded into appellant's home,[1] a place that society has long considered to be a location in which it was reasonable for a person to have an expectation of privacy. Thus, we hold that under Rule 10.1(a), the officer's actions constituted a search within the meaning of the Fourth Amendment and Ark. Const. art. 2, § 15. Accordingly, we now consider whether the warrantless search was unreasonable.

As we recently stated in *Goodman v. State*, 74 Ark. App. 1, 9, 45 S.W.3d 399, 403—404 (2001):

> 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.

The United States Supreme Court neatly summarized the relevant law: "With few exceptions, the question [of] whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo v. United States*, ____ U.S. ____, 121 S. Ct. 2038, 2042 (2001) (citing *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990); *Payton*, 445 U.S. at 586).

Commensurate with its burden to demonstrate that the *per se* unreasonable search was reasonable, the State contends that exigent

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[1] It might be tempting to argue that the officer's actions did not constitute a search because appellant was not originally the subject of the officer's investigation. After all, the evidence does not appear to demonstrate that the officer purposefully attempted to deprive appellant of his guaranteed rights. However, our rules of criminal procedure do not define a search so narrowly. More importantly, to adopt such a rationale would circumvent the Fourth Amendment guarantee that one is secure in one's homes, and such a decision would be contrary to the instructions in *Boyd v. United States*, 116 U.S. 616, 635 (1886), that "illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure. . . . It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon."

circumstances did exist to justify affirming the trial court's decision. Namely, appellee argues that the warrantless entry was reasonable in light of appellant's first-party consent or, alternatively, in light of Allen's third-party consent. We address each subissue separately and hold that under the Fourth Amendment and Ark. Const. art. 2, § 15, the search was unreasonable.

*1. First-party consent*

While we agree with appellee that entries based on voluntary first-party consent can be considered reasonable, *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973), we disagree with the notion that appellant's consent is determinative in this case. Although appellant put forward testimony at the suppression hearing that the written consent was involuntary, we disregard that inasmuch as to conclude otherwise would be contrary to our general principle that we defer to the trial judge on issues of credibility. *See Tabor v. State*, 333 Ark. 429, 433, 971 S.W.2d 227, 230 (1998). More importantly, however, it is the initial entry, which took place before the written consent was obtained, that is of greater concern to us. In this regard, it is plain that the officer entered a private home without a warrant and, for the aforementioned reason, appellant's consent was not an exigent circumstance upon which the State can sustain its argument that the entry complied with the law. Accordingly, we hold that a finding that the State met its burden of demonstrating exigent circumstances to justify a warrantless entry of appellant's private home under the theory of first-party consent would be clearly against the preponderance of the evidence.

*2. Third-party consent*

As an alternative theory, appellee argues that Allen provided a valid third-party consent to justify the warrantless entry. Again, we agree that voluntary third-party consent can be considered reasonable, *United States v. Matlock*, 415 U.S. 164 (1974); however, we disagree with the State's position that such consent was given in this case.

It is questionable as to whether Srite's observations at the time he received Allen's "consent" were sufficient to sustain a conclusion that he reasonably believed that the consenting party had common authority over the premises that was searched. Assuming, *arguendo*, that the officer reasonably believed Allen had authority to permit the consent, we do not reach the question of apparent authority

until we are satisfied that Allen's actions constituted consent. *See* Ark. R. Crim. P. 11.1 ("An officer may conduct searches . . . without a search warrant or other color of authority if consent is given to the search. . . .").

When viewing the totality of the circumstances, it is arguable that Allen's conduct should not be construed as consent. Here, the dispute centers on whether Allen's non-verbal conduct constituted third-party consent to the government to enter appellant's home. While we do not necessarily hold that consent must be oral or written to be effective, we are concerned about the general notion of courts speculating as to the meaning of a third-person's nonverbal conduct to reach the conclusion that a warrantless search was reasonable. After all, as stated in *Bumper v. North Carolina*, 391 U.S. 543, 548—549 (1968):

> When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority.

*See also White v. State*, 261 Ark. 23-D, 24, 545 S.W.2d 641, 642 (1977). In our view, it is self-evident that from the officer's perspective there is little, if any, objective difference between acquiescence to a claim of lawful authority and implied third-party consent. This realization, coupled with the fact that we must view searches in cases such as this as *per se* unreasonable, form the basis of our concern. This problem is remedied, of course, if the third-party consent is oral or, even better, written.

Our supreme court touched on the issue of implied consent in *Norris v. State*, 338 Ark. 397, 409, 993 S.W.2d 918, 925—926 (1999), and quoted with favor *United States v. Gonzalez*, 71 F.3d 819, 830 (11th Cir. 1996) (citations omitted), which stated:

> We have previously noted our hesitancy to find implied consent (*i.e.*, consent by silence) in the Fourth Amendment context and we agree with our colleagues in the Ninth Circuit that, whatever relevance the implied consent doctrine may have in other contexts, it is inappropriate to "sanction[ ] entry into the home based upon inferred consent." As Judge Ferguson cogently explained:
>
>> The government may not show consent to enter from the defendant's failure to object to the entry. To do so would be

> to justify entry by consent and consent by entry. "This will not do." We must not shift the burden from the government — to show "unequivocal and specific" consent — to the defendant, who would have to prove unequivocal and specific objection to a police entry, or be found to have given implied consent.

The facts of the case at bar provide a good illustration of potential problems with nonverbal third-party consent. Srite acknowledged that he might have drawn his weapon before entering appellant's home and was certain that he had instructed two additional officers to take appellant and Ellis away for interrogation. Following these events, he and Allen were alone — he was on the porch and she was inside the house. Srite's testimony plainly demonstrates that he did not solicit Allen's consent to enter appellant's home, and he acknowledged Allen did not give him oral permission to enter the house. Instead, he merely told Allen that he needed to talk with her and asked if there was a place that they could talk. Thus, what Allen intended is unclear — was she inviting the officer inside appellant's home or was she reacting to the command of a law-enforcement officer who may have drawn his weapon and was accompanied by at least two other officers who had already taken away the person who resided in the house?

When viewing the totality of the circumstances, we conclude that a finding that Allen's actions constituted a communication to the government to enter appellant's home that was both "unequivocal and specific" and given "freely and voluntarily" is clearly against the preponderance of the evidence. Moreover, in light of the foregoing, we also conclude that it is unnecessary and, accordingly, decline to address the issue of whether the government's warrantless entry into appellant's home was lawful under the theory that Allen had either actual or apparent authority to consent to the entry to appellant's home. Instead, we merely conclude that the trial court's denial of the suppression motion constituted reversible error for the foregoing reasons and, therefore, reverse.

### *III. Logical progression of events*

In its final argument, appellee argues that the officer's actions constituted a "logical progression of events" that warrant an affirmance of the denial of the suppression motion. In support of this argument, the State relies upon *Adams*, which relied, in part, on the United States Supreme Court decision of *New York v. Belton*, 453 U.S. 454, 460 (1981), in which the Court held that "when a

policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." However, both *Belton* and *Adams* concern Fourth Amendment and the search and seizure of items following the stopping and detaining of individuals who are in vehicles. We decline to accept the State's ostensible invitation to adopt Fourth Amendment analysis of the searches of vehicles to the searches of a home in light of the well-developed precedents that specifically touch on these rights as they pertain to a person's home.

However, it is instructive to note that in *Adams*, the court also relied upon *Baxter v. State*, 274 Ark. 539, 542, 626 S.W.2d 935, 936—937 (1982), which also dealt with the stopping and detaining of an individual in a vehicle and stated:

> The crucial issue in this case is whether the initial stop of appellant was valid under state and federal law. If the stop is found to be valid, the logical progression of events which followed resulted in probable cause for the arrest. The subsequent search of appellant's car after the arrest was a search incident to a lawful arrest and valid under the recent case of *New York v. Belton*, 453 U.S. 454 (1981).

Accordingly, if we were to adopt the State's invitation to apply the foregoing authorities to the homes, our conclusion would be the same. The crucial issue in this case is whether the initial entry of appellant's home was valid under state and federal law. If the entry is found to be valid, the logical progression of events which followed could have resulted in a valid warrantless search of the house. However, for the reasons already stated, we conclude that the initial entry was unlawful and the search was unreasonable.

In reaching our decision, we do not intend to undermine the general manner in which our law-enforcement officers interact with their fellow citizens. However, we are cognizant that these officers occupy a special role in our society inasmuch as their actions frequently represent the government's first contact with individuals. Because our laws rightly value the rights of these individuals, even the most casual of contacts by police officers — particularly when such contact involves the entering of a person's home during the course of exercising official duties — can raise profound constitutional questions. In our view, the officer here simply operated beyond established parameters, which necessitates a reversal. "[T]o conclude otherwise would exact too high a cost inasmuch as such a decision would be contrary to the principles embodied in the Fourth and Fourteenth Amendments to the

United States Constitution." *Mathis*, 73 Ark. App. at 96, 40 S.W.3d at 820.

Reversed and remanded.

NEAL, BAKER, and ROAF, JJ., agree.

BIRD and VAUGHT, JJ., dissent.

LARRY D. VAUGHT, Judge, dissenting. "Reasonableness" is the linchpin of Fourth Amendment analysis. The prohibition against unreasonable searches and seizures protects citizens from police misconduct and overreaching; however, it does not require that police be infallible and free from all mistakes. As stated by the Supreme Court of the United States:

> It is apparent that in order to satisfy the "reasonableness" requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government — whether the magistrate issuing a warrant, the police officer executing a warrant, or the police officer conducting a search or seizure under one of the exceptions to the warrant requirement — is not that they always be correct, but that they always be reasonable.

*Illinois v. Rodriguez*, 497 U.S. 177, 185 (1990).

In the instant case, Deputy Srite testified that after Mr. Ellis and the appellant were outside of the house, there was a woman (Ms. Allen) standing in the doorway to the house. Deputy Srite approached Ms. Allen and asked her if there was some place they could talk.[1] He stated that she opened the door and "indicated to me to come in." Before launching into a Fourth Amendment analysis, the deputy's options should be considered. If Ms. Allen had simply come out of the house to talk outside, there is no question that he could not have entered the house. If, on the other hand, Ms. Allen had retreated into the house and told the deputy that he could not enter, again he would be barred from lawful entry. However, her gesture of invitation (without considering at this time

[1] Deputy Srite's request to interview Allen was permissible under Rule 2.2(a) of the Arkansas Rules of Criminal Procedure, which provides that "[a] law enforcement officer may request any person to furnish information or otherwise cooperate in the investigation or prevention of a crime. The officer may request the person to respond to questions, to appear at a police station, or to comply with any reasonable request."

whether she had the authority to invite) must be considered clear and reasonable.

The first question to be answered is whether Deputy Srite, by simply entering the house at Ms. Allen's invitation, was "searching." Although the dictionary definition of "search" requires an intent to probe on the part of the searcher, the Supreme Court of the United States has recognized a "search" for Fourth Amendment purposes as an intrusion by the State of an area in which an individual has manifested a subjective expectation of privacy, and society is willing to recognize that expectation as reasonable. *See Kyllo v. United States*, ___ U.S. ___, 121 S.Ct. 94 (2001); *California v. Ciraolo*, 476 U.S. 207 (1986). The very core of the Fourth Amendment is "the right of a man to retreat into his own home and there be free from governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961). With few exceptions, a warrantless search of a home is presumptively unreasonable. *See Illinois v. Rodriguez*, 497 U.S. 177 (1990); *Payton v. New York*, 445 U.S. 573 (1980). Therefore, Deputy Srite's mere act of crossing the threshold of appellant's home does indeed constitute a warrantless search. However, the constitutional prohibition against warrantless searches is not applicable if voluntary consent has been obtained, either from the individual whose property is searched, *see Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), or from a third party who possesses common authority over the premises, *see United States v. Matlock*, 415 U.S. 171 (1974). In this case, the person who admitted the officer, Ms. Allen, was later determined to be a visitor who had no common authority over the premises. The questions now become whether Ms. Allen voluntarily consented to the search and whether the officer could reasonably rely on the consent.

Failure to object to a search does not constitute consent. *United States v. Gonzalez*, 71 F.3d 819 (11th Cir. 1996). In this case, there was not merely a failure to object — the officer never asked to come in. His inquiry was only for a place to talk.[2] The person offering the house as the location for the "talk" was Ms. Allen. Her gesture was clear to the officer, whose testimony was believed by the trial judge. On matters of credibility we defer to the trial court. *Tabor v. State*, 333 Ark. 429, 971 S.W.2d 227 (1998).

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[2] The majority makes much ado about testimony that the officer "may" have had his gun drawn when he approached the house. However, a careful review of the abstract indicates that Deputy Srite testified that he may have drawn his gun during his *initial* approach to the scene, prior to the arrest of Ellis and appellant. There is no testimony that he had his gun drawn at any time during this subsequent approach to the home for the express purpose of interviewing Ms. Allen.

In assessing the voluntariness of Ms. Allen's consent we again look to the reasonableness standard. The facts in this case are almost identical to those in *United States v. Turbyfill*, 525 F.2d 57 (8th Cir. 1975). In that case, the officers went to appellant's home in the course of a counterfeiting investigation and knocked on the door. A friend of the appellant's named Church answered the door, and after the officers identified themselves, Church backed away from the door and they entered. The officers' entry was not preceded by either verbal or written consent. After entry, the officers observed marijuana in plain view, leading to the eventual charges against the appellant. The Eighth Circuit upheld the initial entry and stated:

> An invitation or consent to enter a house may be implied as well as expressed. There was no error in the determination of the district court that the action of Church in the opening of the door and stepping back constituted an implied invitation to enter.

525 F.2d at 59 (citations omitted).

The majority, in the instant case, holds that the trial court's finding that Ms. Allen consented to the entry of the officer is clearly against the preponderance of the evidence. They rely on *Norris v. State*, 338 Ark. 397, 933 S.W.2d 918 (1999) (quoting *United States v. Gonzalez, supra*), for the proposition that implied or inferred consent is not valid under the Fourth Amendment. However, *Norris* supports affirmance of this case in all respects.

In *Norris*, the officer went to the appellant's home on the tip of a citizen that the appellant was driving erratically. The door was answered by the appellant's mother-in-law (Ms. Wise) who testified that she admitted the officer into the house because the dogs were making a disturbance and for no other reason. Once inside, she went down the hall to get the appellant, and the officer followed her without asking permission and without invitation. The supreme court first examined whether the mother-in-law, who did not live in the home, had the authority to consent to the entry. The court, citing *Grant v. State*, 267 Ark. 50, 589 S.W.2d 11 (1979), held that so long as a searching police officer reasonably believes that a person giving consent has authority to do so, the consent is valid, notwithstanding a later determination that the consentor had no such authority. The court then reversed the case based on the officer's act of following Ms. Wise down the hall to the back of the house. The court upheld the initial entry and discussed the issue of implied consent only with relation to the uninvited entry to the back of the house.

The analysis again returns to reasonableness. What an individual is assured by the Fourth Amendment itself is *not* that no government search of his house will occur unless he consents, but that no such search will occur that is "unreasonable." *Illinois v. Rodriguez*, 497 U.S. 177 (1990). The invitation Ms. Allen offered for entry into the house was clear in the mind of Deputy Srite. He testified that he thought that she lived there with the appellant and that she had authority to let him enter. Although that conclusion was erroneous, it was not unreasonable. "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability." *Id.* at 186 (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)). The United States Supreme Court has upheld as reasonable the entry into an appellant's residence under the invitation of a third party who had no authority to consent, but who the officer reasonably believed did have such authority. This conclusion was stated with the classic definition of reasonableness:

> As with other factual determinations bearing upon search and seizure, determination of consent to enter must "be judged against an objective standard: would the facts available to the officer at the moment . . . 'warrant a man of reasonable caution in the belief' " that the consenting party had authority over the premises? If not, then warrantless entry without further inquiry is unlawful unless authority actually exists. But if so, the search is valid.

*Id.* at 188. Because here the officer acted reasonably when he entered the appellant's house upon the invitation of Ms. Allen, who he reasonably believed had authority to invite him in, I would uphold the warrantless entry into the appellant's home.

Once inside the house the officer immediately detected the strong odor of marijuana. Having concluded that his entry into the home was lawful, the evidence in the form of the odor was detectable without a warrant pursuant to the "plain smell" doctrine. *United States v. Roby*, 122 F.3d 1120 (8th Cir. 1997). The officer then asked Ms. Allen where the marijuana was, and she produced it. He next inquired if she lived there. After receiving a negative response, the officer immediately exited the house and sought (and received) the written consent of the appellant to complete the search. Unlike the investigator in *Norris*, Deputy Srite did not take advantage of his lawful entry to expand the scope of his search to other parts of the house. He acted "reasonably" by inquiring, at the first detection of

possible contraband, about ownership of the house. I would, therefore, uphold the seizure of the marijuana produced by Ms. Allen after Deputy Srite detected its odor, and the seizure of the items found in the search subsequent to the written consent of the appellant. Accordingly, I would affirm the denial of the motion to suppress.

I am authorized to state that Judge BIRD joins me in this dissent.

Sylvia MORTON *v.* Todd PATTERSON,
Personal Representative of the Estate
of Leon Vincen Holland

CA 00-1364 54 S.W.3d 137

Court of Appeals of Arkansas
Division I
Opinion delivered September 12, 2001

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

*Troy R. Douglas*, for appellee.

JOSEPHINE LINKER HART, Judge. Sylvia Morton appeals a probate court order that (1) denied her petition for the admission of a codicil to probate and the appointment of her as personal representative to the estate of Leon Vincen Holland, and (2) directed appellee to take into possession as estate assets two

vehicles, which the decedent had purportedly conveyed to appellant. For reversal, appellant argues that (1) the probate judge's finding that the decedent did not execute the codicil is not supported by substantial evidence, and (2) the probate court erred in finding that the two vehicles were assets of the estate. While we agree with appellant's second point on appeal, we conclude that the probate judge's finding that the decedent did not execute the codicil is not clearly erroneous. Therefore, we affirm in part, reverse in part, and remand for further action not inconsistent with this opinion.

Following Mr. Holland's death on September 8, 1999, appellee, on October 4, 1999, filed a petition seeking the admission to probate a will dated February 12, 1998. The will named appellee as the personal representative and provided, *inter alia*, for a bequest of $10,000 to appellant. An order admitting the will to probate and appointing appellee as personal representative was filed on October 13, 1999.

Thereafter, appellant filed a petition, seeking the admission to probate a codicil altering the previously-admitted will. The codicil dated July 19, 1999, devised to appellant all of decedent's "real estate, house, land, minerals and contents . . . ."

At a hearing on appellant's petition, several witnesses testified as to the validity of the codicil. Included among those testifying were the individuals who signed as witnesses to the decedent's execution of the codicil and two handwriting experts. Both attestors to the execution of the codicil testified that the decedent had, in fact, signed the document in their presence and had, at that time, verbally acknowledged his intention to give his home and land to appellant. However, other testimony revealed that appellant's daughter-in-law notarized the codicil. Furthermore, appellant's husband[1] served as one of the witnesses to the codicil, and the second witness was the husband's close friend. Finally, despite the testimonial evidence that the decedent had executed the codicil, two separate handwriting experts from the Arkansas State Crime Laboratory opined that the decedent was not the person who signed the codicil.

[1] Ostensibly, this witness was not married to appellant at the time the codicil was purportedly executed; however, he was married to appellant at the time of the hearing.

The probate judge found that the codicil was not executed by the decedent and denied appellant's petition. He further ordered appellant to vacate the home and appellee to take possession of the home and its contents. Although appellant claimed ownership of two vehicles by virtue of a transfer of title to her by the decedent and there was no petition seeking relief, the probate judge ordered appellee to marshal the vehicles as assets of the estate. He also directed appellant to execute the necessary documents to effect conveyance to the estate. From the order embodying these decisions, comes this appeal.

*I. Standard of review*

Our standard of review in matters such as this is well-settled:

> Probate cases are reviewed *de novo* . . . [and] we will not reverse the probate judge's findings of fact unless they are clearly erroneous. . . . A finding is clearly erroneous when, although there is evidence to support it, we are left on the entire evidence with the firm conviction that a mistake has been committed.

*Eddins v. Style Optics, Inc.*, 71 Ark. App. 102, 105, 35 S.W.3d 315, 317 (2000) (citations omitted); *see also* Ark. R. Civ. P. 52(a). Furthermore, as it may pertain to findings of fact, we defer to the superior position of the probate judge to weigh the credibility of the witness. *See Blunt v. Cartwright*, 342 Ark. 662, 671, 30 S.W.3d 737, 742 (2000).

*II. Admission of codicil to probate*

For reversal, appellant first alleges error based on a lack of substantial evidence to support the probate judge's finding that the signature on the codicil was not that of the decedent. In support of her assertion, she argues that the validity of the proper execution of the codicil was established by overwhelming evidence and directs our attention to her testimony and the testimony of the witnesses to the codicil.

Appellant testified that she had lived at decedent's residence since November 1995, when she began working for him as a housekeeper. In December 1996, she also became the primary care giver to the decedent and took over the care of his cattle. According

to her, the decedent had been on oxygen since his bypass surgery in 1996, and he took "a lot" of medication. During 1999, although he was alert most of the time, he was either in his bed, wheelchair, or recliner. Admitting to handwriting the codicil, appellant explained that she produced the document by taking "verbatim" the decedent's dictation and recording that information "word for word."

Appellant's husband, Joe Anderson, testified that he met appellant "four or five years ago" while mowing the decedent's grass, but their relationship did not begin immediately. According to him, he was in decedent's home to be paid for his mowing services and was asked by the decedent to witness the signing of the codicil, which the decedent, in fact, did. Finally, Anderson testified that in addition to the decedent and the two witnesses, appellant and her daughter-in-law, who notarized the witnesses' signatures, were also present at the time the decedent signed the codicil.

The other witness to the codicil, Tommy Johnson, testified that on July 19, 1999, he allowed appellant to borrow his tractor so Anderson could mow the decedent's grass. While accompanying Anderson to decedent's home, Johnson was asked by the decedent to witness his signing of the codicil, which he, in fact, did.

Appellee responded to appellant's evidence by presenting the testimony of two separate expert witnesses who independently reached the opinion that the decedent did not sign the codicil. In instances where the evidence is in conflict, we defer to the probate judge's better position to weigh the credibility of these various witnesses. In this case, we conclude that his finding that the codicil was not executed by the decedent was not clearly erroneous and affirm his denial of appellant's petition.

*III. Possession of two vehicles*

Finally, appellant argues that the probate court erred by instructing appellee to take into possession two vehicles, the titles to which the decedent had purportedly conveyed to appellant. Specifically, appellant argues that the probate judge's action constituted reversible error because it granted relief to appellee on an issue that was improperly before the court. Appellee counters by arguing that appellant waived any dispute that the vehicles belonged to the estate when she failed to file an objection to an inventory that listed the vehicles as being a part of the estate. We, nevertheless, agree with appellant.

Section 10 of Act 140 of 1949, which is codified at Ark. Code Ann. § 28-1-109(a)-(b) (1987), states:

> Every application to the court, unless otherwise provided, shall be by petition signed and verified by or on behalf of the petitioner. This requirement shall be mandatory but not jurisdictional, and noncompliance therewith shall not alone be grounds for appeal.

Stated differently, unless a separate means is given, all relief sought under the probate code must come in the form of a petition that is signed and verified by or on behalf of the petitioner; however, if the petition is not signed and verified, then the court still retains jurisdiction to hear the petition, and a party cannot use the lack of a signature and verification as a reason to appeal the lower court's decision. The statute is unambiguous; accordingly, strict compliance is required. *See Eddins*, 71 Ark. App. at 111-112, 35 S.W.3d at 321 (citing *Norton v. Hinson*, 337 Ark. 487, 989 S.W.2d 535 (1999)).

Here, the only matter before the probate court was a petition that simply sought the admission of a codicil to probate. More important to our inquiry, no petition was filed that alleged that appellant held title to the vehicles and sought an order of possession of these vehicles. Notwithstanding this deficiency, the probate court made findings and granted appellee title and possession of the vehicles.

We agree that there is value in promptly resolving a controversy regarding who should have title to these vehicles; however, we cannot approve of such a summary proceeding inasmuch as it was beyond the plain meaning of Act 140 and deprived appellant of an opportunity to present a complete and thoughtful objection. On *de novo* review of this matter, we conclude that such an order failed to strictly comply with the unambiguous requirements set forth in Ark. Code Ann. § 28-1-109. Accordingly, we reverse the probate court's order directing appellee to take possession of the aforementioned vehicles.

Affirmed in part, reversed in part, and remanded.

ROAF, J., agrees.

PITTMAN, J., concurs.

Doyle TAYLOR *v.* LUBRITECH

CA 01-79 54 S.W.3d 132

Court of Appeals of Arkansas
Division IV
Opinion delivered September 12, 2001
[Petition for rehearing denied October 24, 2001.]

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

*Judy W. Rudd*, for appellee.

OLLY NEAL, Judge. This is an appeal from a decision of the Arkansas Workers' Compensation Commission finding that the average weekly wage of the decedent was $761.42 and denying dependency death benefits to the decedent's stepgrandson. On appeal, the appellant argues that the Commission erred in its failure to include the decedent worker's health insurance allowance, bonus, and vacation pay in the average weekly wage calculation and that the Commission erred in its failure to recognize a stepgrandchild as a dependent entitled to workers' compensation death benefits. We affirm the Commission.

Doyle Taylor worked as a truck driver for Lubritech. On April 18, 1997, Mr. Taylor died in a work-related accident. He was survived by his wife, Wilma Taylor, a stepson, Gerry Louis Coins, and a stepgrandson, Austin Coins. Travelers Insurance Company, appellee's insurance carrier, contested the compensability of the death. On September 25, 1997, an Administrative Law Judge of the Workers' Compensation Commission found the injury compensable. Travelers Insurance Company paid dependency death benefits

to Mrs. Taylor ($667 bi-weekly) and Austin Coins ($286 bi-weekly) based on an average weekly wage calculated to be $953. Travelers later reduced the payments to $488 and $206 respectively. Travelers justified the reduction in benefits based on a decision that Mr. Taylor's average weekly wage was actually $761.42 rather than $953. Travelers and Lubritech also argued that Austin Coins was not entitled to any benefits because he was a step-grandchild; therefore, he was not a dependent under Arkansas Code Annotated section 11-9-522 (Supp. 1999). The ALJ found that the insurance, bonus, and vacation pay were not part of the decedent's average weekly wage and that Austin Coins was ineligible for dependency-death benefits. This decision was adopted and affirmed by the full commission on October 27, 2000.

*Standard of Review*

This court reviews decisions of the Arkansas Workers' Compensation Commission to see if they are supported by substantial evidence. *Smith v. County Market/Southeast Foods*, 73 Ark. App. 333, 44 S.W.3d 737 (2001). Substantial evidence is that relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). If reasonable minds could reach the result found by the Commission, we must affirm the decision. *Wal-Mart Stores, Inc. v. Brown*, 73 Ark. App. 174, 40 S.W.3d 835 (2001).

*Calculation of Average Weekly Wage*

Appellant's first argument on appeal is that the Workers' Compensation Commission erred in its failure to include the decedent worker's health insurance allowance, bonus, and vacation pay in the average weekly wage calculation. Whether the decedent's health insurance allowance, bonus, and vacation pay should be included in the calculation of decedent's average weekly wage turns on whether he was a piece-rate worker. A piece-rate worker is one who is paid on the basis of the quantity of work done. *Mamika v. Barca*, 80 Cal. Rptr.2d 175 (1998). Wilma Taylor testified the decedent was paid by the mile. Lubritech presented evidence showing that decedent's pay varied according to the miles he drove. This variance indicates decedent was paid by the actual miles driven. The evidence clearly establishes decedent's pay was based upon the number of miles driven; therefore we hold decedent, a truck driver paid by the mile, was a piece-rate worker.

Arkansas Code Annotated section 11-9-518(a)(2) (Repl. 1996), provides that the average weekly wage of a piece-rate worker shall be calculated as follows:

> (2) Where the injured employee was working on a piece basis, the average weekly wage shall be determined by dividing the earnings of the employee by the number of hours required to earn the wages during the period not to exceed fifty-two (52) weeks preceding the week in which the accident occurred and by multiplying this hourly wage by the number of hours in a full-time workweek in the employment.

In the case at bar, both parties rely on *Tabor v. Levi Strauss & Co.*, 33 Ark. App. 71, 801 S.W.2d 311 (1990). In *Tabor*, fringe benefits are defined as bonuses, vacation pay, holiday pay, medical insurance, life insurance and weekly disability insurance. *Id.* In *Tabor* we held that fringe benefits are not included in the calculation of the average weekly wage of a piece-rate worker. *Id.* We reached this decision based on the statutory method of determining the average weekly wage of an employee working on a piece-rate basis. Under the statute, "earnings are to be divided by the number of hours required to earn the wages." *Id.* In *Tabor*, we found that Tabor was not required to work a certain number of hours to receive her fringe benefits; therefore, we held that under our statute, fringe benefits are not included in the calculation of the average weekly wage of a piece-rate worker. *Id.*

Here, decedent received a separate check for health insurance because he could not receive coverage under his employer's plan due to his high blood pressure. The evidence established that regardless of the number of hours worked, decedent would receive his insurance benefits totaling $339.70. The evidence also indicates that decedent was not required to work a certain number of hours to receive his bonus and vacation pay. Notwithstanding the separate payment for health insurance, the health insurance, bonus, and vacation pay are fringe benefits as defined by Tabor. No hours were required to be worked to receive the fringe benefits: therefore, we hold that, under our statute, decedent's fringe benefits of insurance allowance, bonus, and vacation pay should not be included in the calculation of his average weekly wage.

*Whether A Step-grandchild Is Entitled to Receive Dependency Death Benefits*

Appellant's second argument on appeal is that the Commission erred in its failure to recognize a step-grandchild as a dependent entitled to workers' compensation death benefits. Arkansas Code Ann. § 11-9-527(c) (Repl. 1996), provides:

> (c) *Beneficiaries — Amounts.* Subject to the limitations as set out in §§ 11-9-501 to 11-9-506, compensation for the death of an employee shall be paid to those persons who were wholly and actually dependent upon the deceased employee in the following percentage of the average weekly wage of the employee and in the following order of preference:
>
> > (1)(A)(i) To the widow if there is no child, thirty-five percent (35%), and the compensation shall be paid until her death or remarriage.
> >
> > (2) To the widow or widower if there is a child, the compensation payable under subdivision (c)(1) of this section and fifteen percent (15%) on account of each child;

Prior to Act 796 of 1993, Arkansas Code Annotated section 11-9-102(10) (1987) defined child as "a natural child, a posthumous child, a child legally adopted prior to injury of the employee, a stepchild, an acknowledged illegitimate child of the deceased or spouse of the deceased, and a foster child." Grandchild was defined as "a child of a child as defined in subdivision (10). . . ." Ark. Code Ann. § 11-9-102(10)(A) (1987). Also under the old statute, the definitions of brother and sister included stepbrother and stepsister. The old statutory definitions suggest that a step-grandchild was included. After Act 796, the definition of child remained the same but amended Arkansas Code section 11-9-102 no longer contained the broad definition of brother, sister, and grandchild that included stepbrother, stepsister, and impliedly, step-grandchild. However, Arkansas Code Annotated section 11-9-527(c)(5) does list brothers, sisters, grandchildren, and grandparents as beneficiaries.

Arkansas Code section 11-9-704(c)(3) (Repl. 1996) states that we are to construe the workers' compensation statutes strictly. Strict construction requires that nothing be taken as intended that is not clearly expressed. *Hapney v. Rheem Mfg. Co.*, 67

Ark. App. 8, 992 S.W.2d 151 (1999). The doctrine of strict construction is to use the plain meaning of the language employed. *Wheeler Const. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001).

We must construe Arkansas Code Annotated sections 11-9-527 and 11-9-102(2) using the plain meaning of the language used by the legislature. The word "step-grandchild" is absent from the language of both Arkansas Codes Annotated sections 11-9-527 and 11-9-102(2). The word grandchild is conspicuously absent from the current statutory definitions in Arkansas Code Annotated section 11-9-102. We hold that the Legislature did not include a step-grandchild as a covered dependent under the statute. Applying the plain meaning of the statutes, we hold that a step-grandchild is not a dependent under the workers' compensation statutes. Because a step-grandchild is not cognizant under the statute as a dependent, we do not reach the issue of whether Austin Coins was "wholly and actually" dependent.

Accordingly, we affirm.

STROUD, C.J., agrees.

GRIFFEN, J., concurs.

WENDELL L. GRIFFEN, Judge, concurring. I concur with the result in this case because I believe reasonable minds could conclude that our legislature did not intend to include step-grandchildren as recipients of death dependency benefits when it enacted Act 796 of 1993. However, I write separately because the applicable statutes in this case reflect an anti-worker, anti-family bias that I do not condone and refuse to ignore.

The term "child" is defined under both pre-Act 796 and post-Act 796 law as "a natural child, a posthumous child, a child legally adopted prior to the injury of the employee, a stepchild, an acknowledged illegitimate child of the deceased or of the spouse of the deceased, and a foster child." Ark. Code Ann. §§ 11-9-102(10) (1987) & 11-9-102(2) (Supp. 1999). Under pre-Act law, brother and sister were defined to include stepbrothers and stepsisters. *See* Ark. Code Ann. § 11-9-102(10)(B)(1987). In addition, under pre-Act law, the definition of parent included a grandparent and grandchild was defined to include "a child of a child defined in subdivision (10) of this section." *See* Ark. Code Ann. § 11-9-102 (10)(B) & (11) (1987).

Thus, under pre-Act law, the term child was interpreted to include stepchild, the term brother to include stepbrother, the term sister to include stepsister, and the term grandchild was defined so broadly as to arguably include "step-grandchild." While Act 796 retained the definition of child that includes a stepchild, it eliminated the definitions of parent, grandparent, brother, and sister. There is no commentary indicating whether by doing so our legislature anticipated coverage for or intended to eliminate coverage for step-grandchildren. However, we are required to strictly construe workers' compensation statutes. *See* Ark. Code Ann. § 11-9-704(c)(3) (Repl. 1996). Because the legislature removed the broad definitions of brother, sister, and grandparent, I agree that a strict reading of the post-Act statutes supports the Commission's finding that the legislature intended to exclude step-grandchildren as recipients of death dependency benefits as a matter of law.

Nonetheless, I disagree with the notion, apparently held by the Commission, that in order for a child to be considered wholly and actually dependent upon a worker within the meaning of the workers' compensation statutes, the worker must have a legal guardianship over the child or claim him on his income taxes. It is a reality of life in Arkansas and elsewhere that many grandchildren reside with and are dependent upon their grandparents, but it is equally true that many of these relationships are never legally formalized. Whether a deceased employee was a legal guardian of a child is not determinative of whether a child was wholly and actually dependent upon the employee. The Commission would not slavishly award benefits to the child of a worker who had a legal obligation to a child but provided no support to that child. Conversely, a worker should not be required to establish legal guardianship in order for a child to be found wholly and actually dependent upon him. Whether a child is wholly and actually dependent is a question of fact, not of law. *See Hoskins v. Rogers Cold Storage*, 52 Ark. App. 219, 916 S.W.2d 136 (1996).

Finally, I do not agree that the fact that Mrs. Taylor worked outside of the home should be controlling or even relevant to a determination as to whether Austin was not wholly and actually dependent upon the decedent. It would be ludicrous to assert that the legislature intended to provide dependency benefits only to the dependents of those deceased workers whose spouses are not employed outside of the home. Moreover, the remedial purposes of the workers' compensation statutes are not furthered by punishing a caregiver for working outside of the home.

James E. POLLARD, *et al. v.*
UNION PACIFIC RAILROAD COMPANY, *et al.*

CA 00-1158 54 S.W.3d 559

Court of Appeals of Arkansas
Division III
Opinion delivered September 12, 2001

*Odell Pollard, P.A.*, by: *Odell Pollard*, for appellants.

*Wright, Lindsey & Jennings, LLP*, by: *Michael D. Barnes*, *Kyle R. Wilson*, and *Elisa Masterson White*, for appellees.

LARRY D. VAUGHT, Judge. This is an appeal from a summary judgment granted in favor of appellees. Appellants argue that the trial court erred because there were material facts left to be decided on the issue of whether the alleged negligence of appellees

was the proximate cause of appellants' automobile accident. We agree and reverse.

Appellants, James Pollard and Sharon Hunter, mother and natural guardian of Scott Hunter, filed a complaint against Floyd Frazier, Union Pacific Railroad (Union Pacific), and Tri-State Traffic Control, Inc. (Tri-State). Appellants later filed an amended complaint adding Frazier's insurance carrier, Liberty Mutual Insurance Co. (Liberty Mutual), as a defendant. The suit arose out of an automobile accident.

On August 13, 1998, Scott Hunter was driving a vehicle in which his grandparents, James and Helen Hunter, were passengers. Hunter was driving north on Highway 49 approaching Highway 306, where he intended to turn east/right onto Highway 306. A railroad track operated by Union Pacific runs parallel to Highway 49 and intersects Highway 306, several feet east of the intersection. As Hunter approached the intersection, he slowed down with the intention of turning right onto Highway 306. Floyd Frazier, an employee of the Arkansas Highway and Transportation Department, was traveling behind Hunter in a state-owned service truck. Hunter, according to Frazier, turned on his right turn signal and began to slow down and bear off to the right like he was about to turn. Frazier then began to pass on the left, admittedly in a no-passing zone. As Hunter turned onto Highway 306, he saw a barricade and sign indicating that the railroad crossing on Highway 306 was closed for repairs by Union Pacific. A sign at the barricade read, "Go back to Hunter," a town located a short distance south of the intersection of Highways 49 and 306. Hunter turned his vehicle back to the left, as if he were going to turn left on Highway 306, and into the path of Frazier's truck. Frazier hit Hunter's vehicle broadside, resulting in personal injuries to Hunter and his grandparents and damage to the vehicle.

Appellants filed their complaint alleging that appellees' negligence was the proximate cause of their injuries. Specifically, appellants stated that Union Pacific hired Tri-State to place the barricade across the railroad tracks on Highway 306 and to place appropriate signs on Highway 49 to warn motorists on Highway 49 that the entrance onto Highway 306 had been barricaded. Appellants complained that Tri-State was negligent in failing to place any warning signs on Highway 49 advising motorists of the barricade, which was only a few feet east of the intersection. Appellants alleged that Union Pacific was negligent because it knew, prior to appellants' accident, that Tri-State failed to place warning signs on Highway 49

and that the barricade was too close to the northbound lane. In addition, appellants alleged that Frazier was negligent in driving at an excessive rate of speed, in attempting to pass in a no-passing zone, and in failing to keep a proper lookout.

Tri-State filed a motion for summary judgment, contending that its alleged negligence was not the proximate cause of appellants' injuries and that their proof of causation amounted to speculation and conjecture. Union Pacific joined the motion for summary judgment of Tri-State. After a hearing on June 9, 2000, the trial court granted summary judgment in favor of Tri-State and Union Pacific. Appellants filed motions to voluntarily nonsuit Frazier and Liberty Mutual, which the trial court granted. This appeal followed.

The supreme court has often stated the standard of review in summary-judgment cases:

> The law is well settled that summary judgment is to be granted by a trial court only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. *Wallace v. Broyles*, 331 Ark. 58, 961 S.W.2d 712 (1998), *supp. opinion on denial of reh'g*, 332 Ark. 189 (1998). Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* On appellate review, this court determines if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *Id.* This court views the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.* Our review focuses not only on the pleadings, but also on the affidavits and other documents filed by the parties. *Id.*

*Shelton v. Fiser*, 340 Ark. 89, 95-96, 8 S.W.3d 557, 561 (2000) (citing *Adams v. Arthur*, 333 Ark. at 62, 969 S.W.2d at 605).

The motion for summary judgment filed by Tri-State, which was adopted by Union Pacific, contends that its negligence was not the proximate cause of appellants' injuries. It further stated that appellants' proof of causation amounted to speculation and that they could not establish that their injuries were a natural and continuous result of the placement (or lack of placement) of any sign by Tri-State, as opposed to the negligence of Hunter or Frazier. Tri-State

argued that the negligence of Hunter and Frazier were separate intervening causes of the accident.

Appellants argue that the question of whether the actions of Hunter and Frazier constituted subsequent intervening proximate causes of the accident is a question of fact to be decided by a jury and not a matter of law to be determined by the trial court on the grant of summary judgment. To establish a prima facie case of negligence, a plaintiff must demonstrate that the defendant breached the standard of care, that damages were sustained, and that the defendant's actions were the proximate cause of those damages. *Union Pac. R.R. Co. v. Sharp*, 330 Ark. 174, 952 S.W.2d 658 (1997). Proximate cause is defined as "that which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred." *Id.* at 181, 952 S.W.2d at 662. Proximate causation is usually an issue for the jury to decide, and when there is evidence to establish a causal connection between the negligence of the defendant and the damage, it is proper for the case to go to the jury. *City of Caddo Valley v. George*, 340 Ark. 203, 9 S.W.3d 481 (2000). In other words, proximate causation becomes a question of law only if reasonable minds could not differ. *Id.* The supreme court recently discussed intervening causes:

> This Court has held that proximate cause is the efficient and responsible cause, but it need not be the last or nearest one. *Bennett v. Bell*, 176 Ark. 690, 3 S.W.2d 996 (1928). The mere fact that other causes intervene between the original act of negligence and the injury for which recovery is sought is not sufficient to relieve the original actor of liability, if the injury is the natural and probable consequence of the original negligent act or omission and is such as might reasonably have been foreseen as probable. *Butler v. Arkansas Power & Light Co.*, 186 Ark. 611, 54 S.W.2d 984; *Arkansas Power & Light Co. v. Marsh, supra; Hayes v. Missouri Pac. R.R. Co.*, 208 Ark. 370, 186 S.W.2d 780 (1945). The original act or omission is not eliminated as a proximate cause by an intervening cause unless the latter is of itself sufficient to stand as the cause of the injury. *Butler v. Arkansas Power & Light Co., supra; Arkansas Power & Light Co. v. Marsh, supra.* The intervening cause must be such that the injury would not have been suffered except for the act, conduct or effect of the intervening agent totally independent of the acts or omission constituting the primary negligence. *Arkansas Power & Light Co. v. Marsh, supra; Hayes v. Missouri Pac. R.R. Co., supra.*

*Shannon v. Wilson*, 329 Ark. 143, 157, 947 S.W.2d 349, 356 (1997).

Applying the above principles to the facts of this case, it is clear that Frazier's passing in a no-passing zone and Hunter's pulling out in front of Frazier's vehicle without a turn signal were in and of themselves sufficient to stand as the cause of the injury. However, the intervening causes must also be independent causes. Appellants argue that the intervening causes were not independent. Rather, they state that Hunter's turning to the left upon reaching the barricade was a normal response to the stimulus of a situation created by the negligence of appellees. They cite *Hill v. Wilson*, 216 Ark. 179, 224 S.W.2d 797 (1949), where the supreme court quoted the *Restatement of Torts*:

> 'An intervening act of a human being . . . which is a normal response to the stimulus of a situation created by the actor's negligent conduct is not a superseding cause of harm to another which the actor's conduct is a substantial factor in bringing about.' Restatement, Torts, 443. 'The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about if, (a) the actor at the time of his negligent conduct should have realized that a third person might so act, or (b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or (c) the intervening act is a normal response to a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent.' Restatement, Torts, 447.

In *Hill*, defendant Hill appealed a plaintiffs' verdict claiming that his negligence was not the proximate cause of their injuries. The facts indicate that Hill owned a truck driven by Kimbrough. Kimbrough drove the truck and made a sudden stop without signaling. The Wilsons were traveling behind Kimbrough and were able to stop in time; however, Snider, who was traveling behind the Wilsons, was not able to stop and struck the Wilsons from behind, causing injuries to the Wilsons and their passengers. Appellant Hill argued that Snider's negligence was an independent intervening cause. The supreme court rejected the argument and affirmed the plaintiffs' verdict.

Appellants argue that Hunter's actions were foreseeable to appellees or that appellees' negligence made the accident more probable. It is foreseeable that when a road that intersects a highway is barricaded near an intersection, a driver, who initially begins to

turn at the intersection and sees a sign indicating "Go back to Hunter," will have to change his course of action. Likewise, it is foreseeable that a driver, when approaching a vehicle appearing to turn right, would pass on the left, even in a no-passing zone. The issue of proximate cause becomes a question of law only when reasonable minds could not differ. *City of Caddo Valley, supra.* Based on the facts of this case, we cannot hold as a matter of law that the acts of Hunter and Frazier were independent intervening causes. Thus, we find that summary judgment was not appropriate in this case.

Reversed and remanded.

ROBBINS and BIRD, JJ., agree.

Sherman JOHNSON *v.* STATE of Arkansas

CA CR 00-1187 55 S.W.3d 298

Court of Appeals of Arkansas
Division III
Opinion delivered September 19, 2001
[Petition for rehearing denied October 24, 2001.]

*William Owen James* and *Clay T. Buchanan*, for appellant.

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

JOHN B. ROBBINS, Judge. Appellant Sherman Johnson was convicted by a jury of committing aggravated robbery and a terroristic act. He was sentenced to ten years in the Arkansas Department of Correction. Mr. Johnson now appeals, arguing that

the trial court erred in failing to suppress a statement he made to the police, and that absent this statement there was insufficient evidence to corroborate his accomplices' testimony and support his convictions.

■ ■ When the sufficiency of the evidence is challenged on appeal, we review this issue before addressing other alleged trial errors. *Sera v. State*, 341 Ark. 415, 17 S.W.3d 61 (2000). In determining whether a finding of guilt is supported by substantial evidence, we review the evidence, *including* any that may have been erroneously admitted, in the light most favorable to the verdict. *Willingham v. State*, 60 Ark. App. 132, 959 S.W.2d 74 (1998). Therefore, in deciding whether there was substantial evidence to support the verdicts against Mr. Johnson, we will consider all of the evidence, including the statement that he asserts was erroneously admitted.

At the jury trial, the victim, Phillip Isgrig, testified on behalf of the State. He stated that he was driving a mail route on June 30, 1999, when three men who were running toward him caught his attention. According to Mr. Isgrig, two of the men had bandanas covering their faces and one wore a ski mask. Shortly thereafter, Mr. Isgrig saw a person raise a pistol and fire two shots, one of which struck his vehicle.

Darcy Smith, an accomplice to the criminal activity, testified that it was Mr. Johnson's idea to rob the mailman, and that he and Jerrod Watson agreed to assist. He testified that they all gave chase and that Mr. Johnson fired shots at Mr. Isgrig.

Mr. Watson, another accomplice, stated that it was Mr. Smith's idea to commit the robbery. However, he acknowledged that he and Mr. Johnson both participated and carried guns. Mr. Watson testified that he heard two shots fired, although he did not see Mr. Johnson fire the shots.

Detective Lynda Keel also testified for the State. She indicated that, after signing a waiver-of-rights form, Mr. Johnson gave a taped statement. The statement was played for the jury, and in the statement Mr. Johnson acknowledged being with Mr. Smith and Mr. Watson when they were planning to rob the mailman. Mr. Johnson admitted that he went along with the plan to commit the robbery. He also admitted that he knew that what he was doing was wrong. However, Mr. Johnson denied having a gun, and maintained that it was Mr. Smith who fired the shots.

We first address Mr. Johnson's argument that there was insufficient evidence to sustain his convictions. He correctly asserts that, pursuant to Ark. Code Ann. section 16-89-111(e)(1) (1987), a conviction cannot be had in any felony case upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense. Mr. Johnson argues that there was insufficient corroboration of his accomplices' testimony, and consequently his convictions must be reversed.

A person commits aggravated robbery if, while armed with a deadly weapon, he threatens to immediately employ physical force upon another with the purpose of committing a theft. *See* Ark. Code Ann. § 5-12-103(a)(1) (Repl. 1997). A person commits a terroristic act if he shoots, with the purpose to cause injury to persons or property, at a conveyance which is being operated or occupied by passengers. *See* Ark. Code Ann. § 5-13-310(a)(1) (Repl. 1997). We hold that there was sufficient corroboration to support Mr. Johnson's convictions for both offenses.

The test for determining the sufficiency of evidence to corroborate the testimony of an accomplice is whether, if the testimony of the accomplice were completely eliminated from the case, other evidence independently establishes the crime and tends to connect the accused with its commission. *Pickett v. State*, 55 Ark. App. 261, 935 S.W.2d 281 (1996). The corroborating evidence need not be sufficient standing alone to sustain the conviction; however, proof that merely places the defendant near the scene of a crime is not sufficient corroborative evidence of his connection to it. *Id.*

In the instant case, the corroborating evidence was primarily supplied by Mr. Johnson's statement to the police. He admitted to participating in criminal activity, as opposed to mere presence at the scene. Without considering the accomplices' testimony, the victim's testimony and appellant's statement established that the crimes were committed, and appellant's statement connected him with the crimes. Mr. Smith testified that Mr. Johnson both planned the robbery and fired the shots, and when considered with the corroborating evidence, this testimony supports the jury's finding that Mr. Johnson committed both aggravated robbery and a terroristic act. While Mr. Johnson submits that Mr. Smith's testimony was unreliable because it was given in exchange for leniency and was inconsistent with that elicited from the other accomplice, we have repeatedly held that the determination of credibility issues

is left to the trier of fact. *See Byrum v. State*, 318 Ark. 87, 884 S.W.2d 248 (1994).

We next address Mr. Johnson's argument that the trial court erred in refusing to suppress his statement to the police. At the suppression hearing, it was established that Mr. Johnson had warrants out for his arrest when he voluntarily presented himself to the police station nine days after the robbery. Detective Charles Ray testified that he read Mr. Johnson the waiver-of-rights form, which Mr. Johnson understood and signed. He then contacted Detective Keel, who arrived thirty-five minutes later and reread Mr. Johnson his rights, which he "appeared to understand." After speaking with Mr. Johnson and listening to his version of the events, Detective Keel taped a statement. The pertinent portion of the tape recording is as follows:

> KEEL: Sherman, I have in front of you our standard Little Rock Police Department Miranda rights form which was read to you at 2150 hours by Detective Charles Ray. You — the top portion of the form indicates that you have 12 years of education and you can read and write and he advised you of your rights. Do you understand those rights? I need you to speak.
>
> JOHNSON: Yes ma'am.
>
> KEEL: Okay. Is this your signature on the form?
>
> JOHNSON: Yes ma'am.
>
> KEEL: Do you have any questions about your rights?
>
> JOHNSON: Yeah, like uh, the right to remain silent.
>
> KEEL: Uh huh.
>
> JOHNSON: (*Inaudible*) and he told me to come, well he told me that when I was going to turn myself in he told me to come up here, he said just tell y'all my name and my address.
>
> KEEL: Why didn't you say that earlier?
>
> JOHNSON: No cause I ain't find — I just went through when I turned myself in then I just went on and told y'all the statement.

KEEL: Okay so you gave us a statement (*Inaudible*) okay that's fine and this is your signature? Okay the bottom portion of the form is a waiver of rights which pertains to giving us a statement. You signed this form here indicating that you did want to give us a statement. You've been talking to us briefly about what happened.

JOHNSON: Yes ma'am.

KEEL: You understand that we are taking a taped statement and you're doing this on your own will, is that correct?

JOHNSON: Yes ma'am.

KEEL: Okay, is this your signature on the form?

JOHNSON: Yes ma'am.

KEEL: Okay. You do understand that we're taking a recorded statement?

RAY: You're nodding your head again.

JOHNSON: Oh, yes ma'am.

RAY: Okay.

KEEL: All right. Start at the beginning and tell me where you were on the afternoon that this happened?

Following the above exchange, Mr. Johnson gave an account of the criminal activity that transpired on the day at issue.

Mr. Johnson argues that his statement should have been suppressed for two reasons. First, he argues that he invoked his Fifth-Amendment right to remain silent and the questioning by Detective Keel impermissibly continued. Second, he contends that any waiver of his right to remain silent was not given knowingly and intelligently.

Mr. Johnson asserts that he raised a question as to his right to remain silent when, after being asked whether he had any questions about his rights, he replied, "Yeah, like uh, the right to remain silent." In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court held that if an individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the

interrogation must cease. Mr. Johnson maintains that since Detective Keel continued the interrogation after he invoked his right to remain silent, his statement was erroneously admitted.

Mr. Johnson also cites *Smith v. Illinois*, 469 U.S. 91 (1984). In that case, while a police officer was reading *Miranda* rights to the appellant, he informed appellant of his right to have a lawyer present, to which appellant responded, "Uh, yeah, I'd like to do that." The interrogation continued at the officer's coaxing, and appellant gave incriminating statements. In reversing his conviction, the Supreme Court announced that the appellant invoked his right to counsel and held that an accused's post-request responses to further interrogation may not be used to cast doubt on the clarity of the initial request for counsel. Mr. Johnson argues that the instant case is analogous to *Smith v. Illinois, supra*, and that for purposes of determining whether or not he invoked his right to silence, we are not permitted to consider any of his responses subsequent to when he initially asserted the right.

In the alternative, Mr. Johnson argues that even if he waived his right to remain silent, his waiver was not knowing and intelligent. He notes that statements made in police custody are presumed to be involuntary, and the burden is on the State to prove the statement was voluntary and that any waiver of rights was knowingly and intelligently made. *See Miranda v. Arizona, supra*. Mr. Johnson argues that the State failed to prove that he knowingly and intelligently waived his right to remain silent because, during his interrogation, Detective Keel continued the questioning without again explaining his rights to him or further inquiring into his uncertainty.

We review a trial court's ruling on a motion to suppress by making an independent determination based on the totality of the circumstances, viewing the evidence in the light most favorable to the State. *Hill v. State*, 344 Ark. 216, 40 S.W.3d 751 (2001). The ruling will only be reversed if it is clearly against the preponderance of the evidence. *Id.* In the case at bar, we hold that the trial court's denial of Mr. Johnson's motion to suppress was not clearly against the preponderance of the evidence.

In *Davis v. United States*, 512 U.S. 452 (1994), the United States Supreme Court held that a suspect's statement during interrogation that "Maybe I should talk to a lawyer" did not require cessation of the questioning because a suspect must unambiguously request counsel. In *Bowen v. State*, 322 Ark. 483, 911 S.W.2d 555

(1996), the Arkansas Supreme Court held that there is no distinction between the right to counsel and the right to remain silent with respect to the manner in which it must be effected. In *Smith v. Illinois, supra,* the appellant specifically stated that he would like to have a lawyer; however, in the instant case, Mr. Johnson responded to Officer Keel's question "Do you have any questions about your rights?" by stating, "Yeah, like uh, the right to remain silent." This ambiguous response, viewed in the light most favorable to the State, as we are required to do, *see Hill v. State, supra,* was merely an acknowledgment by Mr. Johnson that he understood the kind of "rights" to which the officer was referring. But even if viewed in the light most favorable to appellant, this response was no more than an indication that appellant had a question, not that he was specifically asserting his right to remain silent. Consequently, the right was never invoked and there was nothing improper about continuation of the custodial interrogation.

Nor are we persuaded that the trial court erred in finding that Mr. Johnson gave a knowing and intelligent waiver of his rights. In making this determination, we review the totality of the circumstances surrounding the waiver including the age, education, and intelligence of the defendant. *Conner v. State,* 334 Ark. 457, 982 S.W.2d 655 (1998). The circumstances of this case show that Mr. Johnson, who had completed twelve years of education, came to the police station on his own volition and was twice read his rights from a waiver-of-rights form, and he signed the rights form and informed the police that he understood every right on the piece of paper. Mr. Johnson then gave a statement to Officer Keel, and after he agreed to have his statement recorded, Officer Keel inquired again as to whether he had any questions about his rights and he stated, "Yeah, like uh, the right to remain silent." He then proceeded to explain that he was told by someone to turn himself in and give his name and address, and reaffirmed that he agreed of his own will to give a taped statement. Contrary to appellant's argument, we may consider statements made during the interrogation that were made after appellant's alleged inquiry into his rights because Mr. Johnson never expressly asserted his right to remain silent, and in deciding this issue, we must inquire into all of the circumstances surrounding the interrogation. *See Fare v. Michael C.,* 442 U.S. 707 (1979). Under the totality of the circumstances, we find no error in the trial court's finding that Mr. Johnson was aware of his right to remain silent and gave a knowing and intelligent waiver of that right.

Affirmed.

BIRD and VAUGHT, JJ., agree.

Louanne PARKER *v.* John Matthew PARKER

CA 00-331 55 S.W.3d 773

Court of Appeals of Arkansas
Division III
Opinion delivered September 19, 2001
[Petition for rehearing denied October 24, 2001.]

*Kent J. Rubens* and *William Palma Rainey*, for appellant.

*Goodwin, Moore, Colbert, Broadway & Gray, LLP*, by: *Harry Truman Moore*; and *Barrett & Deacon, P.A.*, by: *D.P. Marshall Jr.*, for appellee.

LARRY D. VAUGHT, Judge. In this Craighead County divorce case, appellant, who was granted custody of the parties' children, appeals the chancellor's decision prohibiting her from relocating to Little Rock. She also challenges the chancellor's finding that certain assets were appellee's nonmarital property and the chancellor's calculation of appellee's income for purposes of alimony and child support. We affirm the chancellor's ruling on the property division and support awards, but reverse and remand his ruling on relocation.

Appellant and appellee were married in 1983, and the marriage produced three children. The children were all born in Little Rock, and the family lived there from the mid-1980s until 1996, at which time they moved to Jonesboro. Shortly after the move, the parties' marriage began to deteriorate. Their relationship became very acrimonious and fraught with extreme discord, and the record is replete with evidence of almost daily conflict over numerous matters, large and small. Appellant filed for divorce in December 1997 and sought custody of the children. Appellee also sought custody, and he initially remained in the home following the filing of the divorce complaint. However, in February 1998, appellee left the premises

and rented a house nearby. In conjunction therewith, the parties entered into an agreed temporary order giving appellant custody of the children and containing the following provision:

> Neither parent shall remove the children from the County of Craighead for the purpose of changing the children's residence without the written consent of both parties for a period of five years from the entry of a final decree of divorce and agree that this provision is to be included in a final divorce decree. The parents recognize that this provision does not obligate the court, but the parents agree that this provision is a critical provision of this agreement and mutually request that the court comply with this parental agreement.

In October 1998, after an unsuccessful attempt to settle the case, appellant asked the chancellor to modify the temporary order to allow her to move from Craighead County. She cited as reasons for her request the constant conflict between her and appellee, the number of people in the community that would be involved in the divorce proceeding, and the higher earning potential and better educational opportunities in larger cities. Appellant also amended her complaint to add adultery as a ground for divorce, based upon her claim that, since the original filing date, appellee had engaged in sexual encounters with a number of women, including a twenty-one-year-old college student. She alleged that appellee's conduct had so humiliated her and the children that it would be in their best interest to move from Jonesboro.

During an eleven-day trial, the chancellor heard the testimony of over thirty witnesses and viewed over two hundred exhibits relating to the issues of custody, relocation, property settlement, and support. For the moment, we will concern ourselves only with the evidence that concerns the relocation issue. Appellant testified that, should she receive custody of the children, she would like to move with them to Little Rock for the following reasons: 1) Little Rock is closer to her parents and her sister, whom she visits three times per year; 2) she had a job offer at the Anthony School in Little Rock; 3) she wanted to further her education by pursuing a Ph.D. in School Psychology at the University of Central Arkansas; 4) her children were born in Little Rock, lived there for many years, and have friends there, as does she; 5) she has a strained relationship with her in-laws, who live near her in Jonesboro; and 6) she wanted to remove her family from the acrimony and embarrassment caused by the divorce, by appellee's obsessive behavior, and by appellee's relationship with a much younger woman. She said that, if she were

allowed to move the 133 miles to Little Rock, she would facilitate appellee's visitation by meeting him halfway between the two cities to deliver and pick up the children.

The children did not testify at trial. However, a psychologist, Dr. Phillip Hestand, spoke with all three of them, and his testimony revealed no strong feelings on their part one way or the other regarding a move from Jonesboro to Little Rock. Testimony from several witnesses indicated that all the children were doing well in school in Jonesboro, had made friends there, were involved in sports and activities, and visited frequently with their paternal grandparents.

Following the trial, the chancellor found that both parties were caring, loving, and attentive parents. However, he determined that appellant had been the children's primary caregiver and was more emotionally stable than appellee. He referred to evidence that appellee's obsessive disorder "tended to drive everyone around him crazy in trying to deal with him," and to evidence that psychiatric tests revealed that appellee was depressed, paranoid, suffering from anxiety, and could be using drugs or alcohol. Based on those findings, the chancellor awarded custody to appellant and gave appellee standard visitation. The chancellor then turned to the question of whether appellant should be restricted from relocating outside Craighead County. He first addressed the import of the agreed temporary order:

> [Appellant] now disavows the . . . provision of the Agreed Temporary Order stating that she never intended to agree to its terms and provisions. She was represented by very able and competent counsel who approved that agreement in her behalf and the testimony before the Court convinces the Court that she was aware of the provision. It may well be that, with the passage of time and all the unfortunate events that have occurred, she has now changed her mind and wants to move herself and the children from the scene of a failed marriage. Both parties recognize and agree that it is axiomatic that courts are not bound by any agreement the parties enter into regarding custody, support, or visitation although their agreement may tend to show their attitude regarding those matters.

Next, the chancellor reviewed this court's decision in *Staab v. Hurst*, 44 Ark. App. 128, 868 S.W.2d 517 (1994), wherein we adopted a set of standards to be used in deciding parental relocation cases. In *Staab*, we established a framework that first 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." *Id.* at 134, 868 S.W.2d at 520. Once the custodial parent meets the threshold burden of showing that a real advantage will result from the move, the following factors must then be considered:

> 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 removal is inspired primarily by the desire to defeat or frustrate visitation by the noncustodial parent;
>
> 3) whether the custodial parent is likely to comply with substitute visitation orders;
>
> 4) the integrity of the noncustodial 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 parental relationship with the noncustodial parent.

With the *Staab* factors in mind, the chancellor proceeded to examine appellant's reasons for wanting to move to Little Rock:

> While it is true that [appellant] will be somewhat closer to her relatives in Texas, the distance . . . will only be 133 miles further if she remains in Joneboro. She does have an abundance of friends in Little Rock but, on the other hand, she also has made a number of friends in Jonesboro and some of them rallied to her cause and supported her in her divorce action.
>
> [Appellant] testified that she will have a job starting in August at the Anthony School [in Little Rock] and wants to return to teach there and to place the children in school there. She also has prospects of a job in Jonesboro and, in fact, has a job at the present time earning $700.00 per month. She felt reasonably sure she could obtain better employment if she continued residing in Jonesboro

> and the Court feels confident that, considering her education and background, she should be able to obtain better employment.
>
> [Appellant] definitely wants to complete her educational requirements for a degree, but she was rather uncertain about the advantages of [the University of Central Arkansas] as opposed to [Arkansas State University in Jonesboro]. ASU is an excellent college of higher learning and the Court feels reasonably confident that she could obtain a similar degree at that institution.
>
> Finally, the Court does sympathize with [appellant] in her desire . . . to remove herself from Jonesboro and the scene of a failed marriage, a stressful relationship with her in-laws, and the embarrassment of [appellee's] dalliance with a college girl. On the other hand, [appellant] won't be living with [appellee], nor will she be living with his parents and that stressful part of her life should be relieved. There was no evidence that his cavorting with the young female had ever been in her presence.

The chancellor then returned to consider the effect of the temporary order:

> [T]he court feels that the prime and controlling consideration in enforcing or not enforcing that provision is what it considers to be in the best interests of these children. While they haven't testified, there has been evidence before the Court indicating their feelings, wishes, and desires and none of the three have expressed any strong desire to return to Little Rock. The three of them appear to be well-satisfied in their present environment in Jonesboro. They are all doing well in school, appear to be involved in a number of extracurricular activities and they do have the close support of family and friends in this area. The Court also feels, as does [appellee], that an agreement between parties has to have some meaning and substance or all agreements that parties may make will be inoperative when one of the parties changes his or her mind.

Based upon these findings, the chancellor ordered that the children not be removed from Craighead County for the purpose of changing their residence for a period of five years.

A chancellor's decision on relocation is reviewed *de novo*, but the chancellor's findings will not be reversed unless they are clearly erroneous. *See Wagner v. Wagner*, 74 Ark. App. 135, 45 S.W.3d 852 (2001). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire

evidence is left with the definite and firm conviction that a mistake was committed. *Id.*

*Staab v. Hurst* marked our first attempt at articulating a set of standards to be used by chancellors in parental relocation cases. In that case, a custodial parent sought permission to move from Fort Smith to Texas in order to attend nursing school. The chancellor denied permission based on his findings that the move would make visitation with the noncustodial parent impractical, would reduce the child's contact with her grandparents, and that the custodial parent could pursue other educational opportunities in the Fort Smith area. The chancellor seemed to emphasize the best interests of the child in making his determination. We reversed the chancellor's ruling and recognized that, while the best interests of the children remain the ultimate objective in resolving all child custody and related matters, the standard must be more specific and instructive to address parental relocation disputes. Determination of a child's best interests cannot be made in a vacuum, we said, but requires that the interests of the custodial parent be taken into account as well. We further acknowledged that, following a divorce, children belong to a different family unit than they did when their parents lived together. The new family unit consists of the children and the custodial parent, and what is advantageous to the unit's members as a whole, to each of its members individually, and to the way they relate to each other and function together is in the best interests of the children.

Since we decided *Staab*, we have approved parental relocations in four published cases applying the *Staab* factors. In *Wilson v. Wilson*, 67 Ark. App. 4, 991 S.W.2d 647 (1999), we affirmed the chancellor's decision to allow a relocation to California because the custodial parent felt she could find employment there. In *Friedrich v. Bevis*, 69 Ark. App. 56, 9 S.W.3d 556 (2000), we affirmed a chancellor's decision to allow a relocation to Texas because the custodial parent had obtained a better-paying job with less travel. In *Wagner v. Wagner*, 74 Ark. App. 135, 45 S.W.3d 852 (2001), we affirmed a chancellor's decision to allow relocation to Florida because the custodial parent had a job opportunity there and would be near her mother. Finally, in *Hass v. Hass*, 74 Ark. App. 49, 44 S.W.3d (2001), a case similar to the one now before us in that it involved an intrastate relocation, we reversed the chancellor's decision to prohibit the custodial parent from moving to El Dorado from Fayetteville. There, the parent wanted to move in order to take advantage of a job opportunity.

The proof offered by appellant in the case at bar is as compelling, if not more compelling, than the proof offered in the above-cited cases. The move would allow her to accept a job offer from the Anthony School and pursue an advanced degree at the University of Central Arkansas. While there were comparable opportunities in Jonesboro, the opportunities in Little Rock had distinct personal appeal to appellant. Her children had attended the Anthony School during their years in Little Rock, and appellant had spent a great deal of time there. Further, the particular degree appellant hoped to pursue at UCA was somewhat different from a comparable degree offered by ASU. Although the difference was slight, it mattered to appellant. Additionally, the importance to appellant and her family of moving away from a scene of conflict, embarrassment, and obsessive behavior should not be denied. The psychological and emotional aspects of relocation can be as advantageous as economic or educational aspects.

The chancellor in the case at bar implicitly recognized that appellant stated legitimate reasons for relocating to Little Rock. However, he discounted those reasons on the basis that appellant would be just as well served by staying in Jonesboro. We disagree with the chancellor's conclusion. We believe appellant met her threshold burden of demonstrating a real advantage to the family unit in moving from Jonesboro to Little Rock.

Once appellant met her threshold burden, it only remained for the chancellor to consider the remaining *Staab* factors. There was no finding by the chancellor that either party had improper motives in the dispute. Visitation was not likely to be hampered due to the short distance between Jonesboro and Little Rock and appellant's testimony that she would meet appellee halfway. Finally, the same factors with which appellant met her threshold burden demonstrate that the prospective move is likely to improve the general quality of life for appellant and the children. We also note a circumstance peculiar to this case that weighs in favor of the move: appellant and her children would not be relocating to a strange environment but to the city in which the children were born and in which they had lived all their lives prior to 1996.

Appellee argues that the outcome of this case should be governed by *Hickmon v. Hickmon*, 70 Ark. App 438, 19 S.W.3d 624 (2000), the only post-*Staab* decision in which we have upheld a chancellor's decision to deny permission to relocate. In *Hickmon*, the custodial parent sought permission to move to Arizona with her seven-year-old daughter. She had married a man who lived there

and had obtained employment there. Nevertheless, the chancellor refused to allow her to relocate. We affirmed primarily on the basis that the psychologists who testified were united in their opinions that the move would inflict a loss on the child and would alienate the child from her father and all the family, friends, and pets that she loved. By contrast, there is no testimony in this case that the move would have such a detrimental psychological effect on the children.

