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Louis S. RALPH *v.* STATE of Arkansas

CA CR 01-388 62 S.W.3d 1

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

McDaniel & Wells, P.A., by: *Bill Stanley*, for appellant.

Mark Pryor, Att'y Gen., by: *Katherine Adams*, Sr. Ass't Att'y Gen., for appellee.

TERRY CRABTREE, Judge. The appellant, Louis S. Ralph, entered a conditional guilty plea to criminal attempt to manufacture methamphetamine pursuant to Ark. R. Crim. P. 24.3(b) (2001). Appellant was sentenced to ten years' imprisonment in the Arkansas Department of Correction with an additional five years suspended. Appellant argues on appeal that the trial court erred in denying his motion to suppress evidence. We disagree, and affirm.

On May 29, 1999, Deputy Robb Rounsavall of the Mississippi County Sheriff's Office received information from a confidential informant that appellant was manufacturing methamphetamine in a shed at his residence. At approximately 8:30 p.m. that night, Deputy Rounsavall and Detective David Flora of the Second Judicial District's Drug Task Force arrived at appellant's residence. They approached appellant, who was raking leaves in his front yard. After

continued questioning, appellant told the officers that he was Louis Ralph. Detective Flora informed appellant that they had information that there was a working methamphetamine lab in the shed and requested to search. Appellant gave consent to search the residence and yard, but specifically excluded the shed. Appellant then informed the officers that marijuana plants were growing outside the shed. Upon finding the marijuana plants, Deputy Rounsavall placed appellant in custody. The officers then requested and received a search warrant for the entire premises, including the shed.

At the suppression hearing, the State chose not to rely on the search warrant for admission of evidence because the warrant was deficient as to the nighttime search warrant requirements. Instead, the State relied on the consent given by appellant, and it only introduced evidence seized as a result of the consent to search appellant's residence. At the hearing, appellant denied giving consent and hearing anything about a search warrant. During the suppression hearing, the State introduced into evidence numerous guns, items with suspected methamphetamine residue, lithium batteries, and a one-gallon plastic jar containing a clear liquid and white sediment. The trial court, in denying appellant's motion to suppress, found that appellant's consent was freely and voluntarily given. The trial court reasoned that because appellant denied ever being informed of the search warrant, the existence of an allegedly invalid search warrant had no bearing on his ability to exercise his right to limit or withdraw his consent. Appellant appeals this denial of his motion to suppress.

In reviewing a trial court's ruling on a motion to suppress, the court makes an independent determination based on the totality of the circumstances, viewing the evidence in a light most favorable to the State, and reverses only if the ruling is clearly against the preponderance of the evidence. *Johnson v. State*, 71 Ark. App. 58, 25 S.W.3d 445 (2000).

Appellant argues that his consent was not voluntarily given. "An officer may conduct searches and make seizures without a search warrant or other color of authority if consent is given to the search or seizure." Ark. R. Crim. P. 11.1 (2001). The State must prove by clear and positive evidence that consent was freely given. *Norris v. State*, 338 Ark. 397, 993 S.W.2d 918 (1999). The consent must not be the product of actual or implied duress or coercion. *Russey v. State*, 336 Ark. 401, 985 S.W.2d 316 (1999). "Knowledge of the right to refuse consent to search is not a requirement to prove

the voluntariness of consent." *Chism v. State*, 312 Ark. 559, 569, 853 S.W.2d 255, 260 (1993).

In the present case, the officers approached appellant in his yard, identified themselves, and told appellant that they had information about a methamphetamine lab in his shed. At first, appellant gave the officers several false identities. Appellant then gave consent to search the residence and the yard, but excluded consent to search the shed. Appellant later denied giving consent. We hold that the trial court's finding that appellant's consent was freely and voluntarily given is not clearly against the preponderance of the evidence.

Appellant argues that his residence was not searched pursuant to his consent, but searched pursuant to the search warrant, which was invalid and illegal. Appellant relies on *Bumpers v. North Carolina*, 391 U.S. 543 (1968), for his argument that the evidence should be suppressed. In *Bumpers*, the Supreme Court held that a person does not give consent when a law enforcement officer claims authority to search a home under a warrant. *Id.* "The situation is instinct with coercion-albeit colorably lawful coercion. Where there is coercion there cannot be consent." *Id.* at 550. The present case is distinguishable from *Bumpers*, because in *Bumpers* the consenting party was told beforehand of the existence of a warrant. Only after being told by the official conducting the search that he had a search warrant did the person respond "go ahead." *Id.* In this case, appellant denies that he was ever informed that the officers obtained a search warrant. Thus, we hold no coercion was shown.

Appellant also argues that the officers requested a search warrant because the officers were unsure of the consent from appellant. Appellant argues that only after the flaws with the search warrant were discovered did the State take the position that appellant consented and the search warrant was unnecessary. The State argues that the officers requested the search warrant for the shed, which was specifically excluded in appellant's consent. We note that subjective beliefs held by officers that are not communicated to the suspect are irrelevant. *Arnett v. State*, 342 Ark. 66, 27 S.W.3d 721 (2000). We hold that the reliance of the officers on the search warrant is irrelevant. The State relied at the hearing only on the consent, and introduced evidence found in the residence, an area that appellant consented to being searched. As we have held that appellant's consent was freely and voluntarily given, we find no error.

Affirmed.

ROBBINS and NEAL, JJ., agree.

Paul Dwain CROMWELL *v.* UNIVERSITY of ARKANSAS

CA 01-228 61 S.W.3d 864

Court of Appeals of Arkansas
Division II
Opinion delivered November 28, 2001
[Petition for rehearing denied January 9, 2002.]

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

Richard S. Smith, for appellees.

JOHN MAUZY PITTMAN, Judge. The appellant in this workers' compensation case was employed by appellee. Appellant's duties included extensive overseas travel as a fundraiser. Before his first trip to the Middle East, appellant was prescribed Lariam (an anti-malarial drug), and he took that drug over a fourteen-week period beginning in June 1994 and ending in August 1994. Five years later, in August 1999, appellant filed a claim for disability benefits alleging that, as a result of his treatment with the drug Lariam during this period, he sustained a compensable injury in the form of an organic brain disorder. Appellee contested the claim arguing, *inter alia*, that it was time-barred. After a hearing, the Commission found that the date of any potential compensable injuries produced by appellant's Lariam treatments would have been between June 1994 and October 1994, and concluded that appellant's claim was not filed within the two-year period provided for in Ark. Code Ann. § 11-9-702(a)(1)(A) (Repl. 1996). From that decision, comes this appeal.

For reversal, appellant contends that the Commission erred in finding that his claim was barred by section 11-9-702. He argues that his injury had not fully developed by October 1996, and urges us to find that his date of injury was May 1999 when he became unable to continue work. We must affirm.

The running of the statute of limitations is largely a question of fact. *See Young v. Houston Contracting Co.*, 267 Ark. 322, 590 S.W.2d 653 (1979); *see Houston Contracting Co. v. Young*, 271 Ark. 455, 609 S.W.2d 895 (1980). In determining the sufficiency of the evidence to support the factual findings of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings, and we will affirm if those findings are supported by substantial evidence, *i.e.*, such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Thompson v. Washington Regional Medical Center*, 71 Ark. App. 126,

27 S.W.3d 459 (2000). The determination of the credibility and weight to be given a witness's testimony is within the sole province of the Commission. *Second Injury Fund v. Exxon Tiger Mart, Inc.*, 70 Ark. App. 101, 15 S.W.3d 345 (2000).

Act 796 of 1993 made numerous changes to Arkansas Workers' Compensation law. By its terms, the Act applies to injuries that occur after July 1, 1993. *See* Acts 1993, No. 796, § 41. Appellant did not begin his Lariam treatment until June 1994, and his claim therefore comes under the provisions of Act 796 of 1993.

Arkansas Code Annotated § 11-9-702(a)(1)(A) provides that a claim for compensation for disability on account of an injury shall be barred unless filed within two years of the compensable injury. Section 11-9-702(a)(1)(B), added by Act 796 of 1993, invalidated a large body of prior caselaw by mandating that, for purposes of § 11-9-702, the date of the compensable injury shall be defined as the date an injury is caused by an accident as set forth in Ark. Code Ann. § 11-9-102(5) (Repl. 1996). *See, e.g., Haygood Limited Partnership v. Whisenant*, 74 Ark. App. 185, 47 S.W.3d 277 (2001) (Roaf, J., concurring). Such an injury is one caused by a specific incident that is identifiable by time and place of occurrence, and which causes physical harm, arises out of and in the course of the employment, and requires medical services or results in disability or death. Ark. Code. Ann. § 11-9-102(5)(A)(i) (Repl. 1996). The 1993 amendment added the stipulation that a latent injury or condition shall not delay or toll the limitations period specified in § 11-9-702(a)(1). Ark. Code Ann. § 11-9-702(g)(1) (Repl. 1996).

In the present case, the Commission's finding was based on evidence that, soon after beginning his course of Lariam treatment and immediately after taking one of the initial doses, appellant began to experience dramatic somatic changes including tunnel vision, weakness tantamount to loss of consciousness, a violent seizure, and what he described as a "shutdown of the body." Appellant stated that he knew something was severely wrong with him and asked his wife to call the doctor who had given him his travel medication. By July 1994, appellant experienced his first instance of disorientation and had become extremely irritable. He could no longer concentrate or perform complex tasks. He continued to take Lariam throughout this period. By October 1994 he was extremely depressed, and by December 1994 he was experiencing panic disorder and suicide ideation in addition to depression. Appellant's supervisor recommended that appellant seek a medical evaluation in the spring of 1996, and he was seen by Dr. Pang in April 1996.

Appellant testified that Dr. Pang looked up Lariam in the Physician's Desk Reference and informed him that Lariam could be the reason for his complaints.

Given the evidence that appellant's injury was caused by the Lariam treatments, that he required medical treatment for a severe reaction almost immediately after beginning those treatments and that his mental symptoms had become severe by October 1994, that the connection between Lariam treatments and his subsequent illness had been discovered prior to October 1996, and the fact that appellant's claim for disability benefits was not filed until August 1999, we cannot say that the Commission erred in finding that appellant's claim was not filed within the two-year period provided for in Ark. Code Ann. § 11-9-702(a)(1)(A) (Repl. 1996).

Affirmed.

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

David A. BRAMUCCI *v.* STATE of Arkansas

CA CR 01-235 62 S.W.3d 10

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

John W. Cone, for appellant.

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

JOSEPHINE LINKER HART, Judge. Appellant, David Bramucci, appeals the revocation of his suspended sentence. Appellant argues that because his original sentence was illegal, the violation of the conditions of the suspension could not form the basis of the additional sentence imposed by the court. We disagree and affirm.

Appellant entered a plea of guilty on January 9, 1996, to a charge of possession of a controlled substance, a Class C felony. The same day, the trial court entered an order styled, "Order of Probation or Suspending Imposition of Sentence, or Judgment and Commitment," sentencing appellant to "10 years to be served at hard labor in the Department of Correction of which 8 years is suspended." On November 13, 2000, the State filed a petition to revoke the suspended sentence, and a hearing was held on November 28, 2000. The court determined that appellant had violated the

conditions of his suspended sentence and sentenced him to an additional fifty-two months of incarceration. From that order comes this appeal.

Questions of law are reviewed under a *de novo* standard of review. *See, e.g., Moses v. State*, 72 Ark. App. 357, 395 S.W.3d 459 (2001). In *Meadows v. State*, 320 Ark. 686, 899 S.W.2d 72 (1995), our supreme court stated that sentencing in Arkansas is entirely a matter to be effected in accordance with the statute in effect at the time the crime was committed. Arkansas Code Annotated section 5-4-104(e)(3) (Repl. 1997) provides that "the court may sentence the defendant to a term of imprisonment and suspend imposition of sentence as to an additional term of imprisonment." Upon revocation, the court may, in accordance with Ark. Code Ann. § 5-4-309(f)(1)(A) (Supp. 1999) "enter a judgment of conviction and may impose any sentence on the defendant that might have been imposed originally for the offense of which he was found guilty."

Judgments are generally construed in the same manner as other instruments. The determinative factor is the intention of the court, which is derived from the judgment and the record. *Lewis v. State*, 336 Ark. 469, 475, 986 S.W.2d 95, 99 (1999). The court in *Lewis* noted that "it is to be presumed that a defendant has been accorded a fair trial, and that the judgment of conviction is valid." *Id.* Likewise, "there is a presumption of regularity attendant upon every judgment of a court of competent jurisdiction." *Coleman v. State*, 257 Ark. 538, 541, 518 S.W.2d 487, 489 (1975). This strong presumption of validity applies to criminal convictions and sentences, which entitles them to every reasonable intendment in their favor. *Id.* Absent a contradictory showing, a presumption arises when a sentence is pronounced that the circuit court did its duty according to the statutes unless the court's failure to do so appears on the face of the judgment. *Id.*

Appellant argues that his 1996 sentence was an illegal sentence because it suspended the execution of the sentence, which is prohibited by Ark. Code Ann. § 5-4-104(e)(1)(B)(ii). Thus, on revocation, the court could not sentence him to fifty-two months of imprisonment, but could only sentence him to the time remaining on his suspended sentence. *See Meadows v. State*, 324 Ark. 505, 922 S.W.2d (1996). The calculation of appellant's eight-year term is governed by Ark. Code Ann. § 5-4-307 (Repl. 1997), which provides, "if the court sentences the defendant to a term of imprisonment and suspends imposition of sentence as to a term of imprisonment, the period of suspension commences to run on the day the

defendant is lawfully set at liberty from the imprisonment." Appellant has failed to provide us with the exact date of his release from incarceration, and we are unable to determine the exact time that remains on the eight-year term. However, for the purpose of this opinion, we assume that the time remaining on the eight-year sentence is less than fifty-two months if the execution of the sentence was suspended.

To support his assertion that the sentence was a suspended execution as opposed to a suspended imposition of sentence, appellant points out that the form used by the court during sentencing did not contain the actual words "suspended imposition" in the line used to sentence him. Instead the completed order provides, "sentenced to 10 years to be served at hard labor in the Department of Correction of which 8 years is suspended." He also notes that the line on the form order containing the words "imposition of sentence is suspended for ___ years" was left blank. Relying heavily on these undisputed facts, appellant asserts that the court failed to fill in the appropriate blanks and to specifically designate that it was suspending the imposition of the sentence. Thus, the order provided for a suspended execution of the sentence as opposed to a suspended imposition of the sentence.

It is apparent that the court did not fill out the line specifically referencing suspended imposition of sentence. It is equally apparent that the line did not contain separate spaces for the time to be served and the time suspended. While the line that was filled out by the court refers only to "suspended" sentence, the document is titled an "Order of Probation or Suspending Imposition of Sentence, or Judgment and Commitment." Arkansas Code Annotated section 5-4-101(1)(Supp. 1999) defines "suspension" and "suspend imposition of sentence" identically.[1] Moreover, as was pointed out at the revocation hearing, a second judgment and commitment dated ten days after the original was prepared by the clerk's office and did contain the words "8 YRS" typed into the space under the subheading SIS (suspended imposition of sentence). Any confusion created by the original order dated January 9, 1996, was clarified by the judgment filed ten days later on January 19th, which included language specifying the number of years for the suspended imposition of sentence.

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[1] Ark. Code Ann. § 5-4-101(1) states: "Suspension" or "suspend imposition of sentence" means a procedure whereby a defendant who pleads or is found guilty of an offense is released by the court without pronouncement of sentence and without supervision.

Because the sentencing court's intention is clearly reflected in the court's orders, we cannot agree with appellant that the sentencing was illegal. Therefore, we affirm.

Affirmed.

VAUGHT and BAKER, JJ., agree.

Johnnie CATRON *v.* STATE of Arkansas

CA CR 01-582 61 S.W.3d 861

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

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Keith, Miller, Butler & Webb, PLLC, by: *Billy Bob Webb*, for appellant.

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

JOSEPHINE LINKER HART, Judge. Appellant, Johnnie Catron, appeals the trial court's denial of his motion to dismiss the State's information charging him with manslaughter. He contends that because he was previously found guilty of driving while intoxicated and driving left of center, and because these offenses are lesser-included offenses of the crime of manslaughter, that trying him for manslaughter would "twice put him in jeopardy of life and limb," violating the prohibition against double jeopardy found in the Fifth Amendment to the United States Constitution and in our double-jeopardy statute, Ark. Code Ann. § 5-1-110 (Repl. 1997). We, however, conclude that these crimes are not lesser-included offenses of manslaughter. Therefore, we affirm the denial of the motion to dismiss.

It is not disputed that on December 31, 2000, Catron was involved in an automobile accident that resulted in the death of Aaron Leuders. According to exhibits attached to his motion to dismiss, on January 17, 2001, Catron pleaded no contest in municipal court to the charge of driving while intoxicated, and on January 19, 2001, he pleaded guilty in municipal court to the charge of driving left of center. On January 29, 2001, the State filed an information charging Catron with manslaughter, asserting that Catron "on or about December 31, 2001, . . . did . . . [r]ecklessly cause[ ] the death of another person." In describing how the crime was committed, the information further provided that "[w]hile intoxicated [Catron] entered the northbound lane of interstate 540 near Watkins St. and drove southbound where he struck an automobile driven by Aaron Leuders causing his death. . . ."

In response to this charge, Catron filed a motion to dismiss, asserting that he had been convicted of driving while intoxicated and driving left of center, and that the Double Jeopardy Clause precluded the State from prosecuting him for manslaughter. Additionally, Catron claimed that the State was collaterally estopped from litigating the manslaughter charge. The court denied this motion, and Catron appealed.

On appeal, Catron again contends that driving while intoxicated, which requires proof that a person was operating or in actual physical control of a motor vehicle while intoxicated or while "there was . . . 0.10 % . . . or more by weight of alcohol in the person's blood,"[1] and driving left of center, in violation of a statute that requires, with certain exceptions, that "a vehicle shall be driven upon the right half of the roadway,"[2] are lesser-included offenses of manslaughter, which requires proof that "[h]e recklessly cause[d] the death of another person,"[3] and that prosecuting him for manslaughter violates the Double Jeopardy Clause. He reaches this conclusion by noting that the facts set forth in the State's information, that while intoxicated he committed manslaughter by entering the northbound lane of interstate 540 and driving southbound where he struck an automobile driven by Aaron Leuders causing his death, would also establish the crimes of driving while intoxicated and driving left of center. Because these facts would establish these crimes, he concludes that driving while intoxicated and driving left of center are lesser-included offenses of manslaughter, which has only one additional element, causing the death of another person.[4]

The test for determining whether a subsequent prosecution is barred under the Double Jeopardy Clause was restated in *United States v. Dixon*[5] as follows:

> In both the multiple punishment and multiple prosecution contexts, this Court has concluded that where the two offenses for which the defendant is punished or tried cannot survive the "same-

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[1] Ark. Code Ann. § 5-65-103 (Repl. 1997).
[2] Ark. Code Ann. § 27-51-301 (Supp. 2001).
[3] Ark. Code Ann. § 5-10-104(a)(3) (Repl. 1997).
[4] We further note that appellant contends that *State v. Thornton*, 306 Ark. 402, 815 S.W.2d 386 (1991), stands for the proposition that driving while intoxicated is a lesser-include offense of manslaughter and that *Montague v. State*, 68 Ark. App. 145, 5 S.W.3d 101 (1999), and the case reversing this court, *Montague v. State*, 341 Ark. 144, 14 S.W.3d 867 (2000), and stand for the proposition that negligent homicide is a lesser-included offense of manslaughter when intoxication is an essential element. We disagree, as none of these cases so hold.
[5] 509 U.S. 688 (1993).

> elements" test, the double jeopardy bar applies. The same-elements test, sometimes referred to as the *Blockberger* test, inquires whether each offense contains an element not contained in the other; if not, they are the "same offense" and double jeopardy bars additional punishment and successive prosecution.[6]

Further, our double-jeopardy statute provides that a person may not be convicted of more than one offense if "[o]ne offense is included in the other."[7] An offense is so included 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."[8]

In examining the elements of manslaughter, driving while intoxicated, and driving left of center, we conclude that driving while intoxicated and driving left of center are not lesser-included offenses of manslaughter. Specifically, we note that driving while intoxicated requires proof that a person was operating or in actual physical control of a motor vehicle and was intoxicated or had 0.10% or more by weight of alcohol in the person's blood. Neither of these elements is an element of the offense of manslaughter. Likewise, the offense of driving left of center requires proof that the driver was impermissibly driving left of center; the offense of manslaughter does not. Moreover, manslaughter requires proof that a person recklessly caused a death, elements which are not found in either of the other two offenses.

Catron further argues that in our analysis we must also determine whether the State will prove "conduct" that constitutes an offense for which the defendant has already been prosecuted. That approach, however, was rejected by the United States Supreme Court in *Dixon*.[9]

Catron also notes that under our criminal statutes, an "element of the offense" is defined in part as "the conduct, the attendant circumstances, and the result of conduct that . . . [i]s specified in the definition of the offense" or "[e]stablishes the kind of culpable mental state required for commission of the offense."[10] Thus, he contends that our statute incorporated the same-conduct test rather that the same-elements test. However, because the

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[6] *Id.* at 696 (citations omitted).
[7] Ark. Code Ann. § 5-1-110(a)(1) (Repl. 1997).
[8] Ark. Code Ann. § 5-1-110(b)(1) (Repl. 1997).
[9] *See Dixon*, 509 U.S. at 703-04.
[10] Ark. Code Ann. § 5-1-102(5)(A) and (B) (Supp. 2001).

Arkansas Supreme Court has concluded that the Arkansas General Assembly has codified the *Blockberger* test, which is the "same-elements" test, in our double-jeopardy statute, we are constrained to disagree with him.[11]

Catron further suggests that driving while intoxicated and driving left of center are also lesser-included offenses of manslaughter because each offense "differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person . . . or a lesser kind of culpable mental state suffices to establish its commission." We disagree because, as we previously described, there are several differences between manslaughter and the other two offenses. He also asserts that he cannot be convicted of manslaughter because "[t]he offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of that conduct."[12] We again disagree because manslaughter, driving while intoxicated, and driving left of enter are not defined in a way that suggests driving while intoxicated and driving left of center are specific instances of manslaughter.

Catron also argues that the doctrine of collateral estoppel bars a trial on the manslaughter charge because he was previously convicted of driving while intoxicated and driving left of center. However, because the State won rather than lost the earlier convictions, and further, because the elements of the crimes differ, the doctrine of collateral estoppel does not apply.[13]

Affirmed.

VAUGHT and BAKER, JJ., agree.

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[11] *Cothren v. State*, 344 Ark. 697, 705, 42 S.W.3d 543, 548 (2001); *see also State v. Thompson*, 343 Ark. 135, 143, 34 S.W.3d 33, 37-38 (2000).

[12] Ark. Code Ann. § 5-1-110(a)(4) (Repl. 1997).

[13] *Thompson*, 343 Ark. at 142-43, 34 S.W.3d at 37-38.

John Loyd HARTSFIELD *v.* STATE of Arkansas

CA CR 01-477 61 S.W.3d 190

Court of Appeals of Arkansas
Division I
Opinion delivered November 28, 2001

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Gary D. McDonald, for appellant.

Mark Pryor, Att'y Gen., by: *Katherine Adams*, Ass't Att'y Gen., for appellee.

JOHN E. JENNINGS, Judge. John Hartsfield entered a conditional plea of guilty to a charge of manufacturing methamphetamine, reserving the right to contest on appeal the issue of the validity of the search of his home. Hartsfield was sentenced to ten years' imprisonment with five years suspended. On appeal he contends that the trial court should have granted his motion to suppress the evidence for the invalidity of the search warrant. We agree and reverse and remand.

On December 7, 1999, Narcotics Investigator Terry Clark, an employee of the Thirteenth Judicial District Drug Task Force, presented an affidavit for a search warrant to a judge. A warrant was issued and immediately executed, and incriminating evidence was found. Mr. Clark's affidavit stated:

> A. On 07/27/98, I arrested John Hartsfield who was involved in a shooting. At that time, I learned from his wife that he and her had just been to Mexico and picked up a large quantity of prescription

drugs. Some of these were found in the vehicle at the time of his arrest.

B. Over the last two months, Chief Deputy Johnny Green had advised me that he had received information from four separate individuals who are known to him as being of good standing in the community that crystal methamphetamine was being manufactured and sold from the residence of John Hartsfield.

C. Over the last 30 days, I received information from an individual which has provided me with information in the past that proved to be true that led to the arrest of persons. That he had been to the residence of John Hartsfield and gotten red phosphorous and a bottle of sulfuric acid from Hartsfield, which are used in the manufacture process of crystal methamphetamine. While at the residence he noticed that Hartsfield was in the process of drying some crystal methamphetamine that had already been cooked. He went on to state that he saw items of glassware along with other red phosphorous inside the residence.

D. I then spoke with Chief Deputy Raymond Naylor of the Dallas County Sheriff's Depart., who told me that he had spoken with a person known to him as being reliable and who had also been to the residence of Hartsfield and saw red phosphorous and chemicals inside the residence.

E. On 12/07/99, I went to the residence of Hartsfield to investigate the information I had received in hopes of being able to speak with him. I then went to the door, rang the doorbell and knocked on the door to no avail. As I went to leave the residence, I noticed two pieces of plastic tubing beside the door that appeared in my experience to have [been] used as a piece of a HCL generator, which is used in the manufacture of crystal methamphetamine along with a funnel with a reddish tint to it that to me in my experience indicates the presence of iodine which is indicative to a crystal methamphetamine lab.

[redacted] The controlling case is *Franks v. Delaware*, 438 U.S. 154 (1978). In *Franks* the United States Supreme Court held that:

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to finding of probable cause, the Fourth Amendment requires that a hearing

> be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Under *Franks*, if false or erroneous statements meet the standard of knowing deception or reckless disregard, the next step is to extract such statements, examine the remainder, and determine if probable cause exists. *Pyle v. State*, 314 Ark. 165, 862 S.W.2d 823 (1993).

The trial court properly applied the first part of the Franks test at the suppression hearing. The court stated that it gave "absolutely no credence" to the information contained in section B of the affidavit, on the basis that the testimony of Chief Deputy Johnny Green totally contradicted the testimony of Investigator Clark. The trial court also rejected paragraph E of the affidavit. It is clear that the basis for this rejection was the court's perception that Clark's testimony at the suppression hearing was not truthful. Nevertheless, the trial court held that the remaining paragraphs of the affidavit were sufficient to establish probable cause for the issuance of the search warrant. We cannot agree.

Paragraph A of the affidavit does not establish that the appellant had committed a crime in 1998. Even if it had, the statement would have been entitled to no weight under *Yancey v. State*, 345 Ark. 103, 44 S.W.3d 315 (2001) (holding that the known criminal averment is not only insufficient to support a finding of reasonable cause for issuance of a warrant, but is entitled to no weight whatsoever).

The trial court upheld the affidavit on the basis of paragraphs C and D of the affidavit. Paragraph C recites that within thirty days preceding the execution of the affidavit, Clark received certain information from a confidential informant that the informant had been to Hartsfield's residence and, in effect, observed the manufacture of methamphetamine. In *Collins v. State*, 280 Ark. 453, 658 S.W.2d 877 (1983), the court said:

> It is the uniform rule that some mention of time must be included in the affidavit for a search warrant. . . . The only softening of this

> position occurs when time can be inferred from the information in the affidavit. For example, where an affidavit recited that the contraband was "now" in the suspect's possession and that the search was urgent, that was found to be adequate to satisfy the time requirement. . . . In another case where the affidavit said that contraband was "recently" seen, coupled with the use of present tense as to the location of the contraband, that was held to be sufficient. . . . Time is crucial because a magistrate must know that criminal activity or contraband exists where the search is to be conducted at the time of the issuance of the warrant. . . . That is not an unreasonable nor technical demand of the law. (Citations omitted.)

It is clear that the "time" that is critical is the "time during which the criminal activity was observed." *See Herrington v. State*, 287 Ark. 228, 697 S.W.2d 899 (1985).

■ We can tell from the affidavit that Investigator Clark received the information from the confidential informant within thirty days immediately preceding the execution of the affidavit, but the affidavit provides no clue at all as to when the informant's observation was made. Under these circumstances this paragraph cannot be deemed to supply the requisite probable cause. *See Herrington v. State, supra.* Paragraph D of the affidavit is likewise deficient.

■ The trial court struck out the second and fifth paragraphs of the affidavit for a search warrant pursuant to the Supreme Court's decision in *Franks*. What is left cannot fairly be characterized as establishing probable cause for the issuance of the warrant.

Reversed and remanded.

BIRD and ROAF, JJ., agree.

Robert Morgan LAWSON *v.*
Marsha Kay Lawson MADAR

CA 01-372 60 S.W.3d 497

Court of Appeals of Arkansas
Division I
Opinion delivered November 28, 2001

Kearney Law Offices, by: *John L. Kearney*, for appellant.

One brief only.

JOHN E. JENNINGS, Judge. Marsha Madar and Robert Lawson were divorced in 1985, and custody of the parties' two children was awarded to the wife. In September 1998, the wife filed a petition for citation of contempt alleging that Mr. Lawson was behind in paying child support. The court held a hearing in November 1998. At the conclusion of the hearing the parties asked the court to hold off making its decision pending their settlement negotiations.

On August 24, 2000, the chancellor entered an agreed order based on the parties' settlement of all issues finding Mr. Lawson in contempt and awarding a money judgment to Mrs. Madar for past

due child support. The order was entered *nunc pro tunc* to November 20, 1998. Mr. Lawson now appeals from that order, raising a variety of issues relating to the proof before the trial judge at the 1998 hearing, and alleging error in the misapplication of certain presumptions of law. We find no error and affirm.

■ ■ Clearly the decree in the case at bar was a consent decree. Appellant does not contend that the order does not accurately reflect the agreement of the parties. In discussing a decree by consent in *Martin v. Houck Music Co.*, 79 Ark. 95, 94 S.W. 932 (1906), the supreme court said, "[t]hat being so, defendant has no right to ask us to reverse that decree. If there was error in that decree, it was error invited by the defendant." The court's decision in *Martin* was in accord with current general law:

> A party is not aggrieved by a judgment, order, decree, or ruling regularly rendered or made, on agreement or otherwise, with his express or implied consent, therefore he cannot appeal or sue out a writ of error to review it. . . . A party consenting to a judgment is conclusively presumed to have waived all errors, except those going to the jurisdiction of the court.

4 C.J.S. *Appeal and Error* § 189. Consent, it is said, excuses error and ends all contention between the parties. *Vaughan v. Brown*, 184 Ark. 185, 40 S.W.2d 996 (1931); *McIlroy Bank & Trust v. Acro Corp.*, 30 Ark. App. 189, 785 S.W.2d 47 (1990) (overruled in part, on other grounds, in *Carden v. McDonald*, 69 Ark. App. 257, 12 S.W.3d 643 (2000)). Appellant cannot agree to the entry of an order and then contend on appeal that the trial court erred in entering it.

Affirmed.

BIRD and ROAF, JJ., agree.

NORTHEAST ARKANSAS INTERNAL MEDICINE CLINIC, P.A. *v.* Jason CASEY, M.D.

CA 01-358 61 S.W.3d 850

Court of Appeals of Arkansas
Division I
Opinion delivered November 28, 2001

Womack, Landis, Phelps, McNeill & McDaniel, by: *D. Chris Gardner* and *Tom D. Womack*, for appellant/cross-appellee.

Mike Everett, for appellee/cross-appellant.

JOHN E. JENNINGS, Judge. Appellant Northeast Arkansas Internal Medicine Clinic appeals from an order of summary judgment and the dismissal of its subsequently filed amended complaint. Appellee Jason Casey, M.D., cross-appeals from the denial of his motion to dismiss appellant's amended answer to his counterclaim. On direct appeal, we affirm the grant of summary judgment and reverse the dismissal of appellant's amended complaint. On cross-appeal, we affirm the refusal to dismiss appellant's amended answer.

Appellant is a professional corporation that provides medical services in the state of Arkansas. Appellee is a duly licensed physician. On March 31, 1995, appellant and appellee executed an employment contract wherein appellee agreed to practice medicine for appellant. Section 6.1 of the agreement established the manner in which appellee would be compensated for his services as follows:

> *Base and Incentive Compensation.* For all services rendered by the Physician under this Agreement in whatever capacity rendered, the physician shall have and receive remuneration computed as follows: (1) Commence with the gross charges for patient services performed by the Physician, reduced by (2) adjustments to such charges for Medicare, Medicaid, and other write-offs, professional courtesies, and non-collectibles, which shall result in a determination of adjusted charges; (3) adjusted charges applicable to the Physician shall be compared to the amount of adjusted charges attributable to all physicians of the Clinic to determine the fraction thereof; and (4) said fraction shall be multiplied times the net income of the Clinic, which shall be defined for this purpose as the total annual revenues of the Clinic, less all non-physician expenses and less payments made to physician employees whose compensation is a salary plus bonus based on adjusted charges, and the resulting amount shall equal (5) the amount of total compensation to be paid during the employment term. Of said amount, the Physician shall receive a gross salary of $6,250 per month, payable on the last day of each month, less appropriate payroll deductions for taxes and other withholdings, and the remainder of the total compensation shall be paid during the course of the term in bonus compensation and fringe benefits. . . .

For approximately four years following execution of the contract, appellee received his fixed monthly salary without fail, though he often did not produce enough revenue to cover his salary. By April 1999, however, when the amount paid to him as salary had exceeded the earnings he generated based on the contractual formula by $71,825.21, appellant told appellee that it expected repayment of the money. At that point, appellee tendered his resignation, effective July 28, 1999. Part of his May through July salary was applied to the deficit, reducing it to $66,937.25.

On September 23, 1999, appellant sued appellee to recover $66,937.25, and appellee counterclaimed for three months of unpaid salary. Following discovery, both parties moved for summary judgment and agreed that no genuine issues of material fact remained to be tried. In its motion, appellant contended that the employment agreement had consistently been applied in such a way that, if a physician's compensation, as calculated by the contractual formula, was less than his salary draw, the deficit amount would be owed by the physician to appellant. Appellee argued that, because the contract did not mention that such deficits would be reimbursed from a physician's monthly salary, the contract was ambiguous, requiring it to be construed against appellant, the drafter. Attached to appellant's motion was the affidavit of Robert Taylor, M.D., a shareholder, director, and physician-employee of appellant. Dr. Taylor stated that the physicians who practiced medicine as employees of appellant were also shareholders and directors, and the compensation formula set out in Section 6.1 was an income distribution plan designed to allow the physicians to share in the company's profits in accordance with the revenues they generated. Taylor further stated that, if a physician's compensation as calculated by the formula in Section 6.1 was less than his monthly draw, the physician would repay the deficit from his future earnings. As an example of this, Dr. Taylor mentioned two occasions on which appellee had paid appellant $8,103.44 and $1,000 to cover deficits. However, attachments to appellee's motion showed that those amounts were recouped not from appellee's salary but from bonuses that were due him.

On July 5, 2000, the trial judge entered summary judgment in favor of appellee. He found that Section 6.1 was ambiguous in that it did not set forth the parties' rights in the event an employee did not produce enough revenue to cover his salary. Based on that finding, he construed the contract against appellant and ruled that appellant was not entitled to recoup any deficits from appellee. The

order left standing appellee's counterclaim for three months' unpaid salary.

On August 23, 2000, several weeks after summary judgment had been entered, appellant filed an amended complaint alleging that appellee had breached the employment contract by failing to perform certain administrative duties. According to the complaint, appellee's failure to submit certain billing documents cost appellant at least $40,000, and judgment was sought for that amount. Appellee's alleged breach was also set forth by appellant in an amended answer as a defense to appellee's counterclaim. Appellee moved to dismiss the second amended complaint and the amended answer on the ground of *res judicata*. He argued that appellant's allegations regarding breach of administrative duties could have been litigated prior to the entry of summary judgment on July 5, 2000. The trial judge agreed that *res judicata* precluded appellant from seeking damages on the breach-of-contract claim and dismissed the second amended complaint. However, he refused to dismiss appellant's amended answer and let the alleged breach stand as a defense to appellee's counterclaim. Appellant now appeals the entry of summary judgment and the dismissal of its second amended complaint. Appellee cross-appeals the trial court's refusal to dismiss appellant's amended answer.[1]

Appellant first argues that the trial court erred in entering summary judgment in favor of appellee. In most summary-judgment cases, we need only decide if the grant of summary judgment was appropriate, considering whether the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered. *See Inge v. Walker*, 70 Ark. App. 114, 15 S.W.3d 348 (2000). However, in a summary-judgment matter where the parties agree on the facts, as the parties do in this case, we simply determine whether appellee was entitled to judgment as a matter of law. *Jackson v. City of Blytheville*, 345 Ark. 56, 43 S.W.3d 748 (2001).

Section 6.1 of the parties' contract provides that appellee shall receive as compensation a percentage of appellant's net income in proportion to the revenue he generates. For example (using a simplified version of the formula), if appellant's net income over an

[1] Although the court's order was not final because it left pending appellee's counterclaim, the court set forth sufficient reasons, pursuant to Ark. R. Civ. P. 54(b), to allow for immediate appeal.

applicable period were $3,000,000 and appellee generated one percent of that revenue, his compensation would be $30,000. If, during that period, he had received a salary of $25,000, he would be entitled to a $5,000 bonus under the clear terms of the contract. However, the contract is silent as to what would occur if appellee received a $25,000 salary, yet only $20,000 of the revenue was attributable to him.

The contract's silence on that matter makes this case similar to *Carter Construction Co. v. Sims*, 253 Ark. 868, 491 S.W.2d 50 (1973). There, Carter employed Sims as a superintendent on three construction jobs. He agreed to pay Sims forty-nine percent of the net profit on the jobs and to "advance" Sims $3,000 per month until the jobs were completed, whereupon the advances would be deducted from the net profits due Sims. The agreement mentioned nothing about a refund of advances in the event no profits were realized. In a subsequent lawsuit between the two men, a jury found that Sims was not entitled to any lost profits but was entitled to his $3,000-per-month salary for the duration of the jobs. On appeal, the supreme court quoted numerous authorities to the effect that, unless the parties agree otherwise, a drawing account is treated by the courts as a guaranteed minimum compensation, and an excess of advances cannot be recovered by the employer.

■ We agree with the trial court that *Carter* prevents appellant's recoupment of salary payments for the purpose of offsetting appellee's production deficit. As in *Carter*, the parties here made no agreement for recoupment in the event that appellee failed to generate sufficient revenues to cover his salary. Therefore, appellee's salary must be treated as being owed to him regardless of the amount of revenues attributable to him. Appellant attempts to distinguish *Carter* on the basis that it involved a master-servant relationship while this case involves a profit sharing relationship among professionals. The distinction makes no difference in this case. Appellee was an employee of appellant, under the express terms of the contract and, like the employee in *Carter*, was compensated by a salary against a percentage of the profits.

■ Appellant also argues that if a physician is permitted to receive his full salary despite his deficient production, the unfair result will be that the high-revenue producers among the physicians will be subsidizing those who do not produce. Clearly, appellant as the drafter of the agreement could have avoided this result by including a provision to cover the possibility that a physician's

revenues might be inadequate to meet his salary. Instead, the contract is silent on this point. In *Lee v. Hot Springs Village Golf School*, 58 Ark. App. 293, 951 S.W.2d 315 (1997), we held that silence on such a matter renders a contract ambiguous, a holding echoed by the trial judge in this case. The judge resolved the ambiguity in favor of appellee, and there is ample basis for his having done so.[2] It was proper for him to construe the contract against appellant as the party who drafted it. *See Bradley v. Arkansas La. Gas Co.*, 280 Ark. 492, 659 S.W.2d 180 (1983). It is also noteworthy that appellee's salary was not reduced to recover a deficit during the entirety of his employment, even though deficits often existed. Such a course of dealing and the parties' own construction of the contract are relevant to resolve an ambiguity. *See generally Sturgis v. Skokos*, 335 Ark. 41, 977 S.W.2d 217 (1998); *Arkansas Power & Light v. Thompson*, 191 Ark. 171, 83 S.W.2d 838 (1935). Although appellant argues that appellee's reduction in bonus compensation evidences an understanding that deficits could be recouped, the fact that no recoupments were made from appellee's salary supports the trial court's ruling. We affirm the trial court's grant of summary judgment in favor of the appellee.

Next, appellant contends that the trial court erred in dismissing its second amended complaint on the ground of *res judicata*. The doctrine of *res judicata* bars relitigation of 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 involve the same claim or cause of action; and (5) both suits involve the same parties or their privies. *Office of Child Support Enforcement v. Williams*, 338 Ark. 347, 995 S.W.2d 338 (1999).

The trial court held that its interlocutory ruling granting summary judgment precluded appellant from asserting other claims during the pendency of the same lawsuit. We hold that under these circumstances the doctrine of *res judicata* does not apply. Only a final judgment on the merits may be given a preclusive effect. *See Looney v. Looney*, 336 Ark. 542, 986 S.W.2d 858 (1999) (holding that the application of *res judicata* to further proceedings in the same lawsuit appears inappropriate). The summary judgment granted by the trial

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[2] There are circumstances in which a contract provision, even though ambiguous, may be interpreted as a matter of law. *See Smith v. Prudential Prop. & Cas. Co.*, 340 Ark. 335, 10 S.W.3d 846 (2000). Here, the parties agree that there is no genuine issue of material fact remaining, and there is no dispute as to the facts as contained in the discovery pleadings and attachments to the parties' motions.

court was not a final judgment and could even have been reconsidered had the court so desired. *See Stewart Title Guar. Co. v. Cassill*, 41 Ark. App. 22, 847 S.W.2d 465 (1993). It follows that the dismissal of appellant's second amended complaint was error.

The same reasoning applies to appellee's contention on cross-appeal that *res judicata* should have precluded appellant from filing an amended answer to the counterclaim. The amended answer was not barred by *res judicata*, and the trial judge was correct in allowing it to stand.

Affirmed in part and reversed and remanded in part on direct appeal; affirmed on cross-appeal.

HART, J., agrees.

BIRD, J., concurs.

SAM BIRD, Judge, concurring. I agree with the majority's holding that the Clinic's amended complaint was erroneously dismissed through summary judgment on the ground of *res judicata*. However, I write separately for the sole purpose of making it clear that a summary judgment can be a final judgment for *res judicata* purposes.

Summary judgment is an adjudication on the merits that bars a subsequent suit. *National Bank of Commerce v. Dow Chem. Co.*, 338 Ark. 752, 1 S.W.2d 443 (1999); *Magness v. McEntyre*, 305 Ark. 503, 808 S.W.2d 783 (1991). However, under Arkansas Rule of Civil Procedure 54(b)(1), a summary judgment that does not resolve all claims between all the parties to the suit is not a final, appealable judgment. *See French v. Brooks Sports Ctr., Inc.*, 57 Ark. App. 30, 940 S.W.2d 507 (1997). Arkansas Rule of Civil Procedure 54(b) provides, in relevant part, as follows:

> (1) *Certification of Final Judgment.* When more than one claim for relief is presented in an action, wheter as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination, supported by specific factual findings, that there is no just reason for delay and upon an express direction for the entry of judgment. In the event the court so finds, it shall execute [a certification].

> (2) *Lack of Certification.* Absent the executed certificate required by paragraph (1) of this subdivision, any judgment, order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the judgment, order, or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all of the parties.

In light of Rule 54(b), the general rule that summary judgment is an adjudication on the merits that bars a subsequent suit must be interpreted to apply solely to summary judgments that resolve all claims between all parties or are certified as final by the court. The summary judgment order in the case at bar did not resolve all claims, as the order did not dispose of the appellee's pending counterclaim. The order neither contained the findings nor certification necessary under Rule 54 for the summary judgment order to become final. Thus, the summary judgment order was not a final order and could not constitute a *res judicata* bar to the amended complaint. Accordingly, the trial court's grant of summary judgment on the ground of *res judicata* was erroneous.

WAL-MART STORES, INC. *v.* Felicia THOMAS

CA 00-1387 61 S.W.3d 844

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered November 28, 2001

Quattlebaum, Grooms, Tull & Burrow, PLLC, by: *Leon Holmes*, *Thomas G. Williams*, and *Patrick W. McAlpine*, for appellant.

Keil & Goodson, by: *Matt Keil*, for appellee.

JOHN E. JENNINGS, Judge. Wal-Mart Stores, Inc., appeals from a $25,000 judgment awarded to the appellee, Felicia Thomas, after a bench trial. For reversal, appellant contends that there is insufficient evidence to support appellee's claims of relief for malicious prosecution, outrage, or defamation. We hold that the evidence is sufficient to support appellee's claim of malicious prosecution and affirm.

This case arose out of a dispute between appellee and Michelle Mitchell, a manager at the Wal-Mart store in Texarkana, over an item appellee wished to return. Appellee wanted to exchange a garment that she said was too small. Ms. Mitchell would not accept the return of the garment because, even though appellee had a receipt, she believed that it had been worn because there were crease marks and a stain on it. Appellee maintained that she had only worn the garment a few minutes when she had tried it on to see if it fit, and she denied that it was stained. Their discussion lasted from fifteen to twenty minutes and took place at the service desk. At its conclusion, appellee asked Ms. Mitchell to call the police so she could lodge a complaint. Ms. Mitchell called the police for appellee, and appellee went to the layaway department to await their arrival.

Ms. Mitchell testified that, although appellee was persistent in her demands, she was not verbally abusive and had not caused a disturbance of any kind. She stated that she had no reason to have appellee removed from the store, that she had not asked her to leave, and that the police would not have been called had it not been for appellee's request for them to be summoned. She said that she had no problem with appellee waiting in the layaway department, as the purpose of having customers in the store is so that they will spend money. She denied that she told the police to either remove appellee from the store, or to arrest her.

Officer Stacy Williams of the Texarkana Police Department responded to the call. By deposition, she testified that she met Ms. Mitchell at the front of the store and that Ms. Mitchell explained that there was a problem with a customer about a refund, that the customer had caused a disturbance, and that the customer had refused her request to leave the store. Officer Williams said that Ms. Mitchell asked her to remove and ban the customer from the store and that Ms. Mitchell pointed appellee out to her in the layaway department. Williams testified that she approached appellee and

told her that she must leave the store because the manager wanted her to go. Williams said that appellee became upset, that she was trembling, that her voice was quivering, and that she had tears in her eyes. Williams said that appellee refused to leave and said that she would not leave until she said what she had to say, but Williams said that appellee would not speak to her. Williams advised appellee that she would be arrested for criminal trespass if she did not leave because the store personnel wanted her to go. Williams testified that appellee appeared to be unstable and was being uncooperative in that she refused to identify herself or talk to her, so Williams decided to arrest her. When Williams tried to handcuff appellee, appellee grabbed a counter with both hands and then slapped and hit at Officer Williams.

At about that time, Officer Lynn Sanders arrived. At trial, Sanders recalled meeting briefly with Ms. Mitchell at the front of the store, but he said he could not remember receiving any specific instructions from her. He admitted, however, that in an earlier deposition he had testified that Ms. Mitchell had told him that appellee was causing a problem and that she wanted appellee removed from the store. He described the scene he encountered in the layaway department as a "Mexican standoff," and he said that a small crowd had gathered. After being informed by Officer Williams that appellee was to be arrested, Sanders said that he tried to speak with appellee but that she was tensed up and would not respond to any of his questions. Officer Sanders testified that he departed from his normal routine and even begged appellee to submit to the arrest. When appellee did not, he placed her in a "full Nelson," which allowed Officer Williams to get the handcuffs on her. Sanders then dragged appellee out of the store.

Appellee was taken to jail and charged with criminal trespass, loitering, and resisting arrest. The charges were later *nolle prossed.*

To prove malicious prosecution, the plaintiff must establish each of the following elements: (1) an earlier proceeding instituted or continued by the defendant against the plaintiff; (2) termination of the proceeding in favor of the plaintiff; (3) absence of probable cause for the proceeding; (4) malice on the part of the defendant; and (5) damages. *Carmical v. McAfee,* 68 Ark. App. 313, 7 S.W.3d 350 (1999). Appellant argues on appeal that appellee failed to present sufficient proof on the first, third, and fourth elements.

In bench trials, the standard of review on appeal is whether the judge's findings are clearly against the preponderance

of the evidence. *Schueck v. Burris,* 330 Ark. 780, 957 S.W.2d 702 (1997). Resolving disputed facts, and determining the credibility of the witnesses are matters within the province of the circuit court, sitting as the trier of fact. *Heartland Community Bank v. Holt,* 68 Ark. App. 30, 3 S.W.3d 694 (1999).

Appellant first contends that there is no evidence that it instituted a proceeding against appellee because there was no testimony that Ms. Mitchell specifically asked the officers to arrest appellee. Appellant also suggests that it was appellee's own conduct that led to her arrest. As the trier of fact, the trial judge was entitled to accept or reject all of the testimony, or any part thereof that it believed to be true or false. *White v. State,* 39 Ark. App. 52, 837 S.W.2d 479 (1992). Based on the testimony, the trial court could find that the appellee was arrested for criminal trespass because Officer Williams believed that appellee had caused a disturbance and had refused Ms. Mitchell's request to leave the store. The trial court could also have found that appellee had not been disruptive and that Ms. Mitchell had not asked her to leave the store. Thus, the court could conclude that Ms. Mitchell falsely accused appellee of trespassing and that this false accusation set in motion the chain of events that led to appellee's arrest. In discussing this element of malicious prosecution, the supreme court has observed that when a private person makes an accusation of criminal misconduct about another to an official, the person must believe the accusation or information is true. If, however, the information is known by the giver to be false, an intelligent exercise of the officer's discretion becomes impossible, and a prosecution based upon it is procured by the person giving the false information. *South Arkansas Petroleum Co. v. Schiesser,* 343 Ark. 492, 36 S.W.3d 317 (2001). We cannot say the judge's finding that the criminal trespass charge was instituted at the behest of appellant is clearly against the preponderance of the evidence.

Appellant next argues that appellee failed to prove the absence of probable cause. In the context of malicious prosecution, the term "probable cause" is defined as a state of facts or credible information which would induce an ordinarily cautious person to believe that the accused is guilty of the crimes charged. *Harmon v. Carco Carriage Corp.,* 320 Ark. 322, 895 S.W.2d 938 (1995). Further, ordinary caution is a standard of reasonableness that presents an issue for the trier of fact when the proof is in dispute or subject to different interpretations. *See Kellerman v. Zeno,* 64 Ark. App. 79, 983 S.W.2d 136 (1998).

Appellant contends that it has the right to select persons with whom it does business under Ark. Code Ann. § 4-70-101 (Repl. 1996), and that appellee committed a trespass under that statute when she refused the officer's request to leave. The trial court found, however, that Officer Williams asked appellee to leave and arrested her for criminal trespass when she did not comply, only because Ms. Mitchell had led her to believe that appellee had caused a disturbance and had already committed a trespass by refusing Ms. Mitchell's directive to leave the store. The trial court further found that Ms. Mitchell had never asked appellee to leave the store. It was also Ms. Mitchell's testimony that she had no cause to ask appellee to leave and that there was no problem with appellee remaining in the store. The trial court's finding that there was no probable cause to support the charge of criminal trespass is not clearly against the preponderance of the evidence.

Appellant also argues that there was probable cause to suspect appellee of loitering because appellee refused to identify herself to the officers or give them a reasonably credible account for her presence. The loitering statute, found at Ark. Code Ann. § 5-71-213, also requires the accused to linger or remain at the premises without apparent reason and under circumstances that warrant alarm or concern for the safety of persons or property. Again, it was Ms. Mitchell's testimony that appellee was not causing any kind of disturbance and that she remained at the store for the legitimate purpose of conducting further business. We cannot say that appellant had probable cause to believe that appellee had committed this offense.

Next, appellant argues that there was probable cause for the charge of resisting arrest. The trial court found, however, that appellee had not been asked to leave the store and had no reason to expect the police to ask her to go. The court also found that the officers were unaware that their presence had been requested by appellee. The court further found that the officer was under the mistaken impression that appellee had remained in the store despite Ms. Mitchell's request for her leave. The court thus concluded that appellee was confronted with a situation that she did not understand, which led to the conflict. In our view, resisting arrest was but one of the charges brought against appellant. As there was sufficient evidence to support the absence of probable cause for levying the charges of criminal trespass and loitering, we affirm under this point. Moreover, appellant has cited no authority that a plaintiff's reaction to charges that are shown to have been wrongfully brought

works to insulate the defendant from liability for malicious prosecution for bringing those false charges.

Finally, appellant contends that malice was not shown. The evidence shows that Ms. Mitchell and appellee had argued over the return of the garment and that Ms. Mitchell set the police on appellee to remove her from the store by telling the officers, falsely, that appellee had caused a disturbance and had refused to leave the store. Malice may also be inferred from the lack of probable cause. *Wal-Mart Stores, Inc. v. Williams,* 71 Ark. App. 211, 29 S.W.3d 754 (2000). This finding is not clearly erroneous.

Because we affirm the judgment based on malicious prosecution, it is not necessary for us to decide whether there is also sufficient evidence to support claims for outrage and defamation.

Affirmed.

BIRD, VAUGHT, and BAKER, JJ., agree.

ROBBINS and CRABTREE, JJ., dissent.

TERRY CRABTREE, Judge, dissenting. I respectfully dissent from the majority's opinion that appellee presented proof at trial to establish that Wal-Mart engaged in the tort of malicious prosecution. I believe that appellee failed to prove three of the elements of a claim of malicious prosecution. Appellee did not establish (1) that a proceeding was instituted or continued by Wal-Mart or Mitchell against appellee, (2) the absence of probable cause, or (3) malice on the part of Wal-Mart.

Testimony at trial does not indicate that Wal-Mart or Mitchell "instituted or continued a proceeding" against appellee. Officer Williams testified that no one associated with Wal-Mart asked her to *arrest* appellee. In fact, both officers testified that appellee would not have been arrested but for appellee's conduct. Moreover, appellee presented no proof that appellant filed charges or "instituted or continued a proceeding" against her.

Appellee also failed to prove the absence of probable cause. In malicious-prosecution cases, the test for determining probable cause is an objective one based not upon the accused's actual guilt, but upon the existence of facts or credible information that would induce a person of ordinary caution to believe the accused to be guilty. *Wal-Mart Stores, Inc. v. Williams,* 71 Ark. App. 211, 29

S.W.3d 754 (2000). Here, the Texarkana police accused appellee of criminal trespass, loitering, and resisting arrest. I do not believe that appellee proved that probable cause did not exist in support of the charges of criminal trespass and resisting arrest.

Officer Sanders repeatedly asked appellee to leave the Wal-Mart store, but appellee refused. According to Ark. Code Ann. § 4-70-101 (Repl. 1996), a business has the right to select customers and the power to refuse service to any person. Subsection (c) of that statute imposes a penalty upon persons who are requested to leave a place of business and who after having been so requested, refuse to leave. Here, Officers Sanders and Williams had probable cause to believe that appellee was violating this statute and criminally trespassing when she refused to leave the Wal-Mart store. Thus, appellee did not prove the absence of probable cause for the proceeding.

Next, there was ample evidence that appellee resisted arrest. Officer Williams was only able to place handcuffs on one hand of appellee because she was "hanging on to the lay-away counter." Furthermore, appellee hit Officer Williams on the chest and arms during the arrest. Officer Sanders also stated that appellee refused to let him handcuff her, and that he had to put her in a "grip" using his police baton and removed her from the store using that instrumentality.

The fourth element of a malicious-prosecution claim, malice, is also not present in this case. The trial court believed that Mitchell told the officers to have appellee removed from the store. As store manager, Mitchell was entitled to determine who was present in the Wal-Mart store. Appellee had no legal right to stay in the store after the police asked her to leave pursuant to Mitchell's instructions. I do not believe that Mitchell's conduct was sufficient to establish malice. Arkansas Code Annotated § 4-70-101(c) empowered Mitchell to request that appellee be removed from the store. Thus, Mitchell's actions cannot be categorized as malicious. Moreover, appellee had every opportunity to speak to the police, explain the situation, cooperate with them, and leave the store. Wal-Mart cannot be held responsible for appellee's noncompliance with the officers. Ultimately, the evidence presented by appellee in this case does not establish a claim for malicious prosecution because the evidence fails to support three of the requisite elements.

ROBBINS, J., joins.

Dayne BELL (Deceased), Bobby Bell, and
Vanessa Walker *v.* TRI-LAKES SERVICES and
Bituminous Insurance Company

CA 01-412 61 S.W.3d 867

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

[redacted]

Patton & Tidwell, LLP, by: *Christie Gunter Adams*, for appellants.

Anderson, Murphy & Hopkins, L.L.P., by: *Randy P. Murphy*, for appellees.

JOHN B. ROBBINS, Judge. Dayne Bell was employed by appellee Tri-Lakes Services when he died in a motor-vehicle accident on August 30, 1999. Dayne's parents, appellants Bobby Bell and Vanessa Walker, filed a workers' compensation claim seeking medical and funeral expenses. After a hearing, the Commission found that Dayne's death was not compensable because they failed to prove by a preponderance of the evidence that Dayne was performing employment services at the time of the fatal accident. The appellants argue that this ruling was erroneous. We agree, and we reverse and remand for an award of benefits.

Where a claim is denied because the claimant has failed to show entitlement to compensation by a preponderance of the evidence, the substantial-evidence standard of review requires us to affirm the Commission if its opinion displays a substantial basis for the denial of relief. *Stephenson v. Tyson Foods, Inc.*, 70 Ark. App. 265,

19 S.W.3d 36 (2000). In determining the sufficiency of the evidence, we review the evidence in the light most favorable to the Commission's findings and affirm if they are supported by substantial evidence. *Cooper v. Hiland Dairy*, 69 Ark. App. 200, 11 S.W.3d 5 (2000). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.*

Bobby Bell testified at the hearing. He stated that Dayne had worked as a laborer for Tri-Lakes Services for three weeks and a day prior to his death. Tri-Lakes Services has several job sites throughout the southern United States, and for the first three weeks of his employment Dayne worked in Bastrop, Louisiana. Dayne lived in DeQueen, Arkansas, and stayed in Louisiana during his assignment in that state.

August 30, 1999, was Dayne's first day to work in Valliant, Oklahoma, which according to Mr. Bell is about an hour's drive from DeQueen. On that evening, Mr. Bell received a telephone call from Dayne's supervisor, Greg Winer, who told him that Dayne had been involved in an accident shortly before noon. Mr. Winer explained to Mr. Bell that he had sent Dayne to Tri-Lakes' shop in Gillham, Arkansas, to retrieve some tools for a job in DeQueen. Dayne was driving his personal truck at the time of the accident, which occurred between Valliant and DeQueen. Mr. Bell testified that Gillham is near DeQueen and that, to get to Gillham, Dayne's travel would have taken him through DeQueen.

John Helms, Jr., president of Tri-Lakes Services, testified that his employees do not travel on a daily basis, although travel is occasionally required. He further testified that employees are not compensated for travel expenses. On the morning of August 30, 1999, he directed Mr. Winer to report to the shop in Gillham and load equipment for a job in DeQueen that was to begin the next day. Mr. Winer then sent Dayne to Gillham to assist in the loading process, and Mr. Winer followed about thirty minutes later.

Prior to being sent to Gillham, Dayne had already worked several hours in Valliant. Mr. Helms testified that sometimes employees are directed to travel from one site to another on the same day, and that had Dayne refused to go to Gillham "he would have been out of line." Mr. Helms indicated that it could have taken as long as three or four hours for Dayne to complete his assignment of loading tools. If Dayne had completed the assignment, he would have been given the option to either finish the work day doing odd jobs around the shop, or go home. The task of loading tools was a

necessary job, and since Dayne did not load the tools, Mr. Helms did it himself.

Mr. Helms stated that employees are expected to work at least ten hours per day. However, based on payroll records Dayne was paid for only four hours on the day of the accident. Mr. Helms testified, "Based on what I know, his workday had ended in Valliant, Oklahoma."

The appellants argue on appeal that the Commission erred in denying compensability based on its finding that Dayne was not performing employment services at the time of his death. Arkansas Code Annotated section 11-9-102(5)(A)(i) (Repl. 1996) defines a compensable injury as, "An accidental injury causing internal or external physical harm . . . arising out of and in the course of employment and which requires medical services and results in disability or death." Excluded from the definition of "compensable injury" are any injuries sustained at a time when employment services were not being performed. *See* Ark. Code Ann. § 11-9-102(5)(B)(iii) (Repl. 1996). The test for determining whether an employee was acting within the "course of employment" at the time of the injury requires that the injury occur within the time and space boundaries of the employment, when the employee is carrying out the employer's purpose or advancing the employer's interests, directly or indirectly. *Olsten Kimberly Quality Care v. Pettey,* 328 Ark. 381, 944 S.W.2d 524 (1997). The appellants submit that Dayne was acting within the course of his employment and carrying out his employer's interests at the time of the accident, and that therefore the accident was compensable. The appellants' argument has merit.

In *Olsten Kimberly Quality Care v. Pettey, supra,* the appellee was employed as a nursing assistant and was required to travel in her own vehicle to patients' homes to provide nursing services. She was involved in an automobile accident while traveling to the home of the first scheduled patient for the work day, and the accident was found by the Commission to be compensable. Notwithstanding the fact that the appellee was not compensated for her travel time, the supreme court affirmed the Commission's decision. In holding that the appellee was performing employment services, the supreme court relied on the fact that the travel was a necessary part of appellee's employment and that the travel was clearly for the benefit of her employer.

In *Crossett Sch. Dist. v. Fulton*, 65 Ark. App. 63, 984 S.W.2d 833 (1999), the appellee was a school teacher who arrived at work and began her duties of supervising children before school. Before the bell rang to begin school, she was given an assignment that involved reading instructions in fine print, so she left the building to retrieve reading glasses from her car. On the way back to the building, she slipped on ice and was injured, and the Commission found the injury to be compensable. We affirmed, holding that the appellee was performing employment services because she had already begun working and was taking efforts to complete an assignment when the injury occurred.

In the instant case, as in *Olsten Kimberly Quality Care v. Pettey, supra*, the claimant was required to travel for the benefit of his employer. Moreover, as in *Crossett Sch. Dist. v. Fulton, supra*, the claimant's accident occurred after he began his employment duties that day but before the work day was scheduled to end.

This case is distinguishable from other automobile accident cases where compensation was denied. In *Campbell v. Randal Tyler Ford Mercury, Inc.*, 70 Ark. App. 35, 13 S.W.3d 916 (2000), the appellant had taken paperwork home with him over the weekend, and on the following day he died in a one-vehicle accident on his way to work. We affirmed the denial of compensability noting that he was not required by his employer to take work home and he had not yet reported to work at the time of the accident. In *Coble v. Modern Business Sys.*, 62 Ark. App. 26, 966 S.W.2d 938 (1998), the appellant reported for work and during her lunch break drove to a nearby mall to purchase panty hose after discovering a run in her hose. She was involved in an accident while on this errand and sought benefits. We held that there was substantial evidence to support the Commission's finding that the appellant was not engaged in employment services because there was evidence that she was not required, or even expected, to replace hosiery during the work day.

In the case at bar, Dayne was required to travel to Gillham for the purpose of loading tools, and would have been out of line had he refused. And, unlike the situation in *Coble v. Modern Business Sys., supra*, he was not on his way to begin work but rather had started working hours earlier.

The appellee argues that the accident was not compensable, in part, because Dayne was not being compensated during his travel time. While this is a factor to be considered in determining

whether employment services are being performed, *see Matlock v. Arkansas Blue Cross Blue Shield,* 74 Ark. App. 322, 49 S.W.3d 126 (2001), the fact that the employee is not compensated during travel is not dispositive pursuant to our precedent in *Olsten Kimberly Quality Care v. Pettey, supra.* Moreover, it is not clear from the record that Dayne was not paid for his travel time. His supervisor testified that Dayne left Valliant at 10:30 a.m., but was paid until 11:00 a.m., and appellee's president acknowledged that Dayne was paid through 11:00 a.m. and stated only that, "Based on what I know, his workday ended at Valliant, Oklahoma." Nevertheless, our disposition of this case does not depend on whether or not Dayne was being paid for his travel in light of the other circumstances.

The appellee also suggests that Dayne was not performing employment services because his job did not normally require travel, noting that the first time he was requested to travel during work was on the day of his death. In *Arkansas Dep't of Correction v. Glover*, 35 Ark. App. 32, 812 S.W.2d 692 (1991), we held that employment is not limited to that which the person was hired to do; whatever the normal course of employment may be, the employer and its supervisory staff have it within their power to enlarge the course of the employment by assigning tasks outside the usual scope of the employment. Whether an employer requires an employee to do something has been dispositive of whether the activity constituted employment services. *Ray v. University of Arkansas*, 66 Ark. App. 177, 990 S.W.2d 558 (1999). It is thus irrelevant whether or not Dayne's normal work duties involved travel; on the day of the accident that is what his employer required of him.

The accident occurred within the time and space boundaries of Dayne's employment, and at a time when he was advancing the appellee's interests. We hold that the Commission's opinion does not display a substantial basis for the denial of relief and that the Commission erroneously found that Dayne was not performing employment services at the time of his death.

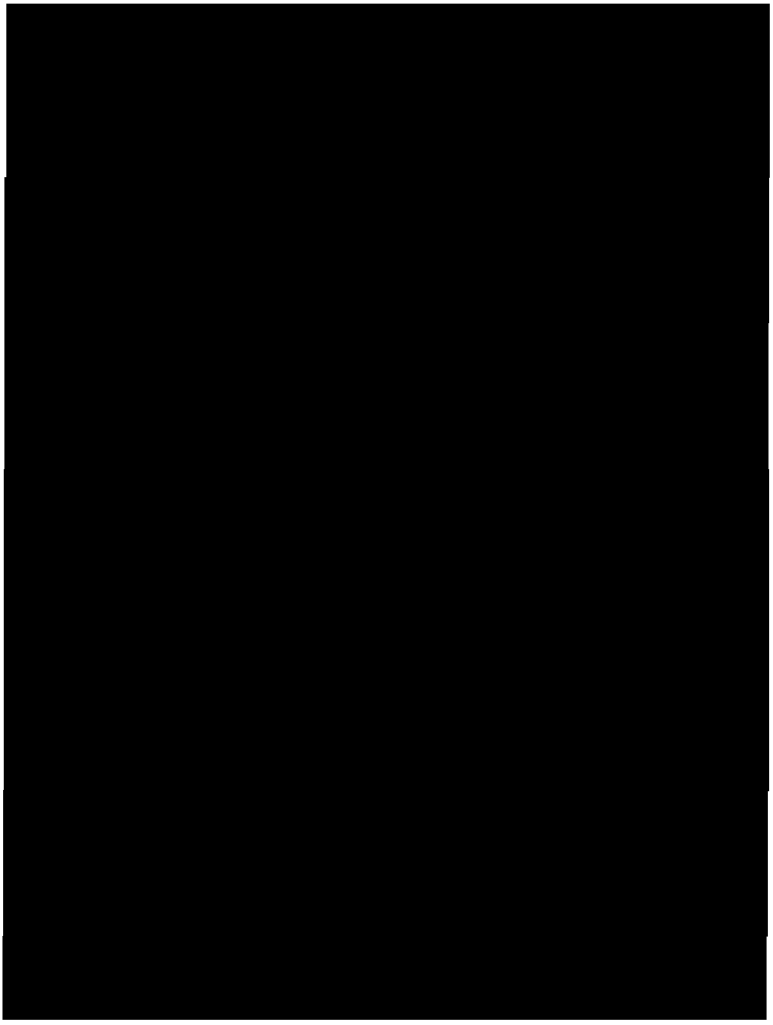
Reversed and remanded for an award of benefits.

NEAL and CRABTREE, JJ., agree.

Julian Robert PROCTOR *v.* STATE of Arkansas

CA CR 00-779 60 S.W.3d 486

Court of Appeals of Arkansas
Divisions III, IV, and I
Opinion delivered November 28, 2001
[Petition for rehearing denied January 9, 2002.]



William C. McArthur, for appellant.

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

WENDELL L. GRIFFEN, Judge. Julian Proctor appeals from his convictions for first-degree attempted murder, and first-degree attempted kidnapping.[1] He argues that his Sixth

[1] Appellant was also convicted of first-degree terroristic threatening, second-degree stalking, burglary, and third-degree battery. He does not appeal from these convictions. First, he does not discuss the burglary and third-degree battery convictions in his argument. Second, while he enumerates his convictions for first-degree murder, first-degree attempted

Amendment Confrontation right was violated when the trial court allowed the arresting officer's testimony from a bond-revocation hearing in a separate case to be read to the jury during trial in this case. He also argues that the evidence was insufficient to sustain his convictions. Because we agree that the trial court erred in admitting the officer's testimony, we reverse and remand for a new trial.

Appellant was charged following an incident that occurred on November 29, 1998, when he allegedly broke into the home of his former girlfriend, Melissa Mahan. At that time, appellant had been released on bond in an unrelated case. On December 8, 1998, the trial court held a hearing to revoke appellant's bond in the other case. The court was informed that appellant's counsel for the bond hearing would not represent him with regard to the unrelated charges that are the subject of this appeal. At the bond hearing, the State sought to introduce the testimony of Bart Puckett, the arresting officer in the instant case. Appellant objected that the testimony was hearsay. The trial court overruled appellant's objection on the ground that the testimony was for the purposes of the bond hearing.

Puckett testified at the bond revocation hearing that on November 29, 1998, he had been assigned "extra patrol" for Mahan's residence because of prior problems between Mahan and appellant.[2] As Puckett passed by Mahan's house at about 10:00 a.m., he noticed that her driver's side car door was open, and that her son was in the back seat of the car on the passenger side. Mahan's son, Robert, told Puckett that appellant was in the house.

Puckett drove into the driveway and got out of his vehicle. Appellant met Puckett on the front steps. Puckett asked appellant to step into the yard and asked why appellant was there. Appellant insisted that he wanted to talk to Mahan. Puckett asked him if he

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kidnapping, first-degree terroristic threatening, and second-degree stalking in his argument, he limits his argument on appeal to the State's alleged failure to present sufficient evidence to support that he took the substantial steps necessary to support his convictions for attempted first-degree murder and attempted first-degree kidnapping. Arguments not raised on appeal are deemed waived. *See King v. State*, 323 Ark. 671, 916 S.W.2d 732 (1996). Therefore, because appellant presents no argument with regard to his convictions for first-degree terroristic threatening, second-degree stalking, burglary, and third-degree battery, he is deemed to have waived his arguments with respect to these convictions on appeal.

[2] Both had been previously charged with domestic battery against each other, and Mahan testified that appellant had previously broken into her home, requiring her to have her locks changed.

realized that he entered her house unlawfully and committed burglary. Puckett testified that appellant responded affirmatively. Officer James Abbey, who had arrived to assist Puckett, read appellant his *Miranda* rights, and arrested appellant. Upon seeing a large bulge in appellant's pocket, Puckett patted down appellant and seized duct tape, brown fleece gloves, a sheath knife with a six-inch blade, handcuffs, a pair of pliers, a leatherman's type tool, and a mini-flashlight. Appellant's car was parked two blocks away. When another officer went to appellant's car to obtain his billfold, the officer found a Wal-Mart receipt for duct tape, a nylon rope, a flashlight, and pliers.

Puckett testified that after appellant was taken back to the police station and was again read his *Miranda* rights, he told Puckett that he broke into Mahan's home by climbing on her roof and entering through the attic. According to Puckett, appellant further confessed that he entered her home with the intent to tie her up, kill her, and then kill himself. Puckett admitted that he did not record appellant's confession and that he did not take any written notes. However, he stated that he wrote his report, which included appellant's statement, within fifteen minutes after appellant gave his statement.

Puckett was out of the country serving in the military when appellant was brought to trial on the charges related to this appeal. Consequently, the State sought to introduce his bond hearing testimony at appellant's criminal trial. The State filed a motion *in limine* requesting the trial court to issue a ruling regarding whether Puckett's testimony was admissible at trial. The attorney who represented appellant at the bond revocation hearing did not represent appellant at trial. Appellant objected to the motion, noting that he had objected at the bond hearing on the grounds that it was hearsay. He further argued that to allow such testimony would violate his Sixth Amendment right to confront the witness against him; that his prior counsel did not know at the time of the bond revocation hearing that Puckett had attempted to date Mahan; and that he would suffer prejudice because he would be denied his right to fully cross-examine Puckett and because the statements he allegedly made would cause a jury to convict him for the "wrong reasons."

The pretrial hearing was conducted on September 27, 1999. Mahan testified that after a stormy two-year relationship involving incidences of violence by both parties, she and appellant stopped seeing each other on November 15th. She further testified that Puckett had responded to one call prior to the incident in this case

when appellant had shown up at her house unexpectedly. She stated that the next day after that incident, Puckett checked on her and invited her to lunch, but she declined. Mahan further stated that Puckett and the police department continued to provide her with "additional patrols" during the next few weeks. She admitted that she and Puckett had Thanksgiving at her parent's house shortly before the incident in this case.

The day before the incident, appellant phoned Mahan and told her that he was coming over and wanted to talk. She told him they had nothing to discuss and that she would leave. She spent that night at her parents. When she returned home the next day, she noticed that her front door was unlocked and her bedroom light was on. She heard a "thump," which she guessed was the closing of the attic door that led to her bedroom. She told her son to go back to the car. She yelled at appellant that she knew he was in there and that she was going to call the police.

Mahan stated that appellant came into the living room and pleaded with her to talk to him. She told him there was nothing to talk about and walked out to her car, but then returned to her house. She said that she stood in the doorway of the house and that appellant sat in a chair on the other side of the living room pleading with her. She then saw a police officer in front of the house and she and appellant went outside. Mahan stated that Puckett asked appellant if he knew that he was not supposed to be there and that he could be arrested for trespassing, and appellant responded, "Yes." She indicated to the officers that she did not want them to arrest appellant, but asked them to tell him not to come back. She further testified that appellant did not threaten her with a knife or threaten her in any way, and that she did not know that he had those items on his person.

Officer Dave Berry read Puckett's testimony from the bond revocation hearing into the record. Appellant objected that appellant's statements that he made prior to being Mirandized were inadmissible. The court ruled that appellant volunteered the information regarding why he was at Mahan's. Appellant objected to the transcript of Puckett's testimony being published to the jury. The court admitted it into evidence, but did not publish it to the jury.

Berry also testified that Mahan informed him approximately two or three weeks after the incident that Puckett had asked her for a date. He stated that he reported this to his supervisor, and that it

was unusual to have an officer in charge of an investigation also trying to date the alleged victim.

Appellant then moved for a directed verdict, asserting that the State failed to meet its burden on each element of each charge, specifically the domestic-battery charge. He also asserted that there was no substantial step to substantiate either of the attempt charges, because Mahan testified that he did not threaten her. The motion was denied. A jury found appellant guilty on all charges and sentenced him to serve thirty-five years on the attempted murder and attempted kidnapping charges.[3]

Admission of Puckett's Bond Revocation Testimony

Appellant argues that the trial court erred in admitting Puckett's bond-revocation hearing testimony at trial in violation of his Sixth Amendment right to confront the witnesses against him.[4] We agree.

Arkansas Rule of Evidence 804(b)(1) provides that testimony given in a different proceeding is an exception to hearsay if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. We agree that appellant did not have a

[3] His sentences for the remaining charges were to run concurrently with this thirty-five year sentence.

[4] Appellant also argues that the State failed to show that Puckett was unavailable as is required by Arkansas Rule of Evidence 804. Rule 804 provides that a witness is unavailable if he is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means. The party seeking to introduce prior testimony of witness because that witness is unavailable must show that he or she made good-faith effort to procure attendance of missing witness. *See Register v. State*, 313 Ark. 426, 855 S.W.2d 320 (1993). Appellant argues that the State did not show that it make a good-faith effort to procure Puckett as a witness. However, we do not address this issue because appellant failed to raise this specific objection to the trial court. Appellant apparently raised a general hearsay objection in its response to the State's motion *in limine*, but when Puckett's statement was read into the record, appellant objected only on the ground that some of his statements might be excludable under *Miranda*. He did not raise even a general hearsay objection during the trial. Moreover, he did not specifically argue that the State failed to show that the witness was unavailable, or that the prerequisites for admitting former testimony were not met. A contemporaneous objection is required in order to preserve for appeal issues that were raised in a motion *in limine* where the trial court failed to rule on the motion, or where the motion is vague. *See Slocum v. State*, 325 Ark. 38, 924 S.W.2d 237 (1996); *Massengale v. State*, 319 Ark. 743, 894 S.W.2d 594 (1995). Because appellant failed to raise this specific objection to the trial court, we decline to address it on appeal.

similar opportunity or similar motive to develop Puckett's testimony at the bond revocation hearing that would warrant the admission of the testimony as an hearsay exception at his criminal trial.

The Confrontation Clause of the Sixth Amendment to the United States Constitution states: "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." Article 2, section 10, of the Arkansas Constitution repeats that same right of confrontation. *See also Smith v. State*, 340 Ark. 116, 8 S.W.3d 534 (2000). In *Scott v. State*, 272 Ark. 88, 612 Ark. 88 (1981), the Arkansas Supreme Court discussed factors that a court should consider when determining whether the admission of former testimony violates Rule 804 and the Sixth Amendment's Confrontation Clause. The issue in *Scott* was whether a transcript of testimony taken at a preliminary hearing to determine probable cause could be used in the defendant's subsequent criminal trial. The court cited such factors as whether the circumstances in the prior hearing closely approximated those that surround a typical trial; whether the witness was under oath; whether the defendant was represented by counsel and had every opportunity to cross-examine the witness; and whether the trial was before a judicial tribunal equipped to provide a judicial record. *See id.* (citing *California v. Green*, 399 U.S. 149 (1970)). The *Scott* court held that the trial court erred in allowing the transcript in that case, where the transcript was brief and the cross-examination was limited, and where the motivation of the witness was at issue because she was the former girlfriend of one of the defendants. The *Scott* court stated:

> *The hearing was not one where a motive existed to develop testimony as one would have in a trial.* The appellants were represented by attorneys but were not obligated to cross-examine the witness. *To presume that they should have done so would be to presume that they knew the testimony could be used later in the absence of the witness.*

Scott v. State, 272 Ark. at 95, 612 S.W.2d at 113 (emphasis added).

Here, appellant's Sixth Amendment Confrontation Clause right was violated because he did not have a similar motive and opportunity to develop Puckett's testimony at the bond revocation hearing as he would have had at trial. The purpose of a bond-revocation hearing is to determine whether reasonable cause exists to believe that a defendant has committed a felony while released pending adjudication of a prior charge, so that the court may

revoke the defendant's release. *See* Ark. R. Crim. P. 9.6. Our supreme court has stated that a hearing held pursuant to Rule 9.6 is not a hearing of an adversarial nature that requires representation by counsel. *See Reeves v. State*, 261 Ark. 384, 548 S.W.2d 822 (1977). Thus, the liberty interest at stake at a bond-revocation hearing is not equivalent to the liberty interest at stake in a criminal trial, as is reflected in the lower standard of proof required to revoke a defendant's bond. It follows then, that a defendant may not have the same motive and opportunity in developing or attacking testimony in a bond-revocation hearing as he would in a trial or even a preliminary hearing, proceedings which are undisputably adversarial in nature. *Compare Hamblin v. State*, 44 Ark. App. 54, 866 S.W.2d 119 (1993)(holding that testimony of child's mother during temporary-custody probable-cause hearing respecting defendant father's shaking of child, where defendant proceeded without counsel, was admissible under hearsay exception for former testimony, because the defendant's motive to develop the testimony in the chancery case was very similar to his motive in the criminal case *i.e.*, to avoid any implications of child abuse).

The State asserts that appellant's motivation at both hearings was similar because his motivation was to discredit Puckett's testimony. Certainly appellant sought to discredit Puckett's testimony. However, appellant's lack of a similar opportunity to develop the testimony at the bond hearing, in order to so do, is particularly evident in this case. Here, the trial court was notified by appellant's counsel at the bond hearing that he would not represent counsel on the other criminal charges. Therefore, the trial court was clearly on notice that appellant's counsel was not prepared to develop the testimony by direct, cross, or redirect exam. *Compare Scroggins v. State*, 312 Ark. 106, 848 S.W.2d 400 (1993)(holding prior testimony was admissible where the witness who first testified during a suppression hearing was murdered after he testified, where the defendant was represented by counsel who had extensively cross-examined the witness).

The State's assertion that appellant's motivation was the same at both proceedings — to discredit Puckett — begs the question of how appellant could do so when the information regarding Puckett's relationship with Mahan was not known to him at the time of the bond-revocation hearing. As a result, appellant was not afforded the opportunity at the bond hearing to memorialize in the transcript questions and responses that would demonstrate or refute Puckett's credibility. Thus, the jury in the subsequent trial was not

afforded "a satisfactory basis for evaluating the truth" of his testimony, *see Mancusi v. Stubbs*, 408 U.S. 204 (1972), because Puckett was not cross-examined in front of the jury, and because the transcript that was used was devoid of any basis for determining his motivation for testifying.

Finally, the motive of the witness was questionable here, because Puckett had asked the victim out shortly before the November 28 incident, and in fact spent Thanksgiving with her, a few days before the incident. *See Dutton v. Evans*, 400 U.S. 74 (1970) (stating one indicium of the reliability of the witness's testimony is his motive to lie or misrepresent the evidence). Puckett's testimony that appellant confessed to him that he intended to tie up and kill Mahan is the only direct proof of appellant's intent; moreover, his testimony contradicts Mahan's testimony that appellant did not threaten her. The State argues that appellant failed to show that Puckett would have testified differently or that his motive for testifying at the bond-revocation hearing was different from his motive would be at appellant's criminal trial. Given his relationship with the victim, there is no reason to assume that Puckett's incriminating testimony would be any different at the subsequent hearing or that his motivation would be different; however, that does not make his testimony at the bond-revocation hearing credible or his motivation for testifying less questionable.

We note that appellant also challenges the sufficiency of the evidence supporting his convictions. However, his argument with regard to his convictions is barred because he failed to renew his motion for a directed verdict at the close of all of the evidence. *See* Ark. R. Crim. P. 33.1; *King v. State*, 338 Ark. 541, 999 S.W.2d 183 (1999). Based on the foregoing, we hold that appellant's Sixth Amendment Confrontation right was violated by the introduction of Puckett's bond-hearing testimony at this criminal trial. Therefore, we reverse and remand for a new trial on the charges of first-degree attempted murder and first-degree attempted kidnapping.

Affirmed in part; reversed and remanded in part.

NEAL and VAUGHT, JJ., agree.