Finally, we address the effect of the agreed temporary order on the matter of relocation. As the chancellor recognized, temporary custody agreements made in contemplation of divorce are not binding on the courts. *See Henkell v. Henkell*, 224 Ark. 366, 273 S.W.2d 402 (1954); *Servaes v. Bryant*, 220 Ark. 769, 250 S.W.2d 134 (1952); *Burnett v. Clark*, 208 Ark. 241, 185 S.W.2d 703 (1945). However, a temporary agreement is of some importance in showing the parties' attitudes. *Henkell v. Henkell, supra.* The chancellor in this case did not go so far as to actually enforce the temporary agreement, but he gave it considerably more weight than a mere indicator of the parties' former attitude on relocation. He declared that the agreement "must have some meaning and substance" or it would simply become "inoperable" when a party changed his or her mind. Once the question of relocation was presented to the chancellor for decision, it was his responsibility to make the determination of whether the relocation was proper under the standards set forth in *Staab*. The temporary agreement should have been viewed as nothing more than an indicator that, at some point, appellant and appellee shared the attitude that the children should not be moved from Craighead County for a period of five years after the divorce.

Based upon the foregoing, we reverse and remand the chancellor's denial of permission to relocate and hold that appellant is free to move to Little Rock.

We turn now to the question of property division. Appellee contended at trial that the following property was either a gift from his parents, an inheritance from his grandparents, or property acquired in exchange for property acquired by gift or inheritance: 1) a Charles Schwab IRA account created from an account appellee owned prior to marriage and funded with gift and inheritance money; 2) four hundred shares of Arkansas National Bancshares stock purchased with gift and inheritance money; 3) a one-third interest in Woodland Hills, Inc., given to him by his father; and 4) property owned jointly with his two brothers as joint venturers and

as partners in Jonesboro Investment Co., LLC. The chancellor agreed that the property was nonmarital pursuant to Ark. Code Ann. § 9-12-315(b) (Repl. 1998), which exempts property acquired by gift and inheritance, property acquired in exchange for property acquired by gift or inheritance, and the increase in value of such property, from the definition of marital property.

With respect to the division of property in a divorce case, we affirm the chancellor's findings of fact unless they are clearly erroneous. *Jablonski v. Jablonski*, 71 Ark. App. 33, 25 S.W.3d 433 (2000).

According to appellant, the property at issue should have been declared marital property because she and appellee agreed that she would give up her career in exchange for the two of them sharing all assets, and because appellee represented on tax returns and loan applications that the property was jointly owned, and he paid tax liabilities on the property with joint funds.[1] She characterizes her argument as an estoppel argument. The elements of estoppel are: 1) the party to be estopped must know the facts; 2) he must intend that his conduct shall be acted on or must so act that the party asserting estoppel has a right to believe the other party so intended; 3) the party asserting estoppel must be ignorant of the facts; and 4) the party asserting estoppel must rely on the other's conduct to his detriment. *Moore v. Moore*, 21 Ark. App. 165, 731 S.W.2d 215 (1987).

We have found nothing in the record, as abstracted, to indicate that appellant made an estoppel argument to the chancellor. Although she presented evidence of her claim that she should be entitled to one-half of the property at issue, she did not inform the chancellor that she was pursuing an argument based on the theory of estoppel. This is further evidenced by the fact that the chancellor did not mention the estoppel theory or make a ruling on it in his lengthy twenty-seven-page letter opinion, his subsequent letter opinions, or in the final decree. Thus, we are unable to consider appellant's argument because we do not address arguments made for the first time on appeal or theories upon which the chancellor has not ruled. *See Presley v. Presley*, 66 Ark. App. 316, 989 S.W.2d 938 (1999). In any event, appellant's proof of estoppel falls short on the third element because there is ample proof that she

[1] Appellant does not argue that she is entitled to a portion of any increase in the value of the property by virtue of her own contribution.

knew appellee received gifts from his family and owned property with his brothers and that he kept these assets separate from marital assets.

A second property-division issue is raised with regard to the Schwab IRA mentioned above. Appellee testified that he funded the IRA with gifts and inheritance money. Appellant argues that IRA contributions may only be made with earned income. Thus, she concludes, the IRA should be considered marital property. She cites no authority for that proposition. We do not address points on appeal that are not supported by convincing argument or authority. *Edwards v. Stills*, 335 Ark. 470, 984 S.W.2d 366 (1998).

The final issue concerns the computation of appellee's income for purposes of alimony and child support. The chancellor awarded appellant $1,600 per month in alimony and ordered appellee to pay $2,026 in child support. He based those figures on an exhibit provided by appellee that projected appellee's 1998 income as $152,705. Appellant argues on appeal that $20,000 should have been added to that figure because, while the divorce was pending, appellee did not draw $20,000 out of the joint-venture account as he had in the past. Appellant has not fully developed this issue or satisfactorily explained the basis for her argument such that we can make a studied consideration of it. However, based upon the figures we have been provided, we are unable to say that appellee's 1998 income, upon which the awards were based, is artificially deflated such that reversal is warranted.

The chancellor's decree is affirmed as to the property division and support awards and reversed and remanded on the relocation issue.

Affirmed in part; reversed and remanded in part.

BIRD, J., agrees.

ROBBINS, J., concurs.

JOHN B. ROBBINS, Judge, concurring. I concur in the majority's decision rendered today in this matter. I write separately to suggest that historically a custodial parent's change of residence within the state has not been a matter requiring prior approval from the chancery court, nor has such an intrastate move been subjected to a prior restraint.

While we did recently address an intrastate move in *Hass v. Hass*, 74 Ark. App. 49, 44 S.W.3d 773 (2001), and applied the criteria adopted in *Staab v. Hurst*, 44 Ark. App. 128, 868 S.W.2d 517 (1994), as the majority does here, I wish to point out that *Staab* and the cases on which it relied involved interstate moves, and the consequential loss of jurisdiction that results from such moves. However, this distinction was not contended in *Hass*, nor by appellant in the instant case. Consequently, and appropriately, the majority does not address the point, and whether it does or should make a difference must await another day for decision.

James HOAY *v.* STATE of Arkansas

CA CR 00-1198 55 S.W.3d 782

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered September 26, 2001

*Blackmon-Solis & Moak, LLP*, by: *DeeNita D. Moak*, for appellant.

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

JOSEPHINE LINKER HART, Judge. Appellant, James Hoay, pleaded guilty to the crime of possession of methamphetamine and was sentenced to eighteen months in the Arkansas Department of Correction to be followed by five years' suspended imposition of sentence. Pursuant to Rule 24.3(b) of the Arkansas Rules of Criminal Procedure, he appeals from the circuit court's denial of his motion to suppress evidence seized from him, arguing that the court erred in concluding that the police had reasonable suspicion to stop his vehicle. Further, he argues that because he was arrested on an invalid arrest warrant after the stop, the items seized in the search incident to that arrest should be suppressed. We agree with appellant's latter argument and reverse and remand.

Jeff Midgett of the Clay County Sheriff's Department testified that on July 9, 1999, during daylight hours, he followed a gray Chevrolet pickup truck for approximately two miles as it traveled south on Highway 135. While following the truck, he saw the truck move to the right of the fog line, cross the center line twice, and then drive to the right of and over the fog line for approximately one-half to one mile. Midgett testified that he stopped the truck because he believed that the driver could have been under the influence of intoxicants or a controlled substance.

As the truck pulled to the side of the road, Midgett saw the driver "doing a lot of frequent moving around, bending over . . . toward the floorboard. . . ." Midgett walked up to the driver's side of the truck and asked appellant, the sole occupant of the truck, for his license. Midgett did not "smell any odor of alcohol at that time." Through his own dispatcher, Midgett checked appellant's license with NCIC, which, according to Midgett, is a nationwide list of persons who have felony warrants for arrest, and found that a warrant for appellant's arrest had been issued in Greene County. Midgett then contacted two different dispatchers for Greene County, one by telephone and one by radio, and Midgett was informed by both dispatchers that they possessed an arrest warrant for appellant based on his failure to appear on a felony charge for possession of a controlled substance.

Midgett asked appellant to step out of his truck because he had a warrant for his arrest. After Midgett handcuffed appellant, he saw a bulge in appellant's sock near his ankle. He removed from the

sock a clear plastic bag containing a smaller plastic bag that contained a rock-like substance he believed to be methamphetamine.

Midgett testified that this search was incident to appellant's arrest on the warrant, and he arrested appellant only on the warrant. Midgett also testified that if it had not been for the warrant, he would have had appellant perform a field-sobriety test because appellant's speech was slurred.

Appellant, however, introduced a docket sheet showing that the arrest warrant was issued on February 11, 1999, and set aside on April 20, 1999. Midgett testified that he did not know that the warrant was set aside, that this was his typical method for verifying warrants, and that he had no problems with Greene County in the past, as he had made several felony and misdemeanor arrests on Greene County warrants.

After hearing the arguments of counsel on appellant's motion to suppress, the court determined that because of appellant's erratic driving, Midgett properly stopped appellant's truck. The court further determined that in making the arrest on the invalid arrest warrant and searching appellant incident to that arrest, Midgett acted in good faith. Consequently, the court denied appellant's motion to suppress.

First, appellant argues on appeal that Midgett lacked reasonable suspicion to stop his truck, and therefore, the evidence seized during the search of his clothing should be suppressed. In reply, the State argues that appellant's driving gave Midgett reasonable suspicion to believe that he was driving while intoxicated.

**[1, 2]** We conclude that, based on the totality of the circumstances, Midgett had reasonable suspicion to stop appellant for driving while intoxicated. Pursuant to Rule 3.1 of the Arkansas Rules of Criminal Procedure, "[a] law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct." In reviewing the denial of a motion to suppress, this court makes an independent examination based on the totality of the circumstances. *Frette v. City of Springdale*, 331 Ark. 103, 108, 959 S.W.2d 734, 736 (1998). We

conclude that appellant's crossing of the center line and fog line provided reasonable suspicion to stop appellant to determine whether he was driving while intoxicated. *Piercefield v. State*, 316 Ark. 128, 133, 871 S.W.2d 348, 351 (1994).

Second, appellant contends that the substance seized should be suppressed because he was arrested on an invalid arrest warrant, and therefore, the search was not incident to a lawful arrest. In response, the State argues that the good-faith exception to the exclusionary rule applies, thus saving from suppression the evidence seized during the search incident to his arrest.

We conclude that the State's failure to present evidence regarding why the invalid warrant remained outstanding, particularly, whether it was the fault of the police or the court, precludes application of the good-faith exception to the exclusionary rule. In *United States v. Leon*, 468 U.S. 897 (1984), the United States Supreme Court concluded that "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." *Leon*, 468 U.S. at 922. And in *Arizona v. Evans*, 514 U.S. 1 (1995), the Court was faced with whether to exclude evidence seized during an arrest or apply the good-faith exception to the exclusionary rule when, because of an error by court employees with regard to computer records, the arrest was made on an arrest warrant quashed seventeen days earlier. The Court concluded that "[i]f court employees were responsible for the erroneous computer record, the exclusion of evidence at trial would not sufficiently deter future errors so as to warrant such a severe sanction." *Evans*, 514 U.S. at 14. The Court, however, specifically refused to address whether the good-faith exception should apply when the mistake is made by law enforcement officials. *Evans*, 514 U.S. at 16 n.5.

The prosecution carries the burden of establishing the applicability of the good-faith exception. *United States v. Leon*, 468 U.S. 897, 924 (1984); *McGhee v. State*, 25 Ark. App. 132, 136, 752 S.W.2d 303, 305 (1988); 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.3(f), at 71 n.65 (1996). However, even if we assume that Midgett did everything he could to determine the validity of the warrant, the State did not present any evidence explaining why the invalid warrant remained outstanding in the Greene County law enforcement records for nearly three months. Because we lack that information, it is impossible for this court to know whether the invalid warrant remained outstanding because of court error,

which, according to *Evans*, permits application of the good-faith exception, or police misconduct, which precludes application of the good-faith exception because of the lack of objectively reasonable reliance on the invalid arrest warrant. 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.3(f), at 71 (1996)("[B]ecause *Leon* rests upon the notion that the exclusionary rule is not implicated where there is no police misconduct to deter, that case does 'not allow law enforcement authorities to rely on an error of their own making,' as when they are at fault in failing to update their own records to show that a validly-issued [search] warrant is no longer in effect."); 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 3.5(d), at 276 (1996)("The *Evans* rationale would seem inapplicable whenever the mistake was instead attributable to the law enforcement agency."); 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 3.5(d), at 276 n.100 (1996)("Then suppression of evidence obtained incident to that illegal arrest is called for 'to deter [the police department] from deliberately or negligently failing to keep its paperwork or computer entries up to date.' "). Thus, we conclude that the State failed to establish that there was objectively reasonable reliance on the invalid arrest warrant, and we must reverse and remand.

As an alternative basis for affirmance, the State argues that even though Midgett did not arrest appellant on a traffic violation and the sole basis for the arrest was the invalid arrest warrant, because there was probable cause to arrest the appellant for violating traffic laws in the presence of the arresting officer, there was an independent basis for appellant's arrest. Citing *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), the State therefore concludes that the arrest was valid and the subsequent search was justified as a search incident to an arrest.

■ Specifically, the State argues that appellant violated Ark. Code Ann. § 27-51-301(a) (Supp. 1999), which provides that "[u]pon all roadways of sufficient width, a vehicle shall be driven upon the right half of the roadway. . . ." and Ark. Code Ann. § 27-51-302(1) (Repl. 1994), which provides that "[w]henever any roadway has been divided into two (2) or more clearly marked lanes for traffic, . . . [a] vehicle shall be driven as nearly as practical entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that movement can be made with safety. . . ." We conclude, however, that the evidence presented at the suppression hearing was inadequate to determine whether there was probable cause to believe that appellant violated the two statutes. Specifically, there is no evidence that appellant did not first ascertain that movement could be made with safety. Lacking this

evidence, we cannot say that the arrest and subsequent search may be justified under this analysis.

Reversed and remanded.

ROAF, J., agrees.

GRIFFEN and VAUGHT, JJ., concur separately.

STROUD, C.J., and CRABTREE, J., dissent.

WENDELL L. GRIFFEN, Judge, concurring. I agree to reverse and remand in this case because it is plain that appellant was arrested on an invalid warrant issued by governmental agencies. Further, it is the State's burden to demonstrate that the good-faith exception is warranted. *See McGhee v. State*, 25 Ark. App. 132, 752 S.W. 2d 303 (1988). Pursuant to *United States v. Leon*, 468 U.S. 897 (1984), and *Arizona v. Evans*, 514 U.S. 1 (1995), the State was required to show that the error was not the result of police conduct. Because the record does not demonstrate where the error in failing to remove the quashed warrant lies, the State failed to meet its burden of proof that the good-faith exception should apply.

While I agree with the result reached in this case, I write separately to state my belief that through *Leon, supra,* and its progeny, the United States Supreme Court has propounded a hypertechnical and extra-Constitutional rule whereby application of the good-faith exception turns on whether the error results from a mistake by the police, as opposed to some other governmental entity. *Leon* and *Evans* purport to limit application of the good-faith exception only where the deterrent purposes of the Fourth Amendment are furthered by its application. Such a rule disregards the fact that the purpose of the Fourth Amendment is to provide prophylactic protection against unreasonable searches and seizures by the *government. See United States v. Verdugo Urquidez,* 494 U.S. 259, 266 (1990)(stating, "[t]he available historical data show, therefore, that the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government. . . ."); and *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979) (stating, "[t]he essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials"). The Fourth Amendment does not draw a distinction between police conduct and conduct by other government officials. Thus, I do not understand the Fourth Amendment to insulate evidence seized as a

result of a warrantless search, absent reasonable cause, where the warrant was issued as the result of governmental action merely because that action was not police-based.

However dutiful the officer may have been in following police procedure when effecting appellant's arrest, the decisive truth is that there was no constitutional justification for appellant's arrest. Therefore, we should not decide this and similar cases on the supposed "good faith" of the police, nor should it matter whether a warrantless search or seizure occurred because the police or other governmental agent has followed agency procedures. The Fourth Amendment is not the servant of the government nor does it exist to protect governmental procedures. Sadly, judges are now forced by the *Leon* and *Evans* holdings to pigeonhole governmental conduct that plainly results in an unreasonable search and seizure in order to determine whether such conduct will be sanctioned under the Fourth Amendment.

LARRY D. VAUGHT, Judge, concurring. I agree that the evidence seized from appellant after his arrest (on an invalid warrant) must be suppressed. I write separately to emphasize that the arresting officer acted properly in making the arrest, and would have been derelict in his duty had he not made the arrest. I also write to point out that the decisions of the Supreme Court of the United States in *United States v. Leon,* 468 U.S. 897 (1984), and *Arizona v. Evans,* 514 U.S. 1 (1995), indicate that the application of the exclusionary rule is appropriate even though the officer acted reasonably.

Although the *Evans* court declined to address the issue of whether one police agency could rely on faulty information from another police agency in good faith, the Court's reasoning leads me to the conclusion that it may not. In discussing the application of the exclusionary rule the Court noted:

> The question of whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.

*Id.* at 10 (quoting *Illinois v. Gates,* 462 U.S. 213, 223 (1983)). The Fourth Amendment rights of the appellant were indeed violated when he was arrested on an invalid warrant. That question is not at

issue. The only question is whether the exclusionary rule is applicable or if the good-faith exception of *Leon* prevails.

The exclusionary rule is a remedial device whose application has been restricted to instances where its objectives are thought most efficaciously served. *Leon, supra.* Deterrence is the only objective of the rule, and "[w]here 'the exclusionary rule does not result in appreciable deterrence, then, clearly, its use . . . is unwarranted.' " *Evans,* 514 U.S. at 11 (quoting *United States v. Janis,* 428 U.S. 433, 454 (1976)). Accordingly, in *Leon,* the Court held that an officer would not be deterred by applying the rule to evidence obtained pursuant to a search warrant, issued by a magistrate, which was later found to be invalid. The Arkansas Supreme Court, following *Leon,* determined that the exclusionary rule is not applicable where officers search a house, pursuant to a warrant, where the judge found that the information supplied by the officers was sufficient to establish probable cause, even if the supreme court later determines that the information did not establish the requisite probable cause to search. *Yancey v. State,* 345 Ark. 103, 44 S.W.3d 315 (2001). Thus, in cases where the police officer on the scene commits some error or negligence, the rule would apply because his conduct is susceptible to deterrence. Just as obviously, where the police act in reliance on a warrant issued by a judge, the rule would not apply because no deterrence to the police officer could be shown.

The next logical extension, whether excluding evidence obtained as a result of a court clerk's error could promote the goal of deterrence, was considered in *Evans.* The Court denied application of the rule when it was shown that an invalid warrant was left in the computer system by an error of a court clerk. The court reasoned:

> [T]here is no basis for believing that application of the exclusionary rule in these circumstances will have a significant effect on court employees responsible for informing the police that a warrant has been quashed. Because court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime, they have no stake in the outcome of particular criminal prosecutions.

514 U.S. at 15 (citation omitted). However, this good-faith exception is not automatic. The State has the burden of proving entitlement to the exception. *Leon, supra.*

In the instant case, Deputy Midgett relied on the NCIC computer reading and the information obtained from the Greene County Sheriff's Office. The State failed to introduce evidence explaining why the warrant (that had been invalid for some three months) was not removed from NCIC after its quashing. Unlike in *Evans*, we do not know if the error is attributable to the Greene County Sheriff's Office or to the county's court personnel. Although the State has failed to identify who in Greene County is responsible for the delinquent record-keeping, it is obvious that Clay County is not implicated in the error. It is tempting to conclude that excluding evidence as a result of an error in Greene County will serve no purpose in deterring unlawful searches by law enforcement officers in Clay County. However, it is my opinion that the acknowledged Fourth Amendment violation in Greene County cannot be immunized by merely passing it along to Clay County. Therefore, I conclude that because the Greene County sheriff's officers are part of the "law enforcement team" referred to in *Evans*, the deterrent effect of the exclusionary rule is applicable and appropriate.

Although I hope that the net result of this decision is not to deter officers like Deputy Midgett from performing their duties in a reasonable manner, I believe that the Constitution requires law enforcement to act on reliable information. As pointed out by Justice O'Connor in *Evans*, "[c]ertainly the reliability of recordkeeping systems deserves no *less* scrutiny than that of informants." 514 U.S. at 17 (emphasis in original) (O'Connor, J., concurring). If police agencies are going to rely on computer systems, and I do not suggest that they should not, then they should not rely on them blindly. I conclude my concurrence, just as Justice O'Connor did in *Evans*, "[w]ith the benefits of more efficient law enforcement mechanisms comes the burden of corresponding constitutional responsibilities." 514 U.S. at 17-18 (O'Connor, J., concurring).

JOHN F. STROUD, JR., Chief Judge, dissenting. While I agree with the majority that Officer Jeff Midgett had reasonable suspicion to initially stop appellant, I disagree with the holding that the exclusionary rule requires the reversal of the trial court. I would affirm the denial of appellant's motion to suppress on the good-faith exception to the exclusionary rule.

In *United States v. Leon*, 468 U.S. 897 (1984), the Supreme Court noted that the basis for the good-faith exception to the exclusionary rule was the deterrent effect that the exclusion of

evidence would have on police officers, but would not have on magistrates or other court personnel. The Court said:

> We have frequently questioned whether the exclusionary rule can have any deterrent effect when the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment. "No empirical researcher, proponent or opponent of the rule, has yet been able to establish with any assurance whether the rule has a deterrent effect. . . ." But even assuming that the rule effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity.

468 U.S. at 918-19 (citations omitted).

Although *Leon* dealt with the exclusionary rule relative to the suppression of evidence obtained in a search pursuant to a search warrant that was subsequently held to have been invalid, the reasoning of the case was adopted and quoted in *Arizona v. Evans*, 514 U.S. 1 (1995). In *Evans*, the facts were substantially the same as the instant case with two exceptions. In both cases an officer had reasonable suspicion to make a routine traffic stop; upon checking with the patrol car's computer the officer learned of an outstanding arrest warrant and made an arrest; upon search of the subjects and the vehicles unlawful drugs were found; and it was subsequently learned that the arrest warrant was no longer outstanding and should have been removed from the computer. In *Evans* there was testimony that the failure to remove the arrest warrant from the computer was the error of an employee of the clerk of the court, and in the instant case, there was no testimony as to the reason for the error. The other difference was that the officer in the instant case was not satisfied just to learn of the outstanding warrant on the computer; he also made two separate calls to the neighboring county where the warrant emanated and was told by two different dispatchers that the warrant was outstanding.

The majority opinion of the instant case places the burden on the prosecution to prove who made the error in not removing the quashed warrant from the computer. The defendant introduced the only evidence regarding the warrant being invalid, which was a copy of the court docket sheet showing the warrant had been quashed. The *Evans* decision reversed the Arizona Supreme Court decision that held that the exclusionary rule required suppression of

the evidence even if the faulty information resulted from an error committed by an employee of the clerk of the court. The *Evans* court held:

> If court employees were responsible for the erroneous computer record, the exclusion of evidence at trial would not sufficiently deter future errors so as to warrant such a severe sanction. First, as we noted in *Leon*, the exclusionary rule was historically designed as a means of deterring police misconduct, not mistakes by court employees. Second, *respondent offers no evidence that court employees are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion.*

514 U.S. at 14-15 (citations omitted) (emphasis added).

The Court seems to place the burden on the defendant to show that court employees ignored or subverted the Fourth Amendment or that there was lawlessness among the actors in order to impose the extreme sanction of exclusion of the seized evidence. In the present case, there was no evidence that either court employees or law enforcement personnel were inclined to ignore or subvert the Fourth Amendment.

In *Evans,* the United States Supreme Court only held that the good-faith exception to the exclusionary rule supported a categorical exception for clerical errors of court employees; it did not make a ruling regarding errors that rest with law-enforcement personnel for failure to remove a warrant from the computer, and it did not have that question before it. In *Evans*, the Supreme Court cited its decision in *Leon, supra*, holding:

> [W]here the officer's conduct is objectively reasonable, excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty.

514 U.S. at 11-12 (quoting *Leon, supra*, 468 U.S. at 919-20).

In my opinion, there was nothing more the arresting officer in the instant case could have done except ignore the outstanding warrant and that would have been a clear dereliction of his duty. I

am also not convinced that the suppression of the contraband discovered in Clay County due to an error committed by someone in the Greene County court system or by its law enforcement personnel would have any deterrent effect on the law enforcement personnel of Greene County, which is not the county where the arrest was made and the case was tried.

When the identity of the persons who failed to remove the warrant from the computer is unknown, and until such time as the United States Supreme Court or the Arkansas Supreme Court holds that the seized evidence should be excluded in spite of the fact that the arresting officer exercised exceptional care in determining that the warrant was truly outstanding before he made the arrest, I intend to vote to affirm such convictions.

I dissent, and I am authorized to state that Judge TERRY CRABTREE joins in this dissenting opinion. I would affirm the trial court.

John A. MAGEE *v.* DIRECTOR,
Arkansas Employment Security Department;
and U.S. Agricultural, Inc.

E 00-295 55 S.W.3d 321

Court of Appeals of Arkansas
Division I
Opinion delivered September 26, 2001

[redacted]

[redacted]

*Allen Law Firm*, by: *David W. Stirling*, for appellant.

*Phyllis A. Edwards*, for appellee Director of Arkansas Employment Security Department.

JOSEPHINE LINKER HART, Judge. John Ashley Magee appeals a decision of the Arkansas Board of Review ("Board") that affirmed the Appeal Tribunal's denial of unemployment insurance benefits and concluded that he was disqualified from receiving those benefits because he failed to take appropriate steps to prevent the mistreatment that gave rise to his leaving work when he did not discuss his work situation with Allan Magee ("president"), his father and president and a fifty-percent owner of U.S. Agricultural, Inc. ("U.S. Agricultural"). We reverse and remand this matter for additional findings of fact.

Appellant worked for U.S. Agricultural from 1996 until May 9, 2000. While employed by U.S. Agricultural as plant and sales manager, appellant's salary was unilaterally decreased by Ed Howard,

chief financial officer and the other fifty-percent owner of the company. Appellant resigned his position with U.S. Agricultural as a result of Howard's repeated undermining of his authority and the reduction of his salary. On August 10, 2000, the agency determined that appellant was not entitled to unemployment insurance benefits, and appellant appealed to the Appeal Tribunal.

A hearing was held before an officer for the Appeal Tribunal on September 14, 2000. Appellant, the president, and Michelle Wallace testified on behalf of appellant, and Howard testified on behalf of U.S. Agricultural.

Appellant testified that in the position of plant manager at U.S. Agricultural, he was responsible for ordering plant supplies. He stressed that failure to acquire the needed supplies in a timely manner would interrupt production, which would cost the company money. Despite this, Howard would frequently interfere with this effort by either telling plant staff not to place the order or canceling orders already made. Furthermore, Howard also refused to finance projects that would protect inventory from flooding and failed to replace badly-worn forklift tires. These impediments, according to appellant, caused costly disruptions in the plant's operations.

In addition, appellant explained the unwritten policies at U.S. Agricultural that governed pay increases and decreases, which gave appellant sole responsibility for the setting of an employee's wage. Moreover, he stated that the salary increase he received in February 2000, was four months later unilaterally decreased by Howard. Following Howard's decrease of appellant's salary, appellant quit working for U.S. Agricultural.

The president then testified and stated that he agreed with appellant's assessment that Howard had repeatedly undermined appellant's authority and expressed the opinion that[1] Howard

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[1] The relevant colloquy was as follows:

HEARING OFFICER: Well, as president of the company, did you have some power to exercise to make sure that John Magee got his proper salary?

PRESIDENT: I suppose I could have filed suit and got lawyers, but I think that we're talking about is we're—I think that's—I think you're the one that's getting ready to determine whether I have that power or not. And I don't—I mean, I was the one that authorized the raise

wanted to get rid of appellant. In particular, the president recounted a specific incident in which Howard told the president while pointing at appellant, "the only thing wrong with this plant was that son-of-a-bitch up there. . . ." Regarding the last incident that caused appellant to leave work, the president testified that prior to the date the salary increase was effective he had consulted with appellant and approved the earnings change. Furthermore, he stated that he and appellant had discussed the salary decrease, but he did nothing to rectify the problem. In his view, the only available solution was that he "could have filed suit and got lawyers."

Wallace testified that she was the office manager at U.S. Agricultural and agreed with appellant's testimony that his pay increase was done commensurate with the company's unwritten policy concerning salaries. She also stated that Howard was not typically involved in the setting of salaries and that the undermining of appellant's authority by Howard happened "on a regular basis."

Finally, Howard testified that many of his actions were based on the company's financial situation at the time and that he had stopped talking with appellant because every time they would discuss something, appellant would go "berserk." He also stated that he had talked with the president about appellant's salary increase and the impact the salary change was having on the company's "bad" financial situation. The president agreed to discuss the matter with appellant, but failed to do so. Accordingly, Howard made the change to appellant's salary.

On September 15, 2000, the Appeals Tribunal affirmed the agency's denial of appellant's application for unemployment insurance benefits, reasoning that appellant "did not take reasonable steps to straighten things out before he quit." On appeal, the Board affirmed, concluding that even if it determined that appellant had good cause to quit, he failed to take appropriate steps to prevent the mistreatment from continuing, as required under *Teel v. Daniels*, 270

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and Ed basically reduced his salary and ran him off.

HEARING OFFICER: How did Mr. Howard reduce his salary?

PRESIDENT: He called the (employee leasing) company and they did it.

HEARING OFFICER: Did he have authority to do this?

PRESIDENT: In my opinion he didn't.

Ark. 766, 769, 606 S.W.2d 151, 152 (Ark. App. 1980). Specifically, the Board stated that it did "not understand why [appellant] did not discuss the situation with his father, the Owner/President, prior to quitting." From the Board's decision, comes this appeal.

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

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

*E.g., Fleming v. Director*, 73 Ark. App. 86, 88, 40 S.W.3d 820, 822 (2001). Because we conclude the Board's decision could not reasonably be reached based upon the evidence before it, we reverse and remand.

*I. Substantial evidence*

Appellant first argues that the Board's decision was not supported by substantial evidence. Specifically, he argues that the overwhelming weight of the evidence demonstrates that his authority was routinely undermined by Howard, and that such efforts gave appellant good cause to leave work. In response, appellee argues that the Board's decision was supported by substantial evidence because appellant failed to take appropriate steps to prevent the mistreatment from continuing. In particular, appellee argues that "[i]t is clear from the evidence that [the president] could have resolved the issue of the raise for appellant," and that "[t]here is no evidence that [a]ppellant ever requested [the president's] assistance in this matter."

Pursuant to Ark. Code Ann. § 11-10-513(a)(1) (Supp. 1999), "[i]f so found by the Director of the Arkansas Employment Security Department, an individual shall be disqualified for benefits if he voluntarily and without good cause connected with the work left

his last work." The key term "good cause" is not defined by the General Assembly.

[redacted] However, in *Teel*, 270 Ark. at 769, 606 S.W.2d at 152, we adopted the definitions of "good cause" as provided in James O. Pearson, Jr., J.D., Annotation, *Unemployment Compensation: Harassment or Other Mistreatment by Employer or Supervisor as "Good Cause" Justifying Abandonment of Employment*, 76 A.L.R.3d 1089 (1977). According to Pearson, *supra* at 1092-1095 (citations omitted):

> Because the courts have employed an objective standard in determining "good cause," it is not possible to state definitely that a particular type of conduct, such as harassment or other mistreatment by an employer, does, or does not, constitute good cause. Rather, it is only possible to state definitely that the answer to this question depends on a consideration of all of the facts and circumstances in each case, since it is well established that "good cause" is a cause which would reasonably impel the average able-bodied, qualified worker to give up his or her employment. . . .
>
> The "average employee" standard applied by itself would indicate that the courts would be interested only in the effects that the employer's mistreatment would have had on an average employee. In other words, the effect that such treatment actually had on the employee in question would appear to be irrelevant under this standard, except as evidence allowing the trier of fact to determine if the average employee would have acted in the same way under such circumstances. . . . [However,] "good cause" is dependent not only on the reaction of the average employee, but also on the good faith of the employee involved. In this context, good faith, which has been held to be an essential element of good cause, means not only the absence of fraud, but also the presence of a genuine desire to work and to be self-supporting. Under this concept, it would appear logical to admit evidence concerning the manner in which the claimant was actually affected by the mistreatment in order to determine if his claim for unemployment compensation was made in good faith.
>
> The fact that good cause is dependent on both the reaction of the average worker and the good faith of the employee involved appears to lead to two basic results concerning eligibility for unemployment compensation. First, if an average employee would not have quit his job, the employee involved may not recover unemployment compensation even though his claim is made in good faith. Indeed, the courts, in determining whether harassment or

> other mistreatment constitutes good cause, have often stated that good cause is not to be measured by the needs of the supersensitive employee and have implied that such an employee is not entitled to benefits merely because his claim is made in good faith. Second, even if the average employee would have left his employment under the circumstances of a particular case, no unemployment compensation can be recovered unless the employee in question acts in good faith in filing his claim. In other words, it appears that an employee who is not bothered by the mistreatment involved, and who is not, therefore, acting in good faith in presenting his claim, cannot recover compensation merely because the average employee would have quit his job under the same circumstances. . . .
>
> Some of the courts considering whether a boss' mistreatment of an employee gives the employee good cause to leave his employment have stated that one of the elements in determining good cause is whether the employee took appropriate steps to prevent the mistreatment from continuing. These courts have implied that it is only after the employee has appealed his case to a higher level of management and has received no satisfaction that he can quit with "good cause."

In this case, the Board simply relied on one factor in their denial of benefits and excluded consideration of the remaining factors. Specifically, the Board merely stated that it found "that even if it determined that [appellant] had good cause to quit, [appellant] did not make reasonable efforts to resolve the situations prior to quitting."

Contrary to the Board's findings, the record plainly exhibits that there were long-held animosities between Howard and appellant, and that appellant had from time to time appealed to the president in order to find resolutions to the various incidents that fed the animosity. For whatever reason and despite the arguable authority to do so, the president did not resolve the matter. Appellant did, on many occasions, appeal his "case" to a higher level of management without obtaining resolution. A stalemate has evolved between two equal owners with equal control. Appellant was in an untenable situation where an appeal for resolution was an exercise in futility. The law does not require an employee to engage in an act of futility as a precursor to obtain employment benefits. Therefore, the Board's finding that appellant did not take appropriate steps to resolve the mistreatment cannot be supported by substantial evidence. Thus, we reverse on this issue.

*II. Good cause*

Finally, appellant argues that the Board failed to consider whether appellant had good cause to leave work. As stated, the Board assumed, *arguendo*, that appellant had a "case," and his error was the fact that he did not appeal that "case" to a higher level for resolution. On this point, we conclude that the Board has defined "good cause" in a manner inconsistent with *Teel*. The Board's finding plainly requires that under all circumstances employees must take steps to prevent the mistreatment from continuing by appealing their complaint to a higher level of management before they are entitled to unemployment insurance benefits. That, however, is not the law.

Whether an employee fails to appeal mistreatment to a higher level of management for resolution before quitting is an appropriate factor to weigh when determining whether an employee was acting in good faith when he voluntarily left work. Good faith, of course, is neither the beginning nor the end of the analysis when determining whether an employee is entitled to unemployment insurance benefits — the statutory standard is "good cause," not "good faith." However, for reasons expressed by Pearson, a thoughtful examination of whether good cause existed requires that every action taken by an employee pertaining to the alleged mistreatment be measured against the good-faith standard. Therefore, while we agree that under the right circumstances an employee's failure to comply with an employer's established grievance procedure could be evidence of a lack of good faith, we hold that such a finding alone does not trump all other considerations when considering whether an employee had good cause to quit his employment.

Hence, what remains is the pivotal question of whether appellant had good cause to quit his employment. In order for us to affirm the Board's decision, we must determine whether there is substantial evidence to support a finding that appellant did not have good cause to resign his employment with U.S. Agricultural. However, we are simply unable to make such a determination because the Board *assumed* that appellant had good cause to quit work and proceeded to find that his failure to appeal required a denial of benefits. While we hold that the Board erred by finding appellant's failure to appeal justified a denial of benefits, the Board's *assumption* does not constitute an addressable *finding* with regard to whether appellant had good cause to quit work. Thus, we are unable to

undertake a meaningful review and determine whether the law was properly applied by the Board.

Despite a relatively complete record, we should not make the necessary findings to determine whether appellant is entitled to unemployment insurance benefits. *See* Ark. Code Ann. § 11-10-529(c)(1) (Supp. 1999) ("In any proceeding under §§ 11-10-523—11-10-530, the findings of the board as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive and the jurisdiction of the court shall be confined to questions of law."). As explained by our supreme court in *Reddick v. Scott*, 217 Ark. 38, 41, 228 S.W.2d 1008, 1010 (1950) (citations omitted), while addressing a failure by the Board to make essential findings of fact:

> Where an administrative body is empowered to make findings of fact it is not the province of the courts to discharge that function merely because the administrative agency has not acted. For instance, it has been our consistent practice under the Workmen's Compensation Act to remand the cause to the Commission if that body fails to make a finding upon a pertinent issue of fact. . . . It is not the function of this court to decide such fact questions in the first instance.

Therefore, we remand this matter to the Board for findings of fact upon the issues that are still undecided and for further proceedings consistent with this opinion.

Reversed and remanded.

ROAF, J., agrees.

PITTMAN, J., concurs.

Darlene FORD *v.* STATE of Arkansas

CA CR 00-842 55 S.W.3d 315

Court of Appeals of Arkansas
Division III
Opinion delivered September 26, 2001

[redacted]

*Randel Miller*, for appellant.

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

JOHN B. ROBBINS, Judge. Appellant Darlene Ford appeals her convictions for possession of ephedrine and for being an accomplice to the manufacture of methamphetamine, for which she was sentenced to concurrent terms of six and ten years in the Arkansas Department of Correction, respectively. She argues that there is insufficient evidence to support the convictions entered by the Greene County Circuit Court. We affirm her conviction of possession of ephedrine but reverse her conviction of being an accomplice to the manufacture of methamphetamine.

Appellant filed timely motions for directed verdict, which were denied. This permits her to contest the sufficiency of the State's evidence against her, inasmuch as a motion for a directed verdict is a challenge to the sufficiency of the evidence. *Barr v. State*, 336 Ark. 220, 984 S.W.2d 792 (1999). The test for such motions is whether the verdict is supported by substantial evidence, direct or

circumstantial. *Id.* Substantial evidence is evidence of sufficient certainty and precision to compel a conclusion one way or another and pass beyond mere suspicion or conjecture. *Peeler v. State*, 326 Ark. 423, 932 S.W.2d 312 (1996); *Ferrell v. State*, 325 Ark. 455, 929 S.W.2d 697 (1996). Circumstantial evidence may constitute substantial evidence, but it must exclude every other reasonable hypothesis consistent with innocence. *Gregory v. State*, 341 Ark. 243, 15 S.W.3d 690 (2000); *Williams v. State*, 338 Ark. 97, 991 S.W.2d 565 (1999). Whether the evidence excludes every hypothesis is left to the jury to determine. *Williams, supra.* On appeal, we review the evidence in the light most favorable to the appellee and consider only the evidence that supports the verdict. *Barr v. State, supra.* We make no distinction between direct and circumstantial evidence when reviewing the sufficiency of the evidence. *Williams, supra.* Neither do we pass on the credibility of the witnesses; that duty is left to the trier of fact. *Cobb v. State*, 340 Ark. 240, 12 S.W.3d 195 (2000); *Stewart v. State*, 338 Ark. 608, 999 S.W.2d 684 (1999).

The evidence at the jury trial, viewed in the light most favorable to the State, revealed that in January 1999, an investigation was underway in Paragould, Arkansas, regarding the reported sale of large quantities of pseudoephedrine tablets at a Junior Food Mart on Highway 412 East. The Paragould Police Department sent a confidential informant to the store to purchase pseudoephedrine tablets, ether, and lithium batteries, in a controlled buy. The informant purchased two cans of starting fluid and two packages of "AA" lithium batteries on January 18, 1999. Two days later on January 20, the informant purchased two cans of starting fluid, fifteen bottles of pseudoephedrine tablets, and two packages of "AA" lithium batteries. The next day, January 21, the informant purchased twenty-four bottles of pseudoephedrine tablets. On February 11, 1999, the informant purchased fifteen bottles of pseudoephedrine tablets and four cans of starting fluid. On February 17, 1999, the informant purchased twelve bottles of pseudoephedrine tablets, two cans of starting fluid, and one package of lithium batteries.

In the midst of these transactions, Roger Case, a narcotics investigator with the Little Rock Police Department assigned to the Drug Enforcement Agency, opened a case file based upon the sales made at the Junior Food Mart and targeted the store as a major distributor of pseudoephedrine and ephedrine. Appellant was the store manager and was the person most often involved in sales of pseudoephedrine.

Case presented himself to appellant at the store on February 2, 1999, asking to purchase her entire stock of pseudoephedrine pills in one buy, just in case the enforcement authorities were following him. In his conversation with appellant, they discussed methamphetamine production, and Case offered to trade the pills for methamphetamine. Case again presented himself to appellant on June 30, 1999, and bought 144 bottles of pseudoephedrine for $1200, though he offered to trade the finished drug for the pills. Case brought the $1200 in payment on July 14, at which time he also purchased lithium batteries and again discussed trading the pills for the finished drug. Appellant had explained to Case that she would not "hold" any quantity for him; she sold the pills on a "first come, first serve" basis as they were delivered from the wholesaler.

When Case arrived at the store on September 1 to purchase more pills, appellant was not there but was on sick leave. Case was also told that appellant had with her five cases of pseudoephedrine pills, the store's entire stock, which was against store policy. Later that day, Case called appellant on her cell phone and arranged to meet her in Jonesboro to purchase a case. Upon meeting in a restaurant parking lot, appellant gave Case a price of $1350 for one case; Case only had $1200 and offered her the difference in methamphetamine, which appellant declined. Appellant took the $1200 and accepted Case's promise to pay the $150 later. Case left after consummating the purchase, and he notified authorities of what appellant had in her Jeep. Her vehicle was stopped for a moving violation, and officers seized the four remaining cases of pseudoephedrine tablets, each case containing 144 bottles. These events led to the charges being filed against her.

At trial, Case testified that one method of manufacturing methamphetamine is "the Nazi method." Case related that this method requires ephedrine, large amounts of ether that can be found in starting fluid, large amounts of sodium metal or lithium that can be extracted from lithium batteries, and anhydrous ammonia. Case testified that, assuming a 72% yield, one case of pseudoephedrine tablets yields 886 grams of methamphetamine. The State entered into evidence the cases of pills retrieved from her vehicle, a box containing cans of starting fluid, the various items purchased by the informant and Case on the dates listed above, and one cassette tape of a recorded interview with appellant.

Appellant testified in her own defense that she was urged by upper management to sell the pills. She stated that pills that were invoiced from wholesale to other store locations were sent to her

store to sell. The store had a permit to sell the pills. She maintained that she figured out what the sales were being used for, and she did not condone it, but she was authorized and encouraged to sell whatever amount was available. She admitted that she delivered large quantities of the pills to a storage facility for another man on one occasion. She did not deny selling a case of the pills to Case in the parking lot that day, though most of the transactions were performed at her desk in the store, keeping the cash in her desk until entering them later in the retail register. Appellant did not deny that she overcharged in bulk sales and that these were cash transactions, nor did she deny that she was wrong to pocket the difference. Appellant denied any knowledge that what she was doing was criminal.

The jury was instructed on the law, and after deliberation, found her guilty of possessing more than five grams of ephedrine[1] and being an accomplice to the manufacture of methamphetamine. This appeal arises from those judgments.

*Possession of Ephedrine*

Appellant argues that she is not guilty of violating Ark. Code Ann. § 5-64-1101 (Repl. 1997), which provides:

> (a) It shall be unlawful for any person to possess more than five (5) grams of ephedrine, its salts, optical isomers and salts of optical isomers, alone or in a mixture, except;
>
> (1) Any pharmacist or other authorized person who sells or furnishes ephedrine, its salts, optical isomers and salts of optical isomers, upon the prescription of a physician, dentist, podiatrist, or veterinarian; or
>
> (2) Without a prescription, pursuant to the Federal Food, Drug, and Cosmetic Act or regulations adopted thereunder provided that the person possesses a sales and use tax permit issued by the Arkansas Department of Finance and Administration; or

[1] We recognize, as does the State, that the charging document and judgment reflect that the State was proceeding on Ark. Code Ann. § 5-64-1102, possession of ephedrine with intent to manufacture, but the jury verdict and all arguments at trial related to Ark. Code Ann. § 5-64-1101, possession of more than five grams of ephedrine. The parties agree that this is the appropriate law applicable herein, and we address the appeal with that stipulation.

(3) Any physician, dentist, podiatrist, or veterinarian who administers or furnishes ephedrine, its salts, optical isomers and salts of optical isomers, to his or her patients; or

(4) Any manufacturer, wholesaler, or distributor licensed by the State Board of Pharmacy who sells, transfers, or otherwise furnishes ephedrine, its salts, optical isomers and salts of optical isomers, to a licensed pharmacy, physician, dentist, podiatrist, veterinarian, or any person who possesses a sales and use tax permit issued by the Arkansas Department of Finance and Administration.

(b) Any person who violates the provisions of this section shall be guilty of a Class D felony.

The evidence demonstrates that four cases of pseudoephedrine were seized from her car containing 576 bottles of pseudoephedrine tablets, and appellant does not contest that she possessed more than five grams of ephedrine. Her contention is that she held the tablets under the authority permitted to the store. However, appellant is the person most interested in the outcome of this trial, and she was in possession of the store's property, selling it outside the store and admittedly keeping profits from these sales. This was a fact question on credibility, left to the fact finder to resolve and which we do not disturb on appeal. *Ashe v. State*, 57 Ark. App. 99, 942 S.W.2d 267 (1997). We hold that sufficient evidence supports her conviction on this charge.

*Accomplice to the Manufacture of Methamphetamine*

Appellant also challenges the sufficiency of the evidence to convict her of accomplice to manufacturing methamphetamine, asserting that there was no proof that anyone manufactured methamphetamine. Therefore, she argues, because the proof did not establish that an underlying crime was committed, she could not be convicted of being an accomplice to it. The State argues that appellant was guilty as an accomplice via her attempts to provide most of the precursors of the drug. Appellant's argument is well-taken.

Manufacturing of controlled substances is defined in Ark. Code Ann. § 5-64-101(m) (Repl. 1997), and it states:

> "Manufacture" means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container, except that this term does not include the preparation or compounding of a controlled substance by an individual for his own use or the preparation, compounding, packaging, or labeling of a controlled substance:
>
> (1) By a practitioner as an incident to his administering or dispensing of a controlled substance in the course of his professional practice; or
>
> (2) By a practitioner or by his authorized agent under his supervision for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale;

Appellant was charged and convicted as an accomplice to the crime of manufacture of methamphetamine. The status of an accomplice is defined in Ark. Code Ann. § 5-2-403 (Repl. 1997):

> (a) A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of an offense, he:
>
> > (1) Solicits, advises, encourages, or coerces the other person to commit it; or
> >
> > (2) Aids, agrees to aid, or attempts to aid the other person in planning or committing it; or
> >
> > (3) Having a legal duty to prevent the commission of the offense, fails to make proper effort to do so.
>
> (b) When causing a particular result is an element of an offense, a person is an accomplice in the commission of that offense if, acting with respect to that result with the kind of culpability sufficient for the commission of the offense, he:
>
> > (1) Solicits, advises, encourages, or coerces the other person to engage in the conduct causing the result; or

> (2) Aids, agrees to aid, or attempts to aid the other person in planning or engaging in the conduct causing the result; or
>
> (3) Having a legal duty to prevent the conduct causing the result, fails to make proper effort to do so.

There is no distinction between criminal liability of an accomplice and the person who actually commits the offense. *Riggins v. State*, 317 Ark. 636, 882 S.W.2d 664 (1994). However, as pointed out by appellant, we have held that "an accomplice's liability does not attach until the State proves that the substantive crime was completed." *Savannah v. State*, 7 Ark. App. 161, 164, 645 S.W.2d 694, 695 (1983). The 1988 Supplementary Commentary to the statute on accomplice liability reiterates this reasoning:

> It speaks in terms of completed offenses. Normally, one is not an accomplice to an offense if, despite his encouragement, no offense is committed. . . . For example, if A agrees to aid B to manufacture and sell drugs, A has no criminal liability on accomplice theory unless B actually commits the offense planned.

The State is correct when it points out that appellant admitted that she was told that the pills were being used to manufacture methamphetamine, appellant knew that the only product that she did not sell that was necessary to the production of methamphetamine was anhydrous ammonia, and appellant overcharged for the cost of the pills and kept the difference. It cites to *Smith v. State*, 68 Ark. App. 106, 3 S.W.3d 712 (1999), for the proposition that the presence of all the components necessary to manufacture methamphetamine except one is sufficient evidence to support a conviction. However, in that case, the components were found in Smith's home, along with the equipment for a working lab. The appeal before us now is for the crime of acting as an accomplice to an offense that was not proven by any of the State's evidence. Indeed, the ingredients purchased were entered into evidence in the same packaging that they were in when purchased by the informant and Case. Based upon the Commentary and our prior decision relating to this issue, we conclude that sufficient evidence does not exist to support appellant's conviction for being an accomplice to manufacturing methamphetamine. We reverse and dismiss this conviction.

Affirmed in part and reversed in part.

BIRD and VAUGHT, JJ., agree.

TONY SMITH TRUCKING, *et al. v.*
WOODS & WOODS, LTD.

CA 00-1381 55 S.W.3d 327

Court of Appeals of Arkansas
Division II
Opinion delivered September 26, 2001

*Hatfield & Lester*, by: *Richard F. Hatfield*, for appellant.

*Barber, McCaskill, Jones & Hale, P.A.*, by: *Gail Ponder Gaines* and *Richard A. Smith*, for appellee.

JOHN B. ROBBINS, Judge. Three separate actions are consolidated for this appeal. The appellants, Tony Smith Trucking, Southern Refrigerated Transport, and Tony and Kathy Smith, all filed amended complaints against appellee Woods & Woods, Ltd., on October 19, 1999. The complaints alleged breach of contract due to the appellee's failure to exercise the required skill and workmanship of certified public accountants in the defense of audits of appellants' 1991, 1992, and 1993 income-tax returns. The trial court entered summary judgment against each appellant, ruling that their causes of action were barred by the three-year statute of limitations applicable innegligence cases. The trial court further ruled that, even if the five-year statute of limitations applied as asserted by appellants, appellants' claims were still time-barred because their complaints were filed more than five years after the filing of the last relevant tax return. The appellants argue on appeal that the trial court erred in entering summary judgment. We affirm.

Appellants' argument is twofold. First, they argue that the trial court erred in finding that the causes of action were in tort, rather than breach of contract, and as a consequence it applied the wrong

limitations period. Next, they argue that, assuming the statute of limitations is five years and not three, the trial court erred in finding that their complaints were not timely. The appellants contend that, in addition to an action for breach of appellee's earlier contract to prepare the subject tax returns, they also pled a cause of action for breach of appellee's contract to render services to appellants during the IRS audit of these returns. Because the audit occurred within five years of the filing of the October 19, 1999, amended complaints, their actions were not time-barred.

Arkansas Rule of Civil Procedure 56(c)(2) provides for summary judgment when "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 party is entitled to a judgment as a matter of law[.]" The moving party bears the burden of sustaining a motion for summary judgment; once the moving party meets this burden, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Calcagno v. Shelter Mut. Ins. Co.*, 330 Ark. 802, 957 S.W.2d 700 (1997). On appeal, we view the evidence in the light most favorable to the opposing party and resolve all questions and ambiguities against the moving party. *Elder v. Security Bank*, 68 Ark. App. 132, 5 S.W.3d 78 (1999). Summary judgment is proper when the statute of limitations bars the action. *Alexander v. Twin City Bank*, 322 Ark. 478, 910 S.W.2d 196 (1995).

In the amended complaints filed by appellants on October 19, 1999, it was alleged that the appellee breached its agreement with appellants in their preparation of the 1991, 1992, and 1993 income tax returns, which subsequently resulted in damages. Moreover, the complaints asserted that the appellee breached its contract with the appellants in representing them in the IRS audit. Donny Woods, representing Woods and Woods, Ltd., joined in execution of a power of attorney with respect to each of the appellants in 1994, authorizing him to represent the appellants before the IRS. The appellants asserted in their complaints that each power of attorney represented a contract, and that each contract was breached due to Mr. Woods's deficient representation during the audit that occurred later. The complaints listed a variety of specific instances where Mr. Woods allegedly failed to raise the appropriate arguments or supply the correct documentation in his defense during the IRS audit. The appellants asserted that, as a result of the contract breach, they suffered damages including taxes, penalties, and interest assessed by the IRS, as well as "fees paid by Smiths to their accountants and attorneys to correct defendant's negligence[.]"

The appellants argue that their actions against the appellees were for breach of contract, and that pursuant to Ark. Code Ann. § 16-56-111 (Supp. 1999), the applicable statute of limitations is five years. However, the trial court found that, even though each complaint purported to be an action for breach of contract, "the gist of the action is one for professional negligence." The statute of limitations for negligence actions is three years. Ark. Code Ann. § 16-56-105 (1987); *Gibson v. Herring*, 63 Ark. App. 155, 975 S.W.2d 860 (1998).

In support of its argument, appellants attempt to distinguish this case from *Sturgis v. Skokos*, 335 Ark. 41, 977 S.W.2d 217 (1998). In that case, the appellants sued for attorney malpractice, asserting both negligence and breach of contract. For its breach of contract claim, appellants maintained that the appellees contracted to represent them diligently and competently, but failed to do so for a number of stated reasons. The supreme court set out the following guidelines for determining which statute of limitations applied:

> In 2 R. MALLEN AND J. SMITH, LEGAL MALPRACTICE § 21.5(4th ed. 1996), the authors explain that "for a contract statute of limitations to apply, there must be a breach of a specific promise." To determine the cause of action, we look to the facts alleged in the complaint to ascertain the area of the law in which they sound. *McQuay v. Guntharp*, 331 Ark. 466, 963 S.W.2d 583 (1998). If two or more statutes of limitation apply, generally the statute with the longest limitations period will govern. *Id.* at 470; *Loewer Farms v. National Bank of Ark.*, 316 Ark. 54, 870 S.W.2d 726 (1994).

*Id.* at 48, 977 S.W.2d at 220. The supreme court held that the three-year limitations period applied, stating:

> The complaint in this case obviously contained a claim of breach of contract. The question thus becomes whether the reference to diligence in the contract is the sort of specific promise that transforms the gist of the action from one for negligence into one for breach of the written agreement. We hold that it does not. The obligation to act diligently is present in every lawyer-client relationship. The violation of that obligation is, by definition, nothing more than negligence. Our conclusion that the gist of the action in this case is negligence is further supported by the fact that the amendment of the complaint to state the contract claim was an obvious afterthought and was done apparently upon realization that, but for one, the negligent acts alleged all occurred more than three years prior to the filing of the complaint.

*Id.* at 49-50, 977 S.W.2d at 221.

The appellants assert that the case at bar is materially different than *Sturgis v. Skokos, supra*, because the powers of attorney required the appellee to perform specific promises. Appellants contend that the contracts required Mr. Woods to perform detailed duties to the best of his knowledge, skill, and ability, which included performing acts on behalf of the taxpayers such as signing agreements, consents, or other documents. Moreover, appellants point out that the powers of attorney stated that Mr. Woods is an enrolled agent under Treasury Department Circular No. 230, which requires representation concerning:

> (a) all matters connected with a presentation to the Internal Revenue Service or any of its officers or employees relating to a client's rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service.
>
> (b) presentations including preparing and filing necessary documents.
>
> (c) corresponding and communicating with the Internal Revenue Service; and
>
> (d) representing a client at conferences, hearings, and meetings.

The appellants note that Mr. Woods's breach of contract is alleged to have occurred through April 24, 1995, when his representation was terminated. This was less than five years prior to the filing of their amended complaints, and appellants argue that, since Mr. Woods was specifically authorized to take specific actions as noted above, a fact question existed as to whether the five-year statute of limitations was applicable.

■ We are unpersuaded by appellants' argument and hold that, for purposes of determining the applicable limitations period, this case is indistinguishable from *Sturgis v. Skokos, supra.* Both cases involve a general agreement by professionals to exercise diligence in representing their clients. While the appellants submit that the powers of attorney outlined sufficient specific promises to trigger the five-year limitations period for breach of contract actions, we disagree. The forms authorized Mr. Woods to represent appellants before the IRS, and by way of example stated that he was authorized to sign agreements, consents, or other documents. However, the powers of attorney do not contain or contemplate specific

promises, but at most represent a general duty to represent appellants with diligence. A violation of that obligation is, by definition, nothing more than negligence. *See Sturgis v. Skokos, supra.* Our conclusion that the gist of the action is negligence is further supported by the fact that the original complaints filed by appellants alleged only negligence, but were soon amended to include breach of contract. *Id.*

In *Ford's Inc. v. Russell Brown & Co.*, 299 Ark. 426, 773 S.W.2d 90 (1989), the supreme court announced that in Arkansas malpractice cases concerning not only attorneys and physicians but also accountants, the three-year statute of limitations begins to run, in the absence of concealment of the wrong, when the negligence occurs, not when it is discovered. While the appellants in the instant case argued below that the appellees fraudulently concealed its negligence, this argument was rejected by the trial court and has not been raised as an issue on appeal. The three-year statute of limitations began to run no later than April 24, 1995, when the appellee discontinued its representation of appellants. Since the limitation period expired before appellants filed their 1999 complaints, the trial court correctly entered summary judgment against appellants as there were no genuine issues of material fact remaining and appellee was entitled to judgment as a matter of law.

Appellants' remaining argument is that, if the five-year limitations period applies, then their claims are not time-barred because the appellee was defending the audit within five years of the filing of their complaints. However, due to our disposition of the first issue, we need not address this contention.

Affirmed.

BIRD and VAUGHT, JJ., agree.

TRI-STATE DELTA CHEMICALS, INC.
*v.* Michael WILKISON

CA 01-162 55 S.W.3d 304

Court of Appeals of Arkansas
Division III
Opinion delivered September 26, 2001

[redacted]

*Lyons, Emerson & Cone, P.L.C.*, by: *Jim Lyons*, for appellant.

One brief only.

SAM BIRD, Judge. In this one-brief case, Appellant Tri-State Delta Chemicals, Inc., appeals the dismissal of its complaint to have a $67,918.26 judgment declared as a first lien on real estate owned by appellee Michael Wilkison. Tri-State contends on appeal that the trial court erred in finding that the real property was Wilkison's homestead. We affirm.

The stipulated facts of this case, set forth in a letter opinion of the Monroe County Circuit Court, are as follows. In September 1987, Wilkison obtained title by warranty deed to the real property at issue. He moved onto the property shortly afterward and continued to reside there through the time of the proceedings in circuit court. Wilkison married in March 1994. His bride, Sarah, and her then-minor son, Larry, lived with Wilkison on the subject real property until she separated from him about October 1998. The couple were divorced on January 7, 2000, but Larry, who was then nineteen years old, continued to reside with Wilkison.

On July 19, 1999, a consent judgment was entered in favor of Tri-State against Wilkison. On September 18, 1999, Tri-State filed its complaint in this action, seeking to impress a lien on the subject real property and to foreclose its judgment lien, sell the property, and apply the proceeds to its judgment. In his answer, Wilkison admitted the judgment against him, but he contended that the real property upon which Tri-State sought to foreclose was his homestead.

At a hearing on its complaint, Tri-State argued that since Wilkison was neither married nor the head of family when he acquired the property, he could not acquire a homestead in the property by virtue of his marriage to Sarah. Tri-State argued further that even though Larry continued to reside on the property, Wilkison did not support him; therefore, Tri-State argued, Wilkison could not qualify as the head of a family merely because Larry continued to live with him.

Article 9, Section 3, of the Arkansas Constitution provides:

> The homestead of any resident of this State who is married or the head of a family shall not be subject to the lien of any judgment, or decree of any court, or to sale under execution or other process thereon, except such as may be rendered for the purchase money or for specific liens, laborers' or mechanics' liens for improving the same, or for taxes, or against executors, administrators, guardians, receivers, attorneys for moneys collected by them and other trustees of an express trust for moneys due from them in their fiduciary capacity.

Homestead laws are remedial and should be liberally construed to effectuate the beneficent purposes for which they were intended. *Triple D-R Dev. v. FJN Contractors*, 65 Ark. App. 192, 986 S.W.2d 429 (1999). It is generally accepted that the homestead exemption protects against all creditors except those mentioned in the constitution, and that the only way the exemption may be removed is by waiver or abandonment. *Id.* Once the property is occupied as a homestead, nothing more need be done to give the debtor the right to claim the personal privilege against a judgment creditor's sale. *Arkansas S & L v. Hayes*, 276 Ark. 582, 637 S.W.2d 592 (1982), (citing *Snider et al. v. Martin*, 55 Ark. 139, 17 S.W. 712 (1891)). The question of homestead and residence, being a question of intention, must be determined by the facts in each case, and the trial court's finding of fact will not be disturbed unless it appears to be against the preponderance of the evidence. *Smith v. Flash TV Sales & Serv., Inc.*, 17 Ark. App. 185, 706 S.W.2d 184 (1986), (quoting *City Nat'l Bank v. Johnson*, 192 Ark. at 945, 949, 96 S.W.2d at 482, 484 (1936)).

Following the hearing and the submission of briefs, the trial court agreed with Tri-State's argument that Wilkison did not continue to be the head of a family simply because Larry continued to live with him. However, the chancellor found that Wilkison had acquired the real property as his homestead previous to the entry of the consent judgment in favor of Tri-State, and that the property did not lose its status as Wilkison's homestead simply because he and Sarah had divorced. The court ruled that Arkansas law regarding a homestead exemption does not require that a landowner be married or head of household when he purchases the real estate. The trial court was correct.

Tri-State argues on appeal, as it did to the trial court, that no family relationship existed in this case because Wilkison was not married at the time he acquired the property; because at the time Sarah married him, her son was thirteen; and because any authority

and control Wilkison had over his stepson was broken with the divorce. Tri-State points out that in *Yadon v. Yadon*, 202 Ark. 634, 635, 151 S.W.2d 969, 970 (1941), the homestead exemption was upheld for a widow who "was the one in authority and control of the family" after her husband's death, and the "relationship [had] never been broken or disintegrated by the removal of all the children from the family circle." We do not view this summary of the factual situation in *Yadon* as standing for the proposition that a person who has acquired the homestead right cannot claim the homestead exemption if he does not occupy a position of familial "authority and control" when the marriage ends.

Tri-State additionally relies upon *Ross v. White*, 15 Ark. 98, 689 S.W.2d 588 (1985), for the proposition that a homestead exemption cannot be claimed for real estate acquired before marriage. The *Ross* court stated that divorce did not deprive a man of his right to claim the homestead exemption *where he had acquired and occupied the homestead while head of the family*, and where he continued to reside on it. (Emphasis Tri-State's.) Just as we find no requirement under *Yadon* that a divorcee claiming a homestead exemption must show continued "authority and control" in a familial relationship, we deduce no requirement from *Ross* that marriage must precede the acquisition of real estate under which a homestead is claimed.

As the supreme court explained in *Butt v. Walker*, 177 Ark. 371, 373, 6 S.W.2d 301, 301 (1928):

> No one can acquire a homestead unless he is at the time a married man or the head of a family. But if, while a married man or head of a family, he acquires a homestead, he does not lose his right to claim it as exempt because his wife dies or because he is divorced, even though he may have no family living with him.

In the recent case of *Middleton v. Lockhart*, 344 Ark. 572, 43 S.W.3d 113 (2001), the supreme court again stated that divorce does not terminate the homestead right in the household head who continues to occupy the homestead.

Here, Wilkison acquired a homestead in his previously purchased real estate when his new wife and her son moved into his home. Under the Arkansas Constitution and the cases discussed above, we find no merit to Tri-State's argument that Wilkison lost his right to claim the homestead exemption against judgment creditors because he and his wife later divorced.

Affirmed.

ROBBINS and VAUGHT, JJ., agree.

Phillip KELLEY *v.* STATE of Arkansas

CA CR 00-1281 55 S.W.3d 309

Court of Appeals of Arkansas
Division IV
Opinion delivered September 26, 2001

*Douglas Coppernoll*, for appellant.

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

OLLY NEAL, Judge. On August 17, 2000, a jury found appellant, Phillip Kelley, guilty of one count of obstructing governmental operations. He was sentenced to two days in the county jail and also received a fine in the amount of $100. It is from this conviction that the appellant brings this appeal.

On the evening of November 29, 1999, Officer Jared Pena of the Springdale Police Department observed an erratically driven van. The officer followed the van for several blocks. The vehicle stopped at a home on 705 Crutcher, Springdale, Arkansas. Officer Pena encountered Mr. Mendoza, the driver of the vehicle. Because he suspected that Mendoza was driving under the influence, Officer Pena began the routine field sobriety testing. Officer Chastain and Sergeant Lewis joined the officer at the scene. Their duties included securing the scene and providing back-up to the responding officer.

Appellant, Phillip Kelley, emerged from the home. Causing quite a disruption, appellant approached the driveway where the field sobriety tests were being administered. Sergeant Lewis detained appellant and requested his identification. Shortly after giving the officers his license, Kelley, shouting many profanities, demanded his license be returned at once.

Determining that appellant smelled of alcohol, Sergeant Lewis attempted to administer sobriety tests on him. Appellant refused to cooperate and attempted to flee inside of the home. He was subsequently arrested. On appeal, appellant argues that the trial court erred in denying his motion for directed verdict. We affirm.

Motions for directed verdict are treated as challenges to the sufficiency of the evidence. *Rutledge v. State*, 345 Ark. 243, 45 S.W.3d 825 (2001); *see also Branscum v. State*, 345 Ark. 21, 43 S.W.3d

148 (2001). When a defendant challenges the sufficiency of the evidence convicting him, the evidence is viewed in light most favorable to the State. *Id.* Evidence is sufficient to support a conviction if the trier of fact can reach a conclusion without having to resort to speculation or conjecture and is sufficient to compel a conclusion one way or the other. *Ethyl Corp. v. Johnson*, 345 Ark. 476, 49 S.W.3d 644 (2001). It is not the appellate court's place to try issues of fact; rather, the court simply reviews the record for substantial evidence to support the jury's verdict. *Ethyl Corp.*, *supra.* If there is substantial evidence supporting the conviction, it must be affirmed on appeal. *Ward v. State*, 64 Ark. App. 120, 981 S.W.2d 96 (1998).

Appellant was charged with obstruction of government operations. A person commits the offense of obstructing governmental operations when he "knowingly obstructs, impairs, or hinders the performance of any governmental function." Ark. Code Ann.§ 5-54-102(a)(1) (Repl. 1997). Arkansas Code Annotated section 5-2-202(2) (Repl. 1997) provides:

> A person acts knowingly with respect to his conduct or the attendant circumstances when he is aware that his conduct is of that nature or that such circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

Unless there is use of force or a threat to use force, obstructing governmental operations is a Class C misdemeanor. Ark. Code Ann. § 5-54-102(b) (Repl. 1997). A government function means any activity which a public servant is legally authorized to undertake on behalf of any governmental unit he serves. Ark. Code Ann. § 5-54-101(4) (Repl. 1997).

A criminal defendant's intent or state of mind is seldom capable of proof by direct evidence and must usually be inferred from the circumstances of the crime; therefore, circumstantial evidence of a culpable mental state may constitute substantial evidence to sustain a guilty verdict. *Stegall v. State*, 340 Ark. 184, 8 S.W.3d 538 (2000). Additionally, it is the responsibility of the trier of fact to determine the credibility of witnesses. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791(2001).

Appellant contends that the trial judge erred in denying his directed-verdict motion on the charge of obstructing governmental operations when the arresting officer testified he was on the scene

to provide backup, and dealing with appellant's conduct was the very thing that a backup officer is on the scene to provide. Officers Pena and Lewis both testified that the actions of the appellant hindered Pena's ability to administer field sobriety tests on Mr. Mendoza. Appellant's actions also interfered with Officer Lewis's ability to provide security for Officer Pena. Officer Lewis was on the job to provide backup for Officer Pena, and it was his job as an officer to ensure the protection of his fellow officer. It was established that once Kelley exited the house, Mendoza stopped cooperating with Officer Pena and began shouting profanities.

Based on the testimony at trial and the jury's assessment of the witnesses' credibility, there is sufficient evidence to support appellant Kelley's conviction for obstructing governmental operations. His actions obstructed, impaired, and hindered the officers' ability to perform their governmental functions as law enforcement officers during the investigation of a DWI traffic stop. We therefore affirm.

STROUD, C.J., and GRIFFEN, J., agree.

John GEER *v.* STATE of Arkansas

CA CR 01-004 55 S.W.3d 312

Court of Appeals of Arkansas
Division II
Opinion delivered September 26, 2001

*William R. Simpson, Jr.*, Public Defender, by: *Clint Miller*, Deputy Public Defender.

*Mark Pryor*, Att'y Gen., by: *Clayton K. Hodges*, Ass't Att'y Gen., for appellee.