PITTMAN, HART, JENNINGS, JJ., concur.

STROUD, C.J., ROBBINS, J., and HAYS, S.J., dissent.

JOHN E. JENNINGS, Judge, concurring. I join in the majority's decision to reverse. In my view this result is required by the supreme court's decision in *Scott and Johnson v. State*, 272 Ark. 88, 612 S.W.2d 110 (1981), and Rule 804(b)(1) of the Arkansas Rules of Evidence. I do not believe that the Confrontation Clause of the Sixth Amendment requires reversal. And while I agree with the dissent that there was an opportunity to cross-examine at the bond hearing, I do not believe that there was a sufficiently "similar motive" to cross-examine as to the testimony that is relevant in the case at bar. Clearly Rule 804(b)(1) requires both opportunity and "similar motive."

At the bond revocation hearing, by the time the officer testified about appellant's admission that he intended to tie Ms. Mayhan up and kill her, there was already evidence before the judge that Proctor had committed burglary. At this stage of the proceedings the revocation of his bond on the prior unrelated charge was a foregone conclusion. For this reason, the attorney at the bond revocation hearing did not have much motive to cross-examine the officer on this particular testimony.

Finally, I must agree with Judge HAYS that the fact that Proctor had a different lawyer at the bond revocation hearing is of no consequence.

PITTMAN and HART, JJ., join in this concurrence.

STEELE HAYS, Special Judge, dissenting. I would affirm the trial court. In my estimation, neither the Sixth Amendment Confrontation Clause nor Rule 804(b)(1) of the Arkansas Rules of Evidence was breached by the admission of Officer Bart Puckett's testimony. Only two requirements are imposed by the Confrontation Clause: the declarant must be unavailable for trial and the testimony must be reliable. *Hamblin v. State*, 44 Ark. App. 54, 866 S.W.2d 119 (1993); *Scott and Johnson v. State*, 272 Ark. 88, 612 S.W.2d 110 (1981); *Ohio v. Roberts*, 444 U.S. 59 (1980); *Dutton v. Evans*, 400 U.S. 74 (1970); *California v. Green*, 399 U.S. 166 (1969). Both requirements are present in this case.

One of those requirements — Officer Puckett's availability — was not preserved for appellate review and is not before us.[1] The other — the reliability of his testimony — is, I contend, beyond any

[1] It is not disputed that Officer Puckett was in uniform in Kosovo, Serbia.

serious challenge. But even if the majority was correct, and the testimony should have been excluded, it would require remanding only the attempted murder and kidnaping convictions, as there is sufficient evidence, extraneous to Officer Puckett's testimony, to affirm the convictions for burglary, terroristic threatening, stalking and battery.[2]

To adequately illustrate these two assertions — the reliability of Officer Puckett's testimony and the presence of extraneous evidence which supports the remainder of the convictions — requires examining the trial record more closely than the majority opinion allows.

This is a classic case of chronic, domestic abuse. In June 1997, Melissa Mahan and appellant began a stormy affair lasting off and on for some fourteen months. The relationship was interspersed with physical violence, harassment and dire threats. In August 1998, following an altercation, appellant was charged with domestic battery, second offense, of the alleged victim, Melissa Mason. While appellant was free on bail, he was arrested on November 29, 1998, on the charges now before us on appeal. Based on the latter charges, the State moved to revoke appellant's bond, alleging that he had committed a felony while free on bail.[3]

Melissa Mahan testified under subpoena. She was a reluctant witness. She did not want appellant to be prosecuted; she wanted him to leave her alone. She told the jury her affair with appellant ended initially in February 1998 for reasons she attributed to his fiery temper. She said, "[h]e would just snap." Shortly after this breakup appellant blocked her car in the driveway as she was trying to leave. She managed to get to the police station to report the incident and returned to the motel where she worked. Appellant forced his way into her room. He struck her in the face several times and kicked her in the head and back while she was lying dazed on the floor. When she asked another employee, Brandon Wittenberg, to call the police, appellant told him Melissa would be dead before the police got there. The next day as she drove her five year old son out of town, appellant followed in his car. She said he

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[2] The statement in the majority opinion that appellant has not appealed from the convictions for burglary, terroristic threatening, stalking, and batttery is demonstrably incorrect. *See* Notice of Appeal (Record, p.66) and Appellant's Brief (p. 3).

[3] The majority opinion refers to this revocation hearing, as "an unrelated case." True, in a sense, but it should be noted that it involved a similar pattern of abuse between the same parties.

would "sometimes get in front of me, sometimes behind me, sometimes beside me." He forced her to pull off the road and told her he would "come after me and my son." As she was delivering some of appellant's belongings to the home of a mutual friend, after the breakup, appellant arrived and struck her in the face several times. She testified that on one occasion appellant took her car keys, knocked her into her car, and "placed his hands around my neck."

On November 28, 1998, she said appellant called her and insisted he was coming over to talk. She told him there was nothing to talk about. She left and spent the night with her parents. The next morning when she returned with her son, she heard the attic door in her bedroom close. She told her son to get back in the car, and she called to appellant that she knew he was there and she was going to call the police. Officer Puckett arrived, followed shortly by Officer James Abbey. She asked Officer Puckett not to arrest appellant, "just let him know he cannot come back, it is over." When Officer Abbey arrived appellant was given the *Miranda* warnings, searched, and found to be carrying handcuffs, a sheath knife with a six inch blade, gloves, two rolls of duct tape, a nylon rope, a flashlight, and a multi-purpose tool containing pliers, a screwdriver, and knives. She said appellant did not threaten her, he sat in a chair in tears begging her to work things out, as she stood in the doorway. Michael Phillips testified that he and appellant were good friends. He said that when Melissa returned appellant's things to Phillips' house, appellant arrived while Melissa was in the yard. He said she came inside "frantically upset and crying" and told him appellant had hit her. When he asked appellant if it was true, appellant said it was.

Officer John Thessing testified that he interviewed Melissa Mahan following the episode at Michael Phillips' house. He said she was "quite upset and distraught, she was trying to get appellant to leave her alone." He said she told him appellant had hit her several times and had threatened to kill her son.

Officer Christopher Padgett testified that he took a report from Melissa Mahan at police headquarters around 11:30 p.m. on February 13, 1998. He described her as "very upset and crying, she kept repeating that her ex-boyfriend would not leave her alone." She told him appellant had threatened her and her son, paging her and coming to her house. Officer Padgett examined her pager, which had a coded message. He asked appellant what the message was and appellant told him it meant, "I love you to death."

Officer James Abbey testified he was Officer Puckett's back-up on November 29 and participated in appellant's arrest at Ms. Mahan's house. He identified the articles appellant was carrying at the time of his arrest. He said appellant's vehicle was parked two and one-half blocks away partially hidden behind a dumpster. Officer Abbey recovered a receipt from Wal-Mart indicating the duct tape, rope, flashlight, and pliers had been purchased that morning.

Officer Bart Puckett's testimony from the bond revocation hearing was introduced over the objection of the defense. He came on duty about 6:00 a.m. Because Ms. Mahan had requested extra patrol, he drove by her house earlier and saw nothing out of the ordinary. Later he saw her car in the drive, a door standing open, her son in the back seat and Melissa Mahan in her doorway calling to someone. When he approached the house, appellant came out. Officer Puckett asked appellant why he was there and appellant told him he just wanted to talk to Melissa for five minutes. Ms. Mahan told Officer Puckett that appellant had been in her house, had jumped out of the attic, and that she wanted him out of her house.

When Officer Abbey arrived, appellant was searched, and the various articles removed from his belt and pockets. Officer Puckett testified that when he and appellant were back at police headquarters, appellant was again warned pursuant to *Miranda* and that he told Officer Puckett he had entered the house through an attic vent, that he planned to tie Melissa up, kill her, and then himself. Asked if he would have killed her son, appellant answered, "I don't know. I guess." Asked what he would do that day if he were released, he said he would probably try to finish what he had started, "kill Melissa."

Appellant did not challenge the State's proof. The single defense witness, Josh Edwards, testified that he had worked with appellant and that they had roomed together for a few weeks. He said Melissa Mahan and appellant seemed to be congenial, and he never saw any signs of physical abuse or violence. He described appellant as happy and carefree, never angry.

Returning to the issue of the Confrontation Clause, the State maintains that the Confrontation Clause was not raised in the trial court and, therefore, is not preserved for appellate review. Appellant does not controvert the State's contention. Prior to trial, the State filed a motion *in limine* asking the court to admit Officer Puckett's testimony pursuant to Ark. Rule Evid. 804(b)(1) based on his being

unavailable. Appellant filed a motion in opposition based on several grounds, including the Confrontation Clause. Appellant's motion was not ruled on. At a pretrial conference shortly before trial the State profferred Officer Puckett's testimony. The appellant objected on a number of grounds not including the Confrontation Clause. The State's point is well taken. *See Hall v. State*, 343 Ark. 62, 31 S.W.3d 850 (2000); *Alexander v. State*, 335 Ark. 131, 983 S.W.2d 110 (1998). However, since the majority has opted to address the argument I feel obliged to follow suit.

If there were any serious suggestions that Officer Puckett's testimony was suspect or unreliable, the majority might be on firm ground. But the fact is, his testimony is fully consistent with the other evidence in the record. The majority opinion states that Officer Puckett's testimony was the only direct proof of appellant's intent. With due deference to the majority, I submit that the assertion short-changes the record. That may have been the only testimonial evidence of appellant's specific intent on the morning of November 29, but there was no shortage of direct testimony that appellant had threatened to kill Melissa Mahan on several occasions. She testified to death threats by appellant toward her and her son; Brandon Wittenberg testified to death threats by appellant. Officer Padgett testified to appellant's message on Melissa Mahan's pager, "I love you to death." Officer Abbey's testimony that appellant's car was parked two and one-half blocks away hidden behind a dumpster may not be direct evidence of appellant's intent, but it is highly suggestive of an ulterior motive of some kind. But laying all that aside, the tangible evidence of appellant's intent could hardly be more incriminating. There was the physical evidence of appellant's having broken into Melissa Mahan's house through an attic vent and the muddy foot prints on the porch near the vent from appellant's boots. Most compelling were the items appellant was carrying with him at the time. They provide the near equivalent of a smoking gun. They were, in fact, precisely the tools one would expect to find on someone bent on such a venture.

The majority opinion states that Officer Puckett's testimony contradicts Ms. Mahan's testimony that she was not threatened by appellant. But nothing in Puckett's testimony implies that she was. The fact that Ms. Mahan did not feel threatened during those few minutes she stood in the doorway before the police arrived says little one way or the other of what might have happened had not the police arrived when they did.

Nor am I persuaded that Rule 804(b)(1) required the exclusion of Officer Puckett's testimony. The bright-line demands of the Rule were scrupulously observed: appellant was represented by counsel; the declarant, Officer Puckett, was under oath; Puckett was subject to cross examination; and the proceedings were heard before a tribunal capable of rendering a judicial transcript, and did so. The majority challenges the proceeding on several grounds: appellant lacked a similar motive and opportunity to cross-examine Officer Puckett at the bond hearing; the lawyer who represented appellant at the bond hearing was not appellant's counsel at the trial; Officer Puckett's testimony is stigmatized by the fact that he had asked Melissa Mahan to have lunch; and a bond revocation is non-adversarial and entails a lesser standard of proof than is required in a criminal trial.

Admittedly, a trial and a bond hearing are not identical, but neither are they "significantly different" within the context of Rule 804. A common purpose involves the quantum of proof the State expects to produce to link the accused to the crime with which he stands charged. Moreover, at the bond revocation hearing the State was required to prove that appellant had committed a felony while free on bail on the pending charges. That was the objective of Officer Puckett's testimony — proving the same felony for which appellant was later tried. Defense counsel's motive to offset that testimony would have been essentially the same at either proceeding.

As for the opportunity to cross-examine Officer Puckett at the bond hearing, the record discloses that counsel for appellant questioned Puckett at four separate intervals during his testimony, and there is not the slightest indication that his questioning of Officer Puckett was restricted.

The fact that Officer Puckett's interest in Melissa Mahan seems to have gone beyond mere professionalism raises concerns, but only momentarily. The social interaction was minimal — Thanksgiving dinner with the Mahan family. More importantly, there is no indication that his testimony was colored to curry favor with her. In fact, his actions belie that suggestion, since he arrested appellant notwithstanding her pleas to the contrary.

Lastly, the fact that there was a change of counsel between the bond hearing and the trial cannot be used defensively to defeat Rule 804. The United States Supreme Court pointed out the fallacy of that contention in *Ohio v. Roberts, supra*:

> Nor does it matter that, unlike Green, respondent had a different lawyer at trial from the one at the preliminary hearing. Although one might strain one's reading of *Green* to assign this factor some significance, respondent advances no reason of substance supporting the distinction. Indeed, if we were to accept this suggestion, *Green* would carry the seeds of its own demise; under a "same attorney" rule, a defendant could nullify the effect of Green by obtaining new counsel after the preliminary hearing was concluded.

448 U.S. at 72.

For the reasons stated, I would affirm the judgment appealed from. I am authorized to say that STROUD, C.J., and ROBBINS, J., agree.

Twyla BRYANT *v.* STAFFMARK, INC.

CA 01-522 61 S.W.3d 856

Court of Appeals of Arkansas
Division IV
Opinion delivered November 28, 2001
[Petition for rehearing denied January 9, 2002.]

Lane, Muse, Arman & Pullen, by: *Shannon Muse Carroll*, for appellant.

Barber, McCaskill, Jones & Hale, P.A., by: *Robert L. Henry, III*, and *Wendy S. Wood*, for appellee.

LARRY D. VAUGHT, Judge. This appeal is from a decision of the Arkansas Workers' Compensation Commission upholding the ruling of the Administrative Law Judge. Appellant argues that the ALJ's refusal to allow appellant's rebuttal testimony during her benefit hearing was an abuse of discretion that amounts to reversible error. We agree.

Appellant Twyla Bryant worked as a housekeeper at the Arlington Hotel through Staffmark, Inc. Ms. Bryant's duties included cleaning restrooms, vacuuming, mopping, dusting, cleaning windows, and taking out the trash. She would begin work each day on the seventh floor and work her way down to the first floor, where she took out the trash from the front desk and then went to the basement to clean the women's locker room. On May 18, 2000, appellant arrived for work at 10:00 p.m. and began cleaning on the 7th floor. She took her scheduled lunch break between 12:00 and 12:30 a.m. By 3:00 a.m., Ms. Bryant had progressed to her cleaning

assignments located on the first floor. At this time she began down a metal staircase from the first floor to the basement. As she went down the stairs, she fell and injured her neck and left shoulder. The purpose of Ms. Bryant's trip to the basement was to smoke a cigarette.

Appellant was treated at St. Joseph's Regional Health Center and received follow-up care with Dr. Roy Puen. Ms. Bryant's medical records include various objective findings of injury, including a "contusion paracervical area with trapezius and paracervical strain." The parties stipulated that an employment relationship was in existence at the time of her injury. Appellant was off work (following the May 19, 2000, incident) until June 14, 2000, when she was released from her physician's care to return to work without restrictions.

Appellant filed a claim for workers' compensation benefits, contending that she suffered a compensable injury when she fell at work on May 19, 2000. In response, appellee argued that appellant's injury was not sustained during the course of her employment and alternatively, that appellant's injury did not occur at a time when she was performing employment services.

A pre-hearing order was filed on July 31, 2000. The order directed the parties that the names and the subject matter of the testimony of all witnesses, including possible rebuttal witnesses, "shall be furnished to opposing counsel and this Commission no later than seven days before the date of the hearing." The hearing was held on September 22, 2000.

During the hearing, appellant testified that she was instructed to "space out" her work by taking frequent breaks,[1] therefore she would "go take a smoke break, go sit down, go do something," and that she was paid for all of her breaks, except her scheduled lunch break. She further testified that smoking was permitted in only one location — the Captain's Tavern, in the hotel's basement. She also testified that while she was on paid breaks she was always subject to being recalled to duty, and had in the past been asked to leave her smoke break to recheck a bathroom on the second floor.

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[1] Appellant testified that if she continuously cleaned (without spacing her work out), beginning at the start of her 10:00 p.m. shift, her duties would have been completed by 3:30 or 4:00 a.m.

After appellant's initial testimony, she called Tomislav Tomic as a corroborating witness. Mr. Tomic testified that he had worked at the Arlington for seven and one-half years and that he had trained appellant. He also testified that he only "partially" understood English. Following Tomic's testimony, appellant called Janet Meeks in an attempt to "clarify some of the ideas or concepts that I cannot adequately express to Mr. Tomic." Appellee objected, arguing that Meeks was not listed as a witness in violation of the pre-hearing order.

The ALJ sustained the objection, and appellant proffered the testimony of Meeks. Meeks testified that she was the Arlington's assistant-night manager, and that she supervised the housecleaning crew "in a roundabout way." She further testified that the night housekeeping crew was scheduled from 10:00 p.m. to 6:30 a.m., to be available in case a need for a bed change or room cleaning arose. In sum, Meeks testified that part of the evening cleaning staff's responsibility was simply to be available. After proffering this testimony of Meeks, appellant rested.

Appellee then called Reba Crenshaw as a witness. Ms. Crenshaw testified that she was an employee of Staffmark, and that appellant was not paid for lunch breaks, and "as to any time she took for a smoke break when she worked at the Arlington, to the best of my knowledge we do not pay for breaks. That is true for all employees of Staffmark not just the people like Ms. Bryant here who work at the Arlington." At this point in the hearing, appellant once again offered testimony of Janet Meeks, this time as a rebuttal witness.[2] Appellant argued that, unlike witnesses presented in her case-in-chief, no notice is required for rebuttal witnesses. Appellee objected, arguing that the pre-hearing order also required a seven-day notice for rebuttal witnesses. The ALJ sustained the objection, ruling:

> As far as I know, in our proceedings, a witness is a witness, and I don't, I haven't been asked in a long time, but certainly I do not allow rebuttal witnesses because I think it allows for a lot of unfairness that the Rule is trying to avoid, and I don't allow it for either side. So, I will not allow hers or other testimony to come in unannounced, in violation of the Seven-Day Rule because they are, quote, "a rebuttal witness."

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[2] At no point in the hearing did appellee or the ALJ consider the issue of Ms. Meeks's status as a "true" rebuttal witness.

Ms. Meeks proffered the following rebuttal testimony: "To the best of my knowledge the housekeeping employees are not required to sign out for the occasional smoke breaks that they take. They are not required to clock in or clock out or sign out." Ultimately, the ALJ denied appellant's claim for benefits after a determination that appellant was not engaged in employment services during the time of her injury, and his decision was adopted by the Full Commission.

The Workers' Compensation Commission has broad discretion with reference to admission of evidence, and its decision will not be reversed absent a showing of abuse of discretion. *Brown v. Alabama Elec. Co.*, 60 Ark. App. 138, 959 S.W.2d 753 (1998). The Commission is given a great deal of latitude in evidentiary matters; specifically, Arkansas Code Annotated section 11-9-705(a) (Repl. 1997) states that the Commission "shall not be bound by technical or statutory rules of evidence or by technical or formal rules of procedure." Additionally, the Commission is directed to "conduct the hearing in a manner as will best ascertain the rights of the parties." Ark. Code Ann. § 11-9-705(a); *Clark v. Peabody Testing Servs.*, 265 Ark. 489, 579 S.W.2d 360 (1979).

In the case at bar, the Commission affirmed the ALJ's terse pronouncement that he does "not allow rebuttal witnesses," despite the fact that the rebuttal witness was present for cross-examination and no prejudice would have resulted from her testimony. It is impossible to reconcile this harsh and arbitrary decision with the statutory provisions freeing the Commission from the formal and technical rules of evidence.

In our view, it is clear that the Commission should be more liberal with the admission of evidence, rather than more stringent. It is neither fair nor logical to summarily disallow rebuttal testimony, nor is it appropriate to require (as stated in the pre-hearing order) that all possible rebuttal witnesses be revealed seven days prior to the hearing. Such an order is inconsistent with a large body of law that does not require notice for rebuttal witnesses. *See Parker v. State*, 268 Ark. 441, 597 S.W.2d 586 (1980) (citing *Perkins v. State*, 258 Ark. 201, 523 S.W.2d 191 (1975)). It also defies common sense. It is impossible for one to anticipate seven-days prior to a hearing all testimony that may need rebutting. Therefore, we conclude that the ALJ's seven-day notice requirement for all possible rebuttal witnesses, and his ruling espousing a refusal to even consider the possibility of rebuttal testimony, amounts to an abuse of discretion.

Further, we cannot say that this erroneous evidentiary ruling is harmless error. This hearing was held prior to the important and controlling case, *Matlock v. Blue Cross & Blue Shield*, 74 Ark. App. 322, 49 S.W.3d 126 (2001). In *Matlock*, we outlined the guidelines for conducting an "employment services" test. This court held that:

> [N]o single feature of the employment relationship is determinative of whether conduct falls within the meaning of "employment services." However, the factors that may be relevant in reaching that determination include:
>
> 1. Whether the accident occurs at a time, place, or under circumstances that facilitate or advance the employer's interests;
>
> 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 expected 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;
>
> 6. Whether the employer expects the worker to cease or return from permitted non-work activity in order to advance some employment objective.

Id. at 339-40, 49 S.W.3d 138-39 (citations omitted). The *Matlock* court further noted that the list does not include all of the factors that may conceivably be considered in a given case, and in some cases it may not be necessary for the Commission to consider all of these factors. However, it is the Commission's responsibility as trier of fact to determine whether and to what degree these or other factors demonstrate that the accident occurred when the employee was engaged in the primary activity that he or she was hired to perform or in incidental activities inherently necessary for the performance of the primary activity. On appellate review, our duty is to determine whether the Commission's decision in a given case is supported by substantial evidence. *Matlock, supra.*

In the present case, the proffered testimony of Ms. Meeks concerns a factor emphasized in *Matlock*. The proffered rebuttal testimony directly contradicted the testimony of the appellee's witness regarding whether or not appellant was compensated during her frequent breaks. Considering the *Matlock* court's reliance on *Ray v. University of Arkansas*, 66 Ark. App. 177, 990 S.W.2d 558 (1999) (emphasizing the employee's pay status during her break), coupled with its disclaimer that any of the factors alone may be sufficient to establish that an "employment service" is being performed, there is sufficient justification for reversal.

Reversed and remanded for consideration consistent with this opinion.

HART and BAKER, JJ., agree.

Donna Snow BURKS and Larry Burks *v.*
ARKANSAS DEPARTMENT OF HUMAN SERVICES

CA 00-1064 61 S.W.3d 184

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered November 28, 2001

Timothy C. Sharum, for appellant.

Kathy L. Hall, Office of Chief Counsel, for appellee.

TERRY CRABTREE, Judge. The appellants, Larry and Donna Burks, appeal from an order from the Sebastian County Chancery Court, in which the court terminated their parental rights. Larry and Donna are separate appellants in this case. Appellants argue on appeal that the appellee, Arkansas Department of Human Services ("DHS"), did not meet its burden of proof, and that DHS was required, but failed to submit, expert testimony pursuant to the Indian Child Welfare Act. We find no error, and affirm.

On September 20, 1996, the appellee filed a petition for emergency custody of Joseph Burks, born January 7, 1996, alleging that the child was dependent/neglected under Arkansas law. An affidavit from a DHS caseworker alleged that the child had suffered a fractured femur and the mother's explanation of how the injury occurred was inconsistent with the type of injury. An Order for Emergency Custody was entered, and on November 18, 1996, an Agreed Adjudication Order was entered and the child was adjudicated as dependent/neglected with custody remaining with DHS.

A similar proceeding took place with appellants' minor child Larry Ray Burks, born January 6, 1995. An affidavit from a DHS caseworker alleged an incident of abuse by Mr. Burks. An Agreed Adjudication Order was also entered on November 18, 1996, custody continuing with DHS.

Appellants were directed to do certain things to reach the goal of reunification, including a psychological evaluation, completion of parenting classes, visiting regularly with the children, and cooperating with the DHS caseworker. Review hearings were conducted throughout 1997, with a review order entered on August 12, 1997, returning custody of the children to appellants, with a protective services case continued by DHS. The court entered a review order on February 4, 1998, in which it found that appellants had complied with the court's orders and the DHS case plan.

On June 16, 1998, Mrs. Burks reported to her caseworker that Mr. Burks had whipped the two older boys with a belt and had left bruises from the incident. She stated that she left Mr. Burks. A review hearing was held on June 30, 1998, in which the court continued custody with the mother, appellant Mrs. Burks. Mr. Burks did not appear, but was ordered to have no contact with the children or Mrs. Burks, and was to attend counseling for anger management and domestic violence issues. Mrs. Burks was ordered not to have any contact with Mr. Burks.

Another review hearing was held on December 1, 1998, at which neither of the appellants appeared. The court issued a bench warrant for Mrs. Burks, and she was arrested on January 28, 1999. That same date, custody of the children was placed with DHS. DHS also filed a petition for emergency custody of appellants' youngest child, William Burks, born December 10, 1997, and custody was placed with DHS. Review hearings were subsequently held, in which Mrs. Burks was told not to have any contact with Mr. Burks. On January 6, 2000, the court found that the goal was

to reunify the children with Mrs. Burks. Mrs. Burks was ordered to report if she learned the whereabouts of Mr. Burks, saw him, or talked to him.

On February 15, 2000, appellee filed for termination of parental rights. The court entered an order terminating appellants' parental rights and granting power to consent to adoption as to the appellants' children. It is from this order that appellants appeal.

Arkansas Code Annotated § 9-27-341(b)(3)(Supp. 2001) provides that:

> (3) An order forever terminating parental rights shall be based upon a finding by clear and convincing evidence;
>
> (A) That it is in the best interest of the juvenile, including consideration of the following factors:
>
> > (i) The likelihood that the juvenile will be adopted if the termination petition is granted; and
> >
> > (ii) The potential harm, specifically addressing the effect on the health and safety of the child, caused by continuing contact with the parent, parents, or putative parent or parents;
>
> (B) Of one (1) or more of the following grounds:
>
> > (i)(a) That a juvenile has been adjudicated by the court to be dependent-neglected and has continued out of the home for twelve (12) months and, despite a meaningful effort by the department to rehabilitate the home and correct the conditions which caused removal, those conditions have not been remedied by the parent.

In this case, appellee cited (3)(B)(i)(a) as the grounds on which it sought to terminate parental rights. Further, the children are of Cherokee Indian descent through their father, and thus this case is controlled by the Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.* The Indian Child Welfare Act in 25 U.S.C. § 1912(f) (1988) provides in pertinent part that:

> No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony by qualified expert

> witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Thus, it must be shown by proof beyond a reasonable doubt that the continued custody with appellants is likely to result in serious emotional or physical damage to the children. Appellants argue this burden has not been met. We disagree, and note that the trial court specifically states on page two of its opinion that it finds the "Department has proved all the necessary elements of the case beyond a reasonable doubt."

In chancery cases we review the case *de novo*, but we do not reverse findings of the chancellor unless they are clearly erroneous or clearly against the preponderance of the evidence Ark. R. Civ. P. 52(a); *Presley v. Presley*, 66 Ark. App. 316, 989 S.W.2d 938 (1999). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite conviction that a mistake was committed. *Turner v. Benson*, 59 Ark. App. 108, 953 S.W.2d 596 (1997). In reviewing a chancery court's findings, we give due deference to the court's superior position to determine the credibility of the witnesses and the weight to be accorded their testimony. *Hunt v. Hunt*, 341 Ark. 173, 15 S.W.3d 334 (2000).

As to the evidence with respect to Mr. Burks, it showed that Mr. Burks was ordered to undergo anger management and domestic violence counseling, however Mr. Burks attended one meeting and never returned. Mr. Burks failed to exercise any visitation with the children from June 1998 through January 1999, during which time he could have visited with the children. There were also the allegations of the whipping with the belt leaving bruises on two of the children. Also, initially Joseph Burks, was taken by DHS as a result of allegations of abuse when his leg was broken. Further, allegations of abuse were what prompted DHS to take Larry Ray Burks as well.

The evidence as to Mrs. Burks showed that she maintained daily contact with Mr. Burks after being ordered not to do so. She was ordered by the court to report if she knew where Mr. Burks was, or if she heard from him. She did not follow these orders. Paula Davis testified that Mrs. Burks dropped Mr. Burks off at work every morning. The trial court noted that Mrs. Burks said at the hearing that if DHS would get out of her life she would reunite with Mr. Burks, and would return the children to their home.

Based on the above evidence, we hold that the chancellor did not err when he found that appellee had proven all the necessary elements of the case beyond a reasonable doubt.

Next, Mrs. Burks argues that appellee failed to present expert testimony to support its allegations as required by the Indian Child Welfare Act. Under 25 U.S.C. § 1912(f), in order for parental rights to be terminated, not only must appellee's case be proven beyond a reasonable doubt, it must also be supported by the testimony of "qualified expert witnesses." Guidelines for state courts have been promulgated by the Bureau of Indian Affairs to assist in defining a qualified expert witness under the Act. 44 Fed Reg. 67584 (1979). While not binding on this court, section D.4(b) of the guidelines sets the following as the persons who are most likely to meet the requirements of a qualified expert witness for purposes of Indian child custody proceedings:

> (i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs . . .
>
> (ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians . . .
>
> (iii) A professional person having substantial education and experience in the area of his or her specialty.

In the case at bar, Mr. Artie Marino, an occupational therapist, testified that he has a degree in occupational therapy, and is knowledgeable and experienced in the area of psychology. He has been working with children since 1994, and has previously worked as a residential counselor for emotionally disturbed children. He has experience working with children who have witnessed domestic violence or have been victims of domestic violence. He has worked with Joseph Burks intermittently since May 1997. Appellee asked Mr. Marino, to opine whether Joseph exhibited any signs of being involved in a domestic violence situation. Mr. Burks objected to the question on the basis that the witness was not qualified. Appellee responded that even though Mr. Marino does not have any credentials in psychology, he does have experience in counseling and in domestic violence. The court then overruled the objection. Mr. Marino testified that Joseph was very delayed, not developing his fine motor skills properly, and was exhibiting behaviors he would have gone through at age one or two had he been in a safe environment. Mr. Marino testified that when he visited with Joseph last, in April 1999, he was performing at twenty-two months when his

chronological age was thirty-eight months. He testified that Joseph has progressed while he has been in therapy.

Ms. Jackie Hamilton, the director of the Domestic Violence Intervention Program, testified that appellant, Mr. Burks, inquired about a domestic violence program, but did not attend the sessions. Ms. Hamilton testified without objection. Hamilton testified that domestic violence is not a "quick fix thing" and that her program lasts twenty-six weeks. She testified that statistically, victims leave their abusers six times before they finally leave for good. She also testified that children learn to act violently from watching their parents, and testified about the emotional and physical problems that would likely occur in these children as a result of witnessing domestic violence. She further testified that from an emotional standpoint, the symptoms are identical from children who have been in a violent home and observed violent behavior, with children who have been sexually abused. She testified that children who are raised in a violent home are twenty-four times more likely to commit rape or assault against another individual, and they are seventy-four percent more likely to commit a crime against a person.

■ We hold that the above testimony was sufficient to satisfy the qualified expert witness testimony requirement of the Indian Child Welfare Act. We hold that Mr. Marino and Ms. Hamilton possess adequate experience, and have unique qualifications to sufficiently satisfy the statute's requirements. We note that the Cherokee Nation agreed at trial that the parental rights of appellants should be terminated. We have found nothing in the record to suggest that the purpose of the Act has been compromised in this case.

Affirmed.

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

VAUGHT and JENNINGS, JJ., dissent.

JOHN E. JENNINGS, Judge, dissenting. I am unable to agree that the requirements of the federal statute, 25 U.S.C. § 1912(f) have been met in this case. Perhaps the leading case in this area of the law is *In the matter of N.L. v. Moore, 754 P.2d 863* (Okla. 1988). There the Oklahoma Supreme Court said:

> Testimony showing that continued custody of the child by the parent is likely to result in serious emotional or physical harm to

> the child is necessary. Testimony from a qualified expert witness indicating that such harm will result from continued custody of the parent is sufficient. Where cultural bias is clearly not implicated, expert witnesses who do not possess special knowledge of Indian life may provide the necessary proof that continued custody of the child by the parent will result in serious emotional or physical harm to the child.

Id. at 868 (citations omitted).

Social workers may qualify as expert witnesses under the Act but to do so they must possess "expertise beyond the normal social worker qualifications." *In the Matter of N.L. v. Moore, id.*; *State ex rel. Juvenile Dep't v. Charles*, 688 P.2d 1354 (Or. Ct. App. 1984); *In re Fisher*, 643 P.2d 887 (Wash. Ct. App. 1982); *In the Matter of M.E.M.*, 635 P.2d 1313 (Or. 1981).

Mr. Marino, an occupational therapist, clearly does not qualify as an expert witness under the Act, and not even the department contends that he does. On this record I cannot conclude that Ms. Hamilton has been shown to possess "expertise beyond the normal social worker qualifications." Furthermore, I cannot say that cultural bias is clearly not implicated in the case at bar. Finally, neither Mr. Marino nor Ms. Hamilton testified that the continued custody of the child by the parent would be likely to result in serious emotional or physical damage to the child. *See In the Matter of N.L. v. Moore, supra*; *In the Matter of Morgan v. Morgan*, 364 N.W.2d 754 (Mich. Ct. App. 1985).

Apart from the question of whether the federal statute has been complied with, I have other concerns. The department's involvement began when one of the children suffered a broken leg under suspicious circumstances. The children were returned to the home until Mr. Burks spanked them hard enough to leave bruises, and the court ordered Mrs. Burks to have no contact with Mr. Burks. At this point the department's goal was to reunify the children with Mrs. Burks. It appears that she complied with the instructions of the department and the orders of the court except that, when Mr. Burks' car broke down, she took him back and forth to work. This clearly precipitated the department's decision to terminate her parental rights.

I neither condone nor excuse Mrs. Burks' conduct, but question whether this a sufficient basis to seek to sever the bond between mother and child. I recognize that both the trial court and

the department are hurried by the legal requirements as to time imposed by Ark. Code Ann. § 9-27-337 & -338 (Supp. 1999), as well as the practical consideration that a child neither returned to the home nor given a new permanent home will soon become an adult. Even so, we might do well to remember the supreme court's admonition in *Bush v. Dietz*, 284 Ark. 191, 680 S.W.2d 704 (1984):

> The best interest of the child is a matter of primary concern in adoption proceedings. Termination of the maternal relationship is much more far reaching than a change of custody. Adoption changes the natural relationship between parent and child; it changes the course of lives, the manner of inheritance, the people with whom the child associates, and cuts the ties and relationship between the child and the family of the parent whose rights are terminated. To make a decision based solely upon the best interest of the child could be a dangerous thing. A literal interpretation of what is in the best interest of the child could conceivably lead to a decision to award the child to the parties who were able to furnish the most material things for the comfort and pleasures of life. The wealthy, even though strangers, could take the children of the poor because the children would obviously be better off in a home of plenty. The phrase "best interest of the child" means more than station in life and material things. "Best interest of the child" includes moral, spiritual, material and cultural values, matters of convenience and friends and family relationships. We have recognized as a cardinal principle of law and nature that parents who are able to support their child in their own style of life, however poor and humble they might be, should not be deprived of parental privileges, except when urgently necessary to afford the child reasonable protection. (Citation omitted.)

I respectfully dissent.

VAUGHT, J., joins in this opinion.

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Court of Appeals of Arkansas
Divisions II and III
Opinion delivered November 28, 2001
[Petition for rehearing denied. Supplemental concurring and dissenting opinions on denial of rehearing delivered March 13, 2002.]

McCullough Law Firm, by: *R.A. McCullough*, for appellants.

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

STEELE HAYS, Special Judge. In 1997 appellant was convicted of third-degree battery on a plea of guilty. He was placed on probation for a term of three years.

New charges were filed against appellant in 1999, consisting of first-degree domestic battery and revocation of probation under his previous sentence.

The state and the defense stipulated that the evidence introduced at trial would serve as the revocation hearing. The jury was unable to agree on a verdict and reportedly was deadlocked eleven to one for acquittal. Facing a near unanimous verdict of acquittal, the state elected to *nolle prose* the domestic battery count and that charge was dismissed.

The trial court found that appellant had violated the conditions of his probation and imposed a sentence of five years. Appellant asks us to reverse on four assignments of error: 1) the trial court erred by denying appellant's *Batson* motion; 2) erred by allowing the prosecutor to state the specifics of a proposed plea bargain relative to the domestic battery count; 3) erred by admitting evidence of appellant's criminal history during the trial; and 4) erred by finding sufficient evidence that appellant had breached the conditions of his probation. We affirm the trial court.

■ Appellant's first three points for reversal relate to alleged trial errors. They cannot be addressed because the mistrial of the first-degree domestic battery charge renders them moot. *Johnson v. State*, 319 Ark. 3, 888 S.W.2d 661 (1994). The law affords no appeal absent a conviction. *Webb v. State*, 48 Ark. App. 216, 893 S.W.2d 357 (1995); Ark. R. App. P.—Crim. 1 (2000).

■ In the remaining point for reversal, insufficiency of the evidence for revocation, appellant insists he bore no lawful relationship to his step-daughter, the reputed victim. She was merely the daughter of his spouse and, hence, she did not come within the ambit of Ark. Code Ann. § 5-26-302, defining a "family or household members." We decline to consider this premise, however, because it was not offered to the trial court and may not be initiated

in this court. *Yancey v. State*, 71 Ark. App. 280, 30 S.W.3d 117 (2000).

Turning to the merits of point four, appellant concedes there was an altercation between his seventeen year old stepdaughter and himself, but he maintains she was the aggressor and he was merely defending himself in the face of her repeated threats that she would kill him. Admittedly, he pushed her, but only after she pushed him.

That version does not fully comport with the record. The stepdaughter testified she had previously resided with her mother and the appellant, but at the time of the altercation she only spent alternate weekends with them. During one such weekend an argument developed when she refused appellant's directive to wash the dishes. Words grew heated and she pushed appellant, he pushed her back and they fell to the floor in the struggle. Appellant's wife managed to separate them briefly but the fracas was soon renewed and appellant struck the young woman in the face with his fist. She described her face as scratched and swollen and her lip lacerated. She readily admitted she had pushed appellant and had twice told appellant she would kill him.

Two officers who had been called to the scene testified. One observed marks around her left eye, the other noted some swelling next to her eye. Another witness described her face as badly bruised and swollen.

There was testimony to the contrary. Appellant's spouse and his thirteen year old stepson testified. The latter essentially confirmed the particulars of the quarrel except he denied seeing appellant strike his sister. The former denied that appellant had either pushed or struck her daughter. She was unable to explain how her daughter's face got "all messed up."

With respect to the admitted threats by the stepdaughter directed toward the appellant, without discounting the seriousness of such remarks, nothing in the record suggests the young woman had either the means or the inclination to act accordingly, or that her words were taken seriously by the appellant. By all indications, they were simply an intemperate outburst spoken in anger, and we are satisfied the trial court viewed them in that light.

It was the prerogative of the trial court to resolve any discrepancies in the testimony and to determine, by a preponderance of the evidence, whether appellant's probation was revocable. His finding in the affirmative is entirely consistent with the proof.

Judge Roaf, in dissent, would distinguish this case from *Davis v. State*, 308 Ark. 481, 825 S.W.2d 584 (1992) and *Robinson v. State*, 14 Ark. App. 38, 684 S.W.2d 824 (1985). It remains, however, settled law that although the evidence may be insufficient in a probation revocation proceeding to sustain an allegation that appellant committed a specific offense, revocation will be sustained if the evidence establishes a lesser included offense. *See Selph v. State*, 264 Ark. 197, 570 S.W.2d 256 (1978); *Venable v. State*, 27 Ark. App. 289, 770 S.W.2d 170 (1989); *Felix v. State*, 20 Ark. App. 44, 723 S.W.2d 839 (1987).

Affirmed.

ROBBINS, BIRD and BAKER, JJ., agree.

GRIFFEN and ROAF, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. I respectfully dissent from the decision reached by the majority and would hold that the trial judge erred when he held that Willis had (1) committed domestic battery, and (2) that the supposed violation was inexcusable. A fair-minded inquiry into whether the appellant committed domestic battery under any analysis must include a review of the evidence. All of the eye-witness accounts of the incident that triggered the probation revocation petition show that India Ledbetter threatened to kill appellant and began hitting him. After she paid a greater price than she apparently expected, she summoned the police and pursued the prosecution that resulted in appellant's sentence.

From the earliest times, human moral and legal codes have recognized the authority of parent figures to administer discipline in their homes. Moreover, civilized societies have uniformly upheld the view that a child who strikes a parent commits a serious violation of social order. The Code of Hammurabi, which continued in use for centuries and exerted considerable influence on Arabic and Islamic law, prescribed that the hands would be cut off a son who struck his father. The Second Book of Moses commands that parents are to be honored (*Exodus* 20:12). Under Mosaic law, to strike one's father or mother was a crime punishable by death (*Exodus*

21:15). It was a crime, punishable by death, to even curse a parent (*Exodus* 21:17). The Greek scholar and philosopher Plato affirmed in *The Republic* that an elder is duty bound to rule and chastise a younger, and that the younger will not "strike or do any other violence to an elder, nor will he slight him in any way. For there are two guardians, shame and fear, mighty to prevent him: shame, which makes men refrain from laying hands on those who are to them in the relation of parents; fear, that the injured one will be succored by the ones who are his brothers, sons, fathers."

Until this decision, I have found nothing in the laws of Arkansas, the United States, or in the legal or moral codes of any other society known to human history that supports the notion that a child may threaten to kill and then strike a parent figure with impunity. While modern society properly does not impose the death penalty for such conduct the way that ancient societies did, the whole body of law known to humanity offers no support whatsoever for the preposterous idea that a parent figure is obligated to retreat from such a rebellious child under any circumstances. But today, the majority upholds a decision by the trial court that adjudges this appellant guilty of inexcusably violating the conditions of his probation because he did not "run from" such an attack by his stepdaughter in his own home.

Although appellant's counsel raises several points for reversal, the only one with merit concerns whether the trial court clearly erred when it revoked appellant's 1997 probationary sentence following his guilty plea to third-degree battery. In 1999, new charges were filed against appellant for first-degree domestic battery arising from an altercation between appellant and India Ledbetter, his seventeen-year-old stepdaughter. The State also filed a petition for revocation. As the majority opinion indicates, the parties stipulated that the evidence in the domestic battery jury trial would constitute the record for the revocation hearing. After the jury deadlocked on the domestic battery charge in what was reported by the prosecution to be an eleven to one split for acquittal, the State elected to nolle prosequi and dismiss that charge. Nevertheless, the trial judge found that appellant had violated the conditions of his probation, specifically, the requirement that appellant, "obey all Federal and State laws, Local ordinances, and Court orders."

Appellant is married to Natalie Willis, the mother of India Ledbetter. Ledbetter was visiting the residence of her mother and appellant when the altercation took place. According to the testimony at trial, appellant and Willis went out to visit another relative

and returned home to find dirty dishes that Ledbetter left in the kitchen sink. Ledbetter's mother told her to wash the dishes; however, Ledbetter refused and tartly said she would wash the dishes the next day. When her brother (Cory Williams) commented to his mother that he was required to perform tasks immediately, appellant told Ledbetter that she needed to wash the dishes. Ledbetter then began arguing with appellant. Appellant walked away from Ledbetter and went into another room, but Ledbetter followed him and continued to argue. Ledbetter's mother (Willis) described what happened next:

> I went in the den and told them they needed to stop. They kept on arguing. I walked outside, when I came back in they were still arguing. They were up close to each other and India started pushing [appellant]. She first had threatened him. She told him, 'I will kill you' and then she pushed him. I saw him put his hands up and step back and told her not to push him anymore. She then said she'd push him again and she did. They grabbed each other. He grabbed her hair. She grabbed his shirt and I tried to get in the middle to pull them apart. I guess we lost our balance. We all hit the floor and were steady wrestling and I was trying to get them apart. I finally told [appellant] to let her hair go and told India to let his shirt go. They finally let each other go. Prior to the time she made the threat to kill him, she had pushed him and he had not put his hands on her. He did not ever purposely strike her or try to hit her during the little tussling. . . . He did not push her to the ground and get over and start pulling her hair. That happened when I tried to pull them apart and we all fell to the ground at the same time. . . .

Willis testified that after appellant and Ledbetter stopped wrestling, appellant tossed a beverage in Ledbetter's face while Ledbetter was using the phone.

Cory Williams, Ledbetter's twelve-year-old brother and appellant's stepson, also witnessed the incident between appellant and Ledbetter. Williams testified that Ledbetter refused their mother's directive to wash the dishes, began arguing with their mother about it, and then began arguing with appellant after he told her to wash the dishes. Williams also testified that Ledbetter pushed appellant, threatened to kill him, and that appellant splashed a drink in Ledbetter's face when she began phoning the police.

Ledbetter admitted in her testimony that she threatened appellant after he told her to wash the dishes, that she, "was hollering and

fussing when I said it," and that, "I fell to the floor, and I brought him down with me, and all I know is we were tussling and fighting." Ledbetter testified that although her eyes were closed, "I was trying to fight him . . . I cannot tell you exactly where he was hitting me. He did not hit me in the face. . . . When I fell on the ground, he had my braids in his hand, and he was pulling my braids.[1] He was just pulling them. I was on the ground when he pulled my braids out." At another point in her testimony, Ledbetter testified, "he did not hit me in the face the first time we were fighting, but he hit me in the face the second time." Although the evidence demonstrates that an altercation took place between Ledbetter and appellant, both Willis (her mother) and Williams (her brother) contradicted Ledbetter's testimony that appellant struck her in the face or caused the bruises and lacerations she described during her testimony.

Arkansas Code Annotated section 5-4-309(d) (1987) provides that if the trial court finds by a preponderance of the evidence that a defendant has *inexcusably* failed to comply with a condition of his suspension or probation, it may revoke the suspension or probation at any time prior to the expiration of the period of suspension or probation. On appellate review, we do not reverse the trial court's decision regarding probation revocation unless it is clearly against the preponderance of the evidence. We have previously reversed a trial court decision revoking probation for failure to pay court-ordered fees and fines upon a holding that the decision was clearly against the preponderance of the evidence when there was proof that the defendant had attempted to make payments and had attempted to explain his inability to make payments as ordered. *See Baldridge v. State*, 31 Ark. App. 114, 789 S.W.2d 735 (1990).

In the present case, the trial court's comments, after observing that appellant had two prior convictions for battery, are quite revealing:

> Well, I'll tell you what disturbs me in this case, is the fact that, you know, here's a gentleman that has these prior convictions, [that] are fighting, you know, with family members and, I would think, you know, with that hanging over his head and three years' probation and facing the penitentiary, that he would run like the dickens from another family fight. I mean, plus, he supposedly has gone to

[1] The braids that Ledbetter testified about were apparently woven into her hair, not pulled from her scalp.

> domestic abuse counseling and learned not to get into fights with family . . . and a seventeen-year-old girl pushes him and suddenly, they're in a brew-ha here because he just didn't back off and say, I'm not doing this or I'm going out and have a couple of iced tea or something and get out of here because I'm not going to get into a fight with you, because I know better than that.

Nothing supports the conclusion that appellant *inexcusably* failed to comply with the terms of his probation. While it is true that the State can establish a probation violation by evidence that is not sufficient to constitute a criminal conviction, Arkansas Code Annotated section 5-4-309(d) (Supp. 1999) clearly requires that the State prove that the defendant's failure to comply with probation terms is inexcusable. As noted by our supreme court in the recent decision of *Barbee v. State*, 346 Ark. 185, 56 S.W.3d 370 (2001), the term *inexcusable* means an inability to excuse or justify. The appellant in *Barbee* relied on information provided by the State that his driver's license was not suspended. After noting that Barbee complied with every other term of his probation and was observed by the trial court to be "tremendously rehabilitated," our supreme court reversed and remanded the case to the trial court. In the present case, I cannot agree that appellant's failure to comply was inexcusable in the face of compelling evidence that appellant was involved in an altercation after being baited, threatened, and assaulted *in his own residence*. His actions simply do not rise to the level of being without excuse, justification, or pardon.

Like the trial court and majority, I am opposed to domestic violence. However, I find nothing in law or logic that requires an adult to retreat in his own home from a rebellious, threatening, and abusive teenager. Here, all the proof shows that Ledbetter picked a fight with an adult in the adult's house. I refuse to dignify her insolence and disrespect by supporting a decision to send appellant to the penitentiary for refusing to run from her. The State, trial court, and majority have cited no rule of law in Arkansas or anywhere else that obligates a parental figure to retreat from an assault by a rebellious child. That overwhelming body of human experience is not nullified in the case of a person on probation. Therefore, I would reverse the trial court, and respectfully dissent from the majority opinion.

ANDREE LAYTON ROAF, Judge, dissenting. I would reverse and remand this petition for revocation because there is insufficient evidence to support the decision to revoke. The State's petition as abstracted provided only one basis for the revocation:

> The defendant has violated the terms of his probationary sentence in that on August 4, 1999, he committed the offense of Domestic Battery *in the First Degree*, which occurred after his probationary sentence. (Emphasis added.)

The issue is preserved for our review. On October 11, 2001, the supreme court overruled *Miner v. State*, 342 Ark. 283, 28 S.W.3d 280 (2000), and held that a motion for directed verdict is not required in a revocation proceeding in order to preserve the issue of sufficiency of the evidence for appeal. *Barbee v. State*, 346 Ark. 185, 56 S.W.3d 370 (2001).

Regarding the merits, there is no need to belabor the facts of this unfortunate family scuffle, as they are well-documented in the majority opinion and in Judge Griffen's dissent. By no stretch of the imagination do these facts support a finding that Obbie Willis committed Battery in the *First Degree*, domestic or otherwise, because it requires the infliction of serious physical injury. *See* Ark. Code Ann. § 5-26-303 (Supp. 2001).[1] On appeal, Willis argues that the evidence was insufficient to support the revocation, and correctly points out that the "sole basis for the revocation case" was the primary offense charged in the criminal trial.

I am not unmindful of *Davis v. State*, 308 Ark. 481, 825 S.W.2d 584 (1992), *Selph v. State*, 264 Ark. 197, 570 S.W.2d 256 (1978), *Venable v. State*, 27 Ark. App. 289, 770 S.W.2d 170 (1989), *Felix v. State*, 20 Ark. App. 44, 723 S.W.2d 839 (1987), and *Robinson v. State*, 14 Ark. App. 38, 684 S.W.2d 824 (1985), cases that would appear to support the proposition that this court could determine that Willis committed a lesser-included offense of first-degree battery, and affirm on that basis. Whether or not this is "well-settled" law, most of these cases are readily distinguishable. Only *Selph* and *Venable* are in any sense analogous in that both involve revocations based on a single new criminal charge. In *Davis*, the appellant was convicted of rape, and his probation was revoked based on the same conduct in a proceeding held prior to his rape trial. The trial court revoked Davis' probation based on the lesser-included offense of sexual abuse in the first degree, and the supreme court affirmed both the rape conviction and the probation revocation. In *Robinson*,

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[1] Ark. Code Ann. § 5-26-303 was amended twice on the same date by the 1999 General Assembly. *See* Acts 1999, No. 1317, § 2 and No. 1365, § 1. Pursuant to Ark. Code Ann. § 1-2-207, the last enactment, No. 1365, has been codified.

the court of appeals, in reversing the revocation of appellant's suspended sentence that was based on the trial court's finding that a lesser-included offense was committed, held that third-degree battery was not a lesser-included offense of robbery and that the appellant had not been given notice that a battery charge would be the basis for revocation. Here, the State vigorously pursued only the charge of first-degree battery, misstated the law both below and now on appeal,[2] and is sticking to its guns on appeal that Willis committed a non-existent first-degree battery offense and not some lesser-included offense. Moreover, it is clear from the abstract that neither counsel nor the trial court was ever able to sort out the precise offense being charged. To affirm this revocation under these circumstances would result in the sort of rude justice that this court should not countenance.

Moreover, Willis's case is clearly distinguishable from the many cases in which our appellate courts have held that evidence that is insufficient for a criminal conviction may be sufficient for probation revocation. *See e.g. Kirby v. State*, 52 Ark. App. 161, 915 S.W.2d 736 (1996). Nor is it simply a matter of the credibility of the witnesses. The alleged victim's testimony does not even come close to making out a case for first degree battery, and there is no excuse for a trial court dispensing out slipshod justice in this fashion, or for this court to sanction it by affirming this revocation.

I would reverse.

GRIFFEN, J., joins.

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[2] The State contends on appeal that Willis was charged with violating Ark. Code Ann. § 5-26-303(a)(4)(Supp. 2001). There is no such provision, and reference to this subsection is found only in the "A.C.R.C. Notes," following the text of the code, because it was contained only in the earlier uncodified act. See also footnote 1.

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Court of Appeals of Arkansas
Divisions II, III, and IV
Opinion delivered March 13, 2002[1]

JOHN MAUZY PITTMAN, Judge, concurring. I concur in the decision to deny appellant's petition for rehearing. I write for the limited purpose of responding to that part of appellant's petition in which he argues that his probation was erroneously revoked because he was improperly charged with having violated a "non-existent statue [sic]." Specifically, appellant argues that he was charged with having violated Ark. Code Ann. § 5-26-303(a)(4), which appellant contends did not exist because subsequent legislation had re-enacted section 5-26-303 without any mention of the contents of subsection (a)(4). *Compare* Acts 1317 and 1365 of 1999; *see* Arkansas Code Revision Commission notes following Ark. Code Ann. § 5-26-303 (Supp. 2001).

First, it should be pointed out that appellant did not clearly raise this argument in his first brief to this court. He has attempted to raise the issue for the first time in his petition for rehearing. Of course, arguments that are made below cannot be raised to this court for the first time in a reply brief, *Camp v. State*, 66 Ark. App. 134, 991 S.W.2d 611 (1999), much less in a petition for rehearing. *National Bank of Commerce v. Beavers*, 304 Ark. 81, 802 S.W.2d 132 (1991); *Garrett v. Andrews*, 294 Ark. 160, 744 S.W.2d 386, *cert. denied,* 487 U.S. 1219 (1988).

In any event, appellant is relying on a false factual premise. As pointed out in the original opinions in this case, the State (1) charged appellant by information with having committed the crime of first-degree domestic battery; and (2) filed a separate petition to revoke appellant's preexisting probation because he had violated its conditions by committing first-degree domestic battery. The criminal information specifically charged appellant with having committed battery in the manner specified only in the questionable Act 1317, found in the subsection (a)(4) mentioned in the A.C.R.C. notes. However, the propriety of that charge is not before us, as the criminal charge resulted in a hung jury and a *nolle prosequi* of the charge.

[1] *Reporter's note*: Only the concurring and dissenting opinions are published.

The only judgment before us is the order revoking appellant's probation. Contrary to appellant's argument, the State did not limit the probation-violation allegation against appellant to any specific manner of committing the offense; in this respect, the petition to revoke accused him only generally with having "committed the offense of Domestic Battery in the First Degree." It is undisputed that there are three ways to commit first-degree domestic battery aside from the provisions of the questionable Act 1317. *See* Ark. Code Ann. § 5-26-303 (a)(1) — (3). It is also true, as pointed out in the original majority opinion, that this court will affirm a revocation if the evidence is sufficient to support a finding that the defendant committed even a lesser-included offense of a charged offense. *See Selph v. State* 264 Ark. 197, 570 S.W.2d 256 (1978); *Venable v. State*, 27 Ark. App. 289, 770 S.W.2d 170 (1989); *Felix v. State*, 20 Ark. App. 44, 723 S.W.2d 839 (1987). Here, appellant did not complain about the general nature of the allegation in the petition to revoke, move for a bill of particulars, move to have the petition made more definite and certain, or request specific findings from the trial court. As such, the trial court was free to consider whether appellant's conduct constituted, in any manner, the commission of first-degree domestic battery or a lesser-included offense thereof.[1]

JOHN B. ROBBINS, Judge, concurring. I concur with the majority's decision to deny appellant's petition for rehearing; however, I write to clarify the factual scenario that was presented to us by this appeal. Appellant has two prior convictions for domestic battery, one of which resulted in a sentence of probation for three years. During this three-year period, a petition for revocation was filed in which it was alleged that appellant had violated the conditions of his probation by committing the offense of domestic battery in the first degree. At a hearing in the trial court the victim's testimony included the following:

> He was still fussing at my brother. I told him to leave my brother alone. I stood between him and my brother and he pushed me. I did threaten him before that, we had gotten into it [previously], and the day before this incident. I told him in the room that I would kill him and to leave me alone. I was hollering and fussing when I said it. I did not mean it, but I was mad. We were in the den when this happened. I fell on the floor, and I brought him

[1] One way of committing first-degree domestic battery is to "cause[] serious physical injury to a family or household member under circumstances manifesting extreme indifference to the value of human life." Ark. Code Ann. § 5-26-303(a)(3). It is a lesser-included offense thereof to "recklessly cause[ ] physical injury to a family or household member." Ark. Code Ann. § 5-26-305(a)(3).

> down with me, and all I know is we were tussling and fighting. My mother was trying to break it up. My eyes were closed, and I was trying to fight him, so I cannot tell you exactly in detail what exactly happened, I closed my eyes because he was hitting on me. I cannot tell you exactly where he was hitting me. He did not hit me in the face. We were on the floor tussling and fighting. We were on the floor and mom was trying to pull us apart, I got back up and I called 911 and talked to them, and told them what happened. My mother disconnected the phone, he had a drink in his hand, and he threw it in my face. I was on the telephone and I started crying, my mother disconnected the phone. I have no idea what he was drinking and the next thing that happened is I started fussing and cussing at him, because he threw the drink in my face and we fought again. The reason why I started fussing and cussing at him and how it happened the second time is I was in his face. I do not think I hit him first. He did not hit me in the face the first time we were fighting, but he hit me in the face the second time. It was with his fist. We were still fighting and I was trying to push him, get him away from me. My mother was trying to separate us, it finally stopped, I fell on the ground and he was pulling my braids, and then I just left him alone. When I fell on the ground, he had my braids in his hand, and he was pulling my braids. He was just pulling them. I was on the ground when he pulled my braids out. I do not remember how many, but it was a lot. I went into another room and used the telephone and called somebody to come get me, and I went and waited outside until they got there. As we were leaving, the police pulled up so we turned around and went back. When I made contact with the police. I had scratches on my face, my lip was busted, and my face was swollen. My eye was hurting, it was red. And my braids were all over the ground. Next day my whole side of my face was hurting, and I could not lay on it, it was swollen and red. It felt like a headache on my face. I was in substantial pain.

Although there was testimony to the contrary, this was a matter of credibility and the trial judge obviously believed the victim. Her testimony described two distinct altercations. Even if the victim precipitated the first altercation, it had ended and the victim was making a telephone call. Her mother disconnected the telephone and appellant threw a glass of some beverage in the victim's face, and the fight was on again. It was during this second altercation that the victim testified that appellant struck her in the face with his fist.

The dissenting opinion's rationale is premised on the applicability of Ark. Code Ann. § 5-2-605(1) (Repl. 1997), and *Sykes v. State*, 57 Ark. App. 5, 940 S.W.2d 888 (1997). However, this statute

and *Sykes* are inapplicable and irrelevant to this appeal. The grandmother-appellant in *Sykes* was the duly appointed guardian of the minor ward, her grandson. She spanked her grandson with a phone cord because she could not find her belt. The spanking did not result in any bruising, bleeding or welting. Such relationship of guardian and ward is expressly included within the coverage of 5-2-605(1). We applied 5-2-605(1) and held that the physical force was justified. Here, however, appellant is neither the parent, teacher, guardian, nor a person otherwise entrusted with the care and supervision of the victim. *See* Ark. Code Ann. § 5-2-605(1). She is the seventeen-year-old daughter of appellant's wife. While at some time in the past she had resided with her mother and appellant, she did not reside with them at the time of the altercation. She was merely visiting in their home the evening of the incident. Consequently, 5-2-605(1) and *Sykes* have no application and the trial court would have erred if it had relied on them.

Our decision of November 28, 2001, which affirmed the trial court's revocation of appellant's probation, was neither a mistake nor a departure from Arkansas law. We acted consistent with our laws in affirming the appeal, and we do so again now in denying appellant's petition for rehearing.

WENDELL L. GRIFFEN, Judge, dissenting. Our court rarely issues written opinions about decisions to deny petitions for rehearing. It is even more rare when nine judges are involved in this process; most rehearing petitions are reviewed and decided by the original three-judge panel that decided the case plus another three-judge panel. However, I am so convinced that our decision to deny rehearing in this instance is a mistaken departure from clear Arkansas law that I am obliged to write. We have denied rehearing in the instant appeal in the face of two statutes and at least one of our own decisions that contradict our original holding affirming the trial court's decision to revoke appellant's probation arising from his altercation with his stepdaughter.

Arkansas Code Annotated section 5-2-605(1) (Repl. 1997) states:

> The use upon another person of physical force that would otherwise constitute an offense is justifiable under any of the following circumstances: (1) A parent, teacher, guardian, or other person entrusted with care and supervision of a minor or an incompetent person may use reasonable and appropriate physical force upon the minor or incompetent person when and to the extent reasonably necessary to maintain discipline or to promote the welfare of the minor or incompetent person.

Our court based its decision to reverse a conviction of a grandmother for second-degree battery on this statute. *See Sykes v. State*, 57 Ark. App. 5, 940 S.W.2d 888 (1997). The appellant in that case was convicted for spanking her eleven-year-old grandson with a phone cord after the grandson was apprehended by the police for trespassing on private property. She argued on appeal that the evidence was insufficient to support her conviction. Photographs taken ten minutes after the spanking occurred showed welts on the minor's arm, a mark on his leg, and a mark on his bottom. Our court held that the evidence was insufficient to support a finding that the physical force used by the appellant in that case was unreasonable or inappropriate under the circumstances, while acknowledging that "[t]here may be more desirable methods of correction that could have been utilized in this situation. . . ."

If using a phone cord and raising welts on an eleven-year-old boy in the course of a spanking is insufficient to support a conviction for second-degree battery because of the previously cited statute, our original decision holding that appellant's conduct was willfully inexcusable in an altercation with his seventeen-year-old stepdaughter who threatened to kill him and assaulted him with her fists in his home is a mistake. Resisting hand-to-hand assault from a teenager and inflicting minor injuries in the process certainly constitutes justifiable use of physical force. If not, section 5-2-605(1) makes no sense.

Moreover, Arkansas Code Annotated section 5-2-606(a) (Repl. 1997) makes the error of our original decision even more obvious. That statute reads:

> A person is justified in using physical force upon another person to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he may use a degree of force that he reasonably believes to be necessary. . . .

Here, appellant did not provoke the altercation with his stepdaughter, was not the initial aggressor, and the physical force involved did not result from combat by agreement. There is no proof that appellant acted maliciously, with evil motive, or for any purpose other than to defend himself and his parental authority from the assault launched by his stepdaughter after he told her to obey her mother's directive to wash the dishes. Nevertheless, we are denying the petition for rehearing in the face of this proof and the plain language of section 5-2-606(a) which declares the use of physical force in such a situation "justified."

These Arkansas statutes and our *Sykes* decision plainly demonstrate the error of our original decision and show why the petition for rehearing should be granted. Contrary to the rationale declared in the original majority opinion, the original decision does not rest on witness credibility. The undisputed evidence shows that India Ledbetter (the stepdaughter) sustained bruises to her face in the course of the altercation she initiated with appellant. All the evidence — including Ledbetter's own testimony — shows that Ledbetter (a weekend guest) initiated the altercation, threatened to kill appellant, assaulted him with her fists, and then pursued him into another room of his house to continue the assault.

If Arkansas law does not justify the use of physical force in such a situation, any parental figure confronted by a defiant and violent youth not only risks physical danger, but faces loss of all reasonable expectation of authority in the home. Nothing in the cited statutes, our *Sykes* decision, or anything else in Arkansas law supports the notion that the people of this State intend to undermine the parental role by forcing parent figures facing such assaults to run from rebellious children and leave their homes.

I am authorized to state that Judges NEAL and CRABTREE join in this dissent.

ANDREE LAYTON ROAF, Judge, dissenting. I would grant Obbie Willis's petition for rehearing and reverse this revocation for the reasons set out in my dissenting opinion on November 28, 2001, and because contrary to the State's assertion, opinions of the Attorney General are *not* accorded the status of binding precedent by the appellate courts of this State. *City of Fayetteville v. Edmark*, 304 Ark. 179, 801 S.W.2d 275 (1990); *Klinger v. City of Fayetteville*, 293 Ark. 128, 732 S.W.2d 859 (1987). Consequently, it is for a court to say whether there is such an offense as "first-degree domestic battery," Ark. Code Ann. § 5-36-303(a)(4), not the Attorney General. Courts should likewise decide whether it is permissible to send a man to the penitentiary based on a nonexistent criminal offense, as long as the evidence shows that he possibly committed some other uncharged offense. To do so is indeed to dispense "slipshod justice," and while Willis may not have made the most cogent argument in this respect, he did assert that the sole basis for his revocation was "the primary charged offense" — an offense that does not exist in Arkansas.

James Patrick MANNING *v.* STATE of Arkansas

CA 01-129 61 S.W.3d 910

Court of Appeals of Arkansas
Division IV
Opinion delivered December 5, 2001

William R. Simpson, Jr., Public Defender; by: *Stephanie L. Mays*, Deputy Public Defender, for appellant.

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

JOHN MAUZY PITTMAN, Judge. The appellant in this probate case was charged with aggravated assault and acquitted by reason of mental disease or defect. He was consequently admitted to the State Hospital, but subsequently obtained a conditional release. One of the conditions of his release was that he not leave the State of Arkansas without permission from the court. A motion for revocation of his conditional release was thereafter filed, alleging that appellant had been arrested in Oklahoma. At a hearing on the petition to revoke, appellant admitted that he had gone to Oklahoma without permission but asserted that this was an involuntary act caused by his physician's failure to prescribe an adequate dose of medicine for his bipolar disorder. The probate court

revoked appellant's conditional release, and this appeal followed. For reversal, appellant contends that the probate judge erred in revoking his conditional release because appellant proved that he was improperly medicated, so that his actions should be regarded as involuntary. We do not agree.

We review probate proceedings *de novo*, but the decision of the probate judge will not be disturbed unless clearly erroneous. *Buchte v. State*, 337 Ark. 591, 990 S.W.2d 539 (1999). In making our review, we give due regard to the superior position and opportunity of the probate judge to determine the credibility of the witness. *Id.*

The governing statute provides that:

> If, within five (5) years after the order pursuant to § 5-2-314 or § 5-2-315 granting conditional release, the court shall determine, after notice to the conditionally released person and a hearing, that such person has violated the conditions of release or that for the safety of such person or for the safety of the person or property of others his conditional release should be revoked, the court may modify the conditions of release or order the person to be committed to the custody of the Director of the State Hospital or other appropriate facility subject to discharge or release only in accordance with the procedure prescribed in § 5-2-315.

Ark. Code Ann. § 5-2-316(b) (Repl. 1997).

In the present case, it is undisputed that appellant went to Oklahoma within one year of his conditional release, well within the five-year time period for revocation. As to appellant's assertion that he went to Oklahoma involuntarily due to inadequate medication, his testimony was uncorroborated and the probate judge was not required to believe it. *See Rankin v. State*, 338 Ark. 723, 1 S.W.3d 14 (1999).

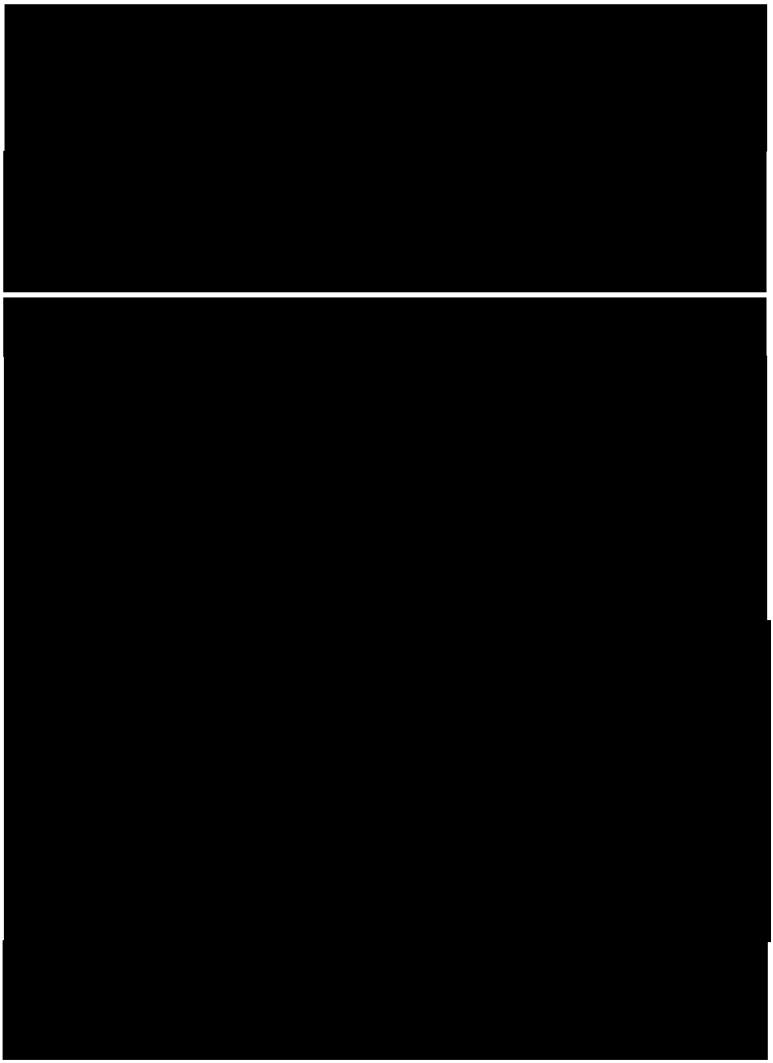
Affirmed.

NEAL and VAUGHT, JJ., agree.

Jim H. APEL *v.* Ronald CUMMINGS

CA 01-8 61 S.W.3d 214

Court of Appeals of Arkansas
Division IV
Opinion delivered December 5, 2001



Lea Ellen Fowler, for appellant.

James W. Wyatt, for appellee.

JOSEPHINE LINKER HART, Judge. Jim Apel appeals the denial of his petition to adopt the twin children of his wife and appellee, Ronald Cummings. He argues that the probate court erred by finding the adoption was not in the best interest of the children. We agree and reverse.

On April 1, 1998, Sarah Apel, mother of the children and wife of appellant, divorced Ronald Cummings, appellee, and obtained custody of their two-year-old twins, Matalynn and Joshua. On May 1, 1998, Sarah married appellant and moved with the children to

appellant's home in Jefferson County. On June 22, 1999, appellant filed a petition for adoption of the twins along with a consent to adoption that failed to conform to the requirements of Ark. Code Ann. § 9-9-209(b)(2) (Repl. 1998)[1]. Appellant attempted to correct the error by mailing to appellee a second consent that fully complied with the statutory requirements. After receiving the second consent for adoption, appellee filed an objection to the adoption and withdrew his former consent on December 20, 1999. The probate court determined that appellee's consent to the adoption was not required but denied the adoption, finding that the adoption was not in the best interest of the children. From that order comes this appeal.

Although probate proceedings are reviewed *de novo*, we will not reverse a probate court's decision regarding the best interest of a child unless it is clearly against the preponderance of the evidence or clearly erroneous. *See* Ark. Code Ann. § 9-9-209(b)(2) (Repl. 1998); Ark. R. Civ. P. 52; *Adoption of Lybrand*, 329 Ark. 163, 946 S.W.2d 946 (1997); *Adoption of Perkins/Pollnow*, 300 Ark. 390, 779 S.W.2d 531 (1989); *Jones v. Ellison*, 70 Ark. App. 162, 15 S.W.3d 710 (2000). When minor children are involved, a heavier burden is placed on the court to exercise all its powers of perception in viewing the witnesses and their testimony when determining the best interest of the children. *In the Matter of the Adoption of J.L.T.*, 31 Ark. App. 85, 788 S.W.2d 494 (1990). Furthermore, adoption statutes are strictly construed. *Adoption of Lybrand, supra.*

Appellee does not appeal the probate court's finding that appellee's consent was not required under Ark. Code Ann. § 9-9-207(a)(2)(Repl. 1998). Thus, we do not address the issue of appellee's consent.[2] However, it is not mandatory for a court to grant an

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[1] Arkansas Code Annotated section 9-9-209(b)(2) provides, in pertinent part, that "the consent shall state that the person has the right of withdrawal of consent. . . ."

[2] Arkansas Code Annotated section 9-9-214(c) provides:

> If at the conclusion of the hearing the court determines that the required consents have been obtained or excused and the required period for the withdrawal of consent and withdrawal of relinquishment have passed and that the adoption is in the best interest of the individual to be adopted, it may (1) issue a final decree of adoption. . . .

The language of section 9-9-207(a)(2) which the probate judge relied on, provides:

> (a) Consent to adoption is not required of:
>
> . . .
>
> (2) a parent of a child in the custody of another, if the parent for a period of at least one (1) year has failed significantly without justifiable cause (i) to communicate

adoption merely because an individual has forfeited his right to require his consent as a condition precedent to the adoption. Before granting an adoption, the probate court must find that the adoption is in the best interest of the child by clear and convincing evidence. *Manuel v. McCorkle*, 24 Ark. App. 92, 749 S.W.2d 341 (1988).

Appellant's sole contention for reversal is that the probate court should have granted the adoption, and the court's failure to do so was not in the best interest of the children. In support of this contention, appellant directs the court's attention to the testimony of Kathy Nauman, L.C.S.W., and the Adoptive Home Study report prepared by her. Nauman's testimony and report recommended, without reservation, that appellant adopt the twins because appellant "is really the only 'father' they have known and they readily accept him in that role."

Appellee testified that from the time he and Sarah Apel were separated in August 1997 until the final divorce in April of 1998, he did not see the twins. In fact, he admitted that his last visitation was half of a day on April 1, 1998, the date the final divorce was granted to Sarah. He did not see the children again until the day of the adoption hearing, some two years and five months later. Also, appellee admitted his failure to make any arrangements to see the children from the date of the divorce until June of 1999. He does, however, assert that he did send the twins birthday cards and a photograph of himself exhibiting a deer that he had killed. Likewise, appellee testified that he called the children about once per month but was not always able to talk to the children or their mother.

Appellee acknowledged his failure to pay his share of the court-ordered health insurance premiums and medical bills for the children after the bills were presented to him by the children's mother. Instead, he asserts that he paid some money for doctors' bills and insurance premiums before he signed the consent to adoption but did not pay for either thereafter. He admits that his main concern, when he signed the consent, was that he would no longer be financially obligated to support the children and he was "more than happy" for appellant to take over the financial responsibility of his two children. He confirmed that he stopped paying child support after signing the first consent to adoption and stated that he

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with the child or (ii) to provide for the care and support of the child as required by law or judicial decree.

had, in his opinion, given up his rights to the children and was no longer their father.

In December 1999, when appellee received the second consent explaining that an inadvertent error required execution of a second consent, he withdrew his first consent and objected to the adoption. He acknowledged that had there not been an error in the first consent form, he would not have made an effort to withdraw his consent.

Testimony of Sarah Apel, the mother of the children, regarding appellee's contact with the children mirrored that given by appellee. She stated that appellee had not visited the children from the time they were separated until the day the divorce was granted. She further testified that since the time she and appellant married, the twins have lived with her and appellant in their home and that he has provided the "main financial" support and the stability of a home for them. She stated that appellee had been given her phone number and addresses; however, when appellee would call, he would rarely ask to speak to the children. Sarah Apel maintained that appellee never asked the children to come and visit him in Indiana where he lived and that he had not visited the children in Arkansas even though she told him that he would be welcome in her home anytime he wished to visit the children. She specified that appellee had made only one attempt to see his children since December of 1999, the date he filed his contest to the adoption. However, he never showed up for the weekend visit he planned in January 2000.

Sarah Apel confirmed that although appellee had fallen behind on his child support payments at times, he would sometimes send double payments to get caught up with the amount past due. She testified that she did not offer to financially assist appellee with visitation because she felt no obligation to do so.

Appellant testified that from the time he and Sarah Apel were married, the twins lived with them. He noted that he and Sarah have a son together and stated that the twins are like his "own children" and they call him "Daddy." Further, appellant asserted that he understood and accepted the legal responsibilities involved in adopting the twins.

The law will favor a natural parent over all others if all things are equal. *Manuel v. McCorkle*, 24 Ark. App. 92, 749 S.W.2d 341 (1988). Further, this court has recognized that "temporal and

material betterments are not conclusive" to determine the best interest of the child and "consideration must also be given to the fostering of moral, cultural, and spiritual values as well as family relationships." *Id.* at 98. "Best interest does not necessarily mean a higher station in life, and those parents who support their child in their own style of life, however poor or humble, should not be deprived of parental privileges except under compelling circumstances." *Id.* (citing *Bush v. Dietz*, 284 Ark. 191, 680 S.W.2d 704 (1984)). As *Manuel* notes, however, this rule is premised on the presumption that the natural parent is providing care and support for the children to the best of his abilities, regardless of how meager those abilities may be.

Parental rights are not proprietary ones and are subject to the performance of duties and obligations of a parent to care for and support a child, and the law only protects the rights of parents so long as the parent discharges these duties. *Manuel*, 24 Ark. App. at 98-99. The preference for natural parents should not be continued beyond the point where these duties and obligations have been ignored or shifted to others. *Id.* at 99 (citing *Watkins v. Dudgeon*, 270 Ark. 516, 606 S.W.2d 78 (Ark. App. 1980)). *See also Pender v. McKee*, 266 Ark. 18, 582 S.W.2d 929 (1979).

> It has been stated that this preference for the natural parents is based on the presumption that they will take care of their children, bring them up properly, and treat them with kindness and affection, but when that presumption has been dissipated the courts will interfere and place the child where those duties will be discharged by someone more willing and able to do so.

Manuel, 24 Ark. App. at 99, 749 S.W.2d at 343 (citing *Loveless v. May*, 278 Ark. 127, 644 S.W.2d 261 (1983); *Brown v. Johnson*, 10 Ark. App. 110, 661 S.W.2d 443 (1983).

As father of these two children, now five years old, appellee has done little more than reluctantly send court-ordered child-support payments and insurance premiums since the time of his divorce from their mother. Although the testimony reflects that he has phoned the mother since the time of the divorce, the evidence indisputably shows that from April 1, 1998, until September 14, 2000, appellee had not seen his children and had made little or no effort to do so. Other than reluctantly paying the court-ordered child support, appellee has ignored his parental duties and has shifted the duties of being a parent onto appellant. It has been

appellant who has fulfilled the role of father to the twins by providing them not only financial support but also a family life and a home.

Appellee essentially abandoned the children for more than three years, content to have appellant assume his parental duties. Therefore, we cannot say that it was in the best interest of the twins for the adoption to be denied. Thus, we reverse.

Reversed and remanded for entry of an order granting the adoption.

VAUGHT and BAKER, JJ., agree.

Wayne Curtis POORE *v.* Diann POORE

CA 01-510 61 S.W.3d 912

Court of Appeals of Arkansas
Division I
Opinion delivered December 5, 2001

Bullock & Van Kleef, by: *John D. Van Kleef*, for appellant.

Peel Law Firm, P.A., by: *Jennifer L. Modersohn*, for appellee.

JOHN E. JENNINGS, Judge. Wayne Curtis Poore appeals from the dismissal of his complaint for divorce in which he sought to end his two-year marriage to appellee, Diann Poore. For reversal, he contends that the chancellor erred in granting her motion for a directed verdict, finding that he had failed to establish grounds for a divorce, and that the chancellor erred in denying his motion for a new trial. We find no error and affirm.

In October 2000, appellant filed a complaint for divorce in Yell County on grounds of general indignities. Appellee answered the complaint and filed a counterclaim for divorce, but she later withdrew her counterclaim and amended her answer to contest appellant's entitlement to a divorce.

At the hearing, appellant testified that their marital problems began in February 2000 when he returned to his former job that required him to travel. He said that he had not been happy with the job he had taken to be closer to home and that he had wanted to go back to the previous job that he had enjoyed. Appellant testified that appellee wanted him to be at home and that his decision hurt and upset her. He said that appellee, who was somewhat older than he, was afraid that he would find someone younger or that he would want children someday. He said that they argued in circles about it every day and that there were times when he would hang the phone up on her or would not go home so as to avoid a fight. Appellant testified that towards the end appellee cursed at him and suggested that he needed counseling. He said that the arguments made him miserable, that he did not want to live a life of constant arguing, and that he did not want to be married to appellee any longer.

Appellee testified that they had discussed appellant's job change but did not argue about it. She said that his decision bothered her because she wanted him to be at home and that she had just told him that she missed him when he was away. Appellee said that his

traveling made the marriage difficult for her because she does not like to be alone and would rather have her husband around. She said that they had dated for four years before getting married and that she was not insecure about him finding someone else or wanting children. Appellee testified that she did not want a divorce.

Lonnie Poore, appellant's mother, testified that appellee confided in her that they had been fighting about appellant's job and his being away from home. She said that appellee was worried about appellant cheating on her and that appellee wanted her to talk to appellant about why he was not staying at home. Ms. Poore testified that she witnessed one argument between the two. She said that they stopped talking when she got there but that appellee was crying. Ms. Poore did not feel that there was any way the two of them could get along.

On this evidence, the chancellor granted appellee's motion for a directed verdict in which she argued that appellant had failed to prove or corroborate his grounds for divorce. Appellant challenges this ruling in his first point on appeal.