KAREN R. BAKER, Judge. Appellant, John Geer, was convicted of the following in Pulaski County Circuit Court: 1) commercial burglary, a Class C felony, as defined in Ark. Code Ann. § 5-39-201(b)(1) (Repl. 1997); 2) breaking or entering, a Class D felony, as defined in Ark. Code Ann. § 5-39-202(a) (Repl. 1997); 3) theft of property with a value of $500 or less, a Class A misdemeanor, as defined in Ark. Code Ann. § 5-36-103(a)(1)(b)(4)(A) (Repl. 1997); and 4) possessing instruments of crime, Class A misdemeanor, as defined in Ark. Code Ann. § 5-73-102(a) (Repl. 1997). At the conclusion of a bench trial, appellant was sentenced to three years' imprisonment in the Arkansas Department of Correction for each of the two felony convictions.[1] The sentences were to run concurrently. Appellant argues on appeal that the circuit court erred in denying appellant's motion to dismiss the felony charges of commercial burglary and breaking or entering because the State failed to introduce substantial evidence of appellant's guilt as to these offenses. We affirm.

At trial, the State presented the testimony of Officer White and Officer Marsh showing that they were dispatched to a silent alarm activation at Chicot Elementary School. Both officers arrived at approximately the same time. Officer White testified that upon arrival, he checked the west side of the school grounds, and Officer Marsh checked the east side of the grounds. Officer White testified that almost immediately, he found appellant sitting on the ground in a shadowed area. As he approached appellant, he saw several objects, a coin box, a piece of metal, a pair of tin-snips, and a hacksaw blade, which was wrapped in a washcloth, on the ground beside appellant. Appellant was sitting Indian-style, and the coin

[1] Pursuant to Ark. Code Ann. § 5-4-403(c)(1) (Repl. 1997), the circuit court did not impose a sentence on the two misdemeanor convictions; any sentence imposed would be satisfied by his sentence of imprisonment for the two felonies.

box was between his legs. Officer White stated that appellant was apparently counting the change from the box.

Officer Marsh testified that before he went around to the east side of the building, he saw Officer White draw his weapon. He went over to assist Officer White. Following appellant's apprehension, he continued around to the south side of the building where he found a door propped open with a brick. According to both Officer Marsh and Officer White, there was a door near the teachers' lounge that had a hole drilled in it. Officer Marsh explained that a hole was driven through the window of the door so that something could be stuck through the hole and released. Officer White testified that a vending machine in the teachers' lounge had been tampered with. It appeared that the lock on the machine had been popped and the metal around the lock bent back. Appellant was the only person found on the school premises when police arrived.

Appellant testified that on August 5, 1999, his father had given him a ride to the local Shell Station to buy some cigarettes. Appellant bought liquor instead, and his father forced him to walk home. While on his way home, he observed three black men coming toward him. To avoid confrontation, he took a different route, which led him toward the back of the school. Appellant testified that while on his new route home, he discovered a pair of tin-snips and a box of coins. At roughly the same time, he saw a black male running from around the side of the school, and the police arrived.

At the conclusion of the State's case, defense counsel moved to dismiss the two felony charges of commercial burglary and breaking or entering. The motion was denied. After the defense presented its case-in-chief, defense counsel renewed the motion to dismiss the two felony charges. The court did not rule on the renewed motion to dismiss.[2]

A motion for a directed verdict is treated as a challenge to the sufficiency of the evidence. *Rose v. State*, 72 Ark. App. 175, 35 S.W.3d 365 (2000). This court affirms if there is substantial evidence to support the verdict, and in making this determination we review the evidence in the light most favorable to the appellee.

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[2] Arkansas Rule of Criminal Procedure 33.1(c) states that, "[i]f for any reason a motion or a renewed motion at the close of all the evidence for directed verdict or for dismissal is not ruled upon, it is deemed denied for purposes of obtaining appellate review on the question of the sufficiency of the evidence."

*Brown v. State*, 310 Ark. 427, 837 S.W.2d 457 (1992) (citing *Gardner v. State*, 296 Ark. 41, 754 S.W.2d 518 (1988)). Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Kennedy v. State*, 49 Ark. App. 20, 894 S.W.2d 952 (1995). The fact that evidence is circumstantial does not render it insubstantial. *Brown, supra*, (citing *Conley v. State*, 308 Ark. 70, 821 S.W.2d 783 (1992)). Where circumstantial evidence is relied upon, however, it must exclude every other reasonable hypothesis but the guilt of the accused. *Id.* The question of whether it does exclude other reasonable hypotheses is usually for the fact finder to determine. *Drew v. State*, 8 Ark. App. 120, 648 S.W.2d 836 (1983).

A person commits commercial burglary if he enters or remains unlawfully in a commercial occupiable structure of another with the purpose of committing therein any offense punishable by imprisonment. Ark. Code Ann. § 5-39-201(b)(1) (Repl. 1997). A place where people assemble for the purpose of education falls within the definition of a commercial building under the statute. Ark. Code Ann. § 5-39-101(2)(B) (Repl. 1997); *Oliver v. State*, 14 Ark. App. 240, 687 S.W.2d 850 (1985), *rev'd on other grounds*, 286 Ark. 198, 691 S.W.2d 842 (1985). A person commits the offense of breaking or entering if for the purpose of committing a theft or felony he enters or breaks into any . . . coin-operated . . . vending machine. Ark. Code Ann. § 5-39-202(a) (Repl. 1997).

Minutes after the silent alarm was activated at the school, Officers White and Marsh found appellant sitting in a shadowed area just outside the school building. Between appellant's legs was a vending machine coin box, and he appeared to be counting the change from the box. Next to appellant, was a small hacksaw blade, which appellant's father testified belonged to appellant, and a pair of tin-snips. Clearly, the trial court could infer that these items could have been used to gain entry to the school. *See, e.g., Alexander v. State*, 55 Ark. App. 148, 934 S.W.2d 927 (1996) (finding substantial evidence of guilt where the defendant was found outside a just-burglarized business, and in possession of a cash box and tools used to gain entry). The officers then discovered an exterior door apparently forced open and another door near the teachers' lounge with a hole drilled through the glass, along with a vending machine inside the lounge which had been tampered with. No one else was found on the premises. Any reasonable inference may be drawn from circumstantial evidence to the same extent as from direct evidence. *Payne v. State*, 21 Ark. App. 243, 731 S.W.2d 235 (1987).

Here, the fact finder could easily infer that appellant committed both commercial burglary and breaking or entering.

Although appellant offered his own explanation as to how he came to be in possession of the coin box and other items, the trial court, as the finder of fact, was not obligated to believe him, as he was the person most interested in the outcome of the case. *Rankin v. State*, 338 Ark. 723, 1 S.W.3d 14 (1999).

We hold that substantial evidence supports appellant's convictions.

Affirmed.

JENNINGS, J., and HAYS, S.J., agree.

Vurda JONES, *et al. v.*
BETHLEHEM BAPTIST CHURCH

CA 00-1482 57 S.W.3d 217

Court of Appeals of Arkansas
Division II
Opinion delivered September 26, 2001

*Mickey Buchanan*, for appellants.

One brief only.

KAREN R. BAKER, Judge. Appellants bring this appeal challenging a decision by the Little River Chancery Court. The chancellor refused to set aside the decision of the appellee, the Bethlehem Baptist Church, which led to the expulsion of appellants from appellee's religious organization. Appellants argue that the trial court erred in finding that "notice" had been properly given to

appellants that they were to be removed as church officers and expelled as members of the church. We affirm.

In January 1996, H.L. Walter was called to fill a vacancy in the pulpit of the Bethlehem Baptist Church. While Pastor Walter was at the Bethlehem Baptist Church, the church began having problems with some members who were serving as deacons and trustees. The deacons and trustees removed Pastor Walter from the pulpit without a vote of the church membership. As a result of their actions, the deacons and trustees were removed from their positions and expelled from the church's membership. Throughout the disciplinary process, there were two church-wide meetings. The first meeting was held on February 6, 2000, where appellants were removed from their positions. A second meeting was held on February 20, 2000, where appellants were dismissed as members of the church.

At trial, Pastor Walter testified that the church used the "Busy Pastor's Guide," published by the National Baptist Convention, as a standard guide for church procedure. Specifically, Pastor Walter testified that the guide "had certain do's and don'ts and helpful hints about how to run the church." Any final decisions regarding church business were to be brought before the church body as a whole for a vote. Pastor Walter testified that the rules require that members proposed for expulsion are advised in writing of the charges against them; however, there is conflicting evidence that a writing is actually required, and the "Busy Pastor's Guide" was never made a part of the record.

Janice Dancer, the church secretary, testified specifically that she did not notify appellants or any other church member by letter regarding the February 6 meeting. Instead, the appellants and the church members were informed of the meeting by a phone call or a personal visit. Appellants were absent from the February 6 meeting; however, following the meeting, a letter was sent to appellants informing them of their removal from church office. Mrs. Dancer's testimony was internally inconsistent concerning when and how she gave notice of the February 6 meeting. However, she consistently testified that approximately one week before the February 20 meeting, she called the church members, including appellants, to inform them that a meeting was scheduled.

At the February 20 meeting, regarding appellants' membership in the church, all appellants were present. Pastor Walter testified that appellants were not only present, but were allowed the opportunity to speak on their own behalf in accordance with the rules set out in

the "Busy Pastor's Guide." In contrast, most of the appellants testified that they were not given an opportunity to speak; however, appellant Earline Cannon testified that she was given a chance to speak prior to the vote of the membership.

Chancery cases are reviewed *de novo*, and the chancellor's findings will not be disturbed unless they are clearly erroneous or clearly against the preponderance of the evidence. *Crismon v. Crismon*, 72 Ark. App. 116, 34 S.W.3d 763 (2000) (citing *O'Neal v. O'Neal*, 55 Ark. App. 57, 929 S.W.2d 725 (1996)). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Stewart v. Stewart*, 72 Ark. App. 405, 37 S.W.3d 667 (2001). Due deference is given to the superior position of the chancellor to judge the credibility of the witnesses. *Holmesley v. Walk*, 72 Ark. App. 433, 39 S.W.3d 463 (2001).

Courts of equity, being without ecclesiastical jurisdiction, will neither revise nor question the ordinary acts of church discipline or the administration of church government. *Ables v. Garner*, 220 Ark. 211, 246 S.W.2d 732 (1952). However, the courts may properly assume jurisdiction of a dispute between factions of a church organization where property rights are involved. *Id.* at 214, S.W.2d at 734 (citing *Monk v. Little*, 122 Ark. 7, 182 S.W. 511 (1916)).

Appellants contend that the trial court erred in finding that "notice" had been properly given to appellants that they were to be removed as church officers and expelled as church members. Appellants specifically argue that appellee failed to provide them with written notice in accordance with church procedure and that they were provided no opportunity to defend themselves regarding the charges against them. The chancellor found that appellants were dismissed as officers and members of the church by a vote from the majority of members present at the two meetings. The chancellor stated that the majority of the congregation is entitled to the management and control of the church's affairs. The chancellor did not find that the church had any formal set of rules or regulations in place concerning matters of governance.

Arkansas case law reflects that the rights of different factions forming a religious body under the congregational form of church government are to be determined by the membership where a majority controls. *Ables, supra.* This statement, of course, assumes that the vote has been cast according to established rules.

*Id.* It also presupposes that from a doctrinal standpoint there has not been such an abrupt departure from congregational principles as to discredit the prevailing group as a matter of law. *Id.* The Georgia Supreme Court has held that, at a minimum, before a member can be expelled from a religious society, notice must be given him to answer the charge made against him and an opportunity offered to make his defense. *Bagley v. Carter*, 285 Ga. 624, 220 S.E.2d 919 (1975). Without such notice and an opportunity to be heard, the order of expulsion is void. *Id.*

Pastor Walter and Erline Cannon testified that the appellants were given an opportunity to speak at the February 20 meeting. In addition, Janice Dancer testified that the appellants were given notice of both the February 6 and the February 20 meeting. Moreover, all of the appellants were present at the February 20 meeting. The testimony of the witnesses in this case was frequently internally inconsistent, and also conflicted with the testimony of other witnesses. When evidence is contradictory, we give due deference to the superior position of the chancellor to judge the credibility of the witnesses. *Holmesley*, *supra*. We cannot say that the chancellor's findings in this case were clearly erroneous; thus, we affirm.

JENNINGS and CRABTREE, JJ., agree.

Beverly CLARDY *v.* MEDI-HOMES LTC SERVICES, LLC,
and
Union Pacific Insurance Company

CA 01-200 55 S.W.3d 791

Court of Appeals of Arkansas
Division I
Opinion delivered September 26, 2001

*Dean A. Garrett*, for appellant.

*Ledbetter, Cogbill, Arnold & Harrison, LLP*, by: *E. Diane Graham* and *Rebecca D. Hattabaugh*, for appellees.

ANDREE LAYTON ROAF, Judge. Beverly Clardy appeals from a Workers' Compensation Commission ruling that injuries she sustained in a fall at work did not occur at a time when employment services were being performed because she had briefly walked across a driveway to speak to a co-worker while she was engaged in taking waste material to an outside storage area. The Commission consequently reversed the Administrative Law Judge's determination that Clardy had established that she sustained a compensable injury and denied benefits. The substantial-evidence standard of review requires that we affirm this case.

On July 28, 1998, Beverly Clardy, twenty-four years old and pregnant, was employed in the dietary area of Medi-Home Nursing Home. Her duties on that date included emptying waste from dirty dishes into "slop buckets" and taking the buckets to a rear outside storage area. As Clardy was returning from the storage area to retrieve a second bucket, she deviated approximately ten feet across a paved driveway adjoining a sidewalk to speak to an off-duty co-worker whose car was parked in the drive. Clardy testified that the area was slippery because mop water was routinely dumped there by employees, and that she slipped and fell down a grassy hill adjoining the driveway, fracturing her ankle. The co-worker, Jeremy Cox, testified that he was preparing to fish at a pond located behind the nursing home when he saw Clardy at the back door pushing a slop bucket, that they exchanged "hellos," and that when he looked up again Clardy had fallen.

The ALJ found that Clardy and Cox presented credible testimony and that Clardy's fall and resulting injuries occurred on the employer's premises, during her regular working hours, at a time when she was on duty and being paid, and while she was carrying out an assigned duty of transporting garbage and trash to a designated storage area. The ALJ further found that the digression of ten to twelve feet from the most direct route back to the kitchen to

speak to a co-worker was only a "*de minimus* deviation" and was not sufficient to take her outside the course and scope of her employment. The Commission reversed the ALJ, issuing majority, concurring, and dissenting opinions. The majority opinion found that Clardy had to get off the sidewalk and cross the pavement to get to the place she fell, characterizing this deviation as an "unscheduled and unauthorized break," and further stated that Clardy had "diverted from her job duties" in "social activities for [her] personal pleasure" that did not further the interests of her employer when she sustained injuries. In its opinion, the Commission allowed that "if [Clardy] had merely said, 'hello' on the way back inside," and "had not gone over to the car to chat," her fall would have been compensable. Clardy appeals from the finding that she was not performing employment services at the time of her injury and from the denial of benefits.

On review, this court will affirm if the Commission's decision is supported by substantial evidence. *Spencer v. Stone Container Corp.*, 72 Ark. App. 450, 38 S.W.3d 909 (2001). To determine if the decision is supported by substantial evidence, this Court views the evidence in the light most favorable to the Commission's findings and affirms if reasonable minds could have reached the same conclusion. *Id.* Where a claim is denied because the claimant has failed to show an entitlement to compensation by a preponderance of the evidence, the substantial-evidence standard of review requires the reviewing court to affirm the Commission if its opinion displays a substantial basis for the denial of relief. *Hislip v. Helena/West Helena Sch.*, 74 Ark. App. 395, 48 S.W.3d 566 (2001); *see also, Williams v. Arkansas Oak Flooring Co.*, 267 Ark. 810, 590 S.W.2d 328 (Ark. App. 1979). The injured party bears the burden of proof in establishing entitlement to benefits under the Workers' Compensation Act and must sustain that burden by a preponderance of the evidence. *Dalton v. Allen Eng'g Co.*, 66 Ark. App. 201, 989 S.W.2d 543 (1999). The provisions of the Workers' Compensation Act were formerly construed liberally. However, Act 796 changed the former practice and mandated that the Commission and the courts construe the provisions strictly. *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 42 S.W.3d 822 (2001). *See* Ark.Code Ann. § 11-9-704 (c)(3) (Repl. 1996).

In this case, the Commission considered the evidence presented in light of Arkansas Code Annotated § 11-9-102(4)(B)(iii) (Supp. 1999), which states that "compensable injury" does not include "[i]njury which was inflicted at a time when employment services were not being performed. . . ." Arkansas

Code Annotated § 11-9-102(4)(A)(I) (Supp. 1999), 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" if it is caused by a specific incident and is identifiable by time and place of occurrence. . . .

Although distinguishable from the case at bar, Arkansas case law has addressed situations where both employment services and personal services were being performed concurrently, and the activity thus served a dual purpose. This Court stated that the test for determining whether an employee is acting within the course of employment as required for a compensable injury is whether the injury occurred "within time and space boundaries of employment, when the employee is carrying out the employer's purpose or advancing employer's interests directly or indirectly." *Ray v. University of Arkansas*, 66 Ark. App. 177, 179, 990 S.W.3d 558 (1999) (finding that appellant performed employment services when her employer received a benefit from the appellant's presence during her break by the requirement that she leave her break if a student needed her assistance, and she was injured when she slipped on salad dressing while reaching for a snack from the cafeteria for her own consumption) (citing *Olsten Kimberly Quality Care v. Pettey*, 55 Ark. App. 343, 934 S.W. 2d 956 (1997)). *See White v. Georgia Pacific Corp.*, 339 Ark. 474, 6 S.W.3d 98 (1999) (holding that the employer gleaned a benefit from the appellant remaining near his work station to monitor machines, which was a requirement of his job duties, and therefore, the appellant was performing employment services).

This court also has recently addressed the meaning of performing "employment services" where the employee's personal comfort was at issue. *See Matlock v. Arkansas Blue Cross Blue Shield*, 74 Ark. App. 332, 49 S.W.3d 126 (2001); *Collins v. Excel Specialty Prod.*, 74 Ark. App. 400, 49 S.W.3d 161 (2001). *See also Olsten Kimberly Quality Care v. Pettey*, 55 Ark. App. 343, 934 S.W.2d 956 (1997). In *Matlock, supra*, the appellant appealed the decision of the Commission that denied benefits for injuries suffered when she fell while returning to her work station after a trip to the restroom. The Commission held that the appellant was not performing employment services when she was injured, and thus, her injury was not compensable. This court reversed and held that the Commission's finding that the appellant was not performing employment services was not supported by substantial evidence. The court stated that the

"employment services" requirement precluding worker's compensation benefits for acts performed by employees solely for their own benefit did not apply to acts of personal convenience or comfort. In explaining the personal-comfort doctrine, the court stated, "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 . . . and on the theory that such a minor deviation does not take the employee out of the employment." *Matlock, supra.*

Whether a worker is performing employment services depends on the particular facts and circumstances of each case. In *Matlock*, this court outlined several factors to be considered in determining whether conduct falls within the meaning of "employment services." These factors include: 1) whether the accident occurs at a time, place, or under circumstances that facilitate or advance the employer's interests; 2) whether the accident occurs when the employee is engaged in activity necessarily required in order to perform work; 3) whether the activity engaged in when the accident occurs is an unexpected part of the employment; 4) whether the activity constitutes an interruption or departure, known by or permitted by the employer, either temporally or spatially from work activities; 5) whether the employee is compensated during the time that the activity occurs; and 6) whether the employer expects the worker to stop or return from permitted non-work activity in order to advance some employment objective.

We are not unmindful of the fact that this court, in dicta, has stated that the "personal comfort" doctrine has been abrogated by the passage of Act 796 of 1993 and the drastic changes to our workers' compensation law wrought by this legislation. *See Beaver v. Benton County*, 66 Ark. App. 153, 991 S.W.2d 618 (1999). However, in *Matlock, supra*, the court pointed this out and stated, "We serve notice that our statement in *Beaver v. Benton County*, 66 Ark. App. 153, 991 S.W.2d 618 (1999), that 'the personal-comfort doctrine is no longer the law,' was *orbiter dictum.*" In any event, according to *Larson's*, the "personal comfort" doctrine extends to various life necessities such as satisfying thirst, eating, discharging bodily wastes, protecting oneself from excessive heat or cold, or cleansing oneself. 2 Arthur Larson, *Larson's Workers' Compensation Law*, § 21.10 (2000); *see also Matlock v. Arkansas Blue Cross Blue Shield*, 74 Ark. App. 322, 329, 49 S.W.3d. 126 (2001). Clearly, Clardy's diversion to speak to a co-worker would fail to come within this doctrine. Moreover, even if we were to apply the *Matlock* factors to the

facts in this case, the Commission's decision must still be affirmed. The activity at issue is not the transport of waste buckets, but Clardy's diversion to talk to a co-worker. Although we may not agree with the Commission's characterization of the activity as an "unscheduled and unauthorized break," Clardy testified that she was not on a scheduled break and had used all of her allotted breaks for the day. Even so, unless her employer was a "Simon Legree,"[1] there is no reason for the Commission to speculate that such a minor diversion would have been forbidden to the nursing home's employees. However, there was no further evidence presented by Clardy concerning the nature of her intended conversation with Cox, how this activity might have in any respect served the employer's interests, or was necessary to the performance of any of Clardy's duties, and the burden of proving entitlement to benefits ultimately rested upon her shoulders.

In sum, we cannot say that Clardy's activity at the time of her fall comes within either the "personal comfort" or "dual purpose" doctrine, and we can find no authority under our post-1993 workers' compensation law for carving out a "*de minimus*" exception to the requirement that the employee be engaged in the performance of employment services at the time an injury occurs.[2] Given the evidence in this case, we cannot say the Commission's finding that Clardy's digression across the driveway was purely personal in nature, or its ruling that Clardy was not performing employment services at the precise time she fell are not supported by substantial evidence.

Affirmed.

HART, J., agrees.

PITTMAN, J., concurs in the result.

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[1] Harriet Beecher Stowe, *Uncle Tom's Cabin or Life Among the Lowly* (1852).

[2] *But see* 1 Arthur Larson, *Larson's Workers' Compensation Law* § 17.04 (discussing triangular deviation); 1 Arthur Larson, *Larson's Workers' Compensation Law* § 17.06[3] (discussing size of deviation).

Harry A. WEYMOUTH *v.* Johnny Lee CHISM

CA 01-94 55 S.W.3d 307

Court of Appeals of Arkansas
Division I
Opinion delivered September 26, 2001

*Brian K. Mueller*, for appellant.

*Gardner & Hardin, P.A.*, by: *Stephen C. Gardner*, for appellee.

ANDREE LAYTON ROAF, Judge. Harry A. Weymouth appeals from a summary judgment granted to appellee Johnny Lee Chism, dismissing Weymouth's negligence complaint against Chism based on the running of the three-year statute of

limitations. Weymouth had nonsuited a previous action filed against Chism in 1998, almost three years to the day after a 1995 vehicular accident. However, Weymouth had failed to serve this complaint upon Chism within the requisite 120 days. Weymouth refiled and timely served the complaint in 2000; Chism raised the statute-of-limitations defense in a motion for summary judgment. On appeal, Weymouth contends that the trial court erred in granting the motion because the sheriff who attempted service of the first complaint was deceived into believing that Chism had moved to another state. We affirm.

Weymouth and Chism were involved in an automobile accident on May 2, 1995. Weymouth filed a negligence action against Chism on May 1, 1998. Despite several attempts to serve Chism by certified mail and through the Pope County Sheriff's Office, Weymouth was unsuccessful in obtaining service on Chism within the 120 days required by Ark. R. Civ. P. 4(i), and did not seek an extension of time to do so. On October 9, 1998, after the 120 days had lapsed, Weymouth filed a motion for non-suit; the motion was granted by order dismissing the case without prejudice on July 1, 1999. Weymouth refiled the action on October 7, 1999, and timely served Chism on January 24, 2000. Chism moved for summary judgment, raising as an affirmative defense the statute of limitations. In his response, Weymouth denied that Chism was entitled to summary judgment and attached proof of his attempts to serve Chism the first complaint in 1998, including a warrant-service report from the Pope County Sheriff's Office stating "[m]oved new address is to Oklahoma (unknown where). Comes to Arkansas to visit in area every once in a while." The trial court granted the summary judgment, and Weymouth appealed.

On appeal, Weymouth argues that the trial court erred in granting the motion for summary judgment. Weymouth asserts that he should not be penalized for failing to file a motion for extension of time to have the summons served because he was deceived into thinking Chism had left the state. Weymouth analogizes this case to *Eddinger v. Wright*, 904 F. Supp. 932 (E.D. Ark. 1995), wherein the federal district court ruled that the statute of limitations had been tolled by the actions of the defendant's father, who had been mistakenly served with the complaint, in misleading the plaintiff into believing that she had served the proper defendant.[1]

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[1] *See also Wright v. Eddinger*, 320 Ark. 151, 894 S.W.2d 937 (1995).

The resolution of this case involves the interpretation of both Ark. R. Civ. P. 3 and 4(i). Rule 3 provides in pertinent part that "[a] civil action is commenced by filing a complaint with the clerk of the proper court. . . ." In *Sublett v. Hipps*, 330 Ark. 58, 952 S.W.2d 140 (1997), the supreme court held that the effectiveness of the commencement date pursuant to Rule 3 is dependent upon meeting the service requirement of Rule 4(i). Rule 4(i) provides in pertinent part:

> *Time Limit for Service.* If service of the summons is not made upon a defendant within 120 days after the filing of the complaint, the action shall be dismissed as to that defendant without prejudice upon motion or upon the court's initiative. If a motion to extend is made within 120 days of the filing of the suit, the time for service may be extended by the court upon a showing of good cause.

We do not agree that *Eddinger* is analogous to this case, even assuming that Weymouth is correct in his assertion that the sheriff's office was somehow deceived into thinking that Chism had left the state, a fact not in evidence in the record before us. In *Eddinger*, the complaint was timely served upon the defendant's father, who had the same first and last names and resided at the same address as the defendant. The father first filed an answer, then later moved for summary judgment based on a lack of service after the expiration of the time in which the plaintiff had to obtain proper service under Rule 4(i). Here there was no service upon Chism whatsoever, and no attempt by Weymouth to obtain an extension of time to do so as provided by Rule 4(i).

Moreover, in *Green v. Wiggins*, 304 Ark. 484, 803 S.W.2d 536 (1991), a case with very similar facts, the supreme court held that where service of summons is not made on a defendant within 120 days after the filing of the complaint as required by Rule 4(i), the action is not commenced within the meaning of Rule 3, and the dismissal-without-prejudice language contained in Rule 4(i) does not apply if the action is otherwise barred by the running of the statute of limitations. Like Weymouth, the plaintiff in *Green* had refiled an action after dismissing his first complaint without making service within 120 days, and after the statute of limitations had run. Although the appellant in *Green* made no attempt to serve the initial complaint upon the appellees, and did not allege any deception on the part of the defendant in avoiding service, we conclude that the decision is nonetheless dispositive of the case

before us. Weymouth knew full well that service of his first complaint had not been accomplished, and consequently, was not deceived into failing to comply with Rule 4(i).

Affirmed.

PITTMAN and HART, JJ., agree.

Paul TOWERY *v.* HI-SPEED ELECTRICAL COMPANY

CA 01-195 56 S.W.3d 391

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

*Dagett, Donovan, Perry & Flowers, PLLC*, by: *Joe R. Perry*, for appellant.

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

JOHN B. ROBBINS, Judge. Appellant Paul Towery brought a workers' compensation claim against appellee Hi-Speed Electrical Company, alleging that he sustained a compensable injury on November 7, 1997, which ultimately resulted in surgery to repair a herniated disc at C6-7 on June 10, 1999. Mr. Towery sought medical expenses, temporary total disability benefits from May 24, 1999, through October 25, 1999, and benefits for a seven-percent permanent partial impairment. After a hearing, the Workers' Compensation Commission found that Mr. Towery failed to prove that his neck problems were causally related to his work, and denied his claim.

Mr. Towery appeals from the decision of the Commission, arguing that it is not supported by substantial evidence. On cross-

appeal, Hi-Speed Electrical argues that the Commission lacked jurisdiction[1] because Mr. Towery elected a remedy by filing his workers' compensation claim in Tennessee. We affirm on direct appeal and on cross-appeal.

We first address the appellee's cross-appeal challenging the propriety of the Commission's exercise of jurisdiction over Mr. Towery's claim. The record shows that appellee is a Tennessee corporation, but Mr. Towery's residence and the site of the alleged compensable injury are in Arkansas. In a correspondence dated November 18, 1999, the Tennessee Department of Labor acknowledged receipt of a "First Report of Injury" form. However, this form is not in the record and testimony showed that it was apparently filed by Hi-Speed Electrical on June 24, 1999. The only other document in the Tennessee file is a notice indicating that the appellee was denying the compensation claim as of June 29, 1999. Nothing in the Tennessee file bore Mr. Towery's signature. Mr. Towery filed his claim with the Arkansas Workers' Compensation Commission on August 18, 1999.

Len Atkins, an employee of appellee's insurance carrier, testified that he had a telephone conversation with Mr. Towery on June 29, 1999, and that he explained to Mr. Towery that he could elect to bring a workers' compensation claim in either Arkansas or Tennessee. According to Mr. Atkins, Mr. Towery inquired about the difference in potential benefits, and Mr. Atkins told him that he could recover a higher amount if he filed in Tennessee. Mr. Atkins testified that he informed Mr. Towery that the limitations periods differed in that his claim was barred one year after the date of injury in Tennessee, as opposed to two years in Arkansas.[2] Mr. Atkins testified that Mr. Towery told him that he preferred to file his claim in Tennessee, and stated that "I could only assume he was under the assumption that we were going to deny his claim" because the statute of limitations had already expired in that State.

For its argument that Mr. Towery's claim in Arkansas was barred because he elected a remedy in Tennessee, appellee cites *Biddle v. Smith & Campbell, Inc.*, 28 Ark. App. 46, 773 S.W.2d 840

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[1] Although appellee sometimes refers to a lack of jurisdiction of the Arkansas Workers' Compensation Commission to entertain Mr. Towery's claim, appellee does not actually argue that the presumption of jurisdiction created in Ark. Code Ann. § 11-9-707(1) was rebutted. Appellee's argument is based upon the election of forum or remedies doctrine.

[2] In his testimony, Mr. Towery denied that the statutes of limitations were discussed in their conversation.

(1989), where we held that the determination as to whether an election of remedies was made depends on whether the claimant actively initiated proceedings or knowingly received benefits pursuant to the laws of another state. We disagree with appellee and hold that the Commission correctly ruled that Mr. Towery's claim was not barred by the election-of-remedies doctrine.

It is undisputed that, unlike the situation in *Biddle, supra,* the appellant in the instant case received no benefits from another state. Nor are we persuaded that Mr. Towery "actively initiated" the Tennessee proceedings. After Mr. Towery informed the appellee that he was bringing a workers' compensation claim, the appellee elected to file a "First Report of Injury" in Tennessee. Shortly thereafter, a representative of appellee's insurer advised Mr. Towery that benefits might be slightly higher if he filed his claim in Tennessee, knowing full well that any action in that state was completely barred by the applicable statute of limitations. Although the insurer's agent testified that he explained the statute of limitations provisions to Mr. Towery, Mr. Towery denied this and it is evident that he did not understand them or he would not have agreed to file the claim in Tennessee. At any rate, the only document filed in response to Mr. Towery's verbal representation that he preferred to proceed in Tennessee was the appellee's notice that it was denying the claim. Mr. Towery filed nothing in Tennessee, and his verbal preference made in response to the advice of the insurance representative falls well short of actively initiating Tennessee proceedings and electing a remedy in that state, and for these reasons the Commission committed no error in ruling that his claim in Arkansas was not barred by the election-of-remedies doctrine.

We now turn to the merits of Mr. Towery's point on direct appeal that the Commission's decision denying compensability was not supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *American Greetings Corp. v. Garey*, 61 Ark. App. 18, 963 S.W.2d 613 (1998). The Commission's decision will be affirmed unless fair-minded persons with the same facts before them could not have arrived at the same conclusion. *Gansky v. Hi-Tech Eng'g*, 325 Ark. 163, 924 S.W.2d 790 (1996). In cases where a claim is denied because a claimant failed to show entitlement to compensation by a preponderance of the evidence, the substantial-evidence standard of review requires that we affirm if a substantial basis for the denial of relief is displayed by the Commission's opinion. *Hooks v. Gaylord Container Corp.*, 67 Ark. App. 159, 992 S.W.2d 844 (1999).

At the hearing, Mr. Towery testified that he has worked for the appellee from August 1997 through the present. He was attempting to load a 500 or 600-pound "jenny lift" onto a truck when it flipped. At that time, a pull bar at the bottom of the heavy equipment struck him in the chin, busted his lip, and almost knocked him out. Mr. Towery continued to work that day, but he reported the accident to his supervisor and an investigative report was filed.

Mr. Towery testified that, two or three days after the accident, he had a swollen and irritated place on the back of his neck, although "it didn't really hurt that bad at the time." He stated that four or five months later he began experiencing numbness in his left shoulder. He first sought medical treatment when he visited Dr. Grady Collum in September 1998, about ten months after the accident.

When he visited Dr. Collum, Mr. Towery did not know what was causing his problems, and he was diagnosed with bursitis. He was eventually referred to Dr. Guy L'Heureux, who continued conservative treatment without success. An MRI was conducted on May 28, 1999, which revealed a disc herniation at C6-7. Drs. John Lindermuth and Rommel Childress performed fusion surgery to repair the herniation on June 10, 1999, and Dr. Lindermuth subsequently assigned a seven-percent permanent impairment rating.

On direct examination, Mr. Towery testified that he suffered no other accidents that could have caused his neck injury, and he also asserted that he had no medical or physical problems when he began working for the appellee. However, on cross examination Mr. Towery acknowledged that he experienced back pain while working for a former employer and also experienced neck pain. He also acknowledged that he had been seeking treatment for back pain and pain in his right shoulder since as early as July 1996.

The medical evidence in this case documents a history of back and neck problems that predates the November 7, 1997, accident. A July 11, 1996, medical report by Dr. James Merritt references radiating shoulder pain and back and neck discomfort. A medical report from Dr. Shakeb Hashni, dated March 17, 1997, indicates that Mr. Towery was complaining of lower and upper back pain. Dr. Thrash, a chiropractor, reported on March 31, 1997, that Mr. Towery was complaining of back and neck pain. As a result of his diagnosis on that day, Dr. Thrash took Mr. Towery off of work from that date through May 1, 1997.

The only medical report directly addressing the compensability of Mr. Towery's injury was filed by Dr. Childress on June 18, 1999. In that report, Dr. Childress stated, "I have advised him that with the history that he has given, that [the accident] is the likely source of the disc rupture[.]"

For reversal of the Commission's decision, Mr. Towery argues that the Commission erred in failing to credit the opinion of Dr. Childress and that there was no medical evidence or testimony suggesting any cause for the herniation other than the work-related accident. While acknowledging that he had some medical problems that pre-existed the accident, Mr. Towery submits that these problems were different than his subsequent problems in that they generally affected his back and not his neck. Mr. Towery notes that he passed a pre-employment physical examination, and asserts, "There is simply no evidence that the disc herniation was caused in any manner other than the November 7, 1997, blow to the face."

We hold that the Commission's opinion displays a substantial basis for its finding that Mr. Towery failed to prove a causal connection between his disc herniation and the November 7, 1997, accident. Contrary to Mr. Towery's argument, the medical evidence showed that he was suffering from both back and neck problems prior to the accident. Indeed, when Dr. Thrash took Towery off work for the month of April 1997, his report indicated both back and neck complaints, and his primary diagnosis on a disability claim form was cervicalgia. The Commission gave little weight to Dr. Childress's opinion that the neck condition was likely compensable, noting that his opinion was in part based on an inaccurate history given by Mr. Towery, who told Dr. Childress that he experienced no pain or difficulty prior to the incident at work. It is well settled that the weight to be given medical testimony is for the Commission to determine. *See Wal-Mart Stores, Inc. v. VanWagner*, 63 Ark. App. 235, 977 S.W.2d 487 (1998). Moreover, the evidence showed that Mr. Towery continued to work after the accident and experienced no symptoms of numbness for four or five months, and that he failed to seek medical treatment until more than ten months later. Under these facts, fair-minded persons could have come to the Commission's conclusion that Mr. Towery failed to establish a compensable injury.

Affirmed on direct appeal and on cross-appeal.

BAKER and ROAF, JJ., agree.

Randy ELLIS *v.* Linda Lee ELLIS

CA 01-284 57 S.W.3d 220

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

*Carroll Law Firm*, by: *Robin J. Carroll*, for appellant.

*Shackleford, Phillips, Wineland & Ratcliff, P.A.*, by: *Teresa Wineland*, for appellee.

SAM BIRD, Judge. Randy and Linda Ellis separated after twenty-eight years of marriage. Randy Ellis worked for Great Lakes Chemical Company and Linda Ellis, at the time of divorce, was working for a flower shop, sitting with an elderly lady, and operating her own florist business. At the time of divorce, Linda Ellis was earning less money than her husband, though there had been times in the past when she had earned as much as he did. Marital debts totaled $75,000, which included the marital home mortgage. In the August 20, 2000, divorce decree, ordered that Randy Ellis was to pay seventy percent and Linda Ellis was to pay thirty percent of the marital debts acquired between the date of marriage, April 27, 1973, and the date of separation, September 1, 1999. The decree awarded $100 per week permanent alimony to Linda Ellis, as well as attorney's fees and costs. The chancellor stated that the reason for the unequal allocation of debt and the grant of alimony was the disparity in the parties' income. The chancellor ordered the parties to divide the marital assets equally in kind and that, if they were unable to do so, that the assets were to be sold and the proceeds divided equally. Randy Ellis now appeals the chancellor's grant of alimony and the division of the debts.

*Alimony*

The decision whether to award alimony is a matter that lies within the chancellor's sound discretion, and on appeal we will not reverse a chancellor's decision to award alimony absent an abuse of that discretion. *Anderson v. Anderson*, 60 Ark. App. 221, 963 S.W.2d 604 (1998). A chancery court has authority to consider the allocation of debt in a divorce case. A chancery court's decision to allocate debt to a particular party in a divorce case is a question of fact and will not be reversed on appeal unless clearly erroneous. *Id.*

The purpose of alimony is to rectify economic imbalance in the earning power and the standard of living of the parties to a divorce in light of the particular facts of each case; the primary factors that a chancery court should consider in determining whether to award alimony are the financial need of one spouse and the other spouse's ability to pay. *Id.* A chancery court may also consider other factors including, among other things: (1) the parties' financial circumstances; (2) the amount and nature of the parties' income, both current and anticipated; (3) the extent and nature of the parties' resources and assets; (4) the parties' earning ability and capacity. *Mearns v. Mearns*, 58 Ark. App. 42, 946 S.W.2d 188 (1997).

Randy Ellis argues that the trial judge abused his discretion by awarding Linda Ellis permanent alimony because Linda had the ability to earn as much money as Randy, and she had done so in the past. Randy Ellis argues that Linda Ellis has the ability to earn as much money as he does because she has completed a two-semester course in dietary management. He further argues that the record is void of any proof of her financial need and that financial need is the main consideration in determining alimony.

Linda Ellis, on the date of her Affidavit of Financial Means, was earning a net income of $378.60 per week. Randy Ellis was earning a net income of $764.74 per week. Linda Ellis had completed the course in dietary management but failed the certification test. She testified that she had been in a car wreck and out of work for a year and that Randy Ellis did not help her pay her medical bills. She admitted that her income had not always been lower than his, and stated that it was higher than his when she was working for one particular elderly patient twenty hours a day. However, she also testified that her florist business has never made a profit. She also alleged in her testimony that it was her husband who blew up her mobile home and that its contents were worth only $250.

This evidence is sufficient to show Linda Ellis's financial need and Randy Ellis's ability to pay; thus, the awarding of alimony to Ms. Ellis was not an abuse of the chancellor's discretion.

*Division of Marital Debt*

Randy Ellis argues that the chancellor erred by dividing the marital debt unequally for three reasons: (1) the chancellor stated the division was due to the disparity in income between the parties, thus Randy Ellis contends that the chancellor did not consider the earning power of both parties and that this was error; (2) not specifying whether Randy Ellis was responsible for seventy percent of the debt before or after the sale of the assets should such sale occur; (3) by not considering that $20,450 of the marital debt was in Linda Ellis's name only.

Randy Ellis contends that Ark. Code Ann. § 9-12-315 (Repl. 1998), which mandates that marital property be divided equally unless the court finds that such a division is inequitable, applies to the division of debts. Linda Ellis, on the other hand, contends that by its own words, section 9-12-315 cannot apply to the division of debts, thus there is no presumption of an equal

division. In *Warren v. Warren*, 33 Ark. App. 63, 800 S.W.2d 730 (1990), this court resolved this argument when it stated that "the code does not expressly give the chancellor the power to allocate marital debts as between the parties." The court further stated, however, that this power is implied and that to ignore the debts would "nullify divorce effectiveness" and leave "an essential item of divorce dispute . . . unresolved." *Id.* (quoting *Srock v. Srock*, 11 Ariz. App. 483, 466 P. 2d 34 (1970)).

A chancery court's decision to allocate debt to a particular party in a divorce case is a question of fact and will not be reversed on appeal unless clearly erroneous. *Anderson, supra.* A chancery court's determination that debt should be allocated between the parties in a divorce case on the basis of their relative ability to pay is not a decision that is clearly erroneous. *Anderson, supra.*

Randy Ellis's Affidavit of Financial Means states that his biweekly net pay as $1,529.48. His share of the total marital debt monthly payment will be $952.70. Randy Ellis states in the affidavit that his monthly expenses total $1,575.35. Thus, after paying monthly debt payments and providing for monthly expenses, Randy Ellis will have $530.91 discretionary income per month. Linda Ellis earns $757.20 biweekly. Her share of the marital debts will be $408.30 per month and her monthly expenses total $1,305.00. Thus, even with the present allocation, Linda Ellis, if her income and expenses remain constant, will avoid a deficiency only because of the receipt of alimony.

In *Richardson v. Richardson*, 280 Ark 498, 659 S.W.2d 510 (1983), the chancellor held that each party was liable for their separate debts. Mr. Richardson contended that certain of his separate debts should be divided equally. The supreme court stated that:

> [h]owever, [Mr. Richardson] has a high income while [Mrs. Richardson] has a modest income. [Mr. Richardson] will be able to pay the debt from income without materially changing his style of life. [Mrs. Richardson] could not pay the debts from her income. She would find it necessary to dispose of assets to pay part of the debt. Under the circumstances, we cannot say the ruling of the chancellor is clearly erroneous. *Id.*

Linda Ellis's income was lower than that of Randy Ellis. It is only as a result of the chancellor's allocation of debt and award of alimony that Linda Ellis will have slightly more discretionary

income per month than Randy Ellis. If debts were divided equally, there is no doubt that Linda Ellis would have to sell assets to pay her half of the debts. Linda Ellis's educational background appears to be limited to a two-semester dietary management course, a trade for which she failed to receive certification. Additionally, she stated that her florist business is operating at a net loss.

The chancellor did not clearly err in unequally dividing the martial debt due to the disparity in income and the parties' relative abilities to pay the debt.

Randy Ellis further argues that the chancellor erred in the division of debt because the decision does not specify if he is responsible for seventy percent of the debt before or after the sale of assets and because some of the marital debt is in Linda Ellis's name only. Randy Ellis does not cite authority nor make a convincing argument in support of these contentions. We do not address unconvincing arguments. *See Harrison v. Benton State Bank*, 6 Ark. App. 642 S.W.2d (1982).

Additionally, Randy Ellis argues that the chancellor erred by not allocating those debts that were incurred after September 1, 1999. The chancellor is not required to allocate debt. *See Hackett v. Hackett*, 278 Ark. 82, 643 S.W.2d 560 (1982); *see also Anderson, supra*. Because the chancellor is not required to allocate debt, there can be no error for allocating some but not all debt.

The chancellor stated in the decree that the allocation was due to the disparity in income, and the facts support a finding of disparity of income. Randy Ellis's other two arguments are unconvincing. Therefore, we affirm the chancellor's division of marital debt.

Affirmed.

GRIFFEN, J., and HAYS, Special Judge, agree.

AUGER TIMBER COMPANY, INC. *v.* Stan JILES

CA 01-304 56 S.W.3d 386

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

*Eilbott Law Firm*, by: *Andy L. Caldwell*, for appellant.

*Harrell & Lindsey, P.A.*, by: *Searcy W. Harrell, Jr.*, for appellee.

WENDELL L. GRIFFEN, Judge. In this case, a Union County jury held appellant liable for the wrongful cutting of appellee's timber and awarded appellee $27,929 in damages. That amount was trebled by the circuit judge for a total award of $83,787. Appellant seeks a new trial on the grounds that the verdict is excessive and that the trial judge committed error in certain evidentiary rulings and damage instructions. We find no error and affirm.

Appellee is the owner of approximately twenty-one acres of timber land in Union County. Directly to the east lies a forty-two-acre tract owned by Robert Charles. In November 1998, Hill Brothers Logging acquired the right to remove timber from the Charles property and contacted appellant to mark the boundaries of the property. Bob Hanry, an employee of appellant, undertook the task and, in the process, mistakenly included almost all of appellee's timber in the area to be cut. Hill Brothers had cut approximately 10.75 acres of appellee's timber when appellee, by chance, noticed the wrongful cutting. He contacted Hanry, who admitted that a mistake had been made and conceded that appellee was due payment for his timber. The parties could not agree on the amount owed, however. Six appraisals of the timber's value were prepared, three by appellee's experts, two by appellant's experts, and one by Bob Hanry. The appraisal amounts ranged from $10,362.58 to $25,679.

The parties' disagreement over the value of the timber was never resolved and, on August 12, 1999, appellee sued appellant for actual and treble damages. The case went to trial, and the jury awarded appellee $25,679 as the fair market value of the timber. Damages for road repair and replanting were stipulated as $1,500 and $750 respectively. The jury was also given the following interrogatory: "Do you find from a preponderance of the evidence that Auger Timber Company, Inc., willfully and intentionally cut timber belonging to Stan Jiles with the intent to deprive him of his property?" Based on the jury's answer of "yes" to the interrogatory, the trial judge trebled the damage award and entered judgment

accordingly. Appellant asked for a new trial, but its request was denied. This appeal followed.

Appellant's first argument is that the trial judge erred in excluding the testimony of an expert witness, Mr. Kenneth Rockett. Rockett was one of several trial witnesses who appraised the value of the wrongfully cut timber. Prior to trial, he testified in a deposition that "I am of the opinion that this was an accident, that they [Auger] weren't trying to steal [Jiles's] trees." Appellee filed a motion *in limine* to exclude that opinion on various grounds, including that Rockett was not qualified to testify regarding the state of mind of appellant's employees, that his opinion went to the ultimate issue in the case, and that it invaded the province of the jury. The trial judge granted the motion, although he did not state his reason therefor.

Whether a witness may give expert testimony rests largely within the discretion of the trial judge. *Williams v. Ingram*, 320 Ark. 615, 899 S.W.2d 454 (1995). A trial judge's decision regarding admissibility will not be reversed absent an abuse of discretion. *Id.* On appeal, the burdensome task of demonstrating that the trial judge has abused his discretion is on the appellant. *Id.*

The test for admissibility of expert testimony under Rule 702 of the Arkansas Rules of Evidence is whether specialized knowledge will aid the trier of fact in understanding the evidence or in determining a fact in issue. *Mearns v. Mearns*, 58 Ark. App. 42, 946 S.W.2d 188 (1997). Appellant argues that, given Rockett's observation of the property and his experience as a forester, his opinion would have been helpful to the jury in resolving the question of whether appellant's wrongful cutting was intentional or the result of a mistake.[1] We disagree. An expert's opinion is generally not considered helpful for purposes of Rule 702 unless the opinion is based on information that is beyond the experience and understanding of the average juror. In *Williams v. Ingram, supra*, a wrongful-death case involving a boating accident, the supreme court held that a marine safety expert's testimony regarding the dangerous nature of currents on the Arkansas River was properly excluded because there was nothing to indicate that the expert's knowledge on that point was so specialized that it was beyond the ability of the

[1] The imposition of treble damages pursuant to Ark. Code Ann. § 18-60-102(a) (1987) requires a showing of intentional wrongdoing, though such intent may be inferred from the carelessness, recklessness, or negligence of the offending party. *See Hackleton v. Larkan*, 326 Ark. 649, 933 S.W.2d 380 (1996).

trier of fact to understand and draw its own conclusions. In *Maxwell v. State*, 279 Ark. 423, 652 S.W.2d 31 (1983), a murder conviction was reversed because a crime-scene-investigation expert testified that the victim had died in appellant's home. The supreme court held that it could find no scientific basis for the opinion that was beyond the comprehension of the jury. In *Higgs v. Hodges*, 16 Ark. App. 146, 697 S.W.2d 943 (1985), a state trooper who investigated a car accident testified that appellant had been driving too fast. We held that the testimony should have been declared inadmissible because, even though the trooper had the expertise to make such a determination, the jury, given the same facts, could have made the determination as well as an expert.

In the case at bar, the jury heard Bob Hanry describe the manner in which the wrongful cutting came about. When Lawrence Hill asked Hanry to put a line around the Charles property, Hanry went to the site and located what he thought was the northwest corner of the Charles tract. He made no survey nor took any measurements because he felt that, due to his familiarity with the area, he would have no trouble finding the corner on his own. He found a corner, but it was the northwest corner of appellee's property. From that corner, Hanry began walking east, then walked around a perimeter without measuring any distances, even though he had a tape measure available for use. By the time he completed his task he had marked, in addition to the Charles property, almost all of appellee's property. Hanry made this twenty-one-acre mistake despite the fact that appellee's four corners were marked, the eastern border that he shared with Charles was flagged, and his tract was primarily pine in contrast to Charles's hardwood. In addition to hearing Hanry's testimony, the jurors viewed maps of the area and photographs of the site. Given the information that was in the hands of the jurors, they were qualified to make the determination of whether appellant acted intentionally without the aid of expert opinion. We cannot say therefore that the trial judge abused his discretion in excluding Rockett's testimony. Although we are unsure of the reason for the exclusion, we may affirm a circuit judge's evidentiary ruling if he reaches the right result. *See, e.g., Thomas v. State*, 62 Ark. App. 168, 973 S.W.2d 1 (1998).

The next issue concerns the trial court's exclusion, for lack of relevance, of the $20,500 appellee paid in 1996 for the subject property and another tract. Appellant argued below that the price was relevant because damages for wrongfully cut timber should be measured by the difference in the fair market value of the land before and after the timber was cut. In its motion for a new trial, it

argued further that the price paid for the land reflected on the legitimacy of appellee seeking damages for timber in excess of what he actually paid for the property as a whole.

■ ■ We will not reverse a trial court's ruling on relevance absent an abuse of discretion. *See Dalton v. City of Russellville*, 290 Ark. 603, 720 S.W.2d 918 (1986). The measure of damages applied by the jury in this case was the fair market value of the timber, not the difference in before-and-after value of the land, although the use of either method has been approved. *See Stoner v. Houston*, 265 Ark. 928, 582 S.W.2d 28 (1979). To assist them in assessing damages on this basis, the jurors were provided with a number of appraisals placing a value on the timber. Appellant has made no showing that the price paid for the land itself almost two years prior to the wrongful cutting was material to the fair market value of the timber in 1998. We therefore find no abuse of discretion in the exclusion of this evidence.

Next, we consider appellant's argument regarding the manner in which the trial court instructed the jury on damages. The jury was charged as follows:

> If an interrogatory requires you to assess the damage to timber and lands belonging to Stan Jiles, you must then fix the amount of money which will reasonably and fairly compensate him for the following elements of damage:
>
> > First, the fair market value of his timber immediately before the occurrence;
> >
> > Second, the reasonable costs of replanting the trees; and
> >
> > Third, the reasonable costs of repairing the road on the property.

This instruction permitted the jurors to assess damages by awarding the fair market value of the timber wrongfully cut. Appellant argues that the trial court should have instructed the jurors so that they could alternatively have awarded damages based upon the difference in the value of appellee's land before and after the cutting. In particular, appellant claims that the trial judge should have instructed the jury with AMI Civ. 4th 2223. That instruction is titled, "MEASURE OF DAMAGES — DAMAGE TO REAL PROPERTY — PERMANENT." It provides that damages are measured by the difference in the fair market value of the land and

its improvements immediately before and immediately after the occurrence.

The record reflects that appellant's objection to jury instructions at trial was as follows:

> I object to the instructions as to the damages as they are not — they do not contain the amount of before and after value of the property and I object to the entirety of the instructions as they do not have that instruction with them.

The objection, in addition to being somewhat imprecise and unclear, is not accompanied by a proffer of AMI 2223 or a similar instruction, nor any mention of same. When an appellant argues on appeal that the trial judge failed to give an instruction on a particular issue, he must show that he submitted a proposed instruction on the issue. *See Peoples Bank & Trust Co. v. Wallace*, 290 Ark. 589, 721 S.W.2d 659 (1986). Failure to make such a proffer means that the appellant cannot complain on appeal of the trial court's failure to give the instruction. *See Wade v. Grace*, 321 Ark. 482, 902 S.W.2d 785 (1995); Ark. R. Civ. P. 51. Appellant contends in its brief that AMI 2223 was proffered, but the proffer is not contained in the record. An appellant must include the proffered instruction in the record if we are to address the trial court's failure to give an instruction. *See Fisher v. Valco Farms*, 328 Ark. 741, 945 S.W.2d 369 (1997); *Wade v. Grace, supra*. Due to the absence of a proffer, we cannot consider reversal on this point.

Appellant's final argument is that the compensatory damages awarded by the jury were excessive. We note that appellant does not argue that the treble-damage award is unsupported by substantial evidence. The only argument regarding the amount of damages is that the award of $25,679, for fair market value of the timber, was excessive.

In addressing an argument that a verdict is excessive, we determine whether the verdict is so great as to shock the conscience of the court or demonstrate passion or prejudice on the part of the trier of fact. *Smith v. Galaz*, 330 Ark. 222, 953 S.W.2d 576 (1997). Here, the jury awarded damages based on the $25,679 appraisal figure testified to by expert witness Pete Prutzman. Prutzman was originally hired as an appraiser by appellant, but he was subpoenaed to testify in favor of appellee. His qualifications and methodology are not questioned by appellant. Further, even though his appraisal was the highest among the six offered at trial, it was in

the same range as three others, which valued the timber at $25,000.00, $21,847.49, and $20,420.00. There is no showing, therefore, that the jurors' award was based on anything other than their choice of which of several very competent experts to believe. Under these circumstances, we cannot say the verdict shocks the conscience of the court or is the result of passion or prejudice.

Because we find no error on any of the above points, we hold that the trial judge did not err in refusing to grant appellant a new trial.

Affirmed.

BIRD, J., and HAYS, S.J., agree.

Heather Marie HOBBS *v.* Tad Oliver HOBBS

CA 01-13 55 S.W.3d 331

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

*Ronald L. Griggs*, for appellant.

*Robert L. Depper, Jr.*, for appellee.

WENDELL L. GRIFFEN, Judge. This appeal concerns a divorce decree that granted joint custody of fifteen-month-old Jacob Hobbs, with alternating weeks of physical custody, to his parents, appellant Heather Marie Hobbs and appellee Tad Oliver Hobbs. Appellant contends that joint custody was not warranted based on the evidence presented at trial. We agree that the record demonstrates that at the time of the final hearing the parties were not working in concert to reach shared decisions

regarding the child. Accordingly, we reverse and remand this case to the chancellor for further action consistent with this opinion.

The parties separated after approximately one year of matrimony and two months following Jacob's birth.[1] Appellee filed a petition for legal separation, and appellant counterclaimed for divorce. In her counterclaim, appellant requested full custody of Jacob.

At a temporary hearing, the chancellor ordered joint custody with the parties alternating physical custody of the child weekly. The chancellor also ordered the parties to exchange Jacob on Mondays at a business parking lot in Magnolia.[2] She directed the parties to cooperate concerning Jacob's care and well being and to provide each other with a list of foods, types of diapers used, medicines, and any other information needed to ensure his proper care. This arrangement continued from the date of the temporary hearing until the final hearing. The chancellor also ordered the parties to enter into individual and joint counseling to help them get along and focus on the best interest of their child. Because the parties could not agree on a counselor, the court ordered the parties to seek consultation with Dr. Mike Fitts.

A final hearing occurred on August 16, 2000. During the hearing, appellant testified that she was twenty-two years of age, lived in Magnolia with her parents, and that she currently worked and attended school. She complained that appellee did not participate in the exchange of the child. As a result, appellant testified that she was forced to interact with her mother-in-law, with whom she has an acrimonious relationship.

Although the court ordered the parties to communicate on a weekly basis, appellant testified that she had to give written correspondence to appellee's mother, who would read the correspondence and react negatively if she did not agree. Appellant also testified that she had tried, to no avail, to get appellee to participate in the exchange, but that when she tried to call him, he told her never to call him again and to speak with his lawyer. She acknowledged that she attended two individual sessions after the court ordered counseling, but admitted that she did not attend joint

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[1] The parties were married on June 12, 1998, and separated on July 29, 1999. Jacob was born May 18, 1999.

[2] At the time of the temporary and final hearings, the parties lived approximately thirty-five miles apart, with appellant living in Magnolia and appellee living in El Dorado.

counseling sessions as ordered. Appellant contended that the joint custody arrangement was not working toward Jacob's best interest because appellee did not correspond with her weekly and did not participate in the exchange.

The chancellor also heard testimony from Jacob's pediatrician, Dr. Amy Albin, who confirmed that Jacob suffered from eczema, an allergic skin disorder, and that due to Jacob's sensitive skin, he was more prone to diaper rash. However, Dr. Albin testified that she saw nothing that indicated Jacob was not properly cared for, and that overall, Jacob was a healthy child.

Appellant's sister, Brandi Young, echoed the sentiments of appellant that there were problems in the exchange. Another witness, Ann Bridges, testified that appellant was an attentive parent. In addition, appellant's father, Dr. James Young, testified that appellee never participated in the custody exchange, but instead played softball.

Appellee testified that he was twenty-six years of age and lived in El Dorado with his parents. He admitted that he had not tried to communicate with appellant since the temporary hearing and further reported that appellant only telephoned him twice in over a one-year period. Appellee stated that when he and appellant went to the counseling session, he suggested to the counselor that they initially undergo individual counseling. The counselor met with the couple separately on two different occasions, but was unable to complete a joint counseling session because appellant did not show up. Appellee testified that he participated in two exchanges with appellant in the time period between the temporary hearing and the final hearing. He stated that he had no definite working hours, and that he was on call on alternate weeks. Appellee testified that he participated in a church softball league, and that his mother kept his son while he worked or played softball. He relayed that it was "too fast" for him and appellant to have any communication, and it was hard for him to stomach the exchanges.

Appellee's mother, Louise Hobbs, also testified at the hearing. She told the court that she and her husband exchanged Jacob with appellant because of appellee's work schedule. Louise Hobbs testified that the circumstances surrounding the joint custody could be better, that the custody was going as well as could be expected under the circumstances, and that joint custody would be a problem when Jacob reached school age. She also acknowledged that she and appellant had problems communicating.

Also testifying on behalf of appellee were Jana Kay Moore and Regina Winget, who testified that they had witnessed appellee playing with Jacob, and that Jacob appeared to be a healthy, happy child. Several letters from one of the parties to the other concerning Jacob's care were introduced into evidence, as well as photographs of him and two videotapes of the exchanges.

After the hearing, the chancellor entered an order that found that the child had been exchanged as directed but that communication between the two parties had been almost nonexistent. She further found that the parties harbored much bitterness toward each other. Yet the chancellor ordered the parties to share joint physical and legal custody of Jacob, to exchange him weekly, and to speak directly with each other on the day prior to the exchange to discuss Jacob and any special concerns they had about him. The chancellor also ordered appellee to personally exchange Jacob unless he was at work and for the parties to attempt to accommodate each other for any scheduling changes. This appeal follows.

*The Joint-Custody Decision was Clearly Erroneous*

Chancery cases are reviewed *de novo* on appeal. *See Thompson v. Thompson*, 63 Ark. App. 89, 974 S.W.2d 494 (1998). A chancellor's findings are not reversed unless this court determines that the findings are clearly erroneous. *See id.* Special deference is given to a chancellor's findings in child-custody cases because of the chancellor's superior position to determine witness credibility, testimony, and the best interest of the child. *See id.*

Custody awards are not made to punish or reward either parent. *See Callaway v. Callaway*, 8 Ark. App. 129, 648 S.W.2d 520 (1983). Instead, the primary focus is on the best interest and welfare of the child. *See Thompson, supra.* Our laws do not favor joint custody, unless it is clear that the parties have demonstrated a mutual ability to cooperate in reaching shared decisions concerning the child's welfare. *See Thompson, supra.*

*Thompson, supra,* involved a joint-custody agreement concerning the parties' two-year-old child, which was approved by the court. The agreement provided that the parties alternate physical custody of the child on a week-to-week basis. After two months, Mrs. Thompson filed a petition to change custody, alleging that the agreement was unworkable. Upon finding that a material change in

circumstances had occurred, the chancellor awarded Mrs. Thompson custody of the child with liberal visitation to Mr. Thompson. Following *de novo* review, we affirmed the chancellor's finding, noting that the record demonstrated that the parties were unable to cooperate regarding their child's health care. *See Thompson, supra.* We stressed the importance of the record demonstrating that the parties were willing and able to cooperate in reaching shared decisions concerning the best interest of the child in order to justify an award of joint custody. *See Thompson, supra.*

In *Drewry v. Drewry*, 3 Ark. App. 97, 622 S.W.2d 206 (1981), we affirmed a chancellor's decision to grant joint custody. After observing that the evidence indicated that the parents shared equally in the child's care, that they lived in close proximity to each other, and that each parent was stable, we agreed that the record supported the chancellor's finding that it was in the child's best interest to have equal contact and shared care by his parents. *See Drewry, supra.*

Contrary to the harmonious atmosphere presented in *Drewry, supra,* and notwithstanding the standard prescribed in *Thompson, supra,* the record clearly shows that the parties in the instant case failed to demonstrate "mutual ability . . . to cooperate in reaching shared decisions in matters affecting [Jacob's] welfare." Instead, the record indicates that communication between the parties was virtually nonexistent as of the final hearing, and had been that way for over a year. This fact was established by both parties' testimonies and is mentioned in the chancellor's order. Significantly, when the chancellor ordered the parties to attend joint counseling sessions, the couple could not agree on a counselor. Consequently, the chancellor selected a counselor. However, the parties testified at the final hearing that they never attended joint counseling sessions, although these sessions were specifically designed to help the parties get along so they could focus on the best interest of their child. In fact, their interaction on Jacob's first birthday, which fell on appellee's scheduled week of custody, resulted in a physical altercation between appellant and appellee's mother that occurred in Jacob's presence and that frightened him and reduced him to tears.

Although appellee concedes that the parties have difficulty communicating with each other, he urges that we affirm the chancellor because the difficulty in communication can be ironed out with "a little maturity, a little time, and the direction of a court." However, our law is well settled that the primary consideration in child custody is the child's best interest *at the time of the final hearing* as demonstrated by the record. The time for parties to demonstrate

the mutual ability to cooperate in reaching shared decisions in matters affecting a child's welfare so as to justify an award of joint custody is before and at the hearing that is the basis of the joint-custody award, not some later time in an unknown future based on unproven facts. It is neither the responsibility nor the role of the court to accommodate the parties' growing pains at the expense of a child. Given the parties' demonstrated inability to communicate or cooperate in reaching shared decisions concerning Jacob's best interest at the time of the final hearing, the chancellor's finding that the circumstances warranted joint custody is clearly erroneous.

Accordingly, we reverse and remand for further action regarding custody based on Jacob's best interest, not the parties' future intentions. We do not prejudge the custody determination. Whether joint custody, custody to appellant, or custody to appellee is in Jacob's best interest must be determined by the chancellor in the light of evidence established by the record when the custody determination is made. The record before us shows that appellant, appellee, and appellee's mother have been engaged in a war of wills. A legitimate concern in view of this clear reality is whether the enmity the parties have manifested renders either of them unsuitable to be awarded custody. While we do not decide that question, we cannot ignore the evidence that Jacob's best interest has thus far been overshadowed by the previously mentioned acrimony of the adults responsible for his nurture and welfare. Neither should the chancellor ignore the evidence on remand.

Reversed and remanded.

NEAL, J., agrees.

STROUD, C.J., concurs.

JOHN F. STROUD, JR., Chief Judge, concurring. I concur. It is clear that at the time this divorce was granted and joint custody was awarded, these parties were not working in concert with each other to raise this child. The chancellor acknowledged in her letter opinion that "communication between the two parties has been almost nonexistent [and that] they each harbor much bitterness toward each other." Under those circumstances and under the considerations required of us by *Thompson v. Thompson*, 63 Ark. App. 89, 974 S.W.2d 494 (1998), the chancellor erred in awarding joint custody. However, it has now been over a year since the divorce was granted and joint custody was awarded. Circumstances may well have changed, for the better or for the worse. I

write only to express my opinion that upon remand the chancellor will be free to re-examine the custody issue in light of the current situation between the parties. Depending upon those circumstances upon rehearing, the chancellor may award custody to the mother, to the father, or again to both if the chancellor determines that the parties are now communicating and can now work in concert to raise the child. Of course, the polestar of such a decision must still be the best interest of the child.

Melba LAIRD *v.* Sandra SHELNUTT

CA 01-207 55 S.W.3d 795

Court of Appeals of Arkansas
Division IV
Opinion delivered October 3, 2001
[Petition for rehearing denied November 7, 2001.]

*Hatfield & Lassiter*, by: *Richard F. Hatfield*, for appellant.

*Baxter, Jensen, Young & Houston*, by: *Ray Baxter*, for appellee.

OLLY NEAL, Judge. This is an appeal from the Saline County Chancery Court's order granting appellee's motion for summary judgment. On appeal, the appellant argues the court erred in granting summary judgment because its decision was not based upon the record as required by Arkansas law, but upon a trial in probate court, which is not a part of this record; and because the record reflects genuine issues of material fact. In the alternative appellant argues that even if the trial court did not err in granting appellee's motion for summary judgment in finding a constructive trust, its finding that $738,000 was the proper amount of damages is clearly erroneous. We affirm.

Appellant, Melba Laird is Don McMann's sister. Appellee, Sandra Shelnutt is his stepdaughter from his marriage to Dixie McMann. On June 23, 1995, Don McMann and his wife Dixie executed reciprocal wills that were prepared by John Lovell, a Benton attorney. Their wills appointed Sandra Shelnutt executrix. After the death of the survivor, the residue of their estate was left to Sandra Shelnutt. The wills contained a clause stating "they agreed that neither would alter, amend, or change their wills or do any act or suffer any omission which would defeat the testamentary plan outlined in their wills 'except by mutual agreement at the time when both of us are alive.' "

On January 29, 1998, $900,000 in funds from an investment account in the name of Don McMann, his wife, Dixie, and Sandra Shelnutt as joint tenants with rights of survivorship, were evenly split as between Sandra Shelnutt and Don McMann. Dixie McMann died February 2, 1998, and following her death, Don added appellant to his account as a joint tenant with right of survivorship. Don also executed a new will on July 14, 1998, naming appellant as his executrix and heir.

Don died June 5, 1999, and appellee was appointed executrix of his estate pursuant to the June 23, 1995, will. Appellant contested the will and sought to probate the 1998 will; however the probate court gave effect to the 1995 will. Appellant appealed arguing the probate court lacked subject-matter jurisdiction to enforce the will contract. We recently held in an unpublished opinion, that the probate court lacked subject-matter jurisdiction to enforce the contract and reversed and remanded the case. *Laird v. Shelnutt*, CA 00-1226 (Ark. App., Sept. 5, 2001).

Appellee brought an action to impose a constructive trust against the property that was once in the joint account held by Don

and appellant, which can be traced to two separate trusts, the Melba Laird Trust and the Max Laird Trust. Appellee argued that Don and Dixie had an agreement that Don would leave property to be transferred by will. Appellee moved for summary judgment, alleging all questions of fact were resolved in probate court. Appellee supported her motion with the transcript of the probate court proceeding. The chancery court issued an order granting appellee's motion for summary judgment, ordering a constructive trust to be placed on a $738,000 investment account owned by appellant.

A trial court's grant of summary judgment is proper when it is clear there are no issues of material fact to be tried. *Tackett v. McDonald's Corp.*, 68 Ark. App. 41, 3 S.W.3d 340 (1999). Once the moving party makes a *prima facie* showing of entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *See Plant v. Wilbur*, 345 Ark. 487, 47 S.W.3d 889 (2001) (quoting *Worth v. City of Rogers*, 341 Ark. 12, 14 S.W.3d 471 (2000)). On appellate review, we determine if the grant of summary judgment was proper based upon whether the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered. *Holytrent Prop. v. Valley Park Ltd.*, 71 Ark. App. 336, 32 S.W.3d 27 (2000). We view pleadings, affidavits, documents, and exhibits filed in support of a motion for summary judgment in the light most favorable to the nonmoving party. *Tackett v. McDonald's Corp., supra.* After reviewing the undisputed facts, summary judgment should be denied if, under the evidence, reasonable men might reach different conclusions from those undisputed facts. *Plant v. Wilbur, supra*, (quoting *Worth v. City of Rogers*, 341 Ark. 12, 14 S.W.3d 471 (2000)).