Divorce is a creature of statute and can only be granted upon proof of a statutory ground. *Gunnell v. Gunnell,* 30 Ark. App. 4, 780 S.W.2d 597 (1989). Appellant's action for divorce was based on the ground of general indignities. *See* Ark. Code Ann. § 9-12-301(4) (Repl. 1998). In order to obtain a divorce on that ground, the plaintiff must show a habitual, continuous, permanent, and plain manifestation of settled hate, alienation, and estrangement on the part of one spouse, sufficient to render the condition of the other intolerable. *Russell v. Russell,* 19 Ark. App. 119, 717 S.W.2d 820 (1986). In *Bell v. Bell,* 105 Ark. 194, 150 S.W. 1031 (1912), the supreme court set out what evidence is necessary to establish indignities as a ground for divorce:

> It is for the court to determine whether or not the alleged offending spouse has been guilty of acts or conduct amounting to rudeness, contempt, studied neglect or open insult, and whether such conduct and acts have been pursued so habitually and to such an extent as to render the condition of the complaining party so intolerable as to justify the annulment of the marriage bonds. This determination must be based upon facts testified to by witnesses, and not upon beliefs or conclusions of the witnesses. It is essential, therefore, that proof should be made of specific acts and language showing the rudeness, contempt, and indignities complained of. General statements of witnesses that the defendant was rude or

> contemptuous toward the plaintiff are not alone sufficient. The witness must state facts — that is, specific acts and conduct from which he arrives at the belief or conclusion which he states in general terms — so that the court may be able to determine whether those acts and such conduct are of such nature as to justify the conclusion or belief reached by the witness. *The facts, if testified to, might show only an exhibition of temper or of irritability probably provoked or of short duration. The mere want of congeniality and the consequent quarrels resulting therefrom are not sufficient to constitute that cruelty or those indignities which under our statute will justify a divorce.*

Id. at 195-196, 150 S.W. at 1032 (emphasis supplied). Although *Bell* was decided long ago, it remains the law that mere incompatibility is not grounds for divorce in this state. *See Wiles v. Wiles,* 246 Ark. 289, 437 S.W.2d 692 (1969); *Settles v. Settles,* 210 Ark. 242, 195 S.W.2d 59 (1946); *Hair v. Hair,* 270 Ark. 948, 607 S.W.2d 72 (Ark. App. 1980).

A directed verdict is only proper where the evidence, when viewed in the light most favorable to the nonmovant, is so insubstantial as to require a jury verdict for the movant to be set aside. *Potlatch Corp. v. Triplett,* 70 Ark. App. 205, 16 S.W.3d 279 (2000). On appeal from a chancery court's order granting a directed verdict, the court on appeal must decide specifically whether the plaintiff has made out a *prima facie* case of entitlement to the relief requested. *Jamison v. Estate of Goodlett,* 56 Ark. App. 71, 938 S.W.2d 865 (1997). This requires that the evidence presented by the plaintiff must be given the highest probative value, taking into account all reasonable inferences therefrom. *Potlatch Corp. v. Triplett, supra.*

Appellant's proof, given its highest probative value, showed that the parties had fallen into disagreement over appellant's decision to return to a job that kept him away from home. As we have pointed out, however, mere uncongeniality and quarrelsomeness, without more, are not sufficient to sustain a charge of general indignities. *See, e.g., Wiles v. Wiles,* 246 Ark. 289, 437 S.W.2d 792 (1969); *Settles v. Settles,* 210 Ark. 242, 195 S.W.2d 59 (1946); *Bell v. Bell, supra; Hair v. Hair,* 270 Ark. 948, 607 S.W.2d 72 (Ark. App. 1980). The conduct complained of must show settled hate and a manifestation of alienation and estrangement, and it must have been conducted systematically and habitually over a period of time as to make the complaining party's condition in life intolerable. *See Settles v. Settles, supra; Hair v. Hair, supra.* We think that the chancellor could reasonably conclude that appellant failed to make a *prima*

facie case of general indignities, and we find no error in his granting a directed verdict.

Appellant next argues that the trial court erred in denying his motion for a new trial. In his motion, appellant alleged that appellee had not been truthful in her testimony concerning the withdrawal of her counterclaim, as evidenced by her having filed a complaint for divorce in Faulkner County the day before the hearing. He argued that her chicanery entitled him to a new trial for fraud under Ark. R. Civ. P. 60(c)(4). We find no error. Appellee's testimony on that subject could have had no possible effect on the outcome of the trial. With or without her testimony, appellant's proof of grounds for divorce was insufficient.

Affirmed.

BIRD and ROAF, JJ., agree.

Steven SANDERS *v.* STATE of Arkansas

CA CR 01-262 61 S.W.3d 871

Court of Appeals of Arkansas
Division I
Opinion delivered December 5, 2001

Dale W. Finley, for appellant.

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

JOHN E. JENNINGS, Judge. Steven Sanders was found guilty by a Newton County jury of possession of drug paraphernalia, simultaneous possession of drugs and firearms, possession of methamphetamine, and possession of marijuana. He was sentenced to terms of three years in prison for possession of drug paraphernalia and possession of methamphetamine to be served concurrently with

a ten-year sentence for simultaneous possession of drugs and firearms. He was fined $500 for possession of marijuana. On appeal, he contends that there is insufficient evidence to support his conviction for possession of drug paraphernalia and that the trial court erred in denying his motion to suppress evidence seized in searches of his vehicle and apartment. We find no reversible error and affirm.

On August 31, 1999, officers working under the Fourteenth Judicial District Drug Task Force were executing a search warrant at the residence of Sam Freeman in Newton County. The Freeman property was located northeast of Jasper off a county road. The residence and a shop were in a wooded area and sat at the end of a two-hundred-yard driveway.

At noon, Investigator Greg Harris was searching in the woods about half-way up the driveway when he heard a vehicle coming onto the property. The search was at an advanced stage at that point, and numerous illegal items had been found, including a methamphetamine lab and a stolen vehicle. By the sound of the approaching vehicle, Officer Harris did not believe it to be a police car, and he thought perhaps that personnel from the crime lab had arrived. He dismissed that notion when he heard the vehicle drive up to the residence, stop, and then head back out of the driveway to leave. Officer Harris walked toward the driveway and saw a pickup truck that was being driven by appellant. Harris said that the window was down and that he yelled to appellant to stop. Harris identified himself and asked appellant who he was and why he was there. Appellant told him that he was looking to find a transfer case for his truck. Harris asked appellant why he thought he could find a truck part there, and appellant said that someone had told him that he could. Appellant could not remember who had told him that, however. Harris then asked appellant if he knew who lived there. Appellant replied that he did not know who lived there and that he had not been there before. Harris then asked him how he had found the place, and appellant said that he had been told that the place to find truck parts was in Jasper.

Officer Harris testified that, under the circumstances, appellant's account did not ring true. He considered that the property was not in Jasper but in an out-of-the-way location where there were no signs for guidance and that this was the scene of a methamphetamine lab. Harris said that he asked appellant if there were any drugs or weapons in the truck. Appellant said that there were none. Harris testified that he asked appellant if he had a problem with him

checking and that appellant gave him permission to search the truck.

Investigator David Small testified that he overheard appellant consent to a search of the truck. In the search, he found a gray box under the driver's seat that contained a handgun. A cigar case was found on the front seat under either a towel or a piece of clothing. The cigar case contained an eighth of one ounce of marijuana and four grams of methamphetamine. Appellant was then placed under arrest.

Paul Woodruff, an officer with the Harrison Police Department, applied for and obtained a search warrant for appellant's apartment in Harrison. In the course of that search, officers found on the kitchen counter a receipt from Wal-Mart that listed the purchase of a cigar case.

Appellant testified at the suppression hearing that he had been having trouble with the transfer case on the front differential of his truck and that he had gone to the Freeman property to find the part he needed. He said that he did not know Mr. Freeman, but that he knew Freeman had a salvage yard and that he did mechanic work. Appellant testified that he drove to the shop where he met Officer Gary Jenkins, and he said that he asked Jenkins if this was the Freeman place since he had not been there before. Appellant said that Jenkins told him that it was Freeman's property but that Freeman was in jail. Appellant said Jenkins let him go but that he was stopped by Officer Darin Spears as he was backing out to leave. Appellant said that Spears also let him go after confirming with Officer Jenkins that Jenkins had already spoken to him. Appellant testified that Officer Harris then stopped him on the driveway and said, "Did you think that you'd leave without being searched when there's been two meth labs discovered?" Appellant said that Harris immediately ordered him out of the truck and told him that a warrant was not needed for him to search the truck. Appellant stated that Harris asked him if he was going to give them a hard time about the search. Appellant testified that he did not consent to a search of his truck, but that he only agreed that he would not give them a hard time.

Officer Harris testified in rebuttal that he did not tell appellant that he was going to search the truck or that a warrant was not necessary for him to do so.

Appellant's drug-paraphernalia conviction was based on his possession of the cigar case that contained marijuana and methamphetamine. Appellant argues that there is insufficient evidence to support this conviction because it is unreasonable to interpret the statute so broadly as to criminalize his possession of that object. We disagree.

The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Ferguson v. State*, 343 Ark. 159, 33 S.W.3d 115 (2000). Evidence is substantial if it is of sufficient force that it would compel a conclusion one way or the other without recourse to speculation and conjecture. *Rose v. State*, 72 Ark. App. 175, 35 S.W.3d 365 (2000). In determining whether there is substantial evidence, we review the evidence in the light most favorable to the State. *Hale v. State*, 34 Ark. 62, 31 S.W.3d 850 (2000).

Arkansas Code Annotated section 5-64-403(c)(1) (Supp. 1999) provides in pertinent part that it is unlawful for any person to use drug paraphernalia to store, contain, or conceal a controlled substance. The term "drug paraphernalia" includes all equipment, products and materials of any kind which are used to store, contain, or conceal controlled substances. Ark. Code Ann. § 5-64-101(v) (Repl. 1997). Specifically included within the definition of drug paraphernalia are containers and other objects that are used in storing or concealing controlled substances. Ark. Code Ann. § 5-64-101(v)(10) (Repl. 1997). Relevant factors in determining whether an object is drug paraphernalia include the proximity of the object to controlled substances, and the existence and scope of legitimate uses for the object in the community. Ark. Code Ann. § 5-64-101(v) (Repl. 1997).

The supreme court has held that the term "drug paraphernalia" is not unconstitutionally vague. *Moore v. State,* 297 Ark. 296, 761 S.W.2d 894 (1988); *see also Crail v. State,* 309 Ark. 120, 827 S.W.2d 157 (1992). The court has also ruled that there was sufficient evidence to support a conviction for this offense where the appellant was in possession of a vial that contained cocaine residue. *Edwards v. State,* 300 Ark. 4, 775 S.W.2d 900 (1989). *See also, e.g., Ramey v. State,* 42 Ark. App. 242, 857 S.W.2d 828 (1993).

Here, the appellant was in possession of a cigar case in which methamphetamine and marijuana were hidden. The jury could conclude that the case was used as a container to conceal

controlled substances. Such an object fits squarely within the statutory definition of drug paraphernalia. We cannot say there is no substantial evidence to support the guilty verdict.

Appellant next argues that the trial court erred by not suppressing the evidence found in his vehicle. He contends that the stop of his vehicle was not justified under either Rule 3.1 or 2.2 of the Rules of Criminal Procedure. We hold that the encounter was authorized under Rule 2.2.

Rule 2.2(a) provides:

> A law enforcement officer may request any person to furnish information or otherwise cooperate in the investigation or prevention of crime. The officer may request the person to respond to questions, to appear at a police station, or to comply with any other reasonable request.

The supreme court has interpreted Rule 2.2 to provide that an officer may approach a citizen in much the same way a citizen may approach another citizen and request aid or information. *State v. McFadden,* 327 Ark. 16, 938 S.W.2d 797 (1997). However, the approach of a citizen pursuant to a policeman's investigative law enforcement function must be reasonable under the existent circumstances and requires a weighing of the government's interest for the intrusion against the individual's right to privacy and personal freedom. *Baxter v. State,* 274 Ark. 539, 626 S.W.2d 935 (1982). To be considered are the manner and intensity of the interference, the gravity of the crime involved, and the circumstances attending the encounter. *Id.* The court has clarified that an encounter under this rule is permissible only if the information or cooperation sought is in aid of an investigation or the prevention of a particular crime. *Stewart v. State,* 332 Ark. 138, 964 S.W.2d 793 (1998).

For example, in *Baxter v. State, supra,* an officer stopped the appellant's vehicle in a park that was near a jewelry store that had just been robbed to ask if anyone had been seen in the park. As it turned out, the vehicle was occupied by the robbers. The supreme court held that the encounter was permissible under Rule 2.2 because the officer was seeking assistance in the investigation of a particular crime. *See also, Blevins v. State,* 310 Ark. 538, 837 S.W.2d 879 (1992). In *Bernal v. State,* 48 Ark. App. 175, 892 S.W.2d 537 (1995), a narcotics dog indicated that two suitcases on a bus contained drugs. The officer approached the appellant after he had exited the bus and asked appellant for identification. We held that

Rule 2.2 authorized the officer to approach the appellant in the course of investigating the drug-related crime. By contrast, in *Meadows v. State,* 269 Ark. 380, 602 S.W.2d 636 (1980), officers approached the appellant at an airport because he and a companion were looking back and had quickened their pace as they were followed by the officers in the terminal. The court held that the encounter was not justified under Rule 2.2 because the officers were not investigating any particular crime.

In the case at bar, the officers were executing a search warrant and had found evidence of illegal activity when appellant came onto the property. It was the scene of a clandestine methamphetamine lab located in a remote area. Under the investigatory authority of Rule 2.2, it was permissible for the officers to approach the appellant to ask for identification and to inquire about the purpose of his visit.

Appellant further argues that the trial court erred in finding that he consented to the search of his truck. The testimony on this subject was conflicting, as the officers testified that appellant gave his consent while appellant testified that he did not. Conflicts in testimony are for the trial judge to resolve, and the judge was not required to believe any witness's testimony, especially that of the accused, since he is the person most interested in the outcome of the proceedings. *Tabor v. State,* 333 Ark. 429, 971 S.W.2d 227 (1998).

In reviewing a trial court's denial of a motion to suppress, the appellate court makes an independent examination based on the totality of the circumstances and will reverse only if the ruling was clearly against the preponderance of the evidence. *Hadl v. State,* 74 Ark. App. 113, 47 S.W.3d 897 (2001). We cannot say that the trial court's decision pertaining to the search of appellant's truck is clearly against the preponderance of the evidence.

Appellant's third argument is that there was no probable cause for the issuance of a warrant to search his apartment. The warrant was obtained based on the affidavit of Officer Woodruff and was predicated on the discovery of the weapon and drugs found in appellant's truck.

Rule 13.1 of the Rules of Criminal Procedure sets out the requirements for the issuance of a search warrant. The rule requires the affidavit to recite facts and circumstances tending to show that such persons or things are in the places to be searched.

The task of the magistrate who issues the warrant is simply to make a practical, common-sense decision whether, given all of the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Illinois v. Gates,* 462 U.S. 213 (1983). We apply the totality-of-the-circumstances test in determining whether the magistrate had a substantial basis for concluding that probable cause existed to issue the warrant. *Stephenson v. State,* 71 Ark. App. 254, 29 S.W.3d 744 (2000).

In *Yancey v. State,* 345 Ark. 103, 44 S.W.3d 315 (2001), the appellant and a man named Lee Cloud were seen tending marijuana plants in a wooded area six miles from Cloud's residence. After watering the plants, the men drove to Cloud's house. Search warrants for both men's homes were issued based on these observed events. The appellant argued on appeal that those facts did not establish probable cause for the search of his home. The supreme court held that, for a search warrant to issue, either direct or circumstantial evidence must be provided to show that contraband or evidence of a crime is likely to be found in the place to be searched and that there must be a factual nexus between the evidence sought and the place to be searched. The court ruled that probable cause was lacking because there was no evidence to suggest that the homes were in any way associated with criminal activity.

The court's holding in *Yancey* applies here. The search of appellant's apartment was authorized solely on the evidence found in appellant's vehicle. There was no evidence in the affidavit linking appellant's apartment with his distant possession of contraband. Therefore, we must conclude that the warrant was invalid.

Nevertheless, we affirm the trial court's denial of the motion to suppress. The court in *Yancey* concluded that suppression was not warranted based on the good-faith exception to the exclusionary rule established in *United States v. Leon,* 468 U.S. 897 (1984). In *Leon,* the Court held that an officer's objective, good-faith reliance on a facially valid warrant will avoid the application of the exclusionary rule in the event that the magistrate's assessment of probable cause is found to be in error. This is because the exclusionary rule is designed to deter police misconduct rather than to punish errors of judges and magistrates. *Herrington v. State,* 287 Ark. 228, 697 S.W.2d 899 (1985). In applying the exception, the *Yancey* court noted that courts in other jurisdictions were divided over the issue of probable cause under similar facts and that the officers were

acting in good faith on the determination of probable cause made by the magistrate. We reach the same conclusion here and hold that the trial court did not err in denying the motion to suppress.

Appellant further contends that the warrant was defective because it authorized the officers to search for "stolen property," the "fruits of any crime," and numerous items that he contends are unconnected to a search for controlled substances. Appellant concedes that courts have generally held that the inclusion of such broad language does not invalidate a warrant, but he argues that this language renders the search unreasonable from its inception. Appellant has cited no authority to support this proposition nor does he provide a convincing argument. For this reason, we need consider the issue no further. *Bunch v. State*, 344 Ark. 730, 43 S.W.3d 132 (2001).

Affirmed.

BIRD, J., agrees.

ROAF, J., concurs.

ANDREE LAYTON ROAF, Judge, concurring. I reluctantly concur in affirming Steven Sanders' conviction for possession of drug paraphernalia, a felony for which he received a three-year sentence in addition to the ten-year sentence he received for possession of the contraband that was found inside the cigar case. The relevant statutory provision, Ark. Code Ann. § 5-64-101(v)(10), defines drug paraphernalia as follows:

> (v) The term "drug paraphernalia" means all equipment, products and materials of any kind which are used, . . . in . . . storing, containing, concealing, . . . a controlled substance. . . . It includes, but is not limited to:
>
> . . . .
>
> (10) Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances;

A cigar case is certainly a "product" or "material" and is a "container or other object." In this instance, Sanders used it to hold his drugs, and, while it may be argued that he was not "storing" or

"concealing" the drugs, the case certainly contained the drugs as provided in § 101(v).

Sanders argues that the evidence is insufficient to support his conviction for simply possessing the cigar case because it is a container that has no special relation to or adaptation for use with controlled substances. He contends that the drug paraphernalia statute, Ark. Code Ann. § 5-64-403 (1999), has been given an "unreasonable interpretation" not intended by our legislature in this instance. Sanders points out and, unfortunately, he is correct, that such an interpretation would likewise support a felony conviction for such an item as a paper bag, an envelope, a baseball cap, a cigarette package, or even a pants pocket.[1] Sanders's argument makes good common sense, however, that is not the kind of authority that this court can employ. Moreover, Sanders acknowledges that our supreme court has held that this statute is not unconstitutionally vague, *see Moore v. State*, 297 Ark. 296, 761 S.W.2d 894 (1988), *Edwards v. State*, 300 Ark. 4, 775 S.W.2d 900 (1989), *Crail v. State*, 309 Ark. 120, 827 S.W.2d 157 (1992), as has the Eighth Circuit court of appeals in *Garner v. Whitt*, 726, F.2d 1274 (8th Cir. 1984), albeit under different facts.

Even so, there is support for Sanders's argument in both Arkansas case law and cases from other jurisdictions. In *Dickerson v. State*, 324 Md. 163, 596 A.2d 648 (1991), the Maryland Court of Appeals held that the appellant could be convicted only of possession of cocaine with intent to distribute and not also of use of drug paraphernalia, where both convictions were based on possession of a single vial of cocaine. The Maryland drug paraphernalia statute provided in a section almost identical to Arkansas's that, "[i]t is unlawful for any person to use drug paraphernalia to . . . store, contain or conceal a controlled dangerous substance . . ." and contained a definitions section likewise identical to ours. The

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[1] *Webster's New Twentieth Unabridged Dictionary* defines "paraphernalia" as

1. personal belongings;

2. Any collection of articles usually used in some activity; equipment, apparatus; trappings; gear.

However, Ark. Code Ann. § 1-2-203(b) (Repl. 1996), a general provision of statutory construction applicable to all cases, civil and criminal, provides that "[w]henever, in any statute, words importing the plural number are used in describing or referring to any matter, parties, or persons, any single matter, party, or person shall be deemed to be included although distributive words may not be used," consequently, a conviction for possession of a single item of paraphernalia does not run afoul of the mandate that criminal statutes be strictly construed in favor of an accused.

Maryland court found persuasive the appellant's argument that the Legislature did not intend to permit dual convictions where the drug paraphernalia conviction is premised solely on the use of a container in which the contraband forming the basis for the drug offense is found.

In Arkansas, there are many cases, too numerous to list, involving a conviction for possession of multiple drug-related items, or "paraphernalia," and where drugs and paraphernalia items were also found in a "box" or "bag" or other similar, otherwise innocuous container. While these cases are numerous, it is significant that I have not found any of these cases to include, directly or by inference, the box or bag within paraphernalia enumerated or addressed in the court's analysis. *See e.g., Hughes v. State*, 74 Ark. App. 126 (2001) (trash bags in which paraphernalia was found not discussed in analysis); *Thompson v. State*, 333 Ark. 92, 966 S.W.2d 901 (1998) (eyeglass case not analyzed as drug paraphernalia); *White v. State*, 47 Ark. App. 127, 886 S.W.2d 876 (1994) (*Crown Royal* bag containing drugs not discussed in sufficiency analysis); *Bond v. State*, 45 Ark. App. 177, 873 S.W.2d 569 (1994) (pipe as paraphernalia, but paper bag marijuana found in not discussed).

However, there are at least two Arkansas cases in which a paraphernalia conviction was based on possession of a single item. In *Edwards v. State, supra*, the supreme court found that a small vial containing cocaine residue was sufficient evidence to support the conviction because the statute specifically included "cocaine vials." *See* Ark. Code Ann. § 5-64-101(v)(12)(F). In *Crail v. State, supra*, the appellant's felony conviction was based on his possession of a small white pipe that was found to have been used to smoke marijuana, while he received only a misdemeanor conviction for the marijuana he possessed. However, Crail's appeal of the paraphernalia conviction was based on an equal protection and void-for-vagueness challenge to the paraphernalia statute. Pipes are also specifically listed as paraphernalia in § 101(v)(12)(A), and it can be argued that these two cases are therefore distinguishable because they involve items bearing a special relation to the use of contraband, however, this is an argument that would best be addressed to our supreme court.

Even a dog gets one bite; surely even a miscreant such as Mr. Sanders should get one paper sack, or, in this instance, one cigar case to carry his drugs around in without being twice made a felon for it. However, it is for the Legislature to make the criminal laws, and the prosecutor to employ his very broad power and discretion

to determine when and if a charge is to be brought. We can be at least relieved that we have not yet seen the conviction based on possession of a paper sack that Sanders warns of. Perhaps our supreme court would revisit the constitutionality of the paraphernalia statute if that occurs. Until then, because this court lacks the discretion of a legislature or a prosecutor, or the ability to overturn supreme court precedent, I must agree to affirm this conviction.

Larry Joe STIVERS *v.* STATE of Arkansas

CA CR 00-947 61 S.W.3d 204

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

Montgomery, Adams & Wyatt, PLC, by: *James W. Wyatt*, for appellant.

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

JOHN E. JENNINGS, Judge. Larry Stivers was found guilty of possession of marijuana, possession of methamphetamine, and the simultaneous possession of drugs and firearms, and was sentenced to ten years' imprisonment. He argues on appeal that the evidence was insufficient to convict him on the charge of simultaneous possession and that the trial court erred in denying his motion to suppress evidence. We reverse on appellant's second point because we hold that the affidavit for the search warrant was insufficient to justify a nighttime search.

In the summer of 1999, police officers obtained a search warrant to search Stivers's home in Carlisle, Arkansas. The warrant was served at 1:18 a.m., and the officers found methamphetamine, marijuana, a .22 caliber rifle, and a 12-gauge shotgun.

Appellant's first argument, that the evidence was insufficient to support his conviction on the charge of simultaneous possession of drugs and firearms, can be easily disposed of. Stivers concedes that he did not move for a directed verdict on this count. He may not now raise an argument he did not make to the trial court. *Love v. State*, 324 Ark. 526, 922 S.W.2d 701 (1996).

Stivers's second point on appeal is that the trial court erred in concluding that the affidavit for search warrant was sufficient to authorize a nighttime search.[1] We agree.

The warrant, issued by the Carlisle Municipal Court judge, stated that "because the items to be seized are in imminent danger of destruction or removal, a nighttime search is authorized."

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[1] Although the State argues that the trial court did not reach the merits of appellant's argument, we conclude that it clearly did.

The affidavit of Carlisle Police Officer Eric Franks recited that: (1) a part-time patrolman told him that his wife had become ill due to a strong chemical odor coming from their neighbor's house; (2) Franks went to the patrolman's house and also smelled the chemical odor coming from appellant's house; and another officer confirmed that he also smelled a chemical odor; (3) Franks was told that a reliable informant, whose information had resulted in convictions for narcotics violations on four separate occasions, told police that appellant was "cooking" methamphetamine; and (4) an officer told Franks that appellant had been present at a residence where police had seized a clandestine methamphetamine lab.

The last paragraph of the affidavit states:

> WHEREFORE, Affiant requests that a search and seizure warrant be issued, allowing a nighttime search, because there is an open drape on the front window of the residence allowing an unobstructed view of N. Williams Ave. The affiant believes that Stivers is aware of the increased law enforcement presence and interest in the area of his residence, and fears that Stivers will respond by attempting to remove or destroy any evidence of illegal activity.

Clearly the affidavit established an adequate basis for the issuance of a warrant. The question is whether it established a sufficient basis for a nighttime search.

Rule 13.2(c) of the Arkansas Rules of Criminal Procedure provides:

> Except as hereafter provided, the search warrant shall provide that it be executed between the hours of six a.m. and eight p.m., and within a reasonable time, not to exceed sixty (60) days. Upon a finding by the issuing judicial officer of reasonable cause to believe that:
>
> > (i) the place to be searched is difficult of speedy access; or
> >
> > (ii) the objects to be seized are in danger of imminent removal; or
> >
> > (iii) the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy;
>
> the issuing judicial officer may, by appropriate provision in the warrant, authorize its execution at any time, day or night, and

> within a reasonable time not to exceed sixty (60) days from the date of issuance.

A factual basis for a nighttime search is required. *Richardson v. State*, 314 Ark. 512, 863 S.W.2d 572 (1993). The affiant's statement that he "believes that Stivers is aware of the increased law enforcement presence" is conclusory. So is the affiant's statement that he "fears Stivers will respond by attempting to remove or destroy any evidence of illegal activity." Conclusory statements in the affidavit are not adequate to support a nighttime search warrant. *Garner v. State*, 307 Ark. 353, 820 S.W.2d 446 (1991).

In *Fouse v. State*, 337 Ark. 13, 989 S.W.2d 146 (1999), the officer's affidavit stated:

> It has been my experience and I know that the process of manufacturing methamphetamine takes approximately four hours and that the chemicals used to manufacture methamphetamine are volatile and subject to explode or at the least cause a fire and can be a danger to surrounding houses in a residential setting such as this. There is also an imminent danger that the items and hardware used to manufacture methamphetamine may be moved or destroyed and the methamphetamine produced may be transported and/or sold.

The supreme court held that these words were conclusory. The court also said:

> Nor can we agree with the trial court that a strong odor of ether detected at the Fouse residence at 9:00 p.m. on December 22, 1997, was a reasonable basis for concluding that methamphetamine was to be removed or sold or both within the next four hours and that a nighttime search was justified.

The affidavit in the case at bar also recited that the Stivers home had an "open drape." While this is a statement of fact and not a conclusion, this fact alone is not enough to support the magistrate's determination that the evidence to be seized was in danger of imminent destruction or removal.

Reversed and remanded.

CRABTREE and BAKER, JJ., agree.

Carl RUDD *v.* STATE of Arkansas

CA CR 01-431 61 S.W.3d 885

Court of Appeals of Arkansas
Division III
Opinion delivered December 5, 2001
[Petition for rehearing denied January 9, 2002.]

Law offices of Charles Karr, P.A., by: *Shane Roughley*, for appellant.

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

JOHN B. ROBBINS, Judge. Appellant Carl Rudd appeals the revocation of his suspended sentence by the Crawford County Circuit Court, for which he was sentenced to ten years in the Arkansas Department of Correction. Appellant argues on appeal that (1) the circuit court lacked subject-matter jurisdiction to revoke his suspended sentence due to the improper passage of a constitutional amendment, and (2) there was insufficient evidence upon which to support revocation. We disagree and affirm.

Rudd pleaded *nolo contendere* to conspiracy to deliver methamphetamine and agreed to ten years of suspended imposition of sentence with one year of supervised probation and payment of a $20 monthly probation fee. As part of his agreed conditions, Rudd was required to attend drug counseling that would be monitored by the adult probation office by weekly reports to his probation officer, his driver's license was suspended for six months, and he was also subject to the condition of not violating any law punishable by imprisonment. The judgment and commitment order was filed of record on September 22, 2000. On January 5, 2001, the State petitioned to revoke Rudd's suspended sentence, alleging that Rudd had failed to report to the adult probation office as required, had failed to pay his probation fees, and had committed a new offense, terroristic threatening, on or about November 21, 2000. After a hearing, the trial court found that appellant failed to comply with the orders, specifically regarding drug rehabilitation, performing community service, and violating the law by forcibly taking money from the victim who was allegedly the subject of terroristic threatening.

We consider sufficiency of the evidence before addressing other alleged trial errors. *Williams v. State*, 338 Ark. 97, 106, 991 S.W.2d 565 (1999). We do so in order to preserve a defendant's right to freedom from double jeopardy. *Rankin v. State*, 329 Ark. 379, 948 S.W.2d 397 (1997); *Williams v. State*, 329 Ark. 8, 946 S.W.2d 678 (1997). *See also Burris v. State*, 330 Ark. 66, 70, 954 S.W.2d 209 (1997).

We address the sufficiency of the evidence in support of the State's petition for revocation, contrary to the State's assertion that this issue is not preserved for appellate review. The State argues that because Rudd failed to move for directed verdict in compliance with Ark. R. Crim. P. 33.1, we cannot do so. We disagree. Our supreme court recently decided in *Barbee v. State*, 346 Ark. 185, 56 S.W.3d 370 (2001), that a defendant in a revocation proceeding is not required to comply with Ark. R. Crim. P. 33.1 regarding motions for directed verdict in order to preserve the issue of the sufficiency of the evidence for review, overruling *Miner v. State*, 342 Ark. 283, 28 S.W.3d 280 (2000), which had held otherwise.

To revoke probation or a suspension, the trial court must find by a preponderance of the evidence that the defendant inexcusably violated a condition of that probation or suspension. Ark. Code Ann. § 5-4-309 (Repl. 1997); *Brandon v. State*, 300 Ark. 32, 776 S.W.2d 345 (1989). Of course, the State bears the burden of

proof. *Petty v. State*, 31 Ark. App. 119, 788 S.W.2d 744 (1990). In order for appellant's suspended sentence to be revoked, the State need only prove that the appellant committed one violation of the conditions. *Ross v. State*, 22 Ark. App. 232, 738 S.W.2d 112 (1987). When appealing a revocation, the appellant has the burden of showing that the trial court's findings are clearly against the preponderance of the evidence. Ark. Code Ann. § 5-4-309(d) (Repl.1997); *Tipton v. State*, 47 Ark. App. 187, 887 S.W.2d 540 (1994); *Russell v. State*, 25 Ark. App. 181, 753 S.W.2d 298 (1988).

With these enunciated rules to guide our review, we examine the evidence presented against appellant Rudd at the revocation hearing. Appellant's probation officer, Jeffrey David Landers, testified that appellant was supposed to report to him on a weekly basis but that appellant reported only twice between pronouncement of his sentence to probation, September 11, 2000, and the date of the revocation hearing, January 22, 2001. Mr. Landers further testified the appellant had failed to pay his probation fees as ordered.

The alleged victim of the terroristic threat testified that appellant forcibly took $60 from her and asked her what she was going to do about it. A few days later, the victim saw appellant again and the two got into an argument, yelling at one another over the money, and appellant threatened to kill her.

Appellant testified in his own defense. Appellant did not contest that he had failed to report to his probation officer as required or that he had failed to pay his probation fees; he admitted as much. Appellant contested that he committed terroristic threatening. When appellant testified, he stated that he did take the victim's $60 and spent it under the pretext that he was going to buy her marijuana with it. Appellant stated that they saw each other again about five days later and argued about the money but that he had not ever threatened to kill her. The trial court announced that it was revoking appellant's probation at the conclusion of the hearing.

Appellant bases his argument on the sufficiency of the evidence as to the proof that he committed terroristic threatening. However, the State need prove only one violation of a condition of probation, which it accomplished and which was not contested but admitted. *See Ramsey v. State*, 60 Ark. App. 206, 209, 959 S.W.2d 765, 767 (1998). There was sufficient evidence upon which to revoke appellant's probation.

Appellant's alternative argument on appeal is that the trial court lacked jurisdiction[1] to enter a sentence on his plea of *nolo contendere* to conspiracy to deliver methamphetamine, the underlying offense for his suspended sentence and probation that was later revoked. Appellant bases this argument on his assertion that Amendment 21 to the Arkansas Constitution was not adopted in compliance with constitutional requirements, and thus the trial court lacked the jurisdiction to prosecute him, as a defendant, upon an information filed by the prosecuting attorney, but could have only proceeded by a grand-jury indictment. Thus, appellant argues, because he was charged by information, an invalid means to be charged, the trial court lacked jurisdiction to convict him on his *nolo contendere* plea and, therefore, lacked jurisdiction to revoke any probation based upon that conviction.

The State counters by pointing out that if appellant's argument is that Amendment 21 is unconstitutional, then his argument is barred for failure to raise it to the trial court. With this, we agree. *See, e.g., Woods v. State*, 342 Ark. 89, 27 S.W.3d 367 (2000); *Nance v. State*, 339 Ark. 192, 4 S.W.3d 501 (1999); *Tabor v. State*, 333 Ark. 429, 971 S.W.2d 227 (1998); *Claiborne v. State*, 319 Ark. 537, 893 S.W.2d 324 (1995). Even constitutional arguments are waived when they are not argued below. *Jordan v. State*, 327 Ark. 117, 939 S.W.2d 255 (1997).

While it is true, as a general proposition, that the issue of subject-matter jurisdiction may be raised at any time, even for the first time on appeal, *see Pike v. State*, 344 Ark. 478, 40 S.W.3d 795 (2001), and *Lambert v. State*, 286 Ark. 408, 692 S.W.2d 238 (1985), appellant's contention that the trial court lacked jurisdiction is premised entirely upon the unconstitutionality of Amendment 21. However, Amendment 21 has never been adjudged to be constitutionally deficient and, for the reasons stated above, appellant may not now raise the issue of its constitutionality. Consequently, appellant has no basis for challenging on appeal the jurisdiction of the trial court in the proceedings below.

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[1] Although appellant characterizes the trial court proceeding in his original prosecution, which was commenced by the prosecutor's information, as one without jurisdiction, he does not contend that the Crawford County Circuit Court lacked jurisdiction over criminal prosecutions. Because of our disposition of this case, it makes no difference whether the issue should more accurately be characterized as an improper exercise of jurisdiction rather than a lack of jurisdiction, so we also will refer to the issue as one pertaining to a lack of jurisdiction.

Moreover, even if the validity of Amendment 21 were properly before us, appellant is incorrect in his argument that it was not validly adopted. Section 22 of Article 19 of the Arkansas Constitution provides the manner in which proposals to amend the Constitution may be submitted to the people by the General Assembly. It reads as follows:

> Sec. 22. Either branch of the General Assembly at a regular session thereof may propose amendments to this Constitution, and, if the same be agreed to by a majority of all members elected to each house, such proposed amendments shall be entered on the journals with the yeas and nays, and published in at least one newspaper in each county, where a newspaper is published, for six months immediately preceding the next general election for Senators and Representatives, at which time the same shall be submitted to the electors of the State for approval or rejection; and if a majority of the electors voting at such election adopt such amendments the same shall become a part of this Constitution; but no more than three amendments shall be proposed or submitted at the same time. They shall be so submitted as to enable the electors to vote on each amendment separately.

See also McCuen v. Harris, 321 Ark. 458, 902 S.W.2d 793 (1995). It is compliance with Article 19, § 22, in the adoption of Amendment 21 that appellant questions. His specific contention is that the General Assembly did not agree to the proposed amendment until after the regular session had ended. In our review, we must necessarily have in mind the universal rule that, whenever a constitutional amendment is attacked as not constitutionally adopted, the question presented is not whether it is possible to condemn, but whether it is possible to uphold; every reasonable presumption, both of law and fact, is to be indulged in favor of the legality of the amendment, which will not be overthrown, unless illegality appears beyond a reasonable doubt. *Chaney v. Bryant*, 259 Ark. 294, 532 S.W.2d 741(1976).

Amendment 21 was proposed in the 1935 session of the General Assembly, which ran from January 14, 1935 through March 14, 1935, as noted in the 1935 edition of the Journal of the House of Representatives. We are permitted to take judicial notice of such Journals. *See McAdams v. Henley*, 169 Ark. 97, 273 S.W. 355 (1925). Amendment 21 was first designated House Joint Resolution Number 18, which was approved by the Arkansas House of Representatives on March 4, 1935, and the Arkansas Senate on March 13, 1935, as reflected in the Journal on page 1272. It is reflected again

that both houses of the General Assembly passed this Joint Resolution in another entry in the Journal also dated March 13, 1935. *See id.* These were accomplished within the session dates and follow the dictates of Article 19, § 22.

Appellant asserts that the adoption of this constitutional amendment did not occur until March 20, 1935, outside the session dates, rendering it void. *See id.* at 995. We disagree because March 20 was the date that House Joint Resolution Number 18 was reported correctly enrolled and was delivered to the governor. *See id.* at 1440 and 1456. The governor's approval is not necessary for a constitutional amendment to be submitted to the citizenry for approval. *See Coulter v. Dodge*, 197 Ark. 812, 125 S.W.2d 115 (1939). Because this amendment was approved by the General Assembly within the regular session, and later by vote of the people of this state, the State was not limited to prosecuting appellant only by means of a grand jury indictment.

Affirmed.

NEAL and CRABTREE, JJ., agree.

William G. ABERNATHY and Anne Abernathy,
his Wife, d/b/a Wonder City, Inc. *v.*
Kenneth J. KNYCH; Wonder City Restaurant, Inc.;
Kenneth J. Knych, Inc.; Michael Freyaldenhoven;
and William Kendall Thomas

CA 00-1225 61 S.W.3d 207

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered December 5, 2001

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

Durrett & Coleman, by: *Gerald A. Coleman*, for appellees.

SAM BIRD, Judge. Appellants William G. (Bill) and Anne Abernathy, husband and wife, doing business as Wonder City, Inc., bring this appeal from an order of the Circuit Court of Crittenden County, which granted a motion for directed verdict in favor of appellees, Kenneth J. Knych, Inc., Wonder City Restaurant, Inc., and Kenneth J. Knych, Michael Freyaldenhoven and William Kendall Thomas, individually. From our review of the record, considering the evidence in the light most favorable to appellants, we hold that substantial evidence was presented by appellants that would support a finding by the jury that appellees' contract with Schneider National Carriers for the operation of a cafeteria was terminated for cause. Accordingly, we reverse and remand for a new trial.

The appellants in this case operated a restaurant under the name of Wonder City, Inc., and had entered into an agreement with Schneider National Carriers, which is a trucking firm, to provide Schneider with cafeteria services at its trucking station in West Memphis. The appellants sold their restaurant business on June 30, 1995, to appellees. Under the contract of sale, the appellees were granted the right to continue to provide cafeteria services to Schneider's West Memphis Center and, in return, appellees agreed to pay to the appellants six percent of the gross sales of the cafeteria operation at Schneider for a ten-year period. The contract also provided:

> in the event the Schneider National Carriers Cafeteria operation is lost by them for cause, [appellees] individually shall be liable to Seller in the amount of $150,000.00 for the first year of loss and said liability shall be reduced ten percent (10%) for each year of the remaining ten (10)-year contract in the Schneider National Carriers' phase of said contract.

On July 1, 1995, appellees began operating the cafeteria for Schneider. On February 13, 1996, Schneider entered into a written contract with appellees for the operation of the cafeteria at Schneider's West Memphis trucking center. Among other things, this contract provided:

> 1.1 Term. The initial term of this Agreement is one (1) year from the Effective Date. This Agreement shall continue after the initial one (1) year term on a month to month basis until terminated by either party with or without cause on sixty (60) days prior written notice. After the initial one year term, the parties may

> adjust the specific terms, commissions or guarantees of this Agreement where circumstances beyond the control of either party require adjustments.
>
> 1.2 Termination for Cause. Notwithstanding Section 1.1, in the event that either party defaults in the performance of any of its duties or obligations under this Agreement, which default is not cured within ten (10) days after written notice thereof is given to the defaulting party by the non-defaulting party specifying the default, then the party not in default may, by giving written notice thereof to the defaulting party, immediately terminate this Agreement.

On January 7, 1998, Schneider notified appellees by letter that it was terminating its contract with them, effective sixty days thereafter. Because the appellees refused to pay to appellants the money that the appellants believed was due under the June 30, 1995, contract because of its termination, appellants filed a complaint against appellees, alleging that Schneider's termination of its contract with appellees was for cause. Therefore, appellants alleged, appellees were obligated to pay to appellants, in accordance with the formula set forth in their contract, the sum of $120,000.

During the jury trial, Bill Abernathy testified that he was the former owner of Wonder City Cafeteria. He stated that he began working with Schneider by providing catering service for its driver appreciation events, called "handshakes." Schneider completed its new cafeteria facility at its truck stop location and entered into an agreement under which Abernathy agreed to also provide food services for Schneider's West Memphis cafeteria.

He testified that he sold all of the real estate, building, furnishings, and equipment of Wonder City Cafeteria to the appellees. In addition, he stated that he sold appellees the right to provide food services to Schneider's cafeteria. Abernathy testified that appellees lost the right to operate the Schneider cafeteria for cause during the third year that they were in business and that, pursuant to the contract, appellees owed him $120,000.

Abernathy stated that the cafeteria was initially run "pretty well" under the managership of appellee Michael Freyaldenhoven. However, he stated that when Ed Camper began managing the cafeteria, problems began to arise, *i.e.*, more drivers began complaining about the lack of service, lack of food, the temperature of the food, the cleanliness of the facilities, and the lack of the use of

gloves. Abernathy said that under the contract, he was to have the right of approval over certain matters concerning the operation, but that appellees never sought his approval on any matters. He said that when he offered the appellees suggestions about the cafeteria's operation, he was ignored to the point that he finally stopped telling them anything.

Abernathy stated that in August 1996, he received a letter from Doug Helton, Operation Support Manager for Schneider, in which Schneider placed appellees on a forty-five day probation period for having received no response from appellees regarding complaints. The letter stated that if the problems that were detailed in the letter were not improved upon, the company would find a new vendor. Abernathy stated that after he learned that the contract might be terminated, he spoke to appellees Knych and Thomas, but that no changes in the operation of the restaurant occurred.

Through Abernathy's testimony, the appellants introduced a copy of Schneider's letter informing appellees that their contract was to be terminated in sixty days. In addition to notifying appellees of the termination of the food service agreement, Schneider's letter informed appellees that "there were service and quality issues that Schneider was looking to improve upon."

On cross-examination, Abernathy admitted that he was aware that Best Vendors had been hired by Schneider to oversee their entire cafeteria operation and that Best Vendors was taking bids on the operation. He also admitted that he had made a bid on the operation but had not informed appellees and that Best Vendors had changed the terms of the operation of the cafeterias by requiring the operator to pay rent for use of the cafeteria space and to pay Schneider a percentage of the gross sales. Additionally, he admitted that when he operated the Schneider cafeteria, he had not had to pay Schneider rent or a percentage of his gross profits, and that appellees' contract with Schneider did not require such payments.

Two former employees of the Abernathys, who worked for appellees after the restaurant business was sold, testified that after appellees took over the business, the food quality at Schneider's restaurant deteriorated because appellees quit using some seasonings and spices that should have gone into the food, switched from fresh to frozen vegetables, prepared food from day-old meat, and often re-used food a second day. One of the employees also testified that

under appellees' management, there were often delays in the preparation and serving of food because they would run out of food products, and that they frequently ran out of cleaning supplies.

Janice Brewer testified that she had worked as the operating manager of Schneider's trucking center in West Memphis from 1991 until 1998. She said that although she left Schneider in March 1998, she was familiar with the cancellation of Schneider's contract with appellees because the contract was terminated prior to her departure. She testified that during the time that she managed the Schneider trucking center, Schneider held quarterly celebrations for its drivers, called "handshakes," and that prior to his sale of the business, Abernathy had provided the food for those events. She said that Abernathy began providing the food service to Schneider's cafeteria about the time she began managing the center.

Brewer testified that after the Abernathys sold their rights to operate the restaurant to the appellees, the cafeteria was operated in about the same manner as Abernathy had operated it until about November 1995, when the cafeteria came under the management of Ed Camper. Brewer said that Camper had another job and was not around the cafeteria very often. She said that in 1996 she began to receive complaints from drivers about the operation of the cafeteria. According to Brewer, the complaints included "rudeness, not being waited on, dirty dishes, dirty cooking area, no onsite manager, no chemicals for the dishwasher, servers eating in the kitchen food prep area, servers and cook not wearing gloves or hair nets, not charging the correct price and equipment not being properly cleaned and the employees not wearing uniforms." In addition, Brewer stated that Camper had committed to catering a "handshake," and that the event was "poorly planned," because there was no food at the event. She said that a vice-president of Schneider corporation was in town for the handshake and, because of appellees' performance, the vice-president stated, "get rid of these people."

Brewer testified that in August 1996, a letter was sent to appellees from Schneider's national operations support manager expressing concerns about recurring problems that had been encountered in the operation of the cafeteria. The letter, introduced into evidence without objection, stated that Camper had been made aware of the problems but that no improvements had been made. The letter stated that appellees were being put on forty-five days probation and that a meeting would be scheduled within seven days to discuss corrections that must be made immediately or a new vendor

would take over the cafeteria's operation. Brewer recalled that the meeting was held around the first of September 1996, and that appellees Knych and Thomas were late. She said that at the meeting, Knych and Thomas were very apologetic and promised to solve the problems. She said that the situation improved briefly, but that "then it started going down again."

Brewer testified:

> During 1997, I wanted them out of there. I wanted to terminate them for cause. This decision was made sometime during 1997, but the actual termination letter did not occur until January 7, 1998.
>
> There was conversation with the Schneider people in Green Bay and as a result of the conversation, the letter dated January 7, 1998, was sent as opposed to a letter stating that termination was for cause. . . . I discussed with Bill Abernathy that I was going to terminate the contract with Mr. Knych and Mr. Thomas for cause in 1997.

On cross-examination, Brewer testified that she was the person in charge of the cafeteria at the Schneider trucking center, that she had the authority to make the decision whether to terminate the contract, and that she told Bill Abernathy in 1997 that she was going to terminate the contract for cause.

She also stated that Best Vendors was going to take bids for the operation of all ten of Schneider's cafeterias and that the cafeteria at the West Memphis center was going to be the first one bid, "in order to get the operators out of there." Brewer stated, "Schneider terminated the contract with Wonder City for cause." However, she stated that even though Schneider informed her that they were going to send a "for cause" termination letter, the contract was terminated pursuant to the sixty-day provision.

At the end of Brewer's testimony, appellees moved for a directed verdict, stating that appellants had presented no evidence that the contract was terminated for cause. The court granted the motion, stating:

> Although plaintiff argued that the contract was terminated because of bad services and bad supervision, that was not the reason given. The easy way was used, which the contract gave them an option to do. It was an at will termination with 60 days notice. Additionally,

> there was the modification. The modification of the terms of the anticipated contract modified any profits that would have been realized as a result of it. This would have been grounds for recission of the contract in the first place. For those two reasons, there was not a jury question.

Appellants bring this appeal, contending that the court erred in directing a verdict in appellees' favor because there was substantial evidence presented that the appellees' contract with Schneider was terminated for cause. The testimony presented, appellants argue, unquestionably created a fact question.

In ruling on a motion for directed verdict, the trial court views the evidence most favorably to the nonmoving party and gives that evidence its highest probative value, taking into account all reasonable inferences deducible from it. *Dorton v. Francisco*, 309 Ark. 472, 833 S.W.2d 362 (1992). The motion should only be granted where the evidence is so insubstantial as to require that a jury verdict for the nonmoving party be set aside. *Id.* On the other hand, if there is substantial evidence to support the jury verdict, the motion should be denied. *Id.* Substantial evidence is evidence of sufficient force and character that it will compel a conclusion one way or the other and it must induce the mind to pass beyond mere suspicion or conjecture. *Id.*

In determining whether a directed-verdict motion should have been granted, the appellate court reviews the evidence in the light most favorable to the party against whom the verdict is sought and gives it its highest probative value, taking into account all reasonable inferences deducible from it. *Morehart v. Dillard Dep't Stores*, 322 Ark. 290, 908 S.W.2d 331 (1995). Where the evidence is such that fair-minded persons might reach different conclusions, then a jury question is presented, and the directed verdict should be reversed. *Id.*

We do not agree with the trial judge's conclusion that Schneider's use of the sixty-day notice provision to accomplish the termination of its contract necessarily precludes a jury finding that the termination was for cause. Although the Schneider contract contained two procedures by which the contract could be terminated, either one of them could be used to terminate the agreement for cause. Section 1.1 of the contract provided that the contract could be terminated by either party "with or without cause on 60 days prior written notice." Section 1.2 provided that if either party defaulted in its performance of the agreement and the default was

not cured within ten days after written notice, the non-defaulting party could give written notice of its immediate termination of the agreement. Under either section 1.1 or 1.2, the contract could be terminated for cause. The only significant difference in the sections is the length of time to elapse between the notice and the termination.

The testimony of Janice Brewer is certainly substantial evidence that the contract was terminated for cause. The January 7, 1998, letter from Schneider to appellees, giving the sixty-day notice and stating that there were "service and quality issues" upon which Schneider wished to improve, is substantial evidence that the agreement was being terminated because Schneider was dissatisfied with appellees' performance of the food service agreement. Additionally, inferences could be drawn from the testimony of the former employees about the decline in the quality of the food and services at Schneider's cafeteria that support a conclusion that Schneider terminated the contract because of dissatisfaction with appellees' services.

Viewing this evidence in the light most favorable to appellants, giving it the highest probative value, and taking into account all reasonable inferences deducible therefrom, we find that fair-minded people might reach different conclusions. Whether this evidence establishes that Schneider's termination of its contract with appellees was for cause is a question for the jury to answer. Consequently, we hold that the trial court erred in granting a directed verdict in favor of the appellees.

Reversed and remanded.

ROBBINS, GRIFFEN, CRABTREE, and BAKER, JJ., agree.

ROAF, J., dissents.

ANDREE LAYTON ROAF, Judge, dissenting. I would affirm the trial court's grant of a directed verdict to appellees on the issue of whether or not their contract with a third party for the operation of a truck-stop-type cafeteria was terminated "for cause" three years into their ten-year agreement to pay appellants a percentage of the cafeteria's annual profits. Despite the voluminous testimony and evidence regarding the many problems that appellees had with operating the cafeteria to the satisfaction of third-party Schneider National Carriers, it was uncontroverted that prior to termination of the appellees' contract, Schneider had hired a new

manager, Best Vendors, and had decided to let all of its string of ten in-house cafeterias out for new bids under significantly different terms more advantageous financially to Schneider and less desirable to appellees. Schneider was free to do this, as its contract with appellees was then on a month-to-month basis and terminable by either party with or without cause on 60 days' prior written notice. It was also uncontroverted that both appellants and appellees bid on the new contract, but neither was chosen by Schneider. The actual termination letter was sent to appellees *after this bidding process* and was effective at the end of 60 days, which was also the end of appellees' contract. Consequently, it is irrelevant that Schneider could have terminated the appellees' contract for cause because it simply elected not to do so.

Of course, appellants could have argued that this entire rebidding process could reasonably be construed by the jury as a pretext to get rid of appellees without resorting to the "for cause" termination procedure. However, there is no evidence or testimony whatsoever to support such an inference, unless former Schneider employee Janice Brewer's testimony that appellees' cafeteria was to be the first one rebid "to get the operators out of there," would provide a sufficient basis from which the jury could reach this conclusion. The jury would then also have to conclude that appellees' termination became one "for cause," on account of being the first to be rebid. However, appellants do not argue for this construction of the evidence. Moreover, we can go to the record to affirm, and there are several pieces of evidence of this rebidding process in the record not contained in the appellants' abstract.

Indeed, the trial court carefully considered the evidence before it, including evidence and testimony about the rebidding process, and concluded:

> They chose to terminate without giving any reason for the termination. If paragraph 1.1 and 1.2 have any common sense meaning, the cause meant for cause. If it was cause, it could have been for cold food, not enough food, a thousand different reasons. Also, the terms and conditions of the original contract are being modified by the new overall food service people. This completely and totally altered the relationship between Mr. Abernathy and the new Wonder City people. They were paying him a six percent (6%) surcharge and under the new terms were going to be compelled to pay Best Vendors an additional amount of compensation plus they were going to have to pay rent on the facility. That totally and completely in and of itself altered the original agreement. They

> would have no control over those two factors whatsoever and theoretically, if they were granted the contract, at least a modification of the original agreement between Mr. Abernathy and his purchasers. For those two reasons, the motion for directed verdict was granted.
>
> . . . .
>
> Although [appellants] argued that the contract was terminated because of bad service and bad supervision, that was not the reason given. The easy way was used, which the contract gave them an option to do. It was an at-will termination with 60 days notice. Additionally, there was the modification. The modification of the terms of an anticipated contract modified any profits that would have been realized as a result of it. This would have been grounds for recission of the contract in the first place. For those two reasons there was a not a jury question.

I fully recognize that, in addressing the issue of whether a directed verdict should have been granted, we must review the evidence in the light most favorable to the party against whom the verdict is sought and give it the highest probative value, taking into account all reasonable inferences deducible from it. *Martin v. Hearn Spurlock, Inc.,* 73 Ark. App. 276, 43 S.W.3d 166 (2001). Where the evidence is such that fair-minded people might have different conclusions, then a jury question is presented and the directed verdict should be reversed.

In this instance, I cannot say that fair-minded people could conclude other than exactly the way the trial court saw this evidence. It is the fact that the cafeterias were rebid and not the new financial terms that is significant. Appellees would have had to bear the consequences of any new, less advantageous financial terms had they been awarded the contract with Schneider because their agreement with appellants made no provision for such an occurrence. However, the agreement also did not adequately protect the appellants' rights to profits for the full ten years, where only a month-to-month contract was involved, and no amount of testimony about appellees' shortcomings as cafeteria operators can overcome that omission. I would affirm.

Liza Michelle GEROT *v.* Paul Alan GEROT

CA 01-448 61 S.W.3d 890

Court of Appeals of Arkansas
Division II
Opinion delivered December 5, 2001
[Petition for rehearing denied January 30, 2002.]

[redacted]

William F. Smith, for appellant.

Laws & Murdoch, P.A., by: *Allen Laws*, for appellee.

WENDELL L. GRIFFEN, Judge. Lisa Gerot appeals from a chancery order granting the appellee's petition for a change of custody, denying her petition to relocate to Florida with her minor child, and dismissing her request for a contempt citation pursuant to the court's order mandating the division of certain marital property. She argues that appellee failed to demonstrate a material change in circumstances justifying a change in custody; that the chancellor did not consider the proper factors in determining whether to grant her petition to relocate; and that it was undisputed that appellee has not divided the property as ordered by the court.

We reverse the order granting appellee's motion for a change of custody because there was no allegation or proof of a material change of circumstances warranting a change of custody. In addition, because the chancellor based his finding on the motion for a change of custody and made no ruling on appellant's petition to relocate, we remand for a ruling in that respect. Finally, we affirm with respect to the chancellor's dismissal of the contempt citation.

Appellant obtained a divorce from Paul Gerot, appellee, on October 20, 1999. Appellant was granted custody of their nine-

year-old daughter, Victoria ("Tory"), and appellee was awarded visitation. The chancellor ordered appellee to equally divide the parties' A.G. Edwards stock, to equally divide his 401k account, and to sell his Harley-Davidson motorcycle within ninety days and split the proceeds with appellant.

In January 2000, appellant, who is a registered nurse, accepted a job in Pal Bay, Florida. In March 2000, she filed a petition to relocate to Florida, citing as her reasons for relocating a substantial increase in earnings, a job requiring her to work fewer hours per week that would allow her increased time with Tory, and better educational and extracurricular opportunities for Tory. She also requested that visitation be modified to ensure "continued quality time" with appellee. Because appellant did not want to move Tory during the school year, the parties agreed that she would stay with appellee until after the current school year had ended and he had exercised his summer visitation.

On April 4, 2000, appellee filed a formal objection to the move. He asserted that he had maintained a strong relationship with Tory and that it was not in Tory's best interest to move to Florida while she was attending school. On April 15, 2000, appellant moved to Florida, and pursuant to the parties' agreement, Tory remained in Arkansas with appellee.

On June 13, 2000, after appellee's summer visitation had ended, he filed a petition for a change of custody. He cited the fact that appellant had recently relocated to Florida and asserted that he has maintained a strong relationship with Tory, including participation in her school activities, in an effort to create a stable environment for her. On July 11, 2000, appellant filed a contempt citation, alleging that appellee had failed to divide the stock, failed to divide his retirement account, and failed to sell his motorcycle. He conceded the terms of the property settlement and that appellant was entitled to one-half of the stock and the retirement account, but denied any willful violation of the court's order.

A hearing on these matters was held on December 20, 2000. The chancery court dismissed appellant's petition for contempt and granted appellee's request for a change of custody. After appellant requested that the court provide specific findings of fact, the chancellor orally indicated his specific findings of fact. The chancellor stated:

> I feel it is in the best interest of the child. I think the evidence is clear from the testimony of the teachers that the child is doing quite well and it would not be in her best interest to remove her from the situation she is in now. Furthermore, she has extended family on both sides here. And it was Mrs. Gerot's choice to move to Florida. I think it is clearly, in my opinion, in the best interest of the child to remain here at this time.

The chancellor reiterated these findings in his subsequent written order.

The court further ordered appellee to obtain three bids on his motorcycle; to sell his motorcycle within the next thirty days and divide the proceeds accordingly; and to inform appellant of all documentation necessary to prepare a Qualified Domestic Relations Order to divide the stock and retirement funds as previously directed.

Appellant subsequently filed a motion to reconsider and a motion for a new trial, which the chancellor denied. She appeals only from the order entered on December 20 dismissing her motion for contempt and granting appellee's petition for a change of custody.

I. Summary of the Testimony

Appellee conceded that he and appellant originally agreed that Tory would stay with him only until after he exercised his summer visitation. However, he subsequently objected to Tory moving to Florida "because she's content, she's happy here, her friends are here, her school is here and her family is here." He lives with his mother and father in their house, but testified that his parents intend to give the house to him. Appellee asserted that he has a close relationship with Tory. He also stated that he has a good relationship with appellant's parents and that Tory visits them. Appellee stated that Tory did not talk about her mother often and did not appear to be having any problems with her mother living in Florida.

Appellee also testified that Tory earns As and Bs in school. He stated that he has lunch at school with Tory three to four times per week and participates in parent-teacher conferences. Appellee testified that he and Tory love fishing and that he takes her to a members-only hunting lodge three weekends of each month.

Appellant is a registered nurse. She works in an emergency room, serving three twelve-hour shifts per week, from 7:00 a.m. to 7:00 p.m. She felt that Florida offered "more opportunities" for her daughter, including the ocean, Sea World, theme parks, and the Kennedy Space Center. At the hearing, she presented a letter from her employer stating that she would initially earn $21.30 per hour and would receive a $3,000 sign-on bonus. She testified that she would earn ten to twelve thousand dollars more per year, she would work fewer hours, and that the cost of living was less expensive in Florida. Appellant would also be able to return to college herself at a lower cost through her employer. She purchased a three-bedroom home located five minutes from Discovery Elementary, which she asserted was a highly rated school. She has made arrangements for a babysitter and transportation to school on those days that she is working. Appellant also has a longtime friend who resides in Pal Bay, whom Tory knows, who is also willing to help appellant if needed.

She stated that she left Tory with appellee because she did not want to move her during the middle of a school year and that her attorney indicated that she would receive permission from the court to relocate "within about thirty days." She testified that she talks to Tory on the phone twice each week and that she had visited Tory three times since April 2000. Appellant also testified that she likes fishing and that she and Tory can salt water fish in Florida.

Appellant maintained that she has always encouraged visitation and wants Tory to have fair visitation with her father. Appellee felt that it was important for Tory to "have all of her family." She indicated that she would pay for one-half of the travel expenses to bring Tory back to Arkansas to visit her father. She also planned to return to Arkansas with Tory at least twice per year. She stated that Tory had asked her to take her to Florida the last time that appellant was in Arkansas.

Marvelle Converse, Tory's teacher at the time of the hearing, testified that Tory maintains a B average, and that appellee eats lunch with her three to four times a week and picks her up every afternoon. Her impression was that they have an "enjoyable relationship." She stated that appellee serves as a "room mother" and has gone on some of the outings with Tory's class. Converse said that appellee attends parent-teacher conferences and is very active in Tory's education. She stated that Tory is well-adjusted, active in the classroom, and plays well with her peers. She testified that it would be detrimental to move Tory during the middle of a school year.

Susan Wilson, Tory's second-grade teacher, who taught Tory during the period in which appellee moved, testified that Tory's relationship with her father was very loving; that they had a strong bond; and that Tory seemed to be very comfortable in her father's care. She testified that appellee visits school on Monday, Wednesday, and Friday and brings Tory's lunch; that he also stays to play with her after lunch; and that he picks her up from school.

She further stated that prior to April 2000 (when Tory began living with appellee), Tory "didn't focus. . . . The last part of school when living with her father she was more active. She seemed to be a little more with it. She participated in conversations . . . She seemed more comfortable." Wilson said that Tory did not participate in class at the beginning of the school year, although she was always very active at recess. Wilson said that Tory became more relaxed from the beginning of the school year to the end of the school year; that she talked more; that she formed friendships; "that her activities in class and with her peers became stronger as she grew older." She stated that Tory became more self-confident as the school year progressed. She opined that "moving in with her father was what made the changes." Wilson also said that Tory told her in May 2000 that she did not want to move to Florida.

Debbie Nordin, Tory's first-grade teacher, said that when she taught Tory, she was sullen, quiet, and lacked self-confidence, whereas now, she seems happy and more confident. Nordin stated that both appellant and appellee attended parent-teacher conferences. She stated that she had seen Tory several times in the period from January to May 2000, and that Tory "appears happy and stable. She has really come out and come into her own this year." Nordin has seen appellee eat lunch with Tory and pick her up from school. She stated that it appears that they have a strong bond. She said that Tory has changed since she moved in with her father, but conceded that Tory is three years older now than when she taught her and that children's personalities change as they grow. She also admitted that she has not talked to Tory in the last year.

II. Change of Custody

We first address the chancellor's error in finding that appellee demonstrated a material change in circumstances warranting a change of custody. We review chancery cases *de novo* and reverse the findings of the chancellor only if his findings are clearly erroneous. *See Hickmon v. Hickmon*, 70 Ark. App. 438, 19 S.W.3d

624 (2000). Custody should not be changed unless conditions have altered since the decree was rendered or material facts existed at the time of the decree but were unknown to the court, and then only for the welfare of the child. *See Hollinger v. Hollinger*, 65 Ark. App. 110, 986 S.W.3d 105 (1999). The chancellor must first determine that a material change in circumstances has occurred since the last order of custody; if that threshold requirement is met, he must then determine who should have custody with the sole consideration being the best interest of the child. *See id.*

A custodial parent's move that is made in order to better his or her financial ability to provide for a child is not, in and of itself, a material change in circumstances to be used to the detriment of that parent. *See Hollinger v. Hollinger, supra.* However, such a move is one factor which may be considered when determining whether a material change in circumstances exists. *See Hollinger v. Hollinger, supra.* The party seeking the modification has the burden below to show a material change of circumstances sufficient to warrant a change in custody. *Hollinger v. Hollinger, supra.* While custody is always modifiable, our courts require a more rigid standard for modification than for initial determinations in order to promote stability and continuity for the children and to discourage repeated litigation of the same issues. *See Stellpflug v. Stellpflug*, 70 Ark. App. 88, 14 S.W.3d 536 (2000).

Appellee maintains that the change of circumstances in this case are demonstrated by appellant's relocation to a place where neither she nor Tory have any "roots" and by Tory's "dramatic change" in her attitude since she moved in with him. Appellant notes that the court failed to specify any finding of a material change in circumstances in its oral or written order and maintains that the only testimony offered by appellee was offered as if he were already the custodial parent and is not sufficient to show a change of circumstances to warrant a change in custody.

We agree that the chancellor erred in granting appellee's motion for a change of custody where the appellee failed to allege or present evidence of a material change of circumstances sufficient to warrant a such a change. The only change in circumstances that occurred from October 20, 1999, the date of the original custody order, to the date of the hearing, was that appellant voluntarily left Tory with appellee so she could finish out the school year. However, relocating in order to obtain employment itself does not

constitute a material change in circumstances. *See Jones v. Jones*, 326 Ark. 481, 931 S.W.2d 767 (1996).[1] Nor does the fact that appellee would not get to visit Tory as often. *See Plum v. Plum*, 252 Ark. 340, 478 S.W.2d 882 (1992).

Appellee also maintains that his testimony and that of Tory's teachers demonstrates a "dramatic change" in Tory's demeanor since she began living with him. He testified that Tory was happy and content living with him, and it is undisputed that they share common interests, such as the love of outdoor pursuits.

It is implicit in the chancellor's original order awarding custody to appellant that Tory had a good relationship with her father but was happy and content in appellant's care. Appellee presented no evidence that this has changed. Rather, the evidence shows that Tory continues to enjoy a good relationship with both parents. Appellee did not seek custody on the ground that appellant was an unfit mother. He simply maintained that he was close to Tory and that she was happy and content with him. *See Barnes v. Newton*, 69 Ark. App. 115, 10 S.W.3d 472 (2000) (holding, in part, that there were no material changes in circumstances to justify changing joint-custody order to award custody to the mother where there was no allegation that either parent was unfit). Moreover, while the evidence demonstrates that appellee has taken a more active role with regard to Tory's education since she moved in with him and that Tory is doing well in school, the evidence also showed that both appellant and appellee were actively involved in Tory's education prior to appellant's relocation. Thus, appellee's assertion that he is close to Tory, that she is happy in his care, and that he is actively involved in her education does not demonstrate a material change in circumstances.

Similarly, the testimony by Tory's teachers regarding Tory's progress in school does not justify a change of custody. Tory's

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[1] Appellee maintains that the facts in this case are similar to the facts in *Riley v. Riley*, 45 Ark. App. 165, 873 S.W.2d 564 (1994), in which this court affirmed a change in custody, where both parents had remarried and the custodial parent moved the children several hundred miles away from the children's extended family. However, the facts in *Riley* are easily distinguished from the facts in this case. In *Riley*, both parents had remarried and the mother surreptitiously moved the children without the father's knowledge and returned to the state on two occasions but did not allow visitation with the father on those occasions. *See id.* Here, by contrast, neither parent has remarried; appellant discussed the move with appellee beforehand; and appellant appeared to be following the court's order in not removing Tory from the state until she received the court's approval. By contrast, appellee violated the custody order by keeping Tory beyond her summer visitation.

teacher at the time of the hearing, Ms. Converse, stated that Tory is well-adjusted, active in the classroom, plays well with her peers, and opined that it would be detrimental to move Tory during the middle of a school year. While Wilson, Tory's second-grade teacher, opined that Tory's change in attitude was attributable to her new living arrangements with her father since mid-April 2000, she also stated that she had noticed changes *since the beginning of the school year.* Further, she directly observed Tory's demeanor after she moved in with her father for only a short time, from mid-April until the end of May, when the school year ended. Although Nordin, Tory's first-grade teacher, has not spoken with Tory within the past year, she testified that Tory has "come into her own this year." Nordin apparently based her conclusions on seeing Tory around the school. Further, Nordin's comments, as well as common sense, demonstrate that Tory's change in demeanor is just as likely the result of her normal maturation process.

Further, while it is certainly proper for the chancellor to consider the child's happiness and progress in school, *see Barnes v. Newton, supra,* the testimony showed that Tory maintained an A-B average both before and after she moved in with her father. According to her teachers' testimony, she also played well with other children at recess before and after she moved in with her father. While her personality changed during the months prior to and immediately after the petition for a change in custody, this appears to be due, at least in part, to the natural maturation process and not simply to the fact that she moved in with her father late in the school year.

Even giving due deference to the witnesses' testimony, their testimony does not demonstrate a material change that would justify a permanent change in custody. Because the chancellor erred in granting the motion for a change of custody in the absence of an allegation or proof of a material change warranting a change of custody, we reverse that portion of the chancellor's order.

III. Petition to Relocate

Further, we remand for reconsideration of appellant's petition to relocate because we find the chancellor based his decision solely

on the motion for a change of custody and failed to rule on appellant's petition to relocate.[2]

After the court issued its decision, appellant's attorney requested specific findings of fact pursuant to Arkansas Rule of Civil Procedure 52(b)(2) stating, "Your Honor, can we ask for a finding of fact?" The chancellor indicated:

> I feel it is in the best interest of the child. I think the evidence is clear from the testimony of the teachers that the child is doing quite well and it would not be in her best interest to remove her from the situation she is in now. Furthermore, she has extended family on both sides here. And it was Mrs. Gerot's choice to move to Florida. I think it is clearly, in my opinion, in the best interest of the child to remain here at this time.

In determining whether to grant a petition to relocate, the chancellor must first determine whether a move would result in a real advantage to the family as a whole. *See Hass v. Hass*, 74 Ark. App. 49, 44 S.W.3d 773 (2001). The record supports that the chancellor limited his order to the grant of appellee's motion for a change of custody because he only examined the best interest of the child, without regard for the best interests of the family unit as a whole. Absent from the record and from the chancellor's oral and written findings is any indication that he ruled on appellant's petition to relocate or even considered the advantage to the family unit as a whole. Accordingly, we remand to the chancellor for a ruling on appellant's petition to relocate.

IV. Dismissal of the Contempt Citation

Finally, we affirm the chancellor's dismissal of appellant's petition for a contempt citation. The chancellor entered an order on October 30, 1999, ordering appellee within ninety days to equally

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[2] Appellee asserts that appellant's argument in this regard is barred, pursuant to *Hickmon v. Hickmon*, 70 Ark. App. 438, 19 S.W.3d 624 (2000), because she failed to specifically request findings on the factors supporting the court's "denial" of her petition to relocate. We disagree that *Hickmon* compels such a result.

The instant case is distinguishable from *Hickmon*. Unlike the appellant in the instant case, it appears that the *Hickmon* appellant failed to make *any* request for findings of fact. Here, despite a request for specific findings of fact, the chancellor failed to rule on appellant's petition to relocate. Accordingly, *Hickmon* does not preclude us from addressing the merits of appellant's argument.

divide the parties' A.G. Edwards stock, to equally divide his 401k account, and to sell his Harley-Davidson motorcycle and split the proceeds with appellant. It is undisputed that as of July 11, 2000, the date that appellant filed her motion for contempt, appellee had not complied with this order.

Appellee concedes that at the time of the hearing, he had not complied with the court's order. However, the failure to comply was apparently due to appellee's attorney's failure to act, not appellee's. Appellee's attorney informed the court that appellee had supplied him all of the necessary information to prepare the QDRO and that appellee stipulated that appellant was entitled to one-half of the stock and retirement account. While the chancellor could have imputed appellant's attorney's negligence to appellee, *see Midwest Timber Prod. Co., Inc. v. A.A. Self*, 230 Ark. 872, 327 S.W.2d 730 (1959), he apparently found the attorney's inaction was not willful, and appellant offered no proof to the contrary.

With regard to the motorcycle, appellee testified that it was "tore apart" and that he did not have the money to repair it. He also testified that he had advertised the motorcycle for sale twice in the *Arkansas Democrat-Gazette*, and had made inquiries at the Road House, a local motorcycle shop, but received no suitable offer.

The purposes of civil contempt are to preserve and enforce the rights of private parties to suits and to compel obedience to orders made for the benefit of those parties. *Arkansas Dep't Of Human Servs. v. R.P.*, 333 Ark. 516, 970 S.W.2d 225 (1998). The standard of review where the chancellor has refused to punish a contemnor is abuse of discretion. *See Jones v. Jones*, 320 Ark. 449, 898 S.W.2d 23 (1995). Based on the foregoing facts, we hold the chancellor's finding that appellee's failure to comply with the October 30 order was not willful was not an abuse of discretion. Accordingly, we affirm with respect to the chancellor's dismissal of the contempt citation.

We reverse the order granting appellee's motion for a change of custody. We also remand for a ruling with respect to appellant's petition to relocate. We affirm the dismissal of the contempt citation.

Affirmed in part; reversed in part; and remanded in part.

BIRD and CRABTREE, JJ., agree.

SUPPLEMENTAL OPINION on DENIAL of REHEARING

CA 01-448 65 S.W.3d 494

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered January 30, 2002

William F. Smith, for appellant.

Laws & Murdoch, P.A., by: *Allen Laws*, for appellee.

WENDELL L. GRIFFEN, Judge. Appellee Paul Gerot petitions for rehearing from an unpublished opinion rendered by this court, reversing in part a chancery order awarding him a change of custody and granting him primary custody of his daughter, Victoria ("Tory").[1] We deny appellee's petition for rehearing and reiterate our holding in this case with regard to his petition to change custody.

[1] *See Gerot v. Gerot*, 76 Ark. App. 138, 61 S.W.3d 890 (2001). We also affirmed that portion of the chancellor's order dismissing a contempt petition against appellee, and remanded for a ruling on appellant's petition to relocate.

In this case, appellant Lisa Gerot, appellee's ex-wife and Tory's mother, moved to Florida because she was offered a better job with a larger salary and more flexible hours that would allow her to spend more time with Tory. Tory remained with her father in Arkansas to complete the remainder of her school year. Appellant thereafter filed a petition to relocate and a contempt petition, alleging that appellee failed to divide certain property in accordance with the parties' divorce decree. Appellee filed a petition for a change of custody, alleging that Tory had experienced a "dramatic change" in her attitude after she moved in with him. At the hearing, appellee testified regarding Tory's alleged "dramatic change" and also offered testimony by Tory's teachers to that effect.

We stated that the testimony offered by appellee did not demonstrate a "dramatic change" that would justify a permanent change in custody. Therefore, we held that appellee failed to prove a material change in circumstances and we reversed that portion of the chancellor's order granting appellee primary custody of Tory.

Appellee now asserts that in stating he failed to demonstrate a "dramatic change" that would justify a permanent change in custody, we either misstated or misapplied the law regarding the proof required to establish a change of custody. However, a full reading of our holding demonstrates that we did not misstate or misapply the correct standard governing motions to change custody. The standard regarding motions for change of custody, as we cited in our prior opinion in this case, is well-settled: Custody should not be changed unless conditions have altered since the decree was rendered or material facts existed at the time of the decree but were unknown to the court, and only for the welfare of the child. *See Hollinger v. Hollinger*, 65 Ark. App. 110, 986 S.W.2d 105 (1999).

Here, appellee maintained that Tory's "dramatic change" in her attitude warranted a change in custody. We stated our holding, in full, as follows:

> Even giving due deference to the witnesses' testimony, their testimony does not demonstrate a "dramatic change" that would justify a permanent change in custody. Because the chancellor erred in granting the motion for a change in custody in the absence of an allegation or proof of a material change warranting a change of custody, we reverse that portion of the chancellor's order.

Thus, we held that, appellee's "dramatic change" argument notwithstanding, appellee failed to allege or prove facts demonstrating a *material change* in circumstances necessary to warrant a change in custody. Our decision did not change the well-settled proper standard governing motions for change of custody. Appellee's petition for rehearing raises no new issues of law and provides no additional grounds for consideration.

Petition for rehearing denied.

ROAF, J., concurs.

Robert E. KEATHLEY *v.* Billie A. KEATHLEY

CA 01-423 61 S.W.3d 219

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

[redacted]

Frances Morris Finley, for appellant.

Janice W. Vaughn, for appellee.

WENDELL L. GRIFFEN, Judge. Robert Keathley appeals from a divorce decree allocating certain marital property and debt between him and his ex-wife, Billie Keathley, the appellee. He argues that the trial court erred because it made an unequal distribution of property without considering all the factors set forth in Arkansas Code Annotated section 9-12-315 (Supp. 2001), and because it considered fault as the basis for the unequal division of the marital property. We hold that the chancellor was not obligated to enumerate every factor when she analyzed the property allocation. Thus, we affirm.

The parties in this case were married on June 17, 1988. At that time, appellee was fifty-one years old and worked for Twin City Bank as a vice-president in the Credit Administration Department, where she had worked for twenty-six years. Appellant, then fifty-five, worked in the investment department at Simmons First National Bank. Appellant thereafter left the bank and began selling insurance. In 1992 or 1993, appellant had a stint placed in one of his arteries, and voluntarily retired from work. He drew Social Security retirement benefits of approximately $836 per month.

Appellee continued to work until May 2000, when her job was eliminated as the result of the sale and merger of her bank to Firstar Bank. She retired with a pension vested in the amount of $199,264.15, and a 401k plan with a net value of $64,626.21. Appellee subsequently accepted a part-time position working at her

daughter's resale shop. Thus, she began spending more time at home during the weekdays. During the first week after appellee left the bank, she began receiving calls from creditors regarding credit-card debts in her name. Around this same time, appellant suggested that they file for bankruptcy.

At the time the parties married, they had little or no credit card debt. Due to the calls from the creditors, appellee contacted a credit bureau and discovered that appellant had, without her knowledge, authority, or signature, obtained credit cards in his name, her name, and in their joint names. Their credit-card debt totaled over $100,000, and appellant had paid at least an additional $37,407 on credit-card debts in the preceding few years.

As a result, one week after appellee left the bank, she separated from appellant and filed for divorce. Although the proceedings were not designated for inclusion in the record by appellant, a temporary hearing was held on July 20, 2000. During that proceeding, appellant apparently admitted that he signed appellee's name to certain credit-card applications. The chancellor referred to appellant's testimony to this effect in both of the final hearings on the matter and in the divorce decree from which appellant appeals.

The final hearings were held on September 25, 2000, and October 20, 2000. At the divorce hearing, appellee offered evidence that she filed fraud reports with all of the creditors with whom appellant had opened an account in his name, her name, or their joint names, and had been relieved of three debts originally placed in their joint names totaling $20,718.34. She asserted that at the time of trial, she had not been relieved of unauthorized debt totaling $43,732.30. Of these debts, appellee admitted to signing the credit application for a joint card, a Bank of America card. However, she maintained that she last used the card years ago and that she had since paid the balance due on those charges. This card had an outstanding debt remaining of $10,979.

Appellee maintained that most of the credit card debt accumulated by appellant was accumulated by making cash advances for gambling because many of the cash advances were made at the Oaklawn Race Track and other Hot Springs locations. Between January 1998 and April 2000, appellant obtained at least $83,641 in cash advances. During this time period, he obtained an average cash advance of $2,987 per month.

Appellee performed most of the household duties even though she continued to work after appellant retired. Appellant handled the checkbook and paid the bills. In 1996, after an argument between the parties over appellant's failure to clean up after himself in the house, he began to do so.

When the parties married, appellant owned a home and had accumulated $25,000 in equity in the home. He sold this home and used $8,500 of the proceeds as a down payment on a new home that was acquired in joint tenancy. In 1999, when the parties sold the home, the debt on the home had been reduced from $73,000 to $54,000, a $19,000 reduction. They then bought the current marital home, using $30,000 from the sale proceeds of their previous home as a down payment. The day before the final hearing in this case, the parties sold the marital home and received net proceeds of $18,000 from the sale. Both parties asked the court to order an equal division of these proceeds.

At the close of trial, the court requested a written proposal from each party explaining how each party wanted the court to divide the parties' assets and debts. Appellant proposed that the court divide the house proceeds equally, that he be obligated for all of the credit-card debt except the Bank of America card, and that he receive one-half of the marital portion of appellee's 401k and pension plan.

The chancellor found that appellant did nothing to contribute to the acquisition, preservation or appreciation of the marital property and did not even provide services as a homemaker. The chancellor further found that appellant's conduct in depleting the assets that appellee worked to accumulate rose to the level of fraud. She ordered appellant to pay all of the credit-card debts that he incurred without appellee's knowledge or approval. She noted that appellant made false statements to the court by admitting at the temporary hearing that he had signed appellee's name to credit-card applications and then at the final hearing attempting to claim that appellee incurred the debt. The chancellor also noted that when she reminded appellant that he had previously admitted signing for the credit card in appellee's name, he claimed that he could not remember whether he signed for credit in her name.

The chancellor valued the entire portion of the $64,626.21 of pension plan as marital property and awarded appellant ten percent, or $6,462.62. However, from this amount, she deducted appellee's attorney's fees of $3,500, for a net distribution to appellant of

$2,963.62. The chancellor found that it was appellant's fraudulent behavior that necessitated the need for appellee to incur most of her attorney's fees.

The chancellor also set aside another ten percent of the pension plan for the satisfaction of unresolved unauthorized debts, which she found totaled $32,753.30. She found the $10,979 Bank of America debt was a joint debt. She ordered an additional ten percent of the pension plan to be set aside to pay any portion of the Bank of America Card debt remaining on that card after proceeds from the sale of the parties' home was used to pay the Bank of America debt. The chancellor further ordered that this additional ten percent shall be used to set off one-third of various marital debts totaling $4,068 that appellee had already paid.

The chancellor valued the marital portion of appellee's 401k account at $26,057.08 as of the date of trial. Because there was a loan issued against this account, that loan must be paid in full and a $7,000 penalty will be assessed against the remaining balance in the account upon removal of the funds. Therefore, the court ordered that 20% of the penalty incurred should be deducted from appellant's share of the proceeds from this account and 80% of the penalty shall be deducted from appellee's share of the proceeds.

The chancery court ordered that another 10% of the 401k fund be set aside in the same manner as the 10% set aside from appellee's pension fund. The funds will first be used to offset any debt remaining on the Bank of America debt, then to reimburse appellee for any debts she previously paid, and finally, to reimburse appellee for any unresolved indebtedness.

The chancellor specified that should appellee be able to relieve herself of liability of the unresolved debts by February 15, 2001, any funds remaining in the set aside account, as well as any funds remaining from the 401k account would become appellant's property. However, if she is not able to relieve herself of these debts by that date, the funds in an amount equal to any remaining unresolved accounts shall revert to appellee to compensate her for her liability on those debts. The court ordered that appellee would receive the remaining funds of the pension plan, that is 80% of the marital portion of the account, and 100% of the nonmarital portion of the account.