Appellant argues the trial court erred in granting summary judgment because its decision was not based upon the record required by Arkansas law, but on a trial in probate court, which is not part of the record and because the record reflects genuine issues of fact. We must point out that appellant failed to abstract the disputed transcript, and appellee corrected the deficiency in her brief. We hold that the probate transcripts were a part of the record because the trial court stated in its order that it relied on the transcripts from the probate proceeding in rendering its decision and because the probate transcripts are part of the certified record filed with our clerk's office.

Matters to be considered in summary-judgment proceedings include affidavits, depositions, admissions, and answers to interrogatories. *UMLIC 2 Funding Corp. v. Butcher*, 333 Ark. 442, 970 S.W.2d 211 (1998). We have not addressed the issue of whether a transcript may be used to support a motion for summary judgment. The Maryland Court of Appeals has stated that a transcript of former testimony possesses the same indicia of reliability as an affidavit in the summary-judgment context. *Imbraguglio v. Great Atlantic & Pacific Tea*, 747 A.2d 662 (Md. 1999). The Maryland Court reasoned that a transcript indicates matters the witness would testify to if called in the present case, and like an affiant, the witness gave the former testimony under oath. *See id.* The Maryland Court did note that other courts have decided a transcript of former testimony may not be considered by the trial judge when ruling on a motion for summary judgment. *See id.; Copeland v. Samford Univ.*, 686 So.2d 190 (Ala. 1996); *Gatton v. A.P. Green Servs. Inc.*, 64 Cal.App.4th 688 (1998). However, the Court found those cases distinguishable because the transcript testimony was being offered against a plaintiff or defendant who was not a party to the previous case. *See Imbraguglio*, 747 A.2d at 670. The Maryland Court held that in regard to summary judgment, a court may consider transcript testimony from a prior proceeding involving the same parties. *See id.*

Affidavits submitted in support of, or opposing, summary judgment are never subject to cross-examination. *Farmers Union Oil Company of Williston v. Harp*, 462 N.W.2d 152 (1990). A transcript is superior to an affidavit in that it is subject to cross-examination and conducted under the supervision of a trial judge. We hold that the transcript in the present case possesses all the indica of reliability and that a court may consider a transcript in summary judgment proceedings.

It was proper for the trial court to rely on the transcripts in rendering its decision to grant summary judgment. After reviewing the pleadings, affidavits, documents and exhibits filed in support of the motion for summary judgment in a light favorable to appellant, we hold there were no issues of material fact to litigate; therefore, the trial court's grant of summary judgment was proper.

Appellant argues, in the alternative, that even if the trial court did not err in granting appellee's motion for summary judgment in finding a constructive trust, its finding that $738,000 is the proper amount of damages is clearly erroneous. Appellee presented the testimony of Martin Northern, a stock broker and registered

investment advisor. He testified that he was able to trace $493,249.18 originally in Don McMann's account to trust accounts in the names of appellant and her husband. He also testified that appellant never contributed to the accounts. Northern further testified that the accounts contained $737,791.96 that formerly belonged to Don McMann. Appellant challenges this calculation; however, she failed to offer any proof that this calculation was in error. We hold that the trial court's valuation of the trust at $738,000 was proper.

Appellant failed to abstract the probate transcript. Appellee's attorney filed a motion for attorney's fees because he corrected the deficiency. We believe he is entitled to attorney's fees in the amount of $1,500.

Accordingly, we affirm.

PITTMAN and VAUGHT, JJ., agree.

Omar JARAKI, M.D. *v.* CARDIOLOGY ASSOCIATES of NORTHEAST ARKANSAS, P.A.

CA 01-309 55 S.W.3d 799

Court of Appeals of Arkansas
Division I
Opinion delivered October 3, 2001
[Petition for rehearing denied November 7, 2001.]

*Lyons, Emerson & Cone, P.L.C.*, by: *Jim Lyons*, for appellant.

*Orr, Scholtens, Willhite & Averitt, PLC*, by: *Chris A. Averitt* and *Jay Scholtens*, for appellee.

LARRY D. VAUGHT, Judge. Dr. Omar Jaraki appeals from an order of the Craighead County Chancery Court enforcing a covenant not to compete and enjoining him from the practice of medicine within a seventy-five mile radius of Jonesboro, Arkansas, for a period of two years from the date of entry of the order. Appellant contends that the covenant is void and unenforceable because (1) it violates the public policy of this state that prohibits unreasonable restraints on trade, (2) there is no valid interest in need of protection, (3) the geographic restriction is too broad, and (4) the temporal limitation is unreasonable. Appellant also argues that the chancellor erred in finding that he breached the notice provision contained in his employment contract. Finally, appellant raises an evidentiary objection. We find that the injunction is unreasonable and reverse.

Cardiology Associates of Northeast Arkansas (CANEA) is a medical corporation that employs doctors specializing in the field of cardiology. Dr. Omar Jaraki is a cardiologist who has completed a fellowship in electrophysiology (E.P.). An E.P. cardiologist tests, evaluates, and treats rhythm disturbances of the heart. E.P. cardiology services are most often performed after a primary care physician refers a patient to a cardiologist, after which a cardiologist refers the patient to an E.P. cardiologist.

It takes approximately seven general cardiologists to provide referrals sufficient to justify the presence of one E.P. cardiologist. Prior to Dr. Jaraki being employed by CANEA, there were no practicing E.P. cardiologists in Jonesboro. It was the practice in Jonesboro to refer cardiology patients in need of E.P. services to Little Rock or Memphis.

In order to acquire the services of an "in-house" E.P. cardiologist, on or about April 17, 2000, CANEA employed Dr. Jaraki. CANEA and Dr. Jaraki entered into an employment agreement ("Employment Agreement"), which was to continue for two years unless terminated by ninety days' written notice given by either party. CANEA agreed to pay Dr. Jaraki $265,000 a year in salary, plus a bonus. In the Employment Agreement the parties also agreed that, in the event that the agreement was terminated prior to its expiration, Dr. Jaraki would not practice within a seventy-five mile radius of CANEA's principal office for a period of twenty-four months (the "non-compete").

On December 5, 2000, Dr. Jaraki gave written notice to CANEA that he was resigning on January 5, 2001. On December 21, 2000, Dr. Jaraki's access to CANEA (and its charts, file materials and the database) was terminated. Thereafter, on December 27, 2000, CANEA filed an action in the Chancery Court of Craighead County seeking a temporary restraining order, a preliminary injunction, a permanent injunction, declaratory relief, and damages.

The chancellor entered an *ex parte* order on December 28, 2000, restraining Dr. Jaraki from "competing with plaintiff in violation of the employment agreement, from entering plaintiff's place of business, from contacting plaintiff's patients, referring physicians and/or medical suppliers within the geographical location described in the employment agreement, or from taking any action to the detriment of plaintiff." At a hearing on January 8, 2001, the chancery court considered and rejected Dr. Jaraki's motion to set aside the *ex parte* order.

On January 19 and 23, 2001, the chancellor heard the petition for temporary injunctive relief, and entered his opinion and order upholding the non-compete in the Employment Agreement as valid and enforceable. The court reasoned that Dr. Jaraki was fully aware of the covenants in the Employment Agreement, that CANEA had complied with its obligation, and that CANEA had a legitimate interest to be protected by the non-compete over and above merely prohibiting ordinary competition. The chancellor further found that enforcing the non-compete did not violate public policy. From the granting of CANEA's petition for injunction comes this appeal.

We first consider whether the chancery court's failure to include a certification in its order dealing with the non-compete injunction, as set forth in Rule 54(b)of the Arkansas Rules of Civil Procedure, precludes our consideration of this appeal. This question presents a jurisdictional issue, which the court may raise on its own motion. *Barr v. Richardson,* 314 Ark. 294, 862 S.W.2d 253 (1993). The injunction clearly was treated as separate from the other issues raised and held in abeyance by the chancery court for development at a later time. Because issues relating to bonus fees and contempt were not disposed of, the chancery court's order did not conclude the rights of all of the parties and was not final.

Nevertheless, the appeal before us is one from an injunction, and our rules of appellate procedure provide for an appeal from:

> 6. An interlocutory order by which an injunction is granted, continued, modified, refused, or dissolved, or by which an application to dissolve or modify an injunction is refused.

Ark. R. App. P. 2(a)(6). The supreme court has stated that a mandatory injunction is appealable under Rule 2(a)(6), *Tate v. Sharpe*, 300 Ark. 126, 777 S.W.2d 215 (1989), and has held as we also hold that the specific authority of an appeal from an injunction controls over the general requirement for finality contained in Rule 54(b). *See East Poinsett Cty. Sch. Dist #14 v. Massey,* 317 Ark. 219, 876 S.W.2d 573 (1994). We, therefore, proceed to address the merits of this case.

A chancery court's cases are reviewed *de novo* on appeal, and the appellate court will not reverse unless the chancellor's findings are clearly erroneous or clearly against the preponderance of the evidence. *Dillard v. Pickler*, 68 Ark. App. 256, 6 S.W.3d 128

(1999). A chancery court's finding of fact is clearly erroneous when after reviewing all the evidence, the court is left with a definite and firm conviction that a mistake has been committed even though there is evidence to support the chancery court's decision. *Id.* Because the question of the preponderance of the evidence turns largely on the credibility of the witnesses, the appellate court defers to the chancellor's superior position to assess the credibility of witnesses and the weight to be accorded to their testimony. *Moon v. Moon Enters. Inc.*, 65 Ark. App. 246, 986 S.W.2d 134 (1999).

Covenants not to compete are not looked upon with favor by the law. *Federated Mut. Ins. Co. v. Bennett*, 36 Ark. App. 99, 818 S.W.2d 596 (1991). In order for such a covenant to be enforceable, three requirements must be met: (1) the covenantee must have a valid interest to protect; (2) the geographical restriction must not be overly broad; (3) a reasonable time limit must be imposed. *Id.* The Arkansas Supreme Court has recently discussed covenants not to compete:

> Arkansas has followed the trend in this area by requiring a party challenging the validity of a covenant to show that it is unreasonable and contrary to public policy. *Dawson v. Temps Plus, Inc.*, 337 Ark. 247, 987 S.W.2d 722 (1999). Without statutory authorization or, some dominant policy justification, a contract in restraint of trade is unreasonable if it is based on a promise to refrain from competition that is not ancillary to a contract of employment or to a contract for the transfer of goodwill or other property. However, the law will not protect parties against ordinary competition. *Id.* This court has recognized that covenants not to compete in employment contracts are subject to stricter scrutiny than those connected with a sale of a business. We review cases involving covenants not to compete on a case-by-case basis. *Id.*

*Bendinger v. Marshalltown Trowell Co.*, 338 Ark. 410, 417, 994 S.W.2d 468, 472 (1999).

*Public Policy*

Appellant first asserts that covenants not to compete violate the public policy of our state. Appellant correctly argues that *Duffner v. Alberty*, 19 Ark. App. 137, 718 S.W. 2d 111 (1986), establishes that it is contrary to public policy to unduly restrict the public's right of access to the physicians of their choice. Therefore, we must determine if the contract provision prohibiting appellant

from practicing medicine within seventy-five miles of Jonesboro, for a period of two-years, constitutes an undue interference with the interests of the public right of availability of the cardiologist it prefers to use and if the covenant's enforcement would result in an unreasonable restraint of trade.

The burden is on the party challenging the validity of the covenant to show that it is unreasonable and contrary to public policy. *Madison Bank and Trust v. First Nat'l Bank,* 276 Ark. 405, 634 S.W.2d 268 (1982). Further, covenants not to compete in employment contracts are subject to a stricter scrutiny than those connected with a sale of a business. *Hyde v. C M Vending Company,* 288 Ark. 218, 703 S.W.2d 862 (1986).

Covenants not to compete are not a *per se* violation of our state's public policy. We are mindful of the *Duffner* requirement that the validity of each covenant be examined on a case-by-case basis. Therefore, we must examine the interest that CANEA is attempting to protect, and then determine to what extent, if any, the non-compete prohibits ordinary trade.

*Interest to Protect*

We begin our analysis by considering what, if any, valid interest CANEA has that is in need of protection.

> Where a covenant not to compete grows out of an employment relationship, the courts have found an interest sufficient to warrant enforcement of the covenant only in those cases where the covenantee provided special training, or made available trade secrets, confidential business information or customer lists, and then only if it is found that the associate was able to use information so obtained to gain an unfair competitive advantage.

*Federated Mut. Ins. Co.*, 36 Ark. App. at 102, 818 S.W.2d at 598. The primary interest that appellee argues is in need of protection is its substantial patient base and network of referring physicians throughout the non-compete territory. CANEA argues that a network of referring physicians is akin to customer lists and trade secrets, and these relationships are protected by CANEA in order to maintain goodwill and reputation. In response, Dr. Jaraki argues that appellee's referring physicians could be identified by looking up the names of physicians in the telephone book or observing the patient's hospital chart, and that when a customer list can be readily

ascertained, the list is not protected. *Allen v. Johar, Inc.,* 308 Ark. 45, 823 S.W.2d 824 (1992).

In the case at bar, the fact that Dr. Jaraki's patients were referred to him by appellee is persuasive evidence that he has benefitted from his relationship with CANEA. An extensive referral base established over a fifteen- to sixteen-year period is reflective of CANEA's goodwill and reputation; however, we are not convinced that it is an interest in need of protection. The physicians that are included on the CANEA list, presumably, are not cardiologists. If the non-compete did not exist, there is nothing that would prevent those physicians from referring their patients (in need of general cardiologist services) to CANEA, and then CANEA referring the patients to either an in-house E.P. cardiologist or to an E.P. in Memphis or Little Rock. Additionally, appellee admitted that it would no longer refer patients to Dr. Jaraki and that the seven cardiologists on staff would provide enough referrals to support a full-time E.P. cardiologist.

Appellee responds that there are only ten practicing cardiologists in Jonesboro, and that if Dr. Jaraki were permitted to remain in Jonesboro, it may be difficult for CANEA to recruit another E.P. However, any incoming E.P. (associated with CANEA) would be well provided for, and Dr. Jaraki would be without the requisite cardiologist referral base. If there are too few remaining cardiologists to supply referrals for Dr. Jaraki to exclusively practice E.P., he may then engage in general cardiology.

We next consider whether Dr. Jaraki received any special training in general cardiology from the doctors at CANEA. The president of Cardiology Associates, Dr. Roger Hill, did perform some general procedures with Dr. Jaraki observing. However, there is no evidence that during these procedures Dr. Jaraki received "special" training that would allow him to gain an unfair competitive advantage over CANEA. Dr. Jaraki is a cardiologist with a subspeciality in E.P. cardiology, and any general practice of cardiology he engages in would amount to no more than "ordinary competition."

*Geographic Area*

We are also persuaded that the geographic area included in the non-compete is too broad. The geographic area in a

covenant not to compete must be limited in order to be enforceable. The restraint imposed upon one party must not be greater than is reasonably necessary for protecting the other party. *Federated Mut. Ins. Co. v. Bennett,* 36 Ark. App. 99, 818 S.W.2d 596 (1991). In determining whether the geographic area is reasonable, the trade area of the former employer is viewed. Where a geographic restriction is greater than the trade area, the restriction is too broad and the covenant not to compete is void. *Compare All-State Supply v. Fisher,* 252 Ark. 295, 483 S.W.2d 210 (1972) (statewide restriction valid where employer and employee conducted business statewide).

The trade area included in the non-compete enforced against appellant covers (at least some of) the city of Memphis, Tennessee, and many of the E.P. cardiology facilities in Memphis. In response, appellee argues that none of the E.P. facilities in Memphis are within seventy-five miles "driving distance" from Jonesboro. Additionally, appellee admits that Memphis is not part of its referral base, but counters that appellant testified that he has no intention of moving to Memphis.

It is simply not reasonable to restrict Dr. Jaraki (regardless of his current intent) from practicing in a large market like Memphis, especially when Memphis is not part of CANEA's referral base. The non-compete does not contemplate "driving distance" and refers only to a "seventy-five mile radius." Therefore, at least part of Memphis is included in the restriction. By including the city of Memphis in the scope of the non-compete's geographic restriction, appellee more broadly limited appellant from practicing medicine than is reasonably necessary to protect appellee's trade area.

The non-compete is unenforceable because no valid interest exists that is in need of protection and the geographic limitations are too broad. The injunctive order is reversed, and all other questions and controversies are remanded for final resolution.

Reversed and remanded.

PITTMAN and NEAL, JJ., agree.

Peggy D. Phillips WEIR *v.*
John Field PHILLIPS, III

CA 00-1451 55 S.W.3d 804

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

[redacted]

*Grider Law Firm, PLC*, by: *M. Joseph Grider*, for appellant.

*Goodwin, Moore, Colbert, Broadaway & Gray, LLP*, by: *Harry Truman Moore*, for appellee.

TERRY CRABTREE, Judge. This is a domestic-relations case. The appellant, Peggy Phillips Weir, petitioned the Lawrence County Chancery Court to increase the child-support payment from the appellee, John Phillips. Appellee filed a counter petition requesting that the court change the custody of their two children from appellant to him. The chancery court declined to increase appellee's child-support obligation and ordered a change of custody of the parties' younger child if appellant did not enroll that child in a certain school. Appellant agreed to the school arrangement and kept custody of both children. On appeal, appellant argues that the chancellor erred in: (1) declining to award her an increase in child support; (2) failing to make written findings in regard to his deviation from the family child-support chart; and (3) excluding appellee's use of a company vehicle as "income" for child-support purposes. We agree with appellant that the chancellor must articulate his reasons in writing for deviating from the family child-support chart, and that the chancellor erred in excluding appellee's use of a company vehicle as income. Therefore, we reverse and remand.

The parties are the parents of two minor children, R.P., born April 4, 1984, and J.P., born March 21, 1990. Pursuant to an order of January 28, 1998, appellee pays appellant $140 per week for the care, support, and maintenance of their two minor children. On appeal, the appellant argues that the chancellor erred in declining to find a material change of circumstances significant enough to warrant an increase in child support. She contends that appellee experienced a $114 per week increase in his salary, which equated to an overall 20% increase to his income.

Appellant argues that the chancellor erred in failing to award her an increase in child support. Ark. Code Ann. § 9-14-107(a) (Repl. 1998) provides:

> 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 ($100.00) 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.

A party seeking modification of the child-support obligation has the burden of showing a change in circumstances sufficient to warrant the modification. *Roland v. Roland,* 43 Ark. App. 60, 859 S.W.2d 654 (1993). The evidence is undisputed that appellee's income has increased by $114 per week. Clearly, this increase in income is enough to be deemed a material change of circumstances as it exceeds a $100 per month change as referenced in the statute. Therefore, we believe that appellant successfully established the threshold issue that a material change of circumstances existed with regard to appellee's income. However, we do not decide whether the chancellor erred in failing to award an increase in child support because the chancellor must first articulate his reasons for not awarding an increase in child support after appellant had proven a material change in circumstances.

Section I of Administrative Order No. 10 sets forth the rebuttable presumption that the amount of child support calculated pursuant to the most recent revision of the family support chart, promulgated by the Arkansas Supreme Court, is the amount of child support to be awarded in a judicial proceeding for child support. Although the amount of child support that a chancery court awards lies within the sound discretion of the chancellor and will not be disturbed on appeal absent an abuse of discretion, reference to the family support chart is mandatory. *Guest v. San*

*Pedro*, 70 Ark. App. 389, 19 S.W.3d 62 (2000); *see* Ark. Code Ann. § 9-14-106(a)(1)(A) (Repl. 1998). The most recent revision of the child-support chart is found at *In Re: Administrative Order No. 10: Arkansas Child Support Guidelines*, 331 Ark. 581 (1998). Section I addresses the rebuttable presumption created by the chart:

> The court may grant less or more support if the evidence shows that the needs of the dependents require a different level of support. It shall be sufficient in a particular case to rebut the presumption that the amount of child support calculated pursuant to the Family Support Chart is correct, if the court enters in the case a specific written finding within the Order that the amount so calculated, after consideration of all relevant factors, including the best interests of the child, is unjust or inappropriate. Findings that rebut the guidelines shall state the payor's income, recite the amount of support required under the guidelines, recite whether or not the Court deviated from the Family Support Chart and include a justification of why the order varies from the guidelines[.]

Arkansas Code Ann. § 9-12-312(a)(2) (Supp. 1999) also sets forth guidelines to be followed in setting the amount of child support:

> In determining a reasonable amount of support, initially or upon review to be paid by the noncustodial parent, the court shall refer to the most recent revision of the family support chart. It shall be a rebuttable presumption for the award of child support that the amount contained in the family support chart is the correct amount of child support to be awarded. Only upon a written finding or specific finding on the record that the application of the support chart would be unjust or inappropriate, as determined under established criteria set forth in the family support chart, shall the presumption be rebutted.

Appellee concedes that the chancellor deviated from the family child-support chart. In his brief appellee states:

> The chancellor's statements on the record concerning his reasons for deviating from the family support chart were more than sufficient to support his finding with regard to child support. These statements were not reduced to writing or included in the court's order, but they do indicate the chancellor's justification for his deviation from the chart.

Clearly, both parties agree that the chancellor deviated from the family child-support chart. Because the chancellor chose to deviate

from the family child-support chart, he must specifically articulate in writing his reasons for doing so. However, the chancellor's "Order Modifying Decree" fails to contain any mention of appellee's income, the amount of support required under the guidelines, whether or not the court deviated from the chart, or to include a justification of why the order varies from the guidelines. We reverse and remand to the chancellor to specifically articulate his reasons for deviating from the family child-support chart when appellee's income increased more than $100 per month.

On appeal, appellant also claims that the trial court erred in excluding appellee's use of a company vehicle as "income" for child-support purposes. The chancellor found that appellee's use of a 1997 four-wheel-drive Ford truck inured to the benefit of appellee's employer, First Community Bank, rather than to appellee. Appellee testified that he had the privilege of using the truck for his personal business if he supplied the gas, and that the bank supplied the gas for business purposes.

Our state supreme court specifically defined what constitutes income for child-support purposes. It stated in *Rowlett v. Bunton*, 68 Ark. App. 228, 6 S.W.3d 372 (1999) that income:

> means any form of payment, periodic, or otherwise, due to an individual, regardless of source, including wages, salaries, commissions, bonuses, worker's compensation, disability, payments pursuant to a pension or retirement program, and interest less proper deductions . . . The revised definition includes only employment earnings or payments based on employment benefits. Further the revised definition specifically provides that income must be a payment due to an individual.

We believe that appellee's use of the truck was a sizeable benefit to him and should have been considered a form of payment to him. Appellee testified that he used the truck as his personal vehicle for driving to and from work and on vacations including hunting trips. We hold that the chancellor erred by excluding appellee's use of his company truck as income for child-support purposes. On remand the chancery court should include appellee's use of the 1997 four-wheel-drive truck as income when it considers awarding appellant an increase in child support.

Reversed and remanded.

JENNINGS and BAKER, JJ., agree.

Ruby Jo BELLIS *v.* Edward A. BELLIS

CA 01-182 56 S.W.3d 396

Court of Appeals of Arkansas
Division I
Opinion delivered October 10, 2001

*F. Lewis Steenken*, for appellant.

*Walters Law Firm*, by: *Bill Walters*, for appellee.

JOHN E. JENNINGS, Judge. The appellant, Ruby Jo Bellis, and appellee, Edward A. Bellis, are siblings, and this appeal arises out of their dispute over a music box, a family heirloom. The trial court found that the parties' father had made an *inter vivos* gift of the box to appellee. For reversal, appellant contends that the trial court's decision is not supported by the evidence. We disagree and affirm.

The music box in question was purchased by the parties' grandparents in 1946. Their grandfather predeceased their grandmother, and when she died the box was left to the parties' father by will. No one disputes that it was understood by all in the family that it was their grandparents' desire for the music box to pass to appellee, as the eldest and only son. The parties' father died in a car accident in 1985, and he was followed in death by their mother in 1999. Appellee went to the family home to get the box shortly after their mother died, but found that appellant had removed it from the home. When appellant refused to relinquish the box to him, appellee filed this suit in replevin.

At trial, appellee testified that his father gave him the box in 1983, the same year that he had moved to North Carolina. Appellee said that he left the box in his parents' home because he felt that it was secure there and because his mother enjoyed the box. Appellee introduced into evidence a copy of their father's 1984 will, which contained the provision, "The trust estate shall be divided equally between all of my children except Edward A. Bellis III who shall receive a distribution from the trust estate which is $10,000.00 less than the other shares as I have heretofore made a gift of certain property to Edward A. Bellis III." Appellee testified that the gift referred to in the will was the music box. He estimated that it had a present value of $25,000.

The parties' sister, Elizabeth Ann Bellis Hanna, testified that, after their father died, her mother told her to come get a music box that her father wanted her to have because her father had given the music box in question to appellee. She explained that, like appellee, her sisters Mary and Harriet had been given music boxes by their father prior to his death and that she and appellant received boxes after his death. She said that the boxes she and her sisters received were small and worth less than the music box given to appellee, and she testified that the provision in their father's will, leaving appellee $10,000 less in reference to a gift, was related to the music box in question. She stated that she and her sisters took their boxes but that appellee left his at the family home.

Another sister, Mary Dee Bellis, testified that it was always known that the music box was to go to appellee and that her father gave appellee the box sometime between 1983 and 1985. She said that her father told her that he had given appellee the box at the time her father gave her a music box. She also testified that she had had a discussion with her father about his leaving appellee less money in his will because he had given appellee the music box. The parties' remaining sister, Stella Harriet Bellis Foster, testified that appellee owned the music box because their father had given it to him before he died. She said that she heard her father acknowledge that the box had been given to appellee and that their mother continued to acknowledge appellee's ownership after their father's death. She testified that appellee voluntarily allowed the box to remain in their parents' home because their mother enjoyed it.

Kathy Elizabeth Gifford, their mother's friend, testified that Mrs. Bellis had told her on numerous occasions that the music box belonged to appellee. Jack Smith also testified that, shortly before she died, Mrs. Bellis told him that he could not have the box because it belonged to appellee.

Appellant offered the testimony of Bridgett Province who had known Mrs. Bellis since 1990. She said that Mrs. Bellis told her at least a dozen times that the music box belonged to appellant. Ruby Reed, who had known Mrs. Bellis all of her life, testified that she had once asked Mrs. Bellis what she was going to do with the box and that Mrs. Bellis told her that it would belong to appellant when she was gone. Ms. Reed said that Mrs. Bellis told her that many times. Edna Gossage, a home health nurse who cared for Mrs. Bellis beginning in 1994, testified that Mrs. Bellis told her many times that she wanted appellant to have the music box when she died.

Appellant testified that she had no knowledge of her father giving the box to appellee. She said that she understood that appellee was supposed to inherit the box, but she said that her father had become disenchanted with appellee because he had moved out of state. Appellant did testify that she recalled her father saying that the music box had been given to appellee, but she said that her father took it back when appellee moved away. She testified that the provision in the will did not refer to the music box, but to a parcel of land their father had given appellee. Appellant testified that she began taking care of their mother in 1991 and that her mother told her sometime around 1996 that she could have the music box. Appellant said that her mother gave her the box during the last year of her life and that she removed the box from the home three days before her mother died.

In rebuttal, appellee testified that he had the right to take the music box any time he wanted. He said that he told his father that he would leave the box in the family home, but he said that he was not obligated to do so. Appellee said that the box was his property and that he left it at home for his mother's enjoyment.

Arkansas law is clear that one seeking to sustain an *inter vivos* gift must prove by clear and convincing evidence that: (1) the donor was of sound mind; (2) an actual delivery of the property took place; (3) the donor clearly intended to make an immediate, present, and final gift; (4) the donor unconditionally released all future dominion and control over the property; and (5) the donee accepted the gift. *Jamison v. Estate of Goodlett*, 56 Ark. App. 71, 938 S.W.2d 865 (1997). The test on appeal is not whether there is clear and convincing evidence to support the trial court's findings, but it is whether we can say that the trial court's findings are clearly erroneous. *See Estate of Sabbs v. Cole*, 57 Ark. App. 179, 944 S.W.2d 123 (1997). In our review, we will defer to the trial court's evaluation of the credibility of the witnesses. *See O'Fallon v. O'Fallon*, 341 Ark. 138, 14 S.W.3d 506 (2000).

On appeal, appellant stresses that the music box remained in the family home and contends that the trial court's findings with regard to delivery and the donor's release of dominion and control are clearly erroneous. We do not agree.

The rule with respect to delivery of gifts is less strictly applied to transactions between family members. Even so, delivery must occur for a gift to be effective. *Chalmers v. Chalmers*, 327 Ark. 141, 937 S.W.2d 171 (1997). The gravamen of delivery is a showing

of an act or acts on the part of the putative donor displaying an intention or purpose to part with dominion over the object of the gift and to confer it on some other person. *Bishop v. Bishop*, 60 Ark. App. 164, 961 S.W.2d 770 (1998). The intention to give is not sufficient; there must be a delivery to consummate the gift and pass title. *Gross v. Hoback*, 187 Ark. 20, 58 S.W.2d 202 (1933). In this case, appellee testified that his father gave him the music box and that he had the right to take it away, but that he chose to leave it at home for safekeeping and for his mother's enjoyment. The testimony of the parties' sisters was just as unequivocal that their father had given the box to appellee and that they in turn had also received music boxes. Their father's 1984 will reduced appellee's share of the estate on account of a previous gift, and appellee and the parties' sisters were in agreement that the music box was the gift referred to in the will. The trial court was entitled to credit the testimony of these witnesses that an actual, completed gift was made and to conclude that appellee simply left the music box with his parents, as was his prerogative to do. We cannot say that the court's decision is clearly erroneous. *See, e.g., Carlson, Adm'r v. Carlson*, 224 Ark. 284, 273 S.W.2d 542 (1954). *Accord Prater v. Frazier*, 11 Ark. 249 (1850).

Affirmed.

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

James L. NARUP *v.* Linda Leann NARUP

CA 00-1234 57 S.W.3d 224

Court of Appeals of Arkansas
Division IV
Opinion delivered October 10, 2001

*Davidson Law Firm, Ltd.*, by: *Charles Darwin "Skip" Davidson*, for appellant.

*Friday, Eldredge & Clark*, by: *Barry E. Coplin* and *Betty J. Demory*, for appellee.

WENDELL L. GRIFFEN, Judge. This case involves a dispute about a chancellor's power to clarify a temporary order after a divorce decree is entered. The decree, entered on March 14, 2000, ordered appellant, James Narup, to maintain appellee Linda Leann Narup's medical insurance through July 2000. However, the decree failed to mention the party responsible for appellee's outstanding medical expenses. Appellee subsequently filed a motion seeking clarification of previous orders — including a 1999 temporary order concerning payment of appellee's medical expenses. Following a hearing, the chancellor entered an order that found appellant responsible for appellee's medical expenses from 1997 to March 14, 2000. Appellant now argues that the chancellor lacked jurisdiction to modify the divorce decree and that the order from the temporary hearing did not conform to the trial record. We affirm.

*Facts and Procedural History*

Appellant filed for divorce on March 10, 1999. The court scheduled a temporary hearing for April 28, 1999. During that hearing, the chancellor stated the following:

> THE COURT: I'm going to order $3,000 in spousal support, pro-rate April, the next payment due May 1. Mr. Narup will pay the drug bills that are at the pharmacist that are prescribed. Ms. Narup will pay her own co-pay, insurance co-pay.

Following the hearing, the chancellor entered a temporary order, dated May 21, 1999, that directed appellant to pay appellee's medical and pharmaceutical expenses that were not covered by insurance with the exception of a co-payment, which the chancellor ordered appellee to pay. Neither party appealed the temporary order.

A two-day hearing occurred on January 20 and 21, 2000. During the hearing, appellant introduced Exhibit 1, which outlined the parties' assets and liabilities and included a list of appellee's outstanding medical expenses from 1997 through 1999. Following the hearing, the chancellor entered a divorce decree on March 14, 2000, that ordered, among other things, appellant to maintain

appellee's medical insurance through July 2000. However, the order did not address the party responsible for appellee's outstanding medical expenses. Neither party appealed the decree.

On March 29, 2000, appellee filed a Motion for Clarification regarding her outstanding medical expenses and argued that the decree failed to address the party responsible for paying medical bills that she incurred through 1999. Appellant filed a response, dated April 6, 2000, and contended that appellee had enough money to pay her medical expenses and that the chancellor did not order him to pay medical expenses. He further alleged that the expenses were not reasonable or necessary.

The chancellor held a hearing on the Motion for Clarification on June 21, 2000. He later entered an order dated June 30, 2000, that directed appellant to pay appellee's medical expenses from 1997 through the date of the divorce. In making his findings, the chancellor referred to previously entered orders, including the temporary order dated May 21, 1999, which ordered appellant to pay appellee's medical and pharmaceutical expenses not covered by insurance. Appellant filed a motion for reconsideration on July 21, 2000. That motion marked the first time that appellant alleged that the 1999 temporary order erroneously directed him to pay appellee's medical bills. In response, appellee argued that appellant's motion for reconsideration should be dismissed as untimely because it was filed more than ten days following the entry of the June 30, 2000 order. Alternatively, she asserted that the chancellor discussed the medical expenses during the two-day trial and at the 1999 temporary hearing when he ordered her to pay a co-insurance payment of $10 and $20 per visit. She contended appellant did not file a timely appeal or motion regarding the 1999 temporary order, and that the temporary order should not be modified. Also, she argued that the June 30, 2000 order was not a modification to the final decree. Appellant now challenges the June 30, 2000 order on appeal, contending that the chancellor lacked jurisdiction to enter the order and that the temporary order from which the chancellor based his decision did not conform to the transcript of the temporary hearing.

*Standard of Review*

Chancery decisions are reviewed *de novo* on appeal, and are not reversed unless this court finds that the chancellor's decision is clearly erroneous. *See Reddick v. Streett*, 313 Ark. 706, 858 S.W.2d

62 (1993). We hold that the June 30, 2000 order directing appellant to pay appellee's medical expenses from 1997 through the date of the divorce was not clearly erroneous because the chancellor had inherent power to correct the record pursuant to well-settled case law.

*Jurisdiction to Enter June 30, 2000 Order*

Trial courts have inherent power to enter an order for the purpose of correcting a judgment to ensure that the judgment is truthful and that it accurately reflects the court's original ruling. *See McGibbony v. McGibbony*, 12 Ark. App. 141, 671 S.W.2d 212 (1984). This power is not absolute, and the court is limited to correcting the order to reflect the action the court actually took as demonstrated by the record rather than the action the court should have taken. *See id.* This being so, a trial court has the power to correct a decree to accurately reflect its original ruling or to interpret its prior decision. *See Sims v. First State Bank of Plainview*, 73 Ark. App. 325, 43 S.W.3d 175 (2001).

In *Sims, supra,* the appellants argued that the chancellor had jurisdiction to set aside a November 1999 replevin order based on their January 24, 2000 motion to set aside pursuant to Rule 60(b) of our Rules of Civil Procedure. Our court disagreed, and held that Rule 60 expressly prohibits a trial court from modifying or setting aside an order after the expiration of ninety days unless a party presents proof of an enumerated exception. However, we recognized a trial court's inherent power to correct a record to ensure that the record accurately reflects what actually happened. We then upheld the chancellor's order entered in April 13, 2000, as an *interpretation* of its November 1999 order. *See Sims, supra.*

The record in the present case demonstrates that the chancellor entered the temporary order, dated May 21, 1999, which directed appellant to pay appellee's medical and pharmaceutical expenses not covered by insurance with the exception of a co-payment amount. In addition, during the trial, appellant offered into evidence Exhibit 1, which included an itemized list of appellee's medical expenses from 1997 through 1999.

Contrary to appellant's contentions, the chancellor's June 30, 2000 order did not modify its March 14, 2000 decree. Instead, the order interpreted the trial court's May 21, 1999 order and clarified its March 14, 2000 decree with respect to the earlier

court's original ruling. Given our decision in *Sims, supra*, the chancellor had jurisdiction to do so.

*Failure of Temporary Order to Conform to the Transcript*

For his second point, appellant asserts that the temporary order that the chancellor relied on in entering the June 30, 2000 order did not conform to the transcript. Appellant's argument is not timely. Our laws are well settled that an appellant may not argue on appeal that a trial court acted erroneously when the appellant encouraged, acquiesced, or consented to the action. *See Dodson v. Dodson*, 37 Ark. App. 86, 825 S.W.2d 608 (1992). To preserve an allegation of error, an appellant is required to raise the error in the court proceeding below, at the first opportunity. *See Edwards v. Stills*, 335 Ark. 470, 984 S.W.2d 366 (1998).

Following a temporary hearing on April 28, 1999, the chancellor entered a temporary order on May 21, 1999. Appellant did not object to the order, move for the chancellor to reconsider the order, or seek to correct the order. It is significant that appellant did not complain about the temporary order during the two-day hearing. Appellant also did not object to the language in the order when he responded to appellee's motion for clarification or during the hearing on the motion for clarification. The record indicates that the first time appellant complained about the language of the order was more than a year later when he filed a motion requesting that the chancellor reconsider his June 30, 2000 order. Because appellant did not seek to modify or correct the temporary order in a timely fashion, he has not preserved this issue for appellate review.

Affirmed.

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

DUKE WHOLESALE, INC. *v.* Sharon L. PITCHFORD
and Compass Bank

CA 01-64 56 S.W.3d 399

Court of Appeals of Arkansas
Division IV
Opinion delivered October 10, 2001

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

*Mildred H. Hansen*, for appellee Sharon L. Pitchford.

*Horne, Hollingsworth & Parker*, by: *Bradley S. Chafin*, for appellee Compass Bank.

OLLY NEAL, Judge. Appellant, Duke Wholesale, Inc. (Duke), appeals from an award of summary judgment to appellees, Sharon Pitchford and Compass Bank, by the Saline County Chancery Court. Appellees filed suit seeking a declaratory judgment, arguing that title to a 1995 Chevrolet Camaro was in Pitchford's name and that Duke be required to release the certificate of title to Pitchford and Compass Bank. In their motion for summary judgment, appellees argued that Pitchford was a buyer in the ordinary course of business and as such, under Ark. Code Ann. § 4-9-307(a) (Repl. 1991), she took the car free of Duke's security interest and that Compass Bank received the benefit of Pitchford's

protection under Ark. Code Ann. § 4-9-307(a). They also argued that Duke retained only a security interest in the proceeds from the sale of the car, but not the car itself. In his order granting summary judgment, the chancellor found there were no genuine issues of material fact and awarded Pitchford and Compass Bank attorneys' fees and cost. We affirm the chancellor's grant of summary judgment and reverse the award of attorneys' fees and costs.

Appellant, Duke, is an automobile wholesaler. Compass Bank is an Alabama corporation and financier of automobiles. Duke sold and delivered a 1995 Chevrolet Camaro to Mike Woodall Auto Sales, Inc. d/b/a Mike Woodall Subaru (Woodall). In lieu of payment, Duke retained the certificate of title to the Camaro as security for payment of the purchase price of the car. In January of 1998, Woodall sold the Camaro to Pitchford for $11,900. Pitchford gave Woodall a $1,500 down payment and financed the remainder of the purchase price under a retail installment and security agreement that Woodall assigned to Compass Bank. In exchange for the contract and security agreement, Compass Bank paid Woodall the remainder of the purchase price. Woodall failed to pay Duke for the car and has since closed. On January 20, 1999, Compass requested that Duke release the certificate of title to Compass and Pitchford. Duke refused to relinquish title, alleging it had an interest superior to Compass Bank's interest.

On March 30, 1999, appellees Compass Bank and Pitchford filed a complaint for declaratory judgement seeking a declaration that: (i) Duke sold and delivered to Woodall, or otherwise entrusted Woodall with possession of the automobile, (ii) at all times Duke was a merchant dealing in used automobiles, (iii) at all time relevant, Woodall was a merchant who dealt with new and used automobiles, and (iv) pursuant to Ark. Code Ann. § 4-2-403 (Repl. 1991), Woodall had the power and authority to transfer and convey all Duke's right in the automobile to Pitchford. Pitchford and Compass Bank also sought a declaration that: (i) Duke was a merchant, (ii) Woodall was a merchant, (iii) Pitchford purchased the automobile from Woodall as a buyer in ordinary course, pursuant to Ark. Code Ann. § 4-1-201(9) (Repl. 1991), and (iv) that pursuant to Ark. Code Ann. § 4-9-307(1), Pitchford took the automobile free of any lien or interest created in favor of Duke by Woodall.

Appellees filed a motion for summary judgment on July 13, 1999. They asserted Pitchford was a buyer in the ordinary course of business, who took the Camaro free of Duke's security interest and that Compass Bank was protected due to her protected status. They

supported their motion with the affidavits of Lynn Boyles, Compass Bank's Vice President, and Pitchford. Appellees also submitted the retail-installment contract and security agreement. Both Boyles and Pitchford stated they had no knowledge that the sale was in violation of Duke's security interest. Duke responded to the motion alleging there were genuine issues of material fact with respect to Compass Bank's rights. Duke questioned Compass Bank's relationship with Woodall. Duke alleged that Compass Bank did not provide Pitchford purchase money, but merely purchased Pitchford's loan from Woodall. Duke also counterclaimed for declaratory judgment, seeking that its lien be declared the first lien, that Compass Bank deliver all sums received under the installment sales contract, that their lien be recorded on the certificate of title, and that Duke be declared the owner of the retail-installment contract.

On November 15, 1999, Duke filed a supplemental response to the motion for summary judgment asserting (1) that Compass Bank and Woodall were closely connected and the close-connectedness doctrine prevented summary judgment in Compass Bank's favor, (2) that the doctrine prevents Compass Bank from recovery, and (3) that there are genuine issues of material fact concerning the close-connectedness doctrine. Duke supported its response with the affidavit of Patrick Campbell. Campbell stated he had been a sales manager at Woodall, and Compass Bank established the conditions for purchases based on the purchaser's credit rating, type of car, and interest rate to be paid. He also stated that the contract was a printed form prepared by Compass Bank.

In his order filed August 22, 2000, the chancellor found (1) no genuine issues of material fact, (2) that Duke delivered possession of the vehicle to Woodall and was an entrustor of the vehicle, (3) that Woodall was in the business of selling vehicles of that kind, (4) that Pitchford was a buyer in the ordinary course of business and (5) that she purchased the vehicle in good faith and without knowledge of Duke's interest. The chancellor found that upon purchase, title passed to Pitchford and that Compass Bank's rights were derived from Pitchford, not Woodall. The chancellor found the "close-connectedness" doctrine was inapplicable and had no relevance to the facts of the case. The chancellor awarded Compass Bank $2,500 in attorneys' fees and awarded Pitchford $1,000 in attorneys' fees.

Summary judgment is appropriate when there is no genuine question of material fact to be litigated. *Watts v. St. Edward Mercy Med. Ctr.*, 74 Ark. App. 406, 49 S.W.3d 149 (2001). Once the

moving party makes a *prima facie* showing of entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *See Plant v. Wilbur*, 345 Ark. 487, 47 S.W.3d 889 (2001) (quoting *Worth v. City of Rogers*, 341 Ark. 12, 14 S.W.3d 471 (2000)). On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *Wright v. City of Monticello*, 345 Ark. 420, 47 S.W.3d 851 (2001). We view pleadings, affidavits, documents, and exhibits filed in support of a motion for summary judgment in the light most favorable to the nonmoving party. *Tackett v. McDonald's Corp.*, 68 Ark. App. 41, 3 S.W.3d 340 (1999). After reviewing undisputed facts, summary judgment should be denied if, under the evidence, reasonable men might reach different conclusions from those undisputed facts. *Plant v. Wilbur, supra* (quoting *Worth v. City of Rogers*, 341 Ark. 12, 14 S.W.3d 471 (2000)).

On appeal, Duke questions whether there is a genuine issue of material fact, which would indicate that its equitable vendor's lien is superior to Compass Bank's lien on the retail-installment contract, created as a result of Woodall's "close-connectedness" to Compass Bank, thereby imputing Woodall's knowledge and conduct to Compass Bank. Duke relies on *Commercial Credit Co. v. Childs*, 199 Ark. 1073, 137 S.W.2d 260 (1940), to support its argument that Woodall and Compass Bank were closely-connected. We decline to follow the holding of *Commercial Credit Co. v. Childs, supra*, as it is a pre-code case.

In order to resolve the conflict existing between the parties, we must proceed through a step-by-step analysis of each transaction using the current code. We begin with the transaction between Duke and Woodall. In the present case, Duke retained a security interest in the car it provided Woodall. Arkansas Code Annotated section 4-9-107(a) (Repl. 1991) provides that "a security interest is a 'purchase money security interest' (PMSI) to the extent that it is taken or retained by the seller of the collateral to secure all or part of its price." *See also Herringer v. Mercantile Bank*, 315 Ark. 218, 866 S.W.2d 390 (1993). The facts indicate that Duke retained the certificate of title as security for payment of the purchase price of the car; therefore, under the current code, Duke had a PMSI in the car. The car is a good. Arkansas Code Annotated section 4-9-109(4) (Repl. 1991) states that "goods are inventory if they are held by a person who holds them for sale or lease." Woodall was engaged in the business of selling cars; thus, Duke had a PMSI in inventory.

Furthermore, a PMSI in inventory has "priority over a conflicting security interest in the same inventory and also has priority in *identifiable cash proceeds* . . . ." Ark. Code Ann. § 4-9-312(3) (Repl. 1991) (emphasis added).

We now move to the transaction between Woodall and Pitchford. A buyer in the ordinary course of business takes free of a security interest created by her seller even though the security interest is perfected and even though the buyer knows of its existence. *Merchant & Planters Bank v. Phoenix Hous. Sys.*, 21 Ark. App. 153, 729 S.W.2d 433 (1987); *see also* Ark. Code Ann. § 4-9-307 (Repl. 1991). A buyer in the ordinary course of business is defined as "a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in the ordinary course from a person in the business of selling goods of that kind." Ark. Code Ann. § 4-1-201(9) (Repl. 1991). The facts in this case indicate that Pitchford was a buyer in the ordinary course of business. She purchased the car in good faith and without notice of Duke's interest. As stated earlier, Woodall was engaged in the business of selling cars; therefore, Pitchford purchased the car from someone in the business of selling goods of that kind. As a buyer in the ordinary course, Pitchford was afforded the protection of Ark. Code Ann. § 4-9-307 and took free of Duke's security interest.

Pitchford gave Woodall a $1,500 down payment and Woodall financed the remainder of the purchase price using a retail-installment contract and security agreement. "A writing or writings which evidence both a monetary obligation and a security interest in . . . specific goods is considered chattel paper." *See* Ark. Code Ann. § 4-9-105(b) (Supp. 1999). The retail-installment contract and security agreement are chattel paper.

Our code provides that "a security interest continues in collateral notwithstanding sale, exchange, or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds . . ." Ark. Code Ann. § 4-9-306(2) (Supp. 1999). Proceeds are defined as whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds. Ark. Code Ann. § 4-9-306(1) (Supp. 1999). The transaction between Woodall and Pitchford resulted in Duke having a security interest in the $1,500 down payment and the chattel paper.

Upon completing the transaction with Pitchford, Woodall assigned the installment contract and security agreement to Compass Bank, in exchange for Compass Bank paying Woodall the remainder of the purchase price. The contract and security agreement were chattel paper. Ark. Code Ann. § 4-9-308 (Repl. 1991) provides:

> A purchaser of chattel paper or an instrument who gives new value and takes possession of it in the ordinary course of his business has priority over security interest in the chattel paper or instrument:
>
> > (b) Which is claimed merely as proceeds of inventory subject to a security interest (§ 4-9-306) even though he knows that the specific paper or instrument is subject to the security interest.

New value arises where a secured party (1) makes an advance, (2) incurs an obligation, or (3) releases a perfected security interest. *Niedermeier v. Cent. Prod. Credit Ass'n*, 300 Ark. 116, 777 S.W.2d 210 (1989). The new value in the present case was the payment of the remainder of the purchase price. Compass Bank, engaged in the business of financing cars, took possession of the chattel paper in the ordinary course of its business. Therefore, under section 4-9-308 Compass Bank had priority over Duke's security interest.

The new value paid to Woodall by Compass Bank became a proceed of Duke's original security interest. Duke's PMSI attached to the funds received by Woodall. Compass Bank, as holder of the chattel paper, was entitled to the certificate of title.

We are of the opinion that there were no genuine issues of material fact. After careful review of the pleadings, affidavits, documents, and exhibits filed in support of the motion for summary judgment in a light most favorable to Duke, we hold that reasonable men could not reach a different conclusion from that of the chancellor. The grant of summary judgment by the chancellor was proper.

Duke makes an issue of the fact that it was not allowed to complete discovery. This issue is without merit. The facts reveal that Compass Bank and Pitchford filed their initial complaint for declaratory judgment on March 30, 1999. They filed their motion for summary judgment on July 13, 1999. Duke filed a counterclaim for declaratory judgment on November 15, 1999. The chancellor entered his order granting summary judgment on August 22, 2000.

Duke had over a year to initiate discovery; it simply failed to avail itself of the discovery process. We hold that Duke failed to do timely discovery; therefore, it waived discovery.

Duke also challenges the award of attorneys' fees. Duke questions whether Ark. Code Ann. § 16-22-309 (Repl. 1999) applies, and if so, to what extent. Section 16-22-309(a)(1) (Repl. 1999) provides:

> In any civil action in which the court having jurisdiction finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party or his attorney, the court shall award an attorney's fee in an amount not to exceed five thousand dollars ($5,000), or ten percent (10%) of the amount in controversy, whichever is less, to the prevailing party unless a voluntary dismissal is filed or the pleadings are amended as to any nonjusticiable issue within a reasonable time after the attorney or party filing the dismissal or the amended pleadings knew, or reasonably should have known, that he would not prevail.

To obtain an attorney's fee pursuant to section 16-22-309(a)(1), the prevailing party must show that there was a complete absence of a justiciable issue of either law or fact raised by the losing party or his attorney. *Chlanda v. Killebrew*, 329 Ark. 39, 945 S.W.2d 940 (1997). Compass Bank has not shown a complete absence of a justiciable issue; therefore, we reverse the award of attorneys' fees and cost.

Affirmed in part, reversed in part.

PITTMAN and VAUGHT, JJ., agree.

EMERSON ELECTRIC *v.* Vera A. GASTON

CA 01-136 58 S.W.3d 848

Court of Appeals of Arkansas
Division II
Opinion delivered October 10, 2001

[redacted]

*Roberts, Roberts, & Russell, P.A.*, by: *Bud Roberts*, *Bruce Anible*, and *Ben Cormack*, for appellant.

*Lawrence W. Fitting, P.A.*, by: *Lawrence W. Fitting*, for appellee.

KAREN R. BAKER, Judge. Appellant, Emerson Electric, brings this appeal challenging a decision of the Workers' Compensation Commission awarding temporary total disability benefits for the period between January 27, 1998, and April 13, 1998. On appeal, appellant argues the following: the evidence was insufficient to support a twenty-six percent impairment rating; the evidence was insufficient to support a fifty-percent wage loss; and the evidence was insufficient to support temporary total disability benefits for the period between January 27, 1998, and April 13,

1998. Appellee cross-appeals on the issue of permanent total disability benefits. We affirm on direct appeal and on cross-appeal.

Appellee, Vera Gaston, has been employed by appellant for thirty-one years. Around 1992, appellee was transferred to the winding department. The winding department was an area of appellant's plant in which varnish was coated onto the motor product. Appellee became exposed to varnish vats, varnish ovens, sanders, and grinders, and she began experiencing respiratory difficulties for which she sought medical treatment.

Appellee first saw her family physician, who referred her to Dr. Robert Sanders, a pulmonary specialist. Dr. Sanders diagnosed appellee with occupational asthma, took her off work, and assessed her with a permanent-impairment rating of one hundred percent to the body as a whole. On August 21, 1998, appellee saw Dr. Joseph Bates. After performing a series of tests, Dr. Bates concluded that appellee had no objective abnormalities, normal pulmonary function, and assessed a permanent impairment rating of zero percent. On October 27, 1998, Dr. Sanders performed another series of tests, which resulted in the same diagnosis, a permanent-impairment rating of one hundred percent as to the body as a whole. On January 14, 1999, another physician, Dr. Paula Anderson, performed a series of tests on appellee and concluded that appellee had not sustained any permanent physical impairment to her pulmonary function.

The Administrative Law Judge (ALJ) found that appellee's asthma was a compensable occupational disease and awarded additional wage-loss benefits in the amount of fifty percent. The Commission remanded the claim to the ALJ for more adequate findings on the issues of objective medical findings and permanent physical impairment. In a supplemental opinion, the ALJ found that the pulmonary tests performed by the treating physician were objective and that appellee sustained a twenty-six percent permanent physical impairment to the body as a whole in addition to other benefits in the previous opinion. The Commission affirmed the findings of the ALJ in the original and supplemental opinion. From that decision comes this appeal.

■ We affirm the Commission if its decision is supported by substantial evidence; substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Air Compressor Equip. v. Sword*, 69 Ark. App. 162, 11 S.W.3d 1 (2000). We view the evidence in the light most favorable to the

findings of the Commission and give the testimony its strongest probative force in favor of the action of the Commission. *Buford v. Standard Gravel Co.*, 68 Ark. App. 162, 5 S.W.3d 478 (1999). If reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Southern Steel & Wire v. Kahler*, 54 Ark. App. 376, 927 S.W.2d 822 (1996).

First, appellant challenges the sufficiency of the evidence in regard to the twenty-six percent impairment rating awarded by the Commission. Appellant asserts that there are two reasons that the validity of the rating is not supported by substantial evidence. First, the rating was not based on objective medical findings. Instead, it was based on medical tests which could have come under the voluntary control of the appellee. Second, in assigning the twenty-six percent impairment rating, the ALJ failed to consider all relevant information as required by the AMA Guides in that the ALJ failed to consider appellee's physical condition and ignored two impairment ratings assigned by physicians who did consider this information.

Arkansas Code Annotated section 11-9-704(c)(1)(B) (Repl. 1996) states that "any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings." Moreover, Arkansas Code Annotated section 11-9-102(16)(A)(i) (Repl. 1996) provides that " 'objective findings' are those findings which cannot come under the voluntary control of the patient." During appellee's treatment, both Dr. Sanders and Dr. Bates performed pulmonary-function testing. Both stated in their depositions that the test results depend on the patient giving maximum effort. Clearly, a patient's breathing is at least partially within his or her control and potentially subject to manipulation. However, both doctors opined that appellee was giving maximum effort throughout her testing. Moreover, Dr. Sanders testified as to several factors which help determine whether the patient was performing maximal exercise. Two of those factors included studying the steady rise in oxygen-consumption data to see when the data reaches a plateau and studying the respiratory exchange ratio on the exercise test and the bicarbonate drop in the blood gas obtained at peak exercise to determine when the patient has become anaerobic. Thus, the pulmonary-function testing is clearly an objective test due to the objective data the test produces, in spite of the fact that a patient is at least partially able to control his or her breathing. We find that the Commission was correct in concluding that the oxygen-consumption data and the bicarbonate-

drop data were both objective chemical data, which provide qualitative and quantitative analysis to determine whether the patient has in fact expended maximum effort during exercise, and that the chemical analysis itself is not under the voluntary control of the patient.

Appellant also challenges the twenty-six percent impairment rating because the ALJ failed to consider appellee's physical condition and ignored two impairment ratings assigned by physicians who did consider this information. Contrary to appellant's assertion, the specific degree of impairment was determined primarily by the physicians' testimony, even though it was conflicting. 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. *University of Ark. Med. Sciences v. Hart*, 60 Ark. App. 13, 958 S.W.2d 546 (1997) (citing *Whaley v. Hardee's*, 51 Ark. App. 166, 912 S.W.2d 14 (1995)). The Commission is not required to believe the testimony of any witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Id.* Once the Commission has made its decision on issues of credibility, the appellate court is bound by that decision. *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998) (citing *Linthicum v. Mar-Bax Shirt Co.*, 23 Ark. App. 26, 741 S.W.2d 275 (1987)).

Second, appellant challenges the sufficiency of the evidence as to the fifty-percent wage loss awarded by the Commission. The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Eckhardt v. Wills Shaw Express, Inc.*, 62 Ark. App. 224, 970 S.W.2d 316 (1998). The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage loss, such as the claimant's age, education, and work experience. *Id.* (citing Ark. Code Ann. § 11-9-522(c)(1) (Supp. 1997)). In considering factors that may affect an employee's future earning capacity, the court considers the claimant's motivation to return to work, since a lack of interest or a negative attitude impedes our assessment of the claimant's loss of earning capacity. *Ellison v. Therma Tru*, 71 Ark. App. 410, 30 S.W.3d 769 (2000). Dr. Sanders' diagnosis required that appellee refrain from working in any environment which would cause her to be exposed to excessive dust or chemicals. Since appellee has been in this line of work for thirty-one years, her employment opportunities may have been limited. In addition, appellee was fifty-seven years of age, and her level of education consisted of a GED; both of these factors would

also inevitably limit her employment opportunities. We hold that substantial evidence supported the Commission's award of fifty-percent wage loss.

Third, appellant challenges the sufficiency of the evidence as to the temporary total disability benefits for the period between January 27, 1998, and April 13, 1998. Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. *Carroll Gen. Hosp. v. Green*, 54 Ark. App. 102, 923 S.W.2d 878 (1996) (citing *J.A. Riggs Tractor Co. v. Etzkorn*, 30 Ark. App. 200, 785 S.W.2d 51 (1990)). Arkansas Code Annotated section 11-9-102(13) (Supp. 1995) defines "healing period" as that period for healing of an injury resulting from an accident. The healing period continues until the employee is as far restored as the permanent character of his injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. *Harvest Foods v. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996). The determination of when the healing period has ended is a factual determination for the Commission, which is affirmed on appeal if supported by substantial evidence. *Carroll Gen. Hosp.*, 54 Ark. App. at 107, 923 S.W.2d at 881. In Dr. Sanders's opinion, during the period from January 27, 1998, to April 13, 1998, appellee's condition was so severe as to render her incapable of performing any of her regular employment duties; Dr. Sanders took appellee off work completely in January 1998. Appellee continued to receive medical care from January 1998 to April 1998, and on April 14, 1998, Dr. Sanders concluded that appellee had reached her maximum medical improvement. In view of Dr. Sanders's testimony, we hold that substantial evidence supported the award of temporary total disability benefits from January 27, 1998, to April 13, 1998.

On cross-appeal, appellee asserts that she has proven by a preponderance of the evidence that she is permanently totally disabled based on Dr. Sanders's one hundred percent impairment rating; however, the Commission has the authority to accept or reject medical opinions. *See Estridge v. Waste Management*, 343 Ark. 276, 33 S.W.3d 167 (2000). She further argues that she is entitled to permanent total disability because her work opportunities are restricted due to the fact that she is fifty-seven years old, has a GED, has worked for appellant for thirty-one years, and that she must abstain from working around dust and chemicals. However, the Commission stated that appellee's work opportunities were not completely restricted. The Commission also considered her lack of

motivation in finding employment. *See Ellison, supra.* We acknowledge that her argument resembles the odd-lot doctrine; however, that doctrine has been abolished by Act 796 of 1993, codified at Arkansas Code Annotated section 11-9-522(e) (Supp. 1999). *See Goodwin v. Phillips Petroleum Co.*, 72 Ark. App. 302, 37 S.W.3d 644 (2001). Despite appellee's physical restrictions, we hold that substantial evidence supported the Commission's finding that appellee was not permanently totally disabled.

Pursuant to the Commission's authority, it heard and weighed the conflicting evidence presented in this case and gave the evidence the weight it deemed appropriate. We hold that the Commission's decision was supported by substantial evidence and affirm on direct appeal and on cross-appeal.

JENNINGS and CRABTREE, JJ., agree.

CHILI'S OF JONESBORO, INC.; North Hills Hillbillies, Inc. d/b/a Outback Steakhouse of Jonesboro, Inc. *v.* STATE of Arkansas Alcohol Beverage Control Division

CA 01-366 57 S.W.3d 228

Court of Appeals of Arkansas
Division II
Opinion delivered October 17, 2001

*Hilburn, Calhoon, Harper, Pruniski & Calhoon, Ltd.*, by: *Sam Hilburn* and *Traci La Cerra*, for appellant.

*Milton R. Lueken*, for appellee.

SAM BIRD, Judge. The Director of the Alcohol Beverage Control Division denied private-club permits to Chili's of Jonesboro, Inc., and Outback Steakhouse of Jonesboro, Inc., both of which wished to locate in Jonesboro. The restaurants appealed to the Alcohol Beverage Control Board where the hearings on the applications were consolidated, with the evidence relating to one of the applications relating to both. The Board denied the permits, finding that issuing the permits was not in the public interest of Jonesboro citizens because of the strong opposition to the clubs, that the restaurants would not be operated for a private-club purpose, that the intersection near the proposed site was dangerous, and that Craighead County was a dry county. On appeal to the circuit court, the Board's decision was affirmed and the restaurants now appeal, contending that the decision of the Board was not supported by substantial evidence. Because we find that the Board's decision is supported by substantial evidence, we affirm.

On appeal, our review is directed, not toward the circuit court, but rather toward the decision of the agency. *Arkansas State Hwy. & Transp. Dep't v. Kidder*, 326 Ark. 595, 933 S.W.2d 794 (1996). The decision of the Board should be upheld if it is supported by substantial evidence and is not arbitrary, capricious, or characterized by an abuse of discretion. *Department of Fin. & Admin. v. Samuhel*, 51 Ark. App. 76, 909 S.W.2d 656 (1995). An administrative decision should be reversed as arbitrary and capricious only when it is not supportable on any rational basis, not simply because the reviewing court would have acted differently. *McKinley v. Arkansas Dep't. of Human Servs.*, 311 Ark. 382, 844 S.W.2d 366 (1993). Determining whether the Board's decision was arbitrary or capricious involves a limited inquiry into whether it acted with willful and unreasoning disregard of the facts and circumstances of the case. *Fontana v. Gunter*, 11 Ark. App. 214, 669 S.W.2d 487 (1984).

The reviewing court is to give the evidence its strongest probative force in favor of the agency's ruling. *State Police Comm'n v. Smith,* 338 Ark. 354, 994 S.W.2d 456 (1999). The question on review is not whether the evidence would have supported a contrary finding but whether it supports the finding that was made. *Fontana, supra.* The reviewing court cannot displace the Board's choice between two fairly conflicting views even though the court might have made a different choice had the matter been before it *de novo*; and the question of whether the Board's action was arbitrary or capricious is only applicable when the decision is not supported by any rational basis and is made in disregard of the facts and circumstances. *Id.* A reviewing court may not set aside a Board's decision unless it cannot conscientiously find from a review of the entire record that the evidence supporting the decision is substantial. *Id.* To establish an absence of substantial evidence it must be demonstrated that the proof before the administrative tribunal was so nearly undisputed that fair-minded persons could not reach its conclusions. *Kidder, supra.*

The burden is on the applicant to show that he is "qualified" to hold the permit and that issuance of the permit is "in the public interest," whereupon the Board "may" issue the permit. *Arkansas Beverage Control Bd. v. King,* 275 Ark. 308, 629 S.W.2d 288 (1982). The threshold question that must be considered by the Board is whether the private-club applicant will be "qualified"; thus, necessarily it must be determined whether the proposed club will meet the definition of a private club. In order to qualify as a private club, a nonprofit corporation must be established for a recreational, social, patriotic, political, national, benevolent, athletic, or other nonprofit purpose other than the consumption of alcoholic beverages. *See* Ark. Code Ann. § 3-9-202(10) (Repl. 1996). Bruce Attinger, a joint venturer associated with Outback, testified that the common purpose of the private-club members would be "[s]ocial eatery, I guess, enjoying food, and camaraderie." Additionally, Kim Williams, senior development manager for Brinker International, the holding company for Chili's restaurants, testified that the employees of Chili's restaurants are permitted to choose a charity that the restaurant will support in the local community, and that, statewide, Chili's restaurants serve as drop-off points for the Toys for Tots program. Bruce Attinger testified that Outback's local partner selects a local charity to support and that Outback was very involved on the national level with the Boys and Girls Club, hosting fundraising dinners.

In *King, supra,* the supreme court affirmed the denial of a private-club permit because the private club did not meet the requisite statutory purpose. The purpose of that club was described in testimony as "[a] social gathering for people to come to, to enjoy food with a drink . . ." *Id.* The Board found that "[t]he proposed club . . . would have no other purpose other than the consumption of alcoholic beverages." In *King,* the club argued that because its private-club charter recited the words of the statute as to the required purpose, the requisite purpose element of Ark. Code Ann. § 3-9-202(10) had been met. The supreme court disagreed, stating that "if we should hold that the mere compliance with the statute for the existence of the charter was sufficient to entitle the applicant to a mixed drink permit, then the Board has no discretionary powers and, therefore there is no need for the Board." *Id.*

In the present case, appellants are making essentially the same argument that was made by the applicant in *King.* It is appellants' contention that because the clubs would be created for the purpose of providing a social eatery, where its members could enjoy food and camaraderie, and because the clubs would be a nonprofit corporation whose employees would be civically involved through charitable donations, then the requisite purpose is met. Consistent with the supreme court's holding in *King,* we reject "social eatery, enjoying food, and camaraderie" as a private-club purpose that complies with the requirements of Ark. Code Ann. § 3-9-202(10) (Repl. 1996).

We reject as well the appellants' contention that its charitable contributions constitute a qualified purpose within the meaning of Ark. Code Ann. § 3-9-202(10). We note that the testimony of Kim Williams only established that the employees of Chili's restaurant would be permitted to select a local charity to which the restaurant would contribute. We further note that the testimony of Bruce Attinger only established that Outback's local partner would be permitted to select a local charity to which the restaurant would contribute. There was no testimony that the employees of Chili's or the local partner of Outback, who would be making these charitable selections, would be members of the private clubs. Although this evidence establishes that Chili's and Outback's are actively involved in local charities, it fails to establish that the private-club entities, separate and apart from the restaurants, would be engaged in any charitable activities selected by the club members.

The appellants argue that it is speculative to determine whether an entity could lawfully operate as a private club before

they are given the opportunity to do so and that such speculation is evidence of arbitrary and capricious action by the Board. We do not agree. To lawfully operate as a private club, the requirements of section 3-9-202(10), *inter alia*, must be met. It is neither arbitrary nor capricious for the Board to determine, before it issues a private-club permit, whether the club's operation will fulfill a lawful purpose under section 3-9-202(10).

The appellants further argue that the private-club portion of the businesses would not operate at a profit. Pursuant to the reasoning of *King*, the mere fact that the entities responsible for the nonprofit affairs of the restaurants have been incorporated under the non-profit laws and will not operate at a profit does not necessarily entitle the restaurants to a private-club permit. Mere compliance with the statute's mandate that a private club be a nonprofit corporation does not diminish the Board's discretion to determine whether the nonprofit entity is designed for a private-club purpose. *See King, supra.*

Even if the Board had concluded that appellants had satisfied the "purpose" requirements of section 3-9-202(10), there is substantial evidence to support the Board's decision to deny a private-club permit to appellant. There was evidence that the intersection of State Highways 49 and 63 near the proposed private-club site was dangerous, that there had already been thirty-eight automobile accidents at the intersection during 1999, that the intersection was confusing and drivers frequently entered upon the highway driving in the wrong direction, and that the traffic in the intersection was already congested as the result of a nearby Wal-Mart store. This is substantial evidence that supports the Board's decision to deny appellants' application for a private-club permit.

Because there was substantial evidence that the entities seeking the private-club permits were not qualified under Ark. Code Ann. § 3-9-202(10), and because the decision was not arbitrary or capricious, we affirm.

Affirmed.

GRIFFEN, J., and HAYS, Special Judge, agree.

WASHINGTON REGIONAL MEDICAL CENTER
MANAGEMENT SERVICES, INC.;
Northwest Arkansas Rehabilitation Hospital;
Healthsouth Corporation;
Cigna Insurance Company *v.* Janice SMITH

CA 01-362 58 S.W.3d 858

Court of Appeals of Arkansas
Division III
Opinion delivered October 17, 2001

[redacted]

*Bassett Law Firm*, by: *Tod C. Bassett* and *Nicole W. Fowler*, for appellant Washington Regional Medical Center.

*Ledbetter, Cogbill, Arnold & Harrison, LLP*, by: *E. Diane Graham*, for appellant Healthsouth Corporation.

*Law Offices of James F. Swindoll*, by: *Pamela D. Gilbert*, for appellee.

KAREN R. BAKER, Judge. There are three appellants in this case, Washington Regional Medical Center (WRMC), Northwest Arkansas Rehabilitation Hospital (NARH), and Healthsouth Corporation (HC). Appellant, WRMC, appeals the decision of the Workers' Compensation Commission. The Administrative Law Judge (ALJ) held that appellants WRMC and NARH were equally liable for appellee's compensable injury and that appellant HC was not liable for appellee's injury. The Commission affirmed the ALJ's decision. On appeal, appellant WRMC argues that the Commission's award of benefits apportioned equally between appellants WRMC and NARH was incorrect as a matter of law and not supported by substantial evidence. Appellant HC argues that there was substantial evidence to support the Commission's decision, as does the appellee. However, appellant NARH failed to submit a brief. We reverse.