With regard to the parties' marital home, the court found that the reduction in debt was attributable to appellee's efforts. Pursuant

to both parties' requests that the home be sold and the proceeds split, the court ordered the home to be sold and that each party was to receive $5,000 in net equity proceeds. The remaining proceeds from the sale of the home were to be removed from escrow and given to appellee to pay off the Bank of America account ($10,979). The chancellor stated that by dividing the funds from the sale of the house in this manner, she was dividing the funds equally. Appellant appeals from this order.[1]

I. Consideration of Factors under Ark. Code Ann. § 9-12-315(B)

Appellant first argues that the trial court erred because it failed to consider all of the factors listed in Ark. Code Ann. section 9-12-315, and instead, ordered an unequal division of property based on the sole finding that appellant did not contribute to the acquisition, preservation, and/or accumulation of the parties' assets.

A chancellor has broad powers to distribute property in order to achieve an equitable distribution. *See Hodges v. Hodges*, 27 Ark. App. 250, 770 S.W.2d 164 (1989). The overriding purpose of the property-division statute is to enable the court to make a division of property that is fair and equitable under the circumstances. *See Hoover v. Hoover*, 70 Ark. App. 215, 16 S.W.3d 560 (2000). A chancellor's unequal division of marital property will not be reversed unless it is clearly erroneous. *See id.* A chancery court's finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed. *See Lammey v. Eckel*, 62 Ark. App. 208, 970 S.W.2d 307 (1998). In reviewing a chancery court's findings, we defer to the chancellor's superior position to determine the credibility of witnesses and the weight to be accorded to their testimony. *See Jennings v. Burford*, 60 Ark. App. 27, 958 S.W.2d 12 (1997).

Arkansas Code Annotated section 9-12-315 governs the division of marital property and provides in relevant part:

(a) At the time a divorce decree is entered:

[1] The chancellor also ordered that each party was to receive his nonmarital property as well as the vehicle each was driving. Appellee was ordered to quitclaim her interest in 9 Hot Springs Village lot to appellant. The parties do not dispute these distributions or the division of personal property ordered by the court.

(1)(A) All marital property shall be distributed one-half (1/2) to each party unless the court finds such a division to be inequitable. In that event the court shall make some other division that the court deems equitable taking into consideration:

(i) The length of the marriage;
(ii) Age, health, and station in life of the parties;
(iii) Occupation of the parties;
(iv) Amount and sources of income;
(v) Vocational skills;
(vi) Employability;
(vii) Estate, liabilities, and needs of each party and opportunity of each for further acquisition of capital assets and income;
(viii) Contribution of each party in acquisition, preservation, or appreciation of marital property, including services as a homemaker; and
(ix) The federal income tax consequences of the court's division of property.

(B) When property is divided pursuant to the foregoing considerations the court must state its basis and reasons for not dividing the marital property equally between the parties, and the basis and reasons should be recited in the order entered in the matter.

(2) All other property shall be returned to the party who owned it prior to the marriage unless the court shall make some other division that the court deems equitable taking into consideration those factors enumerated in subdivision (a)(1) of this section, in which event the court must state in writing its basis and reasons for not returning the property to the party who owned it at the time of the marriage.

Appellee argues that the chancellor did not err because she was not required to weigh all of the factors equally and was not required to list each of the factors in her order. In addition, appellee maintains that the chancellor heard evidence pertaining to most of the factors and that the divorce decree itself discusses most of these factors. We agree.

While the statute requires the chancellor to consider certain factors and to state the basis for an unequal division of marital property, a plain reading shows that it does not require the chancellor to list each factor in her order, nor to weigh all factors equally. Appellant cites no authority to that effect. Further, the specific enumeration of these factors does not preclude a chancellor from considering other relevant factors, where exclusion of other

factors would lead to absurd results or deny the intent of the legislature to allow the chancellor to make an equitable division of property. *See Stover v. Stover*, 287 Ark. 116, 696 S.W.2d 750 (1985). Rather, where it is clear upon *de novo* review that the chancellor considered the relevant factors, this court should affirm. *See Pennybaker v. Pennybaker*, 14 Ark. App. 251, 687 S.W.2d 524 (1985).

The chancellor found that appellant "did nothing to contribute to the acquisition, preservation or appreciation of marital property, including services as a homemaker. Indeed, Mr. Keathley spent the last eight (8) years dissipating the assets Mrs. Keathley was working to accumulate, and his actions rise to the level of fraud against Mrs. Keathley."

Appellant maintains that although the chancellor recited her basis for the unequal division of property, it is "clear" from the decree that she did not consider all of the factors that she should have considered, such as: 1) appellant served as the homemaker because he paid all of the bills, wrote all of the checks and cleaned up after himself; 2) he has heart problems, is unemployable, and has no savings; 3) there is no evidence the money was used for anything other than household or marital debts; 4) there was no testimony as to who was responsible for each and every cash advance nor what the money was used for; 5) he worked for nearly five years of their twelve-year marriage and owned the home that originally enabled them to buy another home; and 6) appellee could not reasonably assert that she did not know he was getting the money because she worked in the credit department of a bank, because she admitted that she occasionally used the cards and had attended races with appellant, and because she knew the money to pay for her new house and car had to come from "somewhere."

Clearly, the court is required to consider the services of a homemaker in dividing the marital property. *See Stuart v. Stuart*, 280 Ark. 546, 660 S.W.2d 162 (1983). However, the chancellor is not required to find that a party's homemaker services contributed to the acquisition or preservation of the marital assets. Here, appellant took care of the finances and cleaned up after himself. However, appellee continued to perform the majority of the household chores while working outside of the home. Moreover, it is undisputed that appellant's "handling" of the parties' finances was what enabled him to work the fraud in this case. Appellant's assertion that this case would be decided differently if he were female is without merit. This court has upheld the unequal division of property in

favor of the husband on similar grounds. *See, e.g., Forsgren v. Forsgren*, 4 Ark. App. 286, 630 S.W.2d 64 (1982)(affirming unequal distribution of stock where wife excessively consumed alcohol and drugs resulting in massive medical bills and only contributed services as a homemaker). On these facts, the chancellor was not required to find that appellant's household services contributed to the acquisition or maintenance of the parties' assets.

Appellant also maintains that the chancellor ignored that he is in poor health, presumably due to a heart condition. However, he provided no proof to this effect. Appellee testified that appellant had a stint placed in one of his arteries due to a blockage in 1993, but that his health was good. Further, the evidence is clear that his health was good enough to play golf, shoot pool, and to travel to Hot Springs to attend horse races.

Appellant also asserted that the money was used to deposit into the parties' checking account to pay bills. However, despite repeated questioning by the chancellor with regard to proof on this issue, he failed to provide evidence that he deposited the money into their joint checking account. Appellant further argues that there was no evidence that this money was *not* used for household or other marital expenses. Given the evidence in this case, this assertion is patently untrue.

Appellant also asserts that appellee either acquiesced to the debt accumulation or should have known what was going on. However, appellee testified that the parties had little credit card debt when they married and she thought their only outstanding debts were car and house payments. Because her income alone, $40,000 per year, was sufficient to cover those expenses, and because appellant handled their finances, she had no reason to suspect that appellant was accumulating credit card debt in her name without her authorization.

Appellant also asserts that there is no proof as to who made the ATM withdrawals and that the chancellor would have to infer that he gambled the money away. To the contrary, appellee testified that when she used the ATM, it was taken from the parties' checking account and she informed appellant when she did so because he handled the checkbook. She flatly stated that she made no credit-card ATM withdrawals.

Moreover, while it is true that appellant did not admit that he "gambled the money away" or made cash advances for the

purpose of gambling, he stated during the proceedings: "That month on the bank statements I showed you, I wouldn't be surprised if I took $1,500 in cash advances that month — most of them in Hot Springs. Of the hundreds of thousands of dollars, I wouldn't be surprised at all." The chancellor was entitled to draw reasonable inferences based upon the evidence, *see Kesterson v. Kesterson*, 21 Ark. App. 287, 731 S.W.2d 786 (1987), and it was reasonable on the facts of this case for the chancellor to infer that appellant gambled away the cash advances he fraudulently obtained. Nonetheless, the reason that appellant incurred the debt is arguably irrelevant. The evidence established that he fraudulently incurred the debt in appellee's name, for whatever reason.

Thus, it is clear that the chancellor considered the relevant statutory factors. Further, she referenced numerous factors in her order. She heard evidence of, and referred in her order to, the length of the parties' marriage, the age, health, and station in life of the parties, their occupations, the sources and amounts of their incomes and assets, their liabilities and needs, each party's efforts or lack thereof in making and preserving the marital assets, and the tax consequences regarding the 401k account. It is apparent that the chancellor properly considered the relevant statutory factors. Therefore, we find no error in this respect.

II. Fault as a Ground for Unequal Distribution of Marital Property

Appellant's second argument is that the chancellor improperly considered fault as the basis for the unequal distribution of the parties' marital property and debt. Appellant cites *Leonard v. Leonard*, 22 Ark. App. 279, 739 S.W.2d. 697 (1987), and the dissent in *Stover v. Stover*, 287 Ark. 116, 696 S.W.2d 750 (1985), for the proposition that fault is not a proper consideration, even when it is clothed under the statutory requirement to consider the contribution of each party in acquisition of property. Appellant argues in essence that the chancellor ignored the equities weighing in his favor and ordered an unequal division of property based on his fraudulent conduct alone.

We are not persuaded by appellant's argument. First, his position fails to recognize the distinction between fault and equity. The predecessor statute to section 9-12-315, Arkansas Statute Annotated § 34-1215, dictated that marital property be divided equally, regardless of fault. However, this statute was amended and

now allows the chancellor to make an unequal distribution of marital property, as long as the chancellor specifies the basis for making the unequal distribution. As appellee notes, in some cases, that decision will necessarily be based on action or the failure to act, which in a literal sense of the word, could be considered fault. *See, e.g., Stover v. Stover, supra* (affirming unequal distribution where wife attempted to have her husband killed); *Forsgren v. Forsgren, supra.* Nonetheless, such equitable considerations are always proper factors for the chancellor to consider.

Second, we are not convinced that the chancellor ignored any evidence in this case or improperly considered "fault." Appellant maintains that the chancellor's division of the proceeds from the sale of the house ignores that he entered into the marriage with a home that was sold. Although appellant attempted to represent that the entire $25,000 in equity from his home was used as a down payment on the parties' second home, the record shows that only $8,500 of this money was used for the down payment. The chancellor did not ignore this fact because she mentioned it in her order. When a husband and wife hold real property as tenants by the entirety, it is presumed that the spouse who furnished the consideration made a gift in favor of the other spouse, and this presumption can only be rebutted by clear and convincing evidence. *See Lyle v. Lyle,* 15 Ark. App. 202, 691 S.W.2d 188 (1985). Appellant presented no evidence to rebut this presumption.

The chancellor purported to equally divide the proceeds of the sale of the parties' marital home. It is true that the proceeds from the sale of the parties' marital home were not divided "equally" in a strict sense because the parties received $18,000 in sale proceeds and appellant was awarded only $5,000. However, the fact that appellant had fraudulently incurred debt for gambling or other purposes was a proper consideration in the chancellor's unequal division of the proceeds from the sale of the house. *See Barker v. Barker,* 66 Ark. App. 187, 992 S.W.2d 136 (1999)(*reversed and remanded on other grounds*)(noting the chancellor awarded the first $7,500 of the sale proceeds to the nongambling spouse, with the remaining proceeds to be split equally between the parties).

Moreover, that the proceeds were not divided equally inures to appellant's benefit, because the proceeds were divided in such a manner to further reduce the unauthorized debt for which appellant will ultimately be liable. The chancellor ordered part of

the proceeds from the sale of the marital home to reduce unauthorized debt on a joint credit card, instead of merely ordering appellant to pay that debt. While appellant provided the money for the down payment on the parties' first home, the chancellor found that the debt reduction on the parties' second home, which allowed them to retain $30,000 in proceeds upon the sale of that home to use as a down payment for their marital home, was due to the efforts of appellee. Although the division of the proceeds was not equal, it certainly was not inequitable.

Finally, appellant maintains that the chancellor erred because he only received a net distribution of $2,962.62 from the pension plan and $2,605.71 from the 401k plan. He was ordered to pay all of the unauthorized debt, totaling $32,753.30, as well as one-third of the $4,067 in debts already paid by appellee. Appellant asserts that the property division statute was not designed to "saddle" the homemaker with all of the marital debt because he or she is not earning income.

The short answer to this argument is that appellant has not been unfairly "saddled" with all of the marital debt. The statute does not compel mathematical precision in the distribution of property; it simply requires that marital property be distributed equitably. *See Creson v. Creson*, 53 Ark. App. 41, 917 S.W.2d 553 (1996). Further, a chancellor has the power to adjust the marital debts as between the parties. *See Hackett v. Hackett*, 278 Ark. 82, 86, 643 S.W.2d 560, 562 (1982). Appellant was ordered to pay all of the debt for the credit cards that he fraudulently obtained in appellee's name and will be liable for only one-third of the legitimate marital debt that appellee has already satisfied. Part of the unauthorized debt for which he is responsible will be reduced by the sale of the home and by the set-aside funds from the pension plan and the 401k plan. In addition, if appellee is able to relieve herself of liability for the outstanding unauthorized debts, appellant will receive approximately $20,000 remaining in the 401k plan. It is apparent that the chancellor allocated the debt to each party based on her judgment about which of them should equitably be required to pay the debt.

Moreover, appellant agreed in his proposed findings of facts and conclusions of law that he would be responsible for all unauthorized credit-card debt other than the Bank of America card. An appellant may not complain on appeal that the chancellor erred

if he induced, consented to, or acquiesced in the chancellor's position. *See Anderson v. Anderson*, 60 Ark. App. 221, 963 S.W.2d 604 (1998).

Equity does not require that appellee exhaust her retirement to pay debts that were fraudulently incurred by appellant. To hold that the chancellor was not allowed to make an unequal distribution of property on the facts of this case would defeat the legislative intent to allow for an equitable distribution of marital property. Considering that appellant fraudulently accumulated over $100,000 in credit-card debt, for whatever purposes, and considering that appellee may still be responsible for approximately $30,000 in unresolved debt, an amount which is not completely covered by the set aside funds, we have no reason to hold that the chancellor's findings in this case were clearly erroneous.

Affirmed.

STROUD, C.J., and PITTMAN, J., agree.

Lewis Albert BROOKS *v.* STATE of Arkansas

CA CR 01-663 61 S.W.3d 916

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

John Settle, for appellant.

Mark Pryor, Att'y Gen., by: *Katherine Adams*, Ass't Att'y Gen., for appellee.

OLLY NEAL, Judge. Lewis Albert Brooks was found guilty of possession of cocaine with intent to deliver and possession of marijuana with intent to deliver. He received sentences of forty years' imprisonment for the cocaine charge and ten years' imprisonment for the marijuana charge, with the sentences running consecutively. Brooks was also fined $50,000 for each offense. On appeal, Brooks argues that (1) the trial court erred in allowing the State to introduce a statement, allegedly made by Brooks to a police officer but not disclosed to Brooks or his counsel prior to trial, even though Brooks filed a motion for discovery; (2) the trial court erred in denying his motion for a new trial; and (3) the trial court erred in denying his motion for a new trial without allowing a hearing as requested by Brooks. We affirm.

On the morning of September 13, 2000, Brooks was stopped by an Arkansas State Trooper due to his erratic driving in a construction zone. During the stop, he consented to a search of his vehicle. Thirty-four bundles of marijuana and two bundles of cocaine were found in a hidden compartment located in the floor of the vehicle.

Brooks was charged with possession of cocaine with intent to deliver and possession of marijuana with intent to deliver. Brooks's counsel filed a motion for discovery, requesting copies of any written or recorded statement and the substance of any oral statements made by Brooks. The State responded to the request by reporting that Brooks had made oral statements, and they were attached to the officer's report. The State also provided a copy of an audio recording of the traffic stop. A jury trial was held January 26, 2001, in the Crawford County Circuit Court.

During cross-examination, Brooks denied telling the officers that he and his wife were separated, and that he was hauling the drugs in order to earn money to get back together with her. Following the close of Brooks's case, the State recalled Agent Richard Hoffman. Hoffman contradicted Brooks's testimony, stating that Brooks told him he was hauling the drugs so he could get back together with his wife. Brooks objected to Hoffman's testimony because the statement had not been disclosed during discovery. The trial court overruled the objection. Hoffman went on to testify that

he had told the State about the statement on the day he completed his paperwork. Brooks took the stand again and denied making the statement. Due to the State's failure to disclose the inculpatory statement, Brooks filed a motion for new trial and requested a hearing on his motion. Brooks alleged that withholding the statement prejudiced him and was a denial of due process. The court denied the motion without holding a hearing.

On appeal, Brooks alleges the trial court erred in allowing the State to introduce the inculpatory statement that was not disclosed to him or his counsel prior to trial despite his filing of motions for discovery. We hold that Brooks waived his argument. A party who does not object to the introduction of evidence at the first opportunity waives such an argument on appeal. *Marts II v. State*, 332 Ark. 628, 968 S.W.2d 41 (1998). The policy reason behind this rule is that a trial court should be given an opportunity to correct any error early in the trial, perhaps before any prejudice occurs. *Pyle v. State*, 340 Ark. 53, 8 S.W.3d 491 (2000). Similarly, objections to discovery violations must be made at the first opportunity in order to preserve them for appeal. *Marts II, supra.* Thus, Brooks waived his argument when he failed to object to the inculpatory statement during cross-examination.

Had we reached the merits of Brooks's argument, we would hold that the admission of the statement was not prejudicial. Rule 17.1(a)(ii) of the Arkansas Rules of Criminal Procedure imposes a duty on the prosecution to disclose upon timely request "any written or recorded statements and the substance of any oral statements made by the defendant." *See also Tester v. State*, 342 Ark. 549, 30 S.W.3d 99 (2000); *Henry v. State*, 337 Ark. 310, 989 S.W.2d 894 (1999). Arkansas Rule of Criminal Procedure 19.7 provides that if the court learns that the prosecution has failed to comply with a discovery rule such as Rule 17.1, the court may order the prosecution to permit the discovery or inspection of the material not previously disclosed, grant a continuance, prohibit the party from introducing the undisclosed material, or enter such order as it deems proper under the circumstances. *Henry v. State, supra.* When testimony is not disclosed pursuant to pretrial discovery procedures, the burden is on the appellant to establish that the omission was sufficient to undermine confidence in the outcome of the trial. *Hicks v. State*, 340 Ark. 605, 12 S.W.3d 219 (2000). Upon the introduction of his inculpatory statement, Brooks should have asked for a continuance. Furthermore, he has failed to show that the omission undermines confidence in the outcome of the trial.

Brooks's second argument on appeal is that the trial court erred in denying his motion for new trial. The decision on whether to grant or deny a motion for new trial lies within the sound discretion of the trial court. *State v. Cherry*, 341 Ark. 924, 20 S.W.3d 354 (2000). We do not reverse that decision absent an abuse of discretion. *Bunton v. State*, 36 Ark. App. 170, 820 S.W.2d 466 (1991). Brooks has failed to show that the trial court abused its discretion; therefore, we affirm the denial of his motion for new trial.

Brooks also argues that the trial court erred in denying his motion for new trial without allowing a hearing as he requested. Arkansas Rule of Criminal Procedure 33.3 provides that "the trial court shall designate a date certain if a hearing is requested . . . to take evidence, hear and determine all of the matters presented. The hearing shall be held within ten (10) days of the filing of any motion unless circumstances justify that the hearing or determination be delayed." Our supreme court has held appropriate a trial court's denial of a motion for new trial without a hearing where the holding of a hearing would have been superfluous. *See Turner v. State*, 325 Ark. 237, 926 S.W.2d 843 (1996). Here, judicial economy would not have been served by holding a hearing, because Brooks failed to set out any new evidence. Therefore, we hold that it was appropriate for the trial court to deny Brook's motion for new trial without holding a hearing.

Affirmed.

ROBBINS and CRABTREE, JJ., agree.

Leonard MAYS *v.* STATE of Arkansas

CA CR 01-662 61 S.W.3d 919

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

Bill Luppen, for appellant.

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

OLLY NEAL, Judge. Appellant, Leonard Mays, was charged with possession of cocaine with intent to deliver. In a pretrial motion to suppress, appellant asserted that this charge resulted from a search and seizure that was made absent consent and exigent circumstances. The trial court denied Mays's motion, and he then entered a conditional plea of guilty pursuant to Ark. R. Crim. P. 24.3, reserving his right to appeal the adverse ruling. Mays was sentenced to 120 months in the Arkansas Department of Correction with sixty-six months suspended. He does not allege police lacked reasonable suspicion to stop him. His sole argument on appeal is that the trial court erred in denying his motion to suppress because the police lacked reasonable suspicion to detain him. We disagree, and therefore affirm.

In reviewing a trial court's ruling on a motion to suppress, the court makes an independent determination based on the totality of the circumstances, and reverses only if the ruling is clearly against the preponderance of the evidence. *Owen v. State*, 75 Ark. App. 39, 53 S.W.3d 62 (2001). When police officers have

conducted a search without a warrant, our review begins with the basic premise that a warrantless search is unauthorized. *Hoey v. State*, 73 Ark. App. 118, 42 S.W.3d 564 (2001)(citing *Evans v. State*, 65 Ark. App. 232, 987 S.W.2d 741 (1999)). All warrantless searches are unreasonable unless shown to be within one of the exceptions to the rule that a search must rest upon a valid warrant, and the burden of proof is on those who seek to justify it. *Id.*

At the suppression hearing, Officer Flannery testified that on May 4, 2000, he conducted surveillance in Little Rock on 1406 Izard Street as part of an undercover narcotics purchase by fellow officer, Detective Bakalekos. After making contact with seller Paul Dailey,[1] Detective Bakalekos notified Detective Flannery that Mr. Dailey did not have the narcotics, but was expecting a delivery soon. Thereafter, Detective Flannery observed a black male, later identified as the appellant, exit a blue Chevrolet truck parked in front of the residence. The appellant spoke briefly with Dailey, and they entered the residence. When Detective Flannery saw Dailey return to the front yard, he radioed Detective Bakalekos to come back around and make contact with him. Detective Bakalekos pulled back around, picked up Mr. Dailey, and turned westbound on Fourteenth Street, thereby indicating to the other officers that Dailey had narcotics and an arrest was imminent. Once Bakalekos made contact with Dailey, Detective Flannery observed appellant leaving the residence and followed him. The detective testified that appellant was driving "pretty quick," and when he discovered the officer was behind him, appellant pulled over. Appellant informed Detective Flannery that he had drugs in his right pocket, and Flannery thereafter "retrieved a paper towel that was kind of rolled up which contained approximately seven, eight grams [sic] of off-white rock-like substance[.]"

Appellant argues that Detective Flannery possessed a purely conjectural suspicion that he was involved in criminal activity because the detective neither saw anything in appellant's behavior or actions that indicated he was involved in criminal activity nor did he witness an exchange of drugs or money.

The supreme court has articulated that there are three types of permissible encounters between the police and private citizens, one of which is when an officer justifiably restrains an

[1] After selling drugs to the undercover detective, Mr. Dailey, who is not a party, was arrested and taken into custody by officers at the scene.

individual who he or she has an "articulable suspicion" has committed or is about to commit a crime. *Frette v. City of Springdale*, 331 Ark. 103, 959 S.W.2d 734 (1998). Rule 3.1 of the Arkansas Rules of Criminal Procedure provides that a law enforcement officer may stop and detain any person he reasonably suspects is committing, has committed, or is about to commit a felony. For purposes of this rule, reasonable suspicion means a suspicion based upon facts or circumstances which give rise to more than a bare, imaginary, or purely conjectural suspicion. *Addison v. State*, 298 Ark. 1, 765 S.W.2d 566 (1989).

An officer does not have to witness the violation of a statute in order to stop a suspect. *Piercefield v. State*, 316 Ark. 128, 871 S.W.2d 348 (1994). The justification for an investigative stop depends upon whether, under the totality of the circumstances, the police have specific, particularized, and articulable reasons indicating a person or vehicle may be involved in criminal activity. *Hill v. State*, 275 Ark. 71, 628 S.W.2d 284 (1982), *cert. denied*, 459 U.S. 882 (1982). Among the factors to consider in determining whether an officer has grounds to "reasonably suspect" are the demeanor of the suspect, whether the suspect is consorting with others whose conduct is "reasonably suspect," and the suspect's proximity to known criminal conduct. Ark. Code Ann. § 16-81-203 (1987); *see also Muhammad v. State*, 337 Ark. 291, 988 S.W.2d 17 (1999).

In reviewing the trial court's denial of the motion to suppress, we conclude from the totality of the circumstances that Detective Flannery had reasonable suspicion. His suspicion was based on more than conjecture. He had reasonable grounds to suspect that appellant had committed a felony because when he stopped him, appellant was nervous, he had been with Dailey who officers obviously suspected of selling drugs, and he was at the residence with Dailey before the drug sale took place.

Affirmed.

ROBBINS and CRABTREE, JJ., agree.

Clyde McWILLIAMS *v.* Karl W. SCHMIDT, *et al.*

CA 01-222 61 S.W.3d 898

Court of Appeals of Arkansas
Division IV
Opinion delivered December 5, 2001
[Petition for rehearing denied January 9, 2002.]

Diana M. Maulding, for appellant.

Laser Law Firm, by: *Alfred F. Angulo, Jr.*, for separate appellees Karl Schmidt and Tanas Schmidt.

Matthews, Sanders & Sayes, by: *Doralee Idleman Chandler*; *Clark Brewster*; *Terry Dugger*; and *Hugh L. Brown*, for separate appellees Ronald Gangluff; Johnny Schmidt; Edward and Margaret Gangluff; David Gangluff; and Wrenetta Ritchie.

LARRY D. VAUGHT, Judge. This is an appeal from a jury verdict entered in a case involving a boundary dispute. Appellant Clyde McWilliams also appeals from the entry of summary judgment for appellees in his malicious-prosecution claim. We affirm.

Procedural History

At issue is the ownership of approximately 5.9 acres of land. Appellant received a deed in 1965 to land in the southwest quarter of Section 12, Township 3 North, Range 12 West, in Pulaski County, Arkansas. To the east of his land, in the southeast quarter,

lies property owned by the Gangluff and Schmidt families. The tracts owned by appellees Margaret Gangluff, Ronald Gangluff, and David Gangluff are north of the tracts owned by appellees Johnny Schmidt, Karl Schmidt, and Tanas Schmidt. In 1998, appellees Karl and Tanas Schmidt received a deed to a tract from Wrenetta Schmidt Ritchie and Jerry Ritchie. In 1995, appellee Edward Gangluff conveyed his interest in a tract to his wife, Margaret, to whom he gave a life estate, and to Ronald and David Gangluff, to whom he gave the remainder. According to the parties' deeds, their common boundary line divides the quarter-sections. Appellant claims that the quarter-section line should be located further east, along a meandering old fence line that was built in approximately 1941 and that was extended south in 1958. Appellees argue that the entire fence line was built to prevent cattle from roaming into the eastern area of their property and was never intended to mark the boundary line between the quarter-sections. Although appellant ran cattle and cut hay on the disputed area, appellees maintain that appellant did so with their permission. Appellees also contend that all parties had agreed that, when the need for a survey arose, a fence would be placed on the actual boundary line.

In 1998, appellees commissioned a survey that placed the boundary line considerably west of the old fence. Based on this survey, appellees built a new fence to demarcate the line dividing the southeast quarter from the southwest quarter of Section 12. After appellees built the new fence, appellant sued them in Pulaski County Circuit Court for ejectment, slander of title, and trespass. Appellees then initiated a quiet-title action in Pulaski County Chancery Court, which was dismissed because of the pendency of this action. After the chancery action was dismissed, appellant amended his complaint to include the claim of malicious prosecution. Appellant's claims were bifurcated, and the malicious-prosecution claim was not tried to the jury with the other claims.

Although appellant claimed title to the disputed area by adverse possession, acquiescence, and an agreed boundary line, he testified without qualification that he claimed title only through his 1965 deed, which clearly conveyed land in the southwest quarter-section. Appellant admitted that, if the land in dispute is actually located within the southeast quarter-section, he does not claim it. Therefore, the central question at trial was whether the area in dispute lies within the southwest quarter or the southeast quarter of Section 12. Nevertheless, the jury was instructed on adverse possession, acquiescence, and boundary by agreement. In rendering their verdict for

appellees, the jury specifically found that appellant does not own the area in dispute.

Appellant filed motions for directed verdict, judgment notwithstanding the verdict, and for new trial, all of which were denied. Appellees moved for summary judgment on the malicious-prosecution claim. In support of their motion, appellees filed affidavits indicating that they had relied upon the advice of counsel in filing the quiet-title action. The trial judge granted summary judgment to appellees on this claim. Appellant appeals from the trial judge's refusal to set aside the jury verdict and from the entry of summary judgment for appellees.

Appellant argues that the trial judge should have granted his motions for new trial, directed verdict, and judgment notwithstanding the verdict. A motion for directed verdict is a challenge to the sufficiency of the evidence. *Sparks Reg'l Med. Ctr. v. Smith*, 63 Ark. App. 131, 976 S.W.2d 396 (1998). When reviewing the denial of a motion for directed verdict, we affirm if the jury's verdict is supported by substantial evidence. *Wal-Mart Stores, Inc. v. Binns*, 341 Ark. 157, 15 S.W.3d 320 (2000); *Wal-Mart Stores, Inc. v. Williams*, 71 Ark. App. 211, 29 S.W.3d 754 (2000). The same standard applies when we review the denial of a motion for judgment notwithstanding the verdict. *Home Mut. Fire Ins. Co. v. Jones*, 63 Ark. App. 221, 977 S.W.2d 12 (1998). Substantial evidence is evidence that is of sufficient certainty and precision to compel a conclusion one way or another, forcing or inducing the mind to pass beyond suspicion or conjecture. *Id.* On appeal, only the evidence favorable to the appellee, and all reasonable inferences therefrom, will be considered. *Id.* In reviewing the evidence, the weight and value to be given the testimony of the witnesses is a matter within the exclusive province of the jury. *Rathbun v. Ward*, 315 Ark. 264, 866 S.W.2d 403 (1993). The appellate court does not try issues of fact. *City of Caddo Valley v. George*, 340 Ark. 203, 9 S.W.3d 481 (2000).

We will not reverse the denial of a motion for new trial if the verdict is supported by substantial evidence, giving the jury verdict the benefit of all reasonable inferences permissible under the proof. *St. Louis S.W. Ry. Co. v. Grider*, 321 Ark. 84, 900 S.W.2d 530 (1995). In determining whether the evidence is substantial, the court need only consider the evidence on behalf of the appellee and that part of the evidence that is most favorable to the appellee. *Dixon Ticonderoga Co. v. Winburn Tile Mfg. Co.*, 324 Ark. 266, 920 S.W.2d 829 (1996).

Appellant attempted to prove that his deed included the land in dispute and, in the alternative, that he acquired it through an agreement as to the boundary, by acquiescence, or by adverse possession. Appellant argues that the jury's finding that he does not own the disputed property is not supported by substantial evidence.

Acquiescence

As we stated in *Summers v. Dietsch,* 41 Ark. App. 52, 849 S.W.2d 3 (1993), boundaries are frequently found to exist at locations other than those shown by an accurate survey of the premises in question and may be affected by the concepts of acquiescence and adverse possession. A fence, by acquiescence, may become the accepted boundary even though it is contrary to the surveyed line. *Id.* When adjoining landowners silently acquiesce for many years in the location of a fence as the visible evidence of the division line and thus apparently consent to that line, the fence line becomes the boundary by acquiescence. *Id.* It is not required that there be an express agreement to treat a fence as a dividing line; such an agreement may be inferred by the actions of the parties. *Id.* Acquiescence need not occur over a specific length of time, although it must be for a long period of time. *Lammey v. Eckel,* 62 Ark. App. 208, 970 S.W.2d 307 (1998). A boundary line may be established by acquiescence whether or not it has been preceded by a dispute or uncertainty as to the boundary line. *Jennings v. Burford,* 60 Ark. App. 27, 958 S.W.2d 12 (1997). When a boundary line by acquiescence can be inferred from other facts presented in a particular case, a fence line, whatever its condition or location, is merely the visible means by which the acquiesced boundary line is located. *Id.*Whether a boundary line by acquiescence exists is to be determined upon the evidence in each individual case. *Hedger Bros. Cement and Materials, Inc. v. Stump*, 69 Ark. App. 219, 10 S.W.3d 926 (2000).

Boundary-Line Agreement

For there to be a valid boundary-line agreement, certain factors must be present: (1) there must be an uncertainty or dispute about the boundary line; (2) the agreement must be between the adjoining landowners; (3) the line fixed by the agreement must be definite and certain; (4) there must be possession following the agreement. *Fields v. Griffen*, 60 Ark. App. 186, 959 S.W.2d 759 (1998).

Adverse Possession

In order to establish title by adverse possession, appellant had the burden of proving that he had been in possession of the property in question continuously for more than seven years and that the possession was visible, notorious, distinct, exclusive, hostile, and with the intent to hold against the true owner. *Anderson v. Holliday*, 65 Ark. App. 165, 986 S.W.2d 165 (1999). Whether possession is adverse to the true owner is a question of fact. *Id.* Where possession of property is by permission, title is not acquired by adverse possession. *McCulloch v. McCulloch*, 213 Ark. 1004, 214 S.W.2d 209 (1948). Where the original entry on another's land was amicable or permissive, possession presumptively continues as it began, in the absence of an explicit disclaimer. *Terral v. Brooks*, 194 Ark. 311, 108 S.W.2d 489 (1937).

The Testimony

At trial, appellant testified that he and Otto Schmidt, one of appellees' predecessors in title, agreed in 1965 that the old fence line was the boundary. He said that, over the years since that time, he had bush-hogged the land in dispute, used it as pasture land, and planted grass there without asking anyone's permission to do so. However, appellant emphatically stated that he believed the land in dispute to be in the southwest quarter of Section 12 and denied having any claim to land in the southeast quarter.

Appellees did not dispute appellant's use of the land. Nevertheless, they presented testimony demonstrating that he used it with their permission. Appellee Edward Gangluff testified that he had permitted appellant to graze cattle on the land and to cut hay there. He said that, on four or five occasions, appellant had acknowledged the need to eventually move the fence to the true boundary line. He also stated that he had used the old fence to contain cattle and that he had never considered it as the boundary line. Appellee Johnny Schmidt testified that his father, Otto Herman Schmidt (Otto Schmidt's son), had shown him the true boundary west of the old fence line. He said that, when he was eleven years old (he was sixty-three at the time of trial), the ends of the actual boundary line were marked by an old buggy axle and a steel pin. Appellee Margaret Gangluff testified that a steel pipe has marked the boundary since at least 1956, when she married into the family. She also stated that the old fence had been used to control cattle and that she had

never considered it to be the actual boundary line. Appellee Karl Schmidt also testified that the old fence line had not been accepted as the boundary. Appellee David Gangluff stated that he had heard appellant acknowledge that the old fence was not on the true boundary line and that it would need to be straightened out someday with a survey.

Based on this testimony, there was more than substantial evidence for the jury to find that appellant failed to establish adverse possession, acquiescence, or a boundary by agreement.

Title By Deed

The parties relied on their deeds to establish their rights in the disputed land. The location of a boundary line is a question of fact. *Ward v. Adams*, 66 Ark. App. 208, 989 S.W.2d 550 (1999); *Lammey v. Eckel, supra.* A trial court may not substitute its own view of the evidence for that of the jury. *Schrader v. Bell*, 301 Ark. 38, 781 S.W.2d 466 (1989). The jury is the sole judge of the credibility of the witnesses and the weight and value of their evidence and may believe or disbelieve the testimony of any one or all of the witnesses, even though such evidence is uncontradicted or unimpeached. *Kempner v. Schulte*, 318 Ark. 433, 885 S.W.2d 892 (1994); *Morton v. American Med. Int'l, Inc.*, 286 Ark. 88, 689 S.W.2d 535 (1985). The jury is free to assess a party's credibility and to determine whether or not to believe him or her. *State Auto Prop. and Cas. Ins. Co. v. Swaim*, 338 Ark. 49, 991 S.W.2d 555 (1999).

Both sides presented expert testimony to support their claims. As discussed above, appellant admitted that he did not claim any land in the southeast quarter of Section 12. Appellant offered the testimony of Steve Beadle, a surveyor, who testified that the Government Land Office (GLO) had completed the original survey of this section in 1818. He said that the old fence line is close to where the quarter-section line would be if the GLO measurements are followed and that the boundary line claimed by appellees is not accurate. According to Mr. Beadle, the quarter-section line lies approximately sixty-eight feet east of where appellees' experts have located it. He said that, according to the GLO's measurements, the disputed area lies within the southwest quarter of the section, in the land owned by appellant.

Appellees offered the expert testimony of James Bagwell, a surveyor, and John Pownall, a civil engineer and surveyor. They

stated that Mr. Bagwell performed a survey and, based on the information he provided, Mr. Pownall determined the boundary lines. They stated that the land in dispute is within the southeast quarter-section and agreed that appellant does not own it.

Appellant attacks the reliability of Mr. Bagwell's and Mr. Pownall's testimony and asserts that they did not follow the GLO's measurements. However, both men testified that they had consulted the GLO measurements and had found them to be less than accurate and reliable. It is true that the original United States Government survey is *prima facie* correct and that surveys must conform as nearly as possible with the original survey. *Dicus v. Allen*, 2 Ark. App. 204, 619 S.W.2d 306 (1981). Nevertheless, the weight and effect of the original survey is a question of fact. *See Horne v. Howe Lumber Co.*, 209 Ark. 202, 190 S.W.2d 7 (1945). The supreme court has recognized that errors could have been made in an original government survey. *See Missouri Pac. R.R. Co. v. State*, 197 Ark. 1111, 127 S.W.2d 133 (1939).

Obviously, the jury did not believe Mr. Beadle's testimony that the disputed land lies within the southwest quarter-section, nor was it required to do so. *Gibson Appliance Co. v. Nationwide Ins. Co.*, 341 Ark. 536, 20 S.W.3d 285 (2000). The jury's finding that appellant does not own the disputed land is supported by substantial evidence. Accordingly, the trial judge did not err in refusing to set the verdict aside.

Purported Irregularities at Trial

Appellant also argues that he is entitled to a new trial because of irregularities that occurred at trial. *See* Ark. R. Civ. P. 59(a)(1). A decision on whether to grant or deny a motion for new trial lies within the sound discretion of the trial judge. *Dodson v. Allstate Ins. Co.*, 345 Ark. 430, 47 S.W.3d 866 (2001). We will not reverse a trial judge's order denying a new trial unless there is a manifest abuse of discretion, that is, discretion exercised thoughtlessly and without due consideration. *Montgomery Ward & Co. v. Anderson*, 334 Ark. 561, 976 S.W.2d 382 (1998).

Appellant contends that the trial judge unfairly prejudiced the jury by commenting that he might need to reduce an exhibit in size for the supreme court. We do not agree. Obviously, the reduction of the exhibit for the record on appeal would benefit all parties, regardless of who appeals. We see no prejudice in the trial judge's

remarks. Further, appellant did not raise an objection about the remarks at trial. A judge's allegedly biased or harsh remarks are not subject to appellate review if the appellant failed to object to those statements or move for the judge's recusal. *Dodson v. Allstate Ins. Co., supra.* This is true even if the matter was raised in a motion for new trial. *Id.*

Arkansas Rule of Evidence 615

Appellant also argues that the trial judge should not have limited his cross-examination of Mr. Bagwell about his admission that he had, during a break in the trial, discussed Mr. Beadle's testimony with one of appellees' attorneys. Arkansas Rule of Evidence 615 governs the exclusion of witnesses from the courtroom so that they may not hear the testimony of other witnesses. *Clark v. State*, 323 Ark. 211, 913 S.W.2d 297 (1996). This rule is a valuable tool for discouraging and exposing fabrication, inaccuracy, and collusion and is a means of insuring that a witness's testimony will not be influenced by the testimony of other witnesses. *Bayless v. State*, 326 Ark. 869, 935 S.W.2d 534 (1996). There is a line that exists between perfectly acceptable witness preparation on the one hand and impermissible influencing of the witness on the other hand. *Id.* Trial lawyers, in the course of preparing their witnesses, must not indicate *specifically* what other witnesses have testified. *Id.* However, attorneys are entitled to talk with witnesses before placing them upon the witness stand and to indicate the general nature of prior witnesses' testimony. *Id.* Whether an attorney violates Rule 615 in the course of preparing a witness must be determined on a case-by-case basis. *Id.*

The three possible methods of enforcement available to the trial judge when a violation of the sequestration rule has occurred are: (1) citing the witness for contempt; (2) permitting comment on the witness's noncompliance in order to reflect on her credibility; (3) refusing to allow her to testify. *Lowe v. Ralph*, 61 Ark. App. 231, 966 S.W.2d 283 (1998). A violation of the witness-exclusion rule is a matter that goes primarily to credibility — not competency. *Martin v. State*, 22 Ark. App. 126, 736 S.W.2d 287 (1987). Even if there has been a clear violation of Rule 615, the trial judge does not abuse his discretion in permitting the witness's testimony when exercising his option of allowing comment on the witness's violation in order to reflect on his credibility. *Swanigan v. State*, 316 Ark. 16, 870 S.W.2d 712 (1994). Indeed, the trial judge's

discretion is more readily abused by excluding the testimony than by admitting it. *Id.*

The record discloses that the trial judge permitted appellant's attorney to comment extensively on this alleged violation of Rule 615. Therefore, even if appellees' counsel violated the rule, the error was cured and provides no basis for a new trial. Error is no longer presumed to be prejudicial; unless the appellant demonstrates prejudice, we will not reverse. *Lucas v. Grant*, 61 Ark. App. 29, 962 S.W.2d 388 (1998); *Jones v. Balentine*, 44 Ark. App. 62, 866 S.W.2d 829 (1993).

Malicious Prosecution

Appellant also contends that the trial judge erred in granting summary judgment to appellees on his malicious-prosecution claim. In summary-judgment cases, we need only decide if the granting of summary judgment was appropriate based upon whether the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered. *Inge v. Walker*, 70 Ark. App. 114, 15 S.W.3d 348 (2000). Summary judgment is no longer considered a drastic remedy but is regarded simply as one of the tools in the trial court's efficiency arsenal. *See Wallace v. Broyles*, 332 Ark. 189, 961 S.W.2d 712 (1998). All proof submitted must be viewed in a light most favorable to the party resisting the motion, and any doubts and inferences must be resolved against the moving party. *Inge v. Walker, supra.* On a summary-judgment motion, once the moving party establishes a *prima facie* entitlement to summary judgment by affidavits or other supporting documents, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Welch Foods, Inc. v. Chicago Title Ins. Co.*, 341 Ark. 515, 17 S.W.3d 467 (2000).

An allegedly malicious prosecution can be a civil proceeding. *Carmical v. McAfee*, 68 Ark. App. 313, 7 S.W.3d 350 (1999). The essential elements of malicious prosecution are: (1) a proceeding instituted or continued by the defendant against the plaintiff; (2) termination of the proceeding in favor of the plaintiff; (3) absence of probable cause for the proceeding; (4) malice on the part of the defendant; (5) damages. *McLaughlin v. Cox*, 324 Ark. 361, 922 S.W.2d 327 (1996). Where the defendant makes a full, fair, and truthful disclosure of all the facts known to him before competent counsel and then acts bona fide upon such advice, this

will be a complete defense to a claim of malicious prosecution. *Id.*; *Machen Ford-Lincoln-Mercury, Inc. v. Michaelis*, 284 Ark. 255, 681 S.W.2d 326 (1984).

In *Carmical v. McAfee, supra*, we explained that whether probable cause was lacking may be decided by way of summary judgment:

> Proof of absence of probable cause is an essential element in a claim for malicious prosecution. *Harold McLaughlin Reliable Truck Brokers, Inc. v. Cox, supra; Smith v. Anderson,* 259 Ark. 310, 532 S.W.2d 745 (1976). . . . In the context of malicious prosecution, probable cause means such a state of facts or credible information which would induce an ordinarily cautious person to believe that his lawsuit would be successful. *See McLaughlin v. Cox, supra; Harmon v. Carco Carriage Corp.,* 320 Ark. 322, 895 S.W.2d 938 (1995). . . . In order to have a probable-cause basis to file a lawsuit, a person need only have the opinion that the chances are good that a court will decide the suit in his favor. RESTATEMENT (SECOND) OF TORTS § 675 comment (f) at 460 (1977). The question is not whether the person is correct in believing that his complaint is meritorious, but whether his opinion that his complaint is meritorious was a reasonable opinion. *Id.* A person need have only a reasonable opinion that his complaint is meritorious because, "[t]o hold that the person initiating civil proceedings is liable unless the claim proves to be valid would throw an undesirable burden upon those who by advancing claims not heretofore recognized nevertheless aid in making the law consistent with changing conditions and changing opinions." *Id.* A person's refusal to believe an improbable explanation from someone that he subsequently sues does not amount to substantial evidence that he lacked probable cause to file the lawsuit. *See Kroger Co. v. Standard,* 283 Ark. 44, 670 S.W.2d 803 (1984). The issue of lack of probable cause in a malicious-prosecution case may be decided as a matter of law on summary judgment only if both the facts relied upon to create probable cause and the reasonable inferences to be drawn from the facts are undisputed. *Harmon v. Carco Carriage Corp., supra; Cox v. McLaughlin,* 315 Ark. 338, 867 S.W.2d 460 (1993).

68 Ark. App. at 321-22, 7 S.W.3d at 356-57.

In his affidavit in support of the motion for summary judgment, attorney Hugh Brown stated:

1. That Karl W. Schmidt, Tanas N. Schmidt, Johnny Melvin Schmidt, Edward Bass Gangluff, Margaret Hodge Gangluff, David S. Gangluff, Ronald Gangluff, Wrenetta Sue Schmidt Ritchie, Jerry Ritchie retained my services to defend the above styled Circuit Court action.

2. That my clients disclosed to me all pertinent facts and papers, including deeds and surveys, regarding ownership of the disputed property. The information disclosed was essentially identical to the information that was testified to or introduced at the trial on allegations of ejectment, trespass and slander of title.

3. That based upon the information disclosed during my meetings with my clients I advised that a Petition to Quiet Title and for Injunction in the Chancery Court of Pulaski County should be filed.

4. That I filed said Petition to Quiet Title and for Injunction on behalf of Karl W. Schmidt, Tanas N. Schmidt, Johnny Melvin Schmidt, Edward Gangluff, Margaret Gangluff, David Gangluff and Ronald Gangluff.

Additionally, appellee Ronald E. Gangluff stated in his affidavit:

1. That Karl W. Schmidt, Tanas N. Schmidt, Johnny Melvin Schmidt, Edward Bass Gangluff, Margaret Hodge Gangluff, David S. Gangluff, Wrenetta Sue Schmidt Ritchie, Jerry Ritchie and myself retained Hugh Brown to defend in the above styled Circuit Court action.

2. That all pertinent facts and papers, including deeds and surveys, regarding ownership of the disputed property were disclosed to High [sic] Brown. The information disclosed was the same information that was testified to or introduced at the trial on allegations of ejectment, trespass and slander of title.

3. That based upon the information disclosed to Hugh Brown, he advised that a Petition to Quiet Title and for Injunction in the Chancery Court of Pulaski County should be filed.

4. That said Petition to Quiet Title and for Injunction was filed on behalf of Karl W. Schmidt, Tanas N. Schmidt, Johnny Melvin Schmidt, Edward Gangluff, Margaret Gangluff, David Gangluff and myself by Hugh Brown, attorney of record.

> 5. That at all times I maintained a belief that the Petition to Quiet Title was meritorious.
>
> 6. That the Chancery Court action was filed upon the advise [sic] of my personal counsel.

The other appellees filed affidavits to the same effect.

Appellant argues that the trial judge erred in granting summary judgment to appellees before they answered appellant's interrogatories regarding the malicious-prosecution claim. Rule 56(f) provides that, when a party opposing the motion demonstrates by affidavit that he cannot present facts essential to justify his opposition, the court may refuse the application for summary judgment or order a continuance to permit further discovery. However, the decision on whether to grant a continuance is a matter of discretion with the trial judge. *See Jenkins v. International Paper Co.*, 318 Ark. 663, 887 S.W.2d 300 (1994). If the appellant cannot demonstrate how additional discovery would have changed the outcome of the case, we cannot say that the trial judge abused his discretion. *Id.*

There is no question that appellant failed to rebut appellees' proof with proof. Further, appellant has not demonstrated how additional discovery would have altered the outcome of this claim. Given appellant's lack of diligence in seeking this discovery, we cannot say that the trial judge abused his discretion in refusing to delay his decision on the motion for summary judgment.

Affirmed.

HART and BAKER, JJ., agree.

Lisa CASSIDY *v.* ARKANSAS DEPARTMENT OF HUMAN SERVICES

CA 01-045 61 S.W.3d 880

Court of Appeals of Arkansas
Divisions II, III and IV
Opinion delivered December 5, 2001
[Petition for rehearing denied January 9, 2002.]

[redacted]

James E. Hensley, Jr., for appellant.

Kathy L. Hall, Office of Chief Counsel, for appellee.

KAREN R. BAKER, Judge. The appellant, Lisa Cassidy, is the mother of two children, a daughter, L.C., and a son, C.C., who were born on August 2, 1989, and June 9, 1997, respectively. She is appealing from an order terminating her parental

rights, arguing that the decision is clearly erroneous because Arkansas Department of Human Services ("ADHS") failed to offer appropriate reunification services and because it is contrary to the best interests of the children. Appellant also contends that the chancellor erred in denying her mother's motion to intervene. We affirm.

On August 13, 1999, appellant was arrested for endangering the welfare of a minor based on an incident where C.C., then age two, was found naked and barefooted in a neighbor's yard playing with the neighbor's dogs, including a Rottweiler. The temperature outside that day was reportedly 105 degrees. Upon inspection of the home where appellant and the children lived with appellant's mother, Anita Cassidy, social services observed, among other things, mildewed dishes, trash, mice feces throughout the kitchen and pantry, live mice, a mousetrap sitting on a piece of furniture three feet high, and scissors on the floor. It was also known that C.C. had been found the week before playing at a Wal-Mart construction site several blocks away from the home. The children were taken into emergency custody, and after a hearing they were declared dependent-neglected because of inadequate supervision and environmental neglect. The initial goal and case plan was that of reunification, and services were provided that included homemaking services, in-home parenting and parenting classes, and referrals for individual and family counseling. Appellant underwent a psychological evaluation in September 1999, and three additional psychological examinations in March, June, and August of 2000. At the June examination, it was learned for the first time that appellant suffers from paranoid schizophrenia.

In the meantime, the case was reviewed in January and April of 2000. Appellant was allowed overnight, weekend visitation until April, when only supervised visitation was allowed after L.C. alleged that appellant's brother had molested her. At the permanency planning hearing held in June, the goal was changed from reunification to termination. After a hearing in October, the court granted ADHS's petition to terminate appellant's parental rights. The chancellor granted the petition pursuant to Ark. Code Ann. § 9-27-341(b)(3)(B)(i)(a) (Supp. 1999), finding that the children had been adjudicated as dependent-neglected and had remained outside of the home for one year and that, despite a meaningful effort by the department to rehabilitate the home, appellant had failed to remedy the conditions that had caused the children to be removed.

Appellant's first point is that the chancellor erred in finding that ADHS had provided adequate reunification services. Appellant contends that, although further psychological examination was recommended after her initial evaluation in September of 1999, she was not provided such an examination until March 2000. She argues that ADHS overlooked the need for treatment and aggressive intervention and that ADHS was at fault for the delay in her receiving treatment.

The burden on the party seeking to terminate the parental relationship is a heavy one under Arkansas law. *Malone v. Arkansas Dep't of Human Servs.*, 71 Ark. App. 441, 30 S.W.3d 758 (2000). Arkansas Code Annotated section 9-27-341(b)(3)(Supp. 1999) requires that an order terminating parental rights must be based on clear and convincing evidence. When the burden of proving a disputed fact in chancery court is by clear and convincing evidence, the inquiry on appeal is whether the chancery court's finding that the disputed fact was proven by clear and convincing evidence is clearly erroneous. *Minton v. Arkansas Dep't of Human Servs.*, 72 Ark. App. 290, 34 S.W.3d 776 (2000). In resolving the clearly erroneous question, we must give due regard to the opportunity of the chancery court to judge the credibility of the witnesses. *Dinkins v. Arkansas Dep't of Human Servs.*, 344 Ark. 207, 40 S.W.3d 286 (2001).

The chancellor addressed this issue in some detail in her termination order. The chancellor noted that she had ordered appellant to undergo a psychological evaluation and three subsequent mental examinations and that the need for repeated examinations was attributable to appellant's lack of candor and her failure to disclose her history of mental illness, which manifested when she was a teenager. The chancellor also intimated that appellant's eventual disclosure about her mental illness only came after she had allowed ADHS access to her past medical records, which reportedly included a wealth of information about her long-standing illness. The chancellor noted the testimony of appellant's therapist, Lisa Doan, who testified that it was not unusual for appellant, because of her mental illness, not to divulge information about her mental illness. However, the chancellor found that appellant's credibility was lacking in many other areas as well. Specifically, the chancellor recalled that appellant had been untruthful when she had told the court that her brother had not been in the home during the weekend that L.C. alleged that her uncle had sexually abused her. The chancellor also noted that appellant's mother, who served as her guardian, had also failed to inform anyone of appellant's illness.

There was also testimony that appellant undergoes a yearly mental exam to maintain and receive social security benefits. Further, we note that we are disadvantaged in our review because the testimony and evidence offered at the permanency-planning hearing, which was incorporated into the final hearing for the court's consideration by agreement, has not been included in the record on appeal. From what we can gather from the termination order and brief references made in the testimony at the final hearing, the permanency planning hearing included the testimony of Ms. Doan, as well as testimony concerning appellant's involvement with the Ohio Department of Human Services. It is the appellant's burden to bring up a record demonstrating error. *S.D. Leasing, Inc. v. RNF Corp.*, 278 Ark. 530, 647 S.W.2d 447 (1983). From our review of the record presented, we cannot say that the chancellor's finding is clearly erroneous.

Appellant also contends that the chancellor erred in finding that termination was in the children's best interest. We disagree. The chancellor found that appellant was not fit to care for her children. The chancellor noted that appellant was dependent on her mother to care for her and to provide housing and that her mother had been included in the case plan out of Ohio, apparently without success. The chancellor further noted that, although appellant had completed all of the required classes and had maintained visitation, she had steadfastly refused to recognize that her behavior in not supervising the children was a problem of any concern. In this regard, the case worker testified as to her belief that appellant had been merely going through the motions of completing the requirements of the case plan and that her efforts were not sincere. The chancellor was also disturbed by appellant's failure to acknowledge the possibility that her brother had molested L.C. and that her refusal to entertain the notion represented an unwillingness to work on an appropriate solution. In a nutshell, the chancellor found that appellant was unable and unwilling to provide protection, security, and care for her children, as she had repeatedly demonstrated over a period of years. On this point as well, our review is hampered by the lack of a complete record. We cannot say that the chancellor's finding that termination was in the children's best interest is clearly erroneous.

Appellant's final argument is that the chancellor erred in denying her mother's motion to intervene. We agree with ADHS that appellant lacks standing to complain about the denial of her mother's motion. *See Burdette v. Dietz,* 18 Ark. App. 107, 711 S.W.2d 178 (1986).

Affirmed.

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

JENNINGS, BIRD, and VAUGHT, JJ., dissent.

LARRY D. VAUGHT, Judge, dissenting. I dissent from the majority's affirmance of the chancery court's termination of Lisa Cassidy's parental rights. Like all termination of parental rights cases, this one is difficult and the results are likely to be tragic whatever decision is reached. The majority sets forth the pertinent facts and holdings of the trial court in its opinion and it is not necessary to repeat those here. However, I am convinced that the chancellor clearly erred in finding that the Arkansas Department of Human Services (ADHS) provided adequate reunification services as required by Ark. Code Ann. § 9-27-341(b)(3)(B)(vii)(a) (Supp. 2001), and that appellant failed to take advantage of those services. The court also erred in relying on appellant's refusal to believe that her brother had sexually abused one of the children, when ADHS found the charge unsubstantiated.

This case, in its simplest form, is about whether a person suffering from mental illness has a right to demonstrate the ability to raise her children. Ms. Cassidy has shown a history of failure, lying, and denial when not on her medication. But, she has also shown that she can comply with almost all of the required directives when she is following the prescribed medication. Whether she would stay on the program indefinitely and be successful as a parent, no one knows, but the law requires that she be given a reasonable time to demonstrate her compliance, and I believe that she was denied that time in this case.

The termination of parental rights statute, section 9-27-341(b)(3)(B)(i), sets a benchmark of twelve months for a parent to respond to the programs offered by ADHS. However, this is in no way a limit requiring immediate termination at its completion. In the instant case, the precipitating act that set this case in motion occurred in August of 1999. The appellant was psychologically examined in September 1999 and March, June, and August 2000. However, it was not until the June 2000 examination that appellant was discovered to be suffering from paranoid schizophrenia. It was also established that she had a history of this mental illness for a long period of time. Nonetheless, on October 10, 2000, a termination hearing was held. Appellant had only been on her medication for a

couple of months at that time (since August or September 2000), but the ADHS (and eventually the trial court) relied on the previous twelve-month period to examine appellant's behavior.

If you examine appellant's progress the months prior to August 2000, and the months after August, there is a marked difference in the level of her compliance with parenting requirements. The testimony of Carolyn Williams, a DHS caseworker, at the termination hearing in October 2000, is especially illuminating. Although she supported the contention that appellant had gone for twelve months without complying with directives, she stated (with regard to the status at the time of the hearing) that "[t]he environmental concerns have been remedied. The [appellant's] home is now clean. . . ." Later she testified that appellant had complied with attendance at parenting classes and had generally complied with the court's orders. Ms. Williams testified that appellant's mental illness was responding well to medication, but she did not believe that appellant was honest because she had not alerted the court or ADHS to her prior mental problems. However, Ms. Williams admitted that denial and lying were common symptoms of paranoid schizophrenia.

The chancellor, in her termination order, found that the appellant had not, over a twelve-month period, shown that she was a fit mother for the children. However, with regard to the status of appellant at the time of the October 10, 2000, hearing, the chancellor found:

> The court notes that the testimony presented at this hearing indicates that Ms. Cassidy is now taking her medications for her mental illness, is still in therapy, and has complied with the court orders. Ms. Cassidy testified that she loves her children, had taken another parenting class, and would take another more intensive parenting class if ordered by the court.

In other words, appellant had finally, in only two months of medication, reached the level of compliance set by the court.

Since termination of parental rights is an extreme remedy and is in derogation of the natural rights of parents, *Anderson v. Douglas,* 310 Ark 633, 839 S.W.2d 196 (1988), a heavy burden is placed upon the party seeking to terminate the relationship of parent and child. *Bush v. Dietz,* 284 Ark. 191, 680 S.W.2d 704 (1984). If appellant had claimed disability pursuant to 42 U.S.C. § 12132, the Americans with Disabilities Act, she would have been entitled to a

reasonable accommodation to allow her to complete reunification services. *See* Ark. Code Ann.§ 9-27-341(b)(3)(B)(vii)(b). It only stands to reason that fundamental fairness requires ADHS to allow a reasonable time for appellant to show her compliance while on medication. I would reverse the court's finding that appellant was unfit.

Ms. Williams also testified that there was an allegation of sexual abuse by appellant's brother toward one of the children. Although the allegation was investigated, Ms. Williams stated that it was unsubstantiated. Appellant never believed the allegation and refused to acknowledge it. Ms. Williams testified that "[t]he main reason for my contention that parental rights should be terminated is that the family is not willing to even consider that Mark may have abused [L.C.]." The chancellor, in her termination order, relied on Ms. Williams's testimony and found that appellant's unwillingness to acknowledge the alleged abuse was evidence of unfitness because she would not provide security for the children. The court, in making this finding, acknowledged that the allegation was unsubstantiated and further acknowledged that appellant was cooperative in seeking therapy for the child allegedly abused. I believe that it is clear error for a court to rely on an unsubstantiated allegation to make a finding of unfitness, and I would reverse.

The twelve-month provision of the parental termination statutes should be interpreted to mean a reasonable amount of time for a parent to show her ability to take parental responsibilities. When a mentally ill person is diagnosed and put on controlling medication, the reasonable time should begin to run anew. While Ms. Cassidy may ultimately prove to be unfit, I believe that she should be given a fair opportunity to demonstrate otherwise.

I would reverse and remand, and I am authorized to state that Judges JENNINGS and BIRD join this dissenting opinion.

R&T PROPERTIES, LLC *v.* Michael REYNA and Brenda C. Reyna

CA 01-511 61 S.W.3d 229

Court of Appeals of Arkansas
Division IV
Opinion delivered December 5, 2001

Charles P. Allen, for appellant.

L. Ashley Higgins, P.A., by: *L. Ashley Higgins*, for appellees.

KAREN R. BAKER, Judge. Appellant argues on appeal that the trial court erred in denying its request for the establishment of an easement by necessity in a particular roadway. We find no error and affirm.

Appellant owns farm land directly north of and adjacent to the appellees' property. The appellees' land is residential property, located in Sandraland Subdivision, and consists of two lots approximately 100 feet wide and 304 feet deep.

The parties have a common grantor. Prior to 1976, James H. Carter and Linda L. Carter owned the farmland now owned by the appellant and the subdivision land now owned by appellees. For many years, appellant rented the farm land from the Carters and used Connie Street and the roadway in question as ingress and egress to a 29.13 acre parcel which lies west of what is now Sandraland Subdivision.

The appellant rented the farm land north of Sandraland Subdivision and had ingress and egress to that land by means of Marilyn Street, which lies on the east side of Sandraland Subdivision. A substantial ditch separates the appellant's land north of Sandraland Subdivision from the 29.13 acre parcel west of the subdivision. To reach the 29.13 acre parcel, appellant travels south on Marilyn Street to Connie Street, goes west on Connie Street to the roadway in question, and then travels northwest on the roadway. There is no culvert between appellant's north parcel and its west parcel and the ditch prevents appellant from moving farm equipment directly.

In 1976, the Carters developed Sandraland Subdivision and dedicated it as such on February 6, 1976. They conveyed lots 16 and 17 to appellees on June 2, 1995. On April 26, 1996, the Carters conveyed to appellant the north farmland and the 29.13 acre parcel by one legal description. The legal description did not mention the drainage ditch which physically separated the two farm parcels.

Subsequent to the Carters' conveyance of the land to appellees, the appellees allowed the appellant to cross lot 16 in order for appellant to farm the 29.13 acre parcel. The dispute over this access arose after appellees heard that appellant intended to sell the 29.13 acre parcel to a sawmill company. Appellees then had a fence erected across the roadway to prohibit the appellant's continued use of the roadway for access.

The trial court found that under the facts of this case, appellant's use of the roadway would be only a convenience, not a necessity. We agree.

The person who asserts an easement has the burden of proving the existence of the easement. *Riffle v. Worthen*, 327 Ark. 470, 939 S.W.2d 294 (1997) (citing *Kennedy v. Papp*, 294 Ark. 88, 741 S.W.2d 625 (1987)). To establish an easement of necessity, appellant had the burden of proving unity of title in the sense that the same person or entity once held title to both tracts, that the unity of title was severed by a conveyance of one of the tracts, and that the easement is necessary so that the owner of the dominant tenement may use his land, with the necessity existing both at the time of the severance of title and at the time the easement is exercised. *Powell v. Miller*, 30 Ark. App. 157, 785 S.W.2d 37 (1990) (citing *Burdess v. United States*, 553 F.Supp. 646 (E.D.1982)). The degree of necessity must be more than mere convenience. *Brandenburg v. Brooks*, 264 Ark. 939, 576 S.W.2d 196 (1979).

Here, the trial court found that appellant has an adequate alternate method of ingress and egress to the property. The only natural obstacle is a drainage ditch that, although the ditch is deep and wide, is not so deep and wide that a road culvert could not be installed. Such a culvert was installed under the Marilyn Street property which currently allows access to the north farm land. The court found that a culvert could be placed in the ditch at a location that would connect the appellant's north farmland with the other 29.13 acres. The court further found that the placement of a culvert was not a great burden on appellant, particularly when considering the detriment that appellees would suffer.

We hold that appellant failed to meet its burden that it was entitled to an easement by reasonable necessity. This is not a case where, as in *Brandenburg v. Brooks*, *supra*, the nature of the land's terrain made it impossible for grantees to access the property except by tractor, and grantees were entitled to a way of reasonable necessity across property owned by grantors.

Here, the only natural obstacle is a ditch which can be traversed by the installation of a culvert, a means already employed to access appellant's north farm land. Therefore, the chancellor did not err in finding that no reasonable necessity exists.

Accordingly, we affirm.

HART and VAUGHT, JJ., agree.

Robert D. BRANDON and Carl L. Brooks *v.*
ARKANSAS WESTERN GAS COMPANY

CA 00-1074 61 S.W.3d 193

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered December 5, 2001
[Petition for rehearing denied January 9, 2002.]

[redacted]

The Evans Law Firm, by: *Marshall Dale Evans*, for appellants.

Everett law Firm, by: *John C. Everett* and *Jason H. Wales*; and *Jeffrey L. Dangeau*, General Counsel, for appellee Arkansas Western Gas Company.

Gilbert L. Glover, for appellee Arkansas Public Service Commission.

ANDREE LAYTON ROAF, Judge. This is the second appeal to this court of an order of the Public Service Commission in this proceeding, Docket No. 93-344-C, which was filed by gas customers in Fayetteville seeking refunds. The controlling question in this appeal is whether the Commission erred in holding that a previous settlement agreement entered in a separate proceeding was *res judicata* and barred this claim for refunds. We affirm the Commission's decision.

Procedural History

In 1978, appellee Arkansas Western Gas Company (hereafter "AWG") entered into a long-term contract (Contract 59) to purchase gas from a sister corporation, SEECO, Inc. AWG and SEECO are subsidiaries of Southwestern Energy Company; the same individual served as the chief executive officer for all three companies. In 1990, AWG filed an application with the Commission for approval of a general change in its rates and tariffs. The Commission approved the overall revenue requirement and associated tariffs but expressed concern about AWG's gas-purchasing practices, its transactions with SEECO, its allocation of gas costs, and its transportation practices. The Commission then established a proceeding on February 14, 1992, to address these issues, Docket No. 92-028-U, in Order No. 1, which initiated that docket. In Order No. 41 in Docket No. 92-028-U, the Commission found on November 29, 1993, that the relationship between SEECO and AWG was fraught with conflicts of interest and that the price paid by AWG under Contract 59 was in violation of Ark. Code Ann. § 23-15-103 (1987), the least-cost-gas-purchasing statute. On October 31, 1994, the parties to Docket No. 92-028-U, AWG, SEECO, the Commission's Staff, the Arkansas Attorney General, through his Consumer Utilities Rate Advocacy Division, and Northwest Arkansas Gas Consumers (hereafter "NWAGC"), entered into a stipulation and agreement amending Contract 59 to reflect the Commission's findings in Order No. 41. The settlement agreement specifically provided that "[t]he parties to this Stipulation and Agreement agree not to seek refunds of costs incurred by AWG under Contract 59 prior to July 1, 1994." After a public hearing on the settlement, the Commission approved the settlement agreement in Order No. 52 on January 5, 1995, and closed that docket in Order No. 53.

While Docket No. 92-028-U was still pending, on December 3, 1993, five days after the entry of Order No. 41, appellants Robert Brandon and Carl Brooks, on behalf of themselves and "all ratepayers similarly situated," filed a complaint in Docket No. 93-344-C with the Commission. Appellants did not intervene in Docket No. 92-028-U. In their complaint, appellants requested that the Commission order AWG to refund to its Arkansas ratepayers the rates that it had collected under Contract 59 with its sister company, SEECO, in violation of the least-cost-gas-purchasing statute. Appellants noted that, in an ongoing proceeding, Docket No. 92-028-U, the Commission had held (in Order No. 41) that the gas price charged by AWG violated section 23-15-103's requirement that it purchase gas from the lowest and most advantageous market and that no request for a refund had yet been made in that proceeding. Appellants requested that the Commission order AWG to refund an amount equal to $14 million per year since 1978 and award them their costs and attorney's fees under the common-fund doctrine.

In its answer, AWG stated that the Commission had previously determined that it would be inappropriate to make refunds regarding Contract 59 and raised the affirmative defense of *res judicata*. On December 23, 1993, AWG responded to a complaint by Georgia Brooks, Mark Pryor, and Claudia Williams to intervene in appellants' action. In its response, AWG asserted that "[t]he Commission has previously determined that it would be inappropriate to make refunds based on the Commission's findings regarding Contract 59" and again raised the affirmative defense of *res judicata*. In a July 18, 1997, response to a petition for intervention by Mid-Con Manufacturing, Inc., AWG stated that it would, in the near future, file a motion to dismiss the proceeding based on the stipulation and agreement entered in Docket No. 92-028-U nearly three years earlier in which the parties representing appellants' and the intervenors' interests had irrevocably waived the right to seek refunds. The Commission ordered Mid-Con's petition to be held in abeyance "pending further consideration. . . ."

In Order No. 4, entered July 30, 1997, the Commission denied appellants permission to act on behalf of other unnamed ratepayers and held that it did not have the power to award appellants attorney's fees from a common fund created by Commission-ordered refunds. Appellants appealed from that order to this court. In *Brandon v. Arkansas Public Service Commission*, 67 Ark. App. 140, 992 S.W.2d 834 (1999), we reversed the Commission's decision on the class-action issue and affirmed its refusal to award attorney's fees to

appellants. We held that the legislature's grant of authority to the Commission is clearly broad enough to allow it to hear a complaint brought as a class action. We reversed and remanded on that issue with directions to the Commission to determine whether appellants' action meets all of the prerequisites and necessary criteria as may be established by the Commission to qualify as a maintainable class action. We emphasized that we were not holding that the Commission must allow appellants' complaint to proceed as a class action and stressed that whether this action qualified for class certification was left to the broad discretion of the Commission. We found ourselves constrained by the statutory scheme and the holdings of the supreme court to hold that the Commission was without authority to award attorney's fees under the common-fund doctrine.

After this action was remanded in part to the Commission, AWG filed a motion for summary judgment, asserting that the October 31, 1994, stipulation and agreement approved by the Commission in Docket No. 92-028-U was *res judicata* and barred this proceeding for refunds. In support of its motion, AWG attached to its brief copies of the settlement agreement and Order Nos. 52 and 53 in Docket No. 92-028-U. According to AWG, the Attorney General represented appellants in Docket No. 92-028-U and appellants were bound by the settlement, to which he had agreed, that had been entered in that docket. *See* Ark. Code Ann. § 23-4-305 (1987), which provides that the Attorney General represents "the state, its subdivisions and all classes of Arkansas utility rate payers." AWG asserted that, in Docket No. 92-028-U, the Commission had investigated facts back to 1978, received evidence from witnesses under trial-like procedures, found AWG to be in violation of the least-cost-gas-purchasing statute, and approved a settlement that compromised an alleged liability dating back to 1978. AWG pointed out that the Attorney General could have requested a refund on behalf of the ratepayers but did not; instead, he agreed to the settlement, which expressly provided that no refunds would be made.

In response, appellants argued that AWG had waived its defense of *res judicata* by failing to object to the fact that two proceedings had been concurrently pending on this cause of action and by failing to move for their consolidation. Appellants argued that, by failing to timely move for consolidation of the two pending actions, AWG waived any possible objection it might have had to the splitting of the cause of action.

In Order No. 5, the Commission held that appellants' complaint was barred by the principle of *res judicata*. The Commission found that Docket No. 92-028-U had been contested vigorously in good faith by all parties, including the Attorney General, who represented all ratepayers:

> The parties, including the AG, agreed that there would be no refunds paid as a result of gas purchased from SEECO, Inc. under Contract 59. The AG made an informed and calculated decision to enter into the Settlement on behalf of AWG's ratepayers after exhaustive discovery and a thorough evaluation of the facts of the case. The class of plaintiffs which Complainants now purport to represent (and Complainants themselves) are bound by the terms of the Settlement and they cannot seek a refund in direct violation of the terms of the Settlement agreement which was negotiated by and entered into on their behalf by the AG. The ratepayers have already received a fair hearing before the Commission on the issue of AWG's gas purchases under Contract 59. *Res judicata* bars them from drawing the same controversy into issue a second time in an effort to undo the very settlement agreement the AG entered into on their behalf with AWG and which the AG considered to be "just and reasonable for all of AWG's ratepayers."

The Commission also found that, because appellants were barred from proceeding individually, they were not entitled to class certification.

In their petition for rehearing, appellants argued that the Commission had erred in failing to apply an exception to the principle of *res judicata*. They contended that AWG had waived its *res judicata* defense by failing to timely object to the splitting of the cause of action based on AWG's gas-purchasing policies. In Order No. 6, the Commission found appellants' application for rehearing to be without merit.

On appeal to this court, appellants admit that the Commission correctly expressed the principle of *res judicata*. They argue, however, that (1) AWG waived its objection to the splitting of the cause of action in two contemporaneous proceedings; (2) the Commission made the splitting of the cause of action necessary because it created a formal barrier preventing appellants' claim for refunds from being heard in Docket No. 92-028-U; and (3) the Commission erred in denying class certification.

Standard of Review

Our standard of review of appeals from the Public Service Commission is limited by the provisions of Ark. Code Ann. § 23-2-423(c) (Supp. 2001); we are to determine whether the Commission's findings of fact are supported by substantial evidence, whether the Commission has regularly pursued its authority, and whether the order under review violated any right of the appellant under the laws or the constitutions of the State of Arkansas or the United States. *Bryant v. Arkansas Pub. Serv. Comm'n*, 46 Ark. App. 88, 877 S.W.2d 594 (1994). If an order of the Commission is supported by substantial evidence and is neither unjust, arbitrary, unreasonable, unlawful, nor discriminatory, then we must affirm the Commission's action. *Id.* Nevertheless, it is clearly for the courts to decide the questions of law involved and to direct the Commission where it has not pursued its authority in compliance with the statutes governing it or with the state and federal constitutions. *Alltel Ark., Inc. v. Arkansas Pub. Serv. Comm'n*, 70 Ark. App. 421, 19 S.W.3d 634 (2000). In questions pertaining to the regular pursuit of its authority, the courts do have the power and duty to direct the Commission in the performance of its functions insofar as necessary to assure compliance by it with the statutes and constitutions. *Id.*

In Order No. 5, the Commission stated that it has authority to summarily dispose of a complaint if there are no genuine issues of material fact and if all questions to be decided are ones of law. Therefore, the principles applicable to motions for summary judgment filed pursuant to Ark. R. Civ. P. 56 may be used as guidance. *See Brandon v. Arkansas Pub. Serv. Comm'n, supra.* Summary judgment should be granted only when it is clear that there are no disputed issues of material fact. *Porter v. Harshfield*, 329 Ark. 130, 948 S.W.2d 83 (1997).

Administrative Res Judicata

The purpose of the *res judicata* doctrine is to put an end to litigation by preventing a party who had one fair trial on a matter from relitigating the matter a second time. *Moon v. Marquez*, 338 Ark. 636, 999 S.W.2d 678 (1999). Under the claim-preclusion aspect of the doctrine of *res judicata*, a valid and final judgment rendered on the merits by a court of competent jurisdiction bars another action by the plaintiff or his privies against the defendant or

his privies on the same claim or cause of action. *Coleman's Serv. Ctr., Inc. v. Federal Deposit Ins. Corp.*, 55 Ark. App. 275, 935 S.W.2d 289 (1996). When a case is based on the same events as the subject matter of a previous lawsuit, *res judicata* will apply even if the subsequent lawsuit raises new legal issues and seeks additional remedies. *Id.* The key question regarding the application of *res judicata* is whether the party against whom the earlier decision is being asserted had a full and fair opportunity to litigate the issue in question. *White v. Gregg Agric. Enters.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). *Res judicata* will apply to a settlement agreement after it is approved by the court and the case is dismissed with prejudice. *Russell v. Nekoosa Papers, Inc.*, 261 Ark. 79-B, 547 S.W.2d 409 (1977).

A person having only a single cause of action is usually not permitted to split the cause of action and maintain more than one suit for different parts of the action; if this rule is violated, it is held that the adjudication reached on the first action is, under the doctrine of *res judicata*, a bar to the maintenance of the second suit. *Coleman's Serv. Ctr., Inc. v. Federal Deposit Ins. Corp., supra.* In his treatise, *Arkansas Civil Practice and Procedure* § 3-7 (1993), Justice David Newbern explained that "[t]he purposes underlying this rule are to protect those against whom split causes of action would be levied from having to defend twice and to protect court dockets from unnecessary burdens." *See U.S. Fidelity & Guar. Co. v. Glass*, 261 Ark. 45, 245 S.W.2d 924 (1977).

There is no dispute that Docket Nos. 92-028-U and 93-344-C involve the same cause of action arising from AWG's gas-purchasing practices under Contract 59. It is also well established that the Commission acted in a quasi-judicial manner in Docket Nos. 92-028-U and 93-344-C. *See* Ark. Code Ann. §§ 23-3-118 and 23-3-119 (1987). When an administrative board acts judicially or quasi-judicially, its decision may be *res judicata* in a second proceeding involving the same question. *Hamilton v. Arkansas Pollution Control & Ecology Comm'n*, 333 Ark. 370, 969 S.W.2d 653 (1998); *Arkansas Dep't of Human Servs. v. Arkansas Child Care Consultants, Inc.*, 318 Ark. 821, 889 S.W.2d 24 (1994); *Bockman v. Arkansas State Med. Bd.*, 229 Ark. 143, 313 S.W.2d 826 (1958); *Perry v. Leisure Lodges, Inc.*, 19 Ark. App. 143, 718 S.W.2d 114 (1986); *Rainbolt v. Everett*, 6 Ark. App. 204, 639 S.W.2d 532 (1982). Administrative *res judicata* is utilized to prevent collateral attacks on administrative agency decisions and to protect successful parties from duplicative proceedings. *Fuchs v. Moore*, 589 N.W.2d 902 (N.D. 1999). Application of the doctrine is especially appropriate to

bar new proceedings when an agency has conducted a trial-type hearing, made findings, and applied the law. *Id.* In quasi-judicial administrative proceedings, *res judicata* has been applied to bar matters within the issues that might have been, but were not, litigated in an earlier action. *See Andrews v. Gross & Janes Tie Co.*, 214 Ark. 210, 216 S.W.2d 386 (1948); *Johnson v. Director of Labor*, 10 Ark. App. 24, 661 S.W.2d 401 (1983).

Exceptions to Res Judicata
Argued by Appellants

Appellants rely upon the following exceptions to the claim preclusion aspect of *res judicata* that are expressed in the *Restatement (Second) of Judgments* § 26 (1982) as follows:

> (1) When any of the following circumstances exists, the general rule . . . does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:
>
> (a) The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein; or
>
> . . . .
>
> (c) The plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief. . . .

Appellants assert that AWG waived its objection to the splitting of appellants' claim by failing to assert in a responsive pleading or motion, as required by Arkansas Rule of Civil Procedure 12(b)(8), that another action between the same parties arising out of the same transaction or occurrence was pending. According to Rule 12(b)(8), when a suit is brought while another suit is pending between the same parties concerning the same subject matter, the trial court where the second suit is brought has no choice but to dismiss the second suit. *Mark Twain Life Ins. Corp. v. Cory*, 283 Ark. 55, 670 S.W.2d 809 (1984). Appellants contend that,

under Rule 12(h), AWG waived this defense and, therefore, the Commission erred in applying the principle of *res judicata*.

Some courts have held that a defendant can waive the benefit of the rule against the splitting of a cause of action by waiting until one of two suits goes to judgment before raising the objection to the splitting of the cause of action in the suit still pending. *See Todd v. Cent. Petroleum Co.*, 155 Kan. 249, 124 P.2d 704 (1942); *Cassidy v. Berkovitz*, 169 Ky. 785, 185 S.W. 129 (1916). *See also Aikens v. Schmidt*, 329 N.J. Super. 335, 747 A.2d 824 (2000).

In the first appeal of this action, we noted our increasing inclination to apply the Rules of Civil Procedure to administrative actions when they can provide appropriate guidance.[1] That decision, however, did not require the Commission to follow the Rules of Civil Procedure. Therefore, the Commission and this court may look to Rule 12 for guidance but are not required to do so.

In any event, whether Rule 12 applies to this question is not controlling, because a waiver can occur without regard to the Rules of Civil Procedure. A waiver may occur when one, with full knowledge of material facts, does something that is inconsistent with the right or his intention to rely upon that right. *Moore v. Pulaski County Special Sch. Dist.*, 73 Ark. App. 366, 43 S.W.3d 204 (2001).

It is clear to us that AWG did not waive its objection to defending appellants' claim for refunds in Docket No. 93-344-C while Docket No. 92-028-U remained open. Although AWG did not expressly state that another proceeding or action was pending, it did raise the affirmative defense of *res judicata* in its answer and stated that the Commission had previously determined that it would be inappropriate to make refunds regarding Contract 59. Further, AWG responded in the same fashion to the 1993 complaint in intervention. In its 1997 response to a separate petition for intervention, AWG stated that it would file a motion to dismiss based on the settlement agreement entered in Docket No. 92-028-U.

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[1] *See Bryant v. Arkansas Pub. Serv. Comm'n*, 53 Ark. App. 114, 919 S.W.2d 522 (1996) (following Ark. R. Civ. P. 8(a)(1) and 12(b)(6) in conjunction with Rule 10.02(c) of the Commission's Rules of Practice and Procedure); *Second Injury Fund v. Mid-State Constr. Co.*, 16 Ark. App. 169, 698 S.W.2d 804 (1985) (taking guidance from Ark. R. Civ. P. 20).