Appellee, Janice Smith, is a registered nurse. In May 1990, she became employed by WRMC as a staff nurse. Up until May 1994, appellee worked more than forty hours a week for WRMC. In May 1994, appellee began working for NARH full time. Appellee remained employed with WRMC; however, her hours were reduced to twenty to thirty hours per week. In May 1997, appellee terminated her employment with WRMC. On November 1, 1997, HC purchased NARH. Appellee worked for HC only one day on November 3, 1997; she was terminated by HC on November 11, 1997. During appellee's employment with WRMC and NARH, appellee was required to wear latex gloves.

Appellee testified that around February or March 1997, she began to have symptoms such as shortness of breath, nausea, chest pains, and she would become diaphoretic. Appellee saw Dr. Laura Koehn, who diagnosed her with severe latex sensitivity after testing

showed appellee to have a high reaction to latex. Dr. Koehn testified that appellee had a previous asthma condition that was worsened by the latex exposure, among other things. In her opinion, the latex exposure broke down any resistance appellee had. Dr. Koehn testified that appellee had been forced to make several trips to the emergency room due to anaphylactic reactions from the latex while at work.

The ALJ found that appellee had proven by clear and convincing evidence that her latex sensitivity was causally related to her employment with WRMC and NARH, and liability was to be apportioned equally between WRMC and NARH. The Commission affirmed, and this appeal followed.

When reviewing a decision of the Workers' Compensation Commission, we must view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission and affirm that decision if it is supported by substantial evidence. *Quality Serv. Railcar v. Williams*, 36 Ark. App. 29, 820 S.W.2d 278 (1991) (citing *Clark v. Peabody Testing Serv.*, 265 Ark. 489, 579 S.W.2d 360 (1979)). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Boyd v. Dana Corp.*, 62 Ark. App. 78, 966 S.W.2d 946 (1998). The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding. *Id.* (citing *Bearden Lumber Co. v. Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983)).

The simple issue in this case is: When was appellee last injuriously exposed? WRMC specifically argues that it was not the site of the "last injurious exposure," and thus is not the party responsible for appellee's medical expenses and benefits. We agree. Arkansas Code Annotated section 11-9-601(f)(1) (Repl. 1996) states that, "[w]here compensation is payable for an occupational disease, the employer in whose employment the employee was *last injuriously exposed* to the hazards of the disease and the carrier, if any, on the risk when the employee was last injuriously exposed under the employer, shall be liable." (emphasis added). WRMC cites *Employers Liability Assurance Corp. v. Employers Mut. Liab. Ins. Co.*, 232 Ark. 113, 334 S.W.2d 701 (1960), in support of its argument. In that case, our supreme court stated that "[m]ost authorities seem to agree that the date which determines liability is not the date when the symptoms of the disease first appear but rather the date when some kind of disablement (such as cessation from work) occurs." *Id.* at 116, 334 S.W.2d at 703. The court in that case

concluded that although the employee's dermatitis appeared during the period insured by the previous carrier, the second carrier was held liable because the permanent disability did not occur until the second carrier was on the risk. *Id.* at 118, 334 S.W.2d at 704.

Appellee testified that she began having symptoms in February or March of 1997. On May 8, 1997, appellee terminated her part-time work for WRMC; therefore, she was not exposed to latex at WRMC's place of business after May 8, 1997. It was not until May 22, 1997, that Dr. Koehn tested appellee for latex sensitivity; it was not until November 1997, when she was terminated by HC that she left the workplace altogether. Appellee testified that by November 3, 1997, she had filed for long-term disability benefits because her condition had gotten so severe that she was unable to continue working. Nonetheless, appellee was exposed to latex up until November 1997. Because the Commission erred in its interpretation of Arkansas Code Annotated section 11-9-601(f)(1), we hold that there is insufficient evidence to support the Commission's apportionment of liability in this case. We remand this case to the Commission for findings as to where appellee was "last injuriously exposed" to latex considering the factor of when her disablement occurred, so as to assign liability.

Reversed and remanded.

ROBBINS and ROAF, JJ., agree.

SHARP COUNTY SHERIFF'S DEPARTMENT *v.*
OZARK ACRES IMPROVEMENT DISTRICT

CA 01-210 57 S.W.3d 764

Court of Appeals of Arkansas
Divisions IV and I
Opinion delivered October 24, 2001

*Roberts, Roberts & Russell, P.A.*, by: *Bud Roberts*, *Bruce Anible*, and *Ben McCormack*, for appellant.

*Womack, Landis, Phelps, McNeill & McDaniel*, by: *Richard Lusby*, for appellee.

JOHN F. STROUD, JR., Chief Judge. Appellant, Sharp County Sheriff's Department ("Sharp County"), appeals the Workers' Compensation Commission's adoption and affirmance of the administrative law judge's determination that appellant was liable for workers' compensation benefits as a special employer for a compensable injury suffered by John Slater on January 6, 1998.

John Slater, who had a substantial work history in law enforcement, was hired by the Ozark Acres Improvement District ("District") as a security guard for the District. At the time he applied for the position, it was made known to Slater that the District wanted to hire a person who could be commissioned by Sharp County as a

deputy, thus allowing the District to have a guard with law enforcement authority. Within a month after being hired by the District, and after being interviewed by Sharp County Sheriff Sonny Powell and undergoing a background check and physical examination, Slater was commissioned as a Sharp County deputy sheriff.

This commission increased Slater's pay as a District employee to a level commensurate with the level of pay of a Sharp County deputy sheriff; however, the District was the only entity that provided Slater's salary. Although Sharp County gave the District a $1,000-per-year grant because it had a commissioned law enforcement officer in its employ, it was undisputed that none of that money was used to pay Slater's salary. Sheriff Powell explained that they made a payment in the same amount to other entities that employed a security guard who became deputized and was available on back-up call under a similar arrangement. Not only was the District the only entity that compensated Slater, it also provided him a truck and his law enforcement equipment, with the exception of a borrowed deputy's uniform provided by Sharp County after being requested by the District, which Slater was required by the District to wear while working. In addition to the uniform, the only items provided to Slater by Sharp County were a badge and an identification card.

After his commission as a deputy, Slater was subject to being called by Sharp County to assist on calls in the county that were outside of the District. However, he was only called as a last resort, and Sheriff Powell testified that Slater's commission would not have been revoked if he did not respond to a call for assistance. Nevertheless, the District required that Slater respond to any calls for his assistance from Sharp County. The District continued to pay Slater for calls he answered outside the District during his regular duty hours and gave him "comp time" if he was required to respond to a Sharp County call while he was off duty.

On January 6, 1998, Slater was off duty when he received a call from the Sharp County Sheriff's Department asking him to respond to a call out in the county. Slater put on his deputy uniform and responded to the call. When he arrived and confronted the suspicious persons, he suffered unquestionably compensable injuries when he was attacked by one of the persons. The District originally paid Slater's workers' compensation benefits but later ceased payments, contending that Sharp County was liable for his injuries. The administrative law judge found that Sharp County was liable for payment of workers' compensation benefits as a special

employer, and the Commission affirmed and adopted that opinion as its own. Sharp County now appeals, arguing that it should not be considered a special employer liable for Slater's workers' compensation benefits or, in the alternative, that at the time Slater was injured, he was serving the interests of both Sharp County and the District and the workers' compensation benefits should therefore be shared between Sharp County and the District. We agree with Sharp County's contention that it should not be liable for paying Slater's workers' compensation benefits; therefore, we reverse the Commission's decision.

The standard of review in workers' compensation cases is well-settled. We view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirm the decision if it is supported by substantial evidence. *Geo Specialty Chem. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Air Compressor Equip. v. Sword*, 69 Ark. App. 162, 11 S.W.3d 1 (2000). The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Geo Specialty, supra.*

Arkansas Code Annotated section 11-9-102(10)(A) (Repl. 1996) defines "employee" as:

> [A]ny person, including a minor, whether lawfully or unlawfully employed in the service of an employer under any contract of hire or apprenticeship, written or oral, expressed or implied; but excluding one whose employment is casual and not in the course of the trade, business, profession, or occupation of his employer, and excluding one who is required to perform work for a municipality, county, or the state or federal government upon being convicted of a criminal offense while incarcerated.

In *Daniels v. Riley's Health & Fitness Ctrs.*, 310 Ark. 756, 759, 840 S.W.2d 177, 178 (1992), our supreme court, quoting from Larson's *Law of Workmen's Compensation*, discussed the requirements that must be met in order for a special employer to become liable for workers' compensation when a general employer lends an employee to it. Those three requirements are:

> (a) The employee has made a contract for hire, express or implied, with the special employer;

> (b) The work being done is essentially that of the special employer; and
> (c) The special employer has the right to control the details of the work.

Additionally, the supreme court also noted in *Daniels:*

> Employment may also be "dual" in the sense that, while the employee is under contract of hire with two different employers, his activities on behalf of each employer are separate and can be identified with one employer or the other. When this separate identification can clearly be made, the particular employer whose work was being done at the time of injury will be held exclusively liable.

310 Ark. at 759, 840 S.W.2d at 178.

Sharp County contends that it cannot be held liable for Slater's workers' compensation benefits as a special employer because it does not meet any of the three requirements. While we find that Sharp County does meet the requirements of subsections (b) and (c), we agree that they do not meet the requirements of subsection (a) and are therefore not liable for workers' compensation benefits as a special employer.

There is not any question that at the time Slater was injured, he was performing services for Sharp County by answering a call out in the county for the sheriff's department. Although Sharp County argues that this also benefitted the District, the call to which Slater was responding was not in the District; therefore, it is difficult to see how Slater's actions were benefitting the District at the time he was injured. Likewise, it was clear from Slater's and Sheriff Powell's testimony that Powell and other sheriff's department officers with a higher rank than Slater had the right to control Slater's actions while he was performing work for the department, although there was testimony that such authority was never asserted. Sharp County argues that because such authority was never asserted, that requirement was not met. The requirement does not mandate that such authority was asserted, merely that the special employer had the *right* to control the details of the work. Sheriff Powell testified that he retained the right to take Slater's commission as a deputy away from him if he believed that Slater was not performing at an acceptable level.

> [T]he "control" which the special employer must assume need not extend to directing the technical details of a skilled employee's activity. This would mean that skilled employees would hardly ever be employees under the act. What is essential . . . is the right to control the time and place of the services, the person for whom rendered, and the degree and amount of services.

3 A. Larson, *Worker's Compensation Law* § 67.05 (2000).

The sheriff department's right to control Slater's work was sufficient to meet the third requirement.

With regard to the first requirement, the District argues that there was "clearly a contract for hire" for Slater's service as a deputy sheriff, contending that there was an express contract, given the interview process between Slater and Sheriff Powell. The District argues that at minimum, there was an implied contract for hire because Slater sought the commission as a deputy because of the authority and the increase in pay such a designation would provide him, and Sharp County approved the commission because it would receive the benefit of Slater's back-up services as a deputy. The District contends that it is immaterial that it paid all of Slater's salary.

We hold that there was never a contract for hire, either express or implied, because Sharp County did not pay Slater for his services. In 3 A. Larson, *Worker's Compensation Law* § 67.05 (2000), it is stated:

> The element of who pays the employee shrinks into comparative insignificance in lent-employee problems, because the net result is almost invariably that the special employer ultimately pays for the services received and the employee ultimately gets paid. But whether the special employer pays the general employer who in turn pays the employee, . . ., or whether the special employer pays the employee direct, the difference for present purposes is one of mechanics and not of substance. *Of course, if this is not so — that is, if either the general employer or the special employer pays the employee and is not reimbursed — the fact of payment is strong evidence that the payor is the employer.*

(Emphasis added.)

This is a case of first impression in Arkansas, but in *Hill v. King*, 663 S.W.2d 435 (Tenn. Ct. App. 1983), the Tennessee Court of

Appeals held that a deputy who was killed in a plane crash while transporting a prisoner was not covered by Robertson County's workers' compensation when he was paid no salary, could work as little or as much as he chose, and even when scheduled to work, he was not obliged to report for duty. Tennessee's definition of "employee" is the same as Arkansas' definition, and the court of appeals held in *Hill* that in order to be considered an employee for purposes of workers' compensation law, there must be an express or implied agreement for the alleged employer to remunerate the alleged employee for his services on behalf of the alleged employer. The court of appeals also stated:

> There is also a sound reason for the requirement that the employment be "for hire." . . . [I]n a compensation case, the entire philosophy of the legislation assumes that the worker is in a gainful occupation at the time of the injury. The essence of compensation protection is the restoration of a part of the loss of wages which are assumed to have existed. Merely as a practical matter, it would be impossible to calculate compensation benefits for a purely gratuitous worker, since benefits are ordinarily calculated on the basis of earnings. These, then, are the underlying reasons why compensation acts usually insist upon a contract of hire. . . . The word "hire" connotates payment of some kind. By contrast with the common law of master and servant, which recognized the possibility of having a gratuitous servant, the compensation decisions uniformly exclude from the definition of "employee" workers who neither receive nor expect to receive any kind of pay for their services.

663 S.W.2d at 440.

Because we hold that Sharp County did not enter into a contract for hire, either express or implied, with Slater, it cannot be said that the first requirement of the three-part test set forth in *Daniels, supra,* has been met. Likewise, because there was no contract for hire between Slater and Sharp County, Sharp County cannot be held liable under the second theory expressed in *Daniels, supra.*

Because we have determined that Sharp County should not be liable for Slater's workers' compensation benefits, it is not necessary to address its alternative argument. We reverse and remand with direction for the Commission to enter an order for the District to be liable for Slater's workers' compensation benefits.

Reversed and remanded.

PITTMAN, HART, NEAL, and ROAF, JJ., agree.

GRIFFEN, J., dissents.

WENDELL L. GRIFFEN, Judge, dissenting. The controlling issue in this case is whether the fact that the County did not provide direct compensation to Slater serves to negate the District's claim that the County was Slater's special employer via an express or implied contract for hire. I believe it does not.

The County and the District agreed that Slater sustained a compensable injury for which he received medical treatment and a fifteen percent permanent impairment rating to his knee. The District, through its insurance company, initially accepted Slater's claim and paid for Slater's knee surgery in the amount of $9,238 in medical expense and for $4,518 in indemnity benefits. In a hearing before the administrative law judge, the District asserted that Slater was not performing employment services for the District at the time of his injury. Rather, it contended that Slater was performing employment services for the County. In response, the County argued that no employer-employee relationship existed between the County and Slater. The County controverted Slater's claim in its entirety.

Arkansas Code Annotated section 11-9-102(9)(A) (Supp. 1999) defines an employee as "any person, including a minor, whether lawfully or unlawfully employed in the service of an employer under any contract of hire or apprenticeship, written or oral, expressed or implied[.]" *Black's Law Dictionary* defines an implied contract as "an agreement which legitimately can be inferred from intention of [the] parties as evidenced by circumstances and ordinary course of dealing and common understanding[.]" *Black's Law Dictionary* 225 (abridged 6th ed. 1990).

Arkansas law recognizes two types of dual employment. *See Daniels v. Riley's Health & Fitness Ctrs.*, 310 Ark. 756, 840 S.W.2d 177 (1992). The first, as set forth in 3 Arthur Larson, *The Law of Workmen's Compensation* § 67.00 (2000), provides as follows:

> When a general employer lends an employee to a special employer, the special employer becomes liable for workmen's compensation only if:
>
> (a) the employee has made a contract of hire, express or implied, with the special employer;

> (b) the work being done is essentially that of the special employer; and
>
> (c) the special employer has the right to control the details of the work.
>
> When all three of the above conditions are satisfied in relation to both employers, both employers are liable for worker's compensation.

*Id. See also Daniels, supra* (quoting 1C Arthur Larson, *The Law of Workmen's Compensation* § 67.00).

A second type of dual employment is said to exist when one can separately identify the job activities performed by a worker on behalf of one employer from job activities performed on behalf of a different employer. *See Daniels, supra.* When the employee's job activities are clearly distinguishable, the employer whose work is being performed at the time of the incident is deemed solely liable for the incident. *See Daniels, supra.*

Larson emphasizes that the critical issue in determining whether a special employment exists is whether the employee *knowingly* made a contract of hire with the special employer. *See 3 Larson, supra.*

> Compensation law, however, is a mutual arrangement between the employer and employee under which both give up and gain certain things. Since the rights to be adjusted are reciprocal rights between employer and employee, it is not only logical but mandatory to resort to the agreement between them to discover their relationship. *The element of payment, to satisfy the requirement of a contract of hire, need not be in money, but may be in anything of value.*

*3 Larson*, § 64.01 (emphasis added).

When the facts demonstrate that an employee has not given informed consent, a special employment relationship does not exist. Consent may be implied through the employee's acceptance of the special employer's control or direction; *however, Larson cautions that the fact that the employee is on the payroll of the special employer is perhaps the least significant factor in determining whether a special employment relationship exists. See 3 Larson, supra.* Instead, one should query whether the employee and the special employer entered into a contract of hire, whether the activity being performed was exclusively that of the special employer, and whether the special

employer assumed the right to dictate the details of the employee's work activity. *See 3 Larson, supra.* Whether a special employment relationship may exist when a borrowing employer has not compensated a loaned employee is a matter of first impression in Arkansas. However, other states reviewing this issue have concluded that the fact of who pays the employee is not wholly dispositive.

In *Sonners v. Department of Labor & Indus.*, 3 P.3d 756 (2000), the Washington Court of Appeals reviewed the issue of dual employment in the context of which employer was responsible for paying industrial insurance premiums. The court held that a leasing company who issued paychecks, had employees fill out applications, performed drug tests, and conducted safety training was not a dual employer under the consent or control prongs of its test to determine whether a dual-employment relationship exists. Although the leasing company provided an entire workforce to a corporation, the court of appeals concluded that the leasing company did not retain the right of control over the worker's daily activities and that the workforce had not consented to an employee-employer relationship such as to satisfy the requirement of dual employment. *See Sonners, supra.*

The issue was also addressed in *Croston v. Montefiore Hosp.*, 229 A.D.2d 330 (1996), when the New York supreme court held that the fact that a technologist-trainee was not financially compensated by Montefiore hospital did not preclude a finding that the trainee was an employee of the hospital. In reaching its decision, the court noted that the hospital selected trainees, supervised and controlled the work of trainees, retained the sole power to discharge trainees, and benefitted from the work performed by trainees. The court observed that the experience and training received by the trainee constituted value to the trainee because it was necessary for her eventual certification. It then held that the trainee's sole remedy against the hospital was workers' compensation benefits. *See Croston, supra.*

In discussing the issue of whether a special employment relationship existed such as to trigger the exclusivity remedy of workers' compensation and bar a common-law claim, the supreme court of Indiana listed several factors to consider. *See Hale v. Kemp*, 579 N.E.2d 63 (1991). These factors include the right to discharge, how an employee is paid, who supplied necessary tools and equipment, whether the parties believed that an employment relationship existed, who controlled the work activities to reach the end result, and whether work boundaries were established. *See Hale, supra.*

However, the *Hale* court noted that the primary factor to determine the existence of an employment relationship was whether the parties *intended* to create a relationship. *See Hale, supra.*

The record in the instant case clearly demonstrates that Slater's application process with the County occurred *after* Slater had been hired by the District as a security guard. The parties do not dispute that Sheriff Powell interviewed Slater numerous times, performed a background investigation, and approved Slater's application for the position of deputy sheriff after Slater underwent a physical at the behest of the County. Also, Slater testified that his employment with the District was not contingent upon him becoming a commissioned deputy sheriff with the County. It is significant that Powell testified that he viewed the application process seriously, that he had the power to approve or deny an application for deputy sheriff, and that he could revoke a deputy sheriff's commission if he determined the deputy was acting in an unprofessional manner.

Slater was aware of the arrangement between the County and the District. The fact that Slater did not receive a monetary benefit from the County is simply not dispositive. The County received the benefit of extra law enforcement in areas outside of the District while the District received the benefit of law enforcement within the District. Slater also benefitted through an increase in the pay he received from the District. Clearly, these facts demonstrate that Slater and the County entered into an express or implied contract for hire. Next, there is no disagreement that Slater received his injury while responding to a law-enforcement call from the County's dispatcher at a time when he was not performing employment services for the District. Because Slater responded during his non-working hours to a call from the County that directed him to investigate a matter located in the County and outside of the District, it is plain that the District received no direct benefit from Slater's law-enforcement activity when his injury occurred.

The County had the right to control Slater's activity while he served in the capacity of a commissioned deputy sheriff outside the District as evidenced by the testimony of Slater and Sheriff Powell. Slater testified that the ranking officer within the sheriff's department had the power to control the activities associated with every response call that took place in the County. Powell corroborated Slater's testimony, and also testified that he retained the ability to revoke the commission of a deputy sheriff if necessary.

Our standard of review is not whether we would have reached a different conclusion from the Commission based on the facts before the Commission, but whether substantial evidence exists to support the Commission's decision. The Commission's decision is supported by substantial evidence and I would affirm. I see no reason to treat Slater different from a leased employee who suffers an injury while working for the employer who procured his labor from a leasing company. The majority, unfortunately, has elevated the factor deemed least important — whether Slater was on the County payroll — as controlling. The better approach is to decide the case based on whose interest Slater was directly serving when injured. Like the Commission, I believe that the record plainly shows that the County was being served. Thus, it should pay the workers' compensation benefits associated with that service.

Rodney McNAIR *v.* Melinda A. McNair JOHNSON

CA 01-496 57 S.W.3d 742

Court of Appeals of Arkansas
Opinion delivered October 24, 2001

*James G. Petty, Jr.*, for appellant.

*Mark Derrick*, for appellee.

JOHN B. ROBBINS, Judge. In this child-custody proceeding, appellant Rodney McNair has filed a motion seeking an order that would unseal a portion of the record containing the testimony of two of the three minor children of the parties. The trial court directed that the transcript of the children's testimony be sealed, in keeping with an agreement by the parties and representations made by the trial judge to these children at the time they were interviewed in chambers.

The issue raised by appellant in his appeal is whether there was sufficient evidence for the trial court to change custody of the children to appellee. Rule 6(b) of the Rules of Appellate Procedure—Civil provides in pertinent part:

> If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or contrary thereto, he shall include in the record a transcript of all evidence relevant to such finding or conclusion.

Rule 4-2(a)(6) of the Rules of the Supreme Court then requires that the appellant include in his brief an abstract of this designated record, which would necessarily include the testimony of these children. While this rule recognizes an exception to the abstracting requirement for maps, plats, photographs, and other similar exhibits, which cannot be abstracted in words, the exception would not include the testimony of children given in camera.

Nor do the rules cited above make exception for testimony that has been sealed by order of the trial court. A meaningful *de novo* review to determine whether the trial court's findings were clearly against the preponderance of the evidence is not possible unless all relevant evidence upon which the chancellor relied is presented to us. Consequently, there does not appear to be a method available under existing law to permit children to testify on the record, whether in chambers or open court, yet exempt such testimony from the appellate rule requiring abstracting if it is designated as part of the record on appeal. We properly grant appellant's motion.

Some judges on our court would grant appellant alternative relief by waiving the abstracting requirement and would review directly the transcripts of the sealed testimony. If we did so, not only would we err, we would risk compounding that error. First, as noted above, we would contravene Rule 4-2(a)(6) promulgated by our supreme court; a rule we are not at liberty to disregard. Second, if we held that the merits of the appeal required reversal of the judgment under appeal, we would violate a doctrine of Arkansas appellate procedure that is so basic that citation to authority is not necessary, i.e., *we will not go to the record to reverse.* Those judges would have us pull aside the cloak of secrecy surrounding the sealed testimony, yet would not, in order to maintain this secrecy, permit us to disclose in our written opinion what we may have seen, even if pivotal to our decision. Surely, we should run from such a procedure.

As a postscript, we note that, while there was a record made in the instant case, *Administrative Order Number 4*, 305 Ark. 613 (Appendix) (1991), and Ark. Code Ann. § 16-64-129(a)(2) appear to countenance a waiver of a record by the parties. However, for the following reason this would not appear to be a satisfactory solution to the problem of allowing children to testify with confidentiality. If the parties agree to waive a record and permit the child or children to be interviewed privately by the trial judge, and the aggrieved parent desires to appeal, the absence of a record virtually renders the judge's decision irreversible. A statement of evidence as contemplated by Civil Rule of Appellate Procedure 6(d) is not possible because, under these circumstances, counsel were not privy to the testimony that was taken in chambers. The consequence of an appeal in this posture is an affirmance, because it is presumed that the matters presented in the unrecorded proceeding support the trial court's findings. *See Argo v. Buck*, 59 Ark. App. 182, 954

S.W.2d 949 (1997); *Rush v. Wallace*, 23 Ark. App. 61, 742 S.W.2d 952 (1988); *Wagh v. Wagh*, 7 Ark. App. 122, 644 S.W.2d 630 (1983).

Unsealing of the record is ordered.

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

STROUD, C.J., PITTMAN, JENNINGS, CRABTREE and BAKER, JJ., dissent.

JOHN E. JENNINGS, Judge, dissenting. I respectfully dissent. At trial, the parties agreed that the trial judge would talk with the children in chambers and in confidence. The trial judge did so, on the record.

At a hearing on June 14 of this year the trial court declined to unseal the record of the children's testimony. The court expressed doubt about its jurisdiction to do so, but also stated:

> THE COURT: Yes, well, let me say this: If the record reflects what it should reflect, the parties agreed that I would meet with the children in private, and they waived any right to be here, or, in my judgment, to know what was said; otherwise, there would be no reason for me to speak candidly with the children. The children said some things which I judged would be detrimental to their best interest if it were revealed to their father and his family because they have to, under my order, visit with this family, and I think if they, the father and the new family were aware of what was said, I think that it would harm the children; and I spoke to them in confidence, they spoke to me with the understanding that it would not be revealed, so I'm still where I was in not doing it, and I don't know what we can do about that.
>
> . . .
>
> THE COURT: My memory of the record is this: We were on the record because I just don't go off the record, and my court reporter took down the conversation between me and the lawyers in chambers, and Mr. Morgan was reluctant to do it, and I said I wasn't going to force him or even lean on him to do it, but I was going to let - the only way I would do it is if they weren't here and if they understood that and that only I would hear it, and he went out and talked to his client and he came back and he said they agree. So I feel like that the parties waived the right to know, but I am still where I was. I would not release this no matter what because I'm

> convinced that some things they said would be detrimental to their interests, with the ongoing relationship with the parties, regardless of what happens.
>
> As I said, that puts you in a tough spot, but we're dealing with the kids here. We're dealing with their lives, and I believe judges have a certain amount of discretion in situations like that, and I think we dotted our I's and crossed our T's here where the people knew the ground rules, and I don't want the kids to pay for it. I think not only would they pay for it, I think forever after they would have no confidence in the system because I told them it wouldn't be revealed.

I see no cogent reason to reject the trial court's reasoning and ruling. The appellant agreed to the procedure that was followed at trial and now seeks to withdraw that agreement. I would deny the motion to unseal the children's testimony.

PITTMAN and CRABTREE, JJ., join in this opinion.

KAREN R. BAKER, Judge, dissenting. In this child-custody case, the trial judge sealed the testimony of children interviewed in chambers. Both parties waived any right they had to listen to the children's testimony and agreed that the children would meet privately with the judge. The trial court represented to the children that their statements to him would be held in confidence and these children spoke to the judge with the understanding that nothing they said would be revealed to the parties. In refusing to unseal the record, the trial court stated that disclosing the children's testimony to the father and his family would harm the children because the children, pursuant to the court's order, would have to continue visiting with the father and his family.

On appeal, the father filed a motion seeking an order that would unseal a portion of the record containing the testimony of the children to the judge in chambers citing the need for abstracting on appeal. In the alternative, he asked we waive the abstracting requirement and review the record itself regarding the children's sealed testimony. I would grant appellant's alternative request. The trial court properly exercised its inherent authority to seal the record and nothing indicates that this court should find otherwise. The majority finds no fault with the judge's sealing of the record, but merely struggles with an apparent inability to reconcile our duty to review the judge's decision that is based in part upon a sealed

record with our procedural requirement to abstract the records of the proceeding.

The Majority states that "there does not appear to be a method available under existing law to permit children to testify on the record, whether in chambers or open court, yet exempt such testimony from the appellate rule requiring abstracting if it is designated as part of the record on appeal." I agree with the majority that a waiver of a record by the parties would be an unsatisfactory solution to the problem of allowing children to testify with confidentiality. The absence of a record would render it impossible for us to perform our responsibility as a reviewing court.

Yet, the alternative relief requested allows us to properly review the judge's decision and at the same time ensure that the children are protected from the harm the trial judge recognized that unsealing the record would pose to the children.

Although the decision we review is that of declining to unseal the records, the issue is whether the records should have been sealed in the first place. *Arkansas Best Corp. v. General Elec. Capital Corp.*, 317 Ark. 238, 878 S.W.2d 708 (1994). As Judge Jennings's dissent explains, the parties agreed that the record should be sealed prior to the children's testifying. Nothing indicates that the judge erroneously sealed the record. When the judge declined to unseal the record of the children's testimony, he reiterated the parties' waiver of any right to know what was said and stated his belief that if the father and his family were aware of what the children said, that it would be detrimental to the children. The judge specifically mentioned that the court ordered visitation of the children with the father would be the source of the harm to the children if the record were unsealed.

Our procedural rules recognize the need to hold certain information in confidence. Rule 26 of the Arkansas Rules of Civil Procedure provides for protective orders closing depositions, for protection of trade secrets, and for filing specified documents in sealed envelopes. In addition, Rule 6-3 of the Rules of the Supreme Court provides for anonymity in certain appellate proceedings by the use of the initials of the first and last names of children involved in adoption or juvenile proceedings. We often utilize this rule for appeals in adoption proceedings after the final order has been entered. *See, e.g., In Re Adoption of K.F.H. and K.F.H.*, 311 Ark. 416, 844 S.W.2d 343 (1993). We have recognized the inherent authority of a trial court to issue appropriate protective

orders to control court records, and, thus, the right to inspect public records is not absolute. *See City of Fayetteville v. Edmark*, 304 Ark. 179, 801 S.W.2d 275 (1990). Many jurisdictions have made similar holdings. *See, e.g., Deere & Co. v. Finley*, 103 Ill.App.3d 774, 59 Ill.Dec. 444, 431 N.E.2d 1201 (1981); *Church of Scientology v. Armstrong*, 232 Cal.App.3d 1060, 283 Cal.Rptr. 917 (1991); *Werfel v. Fitzgerald*, 23 A.D.2d 306, 260 N.Y.S.2d 791 (1965).

The trial court in this case properly exercised its inherent authority to seal the record and properly declined to unseal the record to protect the children from harm. Our ordering the record to be unsealed in order to comply with the abstracting requirement subjects the children to the harm from which the trial court was protecting them. It is unnecessary to do so when we can grant the alternative relief of waiving the abstracting requirement and reviewing a small part of the record ourselves.

Therefore, I would grant the alternative relief.

STROUD, C.J., joins this dissent.

Terri Scott SHROYER *v.* Paul David KAUFFMAN

CA 01-275 58 S.W.3d 861

Court of Appeals of Arkansas
Division III
Opinion delivered October 24, 2001

*Lyons, Emerson & Cone, P.L.C.*, by: *Jim Lyons*, for appellant.

*Sharon P. Glaze*, for appellee.

JOHN B. ROBBINS, Judge. On March 6, 1995, the Sharp County Chancery Court entered a paternity order establishing custody and setting child support pursuant to an agreement between appellant Terri Scott Shroyer (now Corey) and appellee Paul David Kauffman. In the order, Ms. Corey was given custody of the parties' minor child, and Mr. Kauffman was ordered to pay the greater of $300.00 or thirteen percent of his net income as weekly child support. On June 26, 1995, Mr. Kauffman filed a petition requesting a change in custody or, alternatively, a reduction in child

support. The chancery court entered an order of dismissal on January 26, 1998, for want of prosecution.

On November 5, 1999, Ms. Corey filed a "petition for a show cause hearing and other equitable relief," and in her petition prayed for $40,685.00 in delinquent child support. In his answer, Mr. Kauffman asserted that "the parties entered into an agreement in March 1996, whereby [appellant] would not pursue custody of the minor child of the parties, visitation would be more liberal, and child support would be reduced to the sum of $150.00 per week." After a hearing, the chancery court entered an order stating, in pertinent part:

> 3. The Order setting the amount of child support at $300.00 per week remained effective until March 18, 1996, whereupon the parties agreed that child support should be reduced to the amount of $150.00 per week. . . .
>
> 4. An Order was signed by the Chancery Judge reducing the amount of child support to $150.00 per week. The Plaintiff decided that she was not in agreement with the Order reducing the child support amount and the Chancery Clerk was instructed by the Chancery Judge that the Order should not be entered into the record.
>
> 5. The Defendant was without notice that the agreement had been canceled by the Plaintiff, and relied on the agreement until served with notice that an Agreed Order had not been entered, with said notice being served upon Defendant by Plaintiff's attorney on November 19, 1999.
>
> 6. The amount of child support owed to Plaintiff for the support of the minor child should be as set forth in the Order entered March 2, 1995 [filed March 6, 1995] except for the period from March 18, 1996 until November 19, 1999, which is the period excluded by the agreement. Child support due for the period of the agreement should have been paid at the rate of $150.00 per week.

Pursuant to the above findings, the chancery court calculated the child-support arrearage to be only $16,195.00, and ordered Mr. Kauffman to pay that amount and to continue making child-support installments at a rate of $300.00 per week.

Ms. Corey now appeals from the order of the chancery court, arguing that the chancery court erred by retroactively reducing child support for the period from March 18, 1996, through November 19, 1999. Ms. Corey asserts that the original order setting child support at $300.00 per week remained in effect because there was no agreement as to reduction and no order was entered reducing support.

We review chancery cases *de novo* on the record, but we do not reverse a finding of fact by the chancellor unless it is clearly erroneous. *Stewart v. Stewart*, 72 Ark. App. 405, 37 S.W.3d 667 (2001). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Norman v. Norman*, 342 Ark. 493, 30 S.W.3d 83 (2000).

Dick Jarboe testified at the hearing. He stated that he is an attorney and represented Ms. Corey in 1996. Mr. Jarboe indicated that during a deposition in February 1996 a tentative settlement agreement was reached between the parties. Thereafter, opposing counsel sent Mr. Jarboe a copy of the proposed order, and he submitted it to Ms. Corey for approval. Ms. Corey never approved the order, so Mr. Jarboe also refused to approve it. Mr. Jarboe stated that after July 1996, he expressed to opposing counsel that Ms. Corey had not approved the order.

Tommy Estes, Sharp County Chancery Clerk, determined that, according to his records, the child-support arrearage in this case is $43,435.00. Mr. Estes indicated that in 1996 he received an order from Mr. Kauffman's counsel that purported to reduce the child-support obligation to $150.00 per week, and that the order was signed by the chancery judge. However, prior to this time Mr. Estes had been contacted by Ms. Corey, who told him that she did not agree with the order and not to file it. Upon receiving the order, Mr. Estes called Mr. Kauffman's counsel and informed her that there was an objection to the order and that he was not going to file it before consulting with the judge. On September 24, 1996, the judge instructed Mr. Estes to send the order back to Mr. Kauffman's counsel, and while he did not send it back he called her that same day and gave notification that the order was not being filed pursuant to the judge's direction. The order was never filed.

Ms. Corey testified on her own behalf, and asserted that she has not received child support on a consistent basis since entry of the original order. She acknowledged that during a deposition she

agreed to give Mr. Kauffman increased visitation rights, but could not recall agreeing to a reduction in child support. She remembered receiving the order showing a reduction in support and refusing to approve it. Ms. Corey indicated that she assumed that the payments received from Mr. Kauffman represented $300.00 per week because most of them were amounts that were multiples of three hundred. On September 15, 1999, she received a $1200.00 check from Mr. Kauffman with the notation "from 8/15 to 9/15." Ms. Corey maintained that she was not aware that Mr. Kauffman was claiming that there was an agreement to reduce child support to $150.00 per week until after she filed her petition requesting arrearages.

Mr. Kauffman testified that, during lunch break on the day of the deposition in February 1996, Ms. Corey told him that if he would drop his petition for changing custody, she would liberalize visitation and agree to a reduction in child support. After the agreement, visitation was liberalized and, according to Mr. Kauffman, Ms. Corey visited him in March 1996 and showed him the proposed order. She allegedly told him "if it was okay" the chancery judge would sign it that day. He testified that his attorney never contacted him and informed him that nothing had been filed. Mr. Kauffman stated that he believed the order had been filed until being informed otherwise when Ms. Corey filed her petition for support arrearages in November 1999.

For reversal, Ms. Corey argues that the chancery court erred in reducing Mr. Kauffman's child-support obligation to $150.00 from March 18, 1996, through November 19, 1999. She contends that, although there was evidence of some verbal agreement between the parties, the terms of the agreement remain unclear. While an order was reduced to writing, it is undisputed that neither Ms. Corey nor her counsel signed it, it was never filed of record, and Mr. Kauffman's attorney was made aware that the order was not filed. Ms. Corey submits that Mr. Kauffman is charged with the knowledge of his attorney and was thus on notice that the disputed order reducing child support was not entered. Ms. Corey asserts that Mr. Kauffman could not have detrimentally relied on the provisions of the disputed order because he was on notice that it was not filed, and further could not demonstrate reliance because he undisputedly failed to stay current on his payments even under his alleged misunderstanding that he pay only $150.00 per week.

■ Chancery courts are not supposed to recognize private agreements modifying the amount of child support because of the

mandate of Ark. Code Ann. §§ 9-12-314(b) (Repl. 1998) and 9-14-234(b) (Repl. 1998), which provide:

> (b) Any decree, judgment, or order which contains a provision for the payment of money for the support and care of any child or children through the registry of the court or the Arkansas child support clearinghouse shall be final judgment subject to writ of garnishment or execution as to any installment or payment of money which has accrued until the time either party moves through proper motion filed with the court and served on the other party to set aside, alter, or modify the decree, judgment, or order.

*See Burnett v. Burnett*, 313 Ark. 599, 855 S.W.2d 952 (1993); *Sullivan v. Edens*, 304 Ark. 133, 801 S.W.2d 32 (1990). In *Burnett v. Burnett, supra*, the appellee was ordered to pay $140.00 in weekly child support, but later decided to reduce his payments due to a decrease in his earnings. The appellee testified that, although no order modifying support had been entered, the appellant had agreed to accept the reduced payments, and did so without complaint for a period of several months. The chancery court retroactively modified the appellee's child-support obligation due to material changes, but the supreme court reversed, holding that the actions of the appellant did not justify the application of estoppel to prevent the collection of past-due child-support payments.

In the case at bar, Mr. Kauffman did not rely on decreased income as grounds to reduce his child-support obligation, but did allege that a verbal agreement was reached to reduce weekly child support to $150.00. However, his testimony was contradictory in that he stated that, after Ms. Corey showed him the proposed order, "I continued to pay two hundred dollars a week." The payments made by Mr. Kauffman were so sporadic in frequency and amount that they provide no guidance as to what weekly amount he intended to pay. However, it is significant that in September 1999, a payment of $1200.00 was accompanied by a notation that it covered a one-month period, which indicates an acknowledgment that the prior order remained in effect.

Even if a verbal agreement reducing child support was made by the parties, it is undisputed that Mr. Kauffman's attorney drafted and attempted to reduce the agreement to a written order, but none was ever entered because Ms. Corey refused to approve it. Mr. Kauffman testified that he was never informed by his counsel that the order had not been filed; however, on July 29, 1996, his

counsel mailed a letter to the chancery judge acknowledging that the order had not been approved, and the letter reflects that a copy was sent to Mr. Kauffman. But even if Mr. Kauffman received no formal notice from his counsel, as he alleges, his counsel's knowledge is imputed to him. *See Midwest Timber Prods. Co. v. Self*, 230 Ark. 872, 327 S.W.2d 73 (1959). It is not disputed that Mr. Kauffman's counsel knew that the proposed order was being contested and was not filed of record.

Nothwithstanding the clarity of the statutory language prohibiting retroactive modification of child support, we have recognized an exception to *enforcement* in the collection of child support arrearage. *See Roark v. Roark*, 34 Ark. App. 250, 809 S.W.2d 822 (1991) (custodial parent had unclean hands because she interfered with visitation); *Ramsey v. Ramsey*, 43 Ark. App. 91, 861 S.W.2d 313 (1993) (noncustodial parent resided with custodian and children after divorce and provided direct support to family); *State Office of Child Supp. Enforcem't v. Mitchell*, 61 Ark. App. 54, 964 S.W.2d 218 (1998) (alleged that custodial parent was less than candid in identifying defendant as child's father in paternity proceeding).

In the present case, however, while the trial court observed that appellee had relied on the agreement between March 18, 1996, and November 19, 1999, there was no specific finding of an equitable defense. Equitable promissory estoppel requires the innocent party to rely to his detriment on an oral agreement. *See Taylor v. Eagle Ridge Developers, LLC*, 71 Ark. App. 309, 29 S.W.3d 767 (2000). Even if appellee relied on the agreement, as found by the trial court, there is no evidence that he did so to his detriment. The consequence of his reliance was all to his benefit, without any corresponding detriment.

Under these facts, there is no equitable defense to the enforcement of Mr. Kauffman's support obligation; therefore, the chancery court's failure to enforce its original support order was clearly erroneous. We reverse and remand for the chancery court to calculate Mr. Kauffman's arrearages pursuant to the provisions of the original order setting child support.

Reversed and remanded.

BAKER and ROAF, JJ., agree.

Jim PENTZ and Jeannie Pentz *v.*
Al ROMINE and Chris Romine

CA 01-363 57 S.W.3d 235

Court of Appeals of Arkansas
Division II
Opinion delivered October 24, 2001

[redacted]

*Harry McDermott*, for appellants.

*Ball & Mourton, Ltd., PLLC*, by: *David G. Bercaw*, for appellees.

SAM BIRD, Judge. On October 9, 1990, James and Jeannie Pentz (Pentz) entered into a contract to purchase a convenience store from Al and Chris Romine (Romine) for $325,000. The contract required Pentz to make a down payment of $4,000 and monthly payments of $3,300, including interest, until the balance of the purchase price was paid. The contract contained a provision stating that the property was not to be "sold, mortgaged, assigned, or in any way encumbered or hypothecated without the prior written consent of the seller." In 1996, Pentz found a buyer for the store, Marable-Stone, Inc. (MSI), who offered to pay Pentz $290,000 more than Pentz had agreed to pay Romine for the property. Pentz and MSI agreed to a lease-purchase plan by which MSI was to pay Pentz a $50,000 down payment, followed by monthly lease payments of $3,446 for 179 months. At the end of the 179-month term, MSI would have an option to purchase the property upon payment of an additional $3,500.

Romine refused to consent to the Pentzes' lease of the property to MSI and threatened to sue MSI if it leased the property from Pentz without Romine's permission. Pentz discontinued his monthly payments to Romine and brought suit against Romine, alleging that Romine tortiously interfered with his contractual relations with MSI and that Romine had wrongfully withheld consent to the lease-purchase agreement with MSI. In the same action, Pentz also sued MSI for specific performance of the lease-purchase agreement. Romine counterclaimed, seeking foreclosure on the property. Pentz then voluntarily nonsuited his complaint against Romine. The parties litigated the Pentzes' complaint against MSI for specific performance and Romine's counterclaim for foreclosure.

The trial court dismissed the Pentzes' claim against MSI for specific performance, finding that the lease-purchase agreement lacked essential elements of a contract. The court also ruled that Pentz had breached the contract with Romine by failing to make

any payments since April 12, 1996, and by failing to pay real-property taxes and maintain insurance coverage on the property, and ordered the property sold. Following the Pentzes' unsuccessful appeal, *see Pentz v. Romine*, 62 Ark. App. 12, 966 S.W.2d 934 (1998), Pentz filed the present action against Romine for breach of contract, alleging that Romine was aware that MSI would be a responsible tenant but, nevertheless, objected to the lease-purchase arrangement and threatened to sue MSI if they entered into the lease-purchase; and that Romine acted in bad faith because the real reason consent was withheld was to enable Romine to regain the store and sell to MSI.

Romine filed a motion to dismiss, contending that the suit was barred by *res judicata* because the breach of contract cause of action was a compulsory counterclaim to the prior foreclosure suit and was not raised in that suit. The court granted Romine's motion to dismiss, finding that the Pentzes' nonsuited complaint in the first action did not state a cause of action for breach of contract; thus, the present breach of contract claim was barred by *res judicata* because it was a compulsory counterclaim to the foreclosure suit.

*Sufficiency of the Complaint*

The dispositive issue of this case is whether the nonsuited complaint in the first action asserted a cause of action for breach of contract. A nonsuited complaint may be refiled within the time permitted by the statute of limitations or one year, whichever is longer. *See* Ark. Code Ann. § 16-56-126 (1987); *Elzea v. Perry*, 340 Ark. 588, 12 S.W.3d 213 (2000). Pentz filed his present complaint within the time allowed by the statute of limitations. When a complaint is filed subsequent to a nonsuit of the same complaint, it is well established under Arkansas law that, even though the prior complaint may have been a compulsory counterclaim to a claim brought within the original suit, it is not barred by *res judicata*. Our supreme court has clearly held that the nonsuiting of a complaint or a counterclaim prevents the application of *res judicata* due to the absolute right of a party to nonsuit that is granted under Ark. R. Civ. P. 41. *See Lemon v. Laws*, 305 Ark. 143, 806 S.W.2d 1 (1991) (holding that a nonsuited malpractice claim, which would be a compulsory counterclaim to the claim for attorney's fees which was presented as a counterclaim, could be filed again without *res judicata* consequences); *Linn v. NationsBank*, 341 Ark. 57, 14 S.W.3d 500 (2000) (applying the same law to nonsuited counterclaims). Therefore, if the nonsuited complaint asserted a breach of contract cause

of action, then under *Linn*, the present complaint is not barred by *res judicata*.

Pentz argues that his nonsuited complaint against Romine should be liberally construed so as to assert a breach-of-contract action. 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 the obligations. *Bethel Baptist Church v. Church Mut. Ins. Co.*, 54 Ark. App. 262, 924 S.W.2d 494 (1996). The Pentzes' nonsuited complaint clearly asserted a breach-of-contract cause of action against MSI when the complaint stated that MSI "failed and refused to specifically perform their contractual obligations with the plaintiffs." However, as against Romine, even construing the complaint liberally, there was no allegation of a breach of contract. The complaint alleged that the actions of Romine constituted tortious interference with contractual relations. At no point in the complaint did Pentz allege that Romine had a contractual obligation to give consent to the lease and that the refusal of consent constituted a breach of that obligation.

Even though we interpret pleadings liberally, the pleadings must advise the adverse party of its obligation and allege a breach of the obligation. *See id.* The nonsuited complaint does not meet this test. The complaint clearly alleged tortious interference with a contract. That Romine "wrongfully withheld consent" is most logically interpreted as an allegation of the means by which Romine allegedly interfered with the contract between Pentz and MSI. Thus, there was no notice to Romine that by withholding consent, a contractual obligation was breached. Furthermore, there is nothing in the Pentz-Romine contract that imposed any obligation on Romine not to withhold consent; rather, the contract prohibited transfer of the property by Pentz without Romine's consent. Therefore, a liberal interpretation of the pleadings cannot encompass a breach-of-contract claim against Romine because no allegations in the complaint provided sufficient notice to Romine of a contractual obligation and a breach of such obligation.

*Compulsory Counterclaim*

Arkansas Rule of Civil Procedure 13(a) states that:

> [a] pleading shall state as a counterclaim any claim which, at the time of filing the pleading, the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the

> subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. . . .

In *Linn v. NationsBank, supra,* the predecessor-in-interest to NationsBank contracted to provide construction financing loans to the Linns. After construction was complete, a dispute arose over the terms of the permanent financing and the Linns discontinued making interest payments on the construction loan. The bank filed a foreclosure action and the Linns counterclaimed with breach of contract and other claims. The foreclosure was granted, as well as the Linns' motion to nonsuit their counterclaims. The Linns then filed suit again, alleging the same causes of action as originally asserted in their counterclaim, and additionally including breach-of-good-faith and breach-of-fiduciary-duty causes of action, which were not raised in the original suit.

The court dismissed the breach-of-good-faith and breach-of-fiduciary-duty causes of action because it found that these newly brought causes of action were compulsory counterclaims to the foreclosure action and thus barred by *res judicata.* In discussing compulsory counterclaims, the court stated that "the purpose for this rule is to require parties to present all existing claims simultaneously to the court or be forever barred, thus preventing a multiplicity of suits arising from one set of circumstances." *Id.* The court found that the newly raised breach-of-good-faith and breach-of-fiduciary-duty causes of action were compulsory counterclaims because "[the claims] arise directly from the financing transactions and a logical relationship exists between the foreclosure, the counterclaim, and the subsequent complaint." *Id.*

The present breach-of-contract claim was a compulsory counterclaim to the foreclosure action. The foreclosure action arose from the failure of Pentz to meet his contractual obligation to pay Romine the agreed payments on the real estate. An allegation that Romine breached that same contract would be a compulsory counterclaim because, as Rule 13 articulates, the alleged breach arose out of the same transaction or occurrence and would not require the presence of third parties over which the court could not obtain jurisdiction. A logical relationship existed between the foreclosure action and the alleged breach-of-contract claim, for both claims arose from an alleged breach of the same sales contract.

*Res Judicata*

Because the breach-of-contract claim was not pled in the foreclosure action, it is now barred by the claim-preclusion element of *res judicata*. Claim preclusion forecloses relitigation in a subsequent suit when (1) the first suit resulted in a final judgment on the merits; (2) the first suit was based upon proper jurisdiction; (3) the first suit was fully contested in good faith; (4) both suits involved the same claim or cause of action; and (5) both suits involved the same parties or their privies. *Id.* Additionally, claim preclusion bars not only the relitigation of issues that were actually litigated in the first suit but also those that could have been litigated, but were not. *Id.* A party is obligated to assert compulsory counterclaims or be precluded through *res judicata* from raising them in a subsequent action. *Arkansas Game & Fish Comm'n v. Lindsey*, 292 Ark. 314, 730 S.W.2d 474 (1987); *Olmstead v. Rosedale Bldg. & Supply*, 229 Ark. 61, 313 S.W.2d 235 (1958). When the case at bar is based on the same events and subject matter as the previous case, the trial court is correct to find the present case is barred by *res judicata. See Arkansas La. Gas Co. v. Taylor*, 314 Ark. 62, 858 S.W.2d 88 (1993). One of the main purposes of the doctrine of *res judicata* is to put an end to litigation by precluding a party who has had the opportunity for one fair trial from drawing the same controversy into issue a second time before the same or different court. *Bankston v. McKenzie*, 288 Ark. 65, 702 S.W.2d 14 (1986).

The court had proper jurisdiction over the foreclosure action, and it resulted in a judgment on the merits. There is no assertion that the action was not defended in good faith. As discussed previously, the breach-of-contract claim presently asserted by Pentz involved the same cause of action that should have been raised as a counterclaim in the previous suit, but was not, thus constituting a waived compulsory counterclaim. The present suit and the foreclosure action involved both Romine and Pentz, the same parties as in the prior suit. Therefore, the claim-preclusion element of *res judicata* forecloses relitigation of the Pentzes' breach-of-contract claim in the present suit.

*Summary*

The nonsuited complaint did not allege a breach-of-contract cause of action. The breach-of-contract cause of action asserted in the present suit arose out of the same contract from which the

foreclosure action arose in the nonsuited lawsuit, and a logical relationship existed between the foreclosure action and the Pentzes' breach-of-contract cause of action. Thus, the Pentzes' breach-of-contract cause of action was a compulsory counterclaim to Romine's foreclosure action. Therefore, because the compulsory counterclaim was not raised in the previous foreclosure action, Pentz is barred from raising it in a subsequent suit; accordingly, we affirm the trial court's dismissal of the case on the ground of *res judicata.*

Affirmed.

GRIFFEN and CRABTREE, JJ., agree.

Daniel Scott CHROBAK *v.* STATE of Arkansas

CA CR 00-1101 58 S.W.3d 387

Court of Appeals of Arkansas
Division IV
Opinion delivered October 24, 2001

*Gregory E. Bryant*, for appellant.

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

OLLY NEAL, Judge. A jury found appellant, Daniel Chrobak, guilty of rape, two counts of first-degree sexual abuse, and pandering or possessing visual medium depicting sexually explicit conduct involving a child. Appellant was sentenced to fifty years in the Arkansas Department of Correction. It is from this conviction that he appeals.

The events giving rise to this case began with an investigation by the New York State Attorney General's Office into the transmission and receipt of pornographic images of children via the Internet. In February of 1998, the office focused on an organized group of pedophiles known as the "NewsGroup." On July 27, 1998, an individual using the Internet address "Post@them.now" transmitted fourteen messages containing graphic files depicting minors engaged in sexually explicit conduct to the NewsGroup. The Internet service provider, Aristotle.net, confirmed that appellant, Dan Chrobak, had reserved that Internet address.

FBI Agent Jill Hill reviewed the fourteen messages whereupon she determined that the sexually explicit conduct that was exhibited involved children under the age of sixteen. On October 27, 1998, federal agents executed a search warrant on appellant's trailer and seized a videotape and a three-ring binder with photographs of children engaged in sexually explicit conduct. The video contained two scenes. The first scene involved appellant engaged in sexual relations with a female whose torso only was visible in the video. Based on her background and experience, Agent Hill determined that the female in the video was fourteen years of age or younger. Scene two shows a young female sleeping. In the video, appellant touches her buttocks.

The evidence was delivered to Pulaski County Detective Mark Winchester, whereupon he discovered that the young female was A.H., the daughter of K.S., appellant's co-worker. A.H. testified that she was "pretty sure" that she is the sleeping female whose face was not shown in the photograph because she recognized the pajamas and the 3D heart underwear as those she had previously worn. She also stated that she was less than fourteen years old when the events occurred. After further investigation, appellant was arrested and charged.

On appeal, appellant alleges that (1) the evidence taken from his home should have been suppressed, and that (2) there was insufficient evidence to convict him of rape.

*Sufficiency of the Evidence*

Because of our consideration of prohibitions against double jeopardy, we review the sufficiency of the evidence prior to examining trial error. *Diemer v. State*, 340 Ark. 223, 9 S.W.3d 490 (2000); *see Jones v. State*, 336 Ark. 191, 984 S.W.2d 432 (1999); *Conner v.*

*State*, 334 Ark. 457, 982 S.W.2d 655 (1998). Appellant argues that because the alleged victim could not positively identify herself as the person portrayed in the video and was only able to identify a pair of pajamas as resembling those she had previously worn, there was insufficient evidence to convict him of rape.

To preserve a challenge to the sufficiency of the evidence, a defendant must make a directed-verdict motion at the close of the State's case and renew it at the close of all the evidence. *King v. State*, 338 Ark. 591, 999 S.W.2d 183 (1999). However, when a defendant presents no evidence after a directed-verdict motion is made, further reliance on that motion is not waived. *Robinson v. State*, 317 Ark. 17, 875 S.W.2d 837 (1994). Here, appellant made a motion for directed verdict and a motion to dismiss at the close of the State's case, and both motions were denied. Although the abstract fails to evidence it, appellant proceeds, for at least forty pages in the record, to address the court. However, appellant did not present any evidence after the directed-verdict motion was made; hence, reliance on the motion is proper, and we reach the merits of appellant's argument.

Motions for directed verdict are treated as challenges to the sufficiency of the evidence. *Burmingham v. State*, 342 Ark. 95, 27 S.W.3d 351 (2000); *Johnson v. State*, 71 Ark. App. 58, 25 S.W.3d 445 (2001). This review includes an evaluation of otherwise inadmissible evidence. *Id.* (citing *Harris v. State*, 284 Ark. 247, 681 S.W.2d 334 (1984)). When reviewing the denial of a directed verdict, the appellate court will look at the evidence in the light most favorable to the State, considering only the evidence that supports the judgment or verdict and will affirm if there is substantial evidence to support a verdict. *Johnson v. State*, *supra*. Evidence is sufficient to support a verdict if it is forceful enough to compel a conclusion one way or another. *Johnson v. State*, *supra*.

The supreme court has held that the testimony of a rape victim satisfies the substantial-evidence requirement in a rape case. *Prater v. State*, 307 Ark. 180, 820 S.W.2d 429 (1991). The uncorroborated testimony of a rape victim is sufficient to support a conviction if the testimony satisfies the statutory elements. *Williams v. State*, 331 Ark. 263, 962 S.W.2d 329 (1998). However, circumstantial evidence must be consistent with the guilt of the defendant and inconsistent with any other reasonable conclusion. *Engram v. State*, 341 Ark. 196, 15 S.W.3d 678 (2000); *Sublett v. State*, 337 Ark. 374, 989 S.W.2d 910 (1999).

We defer to the jury's determination on the matter of witness credibility. *Johnson v. State, supra.* Jurors do not and need not view each fact in isolation, but rather may consider the evidence as a whole. *White v. State*, 47 Ark. App. 127, 886 S.W.2d 876 (1994). The jury is entitled to draw any reasonable inference from circumstantial evidence to the same extent that it can from direct evidence. *Id.* It is within the province of the jury to accept or reject testimony as it sees fit and inconsistencies in the testimony of a rape victim are matters of credibility for the jury to resolve. *Id.*

Here, the trial court denied all motions for a directed verdict and appellant was subsequently convicted by a jury of raping victim A.H., who was less that fourteen years of age. A person commits the offense of rape "if he engages in sexual intercourse or deviate sexual activity with another person who is incapable of consent because he is physically helpless or who is less than fourteen (14) years of age." Ark. Code Ann. § 5-14-103(a)(1)(B)(C)(i) (Supp. 2001). Deviate sexual behavior is defined as the penetration, however slight, of the labia majora or anus of one person by *any* body member of another person. Ark. Code Ann. § 5-14-101(1)(B) (Supp. 2001) (emphasis added). Physically helpless means that a person is unconscious or physically unable to communicate lack of consent or rendered unaware the sexual act is occurring. Ark. Code Ann. § 5-14-101(8)(A)(i)(ii)(B) (Supp. 2001).

To determine whether the trial court erred, it is necessary to review the trial testimony. First, A.H., the victim in the case, testified that she met appellant through her mother. He was her mother's co-worker. She testified that when she first met appellant, he was very kind and generous and acted "like he wanted to get to know me better." They would go to the movies and go shopping. She would go over to his house and play a lot of games and he would buy her "board games and stuff." She never remembered him taking her other sisters or brothers with them.

A.H. further testified that she would go to appellant's trailer, and while there, she would "watch tv and spend the night there playing the computer." Appellant would give her something to eat and drink, usually "for breakfast like eggs and bacon and toast and during lunch probably a sandwich and a coke." When asked whether she ever noticed anything unusual about the coke that he gave her, A.H. responded that "like the coke when you first drink it . . . it [tastes] fresh and it has a fizz to it, and later on when I came back from the bathroom and it didn't have a fizz to it. It tasted not like a coke. I drank it anyway. It happened more than once."

In addition to the foregoing, A.H. stated that appellant touched her "like at nighttime." When she was staying the night and watching television,

> I rolled over on my chest and he was at the headboard and he started touching me on the vagina area and with his foot, and rubbing back and forth, and asked me if it felt good and then he rolled me over on my chest and started feeling all over my chest. He used his hands to feel on my chest. And he was saying does it feel good. We were on the waterbed. He had touched me earlier that day. I was on the computer earlier that day, and I was playing games, and he come up behind me and started rubbing on my chest with his hands. . . . He was like rubbing in a circular motion. . . . Both times, I told him to stop and leave me alone. . . . He tried to penetrate me with his penis.
>
> He took his penis out of his pants and I saw it. He did not say anything to me while he was doing that. It made me feel scared and I told my sister. I did not tell my mom because I was scared of what she was going to do to me. I thought I was going to get in trouble. . . .
>
> I recognize his bed. It is in his living room. That is the table we used to sit at and eat sometimes when playing the Ouija board at that table. I recognize the red stripedy [*sic*] cover. I used to sleep with it all the time and be covered up in it. That is where I would sleep when I stayed the night over there. The defendant would sleep on the opposite side of the same waterbed.
>
> From the photo, I recognize my pajamas and my underwear. The underwear are white with 3D hearts on them. My grandma gave me the pajamas for my birthday and I wore them every night. I did wear them over at the defendant's trailer. I remember doing that. I don't remember being taped on a video camera. The police did find a videotape, but I have never seen that videotape.

On cross examination, A.H. testified that she was "pretty sure" that she is the person depicted in a photograph. She could not see her face, but she was "pretty sure" that it was her. She further testified that the coke made her "very sleepy."

Appellant's mother, K.S., testified for the State. She testified that she had five children, and appellant, her co-worker, lived in the neighborhood. He would offer to come over and cut grass. "He offered to take one of my daughters because he has a niece her age

to movies, bowling, skating, just different things, go carting. That was my daughter A.H. and he did not express a lot of interest in my other four children." She further stated that she allowed her daughter to spend the night at his trailer. She spent the night over there "thirty times in a year and a half. I never had any reason to think that I was not to trust him."

When shown a picture, K.S. testified that

> that's my daughter sleeping. I believe I saw [the photograph] when Detective Winchester showed it to me to identify my daughter and that is my daughter in that photograph. She looks about eight years old in that picture. Those are her pajamas that her grandmother had given her maybe for her sixth birthday. Those are her underwear also. They are white with designs on them, looks like hearts, pink, blue, and yellow.
>
> I do recall her owning that pair of underwear. She was probably eight years old when she wore that underwear and the same age when the pajamas fit her. She outgrew them and I gave them to Detective Winchester. Those are the pajamas. . . . She also outgrew the panties, but we threw those away.

Detective Winchester testified that when he saw the tape, the first thing he set out to do was "identify the victim." He obtained information from a witness, H.I., appellant's girlfriend. Based on the information she gave him, he was able to locate A.H. He further testified that

> H.I. took me out to the residence where [the victim] used to live. And then I was able to do some research and find out who used to live there. I made contact with her mother, the victim's mother, K.S. I showed her a still photo taken from that video to have her identify her daughter. . . . I showed her actual pictures taken from that tape. . . . After showing her those photographs, I received an item of clothing from A.H.'s mother. They were the pajamas that appeared to be the same as in the still photographs.

The jury was shown the video. The first scene in the video depicted a very disturbing picture of the appellant and a sleeping or otherwise unconscious young female. The female's face is not apparent from the video, however, she is wearing white pajamas with pink polka dots on them and colorful 3D heart underwear. She does not move in the scene, but only flinches once when appellant is shown engaging in deviate-sexual behavior. Appellant is

shown touching the labia majora of the female with his hand. He is also shown moving the pajamas and underwear to the side and penetrating her labia majora with his tongue. He then proceeds to penetrate the labia majora of the female with his penis.

As previously evidenced, victim A.H. testified that she owned pajamas with pink polka dots on them and colorful 3D heart underwear and wore them on some occasions at appellant's home. She further testified that appellant often gave her cokes that, after she returned from the bathroom, did not have a "fizz" to them and made her sleepy. She further testified that on several occasions, appellant had touched her chest with his hands and showed his penis to her and tried to penetrate her. She also testified that while at the opposite end of the bed as appellant, he took his foot and touched her vaginal area "rubbing back and forth."

Her mother K.S. testified that A.H. owned pajamas and underwear as described. The pajamas were given to a younger sibling of A.H. and the underwear were discarded. She relinquished the pajamas to Detective Winchester. Detective Winchester gave testimony that he received an item of clothing from A.H.'s mother that appeared to be the same as those shown in the video.

The foregoing testimony along with the video seized from appellant's home was presented to the jury. After reviewing the evidence in the light most favorable to the State, we have determined that there was substantial evidence to support appellant's conviction. Specifically, we hold that there was enough circumstantial evidence that was forceful enough to compel reasonable minds to reach a conclusion consistent with appellant's guilt and inconsistent with any other reasonable conclusion. The victim testified that appellant had, in previous instances, inappropriately touched her chest and vagina and attempted to penetrate her. We defer to the reasonable inferences of the jury who found enough circumstantial evidence to convict appellant of rape. Accordingly, the trial court's denial of appellant's motion for directed verdict is affirmed.

*Motion to Suppress*

Appellant next contends the trial court erred in denying his motion to suppress the evidence taken from his residence. He alleges that there was no reasonable cause to believe that Chrobak was the person who sent the images from a computer located in his mobile home because (1) FBI Special Agent Jill Hill, in her affidavit

and testimony, stated that she did not know if the person who registered the Internet address "Post@them.now" with Aristotle.net was appellant, and because (2) she did not present any evidence that the computer appellant allegedly used to transmit the pornographic images was located in the mobile home that was searched in October of 1998. Additionally, appellant alleges that there were no reports indicating that appellant transmitted or received pornographic images on occasions other than in July of 1998, and that this single transmission, ninety days before the search, was insufficient to establish probable cause to believe contraband was located in appellant's mobile home. We find appellant's arguments unpersuasive.

In reviewing a trial court's ruling on a motion to suppress, we make an independent determination based on the totality of the circumstances, viewing the evidence in a light most favorable to the State, and reverse only if the ruling is clearly against the preponderance of the evidence. *Johnson v. State, supra.*

The Fourth Amendment to the United States Constitution protects citizens against unreasonable search and seizure. It requires an issuing magistrate to

> simply make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.

*Wyatt v. State*, 75 Ark. App. 1, 54 S.W.3d 549 (2001) (citing *Illinois v. Gates*, 462 U.S. 213 (1983)).

On October 26, 1998, FBI Agent Hill swore out an affidavit for a search warrant for appellant's mobile home at 4629G Old Tom Box Road in Jacksonville, Arkansas, wherein she stated that pursuant to a federal grand jury subpoena, law enforcement officers learned that the account holder of Post@them.now was appellant. Hill testified that her job requires her to execute search warrants based on leads she receives from undercover agents who have gone online in an undercover capacity and have filmed people that are trafficking in child pornography over the Internet. That is what happened in this case.

In the affidavit for the search warrant, Hill stated that through her training, experience, and consultations with other law enforcement officers, she was "aware that individuals involved in the sexual exploitation of children through child pornography almost always keep copies of their sexually explicit materials, especially when they are used in the seduction of children." Hill further stated that due to the protection of passwords and other security devices, the "use of a computer to traffic, trade, and collect child pornography and hardcore sexually explicit pornography is a growing phenomenon," and that individuals involved in the collection and distribution of child pornography almost always maintain and possess their materials in a secure place, most often a residence, to avoid detection by law enforcement. Given her expertise, Hill believed that probable cause existed that computers and computer-related equipment, records and related documents pertaining to the production, receipt, transportation, possession, and distribution of child pornography were located within appellant's mobile home. The United States magistrate judge found that probable cause existed and issued the warrant. Our duty as the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed, and in the case at hand, there was a substantial basis for the magistrate to reach that conclusion. *See Wyatt, supra.*

Citing *White v. State*, 47 Ark. App. 127, 886 S.W.2d 876 (1994), appellant also alleges that the information in the affidavit was stale, thus diminishing probable cause because (1) the information on him came from the New York Attorney General's Office, who intercepted four images from Post@them.now on July 27, 1998, and (2) the search warrant was not applied for until late October of 1998. *White v. State, supra.* However, the delay is not considered separately. Rather, the length of the delay is considered together with the nature of the unlawful activity and in the light of common sense. *Id.* (citing *Cardozo v. State*, 7 Ark. App. 219, 646 S.W.2d 705 (1983)).

Although not binding on this court, we find the decision of the Eighth Circuit Court of Appeals in *United States v. Rugh*, 968 F.2d (8th Cir. 1992) to be highly persuasive. In *Rugh*, the court stated that the delay in executing a search warrant does not always make probable cause fatally stale. Other factors must also be considered, including the nature of the criminal activity involved and the kind of property subject to search. *Id.* In that case, the court ultimately held that the continuous nature of an ongoing child-pornography ring and the tendency of pedophiles to retain child

pornography for a long period of time minimized the lapse of time between information in the affidavit and the execution of a search warrant.

Here, Hill stated that based on her experience, individuals who trade in child pornography "almost always" keep copies of their materials. The New York State Attorney General's Office intercepted the images transferred on July 27, 1998. It was later determined that the address from which the photos were sent belonged to an individual in Arkansas. Common sense tells us that the information would be disseminated to Arkansas officials and that these officials would not act hastily, but instead conduct their own investigation before proceeding further.

Even if it was determined that probable cause was diminished by the length of time between the New York Attorney General's interception of the pornographic images in July of 1998 and the issuance of a search warrant in late October of 1998, we would affirm the denial of appellant's motion to suppress on the good-faith exception to the exclusionary rule. The United States Supreme Court, in *United States v. Leon*, 468 U.S. 897 (1984), noted that the basis for the exclusionary rule was not "to deter objectively reasonable law enforcement activity." The Court went further to state:

> even assuming that the rule effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity. "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least, negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." (Citation omitted.)
>
> "If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the

> search was unconstitutional under the Fourth Amendment." (Citations omitted.) In short, where the officer's conduct is objectively reasonable, "excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty." (Citation omitted.) This is particularly true, we believe, when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope. In most such cases, there is no police illegality and thus nothing to deter. It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient. "Once the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law."

468 U.S. 897 at 919-921 (1984) (citations omitted).

Here, the magistrate operated with full knowledge that the New York State Attorney General's Office intercepted the images on July 27, 1998, as Agent Hill's affidavit so stated. Thus, the magistrate was well aware of the circumstances when he issued the warrant in October of 1998. It was the magistrate's responsibility to determine whether Agent Hill's allegations established probable cause, and we find that the magistrate had a substantial basis for concluding that probable cause existed. The officers conducted a search incident to the execution of that warrant; therefore, any evidence the officers seized became the fruits of a seemingly valid search warrant.

We affirm.

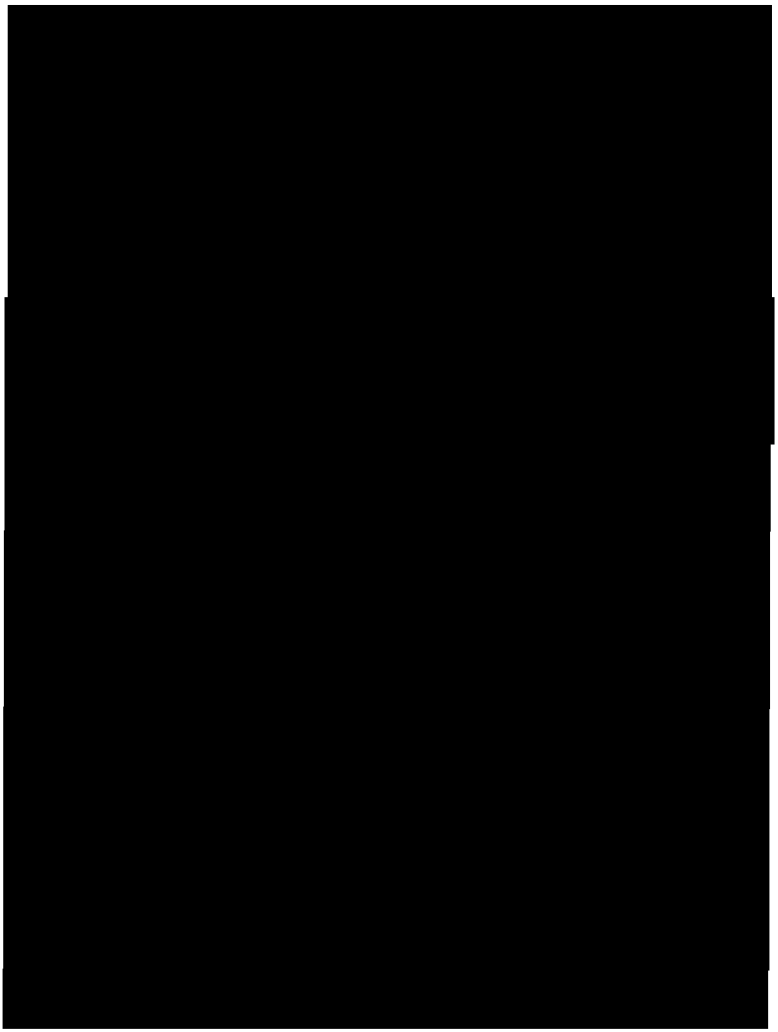
VAUGHT, J., agrees.

PITTMAN, J., concurs.

Erika WENTZ *v.* SERVICE MASTER

CA 01-132 57 S.W.3d 753

Court of Appeals of Arkansas
Division IV
Opinion delivered October 24, 2001
[Petition for rehearing denied November 28, 2001.]



*Walker, Shock & Cox, PLLC*, by: *Eddie H. Walker, Jr.*, for appellant.

*Rieves & Mayton*, by: *Eric Newkirk*, for appellee.

OLLY NEAL, Judge. This is a workers' compensation action. Appellant, Erika Wentz, appeals from the decision of the Workers' Compensation Commission (the Commission) denying her claim for additional benefits. The Commission adopted the administrative law judge's (ALJ) finding that appellant failed to prove she sustained a compensable physical injury to the brain because the medical evidence was not supported by objective findings. On appeal, appellant argues there was no substantial evidence

to support the Commission's decision that the medical opinion in this case was not based on objective findings, and there was no substantial evidence to support the Commission's determination that appellant failed to prove by a preponderance of the evidence that she is entitled to temporary total disability and medical benefits after June 9, 1999. We reverse and remand the decision of the Commission for further proceedings.

Appellant was employed by appellee, Service Master, as a service partner cleaning and servicing machines at Planter's Peanuts. On the evening of December 30, 1998, she was cleaning the floor, and when she came out from underneath a line, her feet came out from under her and she fell head first, hitting her head and the right side of her face on a concrete floor. Although appellant suffered a concussion as a result of the fall, she did not immediately seek medical attention.

On January 5, 1999, appellant was treated in the emergency room of Sparks Regional Medical Center by an internist, Dr. Lance Hamilton. After performing X-ray and MRI testing on appellant, he opined that appellant was suffering from symptoms secondary to the fall. Due to delirium, appellant was admitted to the hospital in February. At this time, she reported to Dr. Hamilton that since the fall, she had been suffering from severe headaches and changes in her mental status. Dr. Hamilton referred appellant to Dr. Douglas Brown, a neuropsychologist. After performing a neuropsychological evaluation on appellant, Dr. Brown diagnosed appellant as having an organic brain disorder, secondary to closed-head injury, mild. Appellant's workers' compensation case manager, Yolanda Kimbrough, asked Dr. Michael Morse to see appellant. Dr. Morse diagnosed appellant as having post-traumatic headaches, along with a post-traumatic encephalopathy and depression. Prior to appellant's visit with Dr. Morse, appellee acknowledged that the injuries to appellant's head and face were compensable and paid temporary total disability benefits and medical benefits through June 9, 1999. However, after Dr. Morse's diagnosis, appellee denied liability for additional benefits.

The ALJ found that the injury to appellant's right jaw and face were compensable injuries. However, the ALJ found that appellant failed to prove by the greater weight of the credible evidence that her jaw/head injuries caused her to be rendered temporarily totally disabled after June 9, 1999. The ALJ also found that appellant failed to prove she sustained a compensable physical injury to the brain as the result of her fall. The Commission affirmed and adopted the

decision of the ALJ. Appellant argues there was insufficient evidence to support the Commission's decision.

When reviewing a decision of the Workers' Compensation Commission, we view the evidence in the light most favorable to the Commission and affirm the decision if it is supported by substantial evidence. *Rice v. Georgia-Pacific Corp.*, 72 Ark. App. 149, 35 S.W.3d 328 (2000). Substantial evidence is that relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). A decision by the Workers' Compensation Commission should not be reversed unless it is clear that fair-minded persons could not have reached the same conclusions if presented with the same facts. *Rice, supra.*

The purpose of our workers' compensation law is to pay benefits to legitimately injured workers who suffer an injury arising out of and in the course of their employment. *Baker v. Frozen Food Express Transp.*, 63 Ark. App. 100, 974 S.W.2d 487 (1998); *see also* Ark. Code Ann. § 11-9-101(b) (Repl. 1996). The employee has the burden of proving a compensable injury. *Carman v. Haworth, Inc.*, 74 Ark. App. 55, 45 S.W.3d 408 (2001). "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). Appellant argues on appeal that there was no substantial evidence to support the Commission's decision that the medical opinion in this case was not based on objective findings. Specifically, appellant argues that neuropsychological testing is objective.

In his testimony, Dr. Morse stated that "[a] neuropsychological evaluation is objective testing for brain function." He explained that "neurological examination will show you if there is any big problem like paralysis or numbers or vision problems or coordination problems, and then the neuropsychological evaluation looks at the mental function of the brain; the ability to do calculations, memory, organize thought, learn, carry out activities."

Dr. Brown admitted that with neuropsychological testing, the patient controls her response. He explained that the "ultimate diagnosis is based upon [the] results of [the patient's] responses which are compared with results of thousands and thousands of others who have done the exact same tests for many years before." He also

explained that when assessing the test results "[he] specifically check[s] to see whether there [are] any indicators that would cause [him] to conclude that [the patient] was attempting to manipulate the test results."

The evidence establishes that appellant had only a ninth-grade education. On March 18, 1999, she saw Dr. Brown for neuropsychological testing. The testing was not finished until March 24, 1999, because appellant suffered exhaustion after the first testing session. Dr. Brown testified that the fatigue factor determines whether psychological examinations are done on one day or two separate days. He explained that administering the examination on one day or two separated days does not affect the validity of the testing. Dr. Brown testified that different tests were administered on each occasion. Dr. Brown further testified that he did not believe that:

> Ms. Wentz's intellectual level or her memory capacity were high enough to manipulate the neuropsychological test. Also, given the broad spectrum of testing that we administer to people such as Ms. Wentz for neuropsychological evaluations, its [*sic*] virtually impossible to manipulate them to come out the way you want them to, because you don't know what each and every piece of the testing means.

We hold there was no evidence that suggested appellant manipulated the testing.

The Pennsylvania courts have found that neurological testing is not generally accepted in the scientific community as a reliable method for diagnosing an encephalopathy when there is no other objective evidence of an encephalopathy. *Skoogfors v. Haverstick-Borthwick Co.*, 44 Pa. D. & C.4th 1 (2000). However, in the case at bar, there is other objective evidence that indicates appellant suffered an injury to her brain. It is uncontroverted that when appellant fell, she landed on the right side of her face on a concrete floor. Dr. Morse opined that appellant suffered nausea and vomiting, and that light made her symptoms worse. He also noted that she did not have any of these symptoms prior to the fall. Furthermore, Drs. Brown and Morse testified that appellant suffered a closed-head injury as a result of the fall. Dr. Brown stated in his report that appellant is suffering from behavioral and cognitive agitation. He also stated that cognitive agitation is often seen with injuries to the cortical processes. Dr. Brown testified that prior to the fall, he estimates that appellant's intellectual capacity was in the

range of ninety-five to one hundred, and now it is in the low eighties. In addition to Dr. Brown's testimony that appellant's memory is deficient, Dr. Hamilton stated that since the fall, appellant has suffered from memory problems, periodic headaches, anxiety, and emotional changes. In his final discharge diagnosis, Dr. Hamilton diagnosed appellant as suffering from a concussion. A concussion is defined as a jarring injury of the brain resulting in disturbance of cerebral function. *Webster's Ninth New Collegiate Dictionary* 273 (1990). Appellant describes herself as weighing 135 pounds and approximately 5'6" in height. She testified that:

> I was cleaning up the floor, standing in some water and chemicals, and my feet came out from underneath me at a side angle. I fell. My feet came up above me. I came down on the right side of my face and head and that's what hit first. My head and the right side of my face actually hit the floor first. It was a cement floor.

When a person of that size and stature falls head first onto a concrete floor, it is conceivable that her brain will suffer some jarring.

Objective findings are also defined as medical opinions stated with a reasonable degree of medical certainty. *Freeman v. Con-Agra Frozen Foods*, 344 Ark. 296, 40 S.W.3d 760 (2001); *see also* Ark. Code Ann. § 11-9-102(16)(B) (Supp. 1999). Our supreme court has held that medical evidence supported by objective findings is not essential in every case, but if medical opinions are offered, they must do more than state that the causal relationship between work and the injury is merely a possibility. *Id.* Our supreme court has gone on to say that, if a doctor renders an opinion that goes beyond possibilities and establishes that a work-related accident was the reasonable cause of the injury, this will establish a reasonable degree of medical certainty. *Id.* Furthermore, 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)).

Appellant testified that on November 13, 1998, she was kicked in the chin, and the blow caused her to hit her head on the edge of

a couch. Appellant testified that her mother took her to the emergency room because she experienced blurred vision and a concussion. She testified that, after this incident, everything was fine. Appellant also testified that after her fall on December 30, 1998, she began experiencing panic attacks and fainting spells, her writing skills changed, and she could no longer drive. Dr. Brown testified that he was unaware of the November 13 incident, but believes that because appellant received no further treatment after the November 13 incident, it was of no significance. He further testified that "in [his] opinion within a reasonable degree of medical certainty it is more likely than not that the December 1998 fall is the cause of [appellant's problems]." Dr. Morse also testified that he believed within a reasonable degree of medical certainty that the fall on December 30, 1998, was the cause of appellant's current problems.

The evidence clearly establishes that appellant began experiencing her current problems after her fall at work. The medical opinions are sufficiently certain and definite that her injuries are the result of her fall at work. Therefore, a causal relationship exists between the resulting injury and her work activity. Based on the evidence, we hold that fair-minded persons could not have reached the same conclusions as the Commission if presented with the same facts.

Appellant also asks us to hold that there was no substantial evidence to support the Commission's determination that she failed to prove by a preponderance of the evidence that she is entitled to temporary total disability and medical benefits after June 9, 1999. Temporary total disability is awarded when the claimant shows she is within her healing period and is totally incapacitated from earning wages. *Superior Indus. v. Thomaston*, 72 Ark. App. 7, 32 S.W.3d 52 (2000). The healing period is that period for healing of an injury which continues until the claimant is as far restored as the permanent character of the injury will permit. *Byars Constr. Co. v. Byars*, 72 Ark. App. 158, 34 S.W.3d 797 (2000). Whether a claimant's healing period has ended is a factual question that is resolved by the Commission. *Dallas County Hosp. v. Daniels*, 74 Ark. App. 177, 47 S.W.3d 283 (2001).

Dr. Morse testified that appellant suffered from post-traumatic encephalopathy and depression. He believed her post-traumatic encephalopathy and depression prevented her from returning to work. The other physicians did not address whether appellant was unable to work. Appellant testified that she has not worked since the accident. She testified that as a result of the fall,

she no longer drives for fear of blacking out and she suffers from dizziness. Based upon the evidence, there was no substantial evidence to support the Commission's determination that appellant failed to prove by a preponderance of the evidence that she was entitled to temporary total disability and medical benefits after June 9, 1999; therefore, we reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

STROUD, C.J., agrees.

GRIFFEN, J., concurs.

WENDELL L. GRIFFEN, Judge, concurring. Although I join the decision to reverse and remand for an award of benefits, I write separately to explain why our past decisions concerning objective findings should be overruled. Prior to a hearing before the administrative law judge, appellee conceded that appellant sustained compensable injuries to the right side of her face or head as a result of the fall. However, appellee disputed whether the accident also resulted in an injury to appellant's brain. It also disputed whether appellant was entitled to the payment of medical expenses and temporary total disability benefits from June 10, 1999, through a date to be determined.[1] As proof of her claim that she sustained an injury to her brain, appellant presented the medical testimony and/or records of Dr. Michael Morse, a board certified neurologist; Dr. Douglas Brown, a certified neuropsychologist; Dr. Lance Hamilton, a general practitioner; Dr. Joe Dorzab, a psychiatrist; and Dr. Timothy Best, a board certified neurologist. All of the medical experts who evaluated appellant agreed that she suffered an injury to her brain as a result of her December 30, 1998, fall. There is no evidence to the contrary.

Dr. Morse testified that when he initially evaluated appellant, she was experiencing severe headaches, face pain, and emotional problems. After treating appellant for post-traumatic headaches and face pain, and diagnosing her with post-traumatic encephalopathy as a result of her December 30, 1998, fall, Dr. Morse referred her to a neuropsychologist for an evaluation. He testified that neuropsychological tests differ from neurological tests, in that neurological

[1] The parties stipulated that appellant sustained a compensable injury to her right jaw and/or face, and that all medical expenses and all temporary disability benefits had been paid through June 9, 1999.

tests measure the loss of motor function such as paralysis, numbness, vision, and coordination. On the other hand, neuropsychological tests assess a person's ability to calculate, remember, learn, organize thoughts, and carry out activities, which Dr. Morse opined served as a reliable assessment of the loss of brain function. Dr. Morse expressed his opinion that a neuropsychological evaluation is an objective testing of brain function because other tests, such as magnetic resonance imagery (MRI) or computerized tomography (CT) scans, are not equipped to detect small tears in the brain. He testified that even though appellant's CT scans and MRIs were normal, she might still have tears in her brain.

The record also includes a November 9, 1999, medical report from Dr. Lance Hamilton. Dr. Hamilton's assessment of appellant in February 1999 was that her change in mental status and symptomatology was secondary to a closed head injury that she suffered from a fall at work. The report indicated that Dr. Hamilton admitted appellant into the hospital in February 1999 for delirium after she experienced severe headaches and a change in mental status. It further relayed that appellant had an MRI of her brain, which was normal except for sinusitis; an X-ray of her facial bones that was normal; a repeat CT scan in February 1999 that was normal for the brain but continued to show sinusitis, and laboratory work that did not show any significant abnormalities. Appellant also underwent an EEG during her February hospital stay that did not demonstrate seizures. In addition, the report indicated that appellant was seen by representatives of the neuropsychology, neurology, and psychiatry departments, who concurred that appellant's mental changes were secondary to her concussion. Dr. Hamilton concluded his report by stating that he had appellant assessed by Dr. Doug Brown, who found that appellant had an organic brain disorder secondary to closed head injury and organic affective disorder of the depressed type that was moderate to severe.

Appellant also introduced a medical report from Dr. Joe Dorzab that was dictated on February 27, 1999. Dr. Dorzab described appellant's mental status exam as normal except for irritability, easy crying, and depression. He also stated that her memory was excellent, and that she was not suicidal or psychotic. Under a heading entitled "Psychiatric Impression," Dr. Dorzab indicated "deferred, suspect some combination of post-concussion syndrome, medication depression and situation factors."

In his deposition testimony, Dr. Brown, a neuropsychologist, testified that he performed a neuropsychological evaluation on

appellant on March 18, 1999, and March 24, 1999, after she was referred to him by Dr. Hamilton. Dr. Brown testified that he was aware that appellant underwent diagnostic examinations, including a CT scan and an EEG. However, Dr. Brown opined that the fact that the diagnostic examinations were normal, and did not indicate there was nothing wrong with appellant's brain. Dr. Brown testified that EEGs were used to determine whether a person had a seizure disorder, and that CT scans may or may not show damage to the brain in terms of structural changes. *He testified that changes that have to do with the function of the brain were only measurable by neuropsychological evaluations.* Dr. Brown opined that although the responses given by appellant were within her control, the results were not, because the tests were safeguarded to prevent patient manipulation. He testified that he based his diagnosis of appellant on the *results* of a series of tests that he administered and *not the responses of appellant.* These tests involved oral responses, written responses, and the performance of various directed physical activities. Dr. Brown testified that the results of the tests were assessed based on patterns established when considering the totality of appellant's responses. He opined that appellant did not have the intellectual level or memory capacity to manipulate the tests, and that unless appellant had extensive knowledge and expertise in the area of neuropsychology, she would not be able to voluntarily control or influence the patterns yielded by her multiple responses. Dr. Brown testified that it was his opinion within a reasonable degree of medical certainty that it was more likely than not that the December 1998 fall appellant sustained was the cause of her brain injury.

Specifically, Dr. Brown stated that he found appellant had a low average range of intelligence, with a very large and significant difference between verbal and nonverbal ability that occurred *only* in certain situations such as brain damage or learning disabilities. He also found a loss of intellectual capacity that looked to be in the fifteen to seventeen point range, and a memory loss in the same range. Dr. Brown stated that the neuropsychological test indicated a weakness of the right frontal cortex and general cortical processing as a whole, with a very severe depression with cognitive and behavioral agitation. He also stated that appellant fit a profile that had been established over the years as consistent with a closed-head injury.

The Commission affirmed and adopted the decision of its administrative law judge based on Arkansas Code Annotated section 11-9-102(5)(D) (Supp. 1999), which requires that a compensable injury be established by medical evidence supported by objective

findings as defined by section 11-9-102(16). Arkansas Code Annotated section 11-9-102(16)(A)(i) (Supp. 1999), defines "objective findings" as "those which cannot come under the voluntary control of the patient." Despite our previous decisions in *Swift-Eckrich, Inc. v. Brock*, 63 Ark. App. 118, 975 S.W.2d 857 (1998), and *Duke v. Regis Hairstylists*, 55 Ark. App. 327, 935 S.W.2d 600 (1996), I vote to reverse the Commission and remand this case for a determination of benefits.

It is settled law that the overriding purpose of our workers' compensation laws is to pay benefits to legitimately injured workers. *See* Ark. Code Ann. § 11-9-1001 (Repl. 1996). It is also clear that the provisions of our workers' compensation law enacted by Act 796 of 1993 are to be strictly construed by administrative law judges, the Commission, and the courts without giving the benefit of the doubt to either party. *See* Ark. Code Ann. §§ 11-9-704(c)(3) and (4) (Repl. 1996). We are governed by the substantial evidence standard of review that obligates us to affirm the Commission if its decision is supported by substantial evidence, *i.e.*, evidence upon which reasonable minds could have reached the same conclusion. None of these principles justifies affirming the Commission's decision. Instead, this case presents clear proof that the footnote I appended to our decision in *Swift-Eckrich, Inc. v. Brock, supra*, and our rationale in *Duke v. Regis Hairstylists, supra*, were fundamentally flawed.

In *Duke v. Regis Hairstylists, supra*, we affirmed the Commission's decision to deny workers' compensation benefits to a woman who alleged that she sustained carpal tunnel syndrome arising from her employment. The treating physician diagnosed the worker's condition based upon medical test findings which were based on the patient's responses to certain stimuli administered by the physician. It was undisputed that an informed patient could voluntarily control her responses to the stimuli administered by the testing physician. In view of the requirement of subsection 11-9-704(c)(3) that the provisions of the workers' compensation law be strictly and literally construed, a majority of our court affirmed the denial of benefits and concluded that the tests did not constitute objective findings.

In *Swift-Eckrich, Inc. v. Brock, supra*, we affirmed the Commission's decision awarding benefits to a worker injured after she was knocked unconscious when struck by a vehicle in her employer's parking lot. In that case, CT scans revealed cerebral edema and interhemispheric hemorrhage and neuropsychological test results

indicated that the worker sustained residual defects in her higher verbal memory, higher level balance, and loss of smell and taste secondary to cranial nerve damage. Although we observed that Brock's complaints of pain, headaches, and her verbal responses to neuropsychological tests were within her voluntary control so as to not constitute "objective findings," we held that substantial evidence existed to support the Commission's finding and award of compensation benefits based on the intercranial bleeding, cranial nerve damage with associated loss of smell and taste, and the results of her CT scan. In a footnote to our decision, I wrote:

> Although this court has previously found that objective findings included diagnoses developed by physicians "based on results obtained from clinical tests which reveal consistent and repeated responses to specific stimuli," [citing *Keller v. L.A. Darling Fixtures*, 40 Ark. App. 94, 845 S.W.2d 15 (1992)] *Keller*, 40 Ark. App. at 98, 845 S.W.2d at 17, such holdings are no longer valid in light of the strict interpretation of the statute which defines objective findings as those not under the voluntary control of the patient. *Duke v. Regis Hairstylists*, 55 Ark. App. 327, 935 S.W.2d 600 (1996). Objective findings did not exist in *Duke* where the findings were based upon patient responses to stimuli even where the tests had built in safeguards against patient fabrications.

*Id.* at 122, 975 S.W.2d at 860.

That statement and the decision in *Duke v. Regis Hairstylists, supra*, resulted from a fundamental mistake about the meaning of the word "findings." Arkansas Code Annotated section 11-9-102(16)(A)(i) states that objective findings are "those [meaning findings] which cannot come under the voluntary control of the patient." In our decision in *Duke v. Regis Hairstylists* and the footnote in *Swift-Eckrich v. Brock*, we construed "findings" to mean the responses that patients provide during clinical testing which can be voluntarily controlled. Thus, in *Duke*, we construed the worker's physical responses to certain tests done by the attending physician as "findings." The Commission followed our decisions in the present case resulting in the appellant's closed-head injury being held as non-compensable because (a) she underwent MRI and CT scanning that revealed no abnormalities to her brain and (b) the neuropsychological test results on which the medical personnel have based their diagnosis of her closed head injury are dependent on responses were theoretically within her control.

But a finding is a determination, not the data upon which that determination is based. "Finding" in the medical sense means a determination by a physician based upon certain data about a condition, disease, or injury. Section 11-9-102(16)(A)(i) provides that objective findings are *findings* that cannot come under the voluntary control of the patient. The relevant inquiry, therefore, is not whether the *clinical data*, or certain datum, are within the patient's control. Appellant's responses to neuropsychological testing are not findings, collectively or specifically. Instead, they are nothing other than indices from which the findings were made. The findings rendered by the physicians who examined appellant were no more within her voluntary control than a factual finding by a trier of fact is within the voluntary control of a witness who reports his or her recollections.

I am sure my analysis will be viewed by some as an attempt to circumvent Act 796 of 1993. I view Act 796 as a draconian legislative scheme; however, that perspective does not control my analysis. Rather, I reach this decision because Ark. Code Ann. §§ 11-9-704(c)(3) states: "Administrative law judges, the commission, and any reviewing courts shall construe the provisions of this chapter *strictly*." (Emphasis added.) Strict construction "obviously connotes a degree of stringency about finding implications and drawing inferences when working with statutes." *See* Morell E. Mullins, Sr., *Coming to Terms With Strict and Liberal Construction*, 64 ALBANY L. REV. 9, 29 (2000).

Test data and patient responses are not findings under any reasonably necessary implication or logical inference. Admitting the distinction between them is entirely consistent with strict construction. Pretending that they mean the same thing is not. Rather than pretend that we are distinguishing this case from our decisions in *Duke* and *Swift-Eckrich*, I would overrule those decisions outright. We can either acknowledge that our past reasoning was flawed, or we can act in slavish obedience to those decisions from an equally flawed notion of *stare decisis*. There is nothing noble or intellectually honest about slavish obedience to a rule whose error is obvious upon deeper reflection.

Moreover, the fields of science and medicine have long recognized a distinction between the responses made by patients and test subjects to stimuli and findings reached by scientists and physicians. When a patient who undergoes an eye examination looks at a visual field and declares whether he sees certain letters, numerals, and

objects, that response is plainly within the patient's voluntary control. But the response is not a medical finding about the patient's vision. When a patient who undergoes auditory examination listens to tones and responds to auditory stimuli (or fails to respond), those responses (or nonresponses) are not clinical findings. Likewise, when patients respond to physical stimuli during clinical testing, their responses are not findings. The findings are made by the professionals in ophthalmology, audiology, or whatever discipline is practiced by the professional in question. As jurists, we should acknowledge the clear difference between objective findings (those made by an examiner whose judgment is not distorted by the patient) and the data from which those findings are obtained. Patient responses are not, as our previous decisions would have one believe, controlling on medical or scientific objectivity. The opposite of objective medical findings are findings based on bias, prejudice, or speculation. That is a far different thing from patient responses.

Finally, this case and our decision in *Swift-Eckrich, supra,* demonstrate that neuropsychology addresses medical and scientific realities that cannot always be anatomically quantified. The uncontradicted expert testimony in this record is that appellant suffered a closed-head injury consistent with a physical injury to the right frontal area of her brain, accompanied by headache, facial pain, nausea, loss of coordination, personality changes, loss of concentration, and other cognitive changes. The opinion of the administrative law judge (which was adopted by the Commission) acknowledges that this evidence medically proves "the presence or existence of some degree of physical injury to the claimant's brain." However, the uncontradicted expert testimony in this record is that such injuries often go undetected even with magnetic resonance imagery or computerized axial tomography. In isolated cases, they have been detected following postmortem inspection of the brain.

Neuropsychology is not superstition, witchcraft, or junk science. Rather, it is a respected and established body of science that combines neurology, physiology, and psychology. There is no intelligent reason why courts and judges should disregard an entire body of scientific knowledge long acknowledged as legitimate merely because current medical technology does not enable radiologists to detect what neuropsychologists can confirm. The experience of Galileo dying under house arrest centuries ago should give us caution us about making sweeping legal conclusions based on the limitations of current and past technology.

Scharel Ann BURLEY *v.* STATE of Arkansas

CA CR 00-1356 57 S.W.3d 746

Court of Appeals of Arkansas
Division IV
Opinion delivered October 24, 2001

[redacted]

*Mason Law Firm, PLC*, by: *Jeffrey W. Hatfield*, for appellant.

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

LARRY D. VAUGHT, Judge. Appellant Scharel Ann Burley was convicted of second-degree murder and sentenced by a jury to eighteen years' imprisonment in the Arkansas Department of Correction. Burley raises two points on appeal. First, she contends that there was insufficient evidence to support the jury verdict. Second, Burley argues that the trial court abused its discretion by allowing the State to introduce evidence of an alleged prior bad act under Rule 404(b) of the Arkansas Rules of Evidence. We reverse and remand on the second point.

*I. Facts*

On Wednesday, January 12, 2000, Central Emergency Medical Services responded to a 911 call from Prairie Grove, Arkansas. The paramedics arrived at the caller's home at 8:48 p.m. to assist a baby in distress. Moments after the paramedics arrived, the baby stopped breathing. The child was identified as eighteen-month-old Samuel Sams. Samuel had been vomiting clear liquid and green mucus, and was breathing at a rate of ten breaths per minute. The paramedics began CPR and transported Samuel to Washington Regional Medical Center. He was pronounced dead at 10:47 p.m.

Dr. Charles Kokes, a medical examiner with the State Crime Lab, performed the autopsy. The cause of death was determined to be acute peritonitis caused by a tear in the child's bowel. The tear was caused by an end-cap of a thermometer, measuring about three inches in length. The end-cap was still inside Samuel at the time of the autopsy. Dr. Kokes testified that peritonitis is associated with severe pain, but is not necessarily fatal. He further testified that the perforation of the rectal wall occurred six to twenty-four hours prior to Samuel's death. Dr. Kokes opined that the force necessary to cause this type of tear would be roughly equivalent to pushing the eraser end of a pencil through six sheets of Saran Wrap. The medical examiner ruled Samuel's death a homicide and concluded that the perforation of his rectum wall by a thermometer cap was "not an accidental happenstance."

Appellant was the child's caregiver at the time that the emergency call was made. Samuel had been in her care since Saturday,

January 8, 2000. She told investigators that Samuel had a fever when she picked him up from his mother's home on Saturday and that she had taken his temperature each day he had been in her care using a digital ear thermometer. Appellant denied ever using a rectal thermometer on Samuel and stated that although she did own a rectal thermometer, she had not seen it for several months. She also told the investigator that she had called the emergency room when Samuel's condition began to deteriorate and was told that Samuel would be fine as long as she could keep him hydrated. During the course of the investigation, appellant admitted that Samuel had not left her sight while he was in her charge, and that she was his only caregiver during the time period in question.

A search of a trash can in appellant's home produced a clear piece of a thermometer cover that matched the piece found inside of Samuel's abdominal cavity. The police also found a rectal thermometer on a bookshelf in appellant's apartment. Paul Williams testified that around Thanksgiving he gave appellant a rectal thermometer that he received during a promotional event held by his employer, Wal-Mart. He further testified that he had seen Samuel the evening prior to his death and that there "was nothing wrong with him." However, Williams also testified that the next morning he observed Samuel in a crib and he "was just laying there like he was dead."

Brenda Westphall testified that her son had been in appellant's care on Sunday, January 9, 2000. She further stated that she borrowed a rectal thermometer from appellant on Sunday when she came to pick up her son. After taking her son's temperature, she left the thermometer, with both pieces of the protective cover intact, on a nightstand in appellant's apartment. According to Westphall's testimony, the following day she noticed that the thermometer had been moved from the nightstand. Two other witnesses testified that they had observed appellant taking Samuel's temperature using a rectal thermometer. Finally, appellant's telephone records were subpoenaed and the police found no evidence that appellant had made a call to the emergency room to seek advice on Samuel's care.

On February 18, 2000, appellant was first charged with second-degree murder; however, the information was later amended to first-degree murder. A jury trial was held on August 8-9, 2000. A jury found appellant guilty of murder in the second degree, sentenced her to eighteen years' imprisonment in the Arkansas Department of Correction, and imposed a $12,000 fine.

*II. Sufficiency of the Evidence*

First, appellant challenges the sufficiency of the evidence to support the jury verdict of second-degree murder. Specifically, appellant argues that the State failed to prove that she "knowingly" caused the death of Samuel. In response, the State argues that the issue was not properly preserved for appeal. The State admits that appellant's motion for a directed verdict as to second-degree murder was properly executed but contends that appellant failed to get a ruling on her motion. In response to appellant's directed-verdict motion, the trial court ruled that the State has "made a prima facie case on the murder in the first-degree charge."

Appellant was charged with first-degree murder for "knowingly caus[ing] the death of a person fourteen (14) years of age or younger at the time the murder was committed." Ark. Code Ann. § 5-10-102(a) (Repl. 1997). The jury was instructed on first-degree murder, second-degree murder, manslaughter, and negligent homicide. She was convicted of second-degree murder, having "knowingly" caused the death of Samuel "under circumstances manifesting an extreme indifference to the value of human life." Ark. Code Ann. § 5-10-103(a)(1). In *Byrd v. State*, 337 Ark. 413, 992 S.W.2d 759 (1999), our supreme court held that "causing a death under circumstances manifesting extreme indifference to the value of human life" is not an element of the charge of first-degree murder under section 5-10-102(a), and that in cases implicating these two code sections, second-degree murder is not a lesser-included offense of first-degree murder. Therefore, the State concludes that the objection was left unresolved and was waived as a point for appeal. *See Danzie v. State*, 326 Ark. 34, 930 S.W.2d 310 (1996).

Although the State has offered a technically sound argument, we hold that the trial court's response to appellant's motion for directed verdict, which found sufficient evidence to go forward on the crime charged, adequately preserved her motion on the other charges. Therefore, we will consider the sufficiency of the evidence on appeal.

A motion for directed verdict is a challenge to the sufficiency of the evidence. The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. Substantial evidence is evidence that is of sufficient certainty and precision to compel a conclusion one way or another. *Ladwig v. State*, 328 Ark. 241, 943 S.W.2d 571

(1997). In a challenge to the sufficiency of the evidence, the appellate court reviews the evidence in the light most favorable to the State, and sustains a judgment of conviction if there is substantial evidence to support it. *Abdullah v. State*, 301 Ark. 235, 783 S.W.2d 58 (1990). Circumstantial evidence may provide the basis to support a conviction, but it must be consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. *Bangs v. State*, 338 Ark. 515, 998 S.W.2d 738 (1999).

In her argument, appellant offers various purportedly exculpatory facts to be weighed against evidence presented at trial by the State. This court, however, views only the evidence that is most favorable to the jury's verdict and does not weigh it against other conflicting proof favorable to the accused. *Hendrickson v. State*, 316 Ark. 182, 871 S.W.2d 362 (1994). The jury is permitted to consider "evidence of cover-up as proof of a purposeful mental state." *Steggall v. State*, 340 Ark. 184, 194, 8 S.W.3d 538, 545 (2000); *See also Paige v. State*, 45 Ark. App. 13, 870 S.W.2d 771 (1994) (holding that a defendant's improbable explanations of incriminating circumstances are admissible as proof of guilt).

Here, the evidence was sufficient to establish that appellant knowingly caused Samuel's death. Appellant inserted a thermometer and its three-inch cap into Samuel's rectum with such extraordinary force that she must have known that the result could be serious injury or death. The medical testimony of the physician who examined Samuel presented evidence of maltreatment, particularly his description of the blunt force required to tear the child's bowel, and his conclusion that this act was "not an accidental happenstance." The autopsy studies indicated that the life-threatening injury occurred six to twenty-four hours prior to Samuel's death, during the time in which appellant was the only care-giver of the child, and she admitted that Samuel had not left her sight during this time period. The medical examiner further testified that peritonitis is not necessarily fatal; therefore, appellant's refusal to seek medical attention after Samuel began a steady decline in health is further evidence that she manifested an extreme indifference to the value of Samuel's life. Finally, appellant's statements that she had not used a rectal thermometer on Samuel and that she misplaced her rectal thermometer months before the incident are improbable explanations of incriminating circumstances and are contrary to the physical evidence and testimony presented by the State at trial.

According to Arkansas Code Annotated § 5-2-202 (Repl. 1993), a person acts knowingly with respect to a result of his

conduct when he is aware that it is practically certain that his conduct will cause such a result. *Ladwig v. State*, 328 Ark. 241, 943 S.W.2d 571 (1997). A jury need not lay aside its common sense in evaluating the ordinary affairs of life, and it may infer a defendant's guilt from improbable explanations of incriminating conduct. *See, e.g., Goff v. State*, 329 Ark. 513, 953 S.W.2d 38 (1997); *Davis v. State*, 325 Ark. 96, 925 S.W.2d 768 (1996). The evidence was sufficient to show that appellant forcefully inserted an object into Samuel's rectum knowing that the result could be serious injury or death. Therefore, the motion for directed verdict was properly denied.

*III. Rule 404(b)*

Appellant next argues that the trial court erred in its denial of her motion in limine, based on Ark. R. Evid. 404(b), to exclude from evidence an allegation of abuse made against appellant in October of 1999. The trial court allowed testimony from Detective Shawn Juhl of the Fayetteville Police Department that he had investigated a battery committed against a three-year-old child, Chelsea Sams. The battery consisted of several bruises on the child's buttocks and "a mark that looked like it had been made with something other than a hand." Detective Juhl testified that after interviewing the child and the child's grandmother he concluded that appellant had committed the battery. Appellant denied the allegation. On November 22, 1999, Juhl sent the file to the Fayetteville prosecutor's office; however, contrary to Juhl's recommendation, no warrant was issued. After Juhl's testimony, the trial court issued the appropriate 404(b) instruction:

> Members of the jury, you are instructed that evidence of other alleged crimes, wrongs or acts of Scharel Ann Burley may not be considered to prove the character of Scharel Ann Burley in order to show that she acted in conformity therewith. This evidence is not to be considered to establish a particular trait of character that she may have nor is it to be considered to show that she acted similarly or accordingly on the day of the incident. The evidence is merely offered as evidence of motive, opportunity, intent, knowledge, absence of mistake or accident. Whether any other alleged crimes or wrongs or acts have been committed is for you to determine.

Evidence offered under Rule 404(b) must be independently relevant, thus having a tendency to make the existence of any fact that is of consequence to the determination of the action more

or less probable than it would be without the evidence. *McGehee v. State*, 338 Ark. 152, 992 S.W.2d 110 (1999). Arkansas Rule of Evidence 404(b) states:

> *Other Crimes, Wrongs, or Acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The list of exceptions to inadmissibility in Rule 404(b) is not an exclusive list, but instead, it is representative of the types of circumstances under which evidence of other crimes or wrongs or acts would be relevant and admissible. *Williams v. State*, 343 Ark. 591, 36 S.W.3d 324 (2001). The test for admission of prior bad acts under Rule 404(b) is whether the evidence offered has independent relevance to a fact of consequence in the case. *Id.* Also, there must be a degree of similarity between the prior bad act and the present crime. To be probative, the prior criminal act must require an intent similar to that required by the charged crime. *Sasser v. State*, 321 Ark. 438, 902 S.W.2d 773 (1995). Finally, if the evidence of a prior bad act is independently relevant to the main issue, rather than merely to prove that the defendant is a criminal, then the evidence of that conduct may be admissible with a cautionary instruction by the court. *Regalado v. State*, 331 Ark. 326, 961 S.W.2d 739 (1998).

Appellant asserts that the detective's testimony should not have been admitted into evidence because (1) there is no evidence that the abuse described was a "prior bad act" of appellant, (2) the State failed to prove that the evidence was used to prove anything other than the bad character of appellant, (3) the evidence is not independently relevant, and (4) the danger of unfair prejudice substantially outweighs the probative value of the evidence. The State concedes that evidence of appellant's prior misconduct would be inadmissible to show only that she was a bad person who should be convicted, but it contends that was not the purposes of the questioning. The conduct inquired about was admissible, the State contends, under Rule 404(b) as proof of motive, intent, preparation, or plan. Specifically, the State argues that appellant failed to seek proper medical attention for Samuel because she was the subject of an investigation of child abuse perpetrated on another child, and that seeking medical care for Samuel could result in more allegations of abuse.

First, we consider if the described abuse allegation was indeed a "bad act." In this case the only testimony, or tangible evidence, of a prior bad act was an opinion offered by Detective Juhl. There is nothing here but an unsubstantiated allegation. Rule 404(b) cannot apply without proof of an actual act being committed. *See Harper v. State*, 1 Ark. App. 190, 614 S.W.2d 237 (1981). An investigator's conclusion of wrongdoing, without anything more, does not amount to an "act" for purposes of Rule 404(b). We, therefore, hold that the trial court's decision to allow Detective Juhl's testimony regarding his investigation of appellant was improper. We cannot say that this testimony had no prejudicial effect. *McIntosh v. State*, 262 Ark. 7, 552 S.W.2d 649 (1977).

Second, we are not convinced that the evidence of appellant's alleged misconduct, even if it amounted to an act, is relevant. Rule 404(b) requires a degree of similarity between the prior bad act and the present crime. *Williams, supra.* The current case involves a puncture wound to a child's bowel, and the allegations of prior misconduct involved a single incident of bruising a child's buttocks. If the evidence does not have a tendency to make the existence of any consequential fact more or less probable than it would be without the evidence, the evidence is not admissible under Rule 404(b). *McGehee, supra.* We fail to see a relationship between the two events that is strong enough to justify an independent relevance for admission.

Third, even if the evidence were relevant, it must be admissible under Rule 403, which requires that its probative value be substantially outweighed by the danger of unfair prejudice. Ark. R. Evid. 403. Evidence of an *alleged* prior bad act has little or no probative value; therefore, any resulting unfair prejudice, tips the balance. The evidence revealed by Detective Juhl's testimony was clearly more prejudicial than probative. We, therefore, conclude that the trial judge abused his discretion by admitting the testimony into evidence. *Mixon v. State*, 330 Ark. 171, 954 S.W.2d 214 (1997).

Reversed and remanded for a new trial.

PITTMAN and NEAL, JJ., agree.

Patricia RUBLE *v.*
ARKANSAS DEPARTMENT of HUMAN SERVICES

CA 01-138 57 S.W.3d 233

Court of Appeals of Arkansas
Division I
Opinion delivered October 24, 2001

*Morgan & Tester, P.A.*, by: *Kent Tester*, for appellant.

*Kathy L. Hall*, Office of Chief Counsel, for appellee.

LARRY D. VAUGHT, Judge. In this parental-rights termination case, appellant asserts that the trial court erred in not requiring the Department of Human Services to comply with the Americans with Disabilities Act and in failing to make a "reasonable" award of attorney's fees. We affirm.

On April 12, 1999, K.C. was taken into DHS custody after the agency received a phone call from the child's babysitter alleging that appellant, Patricia Ruble, the child's mother, had abandoned the child. On April 14, 1999, the court found that probable cause existed for custody to remain with DHS. On May 14, 1999, an adjudication order was entered, finding K.C. to be dependent/neglected, and the child remained in DHS custody until the September 6, 2000, termination hearing. On October 5, 2000, appellant's parental rights were terminated.

During the time that K.C. was in DHS custody, appellant was provided many services by DHS. The services included counseling, parenting classes, job location and transportation assistance, and access to housing and utilities. One of the counselors who treated appellant at Community Services, Inc., noted the following in a client narrative: "I suggested that she [appellant] be sent to a residential facility for assessment, evaluation, and treatment, due to her acting out behaviors." Also, Vicky Dennison testified that appellant was depressed and lethargic virtually all of the time and could not do anything to improve her condition.

Appellant argues that these two pieces of evidence establish her entitlement to services under the Americans with Disabilities Act, and that DHS failed to provide such services. Appellant further reasons that the failure to provide these ADA-required services resulted in a premature termination of her parental rights.

In the Americans with Disabilities Act, "disability" is defined at 42 U.S.C.A. § 12102(2), which reads:

> The term "disability" means, with respect to an individual
>
> (a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual.
>
> (b) a record of such impairment; or
>
> (c) being regarded as having such an impairment.

Here, appellant did not notify DHS that she was disabled. Appellant did not identify for DHS (nor, this court) what type of disability she has, nor did she identify what services she needs. The scant testimony that appellant argues establishes her disability is nothing more than a lay observation, and a recommendation for further evaluation. Appellant has not demonstrated that she has a "record" of any impairment covered by the ADA or that she is "regarded" as having such an impairment.

Appellant did not establish that she is entitled to ADA protection; therefore, any arguments related to requirements of the ADA are not preserved for appellate review. DHS provided appellant with meaningful access to services that would allow her a fair chance at remedying the conditions that caused the removal of her child. Once the child has been out of the home for twelve months, and the conditions that warranted removal have not been remedied by the parent, termination of parental rights is appropriate. Ark. Code Ann. § 9-27-341 (Supp. 1999).

For her second point on appeal, appellant argues that the chancellor erred by failing to award the full amount requested in attorney's fees for work performed. Appellant's counsel was appointed by the chancellor pursuant to Ark. Code Ann. § 9-27-316 (Repl. 1998), which requires appointment of counsel for indigent parents in termination cases. Counsel filed a motion for attorney's fees with the chancery court on September 27, 2000. The motion requested attorney's fees in the amount of $2,700. This

amount represented nineteen hours of work at a rate of $125 per hour. Counsel's motion had an accompanying detailed worksheet which itemized the nineteen hours of service he provided; however, counsel did not include the worksheet in the abstract or attach the worksheet as an addendum to his brief. The motion was supported by affidavits from three local attorneys attesting to the fact that $125 per hour was the customary local billing rate for attorneys. The chancellor awarded appellant attorney's fees in the amount of $900 and directed that the fees be paid from the Van Buren County coffers.

Counsel argues that absent a showing that his $2,700 request for fees was "unreasonable," he is entitled to the full amount requested. For this proposition, he cites *Baker v. Arkansas Dep't of Human Servs.*, 340 Ark. 42, 12 S.W.3d 201 (2000). However, in *Baker*, the supreme court examined the constitutionality of requiring counsel to represent an indigent parent *pro bono* in a termination case. The court recognized that the services of an attorney are a specie of property subject to Fifth and Fourteenth Amendment protection. *Baker, supra*; *Arnold v. Kemp*, 306 Ark. 294, 813 S.W.2d 770 (1991). In *Arnold*, the supreme court held that the appointment of counsel in criminal cases results in a taking of the appointed counsel's property for which he must be justly compensated. *Id.* The *Baker* court recognized that termination cases are civil in nature, but it concluded that the principles that require payment of attorneys' fees for representing an indigent criminal defendant are applicable to termination cases as well, and further concluded that it would be unconstitutional for the chancellor to appoint counsel to represent appellant, and then deny that counsel reasonable payment for services rendered.

It is the "reasonable payment" language of *Baker, supra*, that appellant relies on. However, this court traditionally leaves the "reasonable" determination to the chancellor. The decision to award attorney's fees and the amount to award are discretionary determinations that will be reversed only if the appellant can demonstrate that the trial court abused its discretion. *Nelson v. River Valley Bank & Trust*, 334 Ark. 172, 971 S.W.2d 777 (1998); *Burns v. Burns*, 312 Ark. 61, 847 S.W.2d 23 (1993).

Appellant contends that an award of fees at a rate of $125 per hour is "reasonable" based on the affidavits provided to the court, and that absent a showing otherwise, any reduced award is an abuse of discretion. However, in *Baker*, the case upon which appellant so heavily relies, the supreme court set the fees at $55 per hour

by per curiam order. *See Baker v. Arkansas Dep't of Human Servs.*, 340 Ark. 408, 12 S.W.3d 200 (2000). The trial court's $900 fee award is comparable to the "reasonable" amount awarded in *Baker*. Additionally, at the time of counsel's appointment in this case, there was no statutory provision for an award of attorney's fees in indigent dependency-neglect cases.[1] Therefore, we find no error. Affirmed.

PITTMAN and NEAL, JJ., agree.

COOPER TIRE & RUBBER COMPANY
*v.* Richard ANGELL

CA 01-152 58 S.W.3d 396

Court of Appeals of Arkansas
Division II
Opinion delivered October 24, 2001
[Petition for rehearing denied November 28, 2001.]

[1] This omission was rectified by Act 1267 of 2001.

*William G. Bullock*, for appellant.

*Carolyn Lee Whitefield*, for appellee.

TERRY CRABTREE, Judge. This appeal arises from an Arkansas Workers' Compensation Commission's opinion in which the Commission made the following findings: 1) that the claim of the appellee, Richard Angell, for additional worker's compensation was not barred by Ark. Code Ann. § 11-9-702(b); 2) that the appellant, Cooper Tire & Rubber Company, willfully and intentionally failed to pay for medical treatment received by appellee, and thus appellant must pay a 36% penalty; and 3) that by failing to comply with the Administrative Law Judge's October 29, 1997, order, appellant was in contempt, however the Commission suspended and held in abeyance a $10,000 fine, contingent on appellant's compliance with the Commission's past and prospective orders. Appellant appeals the decision of the Commission. We find no error and affirm.

This case arose out of an admitted compensable injury to appellee on June 8, 1992. Appellee testified that he was pulled within two rollers of a machine. Appellee reported injuries to his upper extremities, low back, and lower extremities. Appellant paid temporary total disability payments from the date of the injury through May 31, 1993, the date on which appellee's healing period ended. Appellee was assigned a 23% impairment rating to his left lower extremity, which appellant accepted and paid. An issue arose as to whether complaints appellee made in 1995 and 1996 of problems with his right knee and low back were related to the June 8, 1992, injury. The Administrative Law Judge ("ALJ"), by opinion dated October 29, 1997, found that appellee had shown that his physical problems involving his right leg and back were directly and causally related to the compensable injury. The ALJ found Dr. William Bundrick as appellee's primary medical provider. The ALJ found that appellant was responsible for continued reasonably necessary medical treatment and/or referrals provided by Dr. Bundrick. The ALJ found that appellee was not entitled to additional permanent impairment benefits beyond those previously paid, but that the nature and extent of appellee's injury as well as further indemnity benefits required additional development of medical evidence, and was by necessity specifically reserved. The ALJ directed appellant to

pay outstanding medical and related expenses consistent with his findings of fact. Neither party appealed this ruling.

The last medical treatment of appellee that appellant paid for was treatment provided by Dr. Bundrick on February 10, 1998. In October 1999, appellant filed for additional worker's compensation benefits. In an opinion filed on May 19, 2000, the ALJ found in favor of appellee, and specifically found no statute of limitations violation, imposed a 36% penalty on appellant, and imposed a $10,000 fine for contempt on appellant. The Commission affirmed the ALJ's decision, but modified the findings with respect to the fine, holding the fine in abeyance contingent on appellant complying with the Commission's orders. It is from this order that appellant brings this appeal.

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).

Appellant's first point on appeal is that the Commission erred in not finding that the statute of limitations had run on appellee's claim for additional benefits pursuant to Ark. Code Ann. § 11-9-702(b). Section 11-9-702(b) in its pre-Act 796 form states:

> (1) In cases where any compensation, including disability or medical, has been paid on account of injury, a claim for additional compensation shall be barred unless filed with the commission within one (1) year from the date of the last payment of compensation, or two (2) years from the date of the injury, whichever is greater.

> (2) The time limitations of this subsection shall not apply to claims for the replacement of medicine ... permanently or indefinitely required as the result of a compensable injury, where the employer or carrier previously furnished such medical supplies, but replacement of such items shall not toll the running of the statute of limitations.

Appellant argues that the statute of limitations has run as the last medical bill it paid was for treatment on February 10, 1998, and appellee did not file his claim for additional benefits until October 1999. We hold that the statute of limitations was tolled as a result of appellant's refusal to provide treatment by Dr. Cavanaugh after appellee was referred to him, and treatments by Dr. Mitchell Young from May 5, 1999, though December 25, 1999. The ALJ's opinion of October 29, 1997, stated that appellant was responsible for continued reasonably necessary medical and related treatment, and that Dr. Bundrick was appellee's primary medical provider. Appellee testified that he attempted, unsuccessfully, to arrange treatment with Dr. Bundrick shortly after the ALJ rendered his October 29, 1997 opinion. Appellee's unsuccessful attempt to arrange treatment with Dr. Bundrick was a result of the appellant not notifying Dr. Bundrick's office that it would pay for an evaluation and reasonably necessary treatment for appellee's injuries. Eventually, on February 10, 1998, Dr. Bundrick treated appellee, and referred appellee to Dr. Cavanaugh for low back pain. Appellant never provided the treatment by Dr. Cavanaugh. Dr. Cavanaugh would not see appellee until appellant approved the visit, and appellant never approved the visit. Further, Dr. Bundrick told appellee that if all he needed was a cortisone injection in his right knee, and if he had a physician who could give the injection in Texarkana, it would save him a trip to Shreveport. In following Dr. Bundrick's advice, appellee saw Dr. Mitchell Young on several occasions. Dr. Young gave appellee injections into his right knee on May 25, 1998, and next on June 9, 1999. Appellant argues that since injections to the knee were the only thing covered by the "so-called referral" that the period has run. However, since appellant would not approve the visit to Dr. Cavanaugh regarding his back, and since Dr. Bundrick did not treat the back, it was necessary for appellee to see Dr. Young regarding his back pain. Appellee was treated for his back pain by Dr. Young on 9/23/98, 1/13/99, 4/20/99, and 5/25/99. Based on this we hold that appellee's claim for additional benefits is not barred by Ark. Code Ann. § 11-9-702(b).

Second, appellant argues that the Commission erred in finding that it willfully and intentionally failed to pay for the incurred

medical treatment received by appellee under the care of Dr. Bundrick subsequent to the medical service of February 10, 1998, and ordering it to pay a 36% penalty. Arkansas Code Annotated § 11-9-802 (Repl. 1996) states in relevant part:

> (d) Medical bills are payable within thirty (30) days after receipt by the respondent unless disputed as to compensability or amount.
>
> (e) In the event the commission finds the failure to pay any benefit is willful and intentional, the penalty shall be up to thirty-six percent (36%) payable to the claimant.

The ALJ found that a bill for reasonable and necessary medical treatment provided by Dr. Bundrick on December 6, 1999, had not been paid. Further the ALJ found that appellant had not paid for prescription medication provided by Dr. Bundrick. We hold that there is substantial evidence to support the Commission's imposition of a 36% penalty upon appellant.

Last, appellant argues that the $10,000 fine imposed is excessive and violates the Due Process Clause of the Arkansas Constitution as well as the United States Constitution Amendment 14, § 1, specifically that the fine violates the prohibition against the deprivation of property without due process, and equal protection. We do not reach the merits of appellant's argument as the Commission suspended and held in abeyance the fine, conditioned on appellant's future compliance with its past and prospective orders. A suspension of a punishment for contempt is in effect a complete remission. *Warren v. Robinson*, 288 Ark. 249, 704 S.W.2d 614 (1986). This renders the issue moot. *See Johnson v. Johnson*, 243 Ark. 656, 421 S.W.2d 605 (1967). We do not decide cases that are moot, or render advisory opinions, or answer academic questions. *See K.S. v. State*, 343 Ark. 59, 31 S.W.3d 849 (2000). Accordingly, we reject appellant's argument.

Affirmed.

JENNINGS and BAKER, JJ., agree.

Robert Kent GWATNEY *v.* STATE of Arkansas

CA CR 00-908 57 S.W.3d 247

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered October 31, 2001

*Lea Ellen Fowler*, for appellant.

*Mark Pryor*, Att'y Gen., by: *Kent G. Holt*, Ass't Att'y Gen., for appellee.

JOHN F. STROUD, JR., Chief Judge. Robert Gwatney was convicted in a bench trial of possession of drug paraphernalia, for which he was sentenced to three years' probation, ninety days in the county jail, and was assessed a $500 fine and court costs. Gwatney now appeals, arguing that the evidence is insufficient to support the verdict and that the trial court erred in refusing to grant his motion for a continuance. We reverse and dismiss on appellant's first point of appeal.

At trial, Officer Kim Francisco, the only witness for the State, testified that on December 29, 1998, she received information from a confidential informant that appellant lived at 21304 Nebraska in North Little Rock and was in possession of a large quantity of methamphetamine at that address. Officer Francisco and other officers proceeded to that address without a search warrant. When they arrived, Karen Bittinger, a resident of the house, answered the door. Officer Francisco told her why they were there and asked if appellant was at the house; Bittinger said that he was not there. Officer Francisco then asked if they could search the house, to which Bittinger agreed.

When the officers entered the first bedroom off the living room area, they found appellant, wearing only a pair of shorts. Officer Francisco testified that a sock containing a spoon with methamphetamine residue on it, a cotton ball, and two syringes were found in a large chest in the bedroom. She did not remember if the top of the chest was open or closed, but she did say that it was not locked. Officer Francisco was unable to lift any latent prints off the spoon.

For the defense, Jerry Bittinger, Karen Bittinger's father, testified that he owned the house at 21304 Nebraska at the time in question, and although appellant was Karen's boyfriend and sometimes spent the night with her at that house, he did not live there. He said that "literally dozens" of people had access to the house, including himself, as he split his time between that house and another house on Lake Conway. He said that the bedroom in which the paraphernalia was found was not his bedroom but Karen's room.

Karen Bittinger testified that appellant was her "on and off again" boyfriend and even though he stayed with her several nights a week, he did not live with her. She said that she told the police appellant was not at the house when they asked because she was scared and was not sure if he was there or not. She acknowledged that the police found appellant in her bedroom, but she said that the officers told her that they had located the paraphernalia in the ceiling, not in the chest to which Officer Francisco testified. Bittinger said that the chest in the bedroom was hers; it had been there for about a week before officers searched the house; it had belonged to one of appellant's acquaintances; and they had retrieved it from storage. Bittinger said that the contents of the chest had not been searched; she knew it had blankets in it, but she had not taken them out of the chest before the officers performed their search. She said

that she had not seen the sock when she looked inside the chest, and unless it had been underneath the contents of the chest, that "more than likely" the sock had to have been placed in the chest after she brought it into the house. However, she also testified that she was not aware of appellant placing any items in the chest or in the ceiling. She stated that "lots" of people had access to her room during the time the chest had been in her room. Bittinger denied putting any needles in the chest, and she said that the spoon that tested positive for methamphetamine was not hers, although she did say that it could have come from her kitchen because she had "all kinds" of silverware.

Appellant testified on his own behalf. He said that he did not live with his girlfriend, Karen Bittinger, but he did occasionally spend the night at her house. He said that he believed that the door to the bedroom in which the officers found him was closed before the police entered the room, and that he had been sleeping until the police came. He said that the chest was either at the foot of the bed or against the wall. He explained that the chest had belonged to a girl named Tracy, and he had rented her a storage unit for her belongings when she "lost her place." Appellant stated that he knew he and Tracy had access to the storage unit, but he did not know who else had access. When the storage fees were not paid, appellant retrieved all of the items in the unit and took them to Karen Bittinger's house. He said that Bittinger and her family went through the things and picked out what items they wanted to keep. He claimed that he "had no idea" what was in the chest and had made no attempt to determine what was in it. Appellant also testified that the officers found a bag of needles in the ceiling; he said that he did not see the police recover any items out of the chest. He denied that any of the items found by the officers belonged to him.

At the close of the State's case and again at the close of all the evidence, appellant made a motion to dismiss, arguing that the State had failed to prove that appellant knew or should have known that the items of contraband were in the chest or that he had any control over such items, and that numerous people other than appellant had access to the residence. Both motions were denied by the trial court.

When the sufficiency of the evidence is challenged, the appellate court considers only that evidence which supports the guilty verdict, and the test is whether there is substantial evidence to support the verdict. *Blockman v. State*, 69 Ark. App. 192, 11 S.W.3d

562 (2000). Substantial evidence is evidence of such certainty and precision as to compel a conclusion one way or another. *Id.* There is no distinction between circumstantial and direct evidence in a review for sufficiency; however, for circumstantial evidence to be sufficient, it must exclude every other reasonable hypothesis consistent with innocence. *Mayo v. State*, 70 Ark. App. 453, 20 S.W.3d 419 (2000). While the issue of sufficient evidence is dependent upon the facts of the particular case, the issue is one of law. *Id.*

Actual or physical possession is not required to prove guilt of possession of drug paraphernalia, *Jacobs v. State*, 317 Ark. 454, 878 S.W.2d 734 (1994); constructive possession, which is control or right to control the contraband, is sufficient. *Franklin v. State*, 60 Ark. App. 198, 962 S.W.2d 370 (1998). In *Mayo, supra*, this court stated:

> Constructive possession may be implied where the contraband is found in a place immediately and exclusively accessible to the defendant and subject to his control. Where there is joint occupancy of the premises where the contraband is seized, some additional factor must be found to link the accused to the contraband. In such instances, the State must prove that the accused exercised care, control, and management over the contraband and also that the accused knew that the matter possessed was contraband.

70 Ark. App. at 456, 20 S.W.3d at 421 (citations omitted).

Appellant contends that *Williams v. State*, 289 Ark. 443, 711 S.W.2d 825 (1986), supports his position. However, *Williams* was overruled by *Plotts v. State*, 297 Ark. 66, 759 S.W.2d 793 (1988). Furthermore, that case concerned the possession of marijuana in a vehicle, and this court, in *Mayo, supra*, stated that it was "not persuaded that cases involving the possession of contraband in automobiles are fully applicable to cases involving homes or apartments." 70 Ark. App. at 457, 20 S.W.3d at 422. Nevertheless, we find merit in appellant's argument.

We must analyze the present case under the requirements of joint occupancy set forth in *Mayo*, as it was clearly established at trial that appellant was not the only individual who had access to the bedroom in which the paraphernalia was found; that it was the bedroom of his girlfriend, Karen. To prove constructive possession of contraband in premises where there is joint occupancy, the State

is required to prove that appellant exercised care, control, and management over the contraband and also that the accused knew that the matter possessed was contraband. *Mayo, supra.*

In the present case, although the trial judge indicated that he did not believe that appellant had never opened the chest, the State did not provide any evidence that appellant exercised care, control, or management over the contraband that was found in the chest. It is not known if the top to the chest was open or closed, and Officer Francisco testified that there were no prints taken from the spoon that contained methamphetamine residue. No drug paraphernalia was found on appellant. Although appellant had been the person who initially brought the chest to the residence, the testimony was that Karen Bittinger was the person who had determined that she wanted the chest in her room. Furthermore, the chest had been in her room for at least a week, and there was testimony that "lots" of people had access to that room during the time the chest was there. Even viewing these facts in the light most favorable to the State, there is only speculation and conjecture that appellant exercised care, control or management over the paraphernalia found in the chest, which is not sufficient. Certainly the paraphernalia was not found in a place immediately and exclusively accessible to appellant to allow the implication of constructive possession. Furthermore, this is at best a constructive-possession case of premises jointly occupied, which requires some additional factor to link the accused to the contraband, and we do not find proof of such additional factor. For these reasons, we must reverse and dismiss appellant's conviction for possession of drug paraphernalia.

Appellant also contends that the trial court erred in denying his motion for a continuance. Because we reverse and dismiss the case based upon insufficiency of the evidence, it is not necessary to address this issue.

Reversed and dismissed.

HART, BIRD, GRIFFEN, and CRABTREE, JJ., agree.

JENNINGS, J., dissents.

JOHN E. JENNINGS, Judge, dissenting. I cannot agree with the majority's decision that the evidence in this case is insufficient as a matter of law, although in fairness I must concede that the case is close.

We have not considered the evidence in the light most favorable to the judge's decision, but rather we have weighed it against other conflicting proof that is favorable to the accused. This is precisely what we are not to do under decisions of the supreme court, which are binding upon us. *Hendrickson v. State*, 316 Ark. 182, 871 S.W.2d 362 (1994); *Coleman v. State*, 314 Ark. 143, 860 S.W.2d 747 (1993); *Ricketts v. State*, 292 Ark. 256, 729 S.W.2d 400 (1987); *Westbrook v. State*, 286 Ark. 192, 691 S.W.2d 123 (1985).

I agree that this is clearly a joint-occupancy case. The appellant himself gave this address as his residence to the arresting officer. Whether the majority believes the testimony of Ms. Bittinger, her father, and the appellant that he did not really live there but just stayed there from time to time is irrelevant for our purposes. The pertinent facts are that appellant was found alone on a bed in a bedroom within a few feet of a chest that contained drug paraphernalia.

In order to prove that a defendant is in possession of a controlled substance, constructive possession is sufficient. *Osborne v. State*, 278 Ark. 45, 643 S.W.2d 251 (1982). Neither exclusive nor physical possession is necessary to sustain a charge if the place where the offending substance is found is under the dominion and control of the accused. *Crossley v. State*, 304 Ark. 378, 802 S.W.2d 459 (1991). The State need not prove that the accused had actual possession of the contraband. *Embry v. State*, 302 Ark. 608, 792 S.W.2d 318 (1990). Constructive possession can be implied when the controlled substance is in the joint control of the accused or another, although joint occupancy is not sufficent in itself to establish possession or joint possession. *Hendrickson, v. State, supra.* There must be some additional factor linking the accused to the contraband. *Littlepage v. State*, 314 Ark. 361, 863 S.W.2d 276 (1993). The State must show additional facts and circumstances indicating the accused's knowledge and control of the contraband. *Bailey v. State*, 307 Ark. 448, 821 S.W.2d 28 (1991). Constructive possession can be implied where the contraband is found in a place immediately and exclusively accessible to the accused and subject to his control. *Crossley v. State, supra.* Such control and knowledge may be inferred from the circumstances where there are additional factors linking the accused to the contraband. *Nichols v. State*, 306 Ark. 417, 815 S.W.2d 382 (1991); *Mosley v. State*, 40 Ark. App. 154, 844 S.W.2d 378 (1992).

In the case at bar the appellant testified that he had moved the chest in which the drug paraphernalia was found into the residence.

When that testimony is coupled with the evidence that this was appellant's residence and that he was found alone, in very close proximity to the contraband, I am unwilling to say that the evidence of constructive possession is insufficient as a matter of law. Of course, his knowledge of the contraband is a matter of inference but on these facts, the inference seems permissible. Cf. *Mosley v. State, supra.* After reading the opinion of the majority I cannot help but believe that they have found credible the testimony of the appellant, his girlfriend, and her father. This was the trial court's function, which I fear we inadvertently usurp.

I respectfully dissent.

Jewell POLK *v.* STATE of Arkansas

CA CR 01-270 57 S.W.3d 781

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered October 31, 2001
[Petition for rehearing denied December 12, 2001.]

[redacted]

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

*Mark Pryor*, Att'y Gen., by: *Clayton K. Hodges*, Ass't Att'y Gen., for appellee.

JOSEPHINE LINKER HART, Judge. At a bench trial, the circuit court convicted appellant, Jewell Polk, of the crimes of simultaneous possession of drugs and firearms, possession of a controlled substance with the intent to deliver, and theft by receiving. The court sentenced him to a total of sixteen years' imprisonment in the Arkansas Department of Correction. On appeal, Polk contends that the evidence was insufficient to support the convictions because the State failed to establish that he possessed either the cocaine or the handgun that was found in the car he was driving. While we affirm his conviction for possession of a controlled substance with the intent to deliver, we reverse and dismiss his convictions for simultaneous possession of drugs and firearms and theft by receiving.

At 2:30 a.m. on April 22, 1999, Officer Elliot Young of the Little Rock Police Department had under surveillance a residence that was the subject of several complaints alleging that narcotics activity was taking place there. A 1994 black 530i BMW registered to Clarence Duckworth left the residence. The car stopped briefly at the Waffle House and remained there for three minutes. Young asked Officer Charles Allen of the Little Rock Police Department, who was in another vehicle, for assistance in watching the car. After Allen saw the car weaving back and forth between the lanes of traffic, he stopped the car. Allen asked Polk, the sole occupant of the car, for his driver's license, which Allen discovered had expired. Allen cited Polk for improper lane usage and driving with an expired license and impounded the vehicle. Young inventoried the car, and he saw a piece of plastic sticking out above the driver's sun visor. He pulled the visor down and found a plastic bag containing several pieces of an off-white, rock-like substance later analyzed as 2.804 grams of eighty-five percent cocaine base and procaine. Young also saw a lump in the rear passenger-side floor mat, and underneath the mat he found a loaded .380 semi-automatic handgun that had been reported as stolen. Young further testified that the gun was not visible without moving the floor mat. However, he agreed the lump was "something that jumped out at you."

At the conclusion of the State's case, Polk moved for a directed verdict, contending that there was no showing that he was "ever in actual possession of either the firearm or the drugs." Polk noted that the cocaine was found behind the sun visor, the gun was underneath a floor mat in the rear floorboard, and the car was registered to another person. The State replied that Polk was the only person in the car and had exclusive control of the vehicle, that the plastic bag was sticking out of the sun visor, which was immediately above Polk's head, and that the gun was found underneath the rear passenger floor mat, which, the State contended, was the most accessible place in the rear of the car to the driver. The State further noted that the lump was readily discernible by the officers. The court denied the motion.

In his own defense, Polk testified that he borrowed the car from his girlfriend, who he knew did not own the car, so that he could drive somewhere to eat. Polk stated that he drove the car two to three minutes to the Waffle House, where he remained approximately ten minutes while his hamburger and fries were cooking. He was driving back to the house when he was stopped by police. Polk testified that, at most, he was in the car for fifteen minutes. He further testified that he did not know that either a gun or drugs were in the car. Polk, however, admitted that he was a cocaine user and had been using cocaine that night at the house. He further stated that he had previously pleaded guilty to possession of cocaine and drug paraphernalia but that he did so in those cases because he knew about that cocaine and drug paraphernalia.

At the close of the evidence, Polk again moved to dismiss. Polk noted a number of factors to be considered to establish constructive possession of contraband found in a car when the vehicle is jointly occupied. He pointed out that the car was not his, that he was in the car only a short time, that he did not act suspiciously, and that the handgun was not within his immediate proximity, on the same side of the car, in plain view, on his person, or with his personal effects. Polk further noted that the officers did not testify that he was moving the visor or floor mat when he was driving.