Whether Appellants Were Given an Opportunity to Litigate the Issue of Refunds

Citing section 26(1)(c) of the *Restatement (Second) of Judgments* (quoted above), appellants also argue that the Commission created barriers to the seeking of refunds in Docket No. 92-028-U. The doctrine of *res judicata* does not bar a subsequent action where, in an earlier action, a party was actually prohibited from asserting a claim. *Cater v. Cater*, 311 Ark. 627, 846 S.W.2d 173 (1993); *Coleman's Serv. Ctr., Inc. v. Federal Deposit Ins. Corp., supra.*

Therefore, the controlling question in this appeal is whether appellants had a full and fair opportunity to litigate their claim for refunds in Docket No. 92-028-U. According to appellants, the Commission limited Docket No. 92-028-U to prospective relief only and foreclosed consideration of the possibility of refunds. In Order Nos. 1 and 41 in that docket, the Commission limited that proceeding so as to exclude refunds as an issue. In Order No. 1, the Commission stated: "In Docket No. 92-028-U, the gas purchasing practices, affiliate transactions, gas costs and gas cost allocation issues with regard to both the AWG and ANG Divisions shall be addressed on a prospective basis only." Order No. 1 also contains the following statement: "The scope of Docket No. 92-028-U shall be as set forth hereinabove and shall be prospective in application." In Order No. 41, the Commission further stated:

> The Commission will not rule on the retroactive pricing issues addressed by the parties as refunds are not an issue in this Docket. As stated in Order No. 1 of this Docket, AWG's gas purchasing practices, affiliate transactions, gas costs and gas cost allocation issues with regard to both the AWG and ANG divisions are being addressed on a prospective basis only.

The Commission, however, found in Order No. 5, from which this appeal has been taken, that the previous proceeding was "vigorously contested" by all parties and that the Attorney General made an informed decision after full consideration in that proceeding to compromise any claim for refunds. The Commission also said in Order No. 5 that the basis for the settlement agreement's provision that the parties would not seek refunds was explained during the hearing on the settlement agreement held on December 5, 1994. The Commission stated:

> The primary issue in Docket No. 92-028-U was AWG's compliance with Ark. Code Ann. § 23-15-103. The Commission investigated facts dating back to 1978, received evidence from witnesses under trial-like procedures, interpreted the statute, found AWG to be in violation of the statute, and approved a settlement that compromised an alleged resulting liability that had allegedly accrued since 1978. . . . The AG made an informed and calculated decision to enter into the Settlement on behalf of AWG's ratepayers after exhaustive discovery and a thorough evaluation of the facts of the case.

The Commission stated in Order No. 52 in Docket No. 92-028-U that a public hearing for the purpose of considering the settlement agreement was held on December 5, 1994, at which testimony in support of the agreement was presented; that AWG presented the testimony of Stanley D. Green and Charles V. Stevens, and the testimony of Robert D. Booth was presented on behalf of the Commission's Staff; that the Attorney General adopted the testimony of Mr. Booth in support of the agreement; that SEECO stated that the testimony presented by Staff and AWG adequately addressed the issues; and that NWAGC offered no testimony and took no position regarding the agreement. The Commission stated: "No party offered any objection to the Stipulation. Although invited to do so, no member of the general public offered public comments regarding the Stipulation."

[redacted] In quasi-judicial administrative proceedings, there must have been a full and fair opportunity to contest the decision later argued to be *res judicata*. 46 AM. JUR. 2D *Judgments* § 580 (1994). *See also Campbell v. Arkansas Dep't of Correction*, 155 F.3d 950 (8th Cir. 1998). According to the *Restatement (Second) of Judgments* § 83(2) (1982), an adjudicative determination by an administrative tribunal is conclusive under the rules of *res judicata* only insofar as the proceeding resulting in the determination entailed the essential elements of adjudication, including:

> (a) Adequate notice to persons who are to be bound by the adjudication, as stated in § 2;
>
> (b) The right on behalf of a party to present evidence and legal argument in support of the party's contentions and fair opportunity to rebut evidence and argument by opposing parties;

(c) A formulation of issues of law and fact in terms of the application of rules with respect to specified parties concerning a specific transaction, situation, or status, or a specific series thereof;

(d) A rule of finality, specifying a point in the proceeding when presentations are terminated and a final decision is rendered; and

(e) Such other procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions.

Appellants do not argue that they were not parties, through the Attorney General's representation, to Docket No. 92-028-U. *See* Ark. Code Ann. § 23-4-305 (1987). Appellants also do not deny that the Attorney General participated in the settlement and appeared at the public hearing on the settlement agreement's provisions. Additionally, appellants do not dispute the fact that they, along with other members of the public, could have appeared at the hearing and objected to the terms of the settlement agreement but did not do so. It is, therefore, clear to us that appellants had a full and fair opportunity to litigate the issue of refunds in Docket No. 92-028-U before the settlement agreement was approved and entered. Accordingly, we hold that the Commission did not err in holding that the settlement agreement entered in Docket No. 92-028-U was *res judicata.*

Class Certification

Appellants also argue that the Commission erred in dismissing this proceeding before addressing the question of class certification. They point out that they have not yet petitioned for class certification and argue that, under Rule 23 of the Arkansas Rules of Civil Procedure, the Commission should have considered whether class certification was appropriate before addressing the merits of the case. Rule 23(b) provides that, as soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained and that such an order may be altered or amended before the decision of the action on the merits.

In the first appeal in this proceeding, we held that, although Rule 23 does not govern proceedings before the Commission, the legislature had intended in Arkansas Code Annotated § 23-2-301 (1987) to give the Commission the authority to hear class actions where it may be "necessary or expedient" in the exercise of its power and jurisdiction or in the discharge of its duty. We explained:

> In conclusion, we hold that the legislature's grant of authority to the Commission is clearly broad enough to allow it to hear a complaint brought as a class action. We are cognizant of the fact that this decision may to some degree be regarded as precedent, but the topic behind it is not novel. It comports with judicial economy and balances consumers' ability to seek review with the utilities' ability to alter rates. The legislative intent bolsters this idea, and the economy of scale that is evident in utility rate-making is furthered by this decision.
>
> We reverse and remand on this issue with directions to the Commission to determine whether appellants' action meets all of the prerequisites and necessary criteria as may be established by the Commission to qualify as a maintainable class action. In doing so, we emphasize that we are not holding by this opinion that the Commission must allow appellants' complaint to proceed as a class action. Our holding is expressly limited to our finding that the Commission has the authority to hear a class action. Whether appellants' action qualifies for class certification is left to the broad discretion of the Commission.

Brandon v. Arkansas Pub. Serv. Comm'n, 67 Ark. App. at 152, 992 S.W.2d at 841.

In cases controlled by the Rules of Civil Procedure, the answer is clear that class-certification issues must be addressed before the merits of the case. Citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), the Arkansas Supreme Court stated in *Farm Bureau Mutual Insurance Co. of Arkansas, Inc. v. Farm Bureau Policy Holders*, 323 Ark. 706, 918 S.W.2d 129 (1996), that for purposes of Rule 23, it is totally immaterial whether a complaint will succeed on the merits or even if it states a cause of action. In *Fraley v. Williams Ford Tractor & Equipment Co.*, 339 Ark. 322, 5 S.W.3d 423 (1999), the supreme court held that a trial court had committed error in delving into the merits of affirmative defenses at the class-certification stage of a proceeding. *See also Advance America v. Garrett*, 344 Ark. 75, 40 S.W.3d 239 (2001); *Mega Life and Health Ins. Co. v. Jacola*, 330 Ark. 261, 954 S.W.2d 898 (1997).

Because the Commission is not bound to follow the Rules of Civil Procedure, however, it was not required to first address the class-certification issue. Indeed, it would be pointless to address the question of class certification because it is clear that *res judicata* bars appellants' claim. With few exceptions, we will not address moot issues. *Coleman's Serv. Ctr., Inc. v. Federal Deposit Ins. Corp., supra.* It is the duty of the court to decide actual controversies by a judgment that can be carried into effect and not give opinions upon abstract propositions or declare principles of law that cannot affect the matter in issue. *Bryant v. Arkansas Pub. Serv. Comm'n*, 45 Ark. App. 56, 871 S.W.2d 414 (1994).

Affirmed.

STROUD, C.J., and PITTMAN, JENNINGS, BIRD, and GRIFFEN, JJ., agree.

Michael PAINE *v.* Timothy WALKER
and Rose Walker

CA 01-232 61 S.W.3d 925

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

Lingle & Fulcher, PLLC, by: *H. Clay Fulcher* and *James G. Lingle*; and *Coxsey & Coxsey*, by: *Kent Coxsey*, for appellant.

JOSEPHINE LINKER HART, Judge. Appellant, Michael Paine, appeals from the chancellor's decree settling the accounts of appellant and appellee Timothy Walker, after the parties dissolved their partnership, W.P. Farms. Mr. Paine argues that the chancellor erred in determining that an intervenor to the lawsuit, appellee Rose Walker, held a life estate in certain property that she deeded to the partnership. Further, he argues that the chancellor erred in permitting Mr. Walker to introduce hearsay testimony regarding their respective cash capital contributions to the partnership. Finally, he generally argues that the chancellor failed to follow the dictates of the Uniform Partnership Act in winding up the partnership. We reverse on the first two issues and remand for a new trial without addressing Mr. Paine's final point.

According to the chancellor's order, in 1991 Mr. Paine and Mr. Walker entered into a partnership under the name of W.P. Farms for the purpose of engaging in farming operations, with the parties agreeing to share profits and losses equally. In mid-September of 1998, the parties agreed to dissolve the partnership but failed to reach an enforceable agreement as to how the parties would settle their accounts. In settling the accounts, the chancellor made several dispositions regarding property in the partnership.

In particular, in December of 1994, the intervenor, appellee Rose Walker, deeded to the partnership approximately seventy acres, further providing as follows:

> The right to live in the dwelling located on the NWfr1/4 pf (sic) tje (sic) NWfrl1/4 Section 5, Township 19 North, Range 24 West is hereby reserved by Grantor, Rose Walker, for as long as she desires to live there.

In settling accounts, the chancellor concluded that Ms. Walker conveyed by general warranty deed a gift to the partnership. Further, the chancellor determined that she reserved a life estate in the 29.92 acres described above and the home located there.

On appeal, Mr. Paine argues that the chancellor erred in finding that Ms. Walker held a life estate in the entire 29.92 acres. We agree. The above-quoted language closely resembles that in *Middleton v. Lockhart*, 344 Ark. 572, 43 S.W.3d 113 (2001), where the deed provided that the grantor "reserves for herself the exclusive

right to use and occupy the residence situated on said land for and during the remainder of her lifetime." *Middleton*, 344 Ark. at 580, 43 S.W.3d at 119. The Arkansas Supreme Court concluded that such language reserved only a life estate in the residence, not in the land. *Id.* Because of the similarity of the language in the case at bar and *Middleton*, we conclude that the chancellor erred in finding that Ms. Walker held a life estate in the 29.92 acres, rather than just the dwelling.

In his order, the chancellor further concluded that Mr. Paine provided cash contributions of $46,628.42 and Mr. Walker provided cash contributions of $126,849.18, the same figures that Mr. Walker presented in his testimony. On direct examination, Mr. Walker testified that money was placed in various accounts for partnership business. Mr. Walker was asked whether "based on your looking at those accounts and adding up the figures," how much both he and Mr. Paine had put into the partnership, and Mr. Walker provided the above-referenced figures without further elaboration.

On cross examination, however, Mr. Walker admitted that he did not have any records and that he relied on what he was told by the bank. Mr. Paine objected, arguing that the testimony was hearsay. In the decree, the chancellor noted that evidence of these totals came from Mr. Walker's testimony that was admitted over Mr. Paine's hearsay objection and that Mr. Walker testified that the totals were "compiled by the First National Bank of Berryville, Arkansas." The chancellor found that Mr. Walker's testimony was admissible under the business-records exception to the hearsay rule.

On appeal, Mr. Paine argues that the court's ruling was error. We agree. As an exception to the hearsay rule, Rule 803(6) of the Arkansas Rules of Evidence permits the admission of business records.[1] For a record to be admitted under this exception it must be: (1) a record or other compilation, (2) of acts or events, (3) made at or near the time the act or event occurred, (4) by a person with

[1] The exclusion from the hearsay rule provided in Rule 803(6) is as follows:

(6) *Records of Regularly Conducted Business Activity*. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or disagnoses [sic], made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

knowledge, or from information transmitted by a person with knowledge, (5) kept in the course of regularly conducted business, (6) which has a regular practice of recording such information, (7) all as known by the testimony of the custodian or other qualified witness. *Edwards v. Stills*, 335 Ark. 470, 511, 984 S.W.2d 366, 388 (1998). One who offers evidence has the burden of showing its admissibility, and we will not reverse the court's decision to permit introduction of the evidence absent an abuse of the court's discretion. *Id.*

In the decree, the chancellor specifically noted that the cash-contribution figures were "derived from [Mr. Walker's] testimony that these totals were compiled by the First National Bank of Berryville, Arkansas." Thus, Mr. Walker presented only bald figures that were derived from bank records by someone at the bank. Even if we assume that Mr. Walker's testimony was a "compilation," he failed to present any evidence that his "compilation," which was made by someone at the bank, was "made . . . by, or from information transmitted by, a person with knowledge." *See* Ark. R. Evid. 803(6). As we have previously noted, "the party offering the record must . . . establish by a competent witness that its content is worthy of belief." *Marshall Trucking Co. v. State*, 23 Ark. App. 110, 114, 743 S.W.2d 16, 18 (1988) (holding that a company that integrated another company's records into its own records failed to establish that the other company's records were trustworthy). Moreover, there was no evidence that the "compilation" was "kept in the course of a regularly conducted business activity," as opposed to some other special purpose, that is, for the purpose of litigation. *See* Ark. R. Evid. 803(6); *Parker v. State*, 270 Ark. 897, 606 S.W.2d 746 (1980) (holding that there was no foundation to prove that a list of checks prepared by a bank vice-president were kept in the regular course of business and instead the records were prepared for a specific purpose). Because Mr. Walker failed to establish that his "compilation" fit within the business-records exception to the hearsay rule, we must conclude that the chancellor abused his discretion in admitting the testimony under this exception. *Compare Smith v. Citation Mfg. Co.*, 266 Ark. 591, 597-98, 587 S.W.2d 39, 42 (1979) (holding that the chancellor properly excluded an unaudited financial statement prepared by an accountant where the statement was not properly authenticated and no basis was laid for it being admitted as a business record) with *Ward v. Gerald E. Prince Constr., Inc.*, 293 Ark. 59, 62-63, 732 S.W.2d 163, 165 (1987) (holding that witness's testimony unquestionably identified a summary document she prepared as a business record).

Finally, Mr. Paine argues that the chancellor erred in not according him his rights under the Uniform Partnership Act. Specifically, he argues that the chancellor erred by failing to order an accounting and by failing to allow him to manage partnership assets. Mr. Paine, however, failed to show this court where he made related requests for relief that were adversely ruled upon by the chancellor. Nevertheless, we do not doubt that on retrial the chancellor will accord Mr. Paine whatever rights he may have under the Uniform Partnership Act. Mr. Paine further argues, as he stressed to the chancellor in his motion for a new trial, that his and Mr. Walker's contributions to the partnership were not properly accounted for by the chancellor. On remand, Mr. Paine and Mr. Walker will undoubtedly readdress, with greater specificity, the issue of their respective contributions to the partnership. Because of the considerable likelihood that the evidence presented at the new trial will be substantially different than the evidence presented here, we do not address Mr. Paine's argument at this time. Finally, on remand the chancellor should determine how much land is reasonably necessary to accompany the residence reserved by Ms. Walker and provide for legal access to a public road from the residential tract.

Reversed and remanded.

STROUD, C.J., and JENNINGS, GRIFFEN and CRABTREE, JJ., agree.

BIRD, J., agrees in part and dissents in part.

SAM BIRD, Judge, dissenting. I agree that this case must be reversed and remanded on the first point because of the chancellor's error in concluding that Rose Walker owned a life estate in 29.92 acres. However, I do not agree that the case must also be reversed on the second point because I believe that it is within the chancellor's discretion to determine whether a sufficient foundation had been laid to admit Timothy Walker's testimony about the partnership's bank-account records under the business-records exception to the hearsay rule.

This was an action for the dissolution and winding up of a partnership. To accomplish those purposes, the court was required, under Ark. Code Ann. § 4-42-612(b), to ascertain the partnership assets, sell the assets, pay the debts, and distribute the surplus, if any, according to the respective capital contributions of the partners. In the presentation of its case-in-chief, Paine, the appellant, produced no evidence from which the court could determine the amount of

the capital contributions of the partners. After Paine rested, Timothy Walker, the appellee, testified that according to the partnership's bank-account records, he had contributed $126,849.18 to the partnership capital, while Paine had contributed $46,628.43. Walker's testimony was initially admitted without objection. Then, only after cross-examination, when it was discovered that Walker did not have the bank-account records physically present in court, did Paine object to Walker's testimony as hearsay.

From the abstract, it appears that Walker testified as follows on direct examination:

> We have gone back and looked at the accounts to see how much money I put in as compared to how much money the Paines put in. The Paines put in $46,628.42. I put in $126,849.18, so I put in approximately $80,000 more than they did.

Then, on cross-examination, Walker testified:

> I figured out how much each of us put into the partnership whenever we pulled all of the receipts. First National Bank did that for me. I'd put a bunch in and they had put a bunch in too. I didn't know how much. I didn't have those —. So far as whether I relied on what somebody told me from the bank, they have the records.

The majority has concluded that Walker's testimony was inadmissable as hearsay, and not subject to the business-records exception, because he "presented only bald figures that were derived from the bank records by someone at the bank." I believe the majority has misread or erroneously interpreted Walker's testimony. During direct examination, Walker clearly stated that "[w]e have gone back and looked at the accounts. . . ." Then, on cross-examination, he testified that "I figured out how much each of us put into the partnership whenever we pulled all the receipts. First National Bank did that for me." To me, this testimony is more reasonably interpreted to mean that Walker went back and looked at the bank account records that the Bank "pulled" from the records it had, and that, from those records, Walker determined the capital contributions of each of the partners. For the majority to conclude that Walker meant that "the figures were derived from bank records by someone at the bank," disregards Walker's statements that "we have gone back and looked at the accounts" and "I figured out how much each of us put into the partnership." The majority has also concluded that by his statement, "First National Bank did that for me," Walker must have meant that someone at the bank looked at

the account records and made the calculations, completely disregarding Walker's testimony that *he* looked at the accounts and *he* figured the amounts of the partners' contributions.

Given what I believe to be the more reasonable interpretation of Walker's testimony, I am unwilling to say that the chancellor erred in concluding that Walker's testimony about his calculations of the amounts of the partners' capital contributions to the partnership was within the business-records exception to the hearsay rule.

The practical effect of the majority opinion is to open the door for Paine to cure the deficiency in his case-in-chief that resulted from his failure to offer any proof whatsoever of the amounts of the partner's capital contributions to the partnership. That deficiency was cured by Walker's testimony that he had looked at the records and determined the amounts. The records Walker reviewed were partnership's checking-account records, equally accessible to either partner. Although Paine complains in his brief that he was denied access to partnership records, such denial is not borne out by the record. The record reflects that Walker responded to all of Paine's discovery requests and that Paine filed no motions to compel discovery other than to require Walker to identify his trial witnesses. It appears to me that the majority has decided to give Paine a second chance to cure his failure to produce evidence at the first trial without any showing by Paine that the evidence at the new trial will be any different than it was at the first.

For the foregoing reasons, I dissent to the reversal as to Paine's second point.

WHITE RIVER LEVEE DISTRICT *v.*
John and Christie REIDHAR

CA 01-466 61 S.W.3d 235

Court of Appeals of Arkansas
Division IV
Opinion delivered December 12, 2001

John H. Bell, for appellant.

Gammill & Gammill, by: *Randall L. Gammill*, for appellees.

JOHN B. ROBBINS, Judge. This appeal comes from a decree dismissing appellant's complaint for ejectment and unlawful detainer and quieting title to approximately forty-four acres of property in appellees. We affirm.

In the 1940s and 1950s, appellant White River Levee District built a levee east of the White River in Prairie, Woodruff, and Monroe Counties. The right-of-way necessary for the Prairie County construction was acquired through deeds from various grantors. The deeds relevant to this case encompassed two particular sections in Township 5 North, Range 4 West: Section 29 and the section directly above it, Section 20. The river ran, for the most part, along the western edge of Section 29 and through the western half of Section 20. The levee ran in a north-south direction through the eastern halves of Section 29 and Section 20. A substantial amount of land all along the western edge of the levee was used by the District as a "borrow pit" to acquire dirt used in construction.

In 1965 and 1966, appellees' predecessor, Franklin Collier,[1] purchased property that lay between the White River and the District's levee property. Collier cleared the property from the river to the borrow pit and began farming it. He did so until 1993, when the property was sold to appellees. Appellees continued to farm the property until 1996, without protest by the District. In that year, appellees commissioned a survey of their property for reasons unrelated to this litigation. The survey indicated that the District's right-of-way actually extended a short distance west of the borrow pit. The extension, though not of great width, ran all along the length of the levee and borrow pit and measured 44.4 acres in area.

When the District discovered the result of the survey, it claimed that appellees and their predecessor had been wrongfully farming the area between the borrow pit and the true right-of-way

[1] Collier purchased the land in partnership with James McAlexander. In the 1970s, Collier deeded his interest to McAlexander, who later deeded the property to appellees. However, Collier continued to farm the property as a tenant until 1993, so, for the sake of convenience, we will refer to him as appellees' predecessor in interest.

line. It demanded and received a rental payment from appellees' tenant farmer. On December 7, 1998, the District filed suit against appellees seeking possession of the disputed area. Appellees answered that they and their predecessor had adversely possessed the area for more than seven years, and they asked the court to quiet title in them. The chancellor found that the land descriptions in the deeds under which appellant claimed title were "indeterminate" and did not constitute constructive notice of appellant's claimed ownership of the property in dispute. Further, he found that appellees met their burden of proving adverse possession of the property in dispute, and he quieted title in them.

The District raises two issues on appeal. First, it challenges the chancellor's finding that the deeds by which the District claimed ownership contained indefinite descriptions. Second, it argues that the chancellor erred in finding that appellees proved adverse possession. We need not address the first issue because, even if the deeds contained no defect whatsoever, title to the disputed area was properly quieted in appellees by virtue of their adverse possession claim.[2]

Chancery cases are reviewed *de novo* on appeal. *Anderson v. Holliday*, 65 Ark. App. 165, 986 S.W.2d 116 (1999). We do not reverse the chancery court's findings unless they are clearly erroneous. *Id.* A finding of fact is clearly erroneous when, although there is evidence to support it, we are left with the definite and firm conviction that a mistake has been committed. *Dillard v. Pickler*, 68 Ark. App. 256, 6 S.W.3d 128 (1999).

To prove the common-law elements of adverse possession, the claimant must show that he has been in possession of the property continuously for more than seven years and that his possession has been visible, notorious, distinct, exclusive, hostile, and with the intent to hold against the true owner. *Anderson v. Holliday, supra.* It is ordinarily sufficient proof of adverse possession that the claimant's acts of ownership are of such a nature as one would

[2] The District contends that appellees were not entitled to have title quieted in them by virtue of their adverse possession claim because they raised adverse possession as a defense in their answer, not as a counterclaim. Although appellees did not designate their adverse possession action as a counterclaim, they asked that title be quieted in them, and the case was tried by them, without objection, as though affirmative relief were sought. *See Hempel v. Bragg*, 313 Ark. 486, 856 S.W.2d 293 (1993); *Shinn v. First Nat'l Bank of Hope*, 270 Ark. 774, 606 S.W.2d 154 (1980). Pleadings should be liberally construed so that effect is given to the substance of the pleading rather than the form; a pleading is not judged entirely by what it is labeled but by what it contains. *Cornett v. Prather*, 293 Ark. 108, 737 S.W.2d 159 (1987).

exercise over his own property and would not exercise over the land of another. *See id.* Whether possession is adverse to the true owner is a question of fact. *Id.* We also note that a claimant may "tack on" the adverse-possession time of an immediate predecessor in title. *See Pollins v. Pettus*, 249 Ark. 67, 458 S.W.2d 724 (1970).

The appellees showed that they and their predecessor had cleared the property in question and cultivated much of it as farm land beginning in the late 1960s and continuing through the mid-1990s. There was no evidence that this clearing and cultivation was anything other than open, notorious, exclusive, and hostile, in the sense that it was not in recognition of or subservient to another's right to the property. *See Barclay v. Tussey*, 259 Ark. 238, 532 S.W.2d 193 (1976). In fact, the evidence showed that landowners all along the levee had farmed to the edge of the borrow pit for a number of years without complaint from the District. There was also testimony that none of the District's board members actually knew where the right-of-way line was located. Further, a letter from the board's secretary to the attorney general's office in 1996 acknowledged that "the property lines were not marked and maintained to the extent that they would be recognizable by the adjacent landowners or the public at large" and asked if there were "any steps we could take to regain title." In light of this evidence, we cannot say that the chancellor's finding of adverse possession was clearly erroneous.

The District argues that appellees' and their predecessor's use of the disputed property was permissive as opposed to adverse. It bases this argument on the testimony of T.W. Vincent, the District's secretary, that he considered the farming of the property permissive because it benefitted the District to have the land cleared and cultivated. The District also relies on a purported offer by appellee John Reidhar at a 1996 District board meeting to pay rent on the property and the actual payment of rent to the District by appellees' tenant in 1996.

It is generally recognized that occupation of property is not adverse where a claimant has the owner's permission to enter the property, although it may become adverse under certain circumstances. *See Tolson v. Dunn*, 48 Ark. App. 219, 893 S.W.2d 354 (1995). The District admits in its brief that there was no evidence it gave Franklin Collier, appellees' predecessor, express permission to clear and cultivate the land in dispute. Instead, it argues that the mere existence of a benefit accruing to the District by virtue of

Collier's and appellees' occupation implied the existence of permission. No authority is cited for this proposition, nor are we aware of any. Regardless, we are unwilling to hold that a collateral benefit that results to the owner from a possessor's use is sufficient to declare the use permissive.

As for the argument that John Reidhar offered to pay rent on the property at a District meeting, that evidence was disputed. The chancellor was entitled to resolve that conflict in favor of appellees. *See McNamara v. Bohn*, 69 Ark. App. 337, 13 S.W.3d 185 (2000). Further, there was evidence that the 1996 rental payment was made by appellees' tenant without their prior knowledge and in an attempt by the tenant to avoid going to court.

The District's final argument is that appellees are not entitled to adverse possession of the entire 44.4 acres in dispute but, at most, to that part of the disputed area that is actually cultivated as farm land. The record, as abstracted, does not reveal that the District asked the chancellor, either during trial or in a posttrial motion, to restrict any adverse possession by appellees to a lesser amount of acreage than the 44.4 acres they described in their answer. In any event, appellees and their predecessor asserted possession of the entire area between the right-of-way line and the borrow ditch, regardless of whether it was farmed. Further, they evidenced possession of the areas that were not cultivated by demonstrating that they had posted such areas. We cannot say that the District has made a sufficient showing on appeal that appellees' adverse possession should be restricted to the cultivated areas.

Affirmed.

GRIFFEN and ROAF, JJ., agree.

Freddie E. YARBROUGH *v.* DIRECTOR,
Employment Security Department and
Conway Transportation Services

E 01-161 61 S.W.3d 922

Court of Appeals of Arkansas
Division IV
Opinion delivered December 12, 2001

No brief filed by appellant.

Phyllis A. Edwards, for appellee.

JOHN B. ROBBINS, Judge. This is an appeal from a decision of the Arkansas Board of Review holding that appellant was disqualified to receive unemployment compensation for a period of eight weeks because he had been discharged from his last work for misconduct in connection with the work. We hold that there is no substantial evidence that supports the Board's decision and reverse.

Appellant Freddie Yarbrough was employed for over three years as an account executive in sales for appellee Conway Transportation Service. His employer held annual sales meetings that appellant was expected to attend. It was at the February 21-22, 2001, meeting that appellant was discharged. The sales meeting began at 7:30 a.m. each day. Appellant appeared timely the first day, but was tardy the second day. Johnny Thompson, appellee's service center manager, testified that appellant was forty-five to sixty minutes late, and the explanation appellant gave him was that he had set his alarm clock but his pet had somehow pulled the cord from the wall and he did

not wake up early enough to get to the meeting on time. Thompson said that this incident of not reporting on time was the terminating event, but there had been some overall attendance problems and some issues with his personal life.

Appellant acknowledged that it was mandatory to attend both days of the meeting, that there were alcoholic beverages served the evening of the first day of the meeting, and that he drank too much. He said when he arrived fifteen minutes late the second morning of the meeting, he was sent home without being given an opportunity to explain that his daughter's puppy knocked over his alarm clock.

The Board found that appellant was discharged for failing to report on time on the second day of the sales meeting, and further found that the "employer credibly testified that, due to personal problems, the claimant's attendance had declined and was generally unsatisfactory." Consequently, the Board concluded that appellant's conduct violated a standard of behavior the employer had a right to expect and constituted misconduct.

Our standard of review in cases from the Board of Review is as follows:

> 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.

Walls v. Director, 74 Ark. App. 424, 427, 49 S.W.3d 670, 672 (2001). The statutory authority cited by the Board in its decision was Ark. Code Ann. § 11-10-514(a)(1) (Supp. 2001), which states that "an individual shall be disqualified for benefits if he was discharged from his last work for misconduct in connection with his work." In earlier decisions we have given the following definition to the term "misconduct:"

> [M]isconduct involves: (1) disregard of the employer's interests, (2) violation of the employer's rules, (3) disregard of the standards of

> behavior which the employer has a right to expect of his employees, and (4) disregard of the employee's duties and obligations to his employer.
>
> To constitute misconduct, however, the definitions require more than mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies, ordinary negligence in isolated instances, or good faith error in judgment or discretion. There must be an intentional or deliberate violation, a willful or wanton disregard, or carelessness or negligence of such degree or recurrence as to manifest wrongful intent or evil design.

Nibco, Inc. v. Metcalf, 1 Ark. App. 114, 118, 613 S.W.2d 612, 614 (1981); *see also Walls v. Director, supra.*

Showing up at work, whether at the plant, the office, or even a sales meeting, is certainly a standard of behavior that an employer has a right to expect of its employees. Even a single incident of missing work has been held to violate a standard of behavior that a restaurant employer had a right to expect and constituted employee misconduct. *Parker v. Ramada Inn & Daniels*, 264 Ark. 472, 572 S.W.2d 409 (1978). However, since *Parker* was decided by our supreme court, the applicable statute was amended, to-wit:

> Arkansas Code Annotated section 11-10-514.
>
> *Disqualification — Discharge for misconduct.*
>
> (a)(1) If so found by the Director of the Arkansas Employment Security Department, an individual shall be disqualified for benefits if he is discharged from his last work for misconduct in connection with the work.
>
> (2) *In all cases of discharge for absenteeism, the individual's attendance record for the twelve-month period immediately preceding the discharge and the reasons for the absenteeism shall be taken into consideration for purposes of determining whether the absenteeism constitutes misconduct.* (Italics added.)

The italicized sentence of subsection (2) was added by Act 482 in the 1983 legislative session. This amendment clearly evinces a public policy to require consideration of an employee's attendance record for the preceding twelve-month period when determining whether the employee's absence constitutes such misconduct as to

disqualify the employee from entitlement to unemployment compensation.

Appellant was not discharged for being absent; he was discharged for being tardy, sixty minutes at most. Surely, if a determination of misconduct for missing an entire work shift requires consideration of the employee's attendance history for the previous twelve months, a single incident of tardiness should receive no less consideration. The appellant's tardy arrival on this single occasion and the vague reference by appellant's manager to "some overall attendance problems" does not constitute substantial evidence that appellant intentionally violated his employer's requirements of punctuality so as to manifest wrongful intent or evil design. *See Walls v. Director, supra.*

We reverse and remand for an award of benefits.

GRIFFEN and ROAF, JJ., agree.

Clovis MCHALFFEY *v.*
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY

CA 01-354 61 S.W.3d 231

Court of Appeals of Arkansas
Division IV
Opinion delivered December 12, 2001

Henry, Halsey & Thyer, PLC, by: *Troy Henry*, for appellant.

Scott G. Lauck, for appellee.

ANDREE LAYTON ROAF, Judge. Clovis McHalffey filed suit against his insurance company, Nationwide Mutual Fire

Insurance Company (Nationwide), seeking $115,000, plus attorney's fees, a twelve-percent penalty, and interest, for fire damage to his cotton picker. The day before trial, Nationwide consented to entry of judgment against it for $115,000. At a hearing on the issue of the statutory attorney's fees, penalty, and interest, the circuit court granted McHalffey attorney's fees and interest, but denied the claim for the twelve-percent penalty, finding that Nationwide had made reasonable attempts to settle the claim. McHalffey appeals from the denial of the twelve-percent penalty. We agree that the trial court erred in refusing to award McHalffey the penalty, and reverse and remand.

On November 8, 1999, McHalffey sustained fire loss to his 1996 John Deere cotton picker, which was insured in a policy of farm equipment casualty insurance by Nationwide Insurance Company. McHalffey gave Nationwide notice of the loss, and it made an investigation, determining that the cotton picker was a total loss. McHalffey provided estimates that the value of his cotton picker at the time of the loss was $118,500 and made a claim for $115,000, or alternatively, for Nationwide to purchase a picker comparable to his for that amount. According to his affidavit and testimony, David Wilson, a claims adjuster for Nationwide, made McHalffey an offer for $120,000 by telephone on December 17, 1999, which McHalffey rejected. McHalffey denies that this offer was made. According to Wilson's testimony, he then tried to find replacement pickers and found a comparable picker in Missouri for $97,500. On January 14, 2000, Wilson wrote a letter to McHalffey stating what he had found and Nationwide's offer of $97,500. McHalffey rejected this offer. On March 29, 2000, after McHalffey had filed suit, Wilson advised McHalffey's attorney that he had found another comparable picker in Georgia for $82,000, but that Nationwide's offer remained at $97,500. Wilson testified that the reason the first offer made by telephone was higher than the following offers was that he was not aware that cotton pickers fluctuated in price as much as $30,000 during the year, depending on the time of harvest. Wilson testified that Nationwide's offers of $97,500 were made after he had located pickers comparable to McHalffey's picker.

On March 16, 2000, McHalffey filed a complaint for $115,000, minus a $250 deductible, plus attorney's fees, a twelve-percent penalty, and prejudgment interest. In its original answer, Nationwide denied that the picker was a covered item under its insurance policy and denied that it was obligated to pay any portion of the loss. After discovery, Nationwide filed an amended and substituted answer, admitting all of McHalffey's allegations except

that the amount of the loss was $115,000. Nationwide also filed a motion to dismiss McHalffey's claims for attorney's fees and penalties. The day before trial, on November 27, 2000, Nationwide learned that its expert witness would be unable to attend the trial and moved for a continuance, which was denied, and Nationwide consented to judgment being entered against it for $115,000, less the $250.00 deductible. After a hearing was held on Nationwide's motion to dismiss McHalffey's claims for attorney's fees and penalties, the circuit court granted a $5,000 attorney fee and prejudgment interest, but denied the claim for the twelve-percent statutory penalty on the basis that Nationwide had made reasonable efforts to settle. McHalffey now appeals the denial of his claim for a twelve-percent statutory penalty.

McHalffey argues on appeal that the trial court erred when it denied his claim for the twelve-percent statutory penalty pursuant to Ark. Code Ann. § 23-79-208 (Supp. 2001). A trial court's decision on whether to award attorney's fees, a twelve-percent penalty, and interest pursuant to this statute, due to an insurer's failure to timely pay benefits, will not be reversed on appeal unless the trial court's decision is clearly erroneous. *American Underwriters Ins. Co. v. Turner*, 57 Ark. App. 169, 944 S.W.2d 129 (1997).

McHalffey contends that where Nationwide failed to pay the benefits prior to suit being filed, Nationwide's settlement offers and its confession of judgment the day before trial is no defense to the application of the mandatory penalty pursuant to section 23-79-208. Nationwide contends that the trial court properly declined to award the penalty because it acted in good faith throughout the case and made reasonable attempts to settle with McHalffey.

Section 23-79-208 provides in pertinent part:

> (a)(1) In all cases where loss occurs and the . . . casualty . . . insurance company . . . shall fail to pay the losses within the time specified in the policy, after demand is made, the corporation shall be liable to pay the holder of the policy . . ., in addition to the amount of the loss, twelve percent (12%) damages upon the amount of the loss, together with all reasonable attorney's fees for the prosecution and collection of the loss.

In *Silvey Co. v. Riley*, 318 Ark. 788, 790, 888 S.W.2d 636, 638 (1994), the supreme court stated:

> Our construction of [section 23-79-208(a)] is straightforward: "Where an insured loss occurs and an insurance company fails to pay the loss within the time specified in the policy, then the insurance company is required to pay, in addition to the loss, a 12% penalty plus reasonable attorneys' fees" (quoting *Miller's Mut. Ins. Co. v. Smith Co.*, 284 Ark. 124, 126, 680 S.W.2d 102, 103 (1984)). The fact that the insurance company later paid the claim does not defeat the award of penalty and attorney's fees for "it is well settled that attorney's fees and penalty attach if the insured is required to file suit, even though judgment is confessed before trial" (quoting *Federal Life & Cas. Co. v. Weyer*, 239 Ark. 663, 666, 391 S.W.2d 22, 23 (1965)).

Allowance of the statutory penalty and attorney's fees is penal in nature and is to be strictly construed. *Shepherd v. State Auto Property & Cas. Ins. Co.*, 312 Ark. 502, 850 S.W.2d 324 (1993). The statute is directed against unwarranted delaying tactics of insurers. *Id.* The insurer's good faith in contesting coverage is not a defense. *See Home Mut. Fire Ins. Co. v. Jones*, 63 Ark. App. 221, 977 S.W.2d 12 (1998) (finding the penalty was appropriate despite the insurer's purported good faith in contesting claim). *But cf. Silvey Co. v. Riley*, *supra* (holding that the insurer is allowed to continue its investigation beyond the time that payment is due under the policy if reasonably necessary); *Miller's Mut. Ins. Co. v. Keith Smith Co.*, 284 Ark. 124, 680 S.W.2d 102 (1984) (finding the award of the penalty and attorney's fees inappropriate where plaintiff reduced claim against insurer to correct amount and company promptly confessed judgment for that amount).

Nationwide further submits that it was not credited for $6,000 that McHalffey received in salvage of the picker, despite its motion that this sum be credited toward McHalffey's judgment and penalties. However, because Nationwide has failed to file a cross-appeal in this action, we are unable to address this issue. *See Boothe v. Boothe*, 341 Ark. 381, 17 S.W.3d 469 (2000).

Nationwide also contends that there was no time specified in the policy for it to pay the claim, and McHalffey put on no proof of a specified time in which it was required to pay the claim. However, although section 23-79-208(a) makes reference to an insurance company's failure to pay losses "within the time specified in the policy," the supreme court has held that where an agreement does not specify a time period in which action is to be taken, the application of a reasonable-time analysis is appropriate. *See McKay Properties, Inc. v. Alexander & Assoc., Inc.*, 63 Ark. App. 24, 971

S.W.2d 284 (1998). Moreover, in *Miller's Mut. Ins. Co.*, *supra*, the court has further held that the statutory penalty is properly allowed even though the insurance company later confesses judgment, where it has had a "reasonable opportunity" to pay a claim for an amount less than or equal to the correct amount due under the policy. In this instance, Nationwide did not confess judgment until more than a year after the fire and nearly a year after it had determined that the cotton picker was a total loss, and ultimately settled for the amount that McHalffey had claimed that he was due on the day prior to trial. This is clearly not a reasonable time in which to pay a loss.

Reversed and remanded.

ROBBINS and GRIFFEN, JJ., agree.

ALUMINUM COMPANY OF AMERICA
v. Grady B. ROLLON

CA 01-638 64 S.W.3d 756

Court of Appeals of Arkansas
Division I
Opinion delivered December 19, 2001

Rose Law Firm, by: *Phillip Carroll*, for appellant.

Kaplan, Brewer, Maxey & Haralson, P.A., by: *Silas H. Brewer*, for appellee.

JOHN F. STROUD, JR., Chief Judge. This is the second appeal in this workers' compensation hearing-loss case. The Workers' Compensation Commission originally awarded appellee, Grady Rollon, benefits for his hearing loss, finding that his claim for benefits was not precluded by the statute of limitations. In an unpublished opinion dated June 16, 1999, *ALCOA v. Rollon,* CA 98-776, this court reversed and remanded the case to the Commission for further proceedings in light of our supreme court's decision in *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999). In that case, the supreme court held that the two-year statute of limitations was applicable to work-related, noise-induced hearing loss and began to run when the hearing loss became apparent to the claimant.[1]

[1] Although not controlling in the facts of this case, the supreme court also held in *Minnesota Mining & Mfg. v. Baker* that the statute of limitations began to run on the date the claimant became aware of his hearing loss because his hearing did not continue to deteriorate

On remand, the Commission determined that the two-year statute of limitations barred Rollon's claim for indemnity benefits for his 1.9% hearing loss, and Rollon does not appeal this finding. However, the Commission left intact its finding that ALCOA was responsible for providing hearing aids for Rollon.

ALCOA now appeals the Commission's decision that it is liable for providing hearing aids for Rollon. For its first point on appeal, ALCOA argues, "The Commission erred in holding that an increase in threshold shifts in higher frequencies in claimant's right ear shown in his January 24, 1994, audiogram, as compared to the claimant's September 24, 1990, audiogram justified the finding that ALCOA be required to purchase hearing aids, and that ALCOA had the burden of proving by a preponderance of the evidence that Rollon's hearing loss was sufficient more than two years before he filed his claim to require hearing aids. If Rollon's claim for hearing loss is barred by the statute of limitations, his claim for amplification devices to reduce that handicap is also barred by the statute of limitations." ALCOA's second point on appeal is that the Commission erred in holding that only medical testimony may be considered on the issue of causation. We reverse.

Rollon began working for ALCOA on April 15, 1963, and retired on December 31, 1995. He first worked in the labor pool, but he was transferred to maintenance in 1973 and remained so employed until his retirement. Prior to working for ALCOA, Rollon served in the Army and was trained on the M1 rifle.

ALCOA administered a pre-employment audiogram for Rollon on April 8, 1963. Rollon was informed by ALCOA as early as 1984 that his hearing at high-noise levels was decreasing. In 1989, Rollon was again notified by letter that there had been a decrease in his hearing ability. The results of a hearing test administered on January 8, 1990, which were signed by Rollon, indicated that his hearing impairment was progressive. Another hearing test was administered on September 24, 1990, and in a letter of even date, Rollon was advised that his hearing impairment had not changed since the January test. Rollon's hearing impairment on September 24, 1990, according to the *AMA Guides*, was 1.9%.

Rollon filed his claim for benefits on March 3, 1993. A January 24, 1994, audiogram indicated that Rollon's actual impairment

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from the time he became aware of his hearing loss to the date he filed his claim for benefits.

remained at 1.9% pursuant to the *AMA Guides*, which was the same impairment rating of Rollon's hearing in September 1990. However, there was a shift in the higher threshold frequencies, indicating that Rollon's hearing at those frequencies had continued to deteriorate to profound levels. This was not indicated in the impairment rating because the *AMA Guides* formula used to arrive at the permanent impairment rating only utilizes the frequencies up to 3000 Hz, and Rollon's profound impairment was at levels of 4000 Hz and higher.

In ordering ALCOA to provide hearing aids to Rollon, the Commission stated:

> We have previously awarded the claimant hearing aids based on Dr. Daniel Orchik's expert medical testimony indicating that the claimant's hearing loss after his claim was filed was of a nature and extent sufficient to require hearing aids. While the claimant's hearing impairment as calculated under the *AMA Guides* formula remained the same at 1.9% between 1990 and 1994, we note that the claimant's January 24, 1994, audiogram indicates some degree of overall increased threshold shift, particularly in the higher frequencies, as compared to the claimant's September 24, 1990, audiogram. Whether the claimant's hearing loss might have been sufficient to require a need for hearing aids two years prior to the date that the claimant filed his claim is a medical question, and there are no medical opinions in the record indicating that the claimant's hearing loss was sufficient to require hearing aids more than two years prior to the date the claimant filed his claim for benefits, or to indicate that the claimant's additional hearing loss beginning two years prior to the date he filed his claim was insufficient to cause a need for hearing aids. Under these circumstances, we find that the respondents [ALCOA] have failed to establish by a preponderance of the evidence that the claimant's claim for hearing aids is barred by the statute of limitations.

Arkansas Code Annotated § 11-9-702(a)(1) (1987), provides, "A claim for compensation for disability on account of injury, other than an occupational disease and occupational infection, shall be barred unless filed with the Commission within two (2) years from the date of injury." The Commission determined that Rollon's 1.9% permanent hearing impairment had developed and become apparent to Rollon more than two years prior to the date he filed his claim for benefits on March 3, 1993, and was therefore barred by the statute of limitations, a finding not appealed to this court.

However, the Commission recognized that although Rollon's permanent impairment remained the same under the *AMA Guides*, he had nonetheless continued to suffer additional deterioration of his hearing in the higher frequencies. The Commission determined that because there were no medical opinions in the record to indicate that Rollon's need for hearing aids developed more than two years prior to the date he filed his claim for benefits or that the additional loss of high-frequency hearing that developed within the two years prior to the claim being filed was not the reason he needed hearing aids, ALCOA had failed to establish by a preponderance of the evidence that Rollon's claim for hearing aids was barred by the statute of limitations. We hold that this was an improper shifting of the burden of proof from the employee to the employer.

In *Petit Jean Air Serv. v. Wilson*, 251 Ark. 871, 475 S.W.2d 531 (1972), a workers' compensation case concerning the statutory limitations for a claim for additional benefits, Justice George Rose Smith, in holding that the employee was statutorily barred from receiving additional benefits, stated, "It is plainly the better rule to put upon the claimant the burden of filing his claim for additional compensation within the time allowed by the statute. In our opinion, that view of the matter gives effect both to the letter and to the spirit of the law." 251 Ark. at 875, 475 S.W.2d at 534.

Although not directly on point, we find that this holding is analogous and instructive. The claimant has always been required to prove all of the elements of his workers' compensation claim. *See McFall v. Farmers Tractor & Truck Co.*, 227 Ark. 985, 302 S.W.2d 801 (1957) (holding that the liberal construction of workers' compensation laws did not relieve a claimant of the burden of showing a causal relation between his injury and the employment); *Am. Cas. Co. v. Jones*, 224 Ark. 731, 276 S.W.2d 41 (1955) (holding that it is the claimant's burden to show that the injury was the result of an accident that not only arose in the course of the employment but that it also grew out of, or resulted from the employment); and *Howard v. AP&L Co.*, 20 Ark. App. 98, 724 S.W.2d 193 (1987) (holding that the burden rests upon the party seeking benefits to prove the injury sustained was the result of an accident arising out of and in the course of employment, and the rule of liberal construction is not a substitute for the claimant's burden of establishing his claim by a preponderance of the evidence).[2] Likewise, in the

[2] The claim in the present case was filed prior to July 1, 1993, the date that the new

present case, we hold that it remained Rollon's burden to prove that his need for hearing aids resulted from the hearing loss sustained during the two years prior to the date he filed his claim for benefits. We believe that this interpretation of the issue, as in *Petit Jean Air Serv. v. Wilson, supra*, gives effect both to the letter and to the spirit of the law.

Reversed.

HART and NEAL, JJ., agree.

Eddie RODGERS *v.* STATE of Arkansas

CA CR 01-293 64 S.W.3d 275

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workers' compensation statutes took effect; therefore, the cases cited are pre-1993 cases, in which the workers' compensation statutes were liberally construed.

William R. Simpson, Jr., Public Defender; *Don Thompson*, Deputy Public Defender, by: *Clint Miller*, Deputy Public Defender, for appellant.

Mark Pryor, Attorney General, by: *Lauren Elizabeth Heil*, Assistant Attorney General, for appellee.

JOHN F. STROUD, JR., Chief Judge. Appellant, Eddie Rodgers, was convicted of aggravated assault by a jury for shooting a gun at Bryant Young, who had come to his house to take his younger sister out on a date. During the sentencing phase of the trial and over the State's objection, pursuant to Ark. Code Ann. § 16-97-101(4) (Supp. 2001), the trial judge, in his discretion, instructed the jury that it could recommend an alternative sentence of probation. He pointed out that any such recommendation would not be binding on the court. However, the jury returned with a sentence of three years in the Arkansas Department of Correction and a $5,000 fine, which the trial court accepted.

After sentencing had been pronounced, appellant's counsel asked the trial judge if he would consider setting aside the jury's sentence of three years in prison and placing appellant on three years' probation if appellant agreed to pay the $5,000 fine in a shorter period of time. The deputy prosecuting attorney requested that the trial judge follow the jury's recommendation. The trial judge responded that "had the jury recommended [probation], I probably would, but I have not gone against a jury yet and I don't think this would be the appropriate time to start." Appellant now appeals, arguing that the trial court erred in failing to exercise his discretion by refusing to place appellant on probation after the jury had sentenced him to three years in the Department of Correction. We affirm.

In support of his argument, appellant cites *Acklin v. State*, 270 Ark. 879, 606 S.W.2d 594 (1980), and *Wing v. State*, 14 Ark. App. 190, 686 S.W.2d (1985). However, both of these cases are distinguishable from the present case. The issue in those cases was whether the trial judge abused his discretion with regard to ordering sentences to run consecutively or concurrently; an issue that is solely the trial judge's decision. *See* Ark. Code Ann. § 5-4-403 (Repl. 1997).

In the case at bar, the trial judge exercised discretion in instructing the jury, over the State's objection, that appellant was

eligible for the alternative sanction of probation and that they could recommend that punishment, but that the trial court was not obliged to follow it. He also exercised his discretion after appellant's counsel requested the alternative sentence of probation when he stated that this was not the case to go against the jury's recommended sentence. The trial judge had given the jury the option to recommend probation, and that option was rejected. His unnecessary comment, that he had not yet gone against a jury, does not negate the discretion he had already obviously exercised.

Affirmed.

PITTMAN, JENNINGS, and VAUGHT, JJ., agree.

HART and NEAL, JJ., dissent.

JOSEPHINE LINKER HART, Judge, dissenting. I respectfully disagree with the majority and agree with appellant's argument that the trial judge, as a matter of custom, failed to exercise his judicial discretion in sentencing appellant to a term of imprisonment when denying appellant's request to be placed on probation. After the jury found appellant guilty of aggravated assault, the court instructed the jury that it could recommend probation. After deliberation, the jury sentenced appellant to three years imprisonment and a $5,000 fine.

Appellant then requested that the court, instead, place the appellant on three years' probation on the condition that he pay the fine within a shorter period of time. The court denied appellant's request in the following colloquy:

> DEFENSE COUNSEL: Two days of credit. Would the Court consider setting aside the jury's three years in prison and put him on three years' probation on the condition that he pay the $5,000 back in a shorter period of time?
>
> DEPUTY PROSECUTING ATTORNEY: Your Honor, we would ask the Court to follow the jury's recommendation.
>
> THE COURT: [Defense counsel], had the jury recommended that [probation as opposed to imprisonment], I probably would, but I have not gone against a jury yet and I don't think this would be the appropriate time to start.
>
> DEFENSE COUNSEL: Thank you for your consideration.

THE COURT: So that will be the finding of the Court.

Appellant argues that the trial judge erred by failing to exercise discretion vested in him pursuant to Arkansas Code Annotated section 5-4-301(b) and (c) (Supp.1999).[1] In *Acklin v. State*, 270 Ark. 879, 606 S.W.2d 594 (1980), the appellant argued that the trial judge did not exercise his discretion when considering the appellant's request that the sentences recommended by the jury should

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[1] Ark. Code Ann. § 5-4-301(b) and (c) states as follows:

(b) In making a determination as to suspension or probation, the court shall consider whether:

(1) There is undue risk that during the period of a suspension or probation the defendant will commit another offense;

(2) The defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution;

(3) Suspension or probation will discount the seriousness of the defendant's offense; or

(4) The defendant has the means available or is so gainfully employed that restitution or compensation to the victim of his offense will not cause an unreasonable financial hardship and will be beneficial to the rehabilitation of the defendant.

(c) The following grounds, while not controlling the discretion of the court, shall be accorded weight in favor of suspension or probation:

(1) The defendant's conduct neither caused nor threatened serous harm;

(2) The defendant did not contemplate that his conduct would cause or threaten serious harm;

(3) The defendant acted under strong provocation;

(4) There were substantial grounds tending to excuse or justify the defendant's conduct, though failing to establish a defense;

(5) The victim of the offense induced or facilitated its commission;

(6) The defendant has compensated or will compensate the victim of the offense for the damage or injury that he sustained;

(7) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense;

(8) The defendant's conduct was the result of circumstances unlikely to recur;

(9) The character and attitudes of the defendant indicate that he is unlikely to commit another offense;

(10) The defendant is particularly likely to respond affirmatively to suspension or probation;

(11) The imprisonment of the defendant would entail excessive hardship to him or is dependents;

(12) The defendant is elderly or in poor health; or

(13) The defendant cooperated with law enforcement authorities in his own prosecution or in bringing other offenders to justice.

run concurrently. The court in *Acklin* said in pertinent part, "It's my customary rule to run consecutive sentences imposed by jurors, not because it's an expense to the county and not because someone elects to do that; it's just my judgment in the matter that generally that's what the jury intends to do." *Id.* at 881, 606 S.W.2d at 606. Although the supreme court commended the trial judge in *Acklin* for his outspoken candor, they held that nothing in the colloquy indicated that the trial judge exercised his discretion. *Id.*

In *Wing v. State*, 286 Ark. 494, 696 S.W.2d 311 (1985), appellant argued that the trial judge implemented what he perceived the jury wanted rather than exercising his discretion when he ordered the sentences to be served consecutively. In *Wing*, the supreme court noted that the court of appeals was correct in its decision of another case titled *Wing v. State*, 14 Ark. App. 190, 686 S.W.2d 452 (1985), which followed *Acklin v. State, supra*, by remanding the case for resentencing, finding that the trial judge tried to implement his perception of what the jury wanted rather than exercising his own discretion; therefore, it was necessary to remand the case in order for the trial judge to make it clear that he was exercising his own discretion and not the discretion of the jury. The trial judge in *Wing v. State*, 14 Ark. App. 190, 686 S.W.2d 452, stated in part the following:

> If it had been left to me in the first instance, I feel I would have had a lot more leeway to act. I think it is somewhat presumptuous of me to go against a jury verdict. *I have never done that except in a rare case where it's clearly out of line . . . I think if the jury had wished otherwise, they would have noted otherwise.*

Id. at 192, 686 S.W.2d at 454. Thus, our courts have determined that in cases where the court maintained that its customary rule is to sentence a person according to the jury's intention or where the court has said it has never gone against the jury's recommendation except in rare cases, the trial court failed to exercise its discretion in sentencing the defendant.

In this case, the judge not only indicated that he was not exercising his discretion but also that he routinely failed to exercise his discretion. Likewise, similar language was used by the trial judges in *Acklin* and *Wing*, where the judges imposed sentences recommended by the jury as a matter of custom or only rarely imposing an alternative sentence than that recommended by the jury. The majority's effort to distinguish these cases is unavailing as the analogy that the majority should have drawn from the cited

cases is clearly apposite. Further, the majority reaches its decision by ignoring parts of the judge's comments. In my view, it is readily apparent from the entirety of the judge's comments that he was refusing to exercise his discretion. Given the judge's remarks, I conclude that the court failed to exercise its discretion in sentencing appellant to a term of imprisonment without considering probation. Therefore, I would reverse and remand for resentencing.

NEAL, J., joins.

Matthew COON *v.* STATE of Arkansas

CA CR 01-257 65 S.W.3d 889

Court of Appeals of Arkansas
Division II
Opinion delivered December 19, 2001

[redacted]

Thurman Ragar, Jr., for appellant.

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

JOHN MAUZY PITTMAN, Judge. The appellant in this criminal case was arrested and confessed to robbing a Hardee's restaurant with a toy gun. He was charged with aggravated robbery and theft of property. Although represented by counsel, appellant made a *pro se* pretrial motion to suppress his confession and requested a *Denno* hearing. The court never ruled on the motion and a jury trial was held. Neither appellant nor appellant's attorney mentioned the motion. Appellant's attorney's trial strategy was to admit to robbery — which was done in both the opening and closing arguments — but to try to avoid a conviction for aggravated robbery by emphasizing that the gun was a toy, that appellant was young, and that he cooperated with police by confessing. In furtherance of this strategy, appellant testified in his own behalf, recounting all the significant statements made in his pretrial confession. Appellant was nevertheless convicted of aggravated robbery and theft of property. This appeal followed.

On appeal, appellant contends that the evidence was insufficient to support a conviction for aggravated robbery, and that the trial court erred in failing to rule on his *pro se* motion to suppress his confession.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. Consequently, we must first address this issue because the Double Jeopardy Clause precludes a second trial when a judgment of conviction is reversed for insufficient evidence. *Harris v. State*, 284 Ark. 247, 681 S.W.2d 334 (1984) (citing *Burks v. United States*, 437 U.S. 1 (1978)). We disregard any alleged trial errors in determining the sufficiency question, because to do otherwise would result in avoidance of the sufficiency argument by remanding for retrial on other grounds. *Rose v. State*, 72 Ark. App. 175, 35 S.W.3d 365 (2000).

When the sufficiency of the evidence is challenged on appeal from a criminal conviction, we view the evidence in the light most favorable to the State, considering only the evidence that tends to support the verdict, and will affirm if there is any substantial evidence to support the finding of guilt. *Hardrick v. State*, 47 Ark. App. 105, 885 S.W.2d 910 (1994). Substantial evidence is evidence of sufficient force and character to compel a conclusion one way or the other, inducing the mind to pass beyond mere suspicion or conjecture. *Id.*

A person commits robbery if, with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately thereafter, he employs or threatens to immediately employ physical force upon another. Ark. Code Ann. § 5-12-102(a) (Repl. 1997). A person may commit aggravated robbery by committing robbery and representing by word or conduct that he is armed with a deadly weapon. Ark. Code Ann. § 5-12-102(a)(1) (Repl 1997).

Appellant argues that there is insufficient evidence to support his aggravated robbery conviction because there was no evidence that appellant held the gun during the robbery. We find no error on this point. Appellant's confession was admitted at trial. Following introduction of his confession, appellant also testified, stating that he gave the recorded statement admitting his involvement, and affirming that what he told the police officer was true. He testifed that some friends approached him and asked him to help them rob the Hardee's store. Appellant stated that he agreed and that they obtained some BB guns and drove to Hardee's. Appellant stated that he stuck the BB gun through the back door of the store

and pointed it at the manager, that he did not tell her that it was a toy gun, and that it was his intention for the Hardee's employees to believe it was a real gun that could harm or kill them. Finally, he testified that it was his intention to make money by doing this. We hold without hesitation that this constitutes substantial evidence to support appellant's conviction for aggravated robbery.

Next, appellant argues that the trial court erred in failing to rule on his *pro se* motion to suppress his confession. First, we observe that appellant did not waive this argument by proceeding to trial without reminding the trial judge that the motion was pending. A hearing is mandatory on a motion to suppress, and the supreme court has said that a defendant is not required to question the admissibility of his pretrial statements more than once. *Greene v. State,* 335 Ark. 1, 977 S.W.2d 192 (1998); *Rankin v. State*, 329 Ark. 379, 948 S.W.2d 397 (1997).

Second, we note that there is a real question as to whether the motion was properly before the trial court. Appellant was represented by counsel throughout the proceedings, including the time when he made his *pro se* motion to suppress. This sort of hybrid representation is not favored, and it was within the trial judge's discretion to strike the *pro se* motion because appellant was represented by counsel. *Monts v. Lessenberry*, 305 Ark. 202, 806 S.W.2d 379 (1991). When the record is silent regarding the trial court's findings, our usual practice is to presume that it made all the findings necessary to support the action taken. We are unable to do so in this instance because a *pro se* pretrial motion by a defendant represented by counsel requires a ruling on the record by the trial judge. *Id.*

Third, we hold that, even if appellant's pretrial confession should have been suppressed, the error was harmless beyond a reasonable doubt in view of the fact that appellant testified at his trial and repeated every material aspect of his pretrial statement. *Isbell v. State,* 326 Ark. 17, 22, 931 S.W.2d 74, 77 (1996). At trial, appellant admitted having committed every element of aggravated robbery, and there were no factors tending to make appellant's second statement unreliable. *See id.* Finally, no argument was made below suggesting that appellant was forced to testify because his earlier statement was admitted, nor is that argued here. We assume the decision to testify and give a "judicial confession" was simply a matter of trial strategy. It appears that his testimony was given to demonstrate his youth and repentance to the jury, to show that he cooperated with the police by giving a statement, and to emphasize

that the guns employed in the robbery were not deadly weapons. *See id.*

Affirmed.

JENNINGS and VAUGHT, JJ., agree.

Daniel MILES *v.* STATE of Arkansas

CA CR 01-147 64 S.W.3d 759

Court of Appeals of Arkansas
Division II
Opinion delivered December 19, 2001

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

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

JOHN MAUZY PITTMAN, Judge. The appellant in this criminal case was arrested when a search warrant was executed on the residence of Charles Patterson. Patterson was outside working on a car when the police team approached and detained him there. Appellant and another man were found while they were exiting a bedroom in Patterson's residence. The bedroom contained several items used in the manufacture of methamphetamine, and the distinctive odor of a methamphetamine laboratory was noticed in the

trailer. At appellant's jury trial, Patterson testified that he had been charged with the same offenses as appellant but had agreed to plead guilty in exchange for leniency. Patterson further testified that appellant had manufactured methamphetamine at Patterson's house and that appellant spent several nights every week at his home. Appellant was convicted of possession of methamphetamine and drug paraphernalia, and this appeal followed.

For reversal, appellant argues that his directed-verdict motion should have been granted because the evidence against him was insufficient. He contends that Patterson was an accomplice and that there was not sufficient corroboration of Patterson's testimony to support appellant's conviction. We agree, and we reverse.

Arkansas Code Annotated § 16-89-111(e)(1) (Supp. 2001) provides that a conviction cannot be had in any case of felony upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense. The corroboration is not sufficient if it merely shows that the offense was committed and the circumstances thereof. *Id.* The reason for the rule is that the instinct for survival renders the testimony of an accomplice less than completely credible. *Foster v. State*, 290 Ark. 495, 720 S.W.2d 712 (1986).

The corroborating evidence need not be sufficient standing alone to sustain the conviction, but it must, independent from that of the accomplice, tend to a substantial degree to connect the defendant with the commission of the crime. *Rhodes v. State*, 276 Ark. 203, 634 S.W.2d 107 (1982). The corroborating evidence may be circumstantial so long as it is substantial; evidence that merely raises a suspicion of guilt is insufficient to corroborate an accomplice's testimony. *Gordon v. State*, 326 Ark. 90, 931 S.W.2d 91 (1996). The presence of an accused in the proximity of a crime, opportunity, and association with a person involved in the crime are relevant facts in determining the connection of an accomplice with the crime; however, proof that merely places the defendant near the scene of a crime is not sufficient corroborative evidence of the defendant's connection to it. *Pickett v. State*, 55 Ark. App. 261, 935 S.W.2d 281 (1996).

In reviewing this issue on appeal, we eliminate the testimony given by Patterson, and we examine what remains of the State's evidence to determine if it independently establishes the crime and tends to connect appellant with its commission. *Andrews*

v. State, 344 Ark. 606, 42 S.W.3d 485 (2001). Although the remaining evidence in the present case is sufficient to independently establish the crime, the only evidence produced by the State to connect appellant with the commission of the offenses, aside from Patterson's testimony, is that appellant was walking out of a bedroom in Patterson's house when the police arrived. That is not sufficient to satisfy the requirement of § 16-89-111(e)(1). *See Pickett v. State, supra.* Although constructive possession may be implied when the contraband is in the joint control of the accused and another person, joint occupancy, standing alone, is insufficient to establish possession or joint possession. *Stanton v. State*, 344 Ark. 589, 42 S.W.3d 474 (2001). The State must also establish that (1) the accused exercised care, control, and management over the contraband, and (2) the accused knew the matter possessed was contraband. *Id.* In the present case there was no evidence, other than Patterson's testimony, to show that appellant exercised care, control, or management over the various items in Patterson's home used in the manufacture of methamphetamine.

Reversed and dismissed.

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

Darren Ray GARDNER *v.* STATE of Arkansas

CA CR 01-843 64 S.W.3d 761

Court of Appeals of Arkansas
Division IV
Opinion delivered December 19, 2001

The Jesse Law Firm, P.L.C., by: *Mark Alan Jesse*, for appellant.

Mark Pryor, Attorney General, by: *Clayton K. Hodges*, Assistant Attorney General, for appellee.

JOHN B. ROBBINS, Judge. Appellant Darren Ray Gardner appeals his convictions for one count of rape and two counts of first-degree sexual abuse as decided after a bench trial in Pulaski County Circuit Court. He was sentenced to forty years, ten years, and ten years, respectively, and the sentences were to run concurrently. Appellant argues on appeal that his convictions are not supported by sufficient evidence in that the dates of the alleged sexual abuses and rape as listed on the information do not fit with the State's evidence. However, appellant did not preserve this issue for appellate review, and thus we cannot reach the merits of this claim. Appellant alternatively argues that because the State could not prove that the offenses occurred within the applicable statute of limitations, then his convictions must be reversed and dismissed. We disagree with this contention. Therefore, we affirm.

The prosecution of this case commenced on November 18, 1999, when a bench warrant was issued pursuant to the filing of an information. The three-count felony information alleged that the rape and sexual abuses occurred between March 1 and April 30, 1998. At that time, the victim, A.H., who stated that her birth date was May 13, 1990, was seven years old. At the time of trial, A.H. was nine years old and in the fourth grade.

The evidence adduced at trial was as follows. A.H. testified that appellant was her mother's former boyfriend who had lived with them off and on for some time. The crime was reported on or about July 4, 1999, when A.H. revealed to two of her cousins, aged sixteen and twelve, that appellant had made her do sexual things. The girls thought she was kidding until A.H. began to cry. The cousins reported what A.H. had told them to their grandmother, and this led to telling A.H.'s mother. The police were summoned, and the prosecution began. The substance of A.H.'s testimony was that she, her mother, and appellant lived together in a trailer, and

appellant often took care of A.H. while her mother was gone. A.H. reported incidents of appellant touching her on her breast, bathing with her and having her sit on his lap, having her watch pornographic movies with him while she sat on his lap, and having her perform oral sex on him on more than one occasion. She could not recall dates, though she remembered that her mother and appellant were in a relationship through a couple of moves, and she and her mother lived in an apartment for some period of time, though she did not know where. She thought that the crimes occurred when they all lived together in "the trailer." A.H. did not pinpoint which trailer, but she did recall that one of the events happened in her "mom's room." A.H. was told by appellant to keep the "bad stuff" a secret.

A.H.'s mother testified that she had no knowledge of any of these crimes. Her mother stated that they lived in Rolling Hills Apartments between March and April of 1998, and that appellant had access to her alone during that time as well as before and after those dates. She said that she had undergone major surgery and that appellant helped take care of A.H. during her recovery and after she went back to work.

Appellant testified that these were false allegations and that he was told that A.H. had been molested by her natural father. He thought that A.H. was lying and that her mother put her up to it. Appellant recalled that A.H. and her mother moved in with him in his trailer at Bowman Trailer Park when her mother lost her job as the trailer park manager, when A.H. was about two years old. Appellant stated that A.H. and her mother moved to an apartment in which the mother's sister was residing for a while because he could no longer afford to have A.H and her mother live with him. Appellant said he only visited the apartment. Appellant said that he, A.H., and A.H.'s mother lived together again in A.H.'s mother's trailer when they moved to Rolling Hills Trailer Park. Appellant stated that he eventually broke off their relationship when he caught A.H.'s mother in an infidelity with a neighbor. Appellant averred that he had not had any contact with A.H. or her mother in years until these allegations arose.

At the close of the State's case, trial counsel stated that he was moving for a directed verdict on each charge, and then said, "They have not proven the requirements for rape, nor have they shown sexual abuse through their testimony." A general renewal was offered at the close of all of the evidence. Both the motion and the renewal were denied. The trial court found that appellant was guilty

of the three charged offenses and sentenced him accordingly. This appeal resulted.

Gardner's directed-verdict motions were too general to challenge any element lacking in the State's proof. Accordingly, the sufficiency challenge is not properly preserved for appeal. Even Gardner's appellate counsel acknowledges in his brief that trial counsel may have failed to properly raise and preserve the issue for appellate review. We agree.

In order to preserve a challenge to the sufficiency of the evidence, an appellant must make a specific motion for a directed verdict that advises the trial court of the exact element of the crime that the State has failed to prove. *Conner v. State*, 334 Ark. 457, 978 S .W.2d 300 (1998). A general motion that merely asserts that the State has failed to prove its case is inadequate to preserve the issue for appeal. *Id.*; *See, e.g., Crisco v. State*, 328 Ark. 388, 943 S.W.2d 582 (1997) (claiming that the State failed "to prove a prima facie case"); *Lovelady v. State*, 326 Ark. 196, 931 S.W.2d 430 (1996) (declaring that the State "failed to meet its burden of proof"). Appellant herein failed to make a specific enough motion to preserve the issue.

In appellant's alternate argument, he states that because there is no proof of when the offenses occurred, other than the dates set forth in the information, which do not match with the testimony, the State failed to prove that any offense occurred within the statute of limitations. The State notes that this argument is raised for the first time on appeal, but that this is permissible because it involves the statute of limitations, which implicates jurisdiction to hear the case and cannot be waived. *See Eckl v. State*, 312 Ark. 544, 851 S.W.2d 428 (1993); *Scott v. State*, 69 Ark. App. 121, 10 S.W.3d 476 (2000). Therefore, appellant's failure to raise the issue at trial does not prohibit him from raising it on appeal.

A prosecution for rape must be commenced within six years, and a prosecution for first-degree sexual abuse must be commenced within three years. Ark. Code Ann. § 5-1-109(b)(1) and (2) (Repl. 1997). "A prosecution is commenced when an arrest warrant or other process is issued based on an indictment, information, or other charging instrument, provided that such warrant or process is sought to be executed without unreasonable delay." Ark. Code Ann. § 5-1-109(f) (Repl. 1997). This prosecution commenced on November 18, 1999.

On appellate review of a statute-of-limitations question, we review the record in the light most favorable to the State. *See Hunter v. State*, 330 Ark. 198, 952 S.W.2d 145 (1997). According to Arkansas Code Annotated section 5-1-109(h), a limited exception to the general running of the statute of limitations was adopted in 1987, and it reads:

> If the period prescribed in subsection (b) has expired, a prosecution may nevertheless be commenced for violations of the following offenses if, when the alleged violation occurred, the offense was committed against a minor, the violation has not previously been reported to a law enforcement agency or prosecuting attorney, and the period prescribed in subsection (b) has not expired since the victim has reached the age of eighteen (18)[.]

The offenses enumerated in subsection (h) include rape and sexual abuse in the first degree.[1] The effect of subsection (h) is to extend the statute of limitations for a Class Y felony, such as rape, for up to six years beyond the eighteenth birthday of the victim, and for a Class C felony, such as first-degree sexual abuse, for up to three years beyond the eighteenth birthday of the victim, regardless of the age of the victim at the time of the offense. *See* 1998 Supplementary Commentary to Ark. Code Ann. § 5-1-109 (Repl. 1997). The Commentary explains that a ten-year-old rape victim could, in theory, wait until the day before his twenty-fourth birthday to obtain an arrest warrant. *See id.* This case fits the criteria of subsection (h) in that the offenses were committed against a minor, the offenses had not been reported to authorities on any earlier occasion, and the limitations periods, by definition, could not have expired until well after the victim reached the age of eighteen, since she was and is still a minor. This criminal action was commenced within the applicable statutes of limitation, and we reject appellant's contention to the contrary.

Affirmed.

GRIFFEN and ROAF, JJ., agree.

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[1] Following appellant's conviction, Arkansas Code Annotated section 5-14-108, sexual abuse in the first degree, mentioned in the tolling provisions of 5-1-109(h) was repealed by Acts 2001, No. 1738. The present law addressing this type of criminal conduct appears in §§ 5-14-124 to 5-14-127.

Kelly SMITH, as Administratrix of Lydia Shepard *v.*
ST. PAUL FIRE & MARINE INSURANCE COMPANY

CA 01-488 64 S.W.3d 764

Court of Appeals of Arkansas
Division III
Opinion delivered December 19, 2001

Taylor, Halliburton, Ledbetter & Caldwell, by: *Mark Ledbetter*, for appellant.

Barrett & Deacon, P.A., by: *Paul D. Waddell* and *D.P. Marshall, Jr.*, for appellee.

SAM BIRD, Judge. During November 4-8, 1996, Lydia Shepherd received medical care from St. Bernard's Regional Medical Center. She died on November 8, 1996. On November 4, 1998, her daughter, Kelly Smith, and other heirs brought a wrongful-death and a survival claim against St. Paul Fire and Marine Insurance Co., the insurance provider for St. Bernard's. The heirs nonsuited these claims on February 19, 1999. The case at bar, alleging the same claims, was filed by appellant Kelly Smith, as purported administratrix of Lydia's estate, on February 18, 2000. However, she was not appointed administratrix until April 3, 2000, by a *nunc pro tunc* order stating that it was effective retroactive to September 14, 1999. St. Paul moved to dismiss, stating that the survival and wrongful-death claims were barred by the statute of limitations. Smith contended that the fraudulent concealment exception was applicable because the alleged acts of malpractice were not discovered until September 1998 and that the hospital had concealed its acts. The trial court granted the motion to dismiss,

which it treated as a summary judgment motion, finding no genuine issue of material fact as to whether the acts had been concealed.

Smith appeals, contending (1) that the trial court improperly granted summary judgment on the ground of statute of limitations because the defendant was in no way prejudiced by the alleged failure of plaintiff to file the action in the proper capacity and (2) that the trial court improperly granted summary judgment because a genuine issue of material fact remained to be litigated by and between the parties as to the hospital defendant's concealment of the cause of action. We affirm.

Standard of Review

Summary judgment is a remedy that should only be granted when there are no genuine issues of material fact to litigate and when the case can be decided as a matter of law. *Norris v. Bakker*, 320 Ark. 629, 899 S.W.2d 70 (1995). We have ceased referring to summary judgment as a drastic remedy. *Flentje v. First Nat'l Bank of Wynne*, 340 Ark. 563, 11 S.W.3d 531 (2000). We now regard it simply as one of the tools in a trial court's efficiency arsenal; however, we only approve the granting of the motion when the state of the evidence, as portrayed by the pleadings, affidavits, discovery responses, and admissions on file, is such that the non-moving party is not entitled to a day in court, *i.e.*, when there is not any genuine remaining issue of fact and the moving party is entitled to judgment as a matter of law. *Id.*

The burden of showing there is no remaining genuine issue of material fact and entitlement to judgment as a matter of law is upon the movant for summary judgment. *Norris, supra.* Any doubt and all inferences must be resolved against the moving party. *Id.* Once the moving party makes a *prima facie* showing of entitlement, however, the responding party must meet proof with proof in order to demonstrate that a genuine issue of material fact remains. *Id.* The response and supporting material must set forth specific facts showing there is a genuine issue for trial. *Id.*

When the running of the statute of limitations is raised as a defense, the defendant has the burden of affirmatively pleading this defense. *Meadors v. Still,* 344 Ark. 307, 40 S.W.3d 294 (2001). However, once it is clear from the face of the complaint that the action is barred by the applicable limitations period, the burden shifts to the plaintiff to prove by a preponderance of the evidence

that the statute of limitations was in fact tolled. *Id.* Although the question of fraudulent concealment is normally a question of fact that is not suited for summary judgment, when the evidence leaves no room for a reasonable difference of opinion, a trial court may resolve fact issues as a matter of law. *Id.*

Statute of Limitations

The cause of action for the wrongful-death and survival claims accrued on November 8, 1996, the date of Lydia Shepherd's death. The first wrongful-death claim was brought by Lydia Shepherd's heirs within the time allowed by the two-year statute of limitations; the heirs nonsuited this claim on February 19, 1999. Under Ark. Code Ann. § 16-56-126, a plaintiff has one year to refile suit regardless of whether the statute of limitations would otherwise prevent such institution of suit. The second suit was filed February 18, 2000, which was within this one-year grace period. However, this second suit was filed by Smith in her purported capacity as administratrix of Lydia Shepherd's estate.

In *Murrell v. Springdale Mem. Hosp.*, 330 Ark. 121, 952 S.W.2d 153 (1997), our supreme court held that the savings statute, Ark. Code Ann. § 16-56-126, could not save wrongful-death and survival claims when the current parties had not been parties to the first suit that had been nonsuited. The court emphasized that the statute provided that if " '*the plaintiff therein* suffers a nonsuit' then '*the plaintiff* may commence a new action within one (1) year.' " *Murrell, supra* at 125, 952 S.W.2d at 156 (emphasis in original). The court barred the wrongful-death claims of Murrell's children because the children were not parties to the first action that had been nonsuited.

In the case at bar, the plaintiffs to the first suit were the heirs of Lydia Shepherd. The plaintiff to the second suit was the purported administratrix of the estate. The heirs had one year from the nonsuiting of the original complaint on February 19, 1999, to refile their wrongful-death claim, but they failed to do so. The savings statute, however, would only extend the time to file for the additional year to the heirs, not to the administratrix. The heirs did not refile the wrongful-death claim prior to expiration of the savings period; thus, it is now time-barred.

Turning to the survival claim, we conclude that this cause of action had lapsed as well. The first survival claim was brought by

Smith and other heirs. Heirs cannot file a survival action; it must be brought by the estate. *See Daughhetee v. Shipley*, 282 Ark. 596, 699 S.W.2d 886 (1984). The estate's survival claim expired, at the latest, on November 9, 1998, and no suit had been filed by the estate prior to that time.

The trial judge entered a *nunc pro tunc* order, filed April 3, 2000, that appointed Smith as administratrix and provided that it was retroactive to September 14, 1999. Smith contends that this order made her a valid administratrix as of that retroactive date. Assuming *arguendo* that Smith was a valid administratrix as of September 14, 1999, the survival claim is yet time-barred. The heirs nonsuited the original complaint on February 19, 1999, which was prior to the effective date of the *nunc pro tunc* order. Since there was no administratrix in existence, retroactive or otherwise, when the first complaint was nonsuited, there was no opportunity for the complaint to be amended to include the administratrix as a party. Smith, as administratrix, did not bring suit on behalf of the estate until February 18, 2000, well past the time allowed by the statute of limitations. The current suit was brought within the time allowed by the one-year savings period from the nonsuiting on February 19, 1999. However, the savings statute is inapplicable because the plaintiffs differed between the first and second suits. *See Murrell, supra.*

Smith relies upon *Davenport v. Lee,* 73 Ark. App. 247, 40 S.W.3d 346 (2001), *pet. granted* (May 31, 2001) (No. 01-456), for her argument that because the defendants did not show prejudice, then the trial court's dismissal based on statute of limitations was erroneous. In *Davenport, supra,* Ron and Ramona Davenport had been appointed as administrators of the estate of Ramona's sister. The Davenports brought a *pro se* suit as administrators of the estate or, alternatively, individually and as heirs at law. The trial court dismissed the suit, stating that the Davenports could not file suit in their capacity as personal representatives of the estate because neither of them was an attorney. *Id.* The trial court additionally found that neither was acting in their individual capacity. *Id.* We agreed that the Davenports were not authorized to proceed *pro se* on behalf of the estate, but held that the subsequent amended complaint, which advised the opposing party of the identity of the Davenports' counsel, related back to the initial complaint; thus, the suit was timely brought because the initial complaint tolled the running of the statute of limitations. We found that the opposing party could show no prejudice because the original complaint was timely served and was amended to reflect the identity of counsel.

The defect in the *Davenport* complaint was its failure to show that the plaintiffs were represented by counsel. This defect was cured by the plaintiffs' subsequent amendment. In the case at bar, the defects were that the first suit was brought by the heirs, the wrong party for the survival action, and that the second suit was brought by the administratrix, a different party than the heirs in the first suit. No amendment was ever filed to cure this defect in parties.

Statutes of limitation are for a defendant's protection and a defendant is entitled to believe that he will not be sued after a certain date, barring an exception to the statute of limitations, such as fraudulent concealment. In the case at bar, the defendants were never sued by the administratrix of Shepherd's estate prior to the statute of limitations running on the survival claim. As to the wrongful-death claim, the suit was properly brought by the heirs; however, the heirs nonsuited their original complaint and simply did not refile the suit within the time allowed by the savings statute.

Fraudulent concealment

Smith next contends that the hospital fraudulently concealed their wrongful acts that allegedly led to the death of Lydia Shepherd and that, accordingly, the statute of limitations was tolled until the discovery of such acts in 1999.

Smith does not abstract any of the medical records which she contends form the basis for her fraudulent concealment allegation. She merely abstracts affidavits which discuss the medical records. Furthermore, we note that Smith's brief violates Ark. Sup. Ct. R. 4-2(1)(6), which states that "the appellant's abstract . . . should consist of an impartial condensation, without comment or emphasis, of only such material parts of the pleadings, proceedings, facts, documents, and other matters in the record as are necessary to an understanding of all questions presented. . . ." Smith, while not abstracting the medical records upon which she relies, discusses the medical records by way of editorial comment in her supporting affidavits.

When an abstract is flagrantly deficient, we *may* affirm for noncompliance with the abstracting requirements. Ark. Sup. Ct. R. 4-2(b)(3). When an abstract is so deficient that we cannot discern what happened in the trial court, we must affirm. *Johnson v. State*, 342 Ark. 357, 28 S.W.3d 286 (2000). However, as long as we can determine from a reading of the briefs and appendices material

parts necessary for an understanding of the questions at issue, we will render a decision on the merits. *Id*; *Carmical v. City of Beebe,* 316 Ark. 208, 871 S.W.2d 386 (1994). Because we can determine from the reading of the briefs material parts necessary for an understanding of the question of fraudulent concealment, we address the merit of Smith's argument, despite her deficient abstract.

Fraudulent concealment suspends the running of the statute of limitations, and the suspension remains in effect until the party having the cause of action discovers the fraud or should have discovered it by the exercise of reasonable diligence. *Meadors, supra.* Although the question of fraudulent concealment is normally a question of fact that is not suited for summary judgment, when the evidence leaves no room for a reasonable difference of opinion, a trial court may resolve fact issues as a matter of law. *Id.*

No mere ignorance on the part of the plaintiff of his rights, nor the mere silence of one who is under no obligation to speak, will prevent the statute bar. *Norris, supra.* In order to toll the statute of limitations, a plaintiff is required to show something more than a continuation of a prior nondisclosure. *Meadors, supra.* There must be some positive act of fraud, something so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed, or perpetrated in a way that it conceals itself. *Norris, supra.* And if the plaintiff, by reasonable diligence, might have detected the fraud, he is presumed to have had reasonable knowledge of it. *Id.*

Smith essentially argues that the nurses' making of the charts was an act that was fraudulent in and of itself because of the allegedly untruthful entries. Smith argues, and supports with affidavits, that she only learned in November 1998, that the nurses' entries were allegedly not truthful. She argues that *Gibson v. Herring,* 63 Ark. App. 155, 975 S.W.2d 860 (1998) is analogous. In *Gibson,* a jeweler replaced a diamond with a cubic zirconium. The court held that a fact issue remained as to fraudulent concealment because:

> [a]n act such as that alleged to have been committed by appellee is so furtive by nature that it tends to exclude suspicion or prevent inquiry. A cubic zirconium is designed to look like and be mistaken for a true diamond. The only way appellant could have discovered the fraud immediately upon retrieving the ring would be to have hired an expert to examine the stone. One in appellant's position should not be required to go to such lengths.

Id. at 159, 975 S.W.2d at 863.

Gibson is distinguishable from the case at bar. Here, Smith was not limited to the sole method of hiring an expert as a means to discover the alleged fraud. The medical records show inconsistencies which were apparent from simply reading the records. The records were obtained by Smith prior to the filing of the first suit in November 1998 and Smith makes no allegation that she was prevented from obtaining the records earlier. The records reflect that Lydia's doctor ordered her transferred to ICU at 9:00 and that she was not yet transferred at 11:00, the time that she went into cardiac arrest. Smith asserts that the nurses falsely represented to her that they were monitoring Lydia at "all times" and that she would be checked on "every few minutes," but the nurses' chart reflects that this was not the case. A similar argument was made in *Meadors, supra.* Meadors argued that when a doctor had recorded erroneous information on an operative report, he fraudulently concealed the wrongful act of implanting an erroneous breast size and that such fraudulent concealment occurred because of the way the operative report was written. The court, in affirming the summary judgment for the doctor, found significant that "here we have a plaintiff . . . who could easily have detected any inconsistency in the reports by merely requesting her medical records in their entirety." *Meadors, supra* at 315, 40 S.W.3d at 300.

Furthermore, all but one of the hospital's alleged acts that Smith contends fraudulently concealed her cause of action pertain instead to the issue of whether the hospital was negligent. In *Shelton v. Fiser,* 340 Ark. 89, 8 S.W.3d 557 (2000), the court refused to find that allegations pertaining to the standard of care established fraud for purposes of fraudulent concealment. The issues of whether Lydia was timely transferred to ICU and whether she was monitored as closely as she should have been address whether the hospital breached its standard of care, *i.e.*, negligence, not fraud. Smith has alleged no act by the hospital that pertains to the requisite concealment of fraud. Whether the nurses falsely represented to her that Lydia would be monitored more closely than she was is the only allegation of a fraudulent act made by Smith.

The *Shelton* court refused to reach the issue of whether inconsistencies between medical reports and later statements amounted to fraud because "our law is clear that in order to toll the statute of limitations, the fraud perpetrated must be concealed." We as well do not reach the issue of whether the inconsistencies between the nurses' representations and the reports amounted to

fraud because the inconsistencies were not concealed; there was no positive act of fraud, an act so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed, or an act that was perpetrated in such a way that it concealed itself. Accordingly, we hold that the trial court properly granted summary judgment.

Affirmed.

CRABTREE and BAKER, JJ., agree.

Angel MAYS *v.* ALUMNITEC, INC.

CA 01-591 64 S.W.3d 772

Court of Appeals of Arkansas
Division IV
Opinion delivered December 19, 2001

Lane, Muse, Arman & Pullen, by: *Shannon Muse Carroll*, for appellant.

Laser, Wilson, Bufford & Watts P.A., by: *Frank B. Newell*, for appellee.

KAREN BAKER, Judge. Appellant, Angel Mays, brings this appeal from a decision by the Workers' Compensation Commission. The Administrative Law Judge ("ALJ") denied appellant's claim for compensation based on a lack of objective findings. The Commission affirmed the ALJ's decision. On appeal, appellant argues that the Commission erred in determining that straight-leg-raising tests and range-of-motion tests were not objective findings for the purpose of determining compensability. We disagree.

Appellant was employed as a packer at Alumnitec on May 18, 2000, when she suffered an injury to her lower back. At the time, appellant and her co-worker were lifting long pieces of aluminum onto a table saw to be cut for use in making aluminum ladders. Due to a previous shoulder injury, appellant lifted the aluminum with one hand. As she was bending over holding on to the end of the aluminum, her co-worker twisted appellant's body. Appellant immediately felt pain in her back, and she reported the injury to her supervisor. She was put on light duty. Within ten or fifteen minutes, appellant told her supervisor she needed to go to a doctor. Appellant was allowed to go, but received a "point" for leaving.

When appellant arrived home, she could not get out of the car, so she went directly to the hospital emergency room. The emergency room report stated that appellant complained of bilateral

mid-back pain secondary to lifting at work, but that she denied any radiation down her legs, numbness, weakness, tingling, or previous back injury. The emergency room physician took appellant off work until May 22, 2000. Appellant was also seen by her family physician, Dr. Tilley. Various reports of Dr. Tilley indicated a complaint of muscle spasms, positive pain with straight-leg lift, and decreased range of motion secondary to pain.

When the Commission denies coverage because a worker has failed to meet his burden of proof, the substantial-evidence standard of review requires that we affirm the Commission if its opinion displays a substantial basis for the denial of relief. *Jobe v. Wal-Mart Stores, Inc.*, 66 Ark. App. 114, 987 S.W.2d 764 (1999) (citing *McMillan v. U.S. Motors*, 59 Ark. App. 85, 953 S.W.2d 907 (1997)). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Vittitow v. Central Maloney, Inc.*, 69 Ark. App. 176, 11 S.W.3d 12 (2000). The appellate court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings. *Id.* The issue on appeal is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Oliver v. Guardsmark, Inc.*, 68 Ark. App. 24, 3 S.W.3d 336 (1999).

Appellant claims that the Commission erred in determining that straight-leg-raising tests and range-of-motion tests were not objective findings for the purpose of determining compensability. We disagree. This court addressed this very issue in *Cox v. CFSI Temp. Employment*, 57 Ark. App. 310, 944 S.W.2d 856 (1997). In *Cox*, appellant argued that a range-of-motion test should be considered an objective finding when determining compensability. *Id.* This court disagreed with appellant and held that pursuant to the applicable statutes a range-of-motion test was not an objective finding when determining compensability. *Id.* Arkansas Code Annotated section 11-9-102(4)(D) (Supp. 2001) states that "[a] compensable injury must be established by medical evidence, supported by 'objective findings.' " Section 11-9-102(16) (Supp. 2001) provides in relevant part that:

> (A)(i) "Objective findings" are those findings which cannot come under the voluntary control of the patient.
>
> (ii) When determining physical or anatomical impairment, neither a physician, any other medical provider, an administrative

> law judge, the Workers' Compensation Commission, nor the courts may consider complaints of pain; for the purpose of making physical or anatomical impairment ratings to the spine, straight-leg raising tests or range-of-motion tests shall not be considered objective findings.

However, *Cox* does not fully articulate why straight-leg-raising tests and range-of-motion tests cannot be a basis for objective findings. We take this opportunity to clarify our holding that neither test is objective for purposes of determining compensability. The *American Medical Association Guides* must give way to the statutory definition of objective findings as defined by the General Assembly. Although subjective criteria may be included in the *AMA Guides* when determining a permanent physical impairment rating, clearly the portions of the impairment rating guide that are based upon subjective criteria cannot supersede the statutory definition provided by the General Assembly. Thus, to the extent that there is a conflict, the General Assembly's statutory definition takes precedence over any subjective criteria included in the *AMA Guides*. Furthermore, the legislature has plainly stated through Ark. Code Ann. § 11-9-704(c)(3) (Repl. 1996), that the ALJs, the Commission, and this court shall strictly and literally construe the provisions of the Workers' Compensation Act. *See Duke v. Regis Hairstylists*, 55 Ark. App. 327, 935 S.W.2d 600 (1996).

Appellant bears the burden of proving a compensable injury by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E)(i) (Supp. 2001). We find that appellant failed to do so because the abstract is devoid of any objective findings which are not under the voluntary control of appellant. It is clear that muscle spasms, even those detected by someone other than a physician, can constitute objective medical findings to support compensability. *See Estridge v. Waste Management*, 343 Ark. 276, 33 S.W.3d 167 (2000). Here, the only evidence of muscle spasms was the documentation in Dr. Tilley's June 14, 2000, report, which indicated only a complaint by appellant of muscle spasms in her right leg. Thus, it was only a subjective complaint by appellant, rather than an objective observation by a physician, therapist, or nurse. Although it has been held that passive range-of-motion tests may be proven to be objective findings where the testing was described in the record by the treating physician, at least for the limited purpose of assessing permanent impairment caused by a shoulder injury, *see Hays v. Wal-Mart Stores Inc.*, 71 Ark. App. 207, 29 S.W.3d 751 (2000), the only evidence found in this case regarding a range-of-motion test or a straight-leg-raise test came from Dr. Tilley's various reports. The

record is devoid of testimony that either test was not under appellant's voluntarly control. Therefore, we hold that the evidence is insufficient to demonstrate an objective finding.

Failure to establish a compensable injury, supported by objective findings, is fatal to appellant's claim. Based upon our standard of review, we are convinced that fair-minded persons with these same facts could have reached the same conclusion as the Commission. For these reasons, we affirm the Commission's decision denying benefits to appellant.

Affirmed.

HART and VAUGHT, JJ., agree.

Charity TAYLOR *v.* STATE of Arkansas

CA CR 01-583 64 S.W.3d 278

Court of Appeals of Arkansas
Division IV
Opinion delivered December 19, 2001

Doug Norwood and *Susan Lusby*, for appellant.

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

ANDREE LAYTON ROAF, Judge. Charity Taylor appeals from the circuit court's order finding her in contempt for failing to appear for jury duty; Taylor was sentenced to twenty-four hours in jail and fined $150. Taylor argues that: (1) she was not summoned to jury duty according to law and, thus, could not be summarily penalized under the statute governing the summons of jurors for jury duty; (2) because she was not legally served, the trial court should not have imposed criminal sanctions on her for contempt of court when she failed to appear for jury duty; and (3) even if the trial court could have imposed criminal sanctions, it should not have done so summarily because the alleged act occurred outside the presence of the court. We agree that Taylor was not properly summoned according to Arkansas law and reverse and dismiss.

In December 2000, Charity Taylor received notice and attended her orientation for possible jury duty. On January 26, 2001, Taylor moved from her address registered with the Circuit Court and failed to notify the clerk of her change of address. On February 13, 2001, summonses were issued to a large number of jurors, including Taylor, to appear for jury selection on March 12, 2001. On March 12, 2001, a criminal trial began. During *voir dire*, Taylor's number was called, but she was not present. The trial court ordered that a bench warrant be issued for Taylor. On March 13, 2001, Taylor was booked in the county jail and was given a citation to appear in Benton County Circuit Court at 11:00 a.m. on March 14, 2001.

When Taylor appeared on March 14, 2001, the trial court recessed trial and questioned Taylor on the record about her failure

to appear. Taylor first claimed that a change of address had been submitted to the post office. However, before the contempt hearing, the court had asked the sheriff to check the post office to determine whether Taylor had submitted a change of address form. Captain Gene Drake informed the judge that no forwarding address had been submitted and that Taylor had unclaimed mail at the post office, including what appeared to be the mailed summons for jury duty. Taylor then stated that she had assumed that her husband had submitted the form. The trial court stated that it could not hold Taylor's husband responsible for her failure to submit a change of address to the post office or for her failure to notify the clerk of a new phone number where she could be reached. The court then found Taylor in contempt and sentenced her to twenty-four hours in the Benton County Jail and imposed a fine of $150 which was to be paid within fourteen days. Although Taylor was immediately taken to jail to serve the time, it is not apparent from the record before us that the fine has been paid, consequently we do not consider this case to be moot. *See Minge v. Minge*, 226 Ark. 262, 289 S.W.2d 189 (1956) (holding payment of delinquent child support purged contempt, and thus, the holding of contempt was moot), *Central Emergency Med. Servs., Inc. v. State*, 332 Ark. 592, 966 S.W.2d 257 (1998) (holding that once contempt is purged by payment of the fine, the propriety of the contempt order is moot).

■■ On appeal, Taylor argues that the trial court violated her due process rights under the federal Sixth and Fourteenth Amendments and Article 2, Section 10, of the Arkansas Constitution when it found her guilty of contempt of court for failing to appear for jury duty. Taylor raises several points within this argument. However, before reaching the merits, we must first address the State's contention that Taylor's arguments on appeal are procedurally barred because she did not make them to the trial court, and because her case does not fall within one of the four exceptions to this requirement enumerated in *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980). We do not agree. Taylor was arrested and ordered to appear before the trial court the next day at 11:00 a.m. In *Allison v. Dufresne*, 340 Ark. 583, 12 S.W.3d 216 (2000), the supreme court stated that criminal penalties may not be imposed on an alleged contemnor who has not been afforded the protections that the Constitution requires of criminal proceedings. In *Ward v. Switzer*, 73 Ark. App. 81, 40 S.W.3d 325 (2001), this court reversed an order of contempt for failure to respond to discovery where there was no evidence that the appellant received notice of contempt and opportunity to be heard. We stated that although contempt committed in the immediate view and presence of the court

may be punished summarily, in other cases the party charged shall be notified of the accusation and shall have a reasonable time to defend. Here, Taylor had only one day's notice of the accusation, and we cannot say that she had a reasonable time to defend or even to obtain counsel. Consequently, we hold that she has not waived the right to raise her arguments on appeal and address the merits.

Taylor first contends that she was not summoned to jury duty according to law, and thus, could not be summarily penalized under the statute governing the issuance of summons for jury duty. She further contends that because she was not legally served with a summons for jury duty, the trial court should not have imposed criminal sanctions on her for contempt of court when she failed to appear. In this regard, Taylor argues that due to the inadequacy of the record, primarily the absence of the summons, it is impossible to determine whether the summons for jury duty complied with the statutory requirements of service of summons by first-class mail. Specifically, Taylor contends that she was not lawfully summoned pursuant to the procedure set forth in Ark. Code Ann. § 16-32-106 (Repl. 1999) and that, due to lack of service of the summons, she was deprived of her due process rights because she was not given adequate notice of the charge for failure to appear. The State responds that Taylor attended jury orientation, knew that she was under an order to appear for jury duty, and her failure to appear interfered with the court's business in conducting a trial. The State further claims that Taylor's attendance at jury orientation provided her with the knowledge that she would be subject to contempt for failure to appear.

Arkansas Code Annotated § 16-32-106(b) (Repl. 1999), "Summons of Petit Jurors," provides that jurors shall be summoned by the sheriff by a notice dispatched by first-class mail, given personally on the telephone, or service of summons personally or by such other methods as permitted by law. Arkansas Code Annotated § 16-32-106(c)(1) provides:

> If a notice is dispatched by first-class mail, the prospective juror shall be given a date certain to call the sheriff to confirm receipt of the notice. *Not later than five (5) days before the prospective juror is to appear, the sheriff shall call the prospective juror if the prospective juror has failed to acknowledge receipt of the notice.*

(Emphasis added.) If a juror is legally summoned and fails to appear, then the court may fine the juror in an amount not less than five

dollars nor more than five hundred dollars. Ark. Code Ann. § 16-32-106(d). However, subsection (d) further provides that "nothing in this subsection shall be construed to limit the inherent power of the court to punish for contempt." Arkansas Code Annotated § 16-10-108 (Repl. 1999) empowers every court of record to have the power to punish for criminal contempt, including "willful disobedience or resistance, willfully offered, of any process or order lawfully issued or made," by a fine, not exceeding the sum of fifty dollars, or imprisonment, not exceeding ten days. The trial court thus imposed sanctions upon Taylor pursuant to both its authority to fine for failure to appear for jury duty and its general contempt power, where it imposed a fine of $150 and jail time.

An act is contemptuous if it interferes with the order of the court's business and proceedings or reflects upon the court's integrity. *Hodges v. Gray*, 321 Ark. 7, 901 S.W.2d 1 (1995). The purpose of criminal contempt is to punish for disobedience of the court's order and to vindicate the dignity of the court. *Johnson v. Johnson*, 343 Ark. 186, 33 S.W.3d 492 (2000); *Fitzhugh v. State*, 296 Ark. 137, 752 S.W.2d 275 (1988). The power to punish for contempt is inherent in the courts, and it goes beyond power given to the judges by statute. *Johnson, supra.* However, the "power to punish for contempt should never be exercised except where the necessity is plain and unavoidable if the authority of the court is to continue." *Hodges, supra,* at 14.

The general rule is that before a person may be held in contempt for violating a court order, the order must be in definite terms as to the duties thereby imposed, and the command must be express. *Lilly v. Earl*, 299 Ark. 103, 771 S.W.2d 277 (1989). Criminal penalties may not be imposed on an alleged contemnor who has not been afforded the protections that the Constitution requires of criminal proceedings, including notice of the charges. *Lilly, supra.*; *see also Ward v. Switzer, supra*; *Etoch v. State*, 343 Ark. 361, 37 S.W.3d 186 (2001); *Allison v. DuFresne, supra*; *Fitzhugh, supra.* The Due Process Clause requires that an alleged contemnor be notified that a charge of contempt is pending against him and be informed of the specific nature of that charge. *Allison, supra.*

We agree that the service of summons for jury duty failed to comply with the statutory requirements. The State suggests that Taylor "presumably knew" she would be called later for jury duty and would be subject to contempt; however, such knowledge cannot be the basis for finding Taylor in contempt. Moreover, although the summons itself is not in the record, the testimony presented at

the contempt hearing provides evidence that the service of summons did not comply with Ark. Code Ann. § 16-32-106. Taylor attended jury orientation and subsequently moved without giving a change of address. The evidence presented was that a summons was mailed, presumably by first-class mail, and that Captain Drake had found the letter in Taylor's unclaimed mail at the post office. The letter summons was not introduced into evidence, and it appears the judge did not have a copy of the letter before him, based on the following colloquy:

> THE COURT: Now, in, uh, in February — I am looking for a copy of Sue's letter. What was the date of your letter? Do you remember? The 13th?
>
> MS. HODGES: In February, yes.
>
> THE COURT: Approximately February 13th—
>
> MS. HODGES: I — it was when I was ordered to issue, I believe.

There was no further testimony presented that the summons stated a date certain by which Taylor would have to acknowledge receipt of the summons. Moreover, although the trial court later mentioned in the hearing that Taylor had failed to provide the clerk with a new phone number, there was no testimony that her phone number had changed or that the sheriff had even attempted to call her not later than five days before she was to appear, as required by Ark. Code Ann. § 16-32-106(c)(1).

In *King v. State*, 312 Ark. 89, 847 S.W.2d 37 (1993), the supreme court stated that Ark. Code Ann. § 16-32-106(c)(1)

> does not require five days' notice to jurors . . . [i]t provides that when jurors are mailed a notice to serve, they are to confirm with the sheriff that it was received [and] [i]f no confirmation is given, the sheriff follows up with a telephone call to the non-responsive panel member not later than five days before trial.

Statutory service requirements must be strictly construed and compliance with them must be exact. *Carruth v. Design Interiors, Inc.*, 324 Ark. 373, 921 S.W.2d 944 (1996).

Based on the evidence presented at Taylor's contempt hearing, we find that she was not lawfully summoned to jury duty,

and therefore, could not be found in contempt. Arkansas Code Annotated § 16-32-106(d) requires that a juror be "legally summoned" before she may be fined, and under the requirement of strict construction for statutory service requirements, Taylor was not legally summoned and could not be found in contempt for failure to appear. Because we reverse and dismiss the order of contempt on this point, we need not address Taylor's remaining points on appeal.

Reversed and dismissed.

GRIFFEN and ROBBINS, JJ., agree.

LIBERTY MUTUAL INSURANCE COMPANY
and Film Transit *v.* Randall CHAMBERS

CA 01-424 64 S.W.3d 775

Court of Appeals of Arkansas
Divisions I, II, and III
Opinion delivered January 9, 2002

Friday, Eldredge & Clark, by: *Guy Alton Wade*, for appellants.

The Blagg Law Firm, by: *Brad A. Cazort*, for appellee.

JOHN F. STROUD, JR., Chief Judge. This is a workers' compensation case in which appellee, Randall Chambers, sustained an admittedly compensable injury on August 20, 1999. He was injured in a automobile accident, and as a result of those injuries both of his legs were amputated. He was fitted with prostheses, but relies primarily upon a wheelchair because he has little or no balance without the use of assisted devices and can only walk ten to fifteen feet with the use of a walker. Appellants, Liberty Mutual Insurance Company and Film Transit, paid to have appellee's 1986 Lincoln Continental equipped with a wheelchair rack and hand controls in spite of the fact that the prosthetic laboratory and Baptist Health Rehabilitation Institute both found that these modifications would not be sufficient. The modifications were, in fact, not successful because appellee was not able to put the wheelchair on the rack and walk to the driver's side of the vehicle. Moreover, in order to drive the vehicle, he had to remove his prostheses. Consequently, appellee's wife quit her job to assist him.

Appellee contended that he was entitled to a wheelchair-accessible, hand-controlled van. Appellants countered that they were only responsible for the cost of converting a van to wheelchair accessibility, not for the van itself. They also sought credit for the hand-control/rack modifications that they had already made to appellee's car. The Commission found in favor of appellee with respect to appellant being obligated to provide a "suitable van" and the necessary modifications, and in favor of appellants with respect

to being entitled to a credit against liability equal to the present value of the claimant's 1986 Lincoln. Both parties appealed. We affirm on direct-appeal and reverse on cross-appeal.

The primary issue before us on direct appeal is whether appellee is entitled to a hand-controlled, wheelchair-accessible van pursuant to Arkansas Code Annotated section 11-9-508(a) (Repl. 1996). This statute provides:

> (a) The employer shall promptly provide for an injured employee such medical, surgical, hospital, chiropractic, optometric, podiatric, and nursing services and medicine, crutches, *ambulatory devices*, artificial limbs, eyeglasses, contact lenses, hearing aids, and *other apparatus as may be reasonably necessary in connection with the injury received by the employee.*

(Emphasis added.) Section 11-9-508(a) was amended by the 1993 act and no longer ties "apparatus" to medical services, but rather "other apparatus as may be reasonably necessary in connection with the injury received by the employee." The Commission determined:

> At any rate, we modify the Administrative Law Judge's decision to the extent that we find the respondents liable for the cost of a suitable van (not necessarily a new van) and for the costs of van modifications. We also find that the respondents are entitled to a credit against liability equal to the present value of the claimant's 1986 Lincoln.

Moreover, as noted by at least one Commissioner, the undisputed testimony was that appellee could not afford to purchase a van; therefore, interpreting the statute as argued by appellants would essentially eliminate recovery of such benefits by appellee because he could not afford to purchase the vehicle itself. We will not overturn an administrative agency's interpretation of a statute unless it is clearly wrong. *Byars Constr. Co. v. Byars,* 72 Ark. App. 158, 34 S.W.3d 797 (2000). We find that the Commission's interpretation of this statute with respect to appellants' liability for providing a suitable van is not clearly wrong.

On cross-appeal, Chambers contends that the Commission erred in giving Liberty Mutual and Film Transit credit for the value of the 1986 Lincoln, which would include the cost of placing the rack and hand controls on the vehicle owned by him at the time of his injury. We reverse on cross-appeal because we find that the

Commission was clearly wrong in its interpretation of Arkansas Code Annotated section 11-9-508(a) (Repl. 1996), which requires that the employer promptly provide such apparatus as may be reasonably necessary in connection with the injury received. Based upon the findings of the prosthetic laboratory and Baptist Health Rehabilitation Institute, cross-appellees knew or should have known that their expenditures for modifying the Lincoln would not meet Chambers's needs. Consequently, they are not entitled to a discount for insisting upon useless measures that needlessly delayed Chambers's prompt receipt of reasonably necessary apparatus.

Affirmed on direct appeal; reversed on cross-appeal.

GRIFFEN, NEAL, VAUGHT, and CRABTREE, JJ., agree.

PITTMAN, HART, JENNINGS, and BIRD, JJ., dissent.

JOHN E. JENNINGS, Judge, dissenting. Certainly the result reached by the majority in this case is an equitable one, but the question is one of law not equity. The question is what does this statute mean. Does a specially equipped van qualify as an "other apparatus" within the meaning of the statute?

In interpreting a statute, we try to ascertain the intention of the legislature. *Jackson v. Blytheville Civ. Serv. Comm'n*, 345 Ark. 56, 43 S.W.3d 748 (2001). It was formerly the rule in this state, as it apparently still is in all other states, that workers' compensation statutes, being remedial legislation, should be liberally construed. In 1993, the General Assembly passed Act 796, which includes the provision at Ark. Code Ann. § 11-9-704(c)(3), mandating that workers' compensation laws should now be "strictly construed." The legislature declared:

> When, and if, the workers' compensation statutes of this state need to be changed, the General Assembly acknowledges its responsibility to do so. It is the specific intent of the Seventy-Ninth General Assembly to repeal, annul, and hold for naught all prior opinions or decisions of any administrative law judge, the Workers' Compensation Commission, or courts of this state contrary to or in conflict with any provision in this act. In the future, if such things as the statute of limitations, the standard of review by the Workers' Compensation Commission or courts, the extent to which any physical condition, injury, or disease should be excluded from or added to coverage by the law, or the scope of the workers' compensation statutes need to be liberalized, broadened, or narrowed, those

> things shall be addressed by the General Assembly and should not be done by administrative law judges, the Workers' Compensation Commission, or the courts.

Ark. Code Ann. § 11-9-1001 (Repl. 1996).

All of the "rules of statutory construction" are, at least in theory, aids to determining legislative intent. The judge-made doctrine of *ejusdem generis* is one of the more helpful rules of construction. When general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words. *Hanley v. Arkansas State Claims Commission*, 333 Ark. 159, 970 S.W.2d 198 (1998).

In Ark. Code Ann. § 11-9-508(a), "other apparatus" are general words following a specific enumeration. "Ambulatory devices" surely means wheel chairs or the like. Can it fairly be said that a specially-equipped van is "similar in nature" to wheel chairs, crutches, and hearing aids, regardless of the requirement of strict construction?

The majority finds no Arkansas cases to help us with the problem at hand, and I agree there are none. Why then would we not want to consider decisions from other jurisdictions which are at least arguably directly in point?

In 1991 the Maryland Court of Appeals quoted Professor Larson's treatise on workers' compensation law:

> [A]s to specially-equipped automobiles for paraplegics, the cases have uniformly denied reimbursement, on the ground that an automobile is simply not a medical apparatus or device.

R & T Constr. Co. v. Judge, 594 A.2d 99 (Md. 1991); 2 A. Larson, *The Law of Workmen's Compensation* § 61.13(a), at 10-863 (1989). This was at a time when all states, including Arkansas, construed such statutes liberally. Since the decision in Maryland, the issue, in one form or another,[1] has been decided in a number of states. Relief has been denied in Colorado, *Bogue v. SDI Corp., Inc.*, 931 P.2d 477 (Colo. Ct. App. 1996) (van not "apparatus"); Florida, *Kraft Dairy Group v. Cohen*, 645 So.2d 1072 (Fla. Dist. Ct. App. 1994)

[1] The statutes vary from state to state.

(van not "other apparatus"); South Carolina, *Strickland v. Bowater, Inc.*, 322 S.C. 471, 472 S.W.2d 635 (1996) (van not "other treatment or care"); and Pennsylvania, *Petrilla v. Workmen's Compensation Appeal Board (People's Natural Gas)*, 692 A.2d 623 (Pa. Commw. Ct. 1997) (van not "orthopedic appliance"). The most persuasive decision is *City of Guntersville v. Bishop*, 728 So.2d 611 (Ala. 1998). There, as here, the issue was one of first impression. The Alabama Supreme Court analyzed the statute in question, its own rules of construction, and the decisions from other states. The court said:

> While we recognize our duty to liberally construe the statute, we must nonetheless hold that a motor vehicle does not come within the term "other apparatus" as that term is used in § 25-5-77(a).
>
> . . .
>
> If we held that the workers' compensation statute required reimbursement of a claimant's expenses where the sole purpose of those expenses was to enhance the claimant's independent functioning, we believe we would be dangerously disturbing the balance of interests that the Legislature built into the workers' compensation system.
>
> Our workers' compensation system was designed to provide limited, but guaranteed, benefits to employees injured on the job. In addition to those benefits, employers are required to pay for medical and rehabilitative treatment. However, we hold that those benefits do not include the purchase price of a motor vehicle.

There are four cases that could be said to support the view the majority takes: *Mississippi Transp. Comm'n v. Dewease*, 691 So.2d 1007 (Miss. 1997); *Brawn v. Gloria's Country Inn*, 698 A.2d 1067 (Me. 1997); *Manpower Temporary Servs. v. Sioson*, 529 N.W.2d 259 (Iowa 1995); and *Terry Grantham Co. v. Indus. Comm'n of Arizona*, 154 Ariz. 180 (Ariz. Ct. App. 1987). Each is distinguishable on several grounds and none is persuasive. It bears repeating that every state that has concluded that a van is not required under that state's workers' compensation law, has done so while following a rule of construction requiring the law to be liberally construed.

Perhaps the law should be as the majority says it is. Because I cannot reach the same conclusion under any reasonable method of analysis, I respectfully dissent. I am authorized to state that Judges PITTMAN, HART, and BIRD join in this dissent.

Kenneth D. SHEPARD *v.* ALUMINUM COMPANY of AMERICA

CA 01-646 64 S.W.3d 786

Court of Appeals of Arkansas
Division I
Opinion delivered January 9, 2002

Kaplan, Brewer, Maxey & Haralson, P.A., by: *Silas H. Brewer, Jr.*, for appellant.

Rose Law Firm, by: *Phillip Carroll*, for appellee.

JOSEPHINE LINKER HART, Judge. Appellant, Kenneth Shepard, seeks reversal of the Workers' Compensation Commission's decision, which held that the statute of limitations barred his claim for a job-related hearing impairment. Appellant also argues that the Commission erroneously determined that he had failed to preserve for appeal his argument that appellee is estopped from asserting the statute of limitations as a defense. We agree with appellant's second argument and remand for further factual development of this issue.

Appellant was employed by Aluminum Company of America (ALCOA) from June 1953 until his retirement in September 1990. During his thirty-seven years of employment with appellee, appellant was administered several audiograms that measured his hearing capability. In 1990, two audiograms were performed. On February 27, 1990, appellant signed a report indicating his performance on the audiograms, which stated directly above his signature that he was "hearing impaired." Further, appellant signed a similar report on May 31, 1990, which also advised him of his hearing impairment. On March 2, 1993, appellant filed a claim for workers' compensation benefits.

Initially, the Commission awarded benefits to appellant for his hearing loss on March 11, 1998. However, this court reversed and remanded the case to the Commission for additional finding of facts and further review as was necessitated by our supreme court's

decision in *Minnesota Mining & Mfg. v. Baker,* 337 Ark. 94, 989 S.W.2d 151 (1999). On remand, the Commission held on February 7, 2001, that appellant's claim for benefits was barred by the two-year statute of limitations. Further, the Commission concluded that appellant did not raise an estoppel theory at the hearing before the administrative law judge, and therefore, it was not preserved for appeal. From that order comes this appeal.

On appeal, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission and will affirm the Commission's decision if it is supported by substantial evidence. *See* Ark. Code Ann. § 11-9-711(b)(4)(D) (Repl. 1996); *Spencer v. Stone Container Corp.,* 72 Ark. App. 450, 38 S.W.3d 909 (2001); *Superior Industries v. Thomaston,* 72 Ark. App. 7, 32 S.W.3d 52 (2000). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to sustain a conclusion. *Woodall v. Hunnicutt Const.,* 340 Ark. 377, 381, 12 S.W.3d 630, 633 (2000) (citing *Minnesota Mining & Mfg. v. Baker,* 337 Ark. 94, 989 S.W.3d 151 (1999)). On review of workers' compensation cases, "the question is not whether the evidence would have supported findings contrary to the ones made by the Commission; there may be substantial evidence to support the Commission's decision even though we might have reached a different conclusion if we sat as the trier of fact." *Id.*

Appellant asserts that the Commission erroneously held that he had not preserved his estoppel argument for consideration. Although the Commission noted that the appellant made an argument based on estoppel in his brief to the Commission on remand, the majority held that "our review of the ALJ's decision and the hearing transcript in this case indicates that the claimant did not raise any estoppel theory at the hearing before the ALJ." This ruling was in error because the appellant did file a written brief before the ALJ on April 24, 1996, which included an eight-page discussion on the issue of estoppel. Some twenty-two months later, the full Commission handed down its opinion dated March 11, 1998.

The Commission reviews the decision of the ALJ *de novo. See* Ark. Code Ann. § 11-9-704(c)(2) (Repl. 1996); Ark. Code Ann. § 11-9-705(a)(3) (Supp. 2001). Here, the estoppel theory was raised before the ALJ at the first and only hearing in the case. After the hearing, the ALJ concluded that appellant's claim was not barred by the statute of limitations. Thus, there was no need for the ALJ or appellant to address the issue of estoppel on the first appeal to the Commission.

The Commission failed not only to recognize that appellant did in fact raise the estoppel issue at the initial hearing, but also failed to recognize that the ALJ did not need to address the estoppel theory in his decision because of the initial ruling on the statute of limitations. On remand, appellant's brief appropriately addressed and the Commission ruled on the issue of estoppel; therefore, the issue was properly before this court. We conclude that the Commission should have conducted a *de novo* review and addressed the estoppel theory presented to the ALJ and the Commission. Therefore, we remand for further findings on this issue. Our holding on this issue precludes any consideration of the remaining issues, and we do not address the question pertaining to the statute of limitations.

Remanded for further findings.

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

Shaun SMITH *v.* OFFICE of CHILD SUPPORT ENFORCEMENT

CA 01-328 64 S.W.3d 789

Court of Appeals of Arkansas
Division II
Opinion delivered January 9, 2002

David J. Throesch, for appellant.

Amy L. Ford, for appellee.

JOHN E. JENNINGS, Judge. This is an appeal from an order of paternity. For reversal, appellant contends that the paternity action brought against him was barred under principles of both *res judicata* and collateral estoppel. We disagree and affirm.

The parties agreed on the following facts. Appellant Shaun Smith and Michelle Lowery (then Michelle Gillian) dated in 1994 during the months of May through October. Shortly after that relationship ended, Michelle began dating Willis Lowery. Michelle at first told appellant that she was pregnant with his child. She gave birth to a baby girl on June 29, 1995. Michelle and Lowery executed an acknowledgment of paternity, and Lowery's name was

placed on the child's birth certificate. On April 1, 1996, Michelle and Lowery were married.

Michelle filed for divorce against Lowery after they separated in August of 1996. Lowery entered his appearance in the divorce by filing a written waiver to the proceedings. The decree, dated August 18, 1997, recited that the parties had married on April 1, 1996, and it provided that one child had been born of the marriage, a female born on June 29, 1995. Michelle was awarded custody of the child, while Lowery was granted reasonable visitation rights and was ordered to pay child support and one half of the child's medical expenses not covered by insurance.

Michelle later assigned her child-support rights to appellee, the Office of Child Support Enforcement. On November 24, 1998, appellee filed a motion for contempt against Lowery alleging that he had failed to pay child support. Lowery defended that action by contending that he was not the child's biological father. The court ordered DNA testing, and the results excluded Lowery as the father of the child. On April 6, 1999, the court entered an order finding that Lowery was not the child's father and relieving him of his financial obligations with regard to the child.

On June 14, 1999, appellee filed this paternity action against appellant. In response, appellant affirmatively pled that Michelle and Lowery's 1997 divorce decree established paternity of the child in Lowery and that any claim against him was barred by *res judicata* and collateral estoppel. The parties agreed, however, to DNA testing, and the results indicated a 99.99% probability that appellant was the child's biological father. On December 11, 2000, the court entered a judgment of paternity against appellant. This appeal followed.

As he argued below, appellant contends that the 1997 divorce decree reciting that "one child was born of the marriage" established paternity of the child in Lowery and that this suit against him was barred by *res judicata* and collateral estoppel. In support of this argument, he relies on the decision in *Office of Child Support Enforcement v. Williams*, 338 Ark. 347, 995 S.W.2d 338 (1999). There, the court held that, as between parties to a divorce, *res judicata* does bar a former husband and wife from relitigating paternity when they agreed in the divorce action that a child had been born of the marriage. Appellant acknowledges that he was not a party to the 1997 divorce, but he contends that it is of no consequence. The supreme court, however, has recently addressed this precise argument under facts similar to the case at bar and has decided the issue

unfavorably to appellant's position. *Office of Child Support Enforcement v. Willis*, 347 Ark. 6, ___ S.W.3d ___ (November 15, 2001).

In *Willis*, John and Marigayle Triplett divorced in 1992. The decree stated that the "parties hereby have one (1) child," and the decree provided that Marigayle would have custody of the child and John would pay support. The Tripletts later remarried, but Marigayle again filed for divorce in 1997. In that proceeding, John asserted that he was not the child's biological father, and genetic testing proved him not to be. In the 1998 decree, the court found that John was not the child's father, and John was not ordered to pay child support.

The Office of Child Support Enforcement (OCSE) began paying support to Marigayle, who then stated in an affidavit that Christopher Willis was the child's biological father. Genetic testing showed that there was a 99.98% probability that Willis was the child's father. OCSE then filed a paternity action against Willis, who raised the affirmative defenses of *res judicata* and collateral estoppel based on the 1992 decree. The trial court agreed with Willis, but the supreme court reversed, holding that the suit was not barred by either *res judicata* or collateral estoppel.

■ The court noted that *res judicata* bars relitigation of a subsequent suit when: (1) the first suit resulted in a final judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) the first suit was fully contested in good faith; (4) both suits involve the same claim or cause of action; and (5) both suits involve the same parties or their privies. The court held that *res judicata* did not apply because Willis was not a party to the divorce decree and was not in privity with either John or Marigayle, the parties to the divorce decree.

■ In rejecting Willis's defense of collateral estoppel, or issue preclusion, the court observed that four elements are required before a determination is conclusive in a subsequent proceeding: (1) the issue sought to be precluded must be the same as that involved in the prior litigation; (2) that issue must have been actually litigated; (3) the issue must have been determined by a valid and final judgment; and (4) the determination must have been essential to the judgment. In addition, citing *Arkansas Dep't of Human Servs. v. Dearman,* 40 Ark. App. 63, 842 S.W.2d 449 (1992), the court adopted the rule that, although collateral estoppel may be asserted by a stranger to the first judgment or decree, the party against whom it is asserted must have been a party to the earlier action and

must have had a full and fair opportunity to litigate the issue in the first proceeding. The court held that collateral estoppel did not bar the present suit because the issue of paternity was not "actually litigated" in the 1992 divorce proceeding since neither John nor Marigayle had put the child's paternity in issue. The court also held that the " *Dearman* rule" was not satisfied in that John did not have the opportunity to fully and fairly litigate the issue of paternity in the 1992 divorce proceeding because he did not have any idea at that time that he was not the child's father.

In light of the decision in *Willis*, the appellant in this case cannot succeed in his claim that this action is barred under principles of *res judicata* or collateral estoppel. Appellant was not a party to the 1997 divorce, nor was he in privity with the parties to the divorce. Furthermore, the issue of paternity was not actually litigated in the 1997 divorce. The trial court did not err in its ruling.

Appellant also contends that he should have been made a party to the contempt action brought against Lowery and that his absence impeded his ability to protect his interests. Appellee responds that appellant's defenses of *res judicata* and collateral estoppel would have failed because Lowery had executed an acknowledgment of paternity without benefit of genetic testing and that the version of Ark. Code Ann. § 9-10-115 (Supp. 1995) in effect at the time allowed modification within a five-year period. We simply note that the defenses raised by appellant are not valid now, nor would they have been at that earlier point in time.

Affirmed.

PITTMAN and VAUGHT, JJ., agree.

Samuel James JEFFERSON *v.* STATE of Arkansas

CA CR 01-267 64 S.W.3d 791

Court of Appeals of Arkansas
Division II
Opinion delivered January 9, 2002

[redacted]

[redacted]

William R. Simpson, Jr., Public Defender; *Kent C. Krause* and *Ashley Riffel*, Deputy Public Defenders, 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.

WENDELL L. GRIFFEN, Judge. Samuel Jefferson appeals from his conviction for possession of cocaine. He argues that the trial judge erred in denying his motion to suppress because his stop and detention were not based upon reasonable suspicion and because the seizure of the evidence was impermissibly tainted by his subsequent illegal detention. We agree. Therefore, we reverse and remand for a new trial.

In the early morning hours of August 19, 1999, appellant was stopped by officers of the Little Rock Police Department as he walked through Vorhees Trailer Park in Little Rock. The officers stopped appellant in an attempt to ascertain his identity. As appellant approached the officers, he dropped a small package, which the officers retrieved. Subsequent chemical analysis of the package confirmed that the package contained 2.138 grams of cocaine. Appellant was charged with possession of cocaine with intent to deliver.

Appellant filed a motion to suppress the evidence seized in the search. Citing *Stewart v. State*, 332 Ark. 138, 964 S.W.2d 793 (1998), he alleged that the initial encounter was impermissible under Arkansas Rule of Criminal Procedure 2.2, in that the information requested was not being sought in the investigation or prevention of a crime. Appellant also asserted that the officers had no reasonable or articulable suspicion that he was armed and dangerous, or had committed or was about to commit a felony or a misdemeanor as described in Rule 3.1.

The testimony at trial established that Officer Charles Allen and Officer Charles Johnson were conducting a routine patrol in Vorhees Trailer Park on August 19, in response to numerous complaints and arrests due to narcotic activity by residents and nonresidents in the area. The officers came into the trailer park with their lights off at around 2:30 a.m., and observed appellant walking through the trailer park. When appellant walked in front of the police car, Johnson turned on his headlights. Appellant appeared

startled when he saw the vehicle and changed the direction in which he was walking. The officers stopped, and Allen stepped out of the vehicle and asked appellant to approach so that they could determine whether he was a resident of the trailer park. Initially, appellant did not approach the car. Johnson testified that appellant hesitated and attempted to "evade" the officers.

Allen again called to appellant, who then approached the police car. As appellant approached Allen's side of the car, he had his hand in his right pocket. Allen testified that appellant acted as if he were going to turn away. Allen again commanded appellant to approach the vehicle and drew his weapon. Allen saw appellant throw something to the ground as appellant moved toward the vehicle. The officers ascertained appellant's identity and searched the immediate area. Allen retrieved the item that appellant had thrown, which was a pill bottle containing ten to fifteen pieces of an off-white rock-like substance.

After the officers' testimony, appellant's counsel moved to suppress the evidence of the pill bottle and its contents. The trial court found that appellant had not been actually detained until after the officer observed him throw something from his hands and that he was not searched in order to lead to the evidence that was introduced against him. It further noted that if appellant had discarded something, the officers had a right to pick it up. The court found that given the time of the day, the officers' knowledge regarding the known drug activity at that location, and the fact that appellant was coming from between two trailers (as opposed to being on a public street) gave the officers authority to stop him and determine the reason for his presence to prevent crimes. The trial court denied appellant's motion to suppress. After a jury trial, appellant was found guilty of the lesser-included offense of possession of cocaine and received a five-year prison sentence. He appeals solely from the denial of his motion to suppress.

■ ■ In reviewing a trial court's ruling on a motion to suppress, we make an independent determination based on the totality of the circumstances. *See Hale v. State*, 61 Ark. App. 105, 968 S.W.2d 627 (1998). Where the trial court denied a defendant's motion to suppress, we will reverse only if, in viewing the evidence in the light most favorable to the nonmoving party, the trial court's ruling is clearly against the preponderance of the evidence. *See id.*

I. Whether the Initial Stop was Proper

Appellant argues that the trial court erred in denying his motion to suppress because at the time of the stop, the officers lacked reasonable suspicion that he had committed or was about to commit any criminal offenses and because the officers were not investigating a particular crime. He maintains that his behavior did not give the officers reasonable suspicion to make the initial stop and, therefore, the subsequent search was illegal. Specifically, he argues that the fact that he was outside at 2:30 a.m. in a high-crime area did not give the officers ground for reasonable suspicion, nor did the fact that he initially hesitated before complying with the order to approach the vehicle. He asserts that pursuant to *Illinois v. Wardlow*, 528 U.S. 119 (2000), citizens have the right to ignore police who approach them without probable cause or reasonable suspicion and may go about their business with no response. Appellant also argues that although he changed his direction of travel, he did not engage in unprovoked flight as did the defendant in *Wardlow*, and he was merely ignoring the police, as he is permitted to do. Finally, he maintains that a person's mere refusal to cooperate does not justify detention or seizure. *See Florida v. Bostick*, 501 U.S. 429 (1991).

We agree that nothing about appellant's behavior prior to the stop gave the officers reasonable suspicion that would justify a stop under Rule 3.1 or Rule 2.2. Rule 3.1 provides:

> A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer acting under this rule may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint, or arrested and charged with an offense.

Rule 2.1 defines reasonable suspicion as "a suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but

which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion." Factors that support a reasonable finding of reasonable suspicion include: a person's conduct and demeanor, his gait and manner, the time of day or night the suspect is observed, the location involved, the incidence of crime in the immediate neighborhood, a person's apparent effort to conceal an article, and a person's effort to avoid identification or confrontation by the police. *See* Ark. Code Ann. § 16-81-203 (1987). Although an officer may justifiably restrain an individual for a short period of time if they have an "articulable suspicion" that the person has committed or is about to commit a crime, this encounter is transformed into a seizure when, considering all the circumstances, a reasonable person would believe that he is not free to leave. *See Frette v. City of Springdale*, 331 Ark. 103, 959 S.W.2d 734 (1998).

Rule 2.2 provides that a law enforcement officer may request any person to furnish information or to otherwise cooperate in the investigation or the prevention of a crime. *The officer may request, but may not require the person to respond to such requests.* Appellant also argues that the search was not justified under Rule 2.2 because there was no evidence that the officers were investigating a particular crime. Although the area was a known high drug-traffic area, the officers did not testify that they had reports of any drug activity that evening. Nor was there any evidence that he was hiding or acting furtively, that he fled, that he was wearing bulging clothing that might conceal contraband, or that he was known to the officers as a prior offender. He argues that even in a high-crime area, unless a person is doing something indicative of criminal activity, the police may not approach that person, even under the guise of ascertaining his identity.

Appellant maintains that the application of these rules in *Stewart v. State*, 332 Ark. 138, 864 S.W.2d 793 (1998), and *Jennings v. State*, 69 Ark. App. 50, 10 S.W.3d 105 (2000), compels reversal in this case. We agree. In those cases, the Arkansas Supreme Court reversed on similar facts. In *Stewart*, the police officer was patrolling a known drug area at 1:45 a.m. He spotted the defendant standing on the corner outside of her home. Based upon the late hour, the place where she was standing, and the fact that he had made several prior arrests in that area, the officer suspected the defendant might be engaged in drug trafficking. He pulled his vehicle up to where the defendant was standing and asked what she was doing. She stated that she was about to go for a walk, and placed her right hand inside her coat pocket two or three times despite the officer's

request for her to keep her hands outside of her coat. *See Stewart v. State, supra.* Believing that the defendant had a weapon in her coat, the officer performed a pat-down search and felt a large bulge in her right coat pocket. The officer reached into the pocket and retrieved thirty-five one dollar bills, a one-hundred dollar bill, and a matchbox. The officer then opened the matchbox and found two rocks of crack cocaine. *See Stewart v. State, supra.*

The *Stewart* court reversed, finding that the officer's only justification for the stop was that the defendant was in the wrong place at the wrong time, because there was nothing about the defendant's actions or demeanor to indicate that she was involved in any illegal activity. Further, the court found that the defendant's conduct in placing her hand in her pockets did not occur until after the officer asked her to approach the car and therefore, could not be used as a justification for the stop. *See Stewart v. State, supra.* Therefore, the *Stewart* court held that the stop was unreasonable under Rule 2.2. The court further found that the stop was not justified under Rule 2.2 because an encounter under that rule is permissible only if the information or cooperation sought is in aid of an investigation or the prevention of a particular crime. *See Stewart v. State, supra*; *See also Hammons v. State*, 327 Ark. 520, 940 S.W.2d 424 (1997). The *Stewart* court stated that the officer was not investigating a nearby crime nor was he acting on a tip from an informant at the time of the encounter. Therefore, the court concluded that the encounter was not permissible under Rule 2.2. *See Stewart v. State, supra.*

In *Jennings v. State, supra*, our court reversed the denial of a motion to suppress on similar grounds. In *Jennings*, an officer spotted the defendant and a person known to the officer to be a high school student at the corner of an intersection in an area known for its drug trafficking. Because the area was a known drug area, a sign was posted on the corner forbidding standing or parking. *See Jennings v. State, supra.* The officer asked the men what they were doing and they responded they were waiting for a bus. There were several bus stops along that route, but none at that particular intersection. The officer did not know the defendant and requested his identification. She asked the men to move out of the roadway, and spotted what appeared to be a brown paper bag containing an alcohol flask in the minor student's pocket. *See Jennings v. State, supra.* She confiscated the bottle and conducted a pat-down search for her safety. The officer asked both men if they had any weapons. They each responded, "No." The officer found a small handgun at the defendant's waistline. A subsequent search of the defendant revealed two small plastic bags containing cocaine.

The officer in *Jennings* stated that she initially stopped appellant and the student because she recognized the student because there was a sign prohibiting loitering, because the area was a known drug area, and she intended to "check them out" to see if they were doing anything wrong. *See Jennings v. State, supra.* The *Jennings* court, citing *Stewart v. State, supra,* held that the stop was improper under Rule 3.1 because the defendant was merely in the wrong place at the wrong time. The *Jennings* court found that there was no indication that the defendant was committing or was about to commit a crime, and that the only factor present from section 16-81-203 was the fact that appellant was in a known drug area. As in *Stewart,* the *Jennings* court also found that the stop was improper under Rule 2.2 because there was no testimony that the officer was investigating or preventing a crime when she encountered the defendant. *See Jennings v. State, supra.*

The State agrees that the time of night and appellant's presence in a high-crime area might not be sufficient to support a finding of reasonable suspicion. However, the State maintains that it showed factors in addition to appellant's presence in a high crime area at 2:30 in the morning that, under the totality of the circumstances, gave rise to more than a bare suspicion. It is true that the location as a high-crime area and defendant's nervous and evasive behavior are proper considerations when determining reasonable suspicion. *See Illinois v. Wardlow, supra; United States v. Sokolow,* 490 U.S. 1 (1989).

However, it is only the totality of the circumstances *preceding* the stop that this court may consider. Pursuant to *Stewart* and *Jennings,* and Rules 3.1 and 2.2, we hold the stop was impermissible because nothing about appellant's behavior prior to the stop provided the officer with reasonable suspicion to believe that appellant had committed or was about to commit a crime as described in Rule 3.1. The fact that appellant was out late walking in a high-crime area did not give the officers a sufficient reason to stop him. *See Stewart v. State, supra.* Nor did the fact that appellant appeared startled and turned away when the officer turned his headlights on after appellant stepped in front of the car, as any person would likely do. Further, appellant was not required to obey the officer's demand that he approach the officer's vehicle. *See Illinois v. Wardlow, supra.* Therefore, appellant's initial reluctance to cooperate did not provide the officer with reasonable suspicion. *See Florida v. Botsick, supra.* Even though separate innocent acts, taken together, may give rise to reasonable suspicion, here, appellant merely appeared startled when the officer turned on his headlights,

changed his direction of travel, then stopped and shortly thereafter complied with the officer's demand. Even viewed collectively and in the light most favorable to the State, appellant's conduct does not support a finding of reasonable cause to detain him.

Moreover, the trial court erred in finding that appellant was not detained until after he discarded the pill bottle. Appellant was "seized" within the meaning of the Fourth Amendment when Johnson turned on his headlights and Allen ordered him to approach the car because the use of headlights coupled with the demand to approach would indicate to a reasonable person that he was not free to leave. *See Hammons v. State*, 327 Ark. 520, 940 S.W.2d 424 (1997) (holding that the defendant parked in a parking lot was seized for Fourth Amendment purposes, when police turned on the blue light on his vehicle, because the use of the light was display of authority that would indicate to reasonable person that he was not free to leave). Appellant's only conduct prior to the stop was walking in the trailer park, a known high-crime area, at 2:30 a.m. Certainly, this behavior alone would not give rise to reasonable suspicion under Rule 3.1. He thereafter removed the pill bottle from his pants and threw it down. Therefore, because he threw away the pill bottle after the stop, the State cannot use that conduct to justify the stop. *See Stewart v. State, supra.*

Nor is the stop justified under Rule 2.2, because there was no evidence that the officers were investigating a particular crime. As in *Stewart* and *Jennings*, there was no evidence presented that they were acting on a tip from an informant or investigating or seeking to prevent a particular crime. To the contrary, both officers testified that they were on routine patrol because the area was known for narcotics trafficking. To suggest that the stop was proper under this rule because the officers were merely seeking to ascertain appellant's identity ignores the fact that the officers were not authorized to do so unless they were investigating a particular crime. *See Hammons v. State, supra*; *Meadows v. State*, 269 Ark. 380, 602 S.W.2d 636 (1980). Based on the foregoing authorities, we hold that the initial stop of appellant was improper.

II. Whether Appellant Abandoned the Pill Bottle

However, the State argues that even if the officers' conduct in stopping appellant was unreasonable, the evidence should not be

suppressed because it was discovered as a result of appellant's independent calculated act. Appellant maintains that just as a confession obtained during an illegal detention is tainted, so is the seizure of contraband thrown down during an illegal detention. He also argues that property is not considered "abandoned" when a person discards it due to the unlawful activities of police officers.

This appears to be an issue of first impression in Arkansas. Generally, under Arkansas law, where an initial stop is improper, any subsequent search is improper and any evidence found in the course of an illegal search is inadmissible. *See Jennings v. State, supra.* However, the seizure of abandoned property without a search warrant is permissible because a person has no legitimate expectation of privacy in the area searched or the items seized when he has abandoned an item. *See, e.g., Rockett v. State*, 318 Ark. 831, 980 S.W.2d 235 (1994) *overruled on other grounds by MacKintrush v. State,*33 Ark. 390, 978 S.W.2d 293 (1998); *Edwards v. State*, 300 Ark. 4, 775 S.W.2d 900 (1989). Because there is no expectation of privacy in abandoned property, one may not assert Fourth Amendment protections to abandoned property. *See Edwards v. State, supra*; *Bernal v. State*, 48 Ark. App. 175, 892 S.W.2d 537 (1995).

The State counters that we should inquire into appellant's motive for discarding the pill bottle and the intent of the officers in engaging appellant, rather than automatically excluding the evidence. *See, e.g., People v. Boodle*, 391 N.E.2d 1329 (1979). The State also maintains that appellant's abandonment of the pill bottle was an independent act involving a calculated risk, and was not the fruit of an unlawful search or seizure. Finally, the State argues that the officers' actions did not demonstrate a purposefulness to discover contraband because the purpose of the initial contact was to ascertain appellant's identity and to determine the lawfulness of his presence, because of the complaints that nonresidents were trafficking in illegal drugs.

Abandonment is a question of whether the person has voluntarily discarded or otherwise relinquished his interest in property so that he no longer retains a reasonable expectation of privacy in the property as of the time of the search. *See Kirk v. State*, 38 Ark. App. 159, 832 S.W.2d 271 (1992). Thus, abandonment is a question of intent. *See id.* If the defendant has abandoned his property, then he has no right to assert Fourth Amendment protections. In determining whether property has been abandoned, our courts have primarily examined whether the defendant had been seized when the property was abandoned, *see, e.g.*, *Rabun v. State*, 36 Ark. App.

237, 821 S.W.2d 62 (1991) or whether the defendant intended to abandon the property. *See, e.g., Wilson v. State*, 297 Ark. 568, 765 S.W.2d 1 (1989); *Kirk v. State, supra*. Therefore, the issue before us is whether we should adopt a bright-line rule that property discarded as a result of an illegal detention is not abandoned for Fourth Amendment purposes.

Instead of adopting such a rigid rule, we hold that the totality of the circumstances in this case demonstrate that appellant did not voluntarily discard the pill bottle so as to justify a finding of abandonment. He had already been illegally detained before he discarded the pill bottle, as previously mentioned. Furthermore, the record clearly shows that after appellant was illegally stopped, one officer drew a weapon on him. To deem appellant's action in discarding the pill bottle as being voluntary in the face of these facts is to ignore both the reality of his illegal detention and the coercive force of a pointed gun. To hold that appellant's conduct in discarding the pill bottle was abandonment would undermine the deterrent purpose of the Fourth Amendment to discourage police from engaging in unreasonable searches and seizures. A confession obtained following an illegal detention, at the point of a gun, and under glaring lights is involuntary. We view the discarded pill bottle in this case from the same perspective.

For the above reasons, we hold that the trial court erred in denying appellant's motion to suppress. Thus, we reverse and remand for a new trial.

Reversed and remanded.

STROUD, C.J., agrees.

PITTMAN, J., concurs.

JOHN MAUZY PITTMAN, Judge, concurring. I concur in the decision to reverse appellant's conviction and remand the case. I agree with the majority's conclusions that appellant was illegally seized before dropping the pill bottle and that the evidence was discovered as a result of that seizure, but I do not agree that appellant was seized at the point at which the majority states.

The majority states that appellant was seized when Officer Johnson turned on the headlights and Officer Allen ordered appellant to approach the police car. *Hammons v. State*, 327 Ark. 520, 940

S.W.2d 424 (1997), is cited for this proposition. However, subsequent to its decision in *Hammons*, our supreme court decided *Smith v. State*, 343 Ark. 552, 39 S.W.3d 739 (2001). There, the court very clearly stated:

> Police pursuit of a suspect or their ordering the suspect to stop is generally not a seizure. *United States v. Thompkins*, 998 F.2d 629 (8th Cir. 1993). For a seizure to occur, there must be a physical application of force by the officer or submission to the officer's show of force. *Id.* A show of authority, without any application of physical force, to which the subject does not yield, is not a seizure. *California v. Hodari D.*, 499 U.S. 621 (1991). Based upon this record of an armed standoff between Mr. Smith and the police officers, we hold that Mr. Smith's freedom of action was not curtailed to a degree associated with formal arrest until he was shot in the arm by an officer and physically taken into police custody.

343 Ark. at 571, 39 S.W.3d at 751.

Based on *California v. Hodari D., supra,* and *Smith v. State, supra,* I cannot agree that appellant was seized upon the car's headlights being turned on, upon his being ordered to stop, or even upon the police officer's weapon being drawn. After these events, he continued to walk away. Rather, he clearly was not seized within the meaning of the Fourth Amendment until he submitted to the officers' show of authority. Nevertheless, the record of the suppression hearing makes it clear that appellant did not drop the evidence until after he had ceased to walk away from the officers, after he had displayed his hands, and after he had begun moving, without further deviation, toward the officers. These facts clearly demonstrate that appellant had submitted to the officers' show of force before he discarded the pill bottle, and I concur.

NATIONAL UNION FIRE INSURANCE COMPANY
of Pittsburgh, Pennsylvania *v.* GUARDTRONIC, INC.,
and National Guardian Security Services Corporation

CA 00-1464 64 S.W.3d 779

Court of Appeals of Arkansas
Division III and IV
Opinion delivered January 9, 2002

Mitchell, McNutt & Sams, by: *Otis R. Tims* and *Hardin, Jesson & Terry*, by: *J. Rodney Mills*, for appellant.

Wright, Lindsey & Jennings LLP, by: *Gregory T. Jones*, for appellee.

OLLY NEAL, Judge. In August of 1994, a fire occurred at the Crain Industries foam manufacturing plant in Fort Smith, causing substantial property damage and the death of one employee. Appellees Guardtronic and National Guardian provided fire detection equipment and monitoring services to the plant. In 1996, Crain's property and casualty insurer, appellant National Union Fire Insurance Company, having paid Crain over eleven million dollars in policy proceeds, sued appellees alleging *inter alia* that appellees' systems failed to send a timely signal to the monitoring stations and, in turn, the monitoring stations failed to quickly notify the fire department. The complaint set forth theories of negligence, products liability, misrepresentation, and breach of warranty. Appellees defended on the basis of exculpatory clauses contained in their contracts. The trial judge enforced the clauses and granted summary judgment to appellees. We affirm.

The exculpatory language in question is contained in the alarm-system contracts entered into between Crain and appellees.[1] The Guardtronic contract was executed on June 21, 1978. It provided that, for a fee of $195 per quarter (later raised to $298.16 per quarter), Guardtronic would provide Crain's plant with a smoke and heat detection system and would monitor the system at its central office. The contract contained the following pertinent provision:

> IT IS AGREED THAT THE COMPANY IS NOT AN INSURER and that the payments hereinbefore named are based solely upon the value of the services herein described and it is not the intention of the parties that Company [Guardtronic] assume

[1] National Guardian's contract was executed by its predecessor Spurling Fire & Burglar Alarm Company.

> responsibility for any loss occasioned by malfeasance or misfeasance in the performance of the services under this contract, or for the loss or damage sustained through burglary, theft, robbery, fire or other cause or any liability on the part of Company by virtue of this Agreement or because of the relation hereby established.
>
> IF THERE SHALL, NOTWITHSTANDING THE ABOVE PROVISIONS, AT ANY TIME BE OR ARISE ANY LIABILITY ON THE PART OF THE COMPANY BY VIRTUE OF THIS AGREEMENT OR BECAUSE OF THE RELATION HEREBY ESTABLISHED, WHETHER DUE TO THE NEGLIGENCE OF THE COMPANY OR OTHERWISE, SUCH LIABILITY IS AND SHALL BE LIMITED TO A SUM EQUAL IN AMOUNT TO THE RENTAL SERVICE CHARGE HEREUNDER FOR A PERIOD OF SERVICE NOT TO EXCEED SIX (6) MONTHS, WHICH SUM SHALL BE PAID AND RECEIVED AS LIQUIDATED DAMAGES. SUCH LIABILITY AS HEREIN SET FORTH IS FIXED AS LIQUIDATED DAMAGES AND NOT AS A PENALTY AND THIS LIABILITY SHALL BE COMPLETE AND EXCLUSIVE.
>
> That in the event Subscriber desires Company to assume greater liability for the performance of its services hereunder, a choice is hereby given of obtaining full or limited liability by paying an additional amount under a graduated scale of rates proportioned to the responsibility, and an additional rider shall be attached to this Agreement setting forth the additional liability of Company and additional charge. That the rider and additional obligation shall in no way be interpreted to hold company as an insurer.

The National Guardian contracts — a lease contract and a monitoring contract — were executed in 1986 and 1987.[2] The lease contract provided that, for $107 per month, Crain would lease a system from National Guardian to detect water flow from Crain's own sprinklers. The monitoring contract provided that National Guardian would monitor the system from its central office. Both contracts contained an exculpatory provision that was virtually identical to the Guardtronic provision set out above, the only significant difference being the following language:

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[2] The contracts attached by National Guardian to its motion for summary judgment were somewhat pieced-together because the originals were lost in the 1996 Fort Smith tornado and because a copyist failed to copy the contracts in their entirety. There is no dispute, however, that the contracts are authentic and accurate.

> THAT IN THE EVENT LESSEE DESIRES PROTECTION FOR LOSS OR DAMAGES AS A RESULT OF BURGLARY, THEFT, ROBBERY, FIRE OR OTHER CAUSE, LESSEE AGREES TO PURCHASE AN INSURANCE POLICY FROM A THIRD PARTY TO COVER SAID LOSS OR DAMAGE.

Following discovery, appellees filed motions for summary judgment arguing that they were either absolved from liability or their liability was limited by the above-quoted clauses. The trial judge agreed, finding that the clauses were not ambiguous; that parties are generally free to contract as they wish and Crain had voluntarily entered into these contracts and accepted the benefits thereof; and that the contracts were not ones of adhesion but were arms-length transactions between businesses. From that ruling comes this appeal.

In summary-judgment cases, we need only decide if the grant of summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered. *Inge v. Walker*, 70 Ark. App. 114, 15 S.W.3d 348 (2000). Summary judgment is no longer considered a drastic remedy, but is regarded simply as one of the tools in the trial court's efficiency arsenal. *See Wallace v. Broyles*, 332 Ark. 189, 961 S.W.2d 712 (1998). The burden of sustaining a motion for summary judgment is always the responsibility of the moving party. *Inge v. Walker, supra.* All proof submitted must be viewed in a light most favorable to the party resisting the motion, and any doubts and inferences must be resolved against the moving party. *Id.*

An exculpatory contract is one in which a party seeks to absolve himself in advance for the consequences of his own negligence. Our supreme court has a history of viewing exculpatory contracts with disfavor. *See Farmers Bank v. Perry*, 301 Ark. 547, 787 S.W.2d 645 (1990); *Middleton & Sons v. Frozen Foods Lockers*, 251 Ark. 745, 474 S.W.2d 895 (1972); *Arkansas Power & Light Co. v. Kerr*, 204 Ark. 238, 161 S.W.2d 403 (1942); *Gulf Compress Co. v. Harrington*, 90 Ark. 256, 119 S.W. 249 (1909). Such contracts are not invalid *per se*. In fact, they have been upheld in two Arkansas cases. *See Plant v. Wilbur*, 345 Ark. 487, 47 S.W.3d 889 (2001); *Edgin v. Entergy Operations, Inc.*, 331 Ark. 162, 961 S.W.2d 724 (1998). Because of the disfavor with which exculpatory contracts are viewed, two special rules of construction apply to them. First, they are to be strictly construed against the party relying on them. *Farmers Bank v. Perry, supra.* Second, to be enforceable, the contract

must clearly set out what negligent liability is to be avoided. *Plant v. Wilbur, supra.*

Appellant's initial contention on appeal is that the trial judge did not apply the special rules associated with exculpatory clauses, but instead focused on such factors as whether the contracts were ambiguous, whether Crain accepted the benefits of the contracts, and whether the contracts were freely and voluntarily entered into. We see no error here. The trial judge's ruling, although it did not expressly mention the special rules, did not expressly reject them. In fact, the judge's lengthy discussion of the enforceability of the clauses indicates his understanding that such clauses must be strictly scrutinized. Further, our supreme court has considered, in ruling on exculpatory clauses, the ambiguity, or lack thereof, of the contract language, *see Edgin v. Entergy Operations, Inc., supra,* and the circumstances surrounding the execution of the contract, *see Plant v. Wilbur, supra.* Therefore, we cannot say that the trial court took the wrong approach in considering those same factors.

We begin our analysis by addressing appellant's argument that a fact question remains as to whether Crain freely and voluntarily entered into the contracts with appellees. Appellant points to the affidavit of John Crossley, who signed the Guardtronic contract on behalf of Crain, wherein he stated that he would not have signed the contract had he been aware it contained provisions attempting to relieve Guardtronic of responsibility for failing to alert authorities in a timely manner. Appellant also cites the depositions of Guardtronic salesman Billy Johnson and National Guardian salesman Calvin Evans, evidencing that they did not understand the full exculpatory nature of the contracts. However, there was no proof that appellees induced Crain into believing the contracts were anything other than what they were. The language of the contracts was there for all parties to read; it was conspicuous; and there is no proof it was misrepresented in any way. Appellant offered no evidence of fraud, duress, undue influence, lack of capacity, mutual mistake, or inequitable conduct sufficient to void the contracts. Its reliance on Crain's misunderstanding of the contract is therefore not well-taken. One is bound under the law to know the contents of the papers he signs, and he cannot excuse himself by saying that he did not know what the papers contained. *Carmichael v. Nationwide Life Ins. Co.*, 305 Ark. 549, 810 S.W.2d 39 (1991).

Appellant also argues that Crain's execution of the contracts was not voluntary because the contracts were form contracts, not subject to negotiation. Even if it is true that the contract

provisions were non-negotiable, it does not follow that Crain's execution of the contracts was involuntary. There is no evidence that Crain wanted to or attempted to change any terms of the contracts. Additionally, Crain was free to take its business elsewhere if it was unhappy with the contracts at issue. Finally, as mentioned earlier, there is no proof of any inequitable conduct or mutual mistake in connection with the execution of the contracts.

Along these same lines, appellant argues that the contracts were unconscionable both because they were form contracts and because of the gross inequality of bargaining power between Crain and appellees. In assessing whether a particular contractual provision is unconscionable, courts should review the totality of the circumstances surrounding the negotiation and execution of the contracts. *State v. R & A Inv. Co.*, 336 Ark. 289, 985 S.W.2d 299 (1999). Two important considerations are whether there is a gross inequality of bargaining power between the parties and whether the aggrieved party was made aware of and comprehended the provision in question. *Id.* We have already rejected appellant's argument that Crain's representative did not comprehend the presence of an exculpatory provision; the provision was available for him to read. Regarding the inequality of bargaining power, Crain is a large corporation that has used limitation of liability clauses in its own contracts. Further, there were competing alarm companies operating in Fort Smith from which Crain could have acquired similar services.

Based upon the forgoing, we hold that there was no error in the trial judge's determination that Crain freely and voluntarily entered into the contracts in question.

We turn now to the question of whether the exculpatory provisions recited earlier are enforceable under Arkansas law. The Arkansas Supreme Court has decided numerous cases involving exculpatory clauses. The seminal case is the 1909 case of *Gulf Compress v. Harrington, supra.* There, Gulf Compress stored bales of cotton for Harrington, and the bales were subsequently destroyed by fire. Harrington contended that Gulf was guilty of negligence, and Gulf defended on the basis of language in Harrington's receipt, which read, "[n]ot responsible for loss by fire, acts of Providence, natural shrinkage, old damages, or for failure to note concealed damages." The supreme court held that such language was insufficient to exempt Gulf from liability for its own negligence.

The same result was reached in three subsequent bailment cases. In *Arkansas Power & Light v. Kerr, supra,* where the bailor

contended that the bailee stored his eggs at an incorrect temperature, the purported exculpatory language read, "company is not responsible for [goods'] condition while in storage or at their removal; nor for loss or damage by fire, water, storm or other causes reasonably beyond its control. . . ." In *Middleton & Sons v. Frozen Food Lockers, supra,* where the bailor's meat spoiled while being stored by the bailee, there was an alleged verbal contract in which the bailor agreed to assume the risk of damage to his meat. In *Farmers Bank v. Perry, supra,* where Perry's money was stolen from one of the Bank's safety deposit boxes, the contract read, "the undersigned customer holds the Farmers Bank harmless for loss of currency or coin left in this box." All of these exculpatory agreements were held insufficient to absolve the bailee of liability for its own negligence.

Two recent cases have upheld exculpatory contracts. In *Edgin v. Entergy Operations, Inc., supra,* Michele Edgin sustained injuries while working at Entergy's Nuclear One plant as a security guard. Her actual employer was Wackenhut Corporation, who assigned her to Entergy. Following her injury, Edgin sued Entergy in tort, and Entergy defended on the basis of a document that Edgin had signed in her Wackenhut employment application. The document read, in pertinent part, "I HEREBY WAIVE AND FOREVER RELEASE ANY RIGHTS I MIGHT HAVE to make claims or bring suit against any client or customer of Wackenhut for damages based upon injuries which are covered under . . . Workers' Compensation statutes." The supreme court held that the clause specifically set out what negligent liability was to be avoided and was clear and unambiguous.

A more traditional type of exculpatory contract was discussed in *Plant v. Wilbur, supra,* a case decided by the supreme court last July. There, Plant signed a document before entering the pit area of a racetrack operated by Wilbur. The document, which was a form used by racetracks all over the country, was titled, "Release and Waiver of Liability and Indemnity Agreement." The supreme court held that the clause was enforceable, noting that it contained certain key phrases such as "releases," "discharges," "covenants not to sue," and mentioned claims for negligence in three different places. The court also approved the trial judge's consideration of the circumstances surrounding the execution of the document, such as the fact that Plant had signed the document on other occasions, was not forced to sign the document, had equal bargaining power, and the fact that the activity involved was recreational in nature.

Under the forgoing authority, we must strictly construe the exculpatory contracts in the case at bar against the alarm companies, and we must ask whether they clearly set out what negligent liability is to be avoided. The contracts do not expressly mention that appellees sought to be absolved from liability for their own negligence, nor do they use words such as "release" or "waiver" as did the contracts in *Plant* and *Edgin*. However, the contracts do state that it is not the intention of the parties that appellees assume responsibility for any loss occasioned by "malfeasance or misfeasance in the performance of the services under the contract, or for loss or damage from fire." Our courts view misfeasance as an affirmatively wrongful act generally equated with a tort. *See Westark Specialties v. Stouffer Family Ltd.*, 310 Ark. 225, 836 S.W.2d 354 (1992). The logical reading of the terms as they are used in these clauses is that appellees assume no responsibility for tortious performance of services under the contract. This interpretation is further buttressed by the fact that both contracts provide for a limitation of liability to a small amount of money should the exculpatory provision be invalidated; that the Guardtronic contract goes on to offer the customer the option of paying more money to obtain full or limited liability on the part of Guardtronic; and that National Guardian advised its customers to purchase an insurance policy to protect against loss from fire and other hazards. We therefore hold that the contracts clearly set out what negligent liability is to be avoided.[3]

We further hold that there is nothing in the circumstances surrounding the execution of the contracts that would merit invalidating the exculpatory clauses. The parties herein were businesses dealing at arms' length. The clauses were not hidden from Crain, nor was Crain misled or prevented from reading the clauses. Further, Crain paid a relatively meager amount for appellees' services, and appellees sought accordingly to either absolve themselves from liability for their own negligence or limit their liability to a small dollar amount. Finally, as it was urged to do in the National Guardian contract, Crain purchased insurance (from appellant National Union) to cover losses of the type suffered herein.

In light of our discussion, we hold that the trial court did not err in granting summary judgment in this case.[4]

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[3] Appellant does not raise as a point on appeal that the clauses do not apply to its causes of action other than negligence, *i.e.*, products liability, breach of warranty, or misrepresentation.

[4] Appellant makes two arguments that we do not address. First, it argues that the trial

Affirmed.

HART, ROBBINS, and VAUGHT, JJ., agree.

CRABTREE and BAKER, JJ., dissent.

TERRY CRABTREE, Judge, dissenting. I disagree with the majority that the exculpatory clauses in this case clearly set out what negligent liability appellees sought to avoid. The clauses do not mention the word "negligence" at all, nor do they state that the signator on the contract is waiving any rights or releasing any party from liability. Those omissions distinguish this case from the supreme court's holdings in *Plant v. Wilbur*, 345 Ark. 487, 47 S.W.3d 889 (2001), and *Edgin v. Entergy Operations, Inc.*, 331 Ark. 162, 961 S.W.2d 724 (1998). Further, I do not believe the clauses are saved by the use of the term "malfeasance or misfeasance." The supreme court has always mandated that strong, clear language be used in seeking to absolve oneself of liability. Those words fall short of that mandate. Without more, they are not sufficient to inform a contracting party that he may be giving up his right to hold the other party liable for negligence.

To hold that these contracts clearly set out what negligent liability is to be avoided is to impermissibly extend the holdings of *Edgin, supra,* and *Plant, supra,* beyond what the supreme court intended. I therefore respectfully dissent and am authorized to state that Judge Baker joins in this dissent.

BAKER, J., agrees.

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court erred in citing the exculpatory clause from the National Guardian *lease* agreement rather than the *monitoring* agreement. The trial court's reliance on the lease agreement clause makes no difference because it is virtually identical to the monitoring agreement clause. Second, appellant argues that the monitoring agreement itself is vague because it states that it agrees to monitor a system "owned by Subscriber." Because the alarm system was owned by National Guardian and was only leased by Crain, appellant contends that the monitoring agreement does not apply. The record as abstracted does not show that this argument was made below; certainly it was not ruled on by the trial judge. We need not address an argument under such circumstances. *See Barclay v. First Pyramid Holding Co.*, 344 Ark. 711, 42 S.W.3d 496 (2001). In any event, the lease and the monitoring agreement were intertwined as a practical matter. Appellant also argues briefly that the trial court erred in finding that appellees were not grossly negligent. No convincing argument is made, nor is any authority cited in support of this contention; therefore, we do not address it. *See Collins v. Cunningham*, 71 Ark. App. 297, 29 S.W.3d 764 (2000).

Ronnie L. LASTER *v.* STATE of Arkansas

CA CR 00-250 64 S.W.3d 800

Court of Appeals of Arkansas
Division IV
Opinion delivered January 16, 2002

[redacted]

Dave Wilson Harrod, for appellant.

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

JOHN B. ROBBINS, Judge. Appellant Ronnie Laster was convicted after a bench trial of furnishing a prohibited article, marijuana, by knowingly introducing it into a correctional facility, a Class B felony, as determined by the Izard County Circuit Court. At the time, he was already incarcerated. For this crime he was sentenced to 100 months to be served consecutively to his current sentence. He appeals, arguing that there is insufficient evidence to support the conviction.[1] We agree.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Ferguson v. State*, 343 Ark. 159, 33 S.W.3d 115 (2000); *Terrell v. State*, 342 Ark. 208, 27 S.W.3d 423 (2000). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Ferguson v. State, supra*; *Terrell v. State, supra*. Substantial evidence is evidence that is of sufficient certainty and precision that it compels a conclusion one way or another. *Ferguson v. State, supra*; *see also Booker v. State*, 335 Ark. 316, 984 S.W.2d 16 (1998). On appeal, this court views the evidence in the light most favorable to the State and sustains a judgment of conviction if there is substantial evidence to support it. *Ferguson v. State, supra; Terrell v. State, supra.*

The facility in which the contraband was introduced was the Calico Rock Unit of the Arkansas Department of Correction, an approximately 600-acre area that contained a sixty-acre fenced, secure area. Appellant was an inmate there, and he had been assigned to the utility squad, which is a work detail on which inmates do maintenance and construction work around the compound. On December 15, 1997, appellant was working outside of the fenced area on the compound, and he was strip-searched upon re-entry at the sally port. The searching officer testified that he assumed that appellant was under the supervision of a guard at all times while working on the utility squad outside the fence on the prison property. As part of that search, appellant removed a paper cup from his pants pocket, and in it was a small piece of cellophane containing a green leafy substance later determined to be .208 grams of marijuana.

Appellant challenged the sufficiency of the evidence at his bench trial by arguing that because he never left the prison grounds,

[1] Appellant's counsel initially filed a no-merit brief with us, and in an unpublished opinion we ordered rebriefing for an adversarial presentation of appellant's appeal and denied counsel's motion to withdraw. *Laster v. State*, CACR 00-250 (Ark. App. January 24, 2001).

he could not have "introduced" the marijuana. The trial court rejected that argument, finding that appellant was outside the area of confinement and returned to the area that was used for confining prisoners, bringing with him the contraband. After resting his defense, the motion was renewed and denied. The conviction was entered at the conclusion of the hearing, and appellant appeals to us arguing the same basis for reversal. We agree with his assertion.

A person commits the offense of furnishing a prohibited article if he knowingly introduces a prohibited article into a correctional facility. Ark. Code Ann. § 5-54-119(a)(1) (Repl. 1997). The definition of "a prohibited article" includes a controlled substance. Ark. Code Ann. § 5-54-101(10)(B) (Repl. 1997). "Correctional facility" means any place used for the confinement of persons charged with or convicted of an offense or otherwise confined under a court order. Ark. Code Ann. § 5-54-101(1) (Repl. 1997).

Thus, we must construe the statute. The first rule of statutory construction is to construe the statute just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Hagar v. State*, 341 Ark. 633, 19 S.W.3d 16 (2000). If the language of the statute is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion to resort to rules of statutory interpretation. *Id.* When we construe penal statutes, they must be strictly construed resolving any doubts in favor of the accused, but such statutes must not be so strictly construed as to defeat an obvious intent of the legislature. *See Puckett v. State*, 328 Ark. 355, 944 S.W.2d 111 (1997). We construe this criminal statute to mean, when using terms in their plain and ordinary usage, that one must "introduce" or *bring into from outside.* This is supported by *Webster's Third New International Dictionary* 1186 (1993), wherein "introduce" is defined first as "to lead, bring, conduct, or usher in especially for the first time." Because appellant remained on the correctional facility compound and under the watchful eye of guards, he was within the correctional facility. That it contains an additional fenced area within its borders does not make the external acreage any less a part of the correctional facility. To hold otherwise would do violence to the strict construction we are obligated to apply.

Where the evidence presented is insufficient to sustain a conviction for a certain crime, but where there is sufficient evidence to sustain a conviction for a lesser-included offense of that crime, this court may reduce the punishment to the maximum for the lesser offense, reduce it to the minimum for the lesser offense,

fix it at some intermediate point, remand the case to the trial court for the assessment of the penalty, or grant a new trial either absolutely or conditionally. *McElhanon v. State*, 329 Ark. 261, 948 S.W.2d 89 (1997); *Tigue v. State*, 319 Ark. 147, 889 S.W.2d 760 (1994); *Dixon v. State*, 260 Ark. 857, 545 S.W.2d 606 (1977). Appellant was undoubtedly guilty of possession of a controlled substance, which is a lesser-included offense of furnishing a prohibited article when that article is a controlled substance. *See Goodwin v. State*, 342 Ark. 161, 27 S.W.3d 397 (2000).

According to Arkansas Code Annotated section 5-64-401(f) (1997):

> When any person is convicted of the unlawful possession of a controlled substance in any state, county, or city criminal detention facility, or any juvenile detention facility, the penalty for the offense shall be increased to the next higher classification of felony or misdemeanor as prescribed by law for the offense.

In light of this provision, appellant's conviction for the lesser-included offense constitutes a Class D felony. *See id.* We modify the judgment of conviction to reflect that appellant is guilty of the lesser-included offense, and we remand for resentencing.

Affirmed as modified and remanded for resentencing.

GRIFFEN and ROAF, JJ., agree.

John Lynn WILLOUGHBY *v.* STATE of Arkansas

CA CR 01-806 65 S.W.3d 453

Court of Appeals of Arkansas
Division IV
Opinion delivered January 16, 2002

Fields, Tabor, Langston & Shue, P.L.L.C., by: *Daniel Shue*, for appellant.