The court denied appellant's motion and found appellant guilty of all three counts.[1] The court noted that while Polk was in

[1] Because Polk argued below that the State failed to show constructive possession of the gun, he properly preserved for appeal his challenge to the sufficiency of the evidence to support theft by receiving, which requires proof that the defendant received, retained or disposed of the stolen property. Ark. Code Ann. § 5-36-106(a) (Repl. 1997). "Receiving" is

the car only a short time, he testified that he used cocaine, and cocaine was found in the car. The court also noted that both the handgun and the cocaine were within easy access. Further, the court noted that Polk was in sole possession and control of the car.

Polk challenges the sufficiency of the evidence to support the convictions. When reviewing a denial of a challenge to the sufficiency of the evidence, we consider only the evidence that supports the judgment and affirm if that evidence is substantial. *Boston v. State*, 69 Ark. App. 155, 159, 12 S.W.3d 245, 248 (2000). Specifically, Polk argues that the State failed to show that he constructively possessed either cocaine or the handgun. In response, the State argues that there was substantial evidence that Polk constructively possessed the cocaine and gun because Polk was the sole occupant of the car and both items were found in areas immediately and exclusively accessible to him.

When challenging the sufficiency of the evidence regarding possession of contraband, the standard of review is as follows:

> To convict one of possessing contraband, the State must show that the defendant exercised control or dominion over it. Neither exclusive nor actual, physical possession is necessary to sustain a charge. Rather, constructive possession is sufficient.
>
> . . .
>
> Moreover, constructive possession may be implied when the contraband is in the joint control of the accused and another; however, joint occupancy, alone, is insufficient to establish possession or joint possession. The State must establish that (1) the accused exercised care, control, and management over the contraband, and (2) the accused knew the matter possessed was contraband.

*Stanton v. State*, 344 Ark. 589, 599, 42 S.W.3d 474, 480-81 (2001)(citations omitted).

In this case, appellant was not the owner of the car, and his occupancy of the car was transitory in nature. Based on these facts, Polk's occupancy of the car is more analogous to joint occupancy,

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defined as "acquiring possession, control, or title or lending on the security of the property." Ark. Code Ann. § 5-36-106(b) (Repl. 1997).

as opposed to sole occupancy. Joint occupancy of a vehicle, standing alone, is not sufficient to establish possession or joint possession of the contraband found in the vehicle. *Mings v. State*, 318 Ark. 201, 207, 884 S.W.2d 596, 600 (1994). Other factors to be considered when there is joint occupancy of a vehicle 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 or control over it; and (5) whether the accused acted suspiciously before or during the arrest. *Id.*

While Polk controlled the car, he did not own it; he was in the borrowed car for a short time, well after dark. Further, none of the contraband was in plain view. Nevertheless, we conclude that there was substantial evidence that Polk constructively possessed the cocaine. Young testified that the drugs were found behind the driver's side sun visor, just in front of where Polk was sitting, with the plastic packaging in plain view. Furthermore, Polk admitted to using cocaine at the residence he had just left and to which he was returning.

There was, however, no testimony establishing constructive possession of the handgun. The State did not present any testimony about whether the handgun was easily accessible from the driver's seat or whether the lump in the floor mat could be seen from there. Also, there was not any testimony that during the time Polk was in the car, he entered or reached into the rear of the car. Thus, we conclude that the evidence was insufficient to support the conclusion that Polk constructively possessed the handgun.

Further, we distinguish these facts from those in *Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995), in which there was substantially more evidence connecting the appellant in that case to a handgun found underneath the passenger seat of a borrowed truck. There, an officer testified that the handgun was in an area accessible to the appellant, as the truck cab was so small that anyone in the vehicle had access to it. Also, in that case the appellant exercised dominion and control of the truck, as he drove the truck from Vian, Oklahoma, to Fort Smith, Arkansas, and was the only one to drive the truck that day. Further, the appellant testified that he had "detailed" the truck prior to using it and would have noticed any contraband in it, thus permitting the jury to dismiss the possibility that the contraband was in the truck when the appellant

borrowed it. Also, there was evidence that cocaine was being delivered from the truck, and an officer testified that it was common to find handguns in close proximity to drugs. Finally, the appellant in that case gave an improbable explanation regarding his presence in Fort Smith. Thus, *Kilpatrick* is clearly inapposite given the substantial amount of evidence presented in that case.

Therefore, because Polk constructively possessed the cocaine but not the handgun, we reverse and dismiss his convictions for simultaneous possession of drugs and firearms and theft by receiving and affirm his conviction for possession of a controlled substance with the intent to deliver.

Affirmed in part; reversed and dismissed in part.

STROUD, C. J., and GRIFFEN, J., agree.

BIRD, J., concurs.

JENNINGS and CRABTREE, JJ., concur in part; dissent in part.

JOHN E. JENNINGS, Judge, concurring in part; dissenting in part. I concur in the court's affirmance of appellant's conviction on the charge of possession of cocaine with intent to deliver but dissent from the court's dismissal of the charge of simultaneous possession of drugs and firearms.

The question involved, of course, is whether the evidence is legally sufficient for the case to go to the trier of fact, in this instance the trial judge sitting without a jury. This is a matter of line drawing, and the question of the sufficiency of the evidence is purely one of law. Another way of putting the question would be whether the State has made a *prima facie* case. Manifestly, the question is not whether we have a reasonable doubt of the defendant's guilt or whether we think the trier of fact should have.

In deciding the sufficiency of the evidence, we are bound by certain principles. On appeal we view only the evidence that is most favorable to the verdict and do not weigh it against other conflicting proof favorable to the accused. *Hendrickson v. State*, 316 Ark. 182, 871 S.W.2d 362 (1994); *Coleman v. State*, 314 Ark. 143, 860 S.W.2d 747 (1993). Circumstantial evidence alone may be sufficient to support a conviction. *Ketelson v. State*, 317 Ark. 324, 877 S.W.2d 910 (1994). Finally, the law recognizes that knowledge, like intent, is rarely capable of direct proof and may be established

by circumstantial evidence. *See Bird v. State*, 337 Ark. 413, 992 S.W.2d 759 (1999).

At the outset I must question the majority's employment of a "joint occupancy" analysis. The majority relies on *Mings v. State*, 318 Ark. 201, 884 S.W.2d 596 (1994), for a list of "factors to be considered in joint occupancy cases. . . ." The court in *Mings* actually said, "Other factors to be considered in cases involving *automobiles occupied by more than one person* are. . . ." In the case at bar the defendant was alone in the car when he was stopped. Even if it is appropriate to use a joint occupancy analysis, the fact that the defendant was alone is an appropriate consideration. *See Westbrook v. State*, 286 Ark. 192, 691 S.W.2d 123 (1985) (case involving a residence — not a car). Furthermore, *Mings* clearly states that there must be "some other factor" linking the accused to the drugs. To me this means, at least ordinarily, there must be at least one additional factor. Here, even disregarding the fact that appellant was alone in the car, he was exercising dominion and control over it, a factor that the majority recognizes is appropriate for consideration. Furthermore, I think it can be fairly said that appellant was in "near proximity" to a loaded pistol. It is true that there was no testimony that appellant either could or could not reach the pistol from his position behind the wheel, but "there comes a point where this Court should not be ignorant as judges of what we know as men." *Watts v. Indiana*, 338 U.S. 49, 52 (1949)(Justice Frankfurter).

*Kilpatrick v. State*, 322 Ark. 728, 912 S.W.2d 917 (1995), is, as the majority says, clearly distinguishable on its facts. But in *Kilpatrick* the court said, "The jury might also have inferred that one who possesses cocaine with intent to deliver might also possess a handgun." This statement appears to have been made based in part on certain testimony adduced in *Kilpatrick* and on statements the court had previously made in *Hendrickson v. State, supra*. Here, the appellant's own testimony tied himself to the cocaine located above the visor of the car he was driving — he testified he was a cocaine user and had in fact used it that very evening. For our purposes in deciding the legal sufficiency of the evidence to link the appellant to the pistol, his connection to the cocaine is certainly not determinative, but it is also not irrelevant.

To sustain a conviction for possessing contraband, the State need not prove actual physical possession of contraband; constructive possession, or the control or the right to control contraband is sufficient. *Franklin v. State*, 60 Ark. App. 198, 962 S.W.2d 370 (1998). Constructive possession occurs when contraband is found

in a place that is immediately and exclusively accessible to the accused. *Boston v. State*, 69 Ark. App. 155, 12 S.W.3d 245 (2000). Here the loaded pistol was immediately and exclusively accessible to the appellant.

I respectfully dissent.

CRABTREE, J., joins in this opinion.

TROUTMAN OIL COMPANY, Inc. *v.* Shahlla LONE

CA 00-1453 57 S.W.3d 240

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered October 31, 2001
[Petition for rehearing denied December 5, 2001.]

*Larry K. Cook*, for appellant.

*Knollmeyer Law Office, P.A.*, by: *Michael Knollmeyer*, for appellee.

JOHN B. ROBBINS, Judge. This appeal arises from a breach-of-contract action regarding a lease agreement brought by appellee Shahlla Lone (Lone), the lessee, against appellant Troutman Oil Company, Inc. (Troutman), the lessor. The Lonoke County Circuit Court found that the lease was validly renewed for a term of ten years by Lone, that Troutman breached the contract by terminating the lease without good cause, and that Lone was entitled to damages for lost profits, attorney's fees, and costs in the total sum of $96,980.17. Troutman raises the following points for reversal: (1) that the trial court erred in finding the option to renew the lease was validly exercised when the option contained no terms, rendering it void, and when there was no notice of renewal; (2) that the trial court erred when it denied Troutman's attempts to admit evidence of prior leases between it and other lessees to show the parties' intent regarding rental rates; and (3) that the trial court erred by denying Troutman's motion for new trial. We affirm the trial court's decision.

A more detailed examination of the facts is necessary to an understanding of this appeal. Troutman is in the business of supplying gasoline, oil, and similar products to service stations. While it rents the service station facilities to lessees, Troutman owns the gas in the underground tanks, and the lessee acts as a salesman of the gas and takes a percentage of the gas sales as commission. Lone leased from Troutman a gas station and convenience store located in Cabot. The lease agreement, prepared by Troutman, read in relevant part:

> 2. RENT. . . . The rent shall be as follows: 500.00 (FIVE HUNDRED DOLLARS) per month beginning 2nd day of Jan. 1998 and each 1st day of month thereafter for the term of this lease.
>
> 3. TERM. The term of this agreement shall begin on 2nd day Jan. 1998 and shall run continuously for 1 (ONE) year and shall have one full ten years option to lease again. Troutman shall retain the right to cancel this lease with lessee upon lessee not fulfilling with any or all of the provisions of this agreement.

. . . .

8. ASSIGNMENT. Lessee shall not assign this lease or sublet the leased premises without prior written consent of Troutman. Any such assignment or subletting shall in no way relieve lessee from liability for the obligation imposed by this lease.

[Misspellings corrected.]

Lone sublet the premises by an agreement entered January 2, 1998, wherein he sublet the premises for operation by his sub-lessee in consideration for rental payments of $1500 per month. Troutman gave Lone written consent to this sublease by letter dated January 20, 1998, in which it was stated that the consent letter became a part of the lease agreement. The letter was signed by Charlie Troutman, the company vice president and father of the company president.

Troutman, through its president Toby Troutman, gave Lone notice on May 27, 1999, that it was terminating the lease because Lone had sublet the store in violation of the prior-consent requirement. On September 17, 1999, Lone sued Troutman for breach of the lease agreement, contending that the option to renew was validly exercised, that Troutman had consented to a sublease of the property, and that there was no justification for termination. Troutman countered that Lone's occupancy of the station after January 2, 1999, was on a month-to-month basis, or alternatively that Lone breached the lease by failing to make daily deposits, giving bad checks to Troutman, and failing to provide copies of current inventory upon request, all in violation of other terms in the lease agreement.

The trial judge held for Lone, rendering his findings in a letter opinion that found that the "[a]ctions of parties inferred the renewal of the lease for the ten year term," and that Troutman had insufficient reasons for terminating the lease. Compensatory damages were awarded for the lost profits of $1000 per month (based on the difference between Lone's $500 per month rent obligation and the $1500 per month rent receivable from his sublessee), added to fees and costs. This appeal resulted.

*Whether the Option to Renew was Void and Whether it was Properly Exercised*

Appellant first argues that the contract was void for vagueness and could not be renewed on uncertain terms. Our standard of review of a circuit court's finding following a bench trial is whether that finding was clearly erroneous. *Burke v. Elmore*, 341 Ark. 129, 14 S.W.3d 872 (2000); *City of Pocahontas v. Huddleston*, 309 Ark. 353, 831 S.W.2d 138 (1992). However, we note that the determination of whether a contract is ambiguous is a matter of law. *Western World Ins. Co. v. Branch*, 332 Ark. 427, 965 S.W.2d 760 (1998). The finding that the renewal provision was not void is not clearly erroneous.

Troutman argues that this ten-year renewal provision is void because it does not contain the terms necessary to constitute a valid option. We disagree. There is neither ambiguity nor absence of any essential terms in the option language. The option given Lone under the lease agreement was to continue the lease on the same terms for one additional period of ten years, per the plain language used.

We have recognized that other lease terms have been found void for vagueness, particularly in the context of lease-renewal options. In *Lonoke Nursing Home, Inc. v. Wayne and Neil Bennett Family Partnership*, 12 Ark. App. 282, 285, 676 S.W.2d 461, 463 (1984), Judge Cooper wrote that the lease option to renew therein was void for vagueness because it did not include the terms for the renewal:

> Generally, courts will not supply missing terms in a lease when the parties have not stated in their agreement a definite basis to guide the court's effort to effectuate the parties' agreement. The Arkansas Supreme Court has held that "an option in a written lease to renew upon terms and conditions to be agreed upon is void for uncertainty." *Ferrill v. Collins*, 225 Ark. 247, 281 S.W.2d 939 (1955). However, in *Nakdimen v. Atkinson Imp. Co.*, 149 Ark. 448, 233 S.W. 694 (1921), the Court upheld an option which did not provide for the amount of the rental, but where the parties had agreed that a board of arbitrators would fix the rental. This method of fixing the rent was upheld because of its objective nature. The appellants argue that the language in the option which provides that the renewal is to be on terms "compatible to similar facilities" in Arkansas is objective enough to guide the court in fixing the

terms. We disagree. This option is fatally defective in that no definite method for determining the rental was established. As this Court has stated:

> where the annual rental is not agreed upon and the contract does not otherwise provide a manner for its definite determination, the contract does not meet [the test for definiteness].

*Phipps v. Storey*, 269 Ark. 886, 601 S.W.2d 249 (Ark. App. 1980).

Likewise, in *Heral v. Smith*, 33 Ark. App. 143, 145-146, 803 S.W.2d 938, 940 (1991), we found an option term too vague to enforce:

> We agree with the trial court that the option for renewal in the original lease was void for uncertainty. Generally, courts will not supply missing terms in a lease when the parties have not stated in their agreement a definite basis to guide the court's effort to effectuate the parties' agreement. *Lonoke Nursing Home, Inc. v. Wayne and Neil Bennett Family Partnership*, 12 Ark. App. 282, 676 S.W.2d 461 (1984). The supreme court has consistently held that an option in a written lease to renew upon terms to be agreed upon in the future is void for uncertainty. *Hatch v. Scott*, 210 Ark. 665, 197 S.W.2d 559 (1946). In the case at bar, the statement that the amount of rental could not exceed the cost-of-living index is simply not objective enough to guide the court in fixing the terms of a new lease and therefore cannot be enforced.

Essentially, these cases recognize that those kinds of provisions are nothing more than an agreement to reach an agreement, which are too vague to enforce. *See, e.g., Phipps, supra*. However, we agree with the trial court that there is no such agreement to agree in the case on appeal before us. Indeed, the terms are very clear: The rent is $500 a month for the term of the lease; the term is one year with one full ten years option to lease again. When contracting parties express their intention in a written instrument in clear and unambiguous language, it is our duty to construe the written agreement according to the plain meaning of the language employed. *Coble v. Sexton*, 71 Ark. App. 122, 27 S.W.3d 759 (2000). Different clauses in a contract must be read together and construed so that all of its parts harmonize, if that is at all possible. *Boatmen's Ark., Inc. v. Farmer*, 66 Ark. App. 240, 989 S.W.2d 557 (1999).

As to whether Lone was charged with the duty to specifically notify Troutman of intent to renew after the first year

expired, we find no clear error in the trial judge's conclusions. The trial judge cited to 17A AM. JUR. 2D *Contracts* § 519, which states that if a fixed-time contract provides that a party holds an option to continue the agreement for another similar term, "notice of an election to exercise the option to renew will not be required, in the absence of a contrary provision in the agreement; a continued exercise of the rights conferred by the contract, after the expiration of the first term of its duration, will be sufficient." Likewise, in 17B C.J.S. *Contracts* § 501, it states that: "[c]ontinuing to act under a contract effectively renews it where it . . . otherwise grants a privilege of renewal which is not dependent on any prior notice." Thus, there is support for the conclusion reached by the trial court that the parties effectively renewed the ten-year option on the same terms as the one-year lease by continuing to act in the lessor/lessee capacity after the first year expired. It is noteworthy to add that Troutman did not attempt to terminate the lease until five months after the one-year term had expired, lending support to a waiver of any notice thought required and an acknowledgment of an exercise of the ten-year option. Furthermore, Troutman relied on a provision in the lease as its purported basis for terminating the lease, *i.e.*, Lone's subleasing the property without prior written consent, an invalid basis as conceded at trial. The other alleged defaults occurred after the termination was effectuated and Lone had been ousted.

To illustrate waiver, the case of *Riverside Land Co. v. Big Rock Stone & Material Co.*, 183 Ark. 1061, 40 S.W.2d 423 (1931), is instructive. There, the supreme court, acknowledging that the giving of notice was a condition precedent to the extension of the lease in that case, held that the lessor had waived the lessee's failure to give notice of the extension by accepting rent for over a year, without any objection, before the lessee gave notice of its desire to extend the lease. *See id.*

This is supported in *Stallings v. Poteete*, 17 Ark. App. 62, 67, 702 S.W.2d 831 (1986), where it was stated:

> Our supreme court has long held that a general covenant to renew is sufficiently certain because it imports a new lease like the old one upon the same terms and conditions. *Keating v. Michael*, 154 Ark. 267, 242 S.W. 563 (1922). Here, the term of the lease is provided in the same paragraph as the renewal option.

Based upon the foregoing authorities, the trial court did not err in declining to hold the option right void for vagueness. The lease

contract did not make the renewal dependent upon certain undefinable acts or facts, and the renewal was effective in the absence of a required-notice provision.

*Refusal to Admit Prior Unrelated Leases into Evidence*

Troutman argues that the circuit court abused its discretion in not permitting it to introduce evidence of two prior leases of this convenience store location to demonstrate trade customs and usages in the context of gas/convenience store rentals and options to renew. In sum, the prior leases were intended to demonstrate that Troutman never intended to lease this property for $500 per month for ten years, and that it intended to negotiate the monthly rent upon notice of intent to renew. The two leases dated 1993 and 1995 were with other tenants and provided for $1000 per month rent. The trial court excluded the leases on the basis of irrelevancy. The trial court did not err.

Under Ark. R. Evid. 401, evidence is relevant if it has 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. *Bice v. Hartford Accident & Indem. Co.*, 300 Ark. 122, 777 S.W.2d 213 (1989). The trial court has discretion in determining the relevance of evidence, *Simpson v. Hurt*, 294 Ark. 41, 42, 740 S.W.2d 618 (1987), and its decision on such a matter will not be reversed absent a manifest abuse of that discretion. *Wood v. State*, 20 Ark. App. 61, 65-66, 724 S.W.2d 183 (1987); *see also Oxford v. Hamilton*, 297 Ark. 512, 515, 763 S.W.2d 83 (1989); *Waeltz v. Arkansas Dep't of Human Servs.*, 27 Ark. App. 167, 171, 768 S.W.2d 41 (1989).

Appellant wanted the court to infer that a higher rent would surely have been contemplated for any renewal of the lease as evidenced by *other lessees'* contracts at this location. Those contracts were irrelevant. Perhaps evidence of negotiations that occurred *between Troutman and Lone* prior to entering into the subject lease agreement would be relevant to resolve any ambiguity in their agreement had there been any, but other contracts are not relevant. *See, e.g., Sexton Law Firm, P.A. v. Milligan*, 329 Ark. 285, 948 S.W.2d 388 (1997) (holding that in a breach-of-contract suit between former associate and firm, the trial court properly excluded as irrelevant the testimony of a law school professor who would explain customary practice when an attorney leaves a law

firm); *P.A.M. Transport, Inc. v. Arkansas Blue Cross & Blue Shield*, 315 Ark. 234, 868 S.W.2d 33 (1993) (holding that the testimony of manager of health-care plan administrator's actuarial division that "maximum liability" clause in parties' contract was same as that used in insurance industry standard form was of questionable relevancy in employer's suit for breach of contract and deceit; trial court properly excluded it).

*Denial of Motion for New Trial and for Findings of Fact*

Troutman's last point on appeal is not properly before us for consideration. On July 10, 2000, Troutman timely filed its notice of appeal from the underlying judgment that was entered June 19, 2000. Troutman's motion for a new trial and amended findings of fact filed June 29, 2000, was not ruled on by the trial court; therefore, it was deemed denied July 29, 2000, nineteen days after Troutman's notice of appeal was filed.

According to Rule 4 of the Arkansas Rules of Appellate Procedure—Civil, a notice of appeal filed after the judgment is entered, but before a posttrial motion is resolved, is effective to appeal the underlying judgment. Ark. R. App. P.—Civ. 4(a) and (b). But, "[a] party who also seeks to appeal from the grant or denial of the motion shall within thirty (30) days amend the previously filed notice, complying with Rule 3(e)." There is no amended notice of appeal in the abstract, and this precludes our consideration of his arguments contained in the motion.

The trial court's decision is affirmed in all respects.

STROUD, C.J., GRIFFEN, and VAUGHT, JJ., agree.

BIRD and NEAL, JJ., dissent.

SAM BIRD, Judge, dissenting. The majority holds that the lease-renewal clause is not ambiguous and clearly means that the same terms and conditions shall apply to the ten-year renewal period. I agree with the majority that this clause is not ambiguous; however, I do not agree with the conclusion of the majority that this unambiguous clause creates a general covenant to renew, by which the terms and conditions of the original one-year lease are made applicable to the ten-year renewal term.

The majority states that "[t]he option given Lone under the lease agreement was to continue the lease on the same terms for one additional period of ten years, per the plain language used." This plain language, which the majority construes as a general covenant to renew, states that "[t]he term of this agreement shall begin on the 2nd day Jan. 1998 and shall run continuously for 1 (ONE) year and shall have one full ten years option to lease again."

When no rent or other material term is specified in the contract, and no objective means for determining such term is specified, the contract must fail for uncertainty. *See Heral v. Smith*, 33 Ark. App. 143, 803 S.W.2d 938 (1991); *Lonoke Nursing Home v. Bennett Family P'ship*, 12 Ark. App. 282, 676 S.W.2d 461 (1984).

In *Lonoke Nursing Home*, the dispute centered on an option to renew a property lease. The agreement provided that the renewal terms were to be "compatible to similar facilities." The chancellor held that the option was void for lack of definiteness. This court affirmed, stating that the option was "fatally defective in that no definite method for determining the rental was established." *Lonoke Nursing Home, supra*, at 285. In *Heral*, an option-to-renew clause provided for the terms and conditions of the renewed period to be negotiable, but not to exceed the annual cost-of-living index. The chancellor held that the clause was void for vagueness. This court affirmed, stating that "courts will not supply missing terms in a lease when the parties have not stated in their agreement a definite basis to guide the court's effort to effectuate the parties' agreement." *Heral, supra*, at 145.

The majority concludes that the present renewal clause is enforceable as a general covenant to renew. A general covenant to renew incorporates the same terms and conditions into the new lease. *See Keating v. Michael*, 154 Ark. 267, 242 S.W. 563 (1922). In *Keating*, Michael leased to Keating the west half of a lot. The contract provided to Keating an option to lease both the west and east halves of the lot at the end of the initial lease term. Our supreme court stated that this evidenced a new lease being formed because the option covered additional land, rather than a mere renewal of the same terms and conditions. Due to the lack of agreement as to the rent amount and the finding that there was no general covenant to renew, the court held that the contract failed for indefiniteness.

Similar to the *Keating* contract, which provided that the option for the renewed lease could cover land in addition to that covered

by the original lease, the original lease term in the case at bar was for one year, whereas the renewal option provides for a term of ten years. The same terms and conditions cannot simply be applied to the renewal period because the parties have already explicitly changed the terms and conditions of the renewal period by providing for a longer lease term, thus precluding its enforcement as a general covenant to renew. The parties failed, however, to provide for the amount of rent applicable to the renewal period; thus, the contract must fail for indefiniteness.

To construe the lease renewal clause as a general covenant to renew would contradict the contract's express terms. The second paragraph of the contract provides that the monthly rent shall be $500 per month "for the term of the lease." The third paragraph states that "[t]he term of this agreement shall begin on the 2nd day Jan. 1998, and shall run continuously for 1 (ONE) year and shall have one full ten years option to lease again." The term of the agreement provides only for a one-year term; thereafter, there is an *option* for an additional term.

Different clauses in a contract must be read together and construed so that all of its parts harmonize, if that is at all possible. *Sweeden v. Farmers Ins. Group*, 71 Ark. App. 381, 30 S.W.3d 783 (2000). To read the renewal clause as integrating the $500 rental rate for the ten-year renewal period would contradict the express provision that the $500 rental rate applied to the expressed one-year term of the lease. These different clauses are harmonized by recognizing that the contract explicitly provides the rental rate for the one-year lease and explicitly remains silent as to the rent for the renewal period. Otherwise, construing the clauses would contradict the contract's express terms.

Because the contract fails to provide for the amount of rent for the renewal period and because the clause cannot be enforced as a general covenant to renew, the contract is void for indefiniteness; therefore, I would reverse with instructions to the trial court to dismiss appellee's complaint.

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

Richard Marion HAMM *v.* STATE of Arkansas

CA CR 01-189 57 S.W.3d 252

Court of Appeals of Arkansas
Division II
Opinion delivered October 31, 2001

[redacted]

*Sandra Bradshaw* and *John F. Gibson, Jr.*, for appellant.

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

WENDELL L. GRIFFEN, Judge. After pleading guilty to three counts of Class A misdemeanor sexual misconduct, Richard Marion Hamm was placed on supervised probation for thirty-six months, conditioned upon Hamm serving one year in the county jail and paying a $1,000 fine and court costs. Approximately one year later, Hamm filed a motion for discharge from probation, alleging that he had been on probation for the maximum period of time allowed by law. The State responded that appellant's motion was untimely. The trial court agreed, finding that because appellant was sentenced to one year in jail, the ninety-day limitation on sentence modification applied and that it lacked jurisdiction to modify appellant's sentence. We hold that appellant failed to timely file his motion within ninety days. Consequently, we affirm.

On November 19, 1998, appellant was charged by information for the rape of a minor less than fourteen years of age. He entered into a negotiated plea and pled guilty to three counts of Class A misdemeanor sexual misconduct. As a result of his guilty plea, appellant received an imprisonment of one year, a fine of $1,000 and thirty-six months of supervised probation. He was also required to register as a sex offender.

During the plea proceedings, the court queried whether jail was a condition of probation. The State responded yes, and stated that if appellant did not serve 365 days in jail, he would face one year imprisonment on each count. The court entered an Order and Conditions of Supervised Probation on November 10, 1999. This order deferred sentencing and placed appellant on supervised probation for thirty-six months contingent upon him serving one year in the county jail. The record reveals the following exchange at the proceeding:

THE COURT: And do you lawyers concur in this plea?

MR. GIBSON: Yes, we do, Your Honor.

MS. BRADSHAW: Yes.

THE COURT: The Court finds the plea voluntarily and intelligently made. I further find that there is a factual basis for the plea. In exchange for a plea o[f] sexual misconduct, there's three counts, a class A misdemeanor, it's the judgment and sentence of this court to defer sentencing and place the defendant on supervised probation for thirty-six months. You are to comply with all the conditions of supervised probation. Some of the conditions have an N/A. That's not applicable?

MR. GIBSON: That's correct. Your Honor, the plea was a year in the county jail and thirty-six months unsupervised. And the conditions of probation are geared towards somebody who is reporting on a supervised basis.

THE COURT: Well, where is the other paperwork? I — do you have a commitment form?

MR. CHAMBERS: I don't do a judgment and commitment form for a misdemeanor.

THE COURT: I need a judgment.

MR. CHAMBERS: Here it is. That's one of the orders and condition of supervised probation to serve 365 days in the Ashley County jail.

MR. GIBSON: Right.

THE COURT: So is jail a condition of probation?

MR. CHAMBERS: That's correct. If he doesn't serve his 365 days in jail he could be revoked and he's got three counts of one year each that he could face. What he's doing right now, he's only going to serve one year in jail. . . . And that's what it says, the order on top of the document directs him to serve 365 days in jail. That's because it's a misdemeanor. . . .We typically don't do judgment and commitment orders.

THE COURT: Well, I can do — I think he should be — Is he being sentenced to one year in jail now?

MR. GIBSON: Yes.

Later in the proceedings, the court engaged in the following colloquy:

THE COURT: I don't like to do — I'm not going to — Let's do a regular sentencing to the county jail as if —

So the sentence, you will be sentenced to the county jail for one year?

THE DEFENDANT: Yes sir.

MR. CHAMBERS: Correct.

THE COURT: Does the probation begin after that?

MR. CHAMBERS: *Correct. There will be two years after that, two years probation.* [Emphasis added.]

MR. GIBSON: *Right.* [Emphasis added.]

The trial court entered its findings and orders from the November 8, 1999, proceeding on November 12, 1999, which included the following language:

> The defendant is sentenced to the county jail for twelve months. Defendant shall be permitted to remain out for two weeks and is to report to the Ashley County Sheriff's Office on November 22, 1999, at 5:00 p.m.

Next, the court entered an Amended Order and Findings on December 6, 1999. This order stated as follows:

> Defendant is sentenced to the Ashley County Jail for a period of 365 days. Defendant shall report to the Ashley County Jail within two hours from the time he is off work and shall be released two hours prior to reporting to work.
>
> All previous orders and conditions not specifically modified shall remain in effect.

On December 20, 2000, appellant filed a motion for discharge from probation, alleging that he had been on probation for the maximum period of time allowed by law. In response, the State argued that appellant's motion was untimely pursuant to a ninety-day statutory limitation. Following a hearing, the trial court found that appellant was sentenced to one year of imprisonment in the county jail, with a portion of the sentence requiring him to be on probation and complying with certain conditions. It then found that because the ninety-day limitation to modify a sentence was applicable, it lacked jurisdiction to modify appellant's sentence. This appeal follows.

The crux of appellant's argument hinges on his contention that he was not sentenced by the trial court, but was instead placed on probation conditioned upon him serving 365 days in jail. In response, the State persuasively argues that regardless of the semantics used, appellant was convicted with the result being that the trial court lost jurisdiction.

Arkansas Code Annotated section 5-4-401(b)(1) (Repl. 1997) provides that a Class A misdemeanor sentence shall not exceed one year. When the defendant is placed on probation, the period of probation must not exceed the maximum jail time allowable for the offense charged. *See* Ark. Code Ann. § 5-4-306(a)(1) (Supp. 1999). Also, multiple periods of probation must run concurrently. *See* Ark. Code Ann. § 5-4-307(b) (Repl. 1997).

■■ Once a valid sentence has been put into execution, the trial court loses jurisdiction to modify or amend an original order. *See Pike v. State*, 344 Ark. 478, 40 S.W.3d 795 (2001). While a sentence of jail time constitutes a conviction, our courts have repeatedly held that a conviction also occurs when a plea of guilty, combined with a fine and probation or a suspended sentence, is executed, such that the trial court is deprived of jurisdiction to amend or modify the executed sentence. *See id.*

Rule 37.2 (b) of our Rules of Criminal Procedure provides in pertinent part that "all grounds for post-conviction relief from a sentence imposed by a circuit court, including claims that a sentence is illegal or was illegally imposed, must be raised in a petition under this rule." Subsection (c) goes on to state that when a conviction results from a plea of guilty, the party claiming relief under Rule 37.2 must file a petition in the appropriate circuit court within ninety days of the date of the judgment.

Section 16-90-111(a) (Supp. 1999) of the Arkansas Code Annotated, allows a circuit court to correct an illegal sentence at any time. This remedy is narrow and only applies when the trial court seeks to correct a sentence that was imposed in an illegal manner within ninety days or when the petitioner establishes that the sentence was illegal on its face. *See id.*

Although section 16-90-111(b) allows a trial court to correct an illegal sentence at any time, Rule 37.2(c) of the Arkansas Rules of Criminal Procedure provides a ninety-day time limitation. The filing deadlines contained in Rule 37.2(c) are jurisdictional in nature. *See Petree v. State*, 323 Ark. 570, 920 S.W.2d 819 (1995). Consequently, our supreme court has held that the ninety-day statute-of-limitation period prescribed in Rule 37.2 governs Rule 37 petitions as well as petitions filed pursuant to section 16-90-111(a). *See id.*

The record demonstrates that appellant entered a plea of guilty and received a 365-day jail term, plus a $1,000 fine. Pursuant to *Pike, supra,* appellant was convicted. As a result of his conviction, appellant was ordered to serve one year of imprisonment, followed by a two-year term of probation. This sentence was illegal because, contrary to section 5-4-306, appellant's probationary period exceeded the length of his jail imprisonment. However, appellant filed his petition seeking to modify his sentence approximately one year later. Because the motion was not filed within the ninety-day limitation prescribed by Rule 37.2, the trial court correctly determined that it lacked jurisdiction.[1]

Affirmed.

BIRD and CRABTREE, JJ., agree.

[1] Appellant and his counsel may seek relief via a petition for writ of *habeas corpus. See Renshaw v. Norris*, 337 Ark. 494, 989 S.W.2d 515 (1999).

Kyle COOMBS *v.* HOT SPRINGS VILLAGE PROPERTY OWNERS ASSOCIATION, *et al.*

CA 01-52 57 S.W.3d 772

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered October 31, 2001

*T.B. Patterson, Jr., P.A.*, for appellant.

*Wright, Lindsey & Jennings, LLP*, by: *Kyle R. Wilson*, for appellee.

ANDREE LAYTON ROAF, Judge. Kyle Coombs appeals from the circuit court's order that denied his motion to nonsuit his tort action against the appellees, granted the appellees' motion for summary judgment, and dismissed Coombs' complaint with prejudice. On appeal, Coombs argues that the trial court erred in denying his motion for a voluntary nonsuit pursuant to Ark. R. Civ. P. 41(a) because the motion was filed before the case was finally submitted. We agree that the trial court erred, and reverse and remand.

Coombs brought a tort action against appellees, in which he alleged claims of false arrest and imprisonment, malicious prosecution, tortious interference with a business relationship, abuse of process, and breach of contract. One month before the scheduled trial date, the appellees moved for summary judgment. Coombs moved for additional time to respond to the summary-judgment motion. Although the motion for time was not granted, Coombs failed to respond and, when he appeared at a scheduled pretrial hearing after the time for responding had expired, he was not prepared to defend the motion. The appellees requested that the court rule on the summary judgment motion. Coombs again requested an extension of time. The trial court, who was sitting on assignment from another county, granted a one-week extension of time with the stipulation that further pleadings must be in the judge's hands by September 1, 2000, that they must be faxed to the judge's office in Murfreesboro, and that appellees would have five days to respond. Shortly before the close of business on September 1, Coombs filed with the court clerk another motion for an extension of time or, in the alternative, a motion for a voluntary nonsuit. The trial judge refused to grant the additional time, and stated in a letter opinion dated September 9, 2000, that the motion for nonsuit was made after the court had ruled on the summary-judgment motion. The court entered summary judgment for appellees on September 15, 2000.

Coombs next filed a motion to set aside the summary judgment on September 25, 2000, in which he asserted that the judgment was entered prior to any final submission to the court. In a brief accompanying his motion, Coombs contended that he had been unable to speak to the court or his case coordinator because

the court closed early on September 1, 2000, but that he had faxed the motion for additional time that included an alternative request for voluntary dismissal under Ark. R. Civ. P. 41(a) to the court as agreed on that date.

The trial court advised the parties by letter that it had given Coombs specific instructions on how and when he was to respond to the motion for summary judgment, that Coombs had failed to carry out his instructions, and that the request for nonsuit came after the court had already made its decision. The court denied the motion to set aside the summary judgment by order dated October 23, 2000.

Coombs argues on appeal that the trial court erred in denying his motion for a voluntary nonsuit under the provision of Ark. R. Civ. P. 41(a). He asserts that the motion came before the case had been submitted to the court and that he was entitled to an order dismissing the action as a matter of right.

Arkansas Rule of Civil Procedure 41(a), addressing voluntary dismissal, in pertinent part states:

> Subject to the provisions of Rule 23(d) and Rule 66, an action may be dismissed without prejudice to a future action by the plaintiff before the final submission of the case to the jury, or to the court where the trial is by the court. Although such a dismissal is a matter of right, it is effective only upon entry of a court order dismissing the action.

Both parties are in agreement relating to the standard for determining whether a plaintiff has a right to a nonsuit. "[T]he privilege to take a voluntary nonsuit is an absolute right prior to final submission to a jury or to the court sitting as a jury." *Wright v. Eddinger*, 320 Ark. 151, 154, 894 S.W.2d 937 (1995); *Duty v. Watkins*, 298 Ark. 437, 768 S.W.2d 526 (1989); *see also Beverly Enterprises-Arkansas, Inc. v. Hillier*, 341 Ark. 1, 14 S.W.2d 487 (2000); *Haller v. Haller*, 234 Ark. 984, 356 S.W.2d 9 (1962); *Mutual Benefit Health & Accident Ass'n v. Tilley*, 174 Ark. 932, 298 S.W.2d 215 (1927). Therefore, if a voluntary nonsuit is sought before the final submission of the case, then the nonsuit is an absolute right. *Wright v. Eddinger, supra.* If the nonsuit is requested after final submission of the case, it is within the trial court's discretion to grant or not grant it. *Id.*

Coombs filed his motion on the day his response to appellees' motion for summary judgment was due, Friday, September 1,

2000. Coombs asserts that although the court had indicated that it wanted his response in time to make its decision on that Friday, the court granted appellees five days to reply to the response, and therefore, "[r]egardless of what the [appellant] filed, the [appellees] had requested and received the acknowledged right to reply within five days afterward. The matter simply was not submitted to the court for decision when it denied [appellant's] motion for a voluntary nonsuit." We agree.

A case is not finally submitted until the argument is closed and the case submitted to the jury or the court. *Wright v. Eddinger, supra. See also Haller v. Haller, supra.* In *Wright v. Eddinger, supra,* the principal point on appeal was whether under ARCP Rule 41(a) a trial court may grant a request for voluntary nonsuit where the trial court had announced its decision to grant the defendants' motion for summary judgment. The trial court granted the nonsuit and the defendant appealed. Plaintiff contended on appeal that the argument had not been concluded because she had filed a supplemental memorandum. The supreme court did not agree, and opined that under appellee's theory, "the losing party could simply submit a brief after the trial court's ruling and contend the case was never finally submitted." However, the court ultimately held that the trial court did not abuse its discretion in granting the nonsuit, and affirmed.

In *Duty v. Watkins*, 298 Ark. 437, 768 S.W.2d 526 (1989), a hearing was held on a motion to dismiss the complaint for failure to answer discovery requests. The plaintiff appeared and asked to take a nonsuit under ARCP Rule 41(a), which was denied by the trial court. On appeal, it was determined that plaintiff's request for nonsuit should have been granted. "The rule is clear that the privilege to take a nonsuit before final submission of a case is absolute." *Duty v. Watkins, supra, citing Haller v. Haller, supra.* The court stated that the case had not been finally submitted because, "although the case had come to a hearing, the argument was not yet closed." *Id.*

In the present case, Coombs contends that the argument had not been closed because he still had the right to file a response and appellees retained the right to submit a reply. The trial court instructed Coombs to submit his response by September 1, 2000. On September 1, 2000, appellant instead filed a motion for an extension and, in the alternative, moved for a nonsuit. The trial court did not address Coombs's motion, and on September 8, 2000,

Coombs filed for another extension and again asked, in the alternative, for a nonsuit. Finally, on September 9, 2000, the trial court sent a letter to counsel stating, "When I did not receive any information in response to the Defendant's motion for summary judgment from [Coombs's counsel] as requested and directed by the Court, I then contacted [appellees' counsel] and informed him to prepare an Order with Findings of Fact and Conclusions of Law and forward it to me for my signature." The trial court signed the order of dismissal on September 11, 2000, and it was entered on September 15, 2000..

We find this case distinguishable from *Wright v. Eddinger, supra.* While it is clear that a party cannot "simply submit a brief after the trial court's ruling and contend the case was never actually submitted, unlike the situation in *Wright*, the trial court did not issue a final ruling. The trial court stated that it was "quite impressed" with the motion for summary judgment and that it intended to grant the motion unless Coombs could present something by Septmber 1 to "convince me otherwise;" however, at no point during the pretrial hearing did the trial court state that it was granting appellees' motion for summary judgment on that date.

Instead, the trial court allowed Coombs until September 1 to respond, and Coombs, rather than responding to the merits of the summary judgment, moved for a nonsuit on that date. Under these circumstances the argument was not closed and the case had not been finally submitted to the court. Accordingly, the trial court erred in refusing to grant the motion. We reverse and remand for entry of an order dismissing the case without prejudice.

HART and JENNINGS, JJ., agree.

BAKER, J., concurs.

PITTMAN, J., and HAYS, S.J., dissent.

KAREN R. BAKER, Judge, concurring. I agree with the majority that this case must be reversed. I write separately to express my opinion that the trial judge lacked jurisdiction at the time the summary judgment was entered in this case. "Jurisdiction" is the power of the court to decide cases, and it presupposes control over the subject matter and the parties. *State v. Vaughan*, 343 Ark. 293, 33 S.W.3d 512 (2000) (citing *Davis v. Reed*, 316 Ark. 575, 873 S.W.2d 524 (1994)). Jurisdiction comes from the Arkansas Constitution and the statutes of this state. *See American Party of Ark. v.*

*Brandon*, 253 Ark. 123, 484 S.W.2d 881 (1972); *see also Marvel v. State*, 127 Ark. 595, 193 S.W. 259 (1917).

Arkansas Code Annotated section 16-13-210 (Repl. 1999) provides that a circuit judge who is "physically present in the geographical area of the judicial district which he serves as judge may hear, adjudicate, or render any appropriate order with respect to, any cause or matter pending in any circuit court over which he presides[.]"

Judge Yeargen heard this case on assignment in Garland County, which is part of the Eighteenth Judicial District, and ordered that any further pleadings be faxed to his office in Murfreesboro, Pike County, Arkansas, which is part of the Nineth Judicial District. Assignments are authorized by Amendment 77 (now Amendment 80) of the Arkansas Constitution and by section 16-10-101 (Repl. 1999) of the Arkansas Code. Article 7, section 22, of the Arkansas Constitution states that "the judges of the circuit courts may temporarily exchange circuits or hold courts for each other under such regulations as may be prescribed by law." Although Arkansas Code Annotated section 16-13-405 (Repl. 1999) provides exchange judges the authority to sign orders and papers outside their judicial districts if there is a valid exchange agreement in effect, there is no such statute for judges on assignment.

An extraterritorial order by a circuit judge in a criminal case is "*coram non judice* and void," *Waddle v. Sargent*, 313 Ark. 539, 542, 855 S.W.2d 919, 920-21 (1993) (citing *Williams v. Reutzel*, 60 Ark. 155, 29 S.W. 374 (1895), and jurisdiction cannot be conferred by consent. *Id.* (citing *Red Bud Realty Co. v. South*, 145 Ark. 604, 224 S.W. 964 (1920)). This jurisdictional restriction is codified at Arkansas Code Annotated section 16-88-105(b) (Supp. 2001), which provides that circuit courts shall have jurisdiction to try criminal offenses within the bounds of the geographical judicial district "within the respective counties in which they are held." Language restricting the territorial jurisdiction of chancellors is found at Arkansas Code Annotated section 16-13-317 (Repl. 1999).

In *Henderson v. Dudley*, 264 Ark. 697, 574 S.W.2d 658 (1978), our supreme court held that a chancellor of one judicial district had authority to sign an order while in a different county than the one in which the cause was pending, *as long as it was signed within the judicial district he served* and the court in which the action arose is one

over which the chancellor presided. (Emphasis added.) The clear inference is that trial judges, whether presiding over criminal or civil matters, have jurisdiction to sign orders only within the judicial district from which the cause arose and over which the judge presides.

An order executed by a person lacking authority to act as judge is facially invalid. *Waddle, supra.* Void judgments have no legal effect. *Davis v. Office of Child Support Enforcement*, 322 Ark. 352, 908 S.W.2d 649 (1995). Because the judge was not within the geographical area of the district, the court had no jurisdiction to enter a final judgment in the case. Therefore, the case could not have been before the court for decision. *See Wright v. Eddinger*, 320 Ark. 151, 894 S.W.2d 937 (1995).

JOHN MAUZY PITTMAN, Judge, dissenting. This case involves the ability of a trial judge to regulate proceedings in his courtroom. The appellant's attorney in the present case consistently failed to meet deadlines. The trial judge was in a position to grant summary judgment against appellant for his attorney's dilatory conduct. As a matter of grace, the trial judge gave appellant's attorney a final chance to respond to the summary-judgment motion, provided that certain express conditions were met. Appellant's attorney agreed to those conditions in open court. He then ignored them, waited until the grace period had expired, and filed a voluntary nonsuit instead of the promised response. The majority holds that the trial judge could not then enter summary judgment against appellant. I disagree.

Appellant brought a tort action against appellees. One month before the scheduled trial date, appellees moved for summary judgment. Appellant moved for additional time to respond to the summary-judgment motion. Although the motion for time was not granted, appellant failed to respond, and when he appeared at a scheduled pretrial hearing after the time for responding had expired, he was not prepared to defend the motion. Appellees requested that the court rule on the summary-judgment motion then and there. Appellant again requested an extension of time. The trial judge granted a one-week extension of time with the stipulation that further pleadings must be in the judge's hands by September 1, 2001, and that they must be faxed to the judge's office in Murfreesboro. Appellant did not comply with the terms of the extension. Instead, ten minutes before the close of business on September 1, appellant filed with the court clerk another motion for an extension of time or, in the alternative, a motion for a

voluntary nonsuit. The trial judge refused to grant additional time and entered summary judgment for appellees, stating in a letter opinion that the motion for nonsuit was made after the court had ruled on the summary-judgment motion. Appellant contends that the trial judge erred in denying his motion for nonsuit because the motion for nonsuit was filed before the case was submitted finally. I disagree.

Generally, a case is submitted when argument is closed and the case is before the court for decision. *Wright v. Eddinger*, 320 Ark. 151, 894 S.W.2d 937 (1995). Although it is true that a plaintiff has an absolute right to voluntarily nonsuit a claim before final submission, *Norrell v. Giles*, 343 Ark. 504, 36 S.W.3d 342 (2001), I do not believe that the motion for nonsuit preceded final submission under the particular circumstances of this case.

Rule 6(b) of the Arkansas Rules of Civil Procedure permits a trial judge to grant an extension of time to respond to a summary-judgment motion. The granting of an extension is discretionary. Clearly, it is within a trial judge's discretion to limit the amount of time allowed to one week, as was done in the present case.

A more interesting question is whether it is within the trial court's discretion to modify the *manner* in which pleadings made pursuant to a time extension will be presented to the court. Here, the trial judge, expressing his resolve to rule on the summary-judgment motion on September 1, directed that subsequent pleadings be faxed directly to his out-of-town office in addition to being filed with the court clerk. I believe that the trial judge, who was on assignment and who resided in another county, had the discretion to do this, and that appellant's motion for nonsuit was not presented before final submission of the case because the nonsuit motion was not provided to the court in the manner he directed, *i.e.*, by fax as well as filing. However, I also think this is an academic question under the facts of this case because appellant's attorney *expressly agreed* to present his response to the court in this manner, and the trial judge made it clear that this manner of presentation to the court would be applicable to all subsequent pleadings:

> THE COURT: I was wanting to get [appellant's response] in by next Friday so I can rule.
>
> APPELLANT'S COUNSEL: Yes, sir, . . . I normally include that to mean filed. *I'm perfectly willing to fax it to you* or I'll mail you a file-stamped copy. *Any way you want it.*

> THE COURT: Well, just fax it to me ... and any kind of documentation I need to see. Realize I'm in another county and I don't have access to the Clerk's file, so if there's anything the Court needs to see, correspondence or whatever, address it to my office in Murfreesboro.

Nor do I agree with appellant's argument that the case was not finally submitted because appellee had been allowed five days to file a reply to appellant's response. The trial judge made it quite clear that no further extension was to be granted and that he must have the response in hand by September 1. When appellant failed to respond on the appointed day, pleadings were closed, and the case was finally submitted because there was nothing for appellees to reply to.

I respectfully dissent.

HAYS, S.J., agrees.

HAWKS ENTERPRISES, INC., d/b/a Hawks Mobile Homes and Jim Morgan *v.* Phillip ANDREWS and Deborah Andrews

CA 01-359 57 S.W.3d 778

Court of Appeals of Arkansas
Division III
Opinion delivered October 31, 2001

*Friday, Eldredge & Clark, LLP*, by: *Scott J. Lancaster* and *Bruce B. Tidwell*, for appellants.

*Baxter, Jensen, Young & Houston*, by: *Perry Y. Young*, for appellees.

ANDREE LAYTON ROAF, Judge. Hawks Enterprises, Inc., d/b/a Hawks Mobile Homes, and Jim Morgan appeal from the denial of their motion to dismiss or to stay proceedings pending arbitration and to compel arbitration, in an action filed against them by the appellees, Phillip and Deborah Andrews, in connection with the purchase of a mobile home. On appeal, Hawks and Morgan argue that the trial court erred in 1) refusing to dismiss the action in favor of mandatory arbitration, and 2) refusing the alternative remedy of staying the litigation pending completion of arbitration. We affirm.

In December 1999, the Andrews contracted to purchase a mobile home from Hawks. Morgan was the agent who sold the Andrews the home. The Andrews traded in another mobile home, made a small down payment, and financed the remaining balance of

$45,079. The Andrews signed a contract ("Sales Contract"), dated December 6, 1999, that contained the specifications of the mobile home and terms of the purchase.

The Andrews also executed a separate "Manufactured Home Retail Installment Contract Security Agreement" ("Installment Contract") dated December 20, 1999, for financing of the unpaid balance. The Installment Contract contained an arbitration clause under which the Andrews agreed to settle any "disputes, claims or controversies arising from contract or the relationships which result from this contract" by arbitration. The clause also provided that the arbitration agreement was governed by the Federal Arbitration Act. The Sales Contract signed December 6, 1999, did not contain an arbitration clause.

On August 23, 2000, the Andrews filed suit against Hawks and Morgan for misrepresentation, negligence, and breach of contract. According to the complaint, the mobile home received by the Andrews did not meet the specifications they requested in the Sales Contract. The Andrews alleged, among other things, that Hawks and Morgan intentionally substituted a blank Sales Contract signed by the Andrews for the completed Sales Contract that contained the negotiated specifications.

On September 12, 2000, Hawks and Morgan filed a motion to dismiss with an alternative motion to stay the judicial proceeding and compel arbitration in which they contended that the court lacked jurisdiction and that the arbitration agreement governed the claims alleged in the complaint. They also asserted improper venue and failure to state a claim under Ark. R. Civ. P. 12(b)(6). The trial court denied the motion to dismiss and a subsequent motion to clarify, finding that Hawks and Morgan "had not explicitly made the [Sales Contract] subject to the arbitration clause," that both the Sales Contract and Installment Agreement had integration clauses stating that they contained the entire agreement, that both appeared to be separate and separately enforceable and that "at best, this situation presents an ambiguity which would be construed against the party preparing the documents. . . ."

On appeal, Hawks and Morgan argue that the trial court erred in refusing to either dismiss the complaint or stay the litigation in favor of arbitration. In support of their arguments, they rely to a great extent on case law from federal courts regarding the construction of arbitration agreements. They assert, in essence, that the use of a broad arbitration clause in the Installment Contract indicates

the intent of the parties to submit all disputes to arbitration, despite the absence of such a clause in the Sales Contract. Hawks and Morgan rely on two federal cases, *Fleet Tire Serv. of North Little Rock v. Oliver Rubber Co.*, 118 F.3d 619 (8th Cir. 1997), and *Neal v. Hardee's Food Sys., Inc.*, 918 F.2d 34 (5th Cir. 1990), in support of this argument. In *Fleet Tire*, the parties first entered into a licensing agreement containing a broad arbitration clause in 1990. In 1995, Fleet Tire prepared and obtained the signature of Oliver Rubber's sales agent on a letter purporting to grant Fleet Tire an exclusive market with its licensed area. Fleet Tire subsequently sued Oliver Rubber for breach of the 1995 agreement. The Eighth Circuit found that the broad arbitration clause contained in the original 1990 agreement governed all controversies and claims arising from and relating to it, and that the 1995 letter clearly related to the original agreement. The court reversed the district court's denial of Oliver Rubber's motion to stay Fleet Tire's breach of contract suit pending arbitration.

Of course, *Fleet Tire* is not binding authority on this court; nor is it even persuasive authority in this instance. The Andrews' action involved tort rather than contract claims and the initial Sales Contract had no arbitration clause while the subsequent Installment Agreement contained such a clause, the opposite of the situation in *Fleet Tire*. We also find Hawks' and Morgan's reliance on an Arkansas case, *American Ins. Co. v. Cazort*, 316 Ark. 314, 871 S.W.2d 575 (1994), likewise misplaced, and the case not dispositive of the issue of whether the Andrews may be compelled to arbitrate their tort claims because of Hawks' reliance on the Federal Arbitration Act and federal case law. In *Cazort*, the plaintiff sued his brokers, for among other things, violation of the Federal Securities Act. The supreme court ruled that by alleging a violation of the Federal Securities Act of 1993, the appellee made a claim that was arbitrable and that claims alleging fraudulent inducement, intentional misrepresentation, and outrage are arbitrable under the federal act. This case clearly has no application to the kind of fraud allegations raised by the Andrews.

Moreover, since *Cazort*, our supreme court has reaffirmed that claims sounding in tort are not arbitrable, regardless of the language used in the arbitration agreement, despite the appellant's attempted reliance on federal case law. *Terminix Int'l. Co. v. Stabbs*, 326 Ark. 239, 930 S.W.2d 345 (1996). The case involved a suit against Terminix and others for fraud, deceit, and breach of a federal VA/HUD loan "contract" that arose from a faulty termite inspection and repair job, but there is no discussion in the opinion

concerning the application of the Federal Arbitration Act to the dispute, and it is not clear that it was an issue in the case.

However, there is a further reason for our affirmance of the trial court's ruling in this case. We will affirm the trial court where it reaches the right result, without regard to the reasoning employed by the trial court. *Nettleton Sch. Dist. v. Owens*, 329 Ark. 367, 948 S.W.2d 94 (1997). In *Showmethemoney Check Cashers, Inc. v. Williams,* 342 Ark. 112, 27 S.W.3d 361 (2000), the supreme court held that an arbitration clause contained in the appellant check-cashing service's agreement with its customers was invalid for want of mutuality, one of the essential elements of a contract, and affirmed the trial court's denial of its motion to compel arbitration of a suit against it for violation of Arkansas usury laws. The arbitration clause at issue provided that all disputes should be submitted to arbitration, except for Showmethemoney's actions to collect amounts due it, and further stated that Showmethemoney "cannot be sued in any court or on any controversy or dispute."

In this instance, the arbitration clause employed by Hawks and Morgan suffers from the same infirmity. It provides that "all disputes arising under case law, statutory law, and all other laws, including, but not limited to contract, tort, and property disputes will be subject to binding arbitration." Notwithstanding this language, the arbitration clause further states that Hawks retains the option to use judicial or nonjudicial relief to enforce a security agreement related to the collateral, to enforce the monetary obligation or to foreclose on the collateral, that such relief would take the form of a lawsuit, and that the Andrews would be precluded from filing a suit, including a counterclaim, in the event Hawks did file a lawsuit against them.

Pursuant to the supreme court's ruling in *Showmethemoney*, this arbitration clause is clearly invalid for lack of mutuality, and we cannot say that the trial court erred in refusing to grant Hawks and Morgan's motion to dismiss or stay litigation.

Affirmed.

ROBBINS and BAKER, JJ., agree.

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

CA CR 00-1415 58 S.W.3d 400

Court of Appeals of Arkansas
Division III
Opinion delivered October 31, 2001

*Naif Samuel Khoury*, for appellant.

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

ANDREE LAYTON ROAF, Judge. Robert Izell, Jr., appeals from a conviction for possession of methamphetamine with intent to deliver following his conditional plea of nolo contendere to the offense. On appeal, Izell argues that the trial court erred in 1) denying his motion to suppress the evidence seized during an illegal search of his vehicle; and 2) denying his motion to suppress a statement he subsequently made about the evidence at the Sheriff's Office. We agree that the trial court erred in refusing to suppress the evidence, and reverse and remand.

Robert Izell, Jr., was arrested on January 17, 2000, by Deputy Brandon McCaslin and State Trooper Billy Joe Gatlin on a misdemeanor warrant for violation of a chancery court order prohibiting him from associating with his former girlfriend. Izell was at his parents' home in Midland, Arkansas, had parked his vehicle in the circular drive of the residence, and had been inside for some time when the officers arrived, knocked on the front door, and were allowed inside.

Deputy McCaslin advised Izell that he was placing him under arrest because he had broken his peace bond. Izell was then handcuffed, searched, and arrested. Both officers led Izell outside where Izell was taken toward his own vehicle, although McCaslin's vehicle was parked at the opposite end of the lot. McCaslin asked Izell if

there was anything in the vehicle that he needed to know about, and Izell answered, "No." Izell then repeatedly stated, "You can't search my vehicle." McCaslin responded, "Robert, I am going to anyway." Izell objected when McCaslin stuck his head and arms into the vehicle, claimed that he was planting something in the vehicle, and attempted to run away. Izell fell and was placed in McCaslin's vehicle, while both officers continued the search of the vehicle. McCaslin immediately found a packet of drugs under the front seat.

Izell was transported to the Sebastian County Sheriff's Office, where Captain William Hollenbeck completed a seizure report and interview of Izell. Hollenbeck was briefed by McCaslin about the arrest and was advised that McCaslin planned on "seizing a vehicle that was used in the offense." Hollenbeck verbally advised Izell of his *Miranda* rights. According to Hollenbeck, Izell observed that he was having difficulty weighing the methamphetamine, and began "making fun" of Hollenbeck, by telling him "you can't even turn grams into ounces." Hollenbeck then asked Izell how much the methamphetamine weighed, and Izell responded that it weighed four ounces. After Hollenbeck got the scale to work properly, the methamphetamine weighed 4.13 ounces. This is the "statement" that Izell sought to suppress.

The trial court denied Izell's motion to suppress the evidence; however, Izell's abstract does not contain a ruling on the motion to suppress his statement. Izell subsequently entered into a conditional plea agreement based on a plea of *nolo contendere* and was sentenced to six years' imprisonment with an additional ten years' suspended imposition of sentence.

On appeal, Izell first argues that the trial court erred in denying his motion to suppress the evidence because it was found during an illegal search of his vehicle. When the appellate court reviews a trial court's denial of a motion to suppress evidence, it views the evidence in the light most favorable to the State, makes an independent determination based on the totality of the circumstances, and reverses only if the trial court's ruling was clearly against the preponderance of the evidence. *Fultz v. State*, 333 Ark. 586, 972 S.W.2d 222 (1998); *Thompson v. State*, 333 Ark. 92, 966 S.W.2d 901 (1998). When the validity of a warrantless search is in issue, this court will make an independent determination, based on the totality of the circumstances, and determine whether the evidence obtained by means of a warrantless search should be suppressed. *Folly v. State*, 28 Ark. App. 98, 771 S.W.2d 306 (1989).

Izell claims that his arrest at his parent's home was a pretext to conduct an illegal, warrantless search of his vehicle that was lawfully parked outside in the circular driveway of the home. Izell contends that this case turns upon this court's interpretation of Ark. R. Crim. P. 12.4, which addresses the circumstances under which a vehicle may be searched incident to arrest, and states:

> (a) If, at the time of the arrest, the accused is in a vehicle or in the immediate vicinity of a vehicle of which he is in apparent control, and if the circumstances of the arrest justify a reasonable belief on the part of the arresting officer that the vehicle contains things which are connected with the offense for which the arrest is made, the arresting officer may search the vehicle for such things and seize any things subject to seizure and discovered in the course of the search.
>
> (b) The search of a vehicle pursuant to this rule shall only be made contemporaneously with the arrest or as soon thereafter as is reasonably practicable.

In contrast, the State contends that Officer McCaslin's search was authorized pursuant to Ark. R. Crim. P. 12.6(b) because he inventoried the truck to prevent loss and protect himself pursuant to police procedure. Ark. R. Crim. P. 12.6(b) deals with custodial taking of property pursuant to arrest, otherwise referred to as an inventory search, and states:

> A vehicle which is impounded in consequence of an arrest, or retained in official custody for other good cause, may be searched at such times, and to such extent as is reasonably necessary for safekeeping of the vehicle and its contents.

We find that Izell's arguments regarding the search of his vehicle have merit and hold that the search cannot be upheld pursuant to either Rule 12.4 or 12.6.

Izell was arrested at his parents' home for a misdemeanor violation of a chancery court order. Testimony established that Izell had been there approximately thirty to forty-five minutes before he was arrested, and that his vehicle was parked on a private lot in a circular driveway behind the home. Of utmost importance, Izell was not in the vehicle or its immediate vicinity at the time of the arrest. *See Chimel v. California*, 395 U.S. 752 (1969)(*discussing* area within immediate control).

As a general rule, searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment. *Fultz, supra.* This rule is subject to a few specifically established exceptions, and those who seek to prove an exception must demonstrate that the exigencies of the situation made that course imperative. *Id.* The burden is on the party claiming the exception, the State, to establish an exception to the warrant requirement and to show its need. *Id.*

In *Fultz, supra*, officers obtained a warrant for Fultz's arrest, went to his home, and arrested him somewhere in the vicinity of his carport kitchen door. His car was in "plain view" at the time of the arrest. The officers had knowledge that Fultz had used the car to transport drugs and had bought the car with drug money. After Fultz informed the officers that there might be a gun in the car, the officers seized and searched it pursuant to the department's vehicle inventory policy. The supreme court determined that, under these circumstances, the officers were entitled to perform an inventory search of the car after having legally seized it, pursuant to the plain-view exception.

*Fultz* is clearly distinguishable from the facts of Izell's case. Here, Izell's vehicle was not in plain view at the time of his arrest, but instead was parked outside while Izell was arrested inside the home. Additionally, there is no indication that the vehicle contained any objects that were evidence of a crime or that the officers had probable cause to believe the vehicle contained any evidence of a crime, fruit of a crime, or an instrumentality of a crime.

When Izell was arrested, he was neither in the vehicle nor in its immediate vicinity as required by Ark. R. Crim. P. 12.4. No evidence was presented by the State to indicate that the vehicle contained any objects which were connected with the offense for which the arrest was made, misdemeanor violation of a chancery court order, or to establish any connection between the misdemeanor offense and any reason to search the vehicle incident to that arrest. The officers admitted that Izell strongly objected to the search before it was conducted. An arrest may not be used as a pretext to search for evidence of other crimes. *Folly, supra; see also Long v. State*, 256 Ark. 417, 508 S.W.2d 47 (1974). Therefore, there was not a legal search of Izell's vehicle incident to his arrest.

We further consider the State's argument that Officer McCaslin's search of Izell's vehicle was authorized pursuant to police department policy and Ark. R. Crim. P. 12.6(b). Arkansas

appellate courts recognize the "inventory search" as a well-defined exception to the warrant requirement of the Fourth Amendment as codified in Ark. R. Crim. P. 12.6(b). *Folly, supra.* The State contends that Izell's attempt to flee provides "additional evidence of guilt" and cites *Chapman v. State,* 343 Ark. 643, 38 S.W.3d 305 (2001). The State also relies upon *Folly v. State, supra,* for the proposition that "the fact that a vehicle is legally parked does not necessarily negate the need to take the vehicle into protective custody."

A police officer may conduct a warrantless inventory search of a vehicle that is being impounded to insure against claims of lost, stolen, or vandalized property and to guard the police from danger. *Thompson, supra.* The police may impound a vehicle and inventory its contents only if the actions are taken in good faith and in accordance with standard police procedures. *Id.* However, we do not agree that *Folly v. State* provides authority for upholding the search of Izell's car in this instance. In *Folly,* after receiving phone calls indicating that the appellant had threatened a woman and her sister, the police approached him in his vehicle in a Holiday Inn parking lot, searched him for weapons, and found a plastic bag containing contraband and a six-inch lock-blade knife. After the appellant was taken into custody, but prior to having his vehicle towed, the police conducted an inventory search of the vehicle during which they found additional contraband.

This court upheld the denial of the motion to suppress, first noting that where the search and not the arrest is the officer's true objective, the search is not a reasonable one within the meaning of the Constitution. However, the court further observed that the fact that a vehicle is legally parked does not negate the need to take the vehicle into protective custody, and that factors such as hazard to public safety, possibility of vandalism, and the risk of theft are to be considered when determining whether protective custody is necessary. In upholding the inventory search of Folly's vehicle, the court noted that the police had followed standard procedures in impounding and inventorying the vehicle and were acting in good faith, where the vehicle was to be left in a motel parking lot, the appellant was taken into custody on a serious charge, and the likelihood existed that the vehicle would be vandalized if not taken into protective custody.

In *Thompson v. State, supra,* also clearly distinguishable from the present case, the appellant was stopped in his vehicle because the tail lights were not working, and was cited for not having a valid

driver's license or proof of insurance, but was not placed under arrest. The officer attempted to contact friends and family members of the appellant to find someone to drive his vehicle. Since no one could be located, the officer informed the appellant that his car would have to be impounded and its contents inventoried. In the course of the inventory, the officer found several plastic bags containing methamphetamine. The supreme court stated that it is well settled that police officers may conduct a warrantless inventory search of a vehicle that is being impounded in order to protect an owner's property, to insure against claims of loss, theft, or vandalism, and to guard the police from danger. The court held that since the appellant was unable to legally drive his car, the officer acted in good faith and in accordance with standard police procedures in impounding and taking an inventory of the appellant's vehicle.

In the present case, Izell was arrested, handcuffed, and patted down inside his parents' home. Officer McCaslin then took Izell out the back door and towards his truck instead of going straight to Officer McCaslin's vehicle. Although there was testimony that Izell had asked for his wallet from the truck, Trooper Gatlin testified that he had retrieved it from the seat of the vehicle through an open window and had given it to Izell's father before the search. Indeed, McCaslin stated that although the vehicle was off the road and no danger to anybody, he was going to tow it so "[he] wouldn't be responsible for it." Officer McCaslin testified that he inventoried Izell's truck pursuant to department policy and that his purpose in inventorying the truck was to prevent loss and protect himself. Officer McCaslin further stated that pursuant to policy "any time you make an arrest or you take a person out of their vehicle, that vehicle becomes my responsibility . . . [e]ven though it was parked where it was. . . ."

■ Although we agree that this court has stated that the fact that a vehicle is legally parked does not necessarily negate the need to take the vehicle into protective custody, we set forth factors that must be examined to determine the need for protective custody, such as the risk of theft, vandalism, or the hazards to public safety. None of the factors noted by this court in *Folly* are present in this case. Here, Izell was parked on private property behind his parents' home, and therefore, there was no hazard or risk to public safety or any apparent risk of vandalism. Izell was not arrested for a serious offense and had already been restrained and patted down, thus he posed no danger to the officers or to any evidence in the vehicle. Of particular import is the fact that Izell was not arrested in or within the immediate vicinity of his vehicle. Therefore, McCaslin's

testimony concerning the sheriff department's policy of inventorying vehicles when someone is arrested and removed from a vehicle is of no import since the circumstances necessary to trigger the policy were nonexistent.

There appears to be no legitimate basis for Officer McCaslin's decision to inventory and tow Izell's vehicle over his objections. No probable cause existed to assume the vehicle was related to any criminal activity, and the vehicle was, in fact, unrelated to the violation of the chancery court order. The vehicle was not likely to be in danger of tampering, theft, vandalism, or serve as a hazard to public safety. Izell's attempted "flight" after McCaslin announced his intent to search the vehicle has no relevance whatsoever to our analysis, but would instead pertain to a challenge based on sufficiency of the evidence. *See Chapman, supra.* Accordingly, viewing the evidence in a light most favorable to the State and making our own independent determination based on the totality of the circumstances, we conclude that the trial court's denial of Izell's motion to suppress the evidence must be reversed.