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

ANDREE LAYTON ROAF, Judge. After the trial court denied his motion to suppress evidence, John Lynn Willoughby entered a conditional guilty plea to the charges of possession of methamphetamine, possession of drug paraphernalia, and felon in possession of a firearm. The trial court sentenced him to ten years' imprisonment in the Arkansas Department of Correction with five and one-half years suspended. Pursuant to Ark. R. Crim. P. 24.3(b), Willoughby appeals the trial court's ruling, asserting that the trial court erred by denying his motion to suppress. We affirm.

On December 13, 1999, Willoughby stopped at the Arkansas Highway Police Station on Interstate 40 near Alma. Officer Jack Stepp conducted a safety inspection of Willoughby's commercial truck. Stepp testified that during a typical inspection, an officer stops a commercial vehicle as it pulls up to the scales and checks the driver, his logbook, his fuel receipts, his paperwork, and his bill of lading. Stepp also testified that sometimes the inspections include the truck itself, such as the tire pressure, brakes, and items inside the truck, except for the driver's personal property. Stepp testified that when Willoughby came into the station, he would not stand directly in front of Stepp but over to the side. Willoughby also would not make eye contact or look at Stepp. Stepp stated that Willoughby's hands were shaking and that he acted nervous, giving Stepp the impression that he was trying to hide something, such as drug use. Stepp asked Willoughby if there were any drugs in the truck, and Willoughby replied that there should not be any. Stepp then asked Willoughby for consent to search the truck, and Willoughby asked for clarification about what seizable items meant on the consent form. After Stepp replied that it meant drugs, alcohol, stolen property, or similar items, Willoughby mentioned that there might be a radar detector in the truck, which Stepp stated is illegal in commercial trucks. Willoughby refused to sign the consent form.

At this point, Stepp decided to walk his certified police dog, which was at the scene, around the truck. Stepp testified that he was not finished with his safety inspection at this time and that Willoughby was not free to leave until he completed the inspection. The dog alerted to the driver's door, and Stepp proceeded to search that area of the truck. Between the driver's seat and the passenger's seat, Stepp noticed a radar detector, and underneath it was a metal binder that had a white powder residue on it along with a plastic tube with residue on it. In the sleeper berth, Stepp found two more plastic tubes with white powder, a bottle with a powder substance, a razor blade, a plastic bag with a white substance, and a gun. Stepp testified that the white powder substance on the objects field-tested

positive for methamphetamine. Willoughby was then placed under arrest.

Willoughby was charged with possession of methamphetamine, possession of drug paraphernalia, and being a felon in possession of a firearm. Willoughby filed a motion to suppress the evidence found inside the truck. After the trial court denied the motion, Willoughby entered a conditional plea of guilty. Judgment was entered on January 11, 2001, sentencing Willoughby to ten years' imprisonment in the Arkansas Department of Correction with five and one-half years suspended. Willoughby brings this appeal from the trial court's ruling.

Willoughby argues that the trial court erred in denying his motion to suppress evidence. In reviewing an order denying a motion to suppress evidence, appellate courts make an independent determination based on the totality of the circumstances. *Newton v. State*, 73 Ark. App. 285, 43 S.W.3d 170 (2001). We will reverse the trial court's ruling only if it was clearly against the preponderance of the evidence. *Id.*

Officer Stepp was authorized to stop Willoughby in order to conduct a safety inspection of the truck pursuant to Ark. Code Ann. § 23-13-217(c)(1) (Supp. 1999), and Willoughby does not argue that the initial stop was unlawful. Willoughby argues, however, that Stepp did not have reasonable suspicion to justify conducting a canine sniff of the truck. Although Willoughby's nervous behavior may have been sufficient to constitute reasonable suspicion on the part of Stepp, no further justification was needed here to conduct the canine sniff. A canine sniff of the exterior of a vehicle that is parked in a public area does not amount to a Fourth Amendment search. *Vega v. State*, 56 Ark. App. 145, 939 S.W.2d 322 (1997). Moreover, when an officer has a police dog at his immediate disposal, a motorist's detention may be briefly extended for a canine sniff of the vehicle in the absence of reasonable suspicion, without violating the Fourth Amendment. *United States v. Morgan*, 270 F.3d 625 (8th Cir. 2001); *United States v. $404,905.00 in U.S. Currency*, 182 F.3d 643 (8th Cir. 1999), *cert. denied*, 528 U.S. 1161 (2001). In this case, Stepp had not completed his safety inspection when he decided to conduct the canine sniff, and Stepp testified that his dog was at the scene. The additional time it took for the dog to walk around the truck was a minimal intrusion on Willoughby's personal liberty. *See United States v. $404,905.00 in U.S. Currency, supra.* It was not necessary for Stepp to have further justification for the canine sniff in this situation. Once the dog

alerted, this constituted probable cause for Stepp to search Willoughby's truck. *Newton v. State, supra.*

Willoughby also argues that no exigent circumstance existed under Ark. R. Crim. P. 14.1, which excused Stepp from obtaining a search warrant for the truck after the dog alerted on the door. Rule 14.1 provides that an officer who has probable cause to believe that a moving or readily movable vehicle contains things subject to seizure may search the vehicle without a warrant if the vehicle is located in an area open to the public. Willoughby contends that because he would not have been able to drive away in his truck at that point, that his truck was not readily movable. However, even where the appellant is in custody, our appellate courts have held that a vehicle is readily movable because it is capable of being driven off by a third party if in an area open to the public. *See Reyes v. State*, 329 Ark. 539, 954 S.W.2d 199 (1997); *see Vega v. State, supra.* Here, Willoughby's truck was parked in the inspection station, and there is no indication that this area is not on a public way or is not open to the public. In fact, the inspection station is located on a busy interstate and, by its very nature, there are vehicles passing through the station constantly. In this situation, a search warrant was not required of Stepp in order to search the interior of the vehicle.

It should also be noted that even if the search of Willoughby's truck pursuant to the canine sniff had been illegal, it was proper for the trial court to deny Willoughby's motion to suppress the evidence seized from the truck under the inevitable-discovery doctrine. Under this doctrine, evidence that would otherwise be suppressed is admissible if the State proves by a preponderance of the evidence that the police would have inevitably discovered the evidence by lawful means. *Miller v. State*, 342 Ark. 213, 27 S.W.3d 427 (2000). Here, the evidence indicates that the contraband seized from the truck would have been inevitably discovered during Officer Stepp's completion of the safety inspection. As Stepp testified, he has the authority to search the interior of a truck during a safety inspection, and in this case, Willoughby admitted that he had a radar detector in his truck, which is illegal and subject to seizure. *See* Federal Motor Carrier Safety Regulations, 49 C.F.R. § 392.71 (2001). As the trial court noted, Stepp would have discovered the contraband when he seized the radar detector, as a metal binder and a plastic tube with drug residue on them were found underneath the radar detector. Thus, the trial court's denial of Willoughby's motion to suppress the evidence was not clearly against the preponderance of the evidence.

Affirmed.

ROBBINS and GRIFFEN, JJ., agree.

ALLSTATE INSURANCE COMPANY
v. Billy Wayne VOYLES

CA 01-562 65 S.W.3d 457

Court of Appeals of Arkansas
Division IV
Opinion delivered January 23, 2002

Huckabay, Munson, Rowlett & Tilley, P.A., by: *John E. Moore* and *Julia Busfield*, for appellant.

Ford & Glover, by: *Robert M. Ford*, for appellee.

JOHN B. ROBBINS, Judge. Appellee Billy Wayne Voyles brought suit against appellant Allstate Insurance Company to collect insurance proceeds after his home in Parkin, Arkansas, was destroyed by fire. Allstate defended on the grounds that the fire was set by Mr. Voyles or at his direction, and alternatively because Mr. Voyles made a material misrepresentation by concealing the fact that he had lost a previous insurance claim after a fire destroyed a house that he owned several years ago. After a jury trial, the trial court directed a verdict against Allstate and awarded the policy limit of $20,000, along with a twelve-percent penalty and attorney's fees. Allstate now appeals.

Allstate raises three arguments for reversal. First, it argues that the trial court erred in granting Mr. Voyles's motion for directed verdict. Next, it contends that the trial court erroneously excluded evidence of the previous fire. Finally, Allstate asserts that the trial court erred in excluding evidence of Mr. Voyles's misrepresentation regarding the prior fire and unsuccessful litigation against an insurance company. We agree with appellant's first argument, and we reverse and remand on that basis.

Charles Martin, Parkin Fire Department Chief, testified that he received an emergency call at 3:09 a.m. on December 8, 1997. Upon responding to the call, Chief Martin and other firefighters found Mr. Voyles's house to be in flames. He stated that units from Earle and Wynne were called in for assistance, and that it took about three hours to extinguish the fire.

Chief Martin later spent about fifteen minutes investigating the fire. He found the doors to be locked and no signs of forced entry. In his investigative report, Chief Martin wrote, "Looks like electrical fire from the heat system."

Georgia Sides, a grocery store owner and longtime resident of Parkin, testified that from time to time her store sponsors bus trips to Tunica, Mississippi, for the purpose of visiting casinos. She stated that one such trip began on the afternoon of December 7, 1997, when two buses departed from Slim's Place, which is a club that Mr. Voyles owned in Parkin. Mr. Voyles and his girlfriend, Virginia Williams, were among the group who rode the buses to Fitzgerald's Casino in Tunica. The buses were to return the following day, and Mrs. Sides stated that she saw Mr. Voyles sitting at a blackjack table at about 2:00 a.m.

Ricky Voyles, appellee's brother, gave testimony regarding the appellee's house. He stated that their mother gave it to him, and the appellee owned it free from debt. Ricky estimated that before it burned the house was worth about $50,000. He further testified that he went with the appellee on the Tunica trip, and that when the appellee found out the next morning at the casino that his house had burned, he was upset.

Billy Wayne Voyles testified on his own behalf, and denied hiring anyone to set fire to his house. He indicated that the house was next door to Slim's Place, and that he owned both free from debt. Mr. Voyles stated that after his mother died in 1994, he inherited $80,000 and used some of the money to purchase the club. He estimated the market value of Slim's Place to be about $75,000 to $80,000.

Mr. Voyles testified that before his house burned he would visit Tunica once or twice a month. He acknowledged that, due to a "bad run of luck," he owes a debt to a casino of over $6000, which has been turned over to a collection agency. However, he stated that since the fire there has been no communication about the debt and that, if necessary, he could have borrowed the money from one of his brothers and paid it. Other than the debt at the casino, Mr. Voyles denied having any other significant debts. He also introduced evidence that he was paying his monthly bills and that, shortly before the fire occurred, his bank account balance ranged from a low of more than $2000 to a high of over $6000.

Mr. Voyles testified that the house was not elaborately decorated and that it did not contain pictures on the walls or anything of sentimental value. However, it did contain major appliances and furniture, and he estimated that he lost about $5000 worth of personal items, which were not covered by insurance. He acknowledged that, at the time of the fire, most of his good clothes were at his girlfriend's house and his important documents were at Slim's Place.

Mr. Voyles stated that the water heater was in the house located in a closet next to the bathroom. He testified that there is a small bathroom window, about five feet above the ground, that is large enough for someone to crawl through. Mr. Voyles stated that he was not aware of any person who would have had any reason to burn his house down.

Jim Swain, a fire investigator, testified on behalf of Allstate. He stated that he was contacted by Allstate to investigate the fire at appellee's home. During his investigation, Mr. Swain detected a strong odor of gasoline. He ruled out the water heater as the source of the fire. However, he took samples from the floor of the closet where the water heater was located and confirmed the presence of gasoline. Mr. Swain ultimately concluded:

> Based on my background and training, what I put together that happened out there on the night of December 8 is that a person had to enter the residence, pour a flammable liquid, which we've identified as gasoline in the water heater closet, from the water heater closet across the floor of the bathroom, stopping at the door to the bath. At that point the flammable liquid was ignited by what we call an "external heat source," a match, a lighter, or some similar type of device. The gas was within a couple of feet of the water heater.

Mr. Swain testified that it is not unusual for a person to try to make a fire look accidental by starting the fire near a water heater to try to create the assumption that the water heater caused it. In Mr. Swain's opinion, a man could not have come through the bathroom window, set the fire, and then left through the window.

Charles Douglas Estes, an investigator for the Arkansas State Police, also conducted an investigation of the fire. His investigation revealed that the cause of the fire was widespread distribution of a flammable liquid. He determined that the fire started next to the water heater, but he eliminated the water heater as a possible source.

Officer Estes testified that many times fires are started by water heater malfunctions, and that it is common for a person to start a fire in that location to make it look like an accident.

James Stidman, an insurance adjuster for Allstate, testified that after the fire he went to the house and noticed a strong smell of gasoline. He also noted that the house was not completely burned, and he could tell that it had been sparsely furnished with no pictures on the walls. Mr. Stidman's investigation revealed no evidence of anyone breaking into the house. Relying in part on the gambling debt, Mr. Stidman testified, "From the evidence that was gathered in this investigation I have no doubt in my mind Mr. Voyles had his house set on fire to collect the insurance money, no question." Mr. Stidman did not believe that Mr. Voyles himself set the house on fire, but thought that he directed another person to commit the arson and went to Tunica for an alibi.

Allstate's first point on appeal is that the trial court erred in granting Mr. Voyles's motion for directed verdict. In reviewing an order granting a motion for directed verdict, we view the evidence in the light most favorable to the party against whom the verdict was directed. *Sexton Law Firm, P.A. v. Milligan*, 329 Ark. 285, 948 S.W.2d 388 (1997). If any substantial evidence exists that tends to establish an issue in favor of that party, it is error for the trial court to grant the motion for directed verdict. *Id.* It has been held that where the evidence is such that fair minded people might have different conclusions, then a jury question is presented and the directed verdict should be reversed. *Johnson v. Arkla, Inc.*, 299 Ark. 399, 771 S.W.2d 782 (1989).

We agree that the trial court erred in directing a verdict against Allstate. In granting Mr. Voyles's directed-verdict motion, the trial court relied on evidence that the house was worth more than the insurance policy limits of $20,000, that it was inherited from his mother, and that the contents of the house were not insured. However, there was other evidence from which a jury could have reasonably concluded that Mr. Voyles caused his house to be burned.

While there was no direct evidence that Mr. Voyles set the fire, our supreme court has held that circumstantial evidence, when sufficient to warrant a jury in drawing a reasonable inference that the insured was the author of a fire, is sufficient to sustain a verdict in favor of the insurer. *See Farmers Ins. Exchange v. Staples*, 8 Ark. App. 224, 650 S.W.2d 244 (1983). In *Haynes v. Farm Bureau*

Mut. Ins. Co. of Arkansas, 11 Ark. App. 289, 669 S.W.2d 511 (1984), we announced:

> There are ordinarily no eye witnesses to an act of arson because the deliberate burning of an insured building by its owner is usually accomplished alone and in secret. Any material fact in issue, however, may be established by circumstantial evidence even though the testimony of other witnesses may be undisputed. The fact that evidence is circumstantial does not render it insubstantial as our law makes no distinction between direct evidence of a fact and circumstances from which it might be inferred. The circumstances may be such that different minds can reasonably draw different conclusions from them without resort to speculation. Where there are facts and circumstances in evidence from which reasonable minds might reach different conclusions without resort to speculation the matter is an issue of fact which must be submitted to the jury for its determination.

Id. at 292, 669 S.W.2d at 513 (citation omitted).

In the case at bar, there was circumstantial evidence giving rise to a jury question. Evidence was presented to show that, despite the fact that Mr. Voyles had inherited $80,000 and a home, his financial situation was declining and he owed more than $6000 in gambling debts. Moreover, there were no signs of forced entry into the house, and there was evidence that it was started by an accelerant and made to look like an accident. A jury could infer that Mr. Voyles had a motive for burning the house and there is nothing in the record to disclose that anyone else did. *See Haynes v. Farm Bureau Mut. Ins. Co. of Arkansas, supra.* From our review of the evidence in the light most favorable to the appellant, we hold that there was substantial evidence capable of supporting a jury verdict in its favor, and thus that the trial court erroneously granted Mr. Voyles's directed-verdict motion.

Allstate next argues that the trial court erred in excluding evidence of the prior fire. In 1989, a building belonging to Mr. Voyles and his mother was destroyed by fire, and the insurance company covering the property denied their claim on the grounds that the fire was intentionally set by or at the direction of the insureds. The claim was litigated, and a jury returned a verdict in favor of the insurance company. The trial court refused to permit Allstate to introduce evidence of the 1989 fire, reasoning that it was too remote in time and that any probative value was substantially outweighed by the danger of unfair prejudice.

Where the issue is whether a fire was deliberately set to claim insurance, evidence of other fires may be relevant to show motive, intent, absence of mistake, or accident, but the trial court must decide whether the probative value of such relevant evidence outweighs the harm that its introduction might cause. Ark. R. Evid. 403 and 404(b); *Johnson v. The Truck Ins. Exchange*, 285 Ark. 470, 688 S.W.2d 728 (1985). Allstate submits that, since insurance coverage was successfully denied for the 1989 fire, evidence of that matter was relevant and tended to establish Mr. Voyles's motive and intent to cause the 1997 fire. Allstate further argues that Mr. Voyles opened the door to admission of this evidence when, on direct examination, he stated that he did not have anything to hide.

Questions regarding the admissibility of evidence are matters entirely within the trial court's discretion, and such matters will not be reversed absent an abuse of discretion. *J.E. Merit Constructors, Inc. v. Cooper*, 345 Ark. 136, 44 S.W.3d 336 (2001). We hold that the trial court did not abuse its discretion in excluding evidence of the 1989 fire.

In cases of arson, a history of other fires is admissible if not too remote in time or dissimilar in circumstances. *Johnson v. Truck Ins. Exchange, supra.* In *Johnson*, the supreme court affirmed the admission of evidence of prior fires where the insured had suffered four major fires within five years, at least three of which were insured against loss by fire. However, in the instant case there was only one previous fire; it occurred more than eight years before the 1997 fire; and although Mr. Voyles's insurance claim was denied, there was no other evidence tending to show that he caused the previous fire. Although Allstate makes much of the fact that both fires occurred at night and both occurred relatively soon after Mr. Voyles acquired each structure, these similarities were not so unique as to require the trial court to allow evidence of the first fire. As for Mr. Voyles's testimony that he had nothing to hide, we think the trial court properly found that this did not open the door because it was evident that he was referring only to the 1997 fire, and not the 1989 fire.

Allstate's remaining argument is that the trial court erred in excluding evidence of Mr. Voyles's misrepresentation regarding the previous fire. An Allstate insurance representative took a statement from Mr. Voyles by telephone on December 10, 1997. Mr. Voyles answered "no, sir" to the question, "[H]ave you ever been involved in a lawsuit as a plaintiff or a defendant with an insurance company." Allstate asserts that this misrepresentation was material and

relevant to its investigation and defense of misrepresentations after the loss, and further relevant to show motive. Under Arkansas law, a fact or circumstance is material if it pertains to facts that are relevant to the insurer's rights to decide upon its obligations and to protect itself against false claims. *See Willis v. State Farm Fire & Casualty Co.*, 219 F.3d 715 (8th Cir. 2000). Allstate argues that the trial court should have permitted Mr. Voyles's misrepresentation to be considered by the jury.

We hold that there was no abuse of discretion in the trial court's decision to exclude the misrepresentation because it was not material. In *Willis v. State Farm Fire & Casualty Co., supra*, the misrepresentations related to the fire that was under investigation, whereas in the present case the statement pertained to a different fire and litigation that occurred years earlier. The misrepresentation did not significantly affect Allstate's investigation or defense of the claim, and the trial court correctly found that the prior fire was too remote in time to establish motive or intent. There was no error in the trial court's ruling in this regard.

We agree with Allstate's argument that the trial court erred in directing a verdict against it, and we reverse on that basis. We reject Allstate's remaining arguments that pertain to the admissibility of evidence.

Finally, we address the appellee's request for costs pursuant to Arkansas Supreme Court Rule 6-7, and attorney's fees pursuant to Ark. Code. Ann. § 23-79-208 (Repl. 1999). Because the appellee has not prevailed on appeal, his requests are denied.

Reversed and remanded.

NEAL and BAKER, JJ., agree.

Wayne McFARLAND *v.* Bennie TAYLOR

CA 01-585 65 S.W.3d 468

Court of Appeals of Arkansas
Division III
Opinion delivered January 23, 2002

Compton, Prewett, Thomas & Hickey, P.A., by: *William I. Prewett*, for appellants.

Burbank, Dodson & Barker, PLLC, by: *Gary R. Burbank*, for appellee.

SAM BIRD, Judge. Appellants, Wayne McFarland and Phillip Pittman, are the lessees of mineral rights in land owned by appellee Bennie Taylor and his neighbors in Union County. Since acquiring their leases in 1998, appellants used a road across appellee's land for access to a well that was located on land to the west of appellee's property. In 2000, appellee blocked this road. Rather than use another road, appellants filed suit for an injunction directing appellee to remove the obstruction across the disputed road. After the chancellor refused to issue an injunction, appellants filed this appeal. Because the chancellor did not abuse his discretion in denying appellants' petition for an injunction, we affirm.

After living nearby for about twenty years, appellee purchased this tract of land in 1983 for the purpose of building a house there. Appellee built a house, but it was destroyed by fire before he could occupy it. According to appellee, there were no wells on the adjoining land at that time but that, soon afterward, the oil well to the west was constructed and he gave its operators permission to use his road, which extends from Arkansas Highway 275 to the western boundary of appellee's property. Different oil-well operators used

the road over the next decade. At trial, appellee testified that he gave express permission to use his road to all operators of the well but that he cautioned them that their use could continue only until he withdrew his permission. At some point, another road leading from Highway 15 to the well was built.

In 1998, appellants obtained assignments of the mineral leases and began using the Highway 275 road. Appellee testified at trial that, as before, he gave appellants conditional approval to use this road until he withdrew his permission. Appellants also made some improvements to the Highway 15 road.

In 1997 or 1998, appellee's son and daughter-in-law, Brent and Chelsea Taylor, and their small daughter, moved into a mobile home on appellee's land. Mr. and Mrs. Taylor testified that there is a significant amount of traffic at all hours of the day and night on the Highway 275 road, which is used as their driveway, and that they were concerned about the safety of their three-year-old daughter. Mrs. Taylor also testified that she was worried about her own safety, because her husband works the 3:00 p.m. to 11:00 p.m. shift. Appellants did not dispute that they use the Highway 275 road at night. These concerns prompted appellee to withdraw his permission for appellants to use the Highway 275 road. His blocking of the road prompted appellants to file this lawsuit.

Although appellants testified that the Highway 15 road could not be used as an alternate route without much improvement at great expense, appellee presented evidence to the contrary. Gordon Height, an engineer with the Arkansas Highway and Transportation Department, testified that the Highway 15 road could be adequately improved for between $1,000 and $1,500. Sam Jean, who has twenty-five years' experience in "dirt work" and who has previously worked on the Highway 15 road, testified that he could make that road usable for heavy trucks for no more than $1,500. In his letter opinion, the chancellor stated that he was impressed with Mr. Jean's "experience, his knowledge, and his forthrightness."

The chancellor made the following findings in his letter opinion, which was incorporated in his order denying appellants' petition for an injunction:

> If the issue before me was whether it was reasonable for the [appellants] to use the Highway 275 road once or twice a month for an eighteen wheeler and/or a workover rig, I would have no difficulty in concluding that such a limited amount of use would be

> reasonable. However, taking into account the testimony from the July hearing as to the considerable amount of traffic over the road at all hours of the day and night and taking into account that workover rigs will have to visit the well sites in order to make the wells operational and keep them operational, and taking into account that Highway 15 road can be made fully usable for not more than $1,500.00, it is my conclusion that the most reasonable ingress and egress for [appellants] to their oil and gas properties is from Arkansas State Highway 15.

Appellants argue on appeal that the chancellor erred in denying their request for an injunction. Generally speaking, the granting or denying of an injunction is a matter within the discretion of the chancellor. *Tri-County Funeral Serv., Inc. v. Eddie Howard Funeral Home, Inc.*, 330 Ark. 789, 957 S.W.2d 694 (1997). This court does not reverse unless there has been a clearly erroneous factual determination or unless the decision is contrary to some rule of equity or the result of an improvident exercise of judicial power. *Id.*; *City Slickers, Inc. v. Douglas*, 73 Ark. App. 64, 40 S.W.3d 805 (2001). The prospect of irreparable harm or the lack of an otherwise adequate remedy is at the foundation of the court's power to issue injunctive relief. *Paccar Fin. Corp. v. Hummel*, 270 Ark. 876, 606 S.W.2d 384 (Ark. App. 1980).

Appellants argue that the chancellor erred in considering whether it would be reasonable to use an alternate route across appellee's land because it was not used as a mobile-home site before appellants began production under their lease. According to appellants, a comparison of the reasonableness of using an alternate route can be made only when there is a preexisting use by the surface owner. Appellee responds that appellants are factually and legally incorrect. We agree with appellee.

We are not prepared to hold that, as a matter of law, a mineral owner is always entitled to choose between two or more means of access to the minerals, without regard to necessity or to the harm it may cause the surface owner, if the surface owner's use did not predate the mineral owner's use. The respective rights of mineral and surface owners are well settled. The owner of the minerals has an implied right to go upon the surface to drill wells to his underlying estate, and to occupy so much of the surface beyond the limits of his well as may be necessary to operate his estate and to remove its products. *Diamond Shamrock Corp. v. Phillips,* 256 Ark. 886, 511 S.W.2d 160 (1974). His use of the surface, however, must be reasonable. *Id.* The rights implied in favor of the mineral estate

are to be exercised with due regard for the rights of the surface owner. *See id.* (citing *Getty Oil Co. v. Jones,* 470 S.W.2d 618 (Tex. 1971)).

In *Martin v. Dale,* 180 Ark. 321, 21 S.W.2d 428 (1929), the Arkansas Supreme Court made it clear that, in all circumstances, the mineral owner's use must be necessary and the potential harm to the surface owner must be considered:

> It is not questioned that Lenz, as agent for the trustee to whom the lease was given, had the right of access to the lands covered by the lease; but this is a right which arose out of necessity, and not as a matter of convenience. In other words, while the right of entry was implied, this right did not authorize Lenz to enter as he pleased; it was his duty to do so in the manner least injurious to his grantor, and if a means of ingress existed when the lease was taken, and which continued to be available, this entry, and no other, should have been used, although it was not the most convenient.

180 Ark. at 324, 21 S.W.2d at 429.

In any event, appellee demonstrated that the road in question had been used for residential purposes for many years. Appellants have apparently based their argument on the incorrect factual assumption that the Highway 275 road was built as part of the oil and gas operations near appellee's land. Appellee, however, testified that this road has been used for decades as access to a barn and a potato shed. He said that he has been familiar with this land since 1965 and that this road had been used many years before there were any oil wells on the adjacent land. Appellee also testified that, when he bought his land in 1983 for the purpose of building a house there, the road was not being used for access to an oil well. Appellee further stated that appellants and their predecessors had used the Highway 275 road with his permission. He said he had informed them that they could use it until he told them "to quit." Clearly, appellee's testimony would support a finding that this road had been in residential use for many years before the nearby oil production began.

Therefore, the chancellor was correct in considering whether it was necessary for appellants to use the Highway 275 road and whether it would be reasonable to require them to use the alternative Highway 15 road. He found that the "most reasonable ingress and egress for [appellants] to their oil and gas properties is

from Arkansas State Highway 15." Generally, what is reasonable is a question of fact. *Salem v. Lane Processing Trust*, 72 Ark. App. 340, 37 S.W.3d 664 (2001). Although we review chancery cases *de novo*, we will not reverse a chancellor's finding of fact unless it is clearly erroneous. *Id.* In light of the testimony credited by the chancellor and discussed in his letter opinion, his finding of fact in this regard is not clearly erroneous.

Based on the evidence presented, we cannot say that the chancellor abused his discretion in denying injunctive relief to appellants.

Affirmed.

PITTMAN and ROAF, JJ., agree.

DEATH and PERMANENT TOTAL DISABILITY TRUST FUND *v.* James E. BREWER, *Employee*; Woodruff Electric Cooperative, *Employer*; Federated Rural Insurance Company, *Carrier*

CA 01-746 65 S.W.3d 463

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered January 23, 2002

[redacted]

[redacted]

David L. Pake, for appellant.

Guy Brinkley, for appellee.

TERRY CRABTREE, Judge. The appellant, Death and Permanent Total Disability Trust Fund, appeals from the Arkansas Workers' Compensation Commission's opinions directing it to withhold the claimant's attorney fee and pay it by separate check to the claimant's attorney. We find no error, and affirm.

On August 27, 1990, the appellee, Mr. James Brewer, sustained a work-related injury. Mr. Brewer's healing period ended in May 1992. Mr. Brewer's employer, Woodruff Electric Cooperatiave, also an appellee in this case, initially controverted the extent of permanent disability, but later stipulated to the extent of permanent disability at a pre-hearing conference. On August 19, 1996, an Administrative Law Judge (ALJ) ordered that "[t]he claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits and remitted, by the respondents, directly to the claimant's attorney." Woodruff Electric and the other appellee in this case, Federated Rural Electric Insurance Company, paid appropriate indemnity benefits but did not pay the appropriate attorney's fees as ordered. The Commission found that pursuant to Ark. Code Ann. § 11-9-502(b) (Repl. 1996), the employer/insurance carrier met its liability for indemnity benefits on October 2, 1998. Appellant advised Mr. Brewer, the employer, and the insurance company that it would assume liability for payment of benefits effective October 2, 1998. It was unclear whether appellant advised Mr. Brewer's attorney of its date of the acceptance of the claim. On April 12, 1999, Mr. Brewer's attorney filed a petition for attorney's fees, seeking the back fees ordered to be withheld by the employer pursuant to the August 19, 1996 order. On September 7, 1999, the ALJ ordered appellant to withhold from all future indemnity benefits paid to claimant, and issue by separate check, the claimant's portion of the attorney's fees to claimant's attorney. Appellant

appealed this order, and the Commission on two occasions remanded the case to the ALJ on procedural issues.

On November 7, 2000, the ALJ issued an opinion and order, ordering the appellant to withhold claimant's one-half attorney's fees from all future indemnity benefits and issue the withheld monies by separate check to claimant's attorney. The ALJ ordered this procedure pursuant to Arkansas Workers' Compensation Commission Rule 10. Appellant appealed this ruling, and the Commission, by order dated April 4, 2001, affirmed the ALJ's findings. On May 24, 2001, upon motions for reconsideration, the Commission filed an opinion directing appellant to pay a lump sum attorney's fee to claimant's attorney equal to five percent for controversion accrued from October 2, 1998, through the date of final order, ending the attorney-fee litigation in this case. The Commission also directed appellant to withhold from the benefits payable to the claimant an amount equal to six and one-half percent of the claimant's weekly benefits (five percent to claimant's attorney and one and one-half percent for the appellant to recoup its lump sum payment). Once the lump sum fee is recouped, the appellant is then to reduce benefits to a five percent withholding. The appellant has brought a timely appeal before this court.

When reviewing a Commission decision, 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).

The issue in the present case, as correctly pointed out by the Commission, is how, and by whom, checks are to be paid to claimant's attorney for the claimant's one-half of the fee due to his attorney. Arkansas Code Annotated § 11-9-715(a)(2)(B)(i) (Supp. 2001) states:

> In all other cases, whenever the commission finds that a claim has been controverted, in whole or in part, the commission shall direct

> that fees for legal services be paid to the attorney for the claimant as follows: One-half (1/2) by the employer or carrier in addition to compensation awarded; and one-half (1/2) by the injured employee or dependents of a deceased employee out of compensation payable to them.

The Commission relied on its Rule 10, along with the attorney lien statute found at Ark. Code Ann. § 16-22-304 (Repl. 1999), for its decision that it has the power to direct the manner in which the proceeds of an award are to be disbursed in order to protect the ability of the claimant's attorney to receive his fee. When reviewing the Commission's interpretation and application of its rules, we give the Commission's interpretation great weight; however, if an administrative agency's interpretation of its own rules is irreconcilably contrary to the plain meaning of the regulation itself, it may be rejected by the courts. *Cyphers v. United Parcel Serv.*, 68 Ark. App. 62, 3 S.W.3d 698 (1999). While not conclusive, the interpretation of a statute by an administrative agency is highly persuasive. *Clark v. Sbarro*, 67 Ark. App. 372 (1999). An administrative agency's interpretation of a statute or its own rules will not be overturned unless it is clearly wrong. *Cyphers, supra.*

Arkansas Code Annotated § 16-22-301 (Repl. 1999) provides that "it is the intent of §§ 16-22-302 to -304 to allow an attorney to obtain a lien for services based on his or her agreement with his or her client and to provide for compensation in case of a settlement or compromise without the consent of the attorney." In this case, Mr. Brewer has never ended his contractual relationship with his attorney. There has not been any settlement or compromise of this case with or without the consent of Mr. Brewer's attorney. As such, we find that the attorney lien statute is inapplicable to this case, and the Commission erred in relying on the statute for its decision.

However, we cannot say that the Commission's interpretation of its Rule 10 was clearly wrong. Therefore, we hold that Rule 10 gives the Commission the authority to direct appellant to withhold claimant's one-half attorney's fee and pay that amount by separate check to claimant's attorney.

Arkansas Code Annotated § 11-9-205(a)(1)(A) (Repl. 1996) provides that for purposes of administering the provisions of this chapter, the Commission is authorized "to make such rules and regulations as may be found necessary." Under this authority, the Commission promulgated Rule 10, which provides that: "in all

cases where the petition for a fee is presented by attorneys or representatives of a claimant and a fee is granted the fee shall be paid by separate check."

We agree with the Commission that the threshold issue in this case does not involve the issue as to who owes an attorney's fee or by what formula a fee is calculated. Rather, this case involves the issue as to the administrative means of how checks are exchanged. We agree with the Commission that Rule 10 gives it authority to direct that separate checks be remitted directly to a claimant's attorney.

Appellant argues that at the time Rule 10 was promulgated, a different version of Ark. Code Ann. § 11-9-715 was in effect. The requirement that a claimant pay one-half of his attorney's fee was not enacted until 1987. Before 1987, the employer or insurance carrier was required to pay all of the fee. As such, appellant submits that the fee was paid by separate check by the employer or insurance carrier because it could not be taken out of the proceeds of a claimant who owed no fee at all. Appellant argues that therefore the Commission's reliance on Rule 10 was misplaced.

In addressing appellant's argument, we conclude that the Commission could have changed Rule 10 when section 11-9-715 was amended, but it did not. Instead, the Commission chose not to alter Rule 10. We will not speculate as to why the Commission decided not to change Rule 10. It is immaterial when Rule 10 was initially promulgated. The fact remains that Rule 10 is still in effect, and that this Rule gives the Commission the power for its orders in this case.

Second, appellant asks this court to hold that it was not under any legal obligation to begin withholding appellee's part of the attorney fee commencing with the ALJ's September 7, 1999, award. The Commission addressed this issue in its May 24, 2001 order, stating that appellant is directed to "*immediately* begin withholding from the benefits payable to claimant an amount equal to 6½% of the claimant's weekly benefits for future disbursement depending on the outcome of the Trust Fund's appeal to the Court of Appeals." (Emphasis in original). In fact, appellant states in its brief that it appears that the Commission "has conceded that the Trust Fund was not under a legal obligation to withhold monies pursuant to the September 7, 1999 Order of the law judge." We agree.

We hold that the Commission did not err in requiring appellant to withhold appellant's one-half attorney's fee from his indemnity benefits, and issue by separate check the withheld monies to appellee's attorney.[1]

Affirmed.

HART, NEAL, VAUGHT, and BAKER, JJ., agree.

ROBBINS, J., dissents.

JOHN B. ROBBINS, Judge, dissenting. I agree with the majority's holding that the attorney's lien statute is inapplicable to this case. However, I do not agree with its holding that Rule 10 authorized the Commission to direct the appellant Death and Permanent Disability Trust Fund to withhold the appellee-claimant's share of his attorney's fee from each compensation check and to remit the amount withheld by separate check directly to the appellee-claimant's attorney. Thus, I would reverse the Commission's decision.

The new Workers' Compensation Act provides that, "Administrative Law Judges, the Commission, and any reviewing courts shall construe the provisions of the chapter strictly." Ark. Code Ann. § 11-9-704(c)(3) (Repl. 1996). The claimant's attorney in the instant case is entitled to attorney's fees under Ark. Code Ann. § 11-9-715(a)(2)(B)(i) (Repl. 1996), which provides that fees are paid "One-half (1/2) by the employer or carrier in addition to compensation awarded; and one-half (1/2) by the injured employee . . . out of compensation payable to them." Construing this statute strictly, as we must, it is the claimant that must pay attorney's fees out of compensation paid to him. The attorney's fee statute at issue does not even mention the Death and Permanent Disability Fund, and the Commission lacks the authority to broaden the statute and order the Fund to write separate checks to the claimant's attorney as payment of fees owed by claimant to his attorney.

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[1] We note that appellant brought another point on appeal arguing that the Commission erred when in its May 24, 2001 opinion it ordered that appellant should begin immediately to withhold the claimant's one-half fee despite the fact that appellant appealed that order in its April 25, 2001 notice of appeal. However, we need not address this point, as appellant states in its brief that it "now abandons that part of its appeal."

In reaching its decision, the Commission relied on Rule 10, which provides, "In all cases where the petition for a fee is presented by attorneys or representatives of a claimant and a fee is granted, the fee shall be paid by separate check." However, when promulgated, Rule 10 could not have contemplated payment of the claimant's part of his attorney's fees. This is so because Rule 10 became effective in 1982, and the statute requiring the claimant to pay half of the attorney's fees was not enacted until 1987. Before 1987 only the employer, and not the claimant, could be ordered to pay attorney's fees. *See* Ark. Stat. Ann. § 81-1332 (Supp. 1985). The only logical interpretation of Rule 10 is that if an employer is ordered to pay compensation and fees, it writes separate checks to the claimant and claimant's attorney. But Rule 10 does not stand for the proposition that a claimant's portion of the attorney's fees shall be withheld, and paid on claimant's behalf, by the entity paying the compensation.

It is my view that strict construction of the workers' compensation law mandates that the claimant is responsible for his own attorney's fees, and that the Commission erred in ordering appellant to pay the fees on claimant's behalf. If the method of paying attorney's fees in workers' compensation cases is to be changed, I submit that effecting such change is a matter for the legislature and not the appellate courts. I respectfully dissent.

AMERICAN INVESTORS LIFE INSURANCE COMPANY
v. Dianne Roxanne BUTLER

CA 01-533 65 S.W.3d 472

Court of Appeals of Arkansas
Division III
Opinion delivered January 23, 2002

Skokos, Bequette & Billingsley, P.A., by: *Keith I. Billingsley*, for appellant.

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

ANDREE LAYTON ROAF, Judge. Dianne Roxanne Butler, appellee, sued appellant, American Investors Life Insurance Company ("American Investors"), her health insurance provider, to recover medical expenses that she incurred for a procedure known as high dose chemotherapy autologous stem cell transplantation ("HDC"), which was recommended by her doctor for treatment of her metastatic breast cancer. The trial court denied American Investors's motion for summary judgment and partially granted Butler's motion for summary judgment because the insurance-policy exclusion dealing generally with experimental treatment was ambiguous and because American Investors had not relied on that exclusion. The jury returned a verdict in favor of Butler in the amount of $97,813.58, and judgment was entered in that amount plus a twelve-percent statutory penalty, prejudgment interest, costs, and attorney's fees. American Investors brings this appeal, claiming that the trial court erred in granting summary judgment to Butler and in denying its motions for directed verdict and for judgment notwithstanding the verdict. We affirm on both points.

In April 1998, while insured under a health-insurance policy issued by American Investors, Butler, age 35, was diagnosed with breast cancer. Following surgery for removal of the breast cancer, Butler received standard-dose chemotherapy and radiation treatment. Butler consulted with Dr. William Walsh, an oncologist, who

advocated that Butler also undergo HDC because the surgery indicated that she had metastatic cancer in five of her lymph nodes. In June 1998, a request for preauthorization for the HDC procedure was first submitted to American Investors. As required by the policy, Dr. Walsh forwarded information to American Investors informing them that Butler met each of the criteria necessary for preauthorization of HDC and that the procedure was medically necessary. Dr. Irvin Fleming and Dr. Christine Mroz also wrote letters to American Investors recommending HDC for Butler based on her disease characteristics. The HDC procedure was to begin in July 1998.

After obtaining independent reviews from two other medical oncologists, Dr. Joyce O'Shaughnessy and Dr. Christopher Desch, in October 1998, American Investors denied preauthorization for the procedure by letter dated November 4, 1998, stating that the medical data did not suggest that HDC was more beneficial than standard treatment. Butler underwent the HDC procedure in November and December 1998, despite American Investors's denial of authorization, and filed suit to recover her medical expenses in the amount of $95,264.58. American Investors filed a motion for summary judgment, claiming that the policy provided no coverage for HDC in Butler's case. The trial court denied this motion for summary judgment, but partially granted Butler's motion for summary judgment, finding that language contained in a policy exclusion regarding experimental or investigational treatment was ambiguous. Further, the trial court found that American Investors did not rely on this exclusion in denying coverage. The jury returned a verdict in favor of Butler in the amount of $97,813.58, and the trial court entered judgment in this amount, plus a twelve-percent statutory penalty of $11,737.63, prejudgment interest of $11,673.31, costs of $5,928.61, and attorney's fees of $36,000. American Investors brings this appeal from the judgment.

American Investors first argues that the trial court erred in granting summary judgment to Butler on the basis that the policy exclusion for experimental treatment was ambiguous and unenforceable. Summary judgment is to be granted by the 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. *Stockton v. Sentry Ins.*, 337 Ark. 507, 989 S.W.2d 914 (1999). In reviewing a grant of summary judgment, an appellate court determines if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered. *Id.*

The trial court granted partial summary judgment to Butler, finding that the exclusion in the policy for experimental treatment did not apply as it was ambiguous, and that American Investors did not rely on that exclusion at the time of denial of Butler's claim. The relevant provision of this exclusion is as follows:

> *Experimental or Investigational Treatment.* Services and supplies that are, in [o]ur judgment, experimental or investigational for the diagnosis of the Insured Person being treated are excluded. Also excluded are services and supplies which support or are performed in connection with the experimental or investigational procedure. We shall have full discretion to determine whether services and supplies are experimental or investigational.

This provision further clarifies when a medical treatment may be deemed experimental or investigational, and in particular, states that a medical treatment that is the subject of ongoing phase I, II, or III clinical trials or is otherwise under study to determine its efficacy, as compared with a standard means of treatment, may be found to be experimental at American Investors's discretion. The procedure at issue in this case, HDC, was the subject of phase III trials for breast cancer at Butler's stage of development, and the trial court found that this procedure would be experimental under this provision, if it applied. However, the trial court found that the phrase "experimental or investigational for the diagnosis of the Insured Person" was ambiguous in that it was not clear whether "for the diagnosis" modified experimental, investigational, or both. Following the rule of insurance contract construction that requires the court to resolve ambiguities in the policy in favor of the insured, the trial court found that "for the diagnosis" modified experimental and investigational, and because the procedure at issue was for the treatment, not the diagnosis, of the insured, found that this provision did not apply in this case.

American Investors argues that this provision is not ambiguous, and we agree. The construction and legal effect of a written contract is a matter to be determined by the court, not the jury, except when the meaning of the language depends upon disputed extrinsic evidence. *Smith v. Prudential Property & Cas. Ins.*, 340 Ark. 225, 10 S.W.3d 846 (2000). Language is ambiguous when there is doubt or uncertainty as to its meaning or it is fairly susceptible of two interpretations. *Id.* Where the language in an insurance policy is ambiguous, the court must adopt the interpretation that is favorable to the insured. *Id.* However, language in an insurance

policy should be construed in its plain, ordinary, and popular sense. *Tri-State Ins. Co. v. Sing*, 41 Ark. App. 142, 850 S.W.2d 6 (1993).

Here, it seems clear by reading the entire provision, including the caption, "Experimental or Investigational Treatment," that "for the diagnosis" modifies only "investigational." Otherwise, only diagnostic services and supplies would be excluded under this clause, when it clearly pertains to both treatment and diagnosis. We will, however, affirm a ruling of the trial court, including a grant of summary judgment, where the trial court reached the correct result for the wrong reason. *Dunn v. Westbrook*, 334 Ark. 83, 971 S.W.2d 252 (1998) (holding that the trial court's grant of summary judgment was the right result, even though the trial court announced a wrong reason). The trial court also found that American Investors did not rely on this policy exclusion. American Investors did not mention this exclusion in its letter denying preauthorization or during the depositions of the employees responsible for making this decision. It was not until its motion for summary judgment that American Investors argued that this provision precluded coverage.

Moreover, another rule of contract construction supports the trial court's decision. Although the provision set out above generally excludes coverage for experimental treatment, another provision found in the exclusions section describes when the particular procedure, HDC, is excluded or covered under the policy. This HDC provision was the exclusion relied upon by American Investors when it denied coverage to Butler. The relevant portions of this provision are:

> *High Dose Chemotherapy.* High Dose Chemotherapy and all related procedures, including but not limited to autologous bone marrow transplantation, stem cell rescue or similar treatment or procedure designed to replace or rejuvenate bone marrow or peripheral blood cells. Other than for allogenic bone marrow transplantation, the only instances in which drugs, services or supplies associated with High Dose Chemotherapy and related procedures will be covered are in the following limited circumstances: . . .
>
> (6) For a diagnosis of metastatic breast cancer with (a) metastatic breast cancer patients who have not been previously treated with systemic Chemotherapy for metastatic disease; (b) metastatic breast cancer that is responding to primary systemic therapy; or (c) metastatic breast cancer that has relapsed after responding to first line treatment; and such patients have adequate marrow function with no evidence of marrow involvement in the disease;

In each of the nine limited cases outlined above, the following conditions must be satisfied in order for High Dose Chemotherapy to be a Covered Expense:

> (a) the patient's disease characteristics and treatment history suggest that the probability of achieving durable, complete remission are greater with High Dose Chemotherapy compared to standard treatment or conventional dose Chemotherapy; and
>
> (b) the patient does not have a concurrent condition which would seriously jeopardize the achievement of a durable, complete remission with High Dose Chemotherapy.

The applicable rule of contract construction states that where two provisions of a contract conflict, the specific provision controls over a more general provision, as it is assumed that the specific provision expresses the parties' intent. *English v. Shelby*, 116 Ark. 212, 172 S.W. 817 (1915); *Mutual Reserve Fund Life Ass'n v. Minehart*, 72 Ark. 630, 83 S.W.323 (1904). As the court noted in interpreting an exclusion to an insurance policy in *Home Mutual Fire Insurance Company v. Jones*, 63 Ark. App. 221, 229, 977 S.W.2d 12, 16 (1998), "it would be incongruous for an insurer to plainly include a risk only to exclude it a few paragraphs later." However, another rule of contract construction provides that a court should not give effect to one clause of a contract to the exclusion of another, even if they seem conflicting, if the court can adopt an interpretation that reconciles the various clauses. *Sturgis v. Skokos*, 335 Ark. 41, 977 S.W.2d 217 (1998). The object is to ascertain the intention of the parties from the entire context of the agreement. *Id.* Also, if there is an ambiguity in the contract, the court should give considerable weight to how the parties themselves construe it, as evidenced by subsequent statements, acts, and conduct. *Id.*

In this case, one provision of the policy broadly excludes all experimental treatment, while another provision addresses a specific procedure and describes the particular circumstances in which the procedure may be covered under the policy. The interpretation that gives effect to both clauses is that the procedure at issue, while it could be experimental, is a covered expense if certain conditions are met. This interpretation of the policy is also supported by the actions of American Investors. The deposition of Randy Coleman, the president of American Investors, showed that American Investors had granted another preauthorization request for HDC in a breast cancer case in the recent past. In addition, as

noted by the trial court, American Investors did not argue that Butler's claim was precluded by the experimental exclusion until its motion for summary judgment. In fact, Coleman stated in his deposition that his reason for denying coverage in this case was that Butler did not have metastatic cancer as required by the policy. Thus, the specific language governing HDC, the actions of American Investors in relation to other HDC claims, and American Investors's reason for denying Butler's claim are indicative of the intent of American Investors that HDC be a covered procedure as long as the conditions listed in the policy are met. Thus, we conclude it was not error for the trial court to grant summary judgment as to the experimental provision of the policy, as the rules of contract construction support the decision that this provision did not apply in this case.

American Investors next argues that the trial court erred in denying its motions for directed verdict and for judgment notwithstanding the verdict, in that the jury verdict is not supported by substantial evidence and it is entitled to judgment as a matter of law. The standard of review for the denial of a directed-verdict motion and a motion for judgment notwithstanding the verdict is whether there is substantial evidence to support the jury's verdict, reviewing the evidence and all reasonable inferences therefrom in the light most favorable to the party on whose behalf judgment was entered. *Anselmo v. Tuck*, 325 Ark. 211, 924 S.W.2d 798 (1996). Substantial evidence is that evidence which is beyond mere suspicion or conjecture and which is of sufficient force and character that it, with reasonable certainty and precision, compels a conclusion of the matter one way or another. *Id.*

There were two issues that the trial court found to be material issues of fact and the jury was instructed to focus on these issues and answer two interrogatories to decide if American Investors proved the two issues by a preponderance of the evidence. The two issues were (1) whether a diagnosis of metastatic cancer had been made, and (2) whether Butler's disease and treatment characteristics suggested that the probability of achieving remission was greater with HDC than with standard treatment or conventional-dose chemotherapy. The jury found that American Investors did not prove by a preponderance of the evidence that Butler was not diagnosed with metastatic cancer, or that Butler's disease and treatment characteristics did not suggest a greater probability of remission with HDC than with standard treatment.

Regarding the first issue, American Investors argues that there was not substantial evidence to support the jury's verdict on whether Butler was diagnosed with metastatic cancer because at the time approval for HDC treatment was sought, Butler was cancer-free. Dr. Walsh and Dr. Mroz both testified that Butler was diagnosed with metastatic breast cancer, as the cancer had spread to five of her lymph nodes. The pathology report of these lymph nodes indicates this fact. American Investors relies on a bone-marrow study, CT scans, and ultrasounds performed by Butler's physicians after her operation that indicated an absence of cancer in support of their argument that Butler was not diagnosed with metastatic cancer. However, the policy does not state when or how the diagnosis of metastatic cancer should be made. Given the testimony of Dr. Walsh and Dr. Mroz, two experts in the area of breast cancer, that they considered Butler to have been diagnosed with metastatic cancer, there is substantial evidence to support the jury's verdict that American Investors did not prove by a preponderance of the evidence that Butler was not diagnosed with metastatic cancer.

American Investors also argues that there was not substantial evidence to support the jury's finding regarding the probability of Butler achieving a greater remission with HDC than with conventional chemotherapy. Dr. Walsh stated that HDC was of great benefit and was medically necessary for Butler, and that, given Butler's lymph node involvement, HDC was a reasonable medical alternative and would "certainly prolong survival." Also, Dr. Mroz testified that with the aggressive nature of Butler's tumor and her young age, HDC would offer a much greater chance of survival and a normal life span than standard treatment would. Both Dr. Walsh and Dr. Mroz acknowledged that there were conflicting reports on the benefit of HDC as compared to conventional chemotherapy, and that further studies needed to be done. American Investors' two experts both stated that there was considerable controversy regarding the benefits of HDC for Butler's stage of breast cancer, and that the existing data was inconclusive where there was involvement of less than ten lymph nodes, as in Butler's case. American Investors points to these statements of their two experts and the testimony of Dr. Walsh and Dr. Mroz as support for their argument that there was no substantial evidence to support the jury's finding. However, there was testimony that there was a greater probability of achieving a complete remission with HDC than with standard treatment. The weight and value to be given the testimony of the witnesses lies within the exclusive province of the jury. *Anselmo v. Tuck, supra.* Thus, there was substantial evidence to support the jury's finding that American Investors did not prove by a preponderance of the

evidence that there was not a greater probability of Butler achieving a remission with HDC than with standard chemotherapy.

Affirmed.

BIRD and PITTMAN, JJ., agree.

Barbara SLATER *v.* STATE of Arkansas

CA CR 01-842 65 S.W.3d 481

Court of Appeals of Arkansas
Division II
Opinion delivered January 30, 2002

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

Mark Pryor, Att'y Gen., by: *David J. Davies*, Ass't Att'y Gen., for appellee.

JOHN F. STROUD, JR., Chief Judge. Appellant, Barbara Slater, was found guilty in a bench trial of the offense of theft by receiving. The value of the property was found to be in excess of $500 but less than $2500; therefore, the offense was a Class C felony. At her sentencing hearing, Slater was placed on probation for a period of three years, assessed a $100 fine, and ordered to pay court costs. Slater now appeals, arguing that there is insufficient evidence to support the conviction. We affirm.

At trial, Carmen Hearon testified that on March 6, 2000, she was employed at Best Buy in Sherwood, Arkansas. On that date,

appellant came to the customer-service desk in Best Buy wanting to purchase merchandise using two vouchers in the amounts of $800.47 and $96.01. Although appellant had the vouchers, she did not have the return receipts. Hearon testified that due to the fact that there was an investigation into the creation of fraudulent vouchers in the West Little Rock store, the management staff had instructed her to look up any voucher over $100 on the computer. Additionally, the voucher was also faded and difficult to read.

When Hearon looked up the vouchers, she learned that they were created in the West Little Rock store, although she could not tell which employee in that store had created the vouchers. She called the West Little Rock store and asked Joe Stancheck to look up the actual returns on that store's computer because she was unable to access that information from the Sherwood store. Stancheck was able to pull up the information immediately, but he was unable to provide the paperwork until the following day. Hearon told appellant that she needed the paperwork from the West Little Rock store before she could process the vouchers; appellant waited awhile and then said she would come back the next day.

Hearon testified that she did not have the actual vouchers at trial, that she only had copies, but that the copies were true and correct copies of the originals. She had given the original vouchers to Joe Stancheck. She testified that one could not tell if the vouchers were valid or invalid simply by looking at them; they had to be checked on the computer. She also could not determine when the original vouchers were created. When she asked appellant about the return receipts that were supposed to be attached to the vouchers, appellant said that she only had the vouchers, and that she had received them from a friend as a Christmas gift. However, appellant would not reveal the name of the friend who had given her the vouchers.

Joe Stancheck testified that he worked at the West Little Rock Best Buy in March 2000. He said that there was a problem in the West Little Rock store during that time with employees making no-receipt returns and issuing vouchers for merchandise that was never actually purchased. He said that employees would then give the vouchers to friends and family members or use the vouchers themselves in any of the Best Buy stores. The investigation began when it was discovered that employees of the West Little Rock store were redeeming vouchers in other stores because there was no reason for an employee of one store to go to another store to purchase merchandise.

Stancheck testified that he was contacted by Carmen Hearon on March 6, 2000, and asked to verify two vouchers. He verified that the vouchers were issued from the West Little Rock store, and he identified what merchandise was allegedly returned in exchange for the vouchers. However, when he performed a "cycle count" he found that neither product was in the store. Stancheck described a "cycle count" as the process by which it is determined whether an item is in the store. It is performed by first looking at the computer and determining what product is supposed to be in the store, and then doing an in-store accounting to see if the product is there. Stancheck verified that the vouchers had come from his store, but no product was in the store that had been returned from those vouchers. He also stated that he was unable to tell from merely looking at the vouchers whether they were stolen or not.

Brian Kaelin testified that he was working at the Sherwood Best Buy on March 6, 2000, when Carmen Hearon came to him questioning some vouchers. He said that Morie Artis, the Sherwood store's inventory manager, was contacted at the West Little Rock store. He stated that Artis and Stancheck researched the vouchers and determined that they were issued on merchandise that was never purchased. Kaelin said that through research, it was determined that both vouchers had originally been issued from the West Little Rock store, but one voucher had been partially redeemed at the Sherwood store, with a subsequent voucher being issued from the Sherwood store for the remaining credit.

When appellant came back to the Sherwood store the following day, Kaelin was told by Artis and Stancheck to call the Sherwood Police Department and have appellant arrested. When Kaelin asked appellant where she had obtained the vouchers, she said that she had gotten them from a friend, but she would not give any other information. Kaelin stated that you could not tell by looking at the vouchers that they were stolen, but reiterated that through research it was determined that products were never returned in exchange for the vouchers in question.

The State rested after Kaelin's testimony. At the close of the State's evidence, appellant's counsel made the following directed-verdict motion:

> The burden of proof is on the state, Your Honor, to prove that whoever possessed the vouchers knew they were stolen, that they were stolen. And if they didn't know, that they had good reason to believe that they were stolen and they also have to know what the

> value of them are. And I don't believe the state has, first off, proved that the vouchers were stolen. They say employees from their own store issued those vouchers to somebody. They can't tell us who they issued them to and I don't even know if they could tell us when they were issued. And we've had a conflicting testimony from their state's witnesses where the vouchers were even issued from. And I think the state has failed to meet their burden of proof on this matter and so I'd ask the Court to direct a verdict in the defendant's behalf.

The trial court denied the directed-verdict motion. Appellant rested without calling any witnesses and renewed her motion for directed verdict, which was again denied. Appellant now argues on appeal that there is insufficient evidence to support her conviction for theft by receiving. Specifically, appellant argues that the State failed to prove that the vouchers were stolen, that the vouchers had any intrinsic value, or that she knew the vouchers were fraudulent.

A directed-verdict motion is a challenge to the sufficiency of the evidence. *Ward v. State*, 64 Ark. App. 120, 981 S.W.2d 96 (1998). When the sufficiency of the evidence is challenged, we consider only the evidence that supports the verdict, viewing the evidence in the light most favorable to the State. *Harris v. State*, 72 Ark. App. 227, 35 S.W.3d 819 (2000). The test is whether there is substantial evidence to support the verdict, which is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or another. *Id.* Resolution of conflicts in testimony and assessment of witness credibility is for the fact-finder. *Id.*

A person commits the offense of theft by receiving if he receives, retains, or disposes of stolen property of another person, knowing that it was stolen or having good reason to believe it was stolen. Ark. Code Ann. § 5-36-106(a) (Repl. 1997); *Austin v. State*, 26 Ark. App. 70, 760 S.W.2d 76 (1988). The unexplained possession or control by a person of recently stolen property or the acquisition by a person of property for a consideration known to be far below its reasonable value shall give rise to a presumption that he knows or believes that the property was stolen. Ark. Code Ann. § 5-36-106(c).

Appellant's first argument, that the State failed to prove that the vouchers were stolen, is unpersuasive. The testimony from Joe Stancheck and Brian Kaelin established that the vouchers, which

are in-store credits that can be used like money, were issued for merchandise that was never purchased.

Appellant also argues that the State failed to prove that the vouchers had any intrinsic value. However, this argument was not made to the trial court. We will not address arguments made for the first time on appeal. *Ramaker v. State*, 345 Ark. 225, 46 S.W.3d 519 (2001).

Appellant's last argument is that the State failed to prove that she had knowledge that the vouchers were fraudulent. We disagree. Appellant told the employees at the Sherwood Best Buy store that she had received the vouchers from a friend as a Christmas gift, but she refused to give any more information, including the friend's name. In *Jenkins v. State*, 60 Ark. App. 1, 959 S.W.2d 57 (1997), this court upheld the appellant's conviction for theft by receiving, although she testified that she had received the jewelry (bracelet slides) in question as a gift from her boyfriend in Dallas, Texas, and did not know that the slides were stolen. In that case, the appellant also argued that it would be illogical for her to steal slides from a jewelry store and then return to the same store to have the slides put on her bracelet. In the present case, appellant contends that the fact that she returned to the store the next day is inconsistent with her having knowledge that the vouchers were stolen. However, when questioned about where she obtained almost $900 in vouchers, she would only say that she received them from a friend for Christmas and refused to give any further information. The finder of fact was not required to believe this explanation, especially in view of the fact that appellant refused to provide any information as to who had given her the vouchers. There is sufficient evidence to support appellant's conviction for theft by receiving.

Affirmed.

JENNINGS and CRABTREE, JJ., agree.

Laveris Darnell TOWNSEND *v.* STATE of Arkansas

CA CR 01-516 66 S.W.3d 666

Court of Appeals of Arkansas
Division II
Opinion delivered January 30, 2002

Huggins & Huggins, P.A., by: *Joel O. Huggins*, for appellant.

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

JOHN MAUZY PITTMAN, Judge. The appellant in this criminal case was charged with aggravated robbery, being a felon in possession of a firearm, and being a habitual offender. After a jury trial, he was convicted of those offenses and sentenced to imprisonment for twenty, ten, and ten years, respectively, to be served consecutively. From that decision, comes this appeal.

For reversal, appellant contends that the trial court erred in denying defense counsel's motion to withdraw as attorney of record after defense counsel learned that appellant had sued him in federal court for one million dollars; in denying appellant's motion to suppress his statement and a photo lineup; and in refusing to allow the defense to conduct a sequestered voir dire of the venire, and then refusing to grant a mistrial after one of the prospective jurors made an unsolicited reference to a rape charge that had been severed for trial at a later date. We find that appellant's first contention has merit, and we reverse and remand on that basis.

With regard to appellant's first argument, the record shows that appellant's defense counsel learned, the evening before trial, that

appellant had sued him for one million dollars in federal court, alleging that defense counsel had conspired with the Fayetteville Police Department to intentionally give appellant bad legal advice. On the morning of trial, defense counsel moved to be relieved as attorney of record on the grounds of irreconcilable differences, stating that he had not seen the lawsuit, but he had been reliably informed that such a lawsuit was filed. The trial judge questioned the appellant, who generally confirmed that such a lawsuit had indeed been filed. After a brief discussion, the trial judge denied the motion to be relieved as counsel, stating that:

> I do not quite understand, still to this point, what you have filed in federal court. Obviously I do not have a copy of it, but I see no reason why we cannot proceed today with the trial.

The United States Supreme Court recognized in *Holloway v. Arkansas*, 435 U.S. 475 (1978), that defense counsel is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial. The Supreme Court also stated in *Holloway* that defense attorneys have the obligation to advise the court at once upon discovering a conflict of interest. *See id.*; *see also Eveland v. State*, 54 Ark. App. 393, 929 S.W.2d 165 (1996). Pursuant to *Holloway, supra,* the trial court has a duty, when an objection at trial brings a potential conflict of interests to light, to either appoint different counsel or to take adequate steps to ascertain whether the risk of a conflict of interests was too remote to warrant different counsel. We agree with appellant's argument that the trial court failed to do so in the case at bar. Here, the record shows that the trial judge made only a cursory investigation of the circumstances of the asserted conflict, and summarily ruled on the motion to be relieved in the absence of any information concerning the lawsuit filed against defense counsel. Consequently, we reverse and remand on this point.

We address appellant's argument that the trial court erred in denying his motion to suppress his statement and a photo lineup because it is likely to recur on retrial. The record shows that appellant was walking down a street when he was stopped and questioned during an investigation of motel robberies and rape because his appearance was a close match to a description of the perpetrator. The record also shows that, although appellant was questioned for approximately thirty minutes, much of this time was spent attempting to verify false identification given by appellant to the investigating officers.

It is true that Ark. R. Crim. P. 3.1 generally allows a police officer to detain a felony suspect for only fifteen minutes to verify his identity of the lawfulness of his conduct. However, the Rule expressly provides that this time period may be enlarged so that the investigation may extend "for such time as is reasonable under the circumstances." Here, in light of the evidence that the investigation was lengthened as a result of the false identification given by appellant to the investigators, we cannot say that the additional fifteen minutes' detention was not reasonable under the circumstances.

With regard to the custodial statement made by appellant after he was arrested for criminal impersonation, we review the trial judge's ruling on the motion to suppress by making an independent determination based upon the totality of the circumstances, and we reverse only if the ruling is clearly against the preponderance of the evidence. *Wright v. State*, 335 Ark. 395, 983 S.W.2d 397 (1998). The credibility of witnesses who testify at a suppression hearing about the circumstances surrounding the appellant's in-custody confession is for the trial judge to determine, and we defer to the superior position of the trial judge in matters of credibility. *Id.* Here, there was evidence that appellant was no stranger to the criminal justice system, as well as testimony that appellant understood his *Miranda* rights and indicated that he did so. Under these circumstances, we cannot say that the State failed to prove that his custodial statement was voluntary.

We need not address the issue concerning the unsolicited reference to the severed rape charge during voir dire because it is not likely to recur on retrial.

Reversed and remanded.

JENNINGS and VAUGHT, JJ., agree.

GENERAL ELECTRIC COMPANY *v.* Lila GILBERT

CA 01-311 65 S.W.3d 892

Court of Appeals of Arkansas
Division II, III, and IV
Opinion delivered January 30, 2002

Snellgrove, Langley, Lovett & Culpepper, by: *Todd Williams*, for appellant.

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

WENDELL L. GRIFFEN, Judge. This appeal arises from a wrongful-discharge suit. Appellee, Lila Gilbert, was discharged by her former employer, appellant, General Electric Company. A jury found that appellant had wrongfully discharged appellee in violation of the public policy of Arkansas because she was seeking workers' compensation benefits. The jury awarded her $79,525.44, plus unspecified pension benefits. The trial court determined appellee's pension loss to be $1,965.45. Appellant appeals from the denial of its motion for a directed verdict and from the award of damages for pension benefits. We affirm the award of lost wages because the evidence shows that appellee presented a *prima facie* case of wrongful discharge, but the employer did not prove that it had a legitimate, nondiscriminatory basis for her discharge. However, we reverse with regard to the award of pension benefits because appellee did not specifically prove the amount of pension benefits to which she was entitled.

Appellee began working for appellant in 1973. She was diagnosed with carpal-tunnel syndrome and had surgery for the same in 1992. However, she continued to experience problems with her hands after surgery, and required further treatment. She was terminated in 1993 for being absent for ten days without providing a

medical excuse. Appellee eventually settled her workers' compensation claim against appellant for $6,500 in 1995. She filed a suit for wrongful discharge in May 1996.[1] The case proceeded to trial and appellant now appeals from the verdict and award of damages rendered in the subsequent trial.

Appellee began working for appellant in 1973 as an assembly-line worker. In August 1992, she was diagnosed as having carpal-tunnel syndrome in her left hand. At that time, Dr. C.A. McDaniel, an orthopedic doctor, ordered appellee to avoid work involving repetitive motion. In October 1992, she had carpal-tunnel-release surgery performed on that hand. Appellee received workers' compensation benefits, including payment for her medical treatment. After her surgery, a Dr. Jobe returned her to work with a ten-pound weight restriction and noted that she was still experiencing ongoing mild to moderate right carpal-tunnel symptoms. She returned to work wearing splints, but was unable perform the job she had been performing. Appellant moved her to a "winding" position because the work was less repetitive.

Appellee saw Dr. McDaniel again in May 1993. He ordered her to avoid repetitive motion work and heavy lifting until she saw Dr. Wood the following week (Dr. Wood replaced Dr. Jobe). Dr. Wood noted that appellee stated that she worked at a position with the minimal amount of repetitive motion possible at her company. He also ordered her to continue to perform light duty work. In June 1993, appellee still suffered pain in her left hand and arm and was diagnosed with possible carpal-tunnel syndrome in her right hand.

Appellee testified that she told Jean Nall, appellant's union relations specialist, that the winding job was too repetitive, but that Nall indicated that she was unable to move appellee to another position. Appellee continued to work at the winding position although it hurt her hands to do so. Due to difficulty in performing her work tasks, appellee was averaging only 100% of production,

[1] This is the second time these parties have been before this court in matters involving the same suit. Appellee previously appealed the trial court's grant of summary judgment in appellant's favor on the basis that she had not exhausted the arbitration/grievance procedure set forth in the collective bargaining agreement between the employer and the employees' labor union. In an unpublished case, we reversed and remanded, finding that the trial court erred in finding that the collective bargaining agreement unambiguously required appellee to exhaust her grievance remedy before pursuing a tort claim for wrongful discharge. *See Gilbert v. General Elec. Co.*, No. CA 98-1461, 1999 WL 714654 (Ark. App. Sept. 8, 1999).

while the rest of her co-workers averaged 129% of production. Richard Krafft, appellee's supervisor, verbally informed her on two occasions that she needed to increase her production. On April 12, 1993, he sent her a letter indicating:

> Your output to date has been acceptable on your current job. You have not yet reached the group average after being on your job for several weeks. At the present time, I am not placing you on lack of suitable work status. You have the opportunity to improve your production to an acceptable level. Starting immediately, your bottom level will be 100% of the group average. I want to see a 5% increase with each passing week.
>
> I will review your records weekly and follow your progress. If you fail to reach the acceptable levels stated, I will be forced to look into lack of suitable work status for you.

Appellee thought that the letter meant that she would be fired. She took the letter to Tom Scott, her union representative, who informed Krafft that appellee was not required to average above 100%. She thereafter received no further reprimands with regard to her production.

Appellee continued to experience pain, tingling, and swelling with her hands. On June 1, she saw Dr. Mahon, another orthopedist who had previously treated her. He did not release her from work, so she returned to work. She testified that on June 9, she went to Mary Ann Cornish, the company nurse, and showed Cornish that her hands were swollen and told her that she needed to see a doctor.

According to appellee, Cornish told her to wait until Cornish made an appointment through Carol Kriss, appellant's workers' compensation representative. Appellee said she went home and called in the next five days and reported to Cornish, who was having problems scheduling the appointment. Appellee also unsuccessfully attempted to contact Kriss. On or around June 16, Cornish left a message on appellee's answering machine stating that she had an appointment set up for June 23. When appellee returned Cornish's call, Cornish told her to call in every night to inform the guard that she was not going to be at work.

Appellee stated that one night when she called and informed the guard of her absence, Krafft spoke with her on the phone. He asked how she was doing, and she told him that her hands were

getting worse. He also asked if she would be able to come back to work soon, and she told him that she did not know. Appellee informed him that Cornish scheduled a doctor's appointment for her on June 23. She said Krafft told her to stay home and take care of herself and keep them informed.

On June 16, Cornish received an e-mail from Krafft. His message stated:

> I believe Lila Gilbert has been out for the last five working days. I've tried to call her, but her number listed in the company records has been disconnected. She calls in each night saying she will not be in, but doesn't leave a message. Could you please find out how she is doing or if you know, let me know her status? I've instructed the guard to get me a telephone number where she can be reached.

Cornish responded to Krafft the same day via e-mail:

> What can I tell you about Lila Gilbert? Lila's chief complaint at this time is "hand pain." Her medical evaluation in May stated that she should continue her "light duty work." She requested a change of physicians and had recently been evaluated by a local orthopedist. I have not seen the written report, but a verbal report from our claims administrator indicates that she has been released for work. Lila has requested another appointment with this orthopedist and I will be calling this office today. It appears Lila's absences are self-imposed. We are working very hard to close this case.

Appellee saw Dr. Mahon again on June 23, 1993. On June 28, 1993, Dr. Mahon sent the following letter to the company that processed workers' compensation claims for appellee:

> Upon the request of Ms. Cornish, the General Electric Nurse, I did again see Ms. Gilbert in the office June 23rd. Examination findings remain unchanged from those previously reported to you. *I again advised Ms. Gilbert if she continues to do repetitive activities, probability of recurrence or more difficulty is much greater. We discussed the possibility of her changing jobs.* She also wished to have medical release from work, but I advised her this was not possible, as I felt she could continue working.

(Emphasis added.)

On June 24, appellee called to speak with Nall. The purpose of this call is disputed. Appellee maintains she called to report back to

work, but appellant notes that in her deposition she stated when she called to inform them that she was off for a week *with her cyst*, she was fired. However, it is undisputed that appellee was fired when she called on June 24. Nall informed her that she no longer had a job there because she had not called in and had not informed them regarding the reasons for her absences. Nall also told her she was being terminated because she was absent for two weeks without a doctor's note.

After appellee was terminated, she sought assistance from Scott. He spoke with Nall and told appellee that if she could get a doctor's note for the two weeks that she was absent, she could return to work. Appellee never submitted a doctor's note to appellant. Nor did she file a grievance with the union. She settled her workers' compensation claim with appellant in 1995 and filed a wrongful discharge suit against appellant in May 1996. The case proceeded to trial on November 2, 2000.

In *Wal-Mart, Inc. v. Baysinger*, 306 Ark. 239, 812 S.W.2d 463 (1991), the Arkansas Supreme Court recognized that as a matter of public policy, the common-law doctrine of employment-at-will does not bar a suit for wrongful discharge where the former employee alleges that she has been discharged in retaliation for filing a workers' compensation claim. In 1993, the General Assembly amended the workers' compensation statutes to eliminate the *Baysinger* cause of action. *See* Ark. Code Ann. § 11-9-107(d), (e) (Repl. 1996). This statute was effective as of July 1, 1993; however, because appellant was discharged prior to July 1, 1993, her *Baysinger* cause of action was not abrogated by the General Assembly.

The burden of proof to establish a *prima facie* case of wrongful discharge is upon the employee. *See Wal-Mart, Inc. v. Baysinger*, 306 Ark. 239, 812 S.W.2d 463 (1991). A *prima facie* case is made by presenting substantial evidence that the workers' compensation claim was a cause of the discharge. When an employee has made a *prima facie* case of retaliation, or wrongful discharge, the burden shifts to the employer to prove that there was a legitimate, non-retaliatory reason for the discharge. *See id.*

In ruling on a motion for a directed verdict, the trial court must view the evidence that is most favorable to the nonmoving party and give it its highest probative value, taking into account all reasonable inferences deducible from it. *See Burns v. Boot Scooters, Inc.*, 61 Ark. App. 124, 965 S.W.2d 798 (1998). If the evidence is so insubstantial as to require that a jury verdict for the nonmoving

party be set aside, then the motion should be granted. If, however, there is substantial evidence to support a jury verdict for the non-moving party, then it should be denied. *See id.* Substantial evidence is that which is of sufficient force and character that it will compel a conclusion one way or another. It must force or induce the mind to pass beyond a suspicion or conjecture. *See id.*

We hold that the trial court did not err in denying appellant's motion for a directed verdict. Appellee was not required to present *prima facie* evidence that her workers' compensation claim was the *sole* factor in her termination, only *one* factor. *See Wal-Mart v. Baysinger, supra.* Moreover, to withstand a motion for a directed verdict appellee was only required to raise a reasonable inference that her workers' compensation claim was a factor in her termination.[2]

Here, appellee presented evidence that she had filed a workers' compensation claim for which she was still receiving treatment, that

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[2] The dissent argues that we drew unreasonable inferences in concluding that appellee proved a *prima facie* case of wrongful discharge. This argument merely reinforces our holding that the trial court properly concluded that the case should not have been dismissed on a motion for a directed verdict. Whether the evidence reasonably supports an inference is a question of fact for a jury to determine. If reasonable minds can differ about the conclusions to be drawn from a set of facts, as the dissenting opinion vividly demonstrates, then the issue is properly decided by a jury, not on a motion for a directed verdict. *See Morehart v. Dillard Dep't Stores,* 322 Ark. 290, 908 S.W.2d 331 (1995). The question we determine on appeal is not whether we agree with the inferences drawn by the jury, but whether the *facts support* the inferences drawn by the jury. *See Burns v. Boot Scooters, Inc., supra.*

Further, although the dissenting opinion recognizes that the a *prima facie* case of wrongful discharge will ordinarily be proved by circumstantial evidence, it ignores the circumstantial evidence in this case by finding no evidence in the record: (1) that appellant disregarded medical orders or forced appellee to continue to work in a job that violated her medical restrictions; (2) to support appellee's "opinion" that she was terminated because she filed a workers' compensation claim; (3) that management displayed an antagonistic attitude toward her injuries; or (4) that appellant demonstrated a pattern of terminating employees who filed such claims.

Our opinion clearly sets forth the evidence that appellant disregarded medical orders, forced appellee to continue to work in a job that violated her medical restrictions, and displayed an antagonistic attitude toward her injuries. Further, our opinion clearly declares the evidence supporting an inference that appellee was fired because she filed a workers' compensation claim. We did not base our holding on appellee's "opinion" about why she was fired. Finally, while evidence of a pattern of termination against workers' compensation claimants is certainly proof of an employer's animus, the dissenting opinion cites no authority requiring a claimant to prove that such a pattern exists in order to meet her *prima facie* case. The *real* inquiry is whether there was any evidence creating an inference of retaliation, not whether the employer displayed a pattern of animus toward injured workers seeking compensation benefits.

management had displayed an antagonistic attitude toward her injuries, and that she was fired while she was absent for work due to the injuries that led to her workers' compensation claim. Appellee filed a workers' compensation claim based upon carpal-tunnel syndrome and her claim was continuing. As early as August 1992, Dr. McDaniel advised appellee to avoid repetitive work and none of appellant's doctors appeared to have removed this restriction, which is consistent with an ongoing diagnosis of carpal-tunnel syndrome.

Moreover, appellee testified that Dr. Mahon advised her on June 23 against activities involving repetitive motion and advised her to change jobs. Her testimony is corroborated by Dr. Mahon's notes from June 23, which indicate that he *again* advised appellee that if she continued to perform repetitive activities, "the probability of recurrence or more difficulty is much greater" and that they "discussed the possibility of her changing jobs." If he *again* advised her on June 23, then he must have so advised her on at least one prior occasion. Despite these medical orders, however, appellant forced appellee to continue to work at a position that violated her medical restrictions.

Further, there was substantial evidence that management displayed an antagonistic attitude toward appellee. Her supervisor reprimanded her three times with regard to her production level and threatened to place her on lack of suitable work status, which could eventually lead to termination, even though under the union's rules this threat was unjustified because she was averaging 100% of production. In addition, the correspondence between Krafft and Cornish shows that management knew that she was having problems with her hands, knew that she was calling in as instructed to report her absences, knew that she was absent from work and why, and knew that she was waiting on Cornish to schedule a doctor's appointment. Additionally, Cornish's e-mail reflects a less-than-tolerant attitude towards appellee and shows that Cornish felt the need to assure Krafft that appellee's compensation claim would be resolved soon. Finally, Nall testified that employees who are absent for five days without a doctor's note receive disciplinary action short of termination. However, appellee never received *any* disciplinary action short of termination related to these absences. On these facts, the evidence was sufficient to support the jury's finding that appellee's workers' compensation claim was a factor in her termination.

We also hold that the trial court did not err in denying appellant's motion for a directed verdict because appellant did not

present substantial evidence showing that it had a legitimate, non-discriminatory basis for discharging appellee. Appellant maintains that appellee was terminated for violating a provision in the "National Agreement" or collective bargaining agreement provision, concerning continuity of service. This section of the agreement states in pertinent part:

> Loss of Service Credits and Continuity of Service.
>
> Service credits previously accumulated and continuity of service, if any, will be lost whenever the employee:
>
> Quits, dies, resigns, retires or is discharged.
>
> Is absent from work for more than two consecutive weeks without satisfactory explanation.
>
> Is absent from work because of personal illness or accident and fails to keep the Company notified monthly, stating the probable date of his return to work.

Appellant maintains that appellee was discharged because she violated this provision by missing work for ten consecutive days without obtaining a medical excuse for doing so. The short answer to appellant's argument is that this provision does not provide any ground for terminating employees. Rather, this provision provides the basis for withholding or granting *service credits*, which are used to determine an employee's seniority status with regard to lay-offs, job transfers, reductions in force, work recalls, and accrual of vacation and personal days. Nothing in this provision provides that the employer may *terminate employment* for missing two consecutive weeks without a doctor's note, and appellant presented no evidence of any other personnel policy stating that an absence based on medical reasons requires a doctor's excuse.

Even if the loss-of-service provision provided appellant with a basis for termination, this provision does not specifically require a medical excuse; it only requires a satisfactory explanation. Further, if a satisfactory explanation was required, a jury could have found that one was given, because the evidence shows that management was aware of appellee's absences and why she was absent.

Cornish maintained that she was unaware that appellee was not working until she received the e-mail from Krafft. However, this

assertion is contradicted by Cornish's testimony that she told appellee that she was expected to call in. Cornish knew that appellee continued to have problems with her hands, was absent because she was experiencing problems with her hands, and was awaiting a doctor's appointment. She instructed appellee to call in, as did Krafft. Further, the e-mail from Krafft shows that he also knew appellant was absent and was calling in.

Appellant argues that appellee cannot have a satisfactory explanation absent a medical excuse where she was absent for medical reasons. However, the evidence in this case shows that appellant had no policy requiring a doctor's note for absences in excess of five days and that management was fully apprised of appellee's absences. We hold that this was substantial evidence to support the jury's verdict.

While we affirm the denial of appellant's motion for a directed verdict, we reverse with respect to the award of pension benefits. Although appellee proved her *prima facie* entitlement to pension benefits, she failed to specifically prove the amount of pension benefits to which she was entitled.

The proper measure of damages in a public-policy wrongful-discharge action is the sum of lost wages from termination until day of trial, less sum of any wages that an employee actually earned or could have earned with reasonable diligence; additionally, an employee may recover for any other tangible benefit lost as a result of the termination. *See Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 743 S.W.2d 380 (1988). The party asserting entitlement to damages has the burden to prove the claim. *See Milligan v. General Oil Co.*, 293 Ark. 401, 738 S.W.2d 404 (1987). Damages must not be left to speculation and conjecture. *See Pennington v. Harvest Foods, Inc.*, 326 Ark. 704, 934 S.W.2d 485 (1996).

Appellant concedes that if appellee was entitled to damages, she would be entitled to damages for lost pension benefits from her last day of work to the date of the trial, but maintains that nothing in the evidence submitted by appellee provides a means by which to establish a judgment amount. We agree.

The jury entered an award for "damages of $79.535.44 plus 10% interest plus pension." Appellee submitted into evidence a check stub dated May 23, 1993, showing her pension gross as of that date of $5,615.58. She testified that she began working for appellee in 1973 and had worked there for twenty years. However,

appellee also testified that there were numerous times when she was laid off during that twenty-year period. Although there was no testimony presented as to the means by which appellant calculated appellee's pension benefits, or whether her pension benefits continued to accumulate during those periods of layoff, the trial judge apparently divided the pension gross by the number of years appellee had worked for appellant, resulting in a pro rata figure of $280 per year in pension benefits received. The trial judge then apparently multiplied that figure by the approximate term of the seven-plus years between appellee's termination and her trial, to reach the figure awarded, $1,965.45.

We hold that the evidence was insufficient to specifically prove the amount of appellant's lost pension benefits. We recognize that the trial judge attempted to fashion a remedy based on sparse evidence in the record that was related to lost pension benefits. However, in the absence of evidence showing how appellee's benefits accumulated and whether her pension benefits continued to accumulate during periods of layoff, the trial judge had to assume that appellee continually and uniformly accumulated pension benefits during her twenty-year period of employment. This assumption is not supported by the evidence. Further, we do not believe that remand for reconsideration to the trial judge would be constructive because there is nothing in the record that he has not already considered that would enable him to properly render an award for lost pension benefits.