Izell also argues that the trial court erred in denying his motion to suppress the statement he made at the sheriff's office, as derivative evidence that is fruit of the poisonous tree. The State asserts that this argument is not preserved for appeal because Izell did not raise this argument to the trial court. Moreover, although Izell filed a separate motion to suppress the statement, and the trial court conducted a separate hearing on this motion several months after the earlier suppression hearing concerning the evidence, Izell's abstract contains neither an oral nor written ruling by the trial court on this motion. Nevertheless, the only statement at issue concerns the weight of the methamphetamine found in the illegal search of Izell's vehicle, evidence that we have held must be suppressed. The statement was obtained as a direct result of the illegal search, and must also be suppressed. *See Mitchell v. State*, 294 Ark. 264, 742 S.W.2d 895 (1988). In sum, there will be no evidence to testify about, with respect to its weight or anything else.

Reversed and remanded.

ROBBINS and BAKER, JJ., agree.

Carrie L. SOUTHERLAND *v.*
John R. SOUTHERLAND, Jr.

CA 01-492 58 S.W.3d 867

Court of Appeals of Arkansas
Division II
Opinion delivered November 7, 2001

*Hilburn, Calhoon, Harper, Pruniski & Calhoun, Ltd.*, by: *Sam Hilburn* and *Susan M. Coleman*, for appellant.

*Janice W. Vaughn*, for appellee.

JOHN F. STROUD, JR., Chief Judge. Appellant, Carrie Southerland, and appellee, John Southerland, were divorced on February 2, 1999. The divorce decree provided that appellee, in addition to a weekly stated amount, was also to pay to appellant as child support fifteen percent of the net of any bonuses that he received. On July 10, 2000, appellant filed a Motion to Enforce Decree, followed by an amended motion. Appellant's motions were prompted by a lump-sum payment that appellee received in connection with a stock-option agreement with his employer. At the time of the divorce both parties worked for the same company, United Medical, Inc. Each had his/her own stock-option agreement that had not yet vested; each considered the stock-option agreements to be worthless; and each merely kept his/her own stock-option agreement and did not pursue their division as marital

assets. Following the divorce, however, a larger company, Len Care, Inc., became interested in buying United Medical, the company with which the parties had their stock-option agreements. As a part of the negotiated sale of the business, employees who had stock-option agreements were paid lump sums that, in effect, gave them the same amount of money that they would have received if they had actually owned stock in the company. In order to receive the funds, however, they had to sign a new covenant not to compete. Appellant and appellee signed the non-compete agreements and received lump-sum payments in accordance with the formula applicable to the specific stock-option agreement. Appellee received $118,750, and appellant received $43,905.

The trial court determined that the lump-sum payment that appellee received in connection with his stock-option agreement was not a bonus for child-support purposes under the divorce decree; that the court had not anticipated that the fifteen percent bonus provision of the decree would be "applied to any other lump sum passive payment such as what occurred in this instance"; that the parties received money from Len Care based upon their stock-option agreements and also in exchange for value received, *i.e.,* the covenants not to compete; and that the court would have had to speculate as to the value of the covenant not to compete because there was no evidence presented to establish that value. Consequently, the trial court denied appellant's motion to enforce. For her sole point of appeal, appellant contends that "the trial court erred by failing to classify the $118,750 received by the appellee from his employer as a bonus for child support purposes." We disagree and affirm.

Appellee testified that he entered into an employment agreement with United Medical when he started to work for them; that he was granted a stock-option agreement as part of his employment; that appellant, his wife at that time, also worked for United; and that she, too, received a stock-option agreement that was offered only to key employees. He said that he and appellant were still working for United at the time of their divorce. He stated that under the agreement, he would not have a stock option until he had worked there for three years, and that he had not been there for three years when the company sold. He explained that the United CFO said, "We are accelerating everyone that was given a stock option agreement[,]" and that he "got a piece of paper saying that your options are being accelerated and fully vested," but that he never had a piece of paper that said, "stock option." He stated that he was subsequently paid pursuant to that particular agreement; that

the amount paid was the difference between the option price and the market price; that he received a separate check for $118,775; and that no taxes were deducted. Appellee further testified that he received two or three bonuses for the year 2000, and that he paid the additional fifteen percent child support with respect to those bonuses.

Mr. Michael Johnson, the attorney who represented United Medical when it was acquired by Len Care, also testified. He stated that in 1996 or 1997, United Medical adopted a qualified stock-option plan whereby certain key employees were entitled to receive stock options subject to a vesting period; that when United Medical decided to sell to Len Care, none of the options had vested, meaning that the options terminated and the company had no obligation to do anything. He stated, however, that management decided that the fair thing to do was to give those employees a cash payment in lieu of the stock options they would have received if the options had vested; and that, in effect, those employees received the same price per share that the other shareholders received even though they did not actually own stock. He also testified that the whole transaction revolved around tax issues and that the payment would be classified as ordinary income to the employees. He stated that the parties never tendered any stock to the company; that the payment was strictly classified as a bonus; and that he did not know of any tax attorney or accountant that would classify the payment as anything other than ordinary income. He also testified, however, that he was not sure if this was basically an acceleration of the stock options, even though the company did not treat it as such; and that he tries not to give tax advice.

Appellee stated that the value of the stock as of December 1998, the period selected by the parties for valuation, was $15.66 per share, and that the price for the option was $15.77, giving it a negative value. He stated that the stock-option agreements were discussed during the divorce, and that it was decided that each party would keep their respective shares because of the zero value.

Appellant characterizes the issue involved in this appeal as "whether a lump sum payment based on a formula received from a stock option agreement should be classified as *income* for child support purposes." In making her argument, she relies upon Supreme Court Administrative Rule Number 10, which provides:

> Income means any form of payment, periodic or otherwise, due to an individual, regardless of source, including wages, salaries,

> commissions, bonuses, worker's compensation, disability, payments pursuant to a pension or retirement program, and interest less proper deductions. . . .

She also cites the cases of *Kelly v. Kelly*, 341 Ark. 596, 19 S.W.3d 1 (2000) (holding that the trial court cannot set and establish a sum certain amount of support where the receipt of a bonus is contingent upon the profitability of a business), and *Rowlett v. Bunton*, 68 Ark. App. 228, 6 S.W.3d 372 (1999) and *Halter v. Halter*, 60 Ark. App. 189, 959 S.W.2d 761 (1998) (holding that an inheritance cannot be considered as income for child-support purposes). Obviously, these cases, in and of themselves, do not support appellant's position. Rather, she relies upon them as support for her position by distinguishing them from the facts involved here. That is, she notes that *Kelly* is distinguishable because, here, appellee had already received his lump-sum payment, and there were no contingencies. She implicitly distinguishes *Rowlett* and *Halter* in that the instant case does not involve an inheritance.

Appellant's cited authority and her argument are simply not convincing. Even if the stock-option agreements ceased to be of value in accordance with their original terms, the subsequent sale of the business boosted their value. Only the key employees that possessed the agreements received a lump-sum payment from Len Care, and the payment was clearly tied to the stock-option agreements and calculated as if those employees held shares. Moreover, there was testimony that Len Care would not have written the checks if these employees had not also signed a new covenant not to compete. We recognize that Mr. Johnson testified that he regarded the payment as income and that he doesn't know of any tax attorney or accountant that would classify it as anything other than ordinary income. However, in our opinion, with respect to this issue involved in this case, the stock-option agreement was more akin to a marital asset that increased in value after the divorce, than bonus income that would be subject to the fifteen percent child-support provision in the divorce decree. As with any marital property that increases in value after a divorce is final, the parties cannot come back and claim a portion of the increased value. Consequently, based upon the unique facts of this case, we hold that the trial court was correct in finding that the money was not a bonus for child-support purposes.

Affirmed.

PITTMAN and GRIFFEN, JJ., agree.

Jennifer Nicole Remick WORD *v.* Frank D. REMICK, Sr.

CA 01-148 58 S.W.3d 422

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

[redacted]

*Eugene D. Bramblett*, for appellant.

*Thomas L. Mays*, for appellee.

JOHN MAUZY PITTMAN, Judge. The parties in this child-custody case were divorced in December 1999. They were awarded joint and shared custody of their two minor children, a four-year-old girl and a two-year-old boy. Neither party was ordered to pay child support. Appellee filed a petition for change of custody in August 2000. Appellant filed a counterclaim, also seeking sole custody of the children. After a hearing, the chancellor found that there had been a material change in circumstances and that it would be in the children's best interest to award custody to the appellee. From that decision, comes this appeal.

For reversal, appellant contends that the chancellor erred in finding that there had been a material change of circumstances warranting a change of custody; that appellee was barred under the clean-hands doctrine from asserting that there had been a change of the custodial arrangement from "joint" custody to "split" custody because that change was solely the result of appellee's improper conduct; and that the chancellor erred in basing his finding that it would be in the children's best interest to award custody to the appellee solely on the fact that appellee was the first to quit living in a sexually illicit relationship. We affirm.

The principles governing the modification of custodial orders are well-settled and require no citation. The primary consideration is the best interest and welfare of the child. All other considerations are secondary. Custody awards are not made or changed to punish or reward or gratify the desires of either parent. Although the chancery court retains continuing power over the matter of child custody after the initial award, the original decree is a final adjudication of the proper person to have care and custody of the child. Before that order can be changed, there must be proof of material facts which were unknown to the court at that time, or proof that the conditions have so materially changed as to warrant modification and that the best interest of the child requires it. The burden of proving such a change is on the party seeking the modification. *Watts v. Watts*, 17 Ark. App. 253, 707 S.W.2d 777 (1986).

The role of the appellate court in appeals from modification of custody orders is also well settled. We review chancery cases *de novo* on the record, but the chancellor's findings will not be disturbed unless clearly against the preponderance of the evidence. Since the question of the preponderance of the evidence turns largely upon the credibility of the witnesses, we defer to the superior position of the chancellor. Because a chancellor charged with deciding a question of child custody must utilize to the fullest extent all of his powers of perception in evaluating the witnesses, their testimony, and the child's best interest, there are no cases in which the superior position, ability, and opportunity of the chancellor to observe the parties carry as much weight as in those involving child custody. Our deference to the chancellor is correspondingly greater in such cases. *Fitzpatrick v. Fitzpatrick*, 29 Ark. App. 38, 776 S.W.2d 836 (1989).

The parties in the present case had a four-year-old girl and a two-year-old boy when they divorced in December 1999. The decree provided for joint and shared custody of the children. The parties resided in the same town, within a few blocks of one another, and this arrangement initially worked well. Appellee worked nights and appellant worked days. One party kept the children while the other party was at work, and they alternated custody on weekends.

Appellee later remarried and was assigned to a day shift. The original arrangement was no longer workable, so the parties arranged for custody of the children to alternate between them every week. This arrangement was not successful. The parties could not agree on a regular routine. Disputes over day-to-day custodial issues escalated from heated arguments to physical altercations between appellant and appellee's new wife. Appellee filed a petition to change custody. After the petition was filed, custody of the children was split between the parties, with each party having custody of one child. Appellee testified that he did not trust the appellant to return the children following visitation; he stated that appellant threatened to withhold them from him. Consequently, although they were exchanged between the parents at intervals, the children were never together.

We first address appellant's contention that the chancellor erred in finding that there had been a material change of circumstances warranting a change of custody. With reference to evidence of appellee's remarriage and generally improved circumstances since the original custodial order was entered, appellant argues that a

change of circumstances of the noncustodial parent is an insufficient basis to justify modification of a child-custody award.[1] This question is academic. Appellee was not a noncustodial parent. He was, instead, a custodial parent by virtue of the order of joint and shared custody in the parties' divorce decree.

Appellant also argues that we should reverse because appellee failed to enumerate specific instances of changed circumstances in his pleadings, and because the chancellor's order failed to mention any specific change to support his finding of a material change in circumstances. We find no error on this point. There was no objection below to the lack of specificity of appellee's pleadings, and when issues not raised in the pleadings are tried by the express or implied consent of the parties, Ark. R. Civ. P. 15(b) requires that the pleadings be treated as amended to conform to the proof. Here, appellant was also seeking sole custody of the children, and both parties put on extensive evidence to show that there was a material change of circumstances. Furthermore, in the absence of a request for specific findings under Ark. R. Civ. P. 52(b), the chancellor was not required to expressly detail the facts supporting his finding of a material change in circumstances, and our review is directed toward determining whether there was sufficient evidence from which the chancellor could have found such a change in circumstances. *Hamilton v. Barrett*, 337 Ark. 460, 989 S.W.2d 520 (1999).

There was unquestionably such evidence in the present case. Joint custody or equally divided custody of minor children is not favored in Arkansas unless circumstances clearly warrant such action. *Thompson v. Thompson*, 63 Ark. App. 89, 974 S.W.2d 494 (1998). The mutual ability of the parties to cooperate in reaching shared decisions in matters affecting the child's welfare is a crucial factor bearing on the propriety of an award of joint custody, and

[1] The case relied upon by appellant for this proposition, *Jones v. Jones*, 326 Ark. 481, 931 S.W.2d 767 (1996), has been limited to its own facts by the Arkansas Supreme Court in an opinion that expressly states that the interpretation urged by appellant is too narrow. *Hamilton v. Barrett*, 337 Ark. 460, 989 S.W.2d 520 (1999). Although the Supreme Court recently restated the proposition in *Lloyd v. Butts*, 343 Ark. 620, 37 S.W.3d 603 (2001), it did so without overruling or even mentioning its prior contrary decision in *Hamilton v. Barrett, supra*. Although the holdings regarding this issue are less than clear, it appears that, while a non-custodial parent's changed circumstances may not, standing alone, constitute a material change in circumstances warranting modification of a custody order, a non-custodial parent's changed circumstances nevertheless may properly be considered as a factor in determining whether such a material change in circumstances has occurred. *Compare Hamilton v. Barrett, supra*, and *Lloyd v. Butts, supra*. In the present case, in addition to the evidence that appellee's circumstances had changed for the better, there was evidence that the joint and shared custody decree had become unworkable because of appellant's intransigence. *See infra*.

such an award is reversible error where cooperation between the parents is lacking. *See Hansen v. Hansen*, 11 Ark. App. 104, 666 S.W.2d 726 (1984). In the case at bar, it is undisputed that the parties have fallen into such discord that they are unable to cooperate in sharing the physical care of the children, and this constitutes a material change in circumstances affecting the children's best interest. *See Thompson, supra.*

Appellant next asserts that it was solely the fault of appellee that the parties were unable to cooperate and exercise joint custody of the children, and contends that the appellee therefore was barred under the clean hands doctrine from relying on that fact. We do not agree.

The maxim, "He who comes into equity must come with clean hands," bars relief to those guilty of improper conduct in the matter as to which they seek relief because equity will not intervene on behalf of a plaintiff whose conduct in connection with the same matter has been unconscientious or unjust. *Wilson v. Brown*, 320 Ark. 240, 897 S.W.2d 546 (1995). This maxim is not applied to favor a defendant, and has nothing to do with the rights or liabilities of the parties, but instead is invoked in the interest of the public on grounds of public policy and for the protection of the integrity of the court. *Roark v. Roark*, 34 Ark. App. 250, 809 S.W.2d 822 (1991). Whether the parties are within the application of the maxim is primarily a question of fact. *Id.* In the present case, the evidence was in sharp dispute concerning which of the parties was primarily at fault for the breakdown of the joint custody arrangement, and we cannot say that the chancellor was required to find that appellee was the responsible party.

Finally, appellant contends that the chancellor erred in basing his finding that it would be in the children's best interests to award custody to the appellee solely on the fact that appellee was the first to quit living in a sexually illicit relationship. The immediate answer to this argument is that the record demonstrates that this was not the sole factor relied upon by the chancellor, who also took note of appellee's increased maturity, responsibility, and superior initiative on behalf of the children's best interests. In any event, extramarital cohabitation in the presence of the children has never been condoned in Arkansas, is contrary to the public policy of promoting a stable environment for children, and may of itself constitute a material change of circumstances warranting a change of custody. *Hamilton v. Barrett, supra.* It goes without saying that this

is a significant factor in determining where the best interests of the children require them to be placed.

There was evidence that both parties in the present case engaged in extramarital cohabitation following their divorce. Appellee admitted that his fiancee lived with him briefly but stated that he came on his own to believe this was harmful to the children, and he and his fiancee were married soon thereafter. Appellant admitted that she cohabited with her boyfriend in the presence of the children for over ten months, that she had an illegitimate child by her boyfriend, and that she and her boyfriend were married at the courthouse the day before the custody hearing took place. She explained that, although she believed cohabitation in the presence of the children was harmful to them, she had simply been too busy to marry her boyfriend any sooner.[2] On this record, we cannot say that the chancellor erred in considering appellee's more timely and uncoerced self-correction to be indicative of superior maturity, initiative, and dedication to the best interest of the children.

Affirmed.

NEAL and VAUGHT, JJ., agree.

Bryant Manuel FLORES *v.* STATE of Arkansas

CA CR 01-239 58 S.W.3d 417

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

[2] Appellant testified that the marriage ceremony took approximately fifteen minutes.

*Daniel D. Becker*, for appellant.

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

JOSEPHINE LINKER HART, Judge. Appellant, Bryant Manuel Flores, was charged with capital murder in the death of three-year-old Victor Stephens. At a jury trial, he was convicted of second-degree murder and sentenced to twelve years' imprisonment in the Arkansas Department of Correction. On appeal, he challenges the trial court's decision to admit hearsay over his objection. We reverse and remand.

Prior to trial, the State filed a motion *in limine* seeking the court's permission to introduce at trial hearsay from Dr. Karl F. Wagenhauser, who treated Victor when he was brought to the emergency room at St. Joseph's Hospital in Hot Springs by his mother, Karen Stephens. Wagenhauser's testimony, in the form it was admitted at trial, was that when he spoke with Stephens at the hospital, she told him that "both she and [appellant] had struck Victor and that [appellant] had thrown Victor up against the wall."

Prior to trial and after hearing evidence regarding the admissibility of Wagenhauser's testimony, the court issued a letter opinion addressing the State's motion *in limine*. Citing Rule 803(4) of the

Arkansas Rules of Evidence, the court found that "the statement told by the doctor that there [were] multiple traumas to the child and that the child's body had been thrown against a hard surface" was "reasonably pertinent to the treatment and diagnosis of the child at the time."

On appeal, appellant challenges the admissibility of the hearsay under the exception to the hearsay rule provided in Rule 803(4). In response, the State argues (1) that appellant's argument was not preserved for appellate review; (2) that the evidence was properly admitted under Rule 803(4); (3) that the evidence was admissible because the case concerns medical testimony regarding child abuse; (4) that, though not argued at trial, the evidence could also have been admitted under Rule 803(24) because the evidence had "equivalent circumstantial guarantees of trustworthiness"; and (5) that, though not argued at trial, the evidence could also have been admitted into evidence as an excited utterance pursuant to Rule 803(2). We examine the State's arguments in that order.

Citing *Huls v. State*, 27 Ark. App. 242, 770 S.W.2d 160 (1989), the State argues that appellant's argument was not preserved for appellate review. In *Huls*, this court concluded that a defendant's argument challenging the admissibility of hearsay testimony under Rule 803(4) was not preserved for appellate review because the defendant's argument to the trial court in his motion *in limine* was vague, and appellant failed to specifically argue that the hearsay was inadmissible because it identified him as the perpetrator of the crime. In the case at bar, however, the court's letter opinion specifically recognized that what was at issue was whether the "statement was provided not to merely identify the perpetrators but to provide the doctor with information as to the cause and extent of his injuries." Because the issue was squarely presented to the court, we conclude that *Huls* is inapposite and find that the issue was properly preserved for appellate review.

Next, the State argues that the evidence was admissible under Rule 803(4), which provides that hearsay is not excluded if it consists of "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." The State urges that the hearsay was admissible because Stephens believed that this information was crucial to her son's treatment and because Wagenhauser testified that the information confirmed his diagnosis.

The Arkansas Supreme Court has previously noted that

> where an injured party has described how his injury occurred, the basis for this hearsay exception is his strong motivation to be truthful in giving statements for diagnosis and treatment. Moreover, it has been suggested that, under these circumstances, a fact reliable enough to serve as the basis for diagnosis is also reliable enough to escape hearsay proscription. Thus, the trustworthiness of statements made to a physician and offered at trial under the exception may be tested by determining whether the information provided is of a type reasonably relied upon by a physician in diagnosis and treatment, and by determining whether the patient's motive is consistent with this rule's purpose.

*Benson v. Shuler Drilling Co., Inc.*, 316 Ark. 101, 107-08, 871 S.W.2d 552, 555-56 (1994)(citations omitted). We have likewise observed that the declarant's motive in making the statement must be consistent with the purposes of promoting treatment, and the content of the statement must be such as is reasonably relied on by a physician in treatment or diagnosis. *Huls*, 27 Ark. App. at 245-46, 770 S.W.2d at 162.

Because Stephens's statement to Wagenhauser was not sufficiently trustworthy, we cannot conclude that the court properly admitted the hearsay. The hearsay originated not from the victim but rather from appellant's codefendant, who in effect blamed appellant for Victor's fatal injury, even though she admitted to Wagenhauser some culpability. In support of our conclusion that the hearsay was not trustworthy, we note that under Rule 804(b)(3) of the Arkansas Rules of Evidence, statements against interest are not excluded by the hearsay rule if the declarant is unavailable as a witness. Specifically excluded from this exception, however, is "[a] statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused. . . ." That type of statement is precisely what is presented here. Given that such statements are specifically excluded from one exception to the hearsay rule, we cannot conclude that such statements are trustworthy enough to be considered admissible under Rule 803(4).

Moreover, we do not consider the hearsay, as required by Rule 803(4), "reasonably pertinent to diagnosis or treatment." As Wagenhauser testified at the hearing on the motion *in limine*, Stephens's statement did not make any difference in his treatment of Victor and that her statement "basically confirmed what we'd

already suspected," that is, that someone caused Victor's injuries. *Compare Carton v. Missouri Pac. R.R. Co.*, 303 Ark. 568, 798 S.W.2d 674 (1990)(holding that, where plaintiff stated that her foot slipped, plaintiff's further statement that she accumulated diesel fuel on her boot, was not pertinent to diagnosis or treatment).

Citing *United States v. Renville*, 779 F.2d 430 (8th Cir. 1985), and cases from our court relying on *Renville*, the State argues that because this case involves a victim of child abuse, then the hearsay disclosing the identity of the abuser is admissible because appellant's status as a household member of the victim is reasonably pertinent to a course of treatment including removal from the home. In *Renville*, the United States Court of Appeals for the Eighth Circuit held that statements of identity to a physician by a child sexually abused by a family member are of a type physicians reasonably rely on in composing a diagnosis and course of treatment. *Id.* at 438. The court, however, recognized that it must also focus on the "declarant's motivation for giving the information" and that "this component reflects the premise underlying the rule that the patient's selfish interest in receiving proper treatment guarantees the trustworthiness of the statements," further noting that "[s]tatements of fault traditionally have failed to meet the criterion" because such statements are made "without reasonable expectation that the information will facilitate treatment." *Id.* Here, we must conclude that, given Stephens's status as a codefendant and that the statement came from Stephens and not the victim, the statement lacks the necessary guarantees of trustworthiness and is not admissible under the theory set forth in *Renville*.

We also conclude that, contrary to the State's argument made for the first time on appeal, the evidence was not properly admitted under Rule 803(24), which permits as an exception to the hearsay rule the introduction of a

> statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (i) the statement is offered as evidence of a material fact; (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance to provide the adverse party with a fair opportunity to

> prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

For the reasons stated above, Wagenhauser's testimony regarding what he was told by appellant's codefendant, Stephens, lacks circumstantial guarantees of trustworthiness.

Finally, the State argues for the first time on appeal that the hearsay is admissible as an excited utterance. Rule 803(2) provides that "[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," is not excluded by the hearsay rule. Several factors to consider when determining if a statement falls under this exception include the lapse of time, 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. *Fudge v. State*, 341 Ark. 759, 768, 20 S.W.3d 315, 320, *cert. denied*, 531 U.S. 1020 (2000) (citing *United States v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980)). Furthermore, 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.' " *Id.* (quoting *Iron Shell*, 633 F.2d at 85-86). Here, however, there is no indication that Stephens's remarks were made under the stress of excitement. *Compare Huls*, 27 Ark. App. at 246, 770 S.W.2d at 162-63 (holding that the record was devoid of any testimony tending to show that the declarant was still under the influence of stress or excitement associated with the startling event when the statement was made).

Because we conclude that the hearsay was not admissible under any of the theories proposed by the State, we conclude that the court improperly admitted the hearsay into evidence. Further, there is no argument to be made that admission of the hearsay was harmless, as it was the only evidence presented by the State regarding who committed the murder. Consequently, we must reverse and remand this case for a new trial in which the hearsay statement is not admitted into evidence.

Reversed and remanded.

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

Keith Allen KING *v.* STATE of Arkansas

CA CR 01-145 58 S.W.3d 875

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

*Clark & Spence*, by: *George R. Spence*, for appellant.

*Mark Pryor*, Att'y Gen., by: *Clayton K. Hodges*, Ass't Att'y Gen., for appellee.

JOHN E. JENNINGS, Judge. On January 6, 2000, the law office of Bethel and Cromwell in Fort Smith was burglarized. The fingerprints of Keith Allen King were found on a piece of glass broken out in order to gain entry to the office. Based on this information alone, an arrest warrant was issued, and on January 11, Gary Hulsey, a Fort Smith police officer, arrested King.

King was handcuffed and frisked for weapons and was told that he was being arrested on a warrant for burglary. He was not given *Miranda* warnings. When they reached the patrol car, King asked if he could smoke and Officer Hulsey agreed. When King pulled a pack of cigarettes from his pocket, Hulsey noticed that they were

the same brand as those missing from the Bethel and Cromwell burglary and asked King if the cigarettes were from the Bethel and Cromwell law offices. King said that they were.

Officer Hulsey then asked King if he would like to go to the police department and talk about this, and King said he would. On the way to the police department, Officer Hulsey told him he was curious as to where he had been staying, and King directed him to a building. Other officers entered the building and found a nylon gym bag containing a variety of incriminating evidence, including burglary tools.

When they reached the police station, Officer Hulsey read King his *Miranda* rights. After acknowledging his rights, King confessed to having burglarized the Bethel and Cromwell law offices as well as five other buildings in the area.

Before trial, King moved to suppress evidence, including his full confession, on the basis that the arrest warrant was invalid as not being based on probable cause and on the ground that the police had elicited inculpatory statements from him before giving him the required *Miranda* warnings.

The trial court held that the warrant for arrest was valid, suppressed the contents of the nylon bag under *Miranda v. Arizona*, 384 U.S. 436 (1968), and held that King's subsequent, Mirandized statement given at the police station was admissible under the rule of *Oregon v. Elstad*, 470 U.S. 298 (1985). King was subsequently tried and convicted on six counts of burglary and sentenced to six years on each count. The court ran the sentences consecutively.

For reversal, King contends that the trial court erred in its ruling on the motion to suppress. We find no error and affirm.

Probable cause to arrest was discussed by the supreme court in *Hines v. State*, 289 Ark. 50, 709 S.W.2d 65 (1986):

> Probable cause is said to be only a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing that a crime has been committed by the person suspected. Probable cause does not require the quantum of proof necessary to support a conviction, and arrests are to be appraised from the viewpoint of a prudent and cautious police officer at the time the arrest is made.

> On appeal, all presumptions are favorable to the trial court's ruling on the legality of the arrest and the burden is on the appellant to demonstrate error. Determination of probable cause is said to be based on factual and practical considerations of everyday life upon which reasonable and prudent men, rather than legal technicians, act. Thus, a nontechnical approach has been said to afford the best compromise for accommodating the competing interests of the individual and of society, so that law enforcement officers will not be unduly hampered, nor law abiding citizens left to the mercy of the whim and caprice of overzealous police officers. In making the determination of probable cause the reviewing court should be liberal rather than strict. (Citations omitted.)

When a conviction has been obtained based primarily upon fingerprint evidence, Arkansas courts have upheld or overturned the conviction depending upon the circumstances of the case.[1] In any event, given the rule that probable cause does not require the quantum of proof necessary to support a conviction, we hold that the fingerprints found under the circumstances of this case constituted probable cause for the issuance of the arrest warrant.

King's final argument is that because the police elicited inculpatory statements from him prior to giving him *Miranda* warnings, his subsequent confession obtained after *Miranda* warnings were given should have been suppressed. Clearly, the leading case on this issue is *Oregon v. Elstad*, 470 U.S. 298 (1985). There the United States Supreme Court said:

> It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.
>
> . . .

[1] The evidence was held sufficient in *Ebsen v. State*, 249 Ark. 477, 459 S.W.2d 548 (1970), and *Howard v. State*, 286 Ark. 479, 695 S.W.2d 375 (1985). The evidence was held insufficient in *Standridge v. State*, 310 Ark. 408, 837 S.W.2d 447 (1992), and in *Holloway v. State*, 11 Ark. App. 69, 666 S.W.2d 410 (1984).

> When neither the initial nor the subsequent admission is coerced, little justification exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder.
>
> . . .
>
> We must conclude that, absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights.

In *Childress v. State*, 322 Ark. 127, 907 S.W.2d 718 (1995), the supreme court determined that, under the United States Supreme Court holding in *Elstad*, the failure to give *Miranda* warnings prior to obtaining an initial statement did not require the suppression of a subsequent confession made after proper *Miranda* warnings and a valid waiver of rights. *Childress*, 322 Ark. at 135. We reached the same conclusion in *Dye v. State*, 69 Ark. App. 15, 9 S.W.3d 539 (2000).

Appellant contends that the facts in the case at bar are similar to those in *Shelton v. State*, 287 Ark. 322, 699 S.W.2d 728 (1985), in which the supreme court held that the subsequent Mirandized confession was tainted. We distinguished *Shelton* in our decision in *Dye* and find it distinguishable here for the same reasons. In *Shelton* the suspects were juveniles and there was a coercive element to the interrogation — factors not present in the case at bar. The trial court's determination that King's confession given at the police station was voluntarily made is not clearly against a preponderance of the evidence.

For the reasons stated, the decision of the circuit court is affirmed.

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

Terry HICE *v.* CITY of FORT SMITH, Arkansas;
Garry Campbell and Steve Parke

CA 01-435 58 S.W.3d 870

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

[redacted]

*James R. Filyaw*, for appellant.

*Daily & Woods, P.L.L.C.*, by: *Jerry L. Canfield*, for appellees.

JOHN B. ROBBINS, Judge. Appellant Terry W. Hice appeals the entry of summary judgment against him by the Sebastian County Chancery Court in his suit against appellee City of Fort Smith, Arkansas, alleging wrongful termination and seeking an injunction to compel the city to reinstate his employment, to compel remittance of back pay, and for his attorney's fees and costs. The chancery judge stated in his order granting summary judgment that Hice's employment was at-will, subject to termination by either party; that the personnel handbook recited that Hice's employment was at-will; that no exceptions to the at-will doctrine applied; and that the city was entitled to judgment as a matter of law. The dismissal was with prejudice. From that order comes this appeal. We affirm the entry of summary judgment.

*Standard of Review — Summary Judgment*

The principles governing appellate review of summary-judgment cases have been often stated by our supreme court:

> The law is well settled that summary judgment is to be granted by a trial court only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. *Wallace v. Broyles*, 331 Ark. 58, 961 S.W.2d 712 (1998), *supp. opinion on denial of reh'g*, 332 Ark. 189 (1998). Once the moving party has established a *prima facie* entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* On appellate review, this court determines if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *Id.* This court views the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.* Our review

> focuses not only on the pleadings, but also on the affidavits and other documents filed by the parties. *Id.*

*Shelton v. Fiser*, 340 Ark. 89, 95-96, 8 S.W.3d 557, 561 (2000) (quoting *Adams v. Arthur*, 333 Ark. 53, 62, 969 S.W.2d 598, 605 (1998)). Summary judgment is appropriate when the trial court finds that the allegations, taken as true, fail to state a cause of action. *See, e.g., Cottrell v. Cottrell*, 332 Ark. 352, 965 S.W.2d 129 (1998); *O'Mara v. Dykema*, 328 Ark. 310, 942 S.W.2d 854 (1997); *Hollomon v. Keadle*, 326 Ark. 168, 931 S.W.2d 413 (1996); *Rainey v. Travis*, 312 Ark. 460, 850 S.W.2d 839 (1993). Summary judgment can be entered in appropriate circumstances in the context of a wrongful-termination case. *See Skrable v. St. Vincent Infirmary*, 57 Ark. App. 164, 943 S.W.2d 236 (1997).

*The Employment-At-Will Doctrine*

In Arkansas, the general rule is that an employer or an employee may terminate an employment relationship at will. *See Crain Indus., Inc. v. Cass*, 305 Ark. 566, 810 S.W.2d 910 (1991); *Gladden v. Arkansas Children's Hosp.*, 292 Ark. 130, 728 S.W.2d 501 (1987). There are two basic exceptions to the at-will doctrine: (1) where an employee relies upon a personnel manual that contains an express provision against termination except for cause; and (2) where the employment agreement contains a provision that the employee will not be discharged except for cause, even if the agreement has an unspecified term. *Gladden, supra; see also Ball v. Arkansas Dep't of Community Punishment*, 340 Ark. 424, 10 S.W.3d 873 (2000). An implied provision against the right to discharge will not be sufficient to invoke the exception to the at-will doctrine. *Gladden, supra; see also St. Edward Mercy Med. Ctr. v. Ellison*, 58 Ark. App. 100, 946 S.W.2d 726 (1997). An at-will employee can be fired for any reason, no reason, or even a morally wrong reason. *Smith v. American Greetings Corp.*, 304 Ark. 596, 804 S.W.2d 683 (1991). Thus, the question of malice on the part of the employer is irrelevant. *See Ball, supra.*

In *Scholtes v. Signal Delivery Serv., Inc.*, 548 F. Supp. 487 (W.D. Ark. 1982), Judge H. Franklin Waters assessed the status of Arkansas law concerning the employment-at-will doctrine. He stated:

> [W]e have no hesitancy in concluding that Arkansas law would recognize at least four exceptions to the at-will doctrine, excluding

> implied contracts and estoppel. These are: (1) cases in which the employee is discharged for refusing to violate a criminal statute; (2) cases in which the employee is discharged for exercising a statutory right; (3) cases in which the employee is discharged for complying with a statutory duty; and (4) cases in which employees are discharged in violation of the general public policy of the state.

Our supreme court considered the analysis of Judge Waters and adopted the public-policy exception in *Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 743 S.W.2d 380 (1988). However, the supreme court noted that this limited exception was not meant to protect merely private or proprietary rights. *Id.* at 249; *see also Skrable v. St. Vincent Infirmary, supra.*

*Facts Surrounding Termination of Mr. Hice*

With this exposition on the standard of review and the relevant law on employment at will, we examine the pleadings and the essentially undisputed facts. Mr. Hice worked for the City of Fort Smith as a lead man in the water department, having been employed since October 2, 1992. He advanced from an entry-level employee to a supervisor in his tenure. On May 27, 1998, Hice was told by his supervisor to provide a urine sample for purposes of drug testing, though Hice asserted that there was no explanation of reasonable suspicion for it, and he complied in fear of termination for refusal to test. After the results of that test came back positive for marijuana, Hice was terminated effective June 1, 1998.

Hice, acknowledging his status as an at-will employee, filed suit in chancery court. He claimed that the city had violated the terms of its personnel policy handbook, which stated that an employee could be required to submit to such a test upon "reasonable suspicion," which had to be described in writing. Hice averred that he felt obligated to submit to the drug screen in fear that he would otherwise be terminated for failure to submit per the employer's request. Hice further claimed that he submitted to another drug screen at his own expense on May 30, 1998, three days after the earlier screen, which result was negative for any controlled substances. Hice alleged that because the city required a drug screen without probable cause for one, in violation of its own personnel handbook and in violation of his constitutional rights to be free from unreasonable searches and seizures, and because the results were wrong, then he had no recourse but to seek an injunction in chancery court. He requested the chancery court to order his

reinstatement, payment of his wages dating back to termination, his attorney's fees, and his costs.

The city responded with a motion to dismiss and, alternatively, a motion for a more definite and certain complaint. Among the defenses asserted by the city was the allegation that regardless of whether Hice was correctly or incorrectly requested to submit to a drug screen, and regardless of the outcome of that test, he was subject to the employment-at-will doctrine. The city made it clear in its pleadings that it was convinced that it had reasonable cause to drug-test Hice and that it had other valid reasons, including falsifying records and taking unauthorized possession of city property, to terminate Hice.

The city subsequently filed a motion for summary judgment, arguing that Hice had no employment contract, that he was an at-will employee, and that the narrow exceptions to the at-will rule did not apply. The city asserted that it had valid bases for terminating Hice, though it was assuming Hice's allegations were true for the purposes of its motion for summary judgment. Hice resisted the motion, stating that he had a right to rely on the drug policy in the employee handbook as the only means by which a drug test could be required and that he was under an implied contract preventing such arbitrary and capricious action by his employer. Hice added that being forced to drug test under these circumstances violated his constitutional rights.

The city ordinance adopting the City of Fort Smith Personnel Policy and Procedure Handbook states in pertinent part:

> Neither this ordinance nor the contents of any personnel policy or future handbook that may be used by the City, nor any oral promise, shall constitute or imply an employment contract. Rather employment with the City of Fort Smith is at-will and for an indefinite period of time, capable of being terminated at any time by the employee or the City.

A similar statement in the personnel policy handbook, which was quoted and acknowledged by Hice in his brief to the trial court, unequivocally provided that the contents of the handbook could not be used, nor could any oral promise be alleged, to constitute or imply an employment contract. Indeed, the parties agree that Hice's employment was at will. However, the personnel policy outlined the expectations of the employer with regard to conduct on the job. The personnel policy contained a section titled,

"Drug-Free Workplace," which set forth the city's policy to maintain an environment free from the unlawful manufacture, distribution, dispensation, possession, or use or effect of a controlled substance, recognizing that such drugs impair employee judgment and have detrimental effects on productivity and safety. This section states further that violation of this policy "is absolutely prohibited and constitutes cause for termination," and that if a supervisor or department head has reasonable suspicion that an employee is under the influence of a controlled substance, then the employee will be required to submit to testing. The policy also sets out the bases for searching the property of employees and the city. The policy does not, by its terms, limit drug screens and searches to work place accidents or impairment of employees.

The trial court considered the pleadings, the documentary evidence attached, and the briefs of counsel, and it granted summary judgment in favor of the city. Hice appeals and argues to this court, as he did to the trial court, that (1) the city was not justified in terminating his employment because it violated the provisions of the personnel handbook upon which Hice was entitled to rely; (2) the drug screen violated his Fourth Amendment right to be free from unreasonable searches; and (3) the public-policy exception to the at-will doctrine should apply.

His arguments are not persuasive. Assuming all of Hice's allegations as true, the city was entitled to judgment as a matter of law. Both the city ordinance adopting the personnel handbook and the handbook itself clearly declare that there is no employment contract and that employment is at will. While the personnel handbook contains provisions describing methods for dismissal under certain circumstances and specifying kinds of conduct that could result in being dismissed, it does not contain provisions that an employee will not be discharged except for cause. *See Mertyris v. P.A.M. Transp., Inc.*, 310 Ark. 132, 832 S.W.2d 823 (1992) (holding that the P.A.M. Transport manual lists certain conduct that will result in termination, but nothing in the manual suggests that the list is intended to be exhaustive; thus, it would not only be unreasonable but absurd to interpret the manual as implicitly foreclosing termination for criminal acts and wrongful conduct beyond the seven violations listed in the manual); *Gladden v. Arkansas Children's Hosp.*, 292 Ark. 130, 728 S.W.2d 501 (1987) (holding that without a provision stating that an employee can be terminated only for cause, the at-will doctrine permitted termination in the absence of any reason at all; summary judgment and directed verdict in companion cases affirmed). And it is contrary to the dictates of *Gladden,*

*supra*, to imply such an agreement. Because the employer was not required to have good cause to terminate Hice's employment, the trial court did not err in entering summary judgment.

Hice also argues that his situation falls into a well-established public policy preventing a municipality from terminating an employee unless it follows its drug-free workplace policy to the letter. A "well-established" public policy of the State must be found in our statutes or in our constitution. *See Palmer v. Arkansas Council on Econ. Educ.*, 344 Ark. 461, 40 S.W.3d 784 (2001). Were we to assume that the employer did not follow the dictates of its handbook, we see no well-settled public policy that has been violated to bring Hice into an exception to the at-will doctrine. While an employer should not have an absolute and unfettered right to terminate an employee for an act done for the good of the public, *see Sterling Drug, supra*, we cannot discern any act here that Hice did for the good of the public. Hice was terminated for testing positive for marijuana on a drug screen, an act that does not advance public policy in Arkansas. As to Hice's contention that his rights under the Fourth Amendment to the United States Constitution and Article 2, Section 15, of the Arkansas Constitution to be free from unreasonable searches and seizures were violated, we disagree that his claims prove a basis to move forward. The termination was not motivated by an unlawful reason or purpose. *See, e.g., Qualls v. Hickory Springs Mfg. Co.*, 994 F.2d 505 (8th Cir. 1993); *Garner v. Rentenbach Constructors, Inc.*, 350 N.C. 567, 515 S.E.2d 438 (1999). Hice was terminated based upon his violation of the drug-free workplace policy; he was not terminated for refusal to test, which is the more common route by which claims of violating public policy arise. *See* 82 AM. JUR. 2d *Wrongful Discharge* § 77 (1992).

We affirm.

NEAL and CRABTREE, JJ., agree.

John D. CONNER *v.* STATE of Arkansas

CA CR 01-387 58 S.W.3d 865

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

[redacted]

*Robert T. Rogers, II*, Public Defender, for appellant.

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

SAM BIRD, Judge. John D. Conner was charged with domestic battery in the third degree, fleeing, and endangering the welfare of a minor, resulting from allegations that he dragged his live-in girlfriend, Robin West, through and outside his house. West sustained scratches and abrasions to her skin but did not seek medical attention nor miss work. Conner properly and timely moved for a directed verdict on the domestic-battery charge on the sole basis that there was no evidence of a physical injury that met the definition of Ark. Code Ann. § 5-1-102(14) (Supp. 1999). The trial court denied this motion for directed verdict, and Conner was convicted of all three charges. Conner appeals, contending that the State failed to produce sufficient evidence of a physical injury to support the third-degree domestic-battery conviction. *See* Ark. Code Ann. § 5-26-305(a)(1) (Repl. 1997). We affirm.

The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, which is evidence of such certainty and precision as to compel a conclusion one way or another. *Farrelly v. State*, 70 Ark. App. 158, 15 S.W.3d 699 (2000). We review the evidence in the light most favorable to the appellee, considering only the testimony that tends to support the verdict. *Id.*

Arkansas Code Annotated section 5-1-102(14) (Supp. 1999) defines "physical injury" as "(A) the impairment of physical condition; (B) infliction of substantial pain; or (C) infliction of bruising, swelling, or visible marks associated with physical trauma." Conner asks us to analogize the case at bar to *Kelley v. State*, 7 Ark. App. 130, 644 S.W.2d 638 (1983). In *Kelley*, the victim, though cut by a knife, stated that the wound did not require medical attention

because the wound was not severe. The victim's injury was described by another witness as a "fingernail scratch." *Id.* This court held that the evidence of a physical injury was insufficient to establish that his physical condition was impaired or that he was inflicted with substantial pain. *Id.*

As the State argues, however, *Kelley* was decided in 1983, and the definition of "physical injury" was amended in 1999 to include the additional definition of "infliction of bruising, swelling, or visible marks associated with physical trauma." Ark. Code Ann. § 5-1-102(14) (Supp. 1999); *see also* Ark. Code. Ann. § 5-1-102(14) (Repl. 1997). In *Napier v. State*, 74 Ark. App. 272, 46 S.W.3d 565 (2001), we recognized that this amendment "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." We also note that even before the 1999 amendment, this court has stated that it was not necessary that a victim seek medical treatment in order for the trier of fact to determine that a physical injury was sustained. *See Pettigrew v. State*, 64 Ark. App. 339, 984 S.W.2d 72 (1998).

In the present case, West testified that Conner dragged her "through the kitchen, living room, down the stairs, through the front door, across the front porch, down the steps again, and to the side of the car." She testified that there were scratches on her upper and lower hip. The State introduced photographs taken after the incident that evidence these scratches and abrasions. She testified that she was also bruised, but that the bruising did not show up in the State's photographs. West further explained that she did not miss work because she was not scheduled to work the next day or two.

We hold that West's testimony, coupled with the State's photographs, provide substantial evidence that Conner dragged West through and outside the house and that such action resulted in West's scratches and bruises. We further hold that the scratches and bruises inflicted upon West are encompassed by the amended statutory definition of physical injury. Therefore, we affirm.

JENNINGS and ROAF, JJ., agree.

CROSS COUNTY SCHOOL DISTRICT, *et al. v.*
Naomi SPENCER and Roger Spencer, as Parents
and Next Friend of Hannah Spencer Moran

CA 00-1304 58 S.W.3d 406

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered November 7, 2001

*Shaver & Smith*, by: *J. Harmon Smith*; and *W. Paul Blume*, for appellants.

*Ford & Glover*, by: *Robert M. Ford*, for appellees.

TERRY CRABTREE, Judge. The appellants, Cross County School District, the school's principal, superintendent, and school board members, appeal from an order of the Cross County Chancery Court in which the court reversed the school board's decision to expel Hannah Spencer Moran, the daughter of Naomi Spencer and Roger Spencer. We reverse.

Hannah Spencer was in the eighth grade of the Cross County School District when the facts of this case arose. Hannah and another student, Leslie Headley, had been close friends, but the friendship had ended. On Monday, February 21, 2000, a teacher observed Hannah, near the cafeteria, loudly and angrily shouting Leslie's name while approaching Leslie with her fists tightly clinched and her arms extended to her sides. The teacher intervened and separated the two girls. No violence occurred. Subsequent to this altercation, a student told the principal, Mr. David Hopkins, that she had something he needed to see. Principal Hopkins was then given a handwritten, two-page note, addressed to a student named Calvin. The note contained considerable profanity and threats, including death threats against Leslie. The note was signed by Hannah. The note outlined Hannah's plans to fight with Leslie at lunch on Monday. In fact, the incident took place on Monday at lunch. Leslie had not seen the note.

Principal Hopkins took Hannah into his office, asked her about the note, and she admitted writing the note. Principal Hopkins then suspended Hannah and recommended to the school board that she be expelled for the remainder of the 1999-2000 school year. A hearing was held before the school board on March 2, 2000, in which the school board was presented with the note and accepted the expulsion recommendation. On March 7, 2000, Hannah through her parents, Naomi Spencer and Roger Spencer, filed a Petition for Temporary Restraining Order to have appellee reinstated to school. A hearing was held on March 8, 2000, in which the court granted the petition. A trial on the merits was held on April 6, 2000. On June 27, 2000, the court filed its opinion making the injunction permanent. It is from this order that appellants bring this appeal.

We agree with appellants' contention that the trial court ignored its proper role in reviewing the school board's decision and substituted its judgment for that of the board. Such an act is prohibited by law and is a flagrant abuse of discretion. *Wynne Pub. Schs. v. Lockhart*, 72 Ark. App. 24, 32 S.W.3d 47 (2000). Arkansas Code Annotated § 6-18-506(c) (Repl. 1999) requires school boards to hold pupils strictly accountable for disorderly conduct in school and on the school grounds. There is a general policy against intervention by the courts in matters left to school authorities. *Henderson State University v. Spadoni*, 41 Ark. App. 33, 848 S.W.2d 951 (1993). "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint . . . By and large, public education in our Nation is committed to the control of state and local authorities." *Goss v. Lopez*, 419 U.S. 565, 577-78 (1975) (citing *Epperson v. Arkansas*, 393 U.S. 97 (1968)). The courts have been reluctant to interfere with the authority of local school boards to handle local problems. *Fortman v. Texarkana Sch. Dist. No.* 7, 257 Ark. 130, 514 S.W.2d 720 (1974). A chancery court has no power to interfere with school district boards in the exercise of their discretion when directing the operation of the schools unless the boards clearly abuse their discretion. *Spadoni, supra*. The burden is upon those charging such an abuse to prove it by clear and convincing evidence. *Springdale Bd. of Educ. v. Bowman*, 294 Ark. 66, 740 S.W.2d 909 (1987).

In this case, Hannah was expelled from school pursuant to Rule 23 of the Cross County High School Handbook, entitled "Threatening Another Student," which states "A student shall not threaten another student." Rule 23 then cites Ark. Code Ann. § 5-13-301, the statute covering terroristic threatening. The trial court

found that there was no indication that Hannah "set in motion any chain of events reasonably calculated to communicate the contents of the note beyond the person to whom it was addressed, *i.e.*, Calvin." Also, the court found that it cannot be held that Hannah intended to terrorize the other student referenced in the letter; *i.e.*, Leslie. Based on this, the court reversed the school board's decision to expel Hannah. Appellants point out that although Rule 23 contains a statutory reference to the crime of terroristic threatening, the text of the statue is not set out in the policy.

As stated earlier, our supreme court, in acknowledging a school board's power to expel a student, has held it does not have the power to substitute its judgment for that of such a board, and will do so only when the court determines the board's judgment was arbitrary, capricious, or contrary to law. *Springdale Bd. of Educ. v. Bowman, supra.* From our careful examination of the record before us, we cannot say that the Board abused its discretion or acted arbitrarily, capriciously, or in any way contrary to law. The Board found that Rule 23 is not limited to threats that are communicated to the target of the threat. It is conclusive that the letter written by Hannah contained threatening language toward Leslie. As such, we hold that the appellants acted reasonably in enforcing its policy against a student threatening another student under Rule 23. The trial court improperly substituted its own judgment for that of the Board. Accordingly, we reverse the trial court's decision, and reinstate the Board's decision.

STROUD, C.J., PITTMAN, JENNINGS, and ROBBINS, JJ., agree.

GRIFFEN, J., concurs.

WENDELL L. GRIFFEN, Judge, concurring. I concur in the decision to reverse and remand the chancellor's decision. While I agree that the school board did not abuse its discretion when it voted to expel Hannah Moran because she clearly violated Rule 23 by threatening a student, I suspect that the litigation in this case might have been avoided had parents and school officials acted more responsively.

First, it is regrettable that the families in this case could not resolve this matter privately so that it never became an issue for the school board to consider. Hannah's mother admittedly knew about the tension between Hannah and Leslie Heady. Even if she was dissatisfied with the school's response, she was nonetheless responsible for her daughter's compliance with the school rules. Likewise,

Leslie's family was responsible for her compliance with the school rules. We should not be surprised when school officials seem challenged to address behavioral problems that parents are either unwilling or unable to address.

Second, this litigation may have been avoided if school administrators had made a more energetic attempt to determine the source of the problem and had disciplined both girls. Although the record shows that the school board acted within its discretion to impose that discipline upon Hannah, the fact that Leslie was not also disciplined leaves the appearance of favoritism. The record is clear that both Ms. Greene (the counselor) and Mr. Hopkins (the principal) were aware that there were problems between Hannah and Leslie. Greene testified that Hannah came to her office and told her that she was having problems with Leslie and that she had tried to talk to Hopkins about it, but he was out of his office. She further testified that Hannah told her that other students told Hannah that Leslie had placed a note in her locker. Greene testified that she asked Hannah later if her "problem" had "cleared up," and Hannah indicated that she wanted to talk to Hopkins.

Hopkins testified that on the morning of the incident, Hannah's mother telephoned him and indicated there was a problem between Hannah and Leslie. Hopkins thereafter separately called each girl into his office. He told the girls that he "didn't know exactly what was going on," informed the girls of the consequences of breaking the school's rules, and warned the girls to stay away from each other. He further testified that "[t]hey apparently have problems with each other and I didn't probe into why they have problems . . . I didn't feel like it was necessary at the time."

In addition, the school board received an unsigned noted addressed to Hannah, that was found in her locker, which stated in part that "if we got into a fight, I would kill you!" Hopkins testified that he had not seen that note prior to the school board meeting, and that if he had discovered who wrote the note, "the same thing I did in this case I would do in that case."

As the majority correctly notes, our function is to determine whether the school board's decision was an abuse of discretion. However, if we were reviewing the chancellor's order, I would affirm. Given Hopkins's admitted failure to even attempt to determine "exactly what was going on" and the undisputed evidence that Hannah was having problems with Leslie and vice versa, the chancellor was understandably concerned about the appearance of

partiality when the record contained evidence that both girls engaged in threatening behavior, but only Hannah was disciplined. In her letter opinion, the chancellor stated:

> It is also significant, as Ms. Greene substantiates, that Hannah was the object of objectionable missives from the other student and sought out the assistance of the school authorities. Hannah could not obtain redress through appropriate channels. Her mother sought to address the issue on two separate occasions, without success.
>
> The punishment meted out to Hannah is not only disproportionate given the totality of the circumstances, it is disparate as between the girls involved. There is no discernable reason why the one girl's actions would be ignored while another, whose situations appears to be precisely the same, is expelled for the balance of the school year. This is particularly so when the girl who has gone unpunished might very well have been the instigator.

Parenting and school administration are functions that ought to complement each other. In this case, an adversarial posture developed between a parent and school administrators over an issue that no sensible parent or administrator should discount or disregard — the threat of school violence. Unfortunately, this issue became a legal controversy because the parents failed to insist that their children obey school rules, and because school administrators failed to investigate promptly and thoroughly, and failed to discipline both students.

CITY of MARION; Meredith Hardin *v.*
GUARANTY LOAN & REAL ESTATE COMPANY, *et al.*

CA 00-1459 58 S.W.3d 410

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

*James C. Hale, III*, for appellants.

*Rieves, Rubens & Mayton*, by: *J. Michael Stephenson*; and *David C. Peeples*, for appellees.

KAREN R. BAKER, Judge. Appellants, City of Marion and Meredith Hardin, appeal a decision by the Crittenden County Circuit Court affirming the county judge's decision that granted a petition for annexation of certain property to the City of West Memphis. Appellants present four points on appeal. First, appellants argue that the trial court erred in ruling that the appellants were not prejudiced by the appellees' filing of an amended annexation petition and maps on the day of trial. Second, appellants argue the trial court erred in ruling that the annexation petition contained the majority of the landowners' signatures as required by Arkansas Code Annotated section 14-40-601 *et seq.* (Repl. 1998). Third, appellants argue that the court erred in ruling that an accurate map was made and filed describing the limits of the territory to be annexed. Fourth, appellants argue that the circuit court erred in ruling that the appellees' petition for annexation was right and proper. We affirm.

On November 4, 1996, appellee, Guaranty Loan & Real Estate Company, filed a petition and a map to annex approximately 835.3 acres to the City of West Memphis. The property belonged to six land owners: Guaranty Loan & Real Estate, owning 755.4 acres; the State of Arkansas, owning eighteen and one-half acres; Sherman Bretherick, owning fifteen and one-half acres; the City of West Memphis, owning five acres; Arkansas Builders Transport, Inc., owning twenty acres; and the Bronson Family Trust, owning twenty and nine-tenths acres. Notice was published in the *Evening Times*, a newspaper of general circulation once a week for three consecutive weeks.

On November 21, 1996, Meredith Hardin, Trustee for the Bronson Trust, along with several other landowners, filed a petition for annexation of twenty and nine-tenths acres of property to the City of Marion. This portion of property was included in the 835.3 acres of the November 4, 1996, petition. On December 12, 1996, Meredith Hardin filed an objection on behalf of the Bronson Trust to the pending November 4, 1996, annexation petition. An amended petition for annexation was filed on December 12, 1996,

containing the names of additional property owners, Sherman Bretherick, Builders Transport, Inc., and the Mayor of the City of West Memphis. A second map was also filed. At a hearing on December 12, 1996, a third map describing the area to be annexed was filed.

On December 16, 1996, the county judge granted the petition for annexation to the City of West Memphis. The City of Marion and the Bronson Trust appealed the county judge's decision to the Crittenden County Circuit Court. On August 25, 2000, the circuit court entered an order affirming the county judge's decision. From that order, comes this appeal.

A high degree of reliance must be placed upon the findings of the trial judge because, by the very nature of this type of litigation, there is wide latitude for divergence of opinion. *Lewis v. City Of Bryant*, 291 Ark. 566, 726 S.W.2d 672 (1987). Thus, our task is not to decide where the preponderance of the evidence lies, but solely and simply to ascertain whether the trial court's findings of fact are clearly erroneous. *Id.* (citing *Holmes v. City of Little Rock*, 285 Ark. 296, 686 S.W.2d 425 (1985)). When the appellate court has a firm and definite belief that the trial court made a mistake, it will hold the trial court's finding as clearly erroneous even if there is evidence to support it. *City of West Memphis v. City of Marion*, 332 Ark. 421, 965 S.W.2d 776 (1998). This court views the evidence in the light most favorable to the appellee. *Town of Houston v. Carden*, 332 Ark. 340, 965 S.W.2d 131 (1998).

First, appellants argue that the trial court erred in ruling that the appellants were not prejudiced by the appellees' filing an amended annexation petition and maps on the day of trial. Appellants argue that they were prejudiced when they were unable to argue the validity of the additional signatures on the amended petition because they were unaware that there were petitioners other than Guaranty Loan & Real Estate Company. Appellants also argue that they were prejudiced when the burden of proof shifted and appellants were forced to proceed, litigating issues from an amended petition filed on the day of the trial. Appellants' argument is premised on Arkansas Rule of Civil Procedure 15 (2001). Rule 15(a) states:

> With the exception of pleadings the defenses mentioned in Rule 12(h)(1), a party may amend his pleadings at any time without leave of court. Where, however, upon motion of an opposing party, the court determines that prejudice would result or the

> disposition of the cause would be unduly delayed because of the filing of an amendment, the court may strike such amended pleading or grant a continuance of the proceeding.

Where there was no demonstration of any prejudice resulting from an amendment, the amendment should be allowed. *See Turner v. Stewart*, 330 Ark. 134, 952 S.W.2d 156 (1997). Appellee cites *Chastain v. Davis*, 294 Ark. 134, 741 S.W.2d 632 (1987). The court in *Chastain* held that the trial court did not err in allowing an amended petition, although the original petition contained an incorrect property description; the map attached to the petition properly and sufficiently described the property sought to be annexed, and the area proposed for annexation was not changed or increased by the amended petition. Here, although the maps differed in the property descriptions, the property description in the petition remained the same, and the appellants failed to prove that any prejudice resulted from allowing the amended petition which added the signatures of additional landowners.

Second, appellants argue that the trial court erred in ruling that the annexation petition contained the majority of the landowners' signatures as required by Arkansas Code Annotated sections 14-40-601 *et seq.* (Repl. 1998). The preliminary issue that we must address is whether the signature on the amended petition of the Mayor, as a representative of the City of West Memphis was unauthorized, and whether the trial court erred in ruling that the City of West Memphis, could ratify the Mayor's signature by the adoption of Resolution 1610. Appellants cite Arkansas Code Annotated section 14-43-502(a) and (b)(1) (Repl. 1998), which states:

> The city council shall possess all the legislative powers granted by this subtitle and other corporate powers of the city not prohibited in it or by some ordinance of the city council made in pursuance of the provisions of this subtitle and conferred on some officer of the city. The council shall have the management and control of finances, and of all the real and personal property belonging to the corporation.

Appellees cite section 14-43-504 (Repl. 1998), which states that the mayor of the city shall be its chief executive officer and conservator of its peace. In *Hot Stuff, Inc. v. Kinko's Graphic Corp., Inc.*, 50 Ark. App. 56, 901 S.W.2d 854 (1995), this court stated that the general principle of interpretation of scope of authority is that an agent is authorized to do, and to do only, what is reasonable for him to infer that the principal desires him to do in the light of the

principal's manifestation and the facts as he knows or should know them at the time he acts. Acquiescence by the principal in conduct of an agent whose previously conferred authorization reasonably might include it, indicates that the conduct was authorized. *Id.* "A municipal corporation may ratify the unauthorized acts of its agents, or officers, which are within the scope of the corporate powers, but not otherwise." *Day v. City of Malvern*, 195 Ark. 804, 807, 114 S.W.2d 459, 461 (1938) (quoting *Texarkana v. Friedell*, 82 Ark. 531, 102 S.W. 374 (1907)). Ratification proceeds upon the assumption that there has been no prior authority and constitutes a substitute therefor; it is in the nature of a cure for authorization, and is equivalent to original, prior, or previous authority. *Arnold v. All Amer. Assurance Co.*, 255 Ark. 275, 499 S.W.2d 861 (1973).

In this case, the circuit court concluded that it was not necessary for the city council to authorize the Mayor of the City of West Memphis to sign a petition to annex property; but, in any event, the city council of West Memphis had ratified the Mayor's signature by adopting Resolution 1610. We agree that the Mayor's signature on the petition on behalf of the City of West Memphis was an exercise of his authority as chief executive officer of the city, and that regardless of his prior authorization, the action was ratified by the city council.

We turn next to appellant's argument that the trial court erred in finding that the annexation petition contained the majority of the landowners' signatures as required by Arkansas Code Annotated section 14-40-601 *et seq.* (Repl. 1998) which states:

> Whenever a majority of the real estate owners of any part of a county contiguous to and adjoining any city or incorporated town shall desire to be annexed to the city or town, they may apply, by petition in writing, to the county court of the county in which the city or town is situated and shall name the persons authorized to act on behalf of the petitioners.

Section 14-40-601(b) defines "majority of the real estate owners" as "a majority of the total number of real estate owners in the area affected, if the majority of the total number of owners shall own more than one-half (1/2) of the acreage affected." Although the statute does not specifically provide for amendment in a petition for annexation, nothing prevents the court's looking to the petition and the amended petition to ascertain whether or not a majority of the

owners of record who own a majority of land have, in fact, petitioned to be annexed. *Chastain v. Davis*, 294 Ark. 134, 741 S.W.2d 632 (1987). Here, the property subject to annexation had six owners. The original petition for annexation contained only one signature, that of the agent for Guaranty Loan & Real Estate Company. The amended petition contained three additional signatures, Sherman Bretherick, Builders Transport, Inc., and Al Boals, Mayor of the City of West Memphis. Between Guaranty Loan & Real Estate Company, Sherman Bretherick, Builders Transport, Inc., and the City of West Memphis, the petitioners owned approximately 795 acres of the 835.3 acres subject to the annexation. Clearly, a majority of the landowners signed the amended petition per the statutory requirements.

Third, appellants argue that the court erred in ruling that an accurate map was made and filed describing the limits of the territory to be annexed, violating Arkansas Code Annotated section 14-40-603 (Repl. 1998). That section states that a trial court must determine whether the limits of the territory to be annexed have been accurately described and an accurate map thereof made and filed. Ark. Code Ann. § 14-40-603. In *Chastain, supra*, the court held that it was sufficient that the area proposed for annexation was not changed or increased by any amendments to the petition for annexation. Here, three maps were filed by appellees; each map differed in its description of the amount of square footage subject to annexation. Nevertheless, although the property description in the maps differed, the property description in the petition remained the same. We hold that the trial court did not err in ruling that Arkansas Code Annotated section 14-40-603 was not violated.

Fourth, appellants argue that the circuit court erred in ruling that the appellees' petition for annexation was right and proper. Appellants cite *Vestal v. Little Rock*, 54 Ark. 321, 15 S.W.891 (1891). The court in *Vestal* stated that all property included in the proposed annexation area must comply with at least one of the following requirements:

> (1) Platted or held for sale or use as municipal lots;
> (2) Whether platted or not, if the lands are held to be sold as suburban property;
> (3) When the lands furnish the abode for a densely settled community or represent the actual growth of the municipality beyond its legal boundary;
> (4) When the lands are needed for any proper municipal purposes such as for the extension of needed police regulation;

(5) When they are valuable by reason of their adaptability for prospective municipal uses.

*Id.* at 323-24, 15 S.W. at 892. The burden of proof in an action to prevent annexation is placed on the aggrieved citizens protesting the government annexation. *Town of Houston, supra* (citing *Gay v. City of Springdale*, 298 Ark. 554, 769 S.W.2d 740 (1989)). If a part of the proposed area does not meet one of the five requirements, the annexation of the entire area is void *in toto*. *Id.*

Other jurisdictions that have addressed this issue have developed lists of criteria to be considered; however, the general test for annexation is based on a reasonableness standard. The Mississippi Supreme Court has stated that in annexation cases the outcome-determinative question is the reasonableness of the proposed annexation. *Extension of the Boundaries of the City of Batesville, Panola County v. City of Batesville*, 760 So.2d 697 (Miss. 2000). The Mississippi Supreme Court recognized at least eight indicia of reasonableness, noting that the factors are but indicia of reasonableness and not separate or distinct tests in and of themselves. *Id.* The eight basic factors include:

(1) the municipality's need for expansion,
(2) whether the area sought to be annexed is reasonably within a path of growth of the city,
(3) the potential health hazards from sewage and waste disposal in the annexed areas,
(4) the municipality's financial ability to make the improvements and furnish municipal services promised,
(5) the need for zoning and overall planning in the area,
(6) the need for municipal services in the area sought to be annexed,
(7) whether there are natural barriers between the city and the [proposed annexation area], and
(8) the past performance and time element involved in the city's provision of services to its present residents.

*Id.* at 700. Other judicially recognized indicia of reasonableness include:

(9) the impact (economic or otherwise) of the annexation upon those who live in or own property in the area proposed for annexation; *Western Line*, 465 So.2d at 1059,
(10) the impact of the annexation upon the voting strength of protected minority groups, *Yazoo City*, 452 So.2d at 842-43,

> (11) whether the property owners and other inhabitants of the areas sought to be annexed have in the past, and for the foreseeable future unless annexed will, because of their reasonable proximity to the corporate limits of the municipality, enjoy the (economic and social) benefits of proximity to the municipality without paying their fair share of the taxes, *Texas Gas Transmission Corp. v. City of Greenville*, 242 So.2d 686, 689 (Miss.1970); *Forbes v. City of Meridian*, 86 Miss. 243, 38 So. 676 (1905); and
> (12) any other factors that may suggest reasonableness vel non. *Bassett*, 542 So.2d at 921.

*Id.* at 700. The chancellor must consider all of these factors and determine whether under the totality of the circumstances the annexation is reasonable. *Id.*

The State of Tennessee also utilizes a reasonableness standard for challenges to annexation. *City of Kingsport v. State ex rel. Crown Enterprises, Inc.*, 562 S.W.2d 808 (Tenn.1978). In *Kingsport*, the Tennessee Supreme Court delineated factors to be considered in determining the reasonableness of a proposed annexation: the necessity for, or use of, municipal services; the present ability and intent of the municipality to render municipal services when and as needed; and whether the annexation is for the sole purpose of increasing municipal revenue without the ability and intent to benefit the annexed area by rendering municipal services. *Id.* The court should also consider whether annexation will benefit the citizens of the municipality and whether failing to annex the proposed area will inhibit the growth of the annexing municipality. *See Vollmer v. City of Memphis*, 792 S.W.2d 446 (Tenn. 1990).

The Missouri Court of Appeals has held that there are twelve factors to be weighed when deciding whether a decision to annex was reasonable and necessary:

> (1) a need for residential or industrial sites within the proposed area;
> (2) the city's inability to meets its needs without expansion;
> (3) consideration only of needs which are reasonably foreseeable and not visionary;
> (4) past growth relied on to show future necessity;
> (5) in evaluating future needs, the extent to which past growth has caused the city to spill over into the proposed area;
> (6) the beneficial effect of uniform application and enforcement of municipal zoning ordinances in the city and in the annexed area;

(7) the need for or the beneficial effect of uniform application and enforcement of municipal building, plumbing and electrical codes;
(8) the need for or the beneficial effect of extending police protection to the annexed area;
(9) the need for or beneficial effect of uniform application and enforcement of municipal ordinances or regulations pertaining to health;
(10) the need for and the ability of the city to extend essential municipal services in the annexed area;
(11) enhancement in value by reason of adaptability of the land proposed to be annexed for prospective city uses; and
(12) regularity of boundaries.

*City of Rolla v. Armaly*, 985 S.W.2d 419, 431 (Mo. Ct. App. 1999) (quoting *City of Centralia v. Norden*, 879 S.W.2d 724, 727 (Mo. Ct. App.1994)). The presence or absence of any individual factor is not determinative, and reasonableness and necessity must be judged on a case-by-case basis. *Id.*

There is credible testimony in this case that the annexation was right and proper both under the factors set out in *Vestal* and the reasonableness standard utilized by other jurisdictions. As president of Guaranty Loan & Real Estate Company, Randall Catt testified that it was Guaranty Loan & Real Estate Company's intention to be a part of the City of West Memphis and to develop and plat the property for municipal purposes or municipal lots. Guaranty determined that the subject property has reached a value that made it desirable and economical to develop based on the inclusion of the property into the City of West Memphis. Moreover, the City of West Memphis agreed to provide utilities on the subject property. The circuit court specifically found that, "the affected property has reached a value which makes it desirable and economical to develop, and the value of the affected property is based upon its inclusion into the City of West Memphis." In conclusion, the annexation was reasonable and the requirements of *Vestal* have been satisfied. This being the case, we hold that the circuit court's decision is not clearly erroneous. *See Town of Houston, supra.*

Affirmed.

ROBBINS and ROAF, JJ., agree.

[redacted]