Therefore, we affirm with respect to the denial of appellant's motion for a directed verdict, but reverse with respect to the award of lost pension benefits.

Affirmed in part; reversed in part.

ROBBINS, NEAL, VAUGHT, and BAKER, JJ., agree.

PITTMAN, J., concurs.

BIRD, CRABTREE, and ROAF, JJ., dissent.

SAM BIRD, Judge, dissenting. I agree with the majority opinion in its reversal of the trial court for its award of damages to Gilbert for lost pension benefits. However, in my view the case should be reversed in its entirety and dismissed because of Gilbert's failure to present substantial evidence that constitutes a *prima facie*

case that she was discharged from her employment in retaliation for her filing of a workers' compensation claim.

This court will affirm a denial of a motion for directed verdict if the verdict is supported by substantial evidence. *Pettus v. McDonald*, 343 Ark. 507, 36 S.W.3d 745 (2001). We review the evidence and all reasonable inferences arising therefrom in the light most favorable to the party on whose behalf judgment was entered. *D.B. Griffin Warehouse, Inc. v. Sanders*, 336 Ark. 456, 986 S.W.2d 836 (1999). We have long held that substantial evidence is not present where a factfinder is merely given a choice of possibilities which require the jury to conjecture or guess as to a cause. *Morehart v. Dillard Dept. Stores*, 322 Ark. 290, 908 S.W.2d 331 (1995).

The burden of proving a *prima facie* case of wrongful discharge is on the employee. *Wal-Mart, Inc. v. Baysinger*, 306 Ark. 239, 812 S.W.2d 463 (1991). As the majority observes, in meeting that burden, Gilbert was not required to prove that her workers' compensation claim was the sole reason for her termination, but only one factor. *Id.* However, an employee does not meet her burden by merely pointing to the fact that she has been discharged. *Clair v. District of Columbia Dep't of Empl. Servs.*, 658 A.2d 1040 (D.C. 1995). To prove the necessary retaliatory animus, the employee must make some additional showing beyond the discharge. *Id.*; *see also Flentje v. First Nat'l Bank of Wynne*, 340 Ark. 563, 574, 11 S.W.3d 531, 539 (2000) (explaining that Flentje's own perception of her supervisor's actions, without a supporting affidavit or other form of proof, was insufficient to support a reasonable inference of discriminatory intent). For example, an employee can meet her burden by showing that the employer has engaged in a similar pattern against other employees, or by evidence that a supervisor uttered words such as, "I'll teach you to file a workers' compensation claim." 6 Arthur Larson, *Larson's Workers' Compensation Law*, § 68.36(c) (2000). No evidence of this nature was offered by Gilbert.

Ordinarily the *prima facie* case must, in the nature of things, be shown by circumstantial evidence, since the employer is not apt to announce retaliation as its motive. *See id.* § 104.07[3]; *Mapco v. Payne*, 306 Ark. 198, 812 S.W.2d 483 (1991). Professor Larson sets out the typical beginning point for presenting a *prima facie* case as proximity in time between the claim and the firing, coupled with evidence of satisfactory work performance and supervisory evaluations. *Id.* No close temporal proximity existed between Gilbert's claim and the date of her termination. Gilbert filed her workers'

compensation claim in October of 1992 and she was fired on June 24, 1993, a time span of nine months. The remaining circumstantial evidence in this case fails to establish a fact issue for the jury, even when all reasonable inferences are drawn, that Gilbert was terminated in retaliation for filing a workers' compensation claim.

In my opinion, there is no evidence in the record, substantial or otherwise, to support a finding that Gilbert was terminated in retaliation for filing a workers' compensation claim. While this court, when asked to review a denial of a motion for directed verdict, views not only the evidence, but also all reasonable inferences deducible from the evidence, in a light most favorable to the appellee, *see ERC Mortgage Group, Inc. v. Luper*, 32 Ark. App. 19, 795 S.W.2d 362 (1990), I do not believe that any inferences can be drawn from the evidence presented by Gilbert that support a *prima facie* case. In a lengthy footnote, the majority opinion suggests that the mere fact that the dissenting judges disagree about the reasonableness of inferences that can be drawn from the evidence supports the trial court's decision to deny Gilbert's motion for directed verdict. In making this suggestion, the majority misses the point of the dissenting opinion. The point of this dissenting opinion is that there was not any evidence presented by Gilbert that was legally sufficient to warrant a verdict in her favor.

In the same footnote, the majority states that whether the evidence reasonably supports an inference is a question of fact for a jury to determine. However, in a dissenting opinion in *Burns v. Boot Scooters, Inc.*, 61 Ark. App. 124, 130, 965 S.W.2d 798, 801 (1998) (emphasis added), the author of the majority opinion in the case at bar recognized that:

> It is well settled that where there is any evidence tending to establish an issue in favor of the party against whom the verdict is directed, it is error to take the case from the jury. *Hardeman, Inc. v. Hass, Co.*, 246 Ark. 559, 439 S.W.2d 281 (1969). "Any evidence" means evidence legally sufficient to warrant a verdict. To be legally sufficient, the evidence must be substantial, and *substantiality is a question of law for the trial court to decide. Id.*

Thus, whether the evidence reasonably supports an inference is a question of fact for a jury to determine only so long as the trial court, upon a motion for directed verdict, has determined, as a matter of law, that substantial evidence is present on which the jury *could* base a verdict for the non-moving party. The question of whether evidence was present on which the jury *should* have based a

verdict for the non-moving party is not the issue on appeal and it is not the issue upon which the majority and I disagree.

Following her return to work in January 1993, Gilbert was periodically examined by doctors at Campbell's Clinic, where her surgery had been performed. On March 26, 1993, she was examined by Dr. Jobe, whose records reflect that on that date Gilbert was "doing much better." On May 12, she was examined by Dr. Wood, whose clinic notes state that Gilbert told him that the job she was doing at General Electric involved the minimum amount of repetitive motion possible. After a physical examination, Dr. Wood noted that Gilbert "should continue her light work as noted." On June 1, Gilbert was again examined by Dr. Mahon, who concluded that Gilbert had reached maximum healing from her left carpal tunnel release surgery and assigned a five-percent permanent physical impairment rating to her left arm below the elbow. He assigned no permanent impairment rating to her right arm. As already mentioned, following Dr. Mahon's examination of Gilbert on June 23, he also concluded that she could continue working.

It is noteworthy that from the time Gilbert was released for return to work on January 18, 1993, through June 23, 1993, none of her doctors considered it necessary that she be relieved from work. Despite her lack of a medical work release, Gilbert chose not to work during the two-week period between June 9 and June 23, 1993, without obtaining permission for such absenteeism from her supervisor or any other member of management.

No evidence in the record supports the majority's assertion that General Electric disregarded medical orders or "forced" Gilbert to continue to work in a job that violated her medical restrictions. Rather, the evidence is clear that because Gilbert was restricted to a ten-pound lifting limit upon her return to work, General Electric assigned her to different duties that were less repetitive and met the weight restriction. Gilbert testified that in spite of the new job assignment, her condition continued to worsen. Therefore, on June 9, 1993, she went to the company nurse, showed the nurse her swollen hands, and requested to again be sent to a doctor. The nurse scheduled the appointment and on June 23, Gilbert was seen by Dr. Mahon, an orthopedic surgeon. Dr. Mahon refused to give her a medical release from work because he "felt that she could continue working."

An examination of the abstract of Gilbert's testimony reveals that although she "understood" that she "was to stay home and take care of [her]self" while awaiting an appointment with Dr. Mahon, she did not testify that the nurse or any other General Electric employee authorized or instructed her not to report for work. Gilbert's "understanding" that she was to stay at home does not allow for a *reasonable* inference that she was to miss two weeks of work without informing her supervisor or other management of her reasons for failure to work.

Gilbert testified that when she talked to Richard Krafft, her supervisor, he asked how she was doing and whether she was going to be able to return to work anytime soon. Gilbert testified that when she told Krafft that she did not know when she could return, he told her "to stay home and take care of myself and keep them informed." However, it is clear from the record that this conversation did not take place until after Gilbert had already been absent from work for at least a week, because on June 16, Krafft e-mailed the company nurse inquiring about Gilbert's status and informing her that Gilbert had been absent the last five working days and that he had been unsuccessful in attempts to contact her. Even if Krafft said what Gilbert attributed to him, that statement cannot be inferred as a grant of approval for her absence when she had already missed a week of work without either requesting or receiving his permission to stay home.

Not surprisingly, when Gilbert called General Electric on June 24, she was told that she had been terminated as a result of her failure to report to work for two weeks without a doctor's work release. Gilbert testified that when she complained to her union representative, Tom Scott, about her termination, Scott called back and told her that General Electric had agreed to reinstate her if she could obtain a medical work release for the two weeks.

The only evidence that even remotely suggests that Gilbert was terminated because she had filed a workers' compensation claim is Gilbert's own speculation that, in her "opinion," she was fired because she had filed a workers' compensation claim and her left hand was getting worse. There is absolutely no factual evidence in the record that supports Gilbert's opinion. Furthermore, the medical reports available to General Electric showed only that Gilbert's left hand "continued to improve," that she had reached maximum healing, and that she was released to return to work.

Additionally, there is no evidence to support the majority opinion's assertion that "management had displayed an antagonistic attitude toward her injuries." In fact, the evidence is entirely to the contrary. From the date of diagnosis of Gilbert's carpel tunnel condition until her termination, General Electric provided full workers' compensation benefits. After Gilbert returned to work in January 1993, her work restrictions were accommodated by moving her to a job that involved less repetitive motion and lifting. By Gilbert's own admission, her substitute job involved the least repetitive motion of any job available at General Electric. Even after she was released from treatment on June 1, 1993, another doctor's appointment was scheduled when Gilbert continued to complain of pain. This is not evidence of antagonism to Gilbert's claim; quite to the contrary, it is evidence that General Electric was trying to do everything it could to return Gilbert to work as a fully-productive employee.

Nor was there any evidence of a pattern on the part of General Electric in terminating employees who filed workers' compensation claims. In fact, the evidence established that for a period of five years surrounding her discharge, Gilbert was the only one out of 109 workers' compensation claimants at General Electric to be involuntarily discharged.

In *Wal-Mart, Inc. v. Baysinger, supra,* Baysinger was discharged from her employment for the stated reason that her doctor reported Baysinger's medical condition to be such that "continued exposure to this type work could lead to more serious injury." The difficulty with Wal-Mart's reason for Baysinger's discharge was that the doctor had not made such a report, and the doctor testified that he could not recall saying such a thing. In the case at bar, there is no such inconsistency between the medical reports and General Electric's reason for discharging Gilbert. All of the doctors who examined Gilbert after her return to work on January 18 said that she could continue to work, and they declined to release her. All of the actions taken by General Electric were directed at getting Gilbert back to work. The only conduct that was inconsistent with the doctors' reports was Gilbert's decision that she needed to stay home, despite the unanimous opinions of her three doctors that she was able to work within the ten-pound lifting restriction.

Gilbert has not met her burden of proving that her workers' compensation claim was a factor in her termination. The only conclusions supported by the evidence presented by Gilbert, and reasonable inferences therefrom, are that she sustained an injury on

her job; that the injury was readily accepted as compensable; that General Electric provided Gilbert with all the benefits to which she was entitled under the Workers' Compensation Act; that General Electric made every effort to accommodate Gilbert's condition upon her return to work, but that, notwithstanding her doctor's refusal to release her from work, she did not come to work for two weeks; that despite such absenteeism, General Electric offered to reinstate Gilbert's employment if she could provide a medical release for the time during which she was absent from work; and that there is no pattern of retaliatory discharge at General Electric. General Electric terminated Gilbert nine months after the filing of the claim, during which time it offered working conditions within her restrictions. This time delay cannot be said to constitute close proximity in time between the filing of the workers' compensation claim and termination of employment. Gilbert's evidence merely consisted of two elements; that she had filed a workers' compensation claim and that she was later discharged. This alone cannot constitute a *prima facie* showing of wrongful discharge, see *Clair v. District of Columbia Dep't of Empl. Servs., supra*, and is not substantial evidence on which a jury could base a verdict for Gilbert.

To find a *prima facie* case of wrongful discharge in this case, one would have to engage in impermissible speculation and conjecture. The jury was given a choice of possibilities that required them to conjecture or guess as to the cause of Gilbert's termination. Accordingly, the trial judge's failure to grant General Electric's motion for directed verdict was clearly erroneous, and the jury verdict should be reversed and the case dismissed.

CRABTREE and ROAF, JJ., join in this dissent.

PIERCE ADDITION HOMEOWNERS ASSOCIATION, INC. *v.* CITY of VILONIA PLANNING COMMISSION and Lloyd Stone

CA 00-1262 65 S.W.3d 485

Court of Appeals of Arkansas
Division IV
Opinion delivered January 30, 2002

Marcus Vaden, for appellant.

Wright, Lindsey & Jennings LLP, by: *John William Spivey III* and *Stephen R. Lancaster*; and *Thomas N. Kieklak*, for appellees.

OLLY NEAL, Judge. This appeal derives from a Faulkner County Circuit Court order dismissing with prejudice appellant's emergency petition for stay of approval of a subdivision and issuance of a building permit. Because the circuit court lacked jurisdiction due to appellant's failure to prepare and certify the record pursuant to Inferior Court Rule 9, we reverse and dismiss.

Appellee Lloyd Stone petitioned the City of Vilonia's Planning Commission for approval of a preliminary plat of a subdivision, Benton Addition. The Control of Development and Subdivision of Land Regulations for the City of Vilonia require, in part, that the applicant provide notice to adjoining and affected property owners.

As part of the petition process, Stone allegedly notified two adjacent property owners of his application for a preliminary plat,

and on July 29, 1999, the Planning Commission approved the preliminary plat for construction of six homes in the subdivision. A building permit was issued and Stone began construction.

Appellant objected to the Commission's approval of the preliminary plat, claiming that its members were not properly notified of Stone's application. In response, on August 19, 1999, the Commission requested that Stone temporarily cease work until the issue could be addressed. Stone provided additional notice to all other landowners who were affected by the subdivision. On September 30, 1999, the Commission again approved the preliminary plat and authorized Stone to continue construction, finding that he had met all the requirements necessary for approval of the preliminary plat and issuance of the building permit.

Appellant subsequently filed an appeal and emergency petition for stay of approval to the circuit court. The circuit court entered an *ex parte* order staying the Commission's ruling, but finally reached the decision that Stone had met all of the necessary requirements and dismissed appellant's appeal with prejudice. It is from that decision that the Pierce Addition Homeowners Association brings this appeal.

Appellant's sole argument on appeal is that the trial court erred in failing to hold a trial *de novo* as required by Arkansas law. Counsel for appellees asserts that the trial court should be affirmed because 1) the association failed to perfect its appeal to the circuit court; 2) Arkansas Code Annotated section 14-56-425 (Repl. 1998) does not guarantee appellant a trial; and 3) the association's appeal was properly dismissed as it had no chance of success on the merits.

Appeals from final action taken by the administrative, quasi-judicial, and legislative agencies may be taken to circuit court and must be filed in the manner provided under Rule 9 of the Arkansas Inferior Court Rules. *See* Ark. Code Ann. § 14-56-425 (Repl. 1998); *see also Board of Zoning Adjustment v. Cheek*, 328 Ark. 18, 942 S.W.2d 821 (1997). The provisions of Inferior Court Rule 9 are mandatory and jurisdictional; if an appellant does not comply with the rule's provisions, the circuit court is without authority to accept the appeal. *J & M Mobile Homes, Inc. v. Hampton*, 347 Ark. 126, 60 S.W.3d 481 (2001). When a party fails to perfect an appeal from an inferior tribunal to a circuit court in the time and manner provided by law, the circuit court never acquires jurisdiction of the appeal. *Id.*; *see also Board of Zoning Adjustment, supra.*

Rule 9 of the Arkansas Inferior Court Rules governs appeals taken from agencies like the City of Vilonia Planning Commission to the circuit courts; that rule provides, in pertinent part, as follows:

> (a) *Time for Taking Appeal.* All appeals in civil cases from inferior courts to circuit courts must be filed in the office of the clerk of the particular circuit court having jurisdiction of the appeal within thirty (30) days from the date of the entry of the judgment.
>
> (b) *How Taken.* An appeal from an inferior court to the circuit court shall be taken by filing a record of the proceedings had in the inferior court. It shall be the duty of the clerk to prepare and certify such record when requested by the appellant and upon payment of any fees authorized by law therefor. The appellant shall have the responsibility of filing such record in the office of the circuit clerk.
>
> (c) When the clerk of the inferior court, or the court in the absence of a clerk, neglects or refuses to prepare and certify a record for filing in the circuit court, the person desiring an appeal may perfect his appeal on or before the 30th day from the date of the entry of the judgment in the inferior court by filing an affidavit in the office of the circuit court clerk showing that he has requested the clerk of the inferior court [or the inferior court] to prepare and certify the records thereof for purposes of appeal and that the clerk [or the court] has neglected to prepare and certify such record for purposes of appeal. A copy of such affidavit shall be promptly served upon the clerk of the inferior court [or the court] and the adverse party.

Here, appellant has failed to meet these requirements. On September 30, 1999, the Vilonia Planning Commission made its final ruling allowing Lloyd Stone to resume construction. The Association filed its notice of appeal of this decision on October 6, 1999. Pursuant to the applicable Arkansas Inferior Court Rule 9, the Association had until October 30, 1999, to perfect its appeal by filing with the circuit court a certified copy of the record of the proceedings before the Planning Commission. Otherwise, it could file an affidavit with the circuit clerk showing that a request had been made to the inferior court clerk to prepare and certify the records for appeal and that the clerk neglected to do so.

Our review of the record reveals that the appeal was not properly before the circuit court. On October 28, 1999, appellants

filed the minutes to several Planning Commission meetings. These documents, however, were not certified from the inferior court or an inferior court clerk; nor was there an affidavit showing that appellants requested preparation and certification of the record and that the inferior court or its clerk neglected to prepare and certify such records. When the trial court lacks jurisdiction, the appellate court also lacks jurisdiction. *See Koonce v. Mitchell*, 341 Ark. 716, 19 S.W.3d 603 (2000). Here, the circuit court lacked jurisdiction to enter an order.

We reverse and dismiss.

ROBBINS and ROAF, JJ., agree.

Ronnie MOORE *v.* MIDWEST DISTRIBUTION, INC.

CA 01-763 65 S.W.3d 490

Court of Appeals of Arkansas
Division II
Opinion delivered January 30, 2002

Warner, Smith & Harris, PLC, by: *Matthew C. Carter*, for appellant.

Jones & Harper, by: *Robert L. Jones, III*, and *Charles R. Garner*, for appellee.

TERRY CRABTREE, Judge. The appellant, Ronnie Moore, appeals from an order of the Crawford County Chancery Court, in which the court granted the appellee, Midwest Distribution, Inc., a temporary injunction against appellant from providing services to Jay Godwin. We reverse.

Appellee is in the business of setting up product displays, principally cigarette displays, as a contractor for a company known as Hubb Group or HGDS. Appellant began working in the product display business about five years ago in Memphis, Tennessee, and was contracting to set up displays for HGDS in Memphis. About two years ago, appellant's contract was terminated in Tennessee, and he moved to Fort Smith and went to work for appellee.

Appellant signed a "Service Work for Hire Agreement" effective February 1, 2001, with appellee. The agreement contained a covenant not to compete under which appellant agreed that for a period of one year following termination of employment he would not "provide, or solicit or offer to provide to any present or former Customer of Contractor, or become directly or indirectly interested in any person or entity which provides, or solicits or offers to provide, any services to such Customers." Further, the geographic scope of the agreement applied "to those geographical areas in which the Contractee acts as independent contractor including, but not limited to, the State of Arkansas, Illinois, Iowa, Kansas, Missouri, Nebraska, New Mexico, Oklahoma, Texas, and any other state that contractor has granted a contract or agreement within." The agreement provided that any violation of the covenant may be restrained or enjoined.

Appellant terminated his employment with appellee and went to work for Jay Godwin. Appellant does the same work for Mr. Godwin as he did for appellee. Godwin now contracts with HGDS, and sub-contracts with both appellant and appellee. Appellee brought a petition for temporary and permanent injunction and damages, seeking to enjoin appellant from providing services to Mr. Godwin. On June 18, 2001, the trial court granted appellee a temporary injunction. From this order, appellant brings this appeal.

A party seeking a preliminary injunction must demonstrate a likelihood of success on the merits of the claim for a permanent injunction as well as the likelihood that, absent the granting of preliminary relief, irreparable harm will occur. *Smith v. American Trucking Ass'n, Inc.*, 300 Ark. 594, 781 S.W.2d 3 (1989). An order granting or denying a preliminary injunction is within the

chancery court's discretion. *Wilson v. Pulaski Ass'n of Classroom Teachers*, 330 Ark. 298, 954 S.W.2d 221 (1997). We will not reverse a chancellor's ruling on a preliminary injunction unless there has been an abuse of discretion. *Id.* In this case appellant argues that (1) the covenant not to compete agreement does not protect a legitimate interest of appellee; and (2) the geographical scope of the agreement is unreasonably broad. We agree with both of appellant's arguments.

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; and (3) a reasonable time limit must be imposed." *Id.* The burden is on the party challenging the 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). We review cases involving covenants not to compete on a case-by-case basis. *Id.*

Covenants not to compete will not be enforced unless a covenantee had a legitimate interest to be protected by such an agreement, and the law will not enforce a contract merely to prohibit ordinary competition. *Federated Mut. Ins. Co., supra.* The test of reasonableness of contracts in restraint of trade is that the restraint imposed upon one party must not be greater than is reasonably necessary for the protection of the other and not so great as to injure a public interest. *Id.* 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 covenantee was able to use information so obtained to gain an unfair competitive advantage. *Id.*

In the present case, appellee's president, Kevin Barrett, testified that appellant had been provided with no special training. In addition, he stated that appellant had not been provided with any trade secrets, confidential business information, or customer lists. Further, Mr. Barrett testified that appellant was not using information he obtained from appellee to gain an unfair advantage over appellee, except how to install "fixtures and stuff." We hold that appellant did not use any information to gain an unfair competitive

advantage over appellee. As such, we hold that appellee did not have a legitimate interest to be protected by the agreement.

We are also persuaded that the geographical area included in the agreement is too broad. The geographical area in a covenant not to compete must be limited in order to be enforceable. *Jaraki v. Cardiology Assocs. of Northeast Ark.*, 75 Ark. App. 198, 55 S.W.3d 799 (2001). The restraint imposed upon one party must not be greater than is reasonably necessary for protecting the other party. *Federated Mut. Ins. Co., supra.* In determining whether the geographic restriction is reasonable, the trade area of the former employer is viewed. *Jaraki, supra.* Where a geographic restriction is greater than the trade area, the restriction is too broad and the covenant not to compete is void. *Jaraki, supra.*

In the case at bar, the agreement precluded appellant from working in the trade of setting up displays in any of the nine states listed. The agreement included the state of Oklahoma. However, appellee did not conduct any business in Oklahoma. We find that it is not reasonable to restrict appellant from working in a state he never worked in before. By including in the scope of the non-compete agreement's geographic restriction a state that appellant has never worked in, appellee more broadly limited appellant's working than is reasonable necessary to protect appellee's trade area.

Mr. Barrett testified that he intended to preclude competition only in the areas where appellee actually had contracts. Mr. Barrett testified that the agreement did not cover the complete states listed, it covers only the areas where appellee has zip code coverages in those states. Mr. Barrett stated that the contract only applies to those geographical areas in which appellant acts as an independent contractor, which is only the zip code coverages that appellee has in the states listed.

Our supreme court has held that the contract must be valid as written, and the court will not apportion or enforce a contract to the extent that it might be considered reasonable. *Bendinger v. Marshalltown Trowell Co.*, 338 Ark. 410, 994 S.W.2d 468 (1999). Our supreme court further stated "that the court would not vary the terms of a written agreement between the parties; to do so would mean that the court would be making a new contract, and it has consistently held that this will not be done." *Id.* at 419, 994 S.W.2d at 473. The geographic restriction as appellee wishes to define it, based on Mr. Barrett's testimony, is not contained in the

agreement, and we are unable to rewrite the restrictive covenant to supply it.

The trial court erred in granting a temporary injunction because appellee did not demonstrate a likelihood of success on the merits. The "Service for Hire Agreement" is unenforceable because no valid interest exists that is in need of protection, and the geographic limitations are too broad.

Reversed.

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

John B. THURMAN *v.* Marie BAKER, Attorney In Fact

CA 01-617 65 S.W.3d 478

Court of Appeals of Arkansas
Division II
Opinion delivered January 30, 2002
[Petition for rehearing denied March 13, 2002.]

John P. Gill and *John B. Thurman*, for appellant.

Timothy O. Dudley, for appellee.

TERRY CRABTREE, Judge. The Pulaski County Circuit Court entered judgment against the appellant, John Thurman, for the amount of a promissory note payable to the appellee, Marie Baker, acting as the attorney in fact for Lorraine DeBlack. On appeal, appellant claims (1) that the statute of limitations barred recovery on the note, and (2) that appellee's principal had waived and forgiven the indebtedness. We affirm.

This is the second appeal taken in this case. We dismissed the first appeal for lack of a final appealable order. *See Thurman v. Baker*, CA 00-328 (Ark. App. Dec. 6, 2000). On remand, the circuit court set aside the original order and entered judgment against appellant for a promissory note in the amount of $141,800 and dismissed with prejudice all of the remaining counts of appellee's amended complaint.

Appellee instituted this action on June 14, 1995, as the attorney in fact for Lorraine DeBlack seeking to recover damages for alleged negligence, malpractice, fraudulent misrepresentations, and to collect an indebtedness represented by a promissory note dated August 15, 1990. In response, appellant alleged that appellee, acting as DeBlack's attorney in fact, had no standing to bring this action because DeBlack was incompetent at the time she executed her durable power of attorney on December 20, 1994. Appellant moved to dismiss the complaint. Instead, the suit was transferred to probate court to determine if DeBlack was in fact incompetent. However, the probate court did not hold a hearing on that issue, but rather, in a separate proceeding instituted by appellee, appointed appellee as the guardian of the estate of DeBlack on October 8, 1997, and transferred the case back to circuit court.

On November 2, 1998, appellee filed an amended complaint, alleging that she was now acting as the guardian of DeBlack's estate. Appellant again moved the court for dismissal on the ground that there had been no determination of the competency of DeBlack as of the execution of the power of attorney; that the substitution of appellee as guardian of the estate did not relate back to the initial filing of the complaint; that appellee acting as guardian had not

been authorized by the probate court to intervene or to be substituted as a party plaintiff; that appellee had not petitioned the circuit court for authority to be substituted as a party plaintiff; and that the statute of limitations barred recovery by the estate. Along with the motion to dismiss, appellant attached the affidavit of Dr. Robert Ritchie, DeBlack's personal physician. Dr. Ritchie stated that on December 20, 1994, DeBlack was not competent to transact business, was unable to comprehend what was going on around her, and was unable to take care of herself.

In denying appellant's motion to dismiss, the lower court found that under Arkansas Rule of Civil Procedure 17(a) (1995), appellee acting as guardian, could be substituted as the real party in interest; that the substitution related back to the initial filing date; and that the substitution was not to be considered the filing of a new action in regard to the statute of limitations. Based upon this order, the case was submitted to the trial court with only the deposition of appellant, and the court awarded appellee judgment for the principal amount of the promissory note.

For appellant's first point on appeal, he argues that the trial court erred in refusing to dismiss the amended complaint and in awarding appellee judgment for the amount of the promissory note because appellee's action was barred by the statute of limitations. Arkansas Code Annotated section 16-56-111(a) (1987) provides that actions to enforce written obligations, duties, or rights, must be commenced within five years after the cause of action accrues. Here, the promissory note was dated August 15, 1990, and required payment of interest only on a quarterly basis with principal due upon demand. Appellant specifically contended that the five-year statute of limitations period on the promissory note ended before appellee was appointed guardian and before she was substituted as the plaintiff in the circuit court case. Appellant contended that appellee's substitution as party plaintiff constituted a new action in regard to the statute of limitations. We believe, as did the trial court, that appellee's substitution as the proper party to the action related back to the initial filing of the suit on June 14, 1995. *See* Ark. R. Civ. P. 17(a); *McMaster v. McIlroy Bank, Trustee*, 9 Ark. App. 124, 654 S.W.2d 591 (1983).

Arkansas Rule of Civil Procedure 17(a) states:

> Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian (conservator), bailee, trustee of an express trust, a party with whom or in whose name a

> contract has been made for the benefit of another, or the State or any officer thereof or any person authorized by statute to do so may sue in his own name without joining with him the party for whose benefit the action is being brought. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

What constitutes a reasonable time under Rule 17 is a matter of judicial discretion and will depend upon the facts of each case. *White v. Welsh*, 327 Ark. 465, 939 S.W.2d 299 (1997). We hold that appellee, in protecting DeBlack's interest in this cause, was properly and timely substituted and ratified under the terms of Rule 17.

Appellant maintains that appellee's claim was barred by the five-year statute of limitations because our supreme court has held that when an action is brought in the name of a nonexisting plaintiff, an amendment of the complaint by substituting the proper party to the action as plaintiff will be regarded as the institution of a new action in regard to the statute of limitations. *Ark-Homa Foods, Inc. v. Ward*, 251 Ark. 662, 473 S.W.2d 910 (1971). However, we find *Ark-Homa Foods* to be distinguishable from the case at bar. In *Ark-Homa Foods,* Ark-Homa moved to substitute its insurer as plaintiff after the insurer had fully paid Ark-Homa for the amount of its losses. The lower court denied the motion, and our supreme court, in affirming the decision, cited to 157 A.L.R. 1247 (1945), which states, "an insured who has been paid in full for a loss by his insurer is not the real party in interest and cannot maintain an action in his (the insured's) name against the tort-feasor causing the loss."

In the present case, appellant never obtained a determination from the probate court that DeBlack was in fact incompetent at the time she executed her power of attorney. Therefore, we must proceed under the assumption that DeBlack was competent and that appellee's status as attorney in fact was valid. Thus, appellee, acting as the attorney in fact, was not functioning as a nonexisting plaintiff. Whereas in *Ark-Homa Foods, supra*, the insured was functioning as a nonexisting plaintiff because it had been paid in full by its insurer. We hold that because appellee was not functioning as a nonexisting plaintiff when she initially filed the lawsuit, the trial

court properly allowed appellee as guardian of the estate to substitute herself as plaintiff. In sum, appellee was simply wearing two hats, as attorney in fact and as guardian of the estate, in representing the interests of DeBlack. We agree with the trial court that the November 2, 1998 amended complaint related back to the initial June 14, 1995 complaint.

For appellant's second point on appeal, he contends that the lower court erred in awarding judgment on the promissory note because the only evidence adduced at trial established that payment of the indebtedness represented by the note had been waived by appellee's principal. Although appellant raised the issue of waiver in his answer, he never obtained a ruling from the trial court regarding waiver of the principal indebtedness. He only obtained a ruling that the interest was waived. Failure to obtain a ruling from the trial court is a procedural bar to the consideration of the issue on appeal. *Madden v. Aldrich*, 346 Ark. 405, 58 S.W.3d 342 (2001). Therefore, we do not reach the merits of appellant's second argument.

For the reasons stated above, we affirm.

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

Gary VAN DEVEER *v.* GEORGE'S FLOWERS, INC., RTJ, Inc., d/b/a George's Flowers, Inc., John Doe Corporation 1 and 2, and John Doe 3; Wausau Insurance Company and Precision Glass & Mirror, Inc., *Intervenors*

CA 01-710 65 S.W.3d 488

Court of Appeals of Arkansas
Division III
Opinion delivered January 30, 2002

Taylor Law Firm, by: *Timothy J. Myers* and *Chris D. Mitchell*, for appellant.

Davis, Wright, Clark, Butt & Carithers, PLC, by; *Courtney P. Gilbert*, for appellee.

ANDREE LAYTON ROAF, Judge. Gary Van DeVeer appeals from a summary judgment granted by the Benton County Circuit Court to appellee, RTJ, Inc., d/b/a George's Flowers, Inc. Van DeVeer raises two issues on appeal; however, because the trial court's order fails to resolve the claims against the John Doe defendants, and the claims of the intervenors, we must dismiss the appeal for lack of finality.

The controversy in this case involves injuries Van DeVeer sustained when he fell down a flight of stairs in May 1996 while working on a greenhouse at George's Flowers. Van DeVeer was an employee of Precision Glass and Mirror, Inc. at the time of the accident. Van DeVeer filed a complaint in April 1999 against George's Flowers, Inc., RTJ, Inc. d/b/a George's Flowers, Inc., John Doe Corporation No. 1, John Doe Corporation No. 2, and John Doe No. 3, alleging that his injuries were proximately caused by the negligence of defendants. Precision Glass and Mirror, Inc. and its workers' compensation insurance company, Wausau Insurance Company, filed a motion to intervene, which was granted. RTJ, Inc., d/b/a George's Flowers, filed a motion for summary judgment as a separate defendant, and on March 16, 2001, the trial court entered summary judgment in favor of RTJ, finding that the stairs were an obvious danger and that RTJ owed no duty to warn Van DeVeer. Although the caption of the summary judgment order listed the John Doe defendants and the intervenors, the order only directed that summary judgment be granted in favor of "the defendant" and made no mention of the John Doe defendants or the intervenors. No other order was entered disposing of the claims against the John Doe defendants or dismissing the intervenors' claims.

Rule 2(a)(1) of the Arkansas Rules of Appellate Procedure—Civil provides that an appeal may be taken only from a final judgment or decree entered by the trial court. Whether a final judgment, decree, or order exists is a jurisdictional issue that this court has the duty to raise, even if the parties do not, in order to avoid piecemeal litigation. *Shackleford v. Arkansas Power & Light Co.*, 334 Ark. 634, 976 S.W.2d 950 (1998); *Mid-State Homes, Inc. v. Beverly*, 20 Ark. App. 213, 727 S.W.2d 142 (1987). The appellate court will not engage in a review of an appellant's claim against some defendants when claims against remaining defendants could possibly be required in the future. *Cortese v. Atlantic Richfield*, 317

Ark. 207, 876 S.W.2d 581 (1994), *appeal dismissed*, 320 Ark. 639, 898 S.W.2d 467 (1995). It is the appellant's burden to produce a record on appeal showing the appellate court's jurisdiction. *Id.* This court cannot step in and resolve the issue by speculating that the unresolved claims may lack viability due to failure of service of process, a statute of limitations bar, or other impediments.

Furthermore, Arkansas Rule of Civil Procedure 54(b) states that an order which disposes of fewer than all of the claims or all of the parties is not a final appealable order unless the court makes an express determination that there is a danger of hardship or injustice which an immediate appeal would alleviate. Dismissal of an appeal is appropriate when all defendants, including John Doe defendants, are not granted summary judgment, leaving claims against certain defendants still pending. *See Hodges v. Huckabee*, 333 Ark. 247, 968 S.W.2d 619 (1998); *see also Shackleford v. Arkansas Power & Light Co.*, *supra*. Also, an order is not appealable under Ark. R. Civ. P. 54(b) when it fails to mention or dispose of an intervenor's claim. *Richardson v. Rodgers*, 329 Ark. 402, 947 S.W.2d 778 (1997).

The record in the present case does not indicate that any orders have been entered by the circuit court disposing of the intervenors' claims or disposing of Van DeVeer's claims against the John Doe defendants. A plaintiff may file a motion requesting a voluntary dismissal of a claim against one or all defendants pursuant to Ark. R. Civ. P. 41(a), but no such order is present in the record in this case. Because there is not a final order as to all parties or a Rule 54(b) certification that would justify an immediate appeal, we do not have jurisdiction to hear this case. Therefore, we dismiss the appeal without prejudice.

Appeal dismissed.

BIRD and PITTMAN, JJ., agree.

K II CONSTRUCTION COMPANY *v.*
Harold L. CRABTREE

CA 01-727 65 S.W.3d 905

Court of Appeals of Arkansas
Division III
Opinion delivered February 6, 2002

Randy Phillip Murphy, for appellant.

Michael Allan Friedman, for appellee.

JOHN MAUZY PITTMAN, Judge. This is an appeal from a decision of the Arkansas Workers' Compensation Commission. The Commission adopted the opinion of the administrative law judge; however, the opinion of the administrative law judge was not included in the appellant's abstract or addendum on appeal.

Failure to abstract the order appealed from has traditionally been regarded as a fatal error, and the cases are legion where this was held to be adequate grounds to affirm for noncompliance with the abstracting rules. *See* Ark. Sup. Ct. R. 4-2(a)(8). However, although appellant's abstract is flagrantly deficient in this respect, it is otherwise in compliance with Rule 4-2(a)(6). Under the present circumstances, we think it would be unduly harsh to affirm for noncompliance with the abstracting requirements, and we allow appellant's attorney ten days from the date of this opinion to revise the brief, at his own expense, to conform to Rule 4-2(a)(6). Upon the filing of such a substituted brief by the appellant, appellee (who declined to file a brief in response to appellant's original brief), will be afforded an opportunity to file a brief should he so choose.

We note that our decision to allow rebriefing in this instance is not a premature application of the modification of the abstracting rules set out in *In Re: Modification of the Abstract System*, 345 Ark. Appx. (May 31, 2001). Instead, it is an exercise of the discretion vested in this court by the currently-applicable[1] version of Rule 4-2(b)(3), which in pertinent part provides that:

> If the Court finds the abstract to be flagrantly deficient . . . the judgment or decree *may* be affirmed for noncompliance with the

[1] The record in the present case was filed on July 2, 2001. The amendments to the abstracting rules set out in the supreme court's *per curiam* are effective only as to cases in which the record is lodged with our clerk on or after September 1, 2001. *In re Modification of the Abstract System, supra.*

> Rule. If the Court considers that action to be unduly harsh, the appellant's attorney may be allowed time to revise the brief, at his or her own expense, to conform to Rule 4-2(a)(6).

(Emphasis supplied.)

A plain reading of the current Rules shows that we unquestionably have some discretion to allow rebriefing if we consider affirmance to be unduly harsh in a given case. Whether or not something is "unduly harsh" in a given case is not a question that can be decided in a vacuum; instead, it is a question of *relative* harshness that must be determined by comparison to other parties who are similarly situated, and with a due regard for the public policy that underlies the Rules. We think that the question of "undue harshness" must now be viewed in light of the declared policy of the supreme court that there is a "need for appeals to be decided on the merits." *In Re: Modification of the Abstract System, supra.* In light of this declaration of public policy, the fact that the abstracting error in the present case is technical in nature and easily corrected, and the fact that appellants will soon be permitted to correct even egregious and fundamental errors as a matter of course, we think that affirmance would, in the present case, be unduly harsh.

Rebriefing ordered.

ROAF and BIRD, JJ., agree.

LAWYERS SURETY CORPORATION *v.* George FLOWERS

CA 01-413 66 S.W.3d 669

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered February 6, 2002

Joel Lynn Taylor, for appellant.

Helen Rice Grinder and *George Stephens*, for appellee.

ANDREE LAYTON ROAF, Judge. Lawyers Surety Corporation ("Lawyers Surety") appeals from a circuit court order reversing a determination by the Director of the Arkansas State Police Used Motor Vehicle Administration (UMVA). The UMVA had found Lawyers Surety not liable to appellee George Flowers for his claim against a bond it had written in connection with the issuance of a used-car-dealer license to Denver Haus; Flowers prevailed in the appeal of the UMVA decision to circuit court. On appeal, Lawyers Surety argues 1) that the trial court exceeded the scope of review of administrative agency cases; 2) that the trial court erred in finding that there was sufficient evidence to revoke or suspend Haus's used-car-dealer license; and 3) that the UMVA erred in finding that it could not raise the issue of whether a partnership existed between Flowers and Haus. Appellee George Flowers cross-appeals and argues that because Lawyers Surety wrongfully refused to pay him insurance benefits, the trial court erred in denying him attorney fees and penalties pursuant to Ark. Code Ann. § 23-79-208 (1999). We reverse the circuit court's ruling on direct appeal, and, consequently, the cross-appeal is moot and need not be addressed.

The following facts that gave rise to Flowers's claim against Lawyers Surety are based primarily upon allegations made by Flowers against Haus, and are not disputed by either party. In 1987, George Flowers and Denver Haus agreed to start a partnership business called Star Body Shop and Auto Sales, to purchase, repair, and resell cars. However, Flowers and Haus did not put their agreement in writing. Each man agreed to contribute an initial payment of $5,000 to the partnership. Haus was unable to contribute his share, so Flowers took a promissory note in exchange for his contributing additional money to the partnership.

On December 8, 1987, Haus applied to Lawyers Surety for a Used Motor Vehicle Dealer's Bond, which is required by Ark. Code Ann. § 23-112-607(b)(2) (2001), in order to obtain a used-

car-dealer license. Star Body Shop was listed as the bond principal. On December 12, 1987, Haus applied for a used-car-dealer license. This application listed Haus and Flowers as partners in Star Body Shop. However, Flowers's name was crossed out on the application. Haus and Flowers then leased a building and opened a partnership account in which both were authorized signators. During the initial weeks of operation, Flowers contributed additional capital to the partnership. By February 1988, Flowers suspected Haus of making unauthorized withdrawals from the partnership account and of stealing car titles. Haus had also failed to make any payments toward Flowers's initial loan.

As a result of the disagreement, Haus established a new dealership just down the street from Star Body Shop and Auto Sales. Haus failed to transfer the license to the new dealership. Flowers attempted to operate the original dealership; however, Lawyers Surety refused to transfer the bond for Star Body Shop as it claimed that it lacked notice of a partnership. Flowers was later added to the bond as a co-principal.

During that same year, 1988, Flowers sued Haus for breach of contract and conversion of partnership funds, and was granted a default judgment for over $21,000. After Lawyers Surety refused to pay the judgment, Flowers sued it in Faulkner County Circuit Court in 1991, but apparently did not obtain a judgment in this action. Flowers next attempted to pursue his claim through the Arkansas Motor Vehicle Commission, and eventually filed a claim with the UMVA in 1998, where he was granted a hearing on his claim on August 4, 1998.

The UMVA hearing officer found in favor of Lawyers Surety, and Flowers appealed the decision to circuit court. The circuit court reversed the decision of the UMVA and found in pertinent part that Haus had willfully committed fraud against Flowers, that such a violation of the law constituted ground for suspension or revocation of Haus's Star Body Shop license, and that the surety bond issued by Lawyers Surety was meant to comply with provisions of Ark. Code Ann. § 23-112-302(c)(3) (2001), by indemnifying "for any loss sustained by any person by reason of the acts of the licensees bonded when such acts constituted grounds for the suspension or revocation of the license." The trial court ordered Lawyers Surety to pay Flowers $25,000, the amount of the bond, as his total loss, including interest and costs, exceeded the amount of the bond. However, the trial court denied Flowers's request for attorney's fees. From that decision comes this appeal and cross-appeal.

In an appeal from a circuit court's decision regarding a ruling made by an administrative agency, the appellate court's review is directed not toward the circuit court, but toward the decision of the agency. That is so because administrative agencies are better equipped by specialization, insight through experience, and more flexible procedures than courts, to determine and analyze legal issues affecting their agencies. *McQuay v. Arkansas State Bd. of Architects,* 337 Ark. 339, 989 S.W.2d 499 (1999); *Social Work Licensing Bd. v. Moncebaiz,* 332 Ark. 67, 962 S.W.2d 797 (1998); *Files v. Arkansas State Highway & Transp. Dep't,* 325 Ark. 291, 925 S.W.2d 404 (1996). Our review of administrative decisions is limited in scope. Due deference is afforded to decisions of the administrative agency. *Culpepper v. Board. of Chiropractic Exam.,* 343 Ark. 467, 36 S.W.3d 335 (2001). Such decisions will be upheld if they are supported by substantial evidence and are not arbitrary, capricious, or characterized by an abuse of discretion. *Id.* With these standards in mind, we address the arguments raised by Lawyers Surety on direct appeal.

Lawyers Surety argues that the trial court erred in reversing the decision of the administrative agency when it found in favor of Flowers and ordered payment of $25,000 to Flowers. It argues that the trial court exceeded the scope of its review of the UMVA because the administrative agency's decision was supported by substantial evidence and was not made arbitrarily or capriciously, and also argues that the agency's decision should be upheld because it was supported by substantial evidence. These arguments have merit.

The hearing officer found that Ark. Code Ann. § 23-112-308 (1987) places certain duties on used-car dealers as a means of protecting the public and manufacturers from fraudulent acts of car dealers, but does not create obligations to general creditors or used-car dealers' business partners. When Flowers's claim arose in 1987, Ark. Code Ann. § 23-112-308 (1987), entitled "Denial, Revocation, and Suspension," stated in pertinent part:

> (a) the commission may deny any application for a license or revoke or suspend a license after it has been granted, for any of the following reasons:
>
> > (1) On satisfactory proof of the unfitness of the applicant or licensee in any application for license under the provisions of this chapter;

(2) For fraud practiced or any material misstatement made by an applicant in any application for license under the provisions of this chapter;

(3) For any willful failure to comply with any provision of this chapter or with any rule or regulation promulgated by the commission under authority vested in it by this chapter;

(4) Change of condition after license is granted or failure to maintain the qualifications for license;

(5) Continued or flagrant violation of any of the provisions of this chapter or of any of the rules or regulations of the commission;

(6) For any willful violation of any law relating to the sale, distribution, or financing of motor vehicles;

(7) Willfully defrauding any retail buyer to the buyer's damage;

(8) Willful failure to perform any written agreement with any retail buyer;

(9) Being a manufacturer who fails to specify the delivery and preparation obligations of its motor vehicle dealers, as is required for the protection of the buying public, prior to delivery of new motor vehicles to retail buyers;

(10) On satisfactory proof that any manufacturer, distributor, distributor branch, or division, or factory branch or division has unfairly and without due regard to the equities of the parties or to the detriment of the public welfare failed to properly fulfill any warranty agreement or to adequately and fairly compensate any of its motor vehicle dealers for labor, parts, or incidental expenses incurred by the dealer with regard to factory warranty agreements performed by the dealer;

(11) For the commission of any act prohibited by §§ 23-112-301—307, 23-112-402—403, or the failure to perform any of the requirements of those sections;

> (12) Using or permitting the use of special license plates assigned to him for any other purpose than those permitted by law;
>
> (13) Disconnecting, turning back, or resetting the odometer of any motor vehicle in violation of state and federal law;
>
> (14) Accepting an open assignment of title or bill of sale for a motor vehicle which is not completed by identifying the licensee as the purchaser or assignee of the motor vehicle;
>
> (15) Failure to notify the commission of a change in ownership, location, or franchise, or any other matters the commission may require by regulation. The notification shall be in written form and submitted to the commission at least fifteen (15) days prior to the effective date of the change;
>
> (16) Failure to endorse and deliver an assignment and warranty of title to the buyer pursuant to § 27-14-902.

Arkansas Code Annotated section 23-112-302(c)(4) (1987) provided that the corporate surety bond be executed in the "name of the State of Arkansas for the benefit of *any aggrieved party.*" Ark. Code Ann. § 23-112-302(c)(4) (1987). (Emphasis added.) Likewise, Ark. Code Ann. § 23-112-302(c)(3) (1987) provided that the bond covers "any loss sustained by *any person*" due to acts of the licensee that would subject the licensee to suspension or revocation of his license. (Emphasis added.) The circuit court based its reversal of the agency decision primarily upon this statutory provision.

■ However, the hearing officer found that the statutorily-mandated bond only protects manufacturers and the general public from fraudulent actions by the dealer, and we agree. Section 23-112-308(a) makes specific references throughout to retail buyers in the context of protecting them from fraud or non-performance by licensed car dealers. In fact, used-motor-vehicle dealers were brought within the ambit of the motor vehicle dealers statutory and licencing scheme by Act 1032 of 1985, in which the emergency clause provided in pertinent part:

> It is hereby found and determined by the General Assembly that neither the Arkansas Motor Vehicle Commission nor other board or commission presently have power to license and regulate dealers, salesmen, wholesalers who deal in *used motor vehicles*, motor vehicles lessors or auto auctions and that authority to regulate the aforesaid

> functions of the motor vehicle industry is necessary to *prevent and remedy public injury in motor vehicle transactions.*

(Emphasis added.) Moreover, it is well settled that we may also consider subsequent amendments to statutes as evidence of legislative intent. *Bourne v. Bd. of Trustees*, 347 Ark. 19, 59 S.W.3d 432 (2001); *Arkansas County v. Desha County*, 342 Ark. 135, 27 S.W.3d 379 (2000); *Ford v. Keith*, 338 Ark. 487, 996 S.W.2d 20 (1999). In this regard, there were several pertinent amendments enacted after Flowers's claim arose in 1987. In the subchapter entitled "Used Motor Vehicle Buyers Protection," the following 1993 legislative declaration is found in Ark. Code Ann. § 23-112-601 (Supp. 1999):

> (a) The General Assembly hereby declares that the public interest is affected by the sale and distribution of used motor vehicles, and it is recognized that a significant factor of the inducement in making *a sale of a used motor vehicle to a member of the general public is* the trust and confidence of the purchaser in the retail dealer from whom the purchase is made, with the expectancy that the dealer will remain in business to stand behind and provide service for the motor vehicle purchased.
>
> (b) It is therefore found to be necessary to license used motor vehicle dealers, and to prohibit certain acts and set penalties for violations and perpetration of certain acts . . . in order to prevent fraud, improper impositions, and other abuses upon the citizens of this state. . . .

(Emphasis added.)

Finally, Ark. Code Ann. § 23-112-607 (Supp. 1999), entitled "Dealer License," also enacted in 1993, provides in pertinent part:

> (a)(1) Persons wishing to obtain a used motor vehicle dealer's license shall submit a fully executed application on such used motor vehicle dealer application forms as may be prescribed by the Department of Arkansas State Police.
>
> * * *
>
> (b) The department shall require . . . (2) a corporate surety bond in the sum of at least twenty-five thousand dollars ($25,000);
>
> * * *

> (c)(2) The bond shall be an indemnity for any loss and reasonable attorney's fees sustained *by a retail buyer by reason of the acts of the person bonded when such act constitutes a violation of the law.*

(Emphasis added.)

In sum, from our review of the relevant statutory language, including amendments enacted since 1987, we conclude that there is substantial evidence to support the agency's decision that the statutory scheme, including the used motor vehicle dealer licensing requirements, was intended by the legislature to protect the public in retail transactions with used car dealers, as opposed to general creditors or business partners such as Flowers, and we reverse the circuit court's order on this point.

Lawyers Surety also contends that the UMVA erred in finding that it was precluded from arguing to the agency the existence of a partnership between Haus and Flowers because Lawyers Surety was unaware of the existence of the partnership at the time the bond was issued. This is clearly a contingent argument should we affirm on Lawyers Surety's first two points, and is directed toward the agency decision rather than to the circuit court's ruling. Consequently, because we are reversing the circuit court's ruling on Lawyers Surety's first arguments, we do not address this issue or the propriety of Lawyers Surety challenging both the circuit court and agency decisions in this appeal.

On cross-appeal, Flowers contends that the circuit court erred in denying his motion under Ark. Code Ann. § 23-79-208 (2001), which allows recovery of attorney's fees when a surety or insurer wrongfully refuses to pay benefits under an insurance policy. However, this issue is moot because of our reversal of the trial court's decision, and we need not reach it.

Reversed and dismissed.

STROUD, CJ., and ROBBINS, HART, NEAL, JJ., agree.

GRIFFEN, J., dissents.

WENDELL L. GRIFFEN, Judge, dissenting. I disagree with the majority and would hold 1) that the clear and all-inclusive language used in Arkansas Code Annotated section 23-112-302 (Supp. 2001), which provides indemnity for any loss sustained by any person, covers losses sustained by individuals who are

in privity of a partnership, 2) that the agency's finding that there was a lack of evidence as to the acts of the bonded principal sufficient to revoke the dealer's license is not supported by substantial evidence and that it is arbitrary and capricious, and 3) that appellant failed to properly preserve the issue of partnership for appellate review. In view of my position, I would reverse and remand appellee's cross appeal for further proceedings to occur on appellee's claim for attorney's fees and penalties pursuant to Arkansas Code Annotated section 23-79-208(a)(1) (Supp. 2001).

Statutory Construction

In *Western Carroll Cty. Ambulance Dist. v. Johnson*, 345 Ark. 95, 44 S.W.3d 284 (2001), our supreme court outlined the procedure for statutory construction as follows:

> We review issues of statutory construction *de novo*, as it is for this court to decide what a statute means. The first rule in considering the meaning and effect of a statute is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. When the language of a statute is plain and unambiguous, there is no need to resort to rules of statutory construction.
>
> The basic rule of statutory construction is to give effect to the intent of the General Assembly. Where the language of the statute is plain and unambiguous, we determine legislative intent from the ordinary meaning of the language used. In considering the meaning of a statute, we construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. We construe the statute so that no word is left void, superfluous, or insignificant; and meaning and effect are given to every word in the statute if possible. However, we will not give statutes a literal interpretation if it leads to absurd consequences that are contrary to legislative intent.

Id. at 99-100, 44 S.W.3d at 286-87. (Citations omitted.)

The Arkansas Motor Vehicle Commission Act, as codified by Arkansas Code Annotated sections 23-112-103 to 509, creates certain rules and regulations in regard to motor-vehicle dealers. Section 23-112-302 requires that an individual serving in the capacity of a used motor vehicle dealer complete a license and secure a surety bond. Section 23-112-302(c)(3) (Supp. 2001) provides that

the surety bond "shall be an indemnity for *any loss sustained by any person by reason of the acts of the person bonded when those acts constitute grounds for the suspension or revocation of his license.*" (Emphasis added.)

Section 23-112-308 lists enumerated reasons for which the Commission may deny an application or revoke or suspend a license, including: fraud practiced or a material misstatement made by an applicant in any application for license under the provisions of the chapter; failure to comply with any provision of the chapter or to comply with any rule or regulation promulgated by the commission; any violation of any law relating to the sale, distribution, or financing of motor vehicles; defrauding a retail buyer to the buyer's damage; selling or attempting to sell vehicles from a location other than the location specified on the license; failure to notify the commission of a change in location. *See* Ark. Code Ann. § 23-112-308.

Significantly, section 23-112-302 refers to section 23-112-308 indirectly by its use of the language "when those acts constitute grounds for the suspension or revocation of his license." Section 23-112-308 lists grounds for suspension or revocation. In applying our rules of statutory construction to an interpretation of section 23-112-308 in light of section 23-112-302, the phrase "any loss sustained by any person" is all inclusive. It would appear that the legislature did not intend to restrict the language to provide coverage for the losses sustained by the act of a bonded principal to individuals who are not involved in a partnership arrangement, but to exclude coverage to individuals who are engaged in a partnership. Indeed, sections 23-112-302 and 23-112-308 must be read together, giving the words their ordinary meaning, to ensure that neither section is left void. The legislature recently updated the Arkansas Motor Vehicle Commission Act by its enactment of Act 1053 of 2001. It retained the inclusive language "any loss sustained by any person." Thus, I would conclude that the legislature did not intend to restrict the application of section 23-112-302.

Whether the Circuit Court Exceeded its Scope of Review by Deciding that the Agency's Finding was not Supported by Substantial Evidence and that the Agency's Finding was Arbitrary, Capricious, and an Abuse of Discretion

The rules governing a judicial review of administrative findings are the same for circuit and appellate courts. *See Hector v. Arkansas*

Soil & Water Conservation Comm'n, 47 Ark. App. 177, 888 S.W.2d 312 (1994). When reviewing an agency decision, a *de novo* review of the record by the circuit court or appellate court is not warranted. *See Arkansas State Police Comm'n v. Smith, supra.* Rather, the examination of the record is limited to determining whether substantial evidence exists to support the agency's finding and whether the agency's decision is arbitrary, capricious, or represents an abuse of discretion. *See Arkansas State Police Comm'n v. Smith, supra.*

The circuit court must query whether substantial evidence supports the findings made by the agency, not whether the evidence would have supported a different conclusion. *See Arkansas State Police Comm'n v. Smith, supra.* In order to successfully challenge a finding of substantial evidence, a party must show that the proof before the agency was so nearly undisputed that fair minded individuals could not have reached the conclusion reached by the agency. *See Arkansas State Police Comm'n v. Smith, supra.* Evidence is given its strongest probative force in favor of the agency's decision. *See Arkansas State Police Comm'n v. Smith, supra.*

Arkansas Code Annotated section 23-112-301(d)(1) (Supp. 2001) mandates that no person shall engage in the business of selling, buying or exchanging motor vehicles, unless the person holds a valid license issued by the Arkansas Motor Vehicle Commission for the makes of motor vehicles being bought, sold, or exchanged. License applications must be verified by oath or affirmation of the applicants. *See* Ark. Code Ann. § 23-112-302(a)(i) (Supp. 2001). In addition, the application must be accompanied by the filing with the Commission of a surety bond, which shall be in effect upon the applicant's being licensed and shall be conditioned upon the applicant abiding by the provisions of section 23-112-302. *See* Ark. Code Ann. § 23-112-302(c)(2) (Supp. 2001).

In the present case, the agency specifically found that an application was submitted to the Commission stating that Star Body and Auto Sales was owned by an individual, Denver Haus. It then stated that it was presumed that the bond was issued as stated to Denver Haus as Star Body Shop. Given the agency's conclusion that Haus was acting as Star Body Shop, any unlawful actions of Haus that constituted grounds for suspension or revocation of the dealer's license would fall within the ambits of section 23-112-302. Second, the language in section 23-112-302 provides indemnity for *any loss* sustained by *any person*, payable upon receipt by the Commission of a final judgment from an Arkansas court of competent jurisdiction. The agency decision acknowledged that appellee's complaint

alleged that Haus "stole" certain certificates of title. This clearly falls within section 23-112-308(6), willful violation of any law relating to the sale, distribution, or financing of motor vehicles. However, the agency concluded that appellee was not a member of the general public such as to trigger the protection of the Arkansas Motor Vehicle Commission Act, based on its finding that appellee's claim that Haus "stole" certain certificates from him was a mere allegation that could not be reached due to a lack of evidence.

Substantial evidence existed that Haus's conduct fell within the guidelines to revoke his license because a court of competent jurisdiction had previously determined that appellee had presented prima facie, undisputed evidence that Haus was liable for the allegations cited by appellee in the original complaint. These allegations included appellee's claim that Haus made material misstatements in the license application and defrauded appellee on the sale and financing of motor vehicles by stealing certificates of title while acting in the capacity of Star Body Shop and Auto Sales, as evidenced by a default judgment that found Haus liable to appellee for fraudulent conduct and awarded appellee $21,098. Haus's action of defrauding appellee by stealing certificates of title while acting in his capacity as Star Body Shop and Auto Sales constituted a willful violation of the law relating to the sale and financing of motor vehicles and constituted grounds for the suspension or revocation of the license issued to Haus as Star Body Shop. Additionally, Haus's action of moving the location of the dealership to another location without notifying the Commission and making material misstatements in the license application constituted grounds for the suspension or revocation of his dealer's license. Thus, the agency's decision to ignore the default judgment and deny appellee's claim against the bond because of a lack of evidence represented an abuse of discretion.

Partnership Between Haus and Flowers

For its second point on appeal, appellant argues that the administrative agency erroneously precluded it from arguing that appellee is liable as a partner in the bonded principal. Appellee correctly responds that appellant is precluded from addressing this issue on appeal due to appellants failure to file a cross-appeal on the agency's adverse ruling.

Failure of Trial Court to Grant Attorney's Fees and Penalties

Arkansas Code Annotated section 23-79-208(a)(1) (Supp. 2001) reads as follows:

> In all cases where loss occurs and the . . . surety . . . shall fail to pay the losses within the time specified in the policy after demand made therefore, the person, firm, corporation or association shall be liable to pay the holder of the policy or his assigns, in addition to the amount of the loss, twelve percent (12%) damages upon the amount of the loss, together with all reasonable attorney fees for the prosecution and collection of the loss.

Our supreme court addressed section 23-79-208 in *Newcourt Fin., Inc. v. Canal Ins.*, 341 Ark. 181, 17 S.W.3d 83 (2000), and held that a loss payee is an insured because it could sue to enforce the policy under which it would be paid.

Appellee received a default judgment against Denver Haus, acting as Star Body Shop, in July 1988 and exhausted his administrative remedies in 1993. Appellant refused to pay the claim. Appellee proceeded before the administrative agency, and the agency entered a decision that was reversed by the circuit court. Given my recommendation to reverse the agency decision as arbitrary and capricious, I would remand appellee's claim for attorney's fees pursuant to section 23-79-208.

CAPITOL LIFE and ACCIDENT INSURANCE COMPANY
v. Lela K. PHELPS

CA 01-769 66 S.W.3d 678

Court of Appeals of Arkansas
Division II
Opinion delivered February 13, 2002

[redacted]

Mitchell, Williams, Selig, Gates & Woodyard P.L.L.C., by: *Byron Freeland* and *Leigh Ann Shults*, for appellant.

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

TERRY CRABTREE, Judge. Appellant, Capitol Life and Accident Insurance Company (Capitol), appeals the denial of its claim for rescission of three credit-life policies issued to the late Lincoln Phelps and a subsequent judgment in favor of Phelps's widow, appellee Lela Phelps. This is the third time this case has been before us. On the first occasion, we reversed a circuit court jury verdict in favor of appellee and instructed that the case be transferred to chancery. *See Capitol Life & Accident Ins. Co. v. Phelps*, No. CA98-1495 (June 2, 1999). Following a trial in chancery court, which also resulted in a verdict in favor of appellee, another appeal was taken by Capitol. We dismissed that appeal for lack of finality. *See Capitol Life & Accident Ins. Co. v. Phelps*, 72 Ark. App. 464, 37 S.W.3d 692 (2001). Thereafter, a final order was entered by the chancellor, and this appeal was brought. We are able to reach the merits on this appeal, and we affirm the chancellor's decision.

Between October 24, 1995, and March 8, 1996, Lincoln Phelps submitted applications to appellant for three credit life policies. Each application contained the following language:

> I VOLUNTARILY REQUEST THE INSURANCE DESCRIBED IN THIS POLICY. I . . . AM . . . NOW IN GOOD HEALTH, MENTALLY AND PHYSICALLY, AND HAVE NO CHRONIC DISEASE OR POOR HEALTH CONDITION.

The applications were signed by Phelps and forwarded to appellant, who then issued policies in the amounts of $21,107.07, $6,690.22, and $24,812.78, for a total of $52,610.07.

On September 13, 1996, while all three policies were in effect, Lincoln Phelps died at age fifty-four. His death certificate listed the cause of death as acute myocardial infarction due to cardiac dysrhythmia. Appellee Lela Phelps, as executrix of her husband's estate, submitted claims to appellant on all three policies, but the claims were denied. Following that denial, Mrs. Phelps sued appellant seeking the policy proceeds, plus a twelve-percent penalty, interest, and attorney fees, pursuant to Arkansas Code Annotated section 23-79-208 (Repl. 1999). Appellant counterclaimed for rescission on the grounds that Phelps had misrepresented his health as being good when in fact it was not, and further, had appellant known the true state of Phelps's health, it would not have issued the policies.

On January 18, 2000, a trial was held in chancery court. Appellee presented the testimony of herself and others that Lincoln Phelps had always been a vigorous, hard-working man with no visible health problems. The evidence was undisputed that Phelps consistently worked at hard physical labor for up to twelve hours a day, rarely missed work due to illness, had not been hospitalized in the twenty years preceding his death, and gave no outward indication of being in anything other than good health. Appellant, however, introduced Phelps's medical records into evidence, and they revealed that, at various times during the twenty years preceding his death, Phelps had been diagnosed with Graves disease (a thyroid disorder), hypertension, atrial fibrillation, and a mitral valve insufficiency. Appellant's vice-president, Paul Eaton, testified that, had appellant known of the health problems reflected in those records, it would not have issued the policies.

Following the trial, the chancellor ruled that the terms "good health" and "poor health condition" in the policy applications were ambiguous and that the term "chronic disease" while not ambiguous, was unclear. He also stated that "the Court cannot answer the question that [Phelps's alleged misrepresentation] was material to

the denial. Mr. Eaton, testifying for the insurance company, states [that] they would not have issued the policy, but his testimony is after the fact." Based upon these findings, the chancellor denied appellant's request to rescind the policies and entered judgment for appellee in the amount of $52,610.01. He also awarded appellee a twelve percent penalty, prejudgment interest, attorney fees, costs, and post-judgment interest, for a total judgment of $121,037.11. The appeal is brought from that order.

Misrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent recovery under an insurance policy unless either: 1) fraudulent; 2) material to either the acceptance of the risk or to the hazard assumed by the insurer; or 3) the insurer in good faith would not have issued the policy, or would not have issued it in the same amount, or at the same premium rate, or would not have provided coverage with respect to the hazard resulting in the loss if the facts had been made known to the insurer as required by the application for the policy. *See* Ark. Code Ann. § 23-79-107(a) (Repl. 1999). Appellant does not contend that Phelps fraudulently misrepresented the state of his health, but argues that Phelps's incorrect statement of good health was material to its acceptance of the risk and that, had it known the true facts, it would not have issued the policy. This is an affirmative defense that an insurer must plead and prove by a preponderance of the evidence. *See American Family Life Assurance Co. v. Reeves*, 248 Ark. 1303, 455 S.W.2d 932 (1970).

In deciding appeals from a chancery court, we review the evidence *de novo* and reverse only if the chancellor's findings are clearly erroneous. *Morse v. Morse*, 60 Ark. App. 215, 961 S.W.2d 777 (1998). Further, we give great deference to the chancellor's superior position to determine the credibility of witnesses and the weight to be accorded their testimony. *Simmons First Bank v. Bob Callahan Servs., Inc.*, 340 Ark. 692, 13 S.W.3d 570 (2000).

Appellant first challenges the chancellor's ruling that the language in the applications was ambiguous. An ambiguity exists when a provision in a policy or application is susceptible to more than one reasonable interpretation. *Phelps v. U.S. Credit Life Ins. Co.*, 336 Ark. 257, 984 S.W.2d 425 (1999).

The supreme court has defined the term "good health" as used in this context to mean that an applicant is in "apparent good health and free from such diseases as would seriously affect the risk." *Union Life Ins. Co. v. Davis*, 247 Ark. 1054, 1059, 449 S.W.2d

192, 195 (1970). The court further qualified that definition, stating that the applicant "must be justified in the belief that he is free of symptoms which should cause reasonable apprehension of disease which would materially affect the risk." *Id.* at 1060, 449 S.W.2d at 195. Based upon the fact that Phelps was virtually asymptomatic and able to lead a normal — if not more vigorous than normal — life, it is likely that he was justified in believing himself to be in good health. However, we need not address that point. Even if the application language was unambiguous, and even if Phelps incorrectly represented the state of his health, appellant could not void the policy unless it proved, pursuant to Ark. Code Ann. § 23-79-107(a), that the misrepresentation was material to its acceptance of the risk or that it would not have issued the policy had it known the true facts. The chancellor found that appellant's proof on this point was not convincing, and we cannot say that such a finding was clearly erroneous.

The burden was on appellant to sustain its contention that the facts not disclosed were material to the risk assumed by it or that, in good faith, it would not have issued the policy. *See Old Republic Ins. Co. v. Alexander*, 245 Ark. 1029, 436 S.W.2d 829 (1969). Appellant's vice-president Paul Eaton testified without elaboration that, if appellant had known of Phelps's health problems, it would not have issued the policies. However, Eaton offered no proof of any underwriting practices either in his own company or within the industry with regard to applicants with the type of health conditions reflected in Phelps's records. The only concrete underwriting guidelines introduced into evidence were those that required an applicant to fill out a detailed health certificate based on certain age, policy term, and amount of loan criteria. Those guidelines did not apply to Phelps, who was fifty-three at the time of his application and whose policies were valued at less than $75,000 for only a one-year term.

As the supreme court recognized in *Old Republic Ins. Co. v. Alexander, supra*:

> It is significant, as pointed out by the chancellor, that appellant produced no record of its own underwriting standards, nor did it attempt to show general standards in the underwriting profession or insurance trade by disinterested witnesses. It relied solely on the retrospective and possibly self-serving declarations of conclusions by this witness . . . his testimony cannot be considered as that of a disinterested witness. In weighing testimony, courts must consider

> the interest of a witness in the matter in controversy. Facts established by the testimony of an interested witness, or one whose testimony might be biased, cannot be considered as undisputed or uncontradicted. While the testimony of such a witness may not be arbitrarily disregarded, a trier of facts is not required to accept any statement as true merely because so testified. It cannot be said that such testimony is arbitrarily disregarded when it is not consistent with other evidence in the case, or unreasonable in its nature or is contradicted. Nor is it arbitrarily disregarded where facts are shown which might bias the testimony or from which an inference may be drawn unfavorable to the witness' testimony or against the fact testified to by him. (Citations omitted).

Id. at 1039, 436 S.W.2d at 835-36. *See also Wittner v. IDS Ins. Co. of N.Y.*, 96 A.D.2d 1053, 466 N.Y.S.2d 480 (1983); 44 AM. JUR. 2D Insurance § 1957 (2d ed. 1982) (holding that insurer's testimony on whether policy would have been issued is acceptable evidence, but not conclusive).

The chancellor in the case before us did not accept the testimony of appellant's representative that appellant would not have issued the policy had it known of Phelps's health conditions. Given the conclusory nature of the representative's testimony and the lack of supporting documentation, we cannot say that the chancellor clearly erred.[1]

The final issue concerns the amount of attorney fees awarded to appellee by the chancellor. The chancellor awarded $30,589.86 in fees, which was forty percent of the amount recovered by appellee under the policies, plus penalty and prejudgment interest. In her motion for fees, appellee stated that her agreement with her counsel was that, if the case should be appealed, counsel would be entitled to forty percent of the amount recovered. She also claimed that her counsel had spent over 350 hours on the case, although the itemized statement she attached showed only the activity entries, not the time spent.

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[1] Appellant makes a brief argument that Phelps's misrepresentation was material because Phelps's death was causally related to the matters misrepresented. *See* Ark. Code Ann. § 23-79-107(c) (Repl. 1999), which provides that "a misrepresentation is material if there is a causal relationship between the misrepresentation and the hazard resulting in a loss under the policy or contract." The chancellor made no ruling on the connection between Phelps's death and the conditions listed in his medical reports but, in any event, the evidence was in dispute on this point.

Arkansas Code Annotated section 23-79-208(a) (Repl. 1999) provides that an insured may recover a reasonable attorney fee from an insurer who wrongfully refuses to pay on a policy. *Phelps v. U.S. Credit Life Ins. Co.*, 340 Ark. 439, 10 S.W.3d 854 (2000). The following factors are relevant in determining reasonable fees: 1) the experience and ability of the attorney; 2) the time and labor required to perform the service properly; 3) the amount in controversy and the result obtained in the case; 4) the novelty and difficulty of the issues involved; 5) the fee customarily charged for similar services in the local area; 6) whether the fee is fixed or contingent; 7) the time limitations imposed upon the client in the circumstances; and 8) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the attorney. *Id.* However, while the courts should be guided by the foregoing factors, there is no fixed formula in determining the reasonableness of an award of attorney fees. *Id.* Because of its intimate acquaintance with the record and the quality of service rendered, we recognize the superior perspective of the trial court in assessing the applicable factors. *Id.* Thus, we will not set aside an award of attorney fees absent an abuse of discretion by the trial court. *Id.*

In *Phelps v. U.S. Credit Life Insurance Company, supra*, we approved an attorney fee award based upon a one-third contingency fee arrangement. Considering that this case has been tried twice and appealed three times, we see no abuse of discretion in the award in this case.

Affirmed.

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

Pat JACKSON *v.* Dr. Dean DELIS, Ph.D., *et al.*

CA 01-735 67 S.W.3d 596

Court of Appeals of Arkansas
En Banc
Opinion delivered February 13, 2002

Duncan & Rainwater, P.A., by: *Virginia Trammell*, for appellant.

Barber, McCaskill, Jones & Hale, P.A., by: *John S. Cherry, Jr.*, and *D. Keith Fortner*, for appellee.

PER CURIAM. Ms. Pat Jackson appeals from an order of dismissal granted by the Pulaski County Circuit Court that found it could not exercise personal jurisdiction over the defendant Dr. Dean Delis. Ms. Jackson raises two issues on appeal; however, because the order from which she appeals is not certified as a final judgment pursuant to Rule 54(b)(1) and (2) of the Arkansas Rules of Civil Procedure, we must dismiss.

This dispute arose from a workers' compensation claim made by Ms. Jackson. In June 1996, Ms. Jackson was involved in an automobile collision during the course of her employment. She sustained multiple injuries as a result of the collision, was treated by many doctors and psychologists, and began receiving workers' compensation benefits. Appellee Systemedic, Inc., (Systemedic) administered the details of Ms. Jackson's workers' compensation claim for her employer.

Approximately two years after Ms. Jackson's injury, Systemedic requested that appellee Dr. Delis, a California forensic consultant, review Ms. Jackson's medical records concerning whether Ms. Jackson had suffered a brain injury during her employment-related automobile accident. Ms. Jackson claims that, as a result of the findings made by Dr. Delis in his report, Systemedic stopped payment of her benefits.

Ms. Jackson sued Systemedic and Dr. Delis for negligence in Pulaski County Circuit Court, basing her claim on Dr. Delis's blatant disregard of the ethical rules of the medical profession in preparing his report and Systemedic's sole reliance on the report to discontinue her benefits. She later amended her complaint to add John Doe Systemedic Entity and John Doe Insurance Company as additional defendants. Dr. Delis answered and moved for dismissal of Ms. Jackson's complaint, alleging that the Pulaski County Circuit Court lacked personal jurisdiction over him. In its order entered March 16, 2001, the circuit court granted Dr. Delis's motion and dismissed the complaint against him. On March 30, 2001, the circuit court attempted to enter a final judgment pursuant to Rule 54(b) of the Arkansas Rules of Civil Procedure, but did not file a Rule 54(b) certification. In its order, the court noted that Ms. Jackson's claims and causes of action against defendant Systemedic remained pending before the court. Nevertheless, it held that there was no just reason to delay Ms. Jackson's appeal of the order dismissing Dr. Delis, stating that the appeal could be determinative

of the entire case. The court then directed the entry of a final judgment from which an appeal could be taken.[1]

Rule 2(a)(1) of the Arkansas Rules of Appellate Procedure—Civil provides that an appeal may be taken only from a final judgment or decree entered by the trial court. Arkansas Rule of Civil Procedure 54(b) further provides that, when more than one claim for relief is presented in an action or when multiple parties are involved, an order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not a final, appealable order. *See Hambay v. Williams*, 335 Ark. 352, 980 S.W.2d 263 (1998); *South County, Inc. v. First W. Loan Co.*, 311 Ark. 501, 845 S.W.2d 3 (1993). Whether an order is final for purposes of appeal is a jurisdictional issue that this court is required to raise even if the parties do not. *Hambay v. Williams, supra.*

Rule 54(b) was amended by a *per curiam* of the supreme court that became effective February 1, 2001. *See In re Arkansas Rules of Civil Procedure 4, 12, 15, 45, 54, 56, and 78: and Arkansas Rules of Appellate Procedure—Civil 2 and 4*, 343 Ark. 858, 34 S.W.3d XV (2001). Rule 54(b) now provides that the court shall execute a certification of final judgment, as it appears in Ark. R. Civ. P. 54(b)(1), when it finds no just reason for delaying an appeal. Subsection (2) of this rule further provides that, absent this required certification, any judgment, order, or other form of decision that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action.[2]

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[1] The order made no mention of the separate John Doe defendants.

[2] (b) *Judgment Upon Multiple Claims or Involving Multiple Parties.*

(1) *Certification of Final Judgment.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination, supported by specific factual findings, that there is no just reason for delay and upon an express direction for the entry of judgment. In the event the court so finds, it shall execute the following certificate, which shall appear immediately after the court's signature on the judgment, and which shall set forth the factual findings upon which the determination to enter the judgment as final is based:

Rule 54(b) Certificate

With respect to the issues determined by the above judgment, the court finds:

[Set forth specific factual findings.]

Upon the basis of the foregoing factual findings, the court hereby certifies, in accordance with Rule 54(b)(1), Ark. R. Civ. P., that it has determined that there is no just reason for delay of the entry of a final judgment and that the court has and

Because the court's March 30, 2001, judgment is not a final order as to all the parties, and there is not a Rule 54(b) certification that would justify an immediate appeal, this court is without jurisdiction to hear this case. Therefore, the appeal is dismissed without prejudice.

Appeal dismissed.

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does hereby direct that the judgment shall be a final judgment for all purposes.

Certified this_____ day of _____,_____.

_____
Judge

(2) *Lack of Certification.* Absent the executed certificate required by paragraph (1) of this subdivision, any judgment, order, or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the judgment, order, or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all of the parties.

Ark. Rule Civ. P. 54(b).

Jimmy GIVENS *v.* STATE of Arkansas

CA CR 01-104 69 S.W.3d 50

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered February 20, 2002

Alvin Schay, for appellant.

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

JOSEPHINE LINKER HART, Judge. Appellant, Jimmy Givens, pleaded guilty to the crime of possession of a controlled substance and was sentenced to three years' probation. In accordance with Rule 24.3(b) of the Arkansas Rules of Criminal Procedure, Givens reserved his right to appeal from the trial court's denial of his motion to suppress, and he now argues on appeal that a police officer's search of his person exceeded the permissible scope of a search for weapons. We affirm the court's denial of his motion to suppress.

As noted by the United States Supreme Court, according to *Terry v. Ohio*, 392 U.S. 1 (1968), if an officer justifiably believes a person is armed and dangerous, the officer may conduct a patdown search of the person to determine whether he is carrying a weapon. *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993). The search, however, is strictly limited to a discovery of weapons; if the search exceeds that necessary to determine whether the person is armed, any items seized will be suppressed. *Id.*

However, "[i]f a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context." *Id.* at 375-76. "Under that doctrine, if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant." *Id.* at 375. "If, however, the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object . . . the plain-view doctrine cannot justify its seizure." *Id.* In *Minnesota v. Dickerson*, where the "incriminating character of the object was not immediately apparent" to the officer, the Court held that the officer's further search of the defendant's pocket was invalid. *Id.* at 379.

We note that "as a general matter determination of reasonable suspicion and probable cause should be reviewed *de novo* on appeal." *Ornelas v. United States*, 517 U.S. 690, 699 (1996). However, we "review findings of historical fact only for clear error" and "give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Id.*

At the suppression hearing, Daniel Willey, a police officer with the City of Blytheville, testified that while on patrol, he stopped a car with tinted windows to examine the darkness of the window tinting. Willey observed the occupant of the car, later identified as appellant, moving his arms as if he were hiding something. Believing that appellant was armed, Willey had appellant exit the car and conducted a patdown search of appellant. Willey testified, "When I pat him down I just move my hands down the outer clothing, around the waistband, around the legs, just make sure he hasn't got

a handgun stuck in the side of his pants or within his waistband. . . ." As he was patting appellant down, appellant jerked away, turning his left side away, preventing Willey from searching appellant's left side. Willey handcuffed appellant and patted down his left pants pocket, discovering a "tubular object" that "felt like a crack pipe." Willey testified that most crack pipes "are tubular and glass, open on the ends" and that he knew right away that it was a crack pipe. He then reached in appellant's pocket and removed a crack pipe and placed appellant under arrest for possessing the crack pipe. The officer continued his search of appellant, finding cocaine in appellant's pants pocket and in his ski mask.

On cross examination, Willey testified that it was obvious that the object was a crack pipe, but he conceded that it could have been any number of other items. On redirect examination, Willey testified as follows:

> Well, as I felt it, I see a lot of them. The crack pipe was open on the ends. It was short and hard. At that point there was no doubt in my mind that's what he was hiding from me. He was pulling his leg away from me. At that point I did retrieve it. . . . As I rubbed my hand down it was laying sideways in his pocket. As I rubbed my hand down it you could feel the open end on it. On one finger I could feel it. And at that time I went ahead and retrieved it.

As his only point on appeal, appellant argues that the officer's search of his pocket exceeded the permissible scope of a protective search for weapons because the contour or mass of the crack pipe did not make its identity readily apparent to the officer. He argues that "the testimony of the officer that the tubular object in [a]ppellant's left pocket was open at both ends . . . makes it obvious that he had to either remove it from [a]ppellant's pocket and view it, or manipulate it while it was in the pocket, to determine it had open ends." He further argues that the "round and hard object could have been a pen, a pencil, a spike or any other number of objects." Thus, he contends that the items seized from appellant must be suppressed.

■ In this case, the officer testified that he rubbed his hands down appellant's outer clothing, and in doing so he felt an object in appellant's pocket that he knew was a crack pipe. Giving due weight to Willey's testimony that he had seen a lot of crack pipes, that it was obvious that he felt a crack pipe, and that he immediately knew it was a crack pipe, we cannot conclude that the court erred

in refusing to suppress the crack pipe, as the incriminating nature of the object was immediately apparent to Willey.

This case resembles an earlier case in which we noted an officer's testimony that "based on his experience as a law enforcement officer, it was apparent to him that what he felt in the appellant's pocket was a bag of cocaine." *Dickerson v. State*, 51 Ark. App. 64, 69, 909 S.W.2d 653, 656 (1995). There, we concluded that "the seizure did not invade the appellant's privacy beyond that already authorized by the officer's search for weapons." *Id.* We distinguish the case at bar from a case in which we suppressed items found during an officer's search of a defendant's clothing when it was not "immediately apparent" to the officer that the item he felt was contraband, and he had to remove the item from the defendant's pocket to determine its nature. *Howe v. State*, 72 Ark. App. 466, 39 S.W.3d 467 (2001); *see also Hunter v. State*, 71 Ark. App. 341, 32 S.W.3d 33 (2000) (holding that the search exceeded the permissible scope of a protective search when an officer opened a piece of paper that he had removed from the defendant's waistband).

Further, Willey's testimony that he felt the open end of the crack pipe with one finger does not suggest that he did more than examine the "contour" of the object as is permitted by *Minnesota v. Dickerson*. Willey otherwise described the patdown as rubbing his hands down appellant's outer clothing. This testimony does not give rise to a suggestion that Willey manipulated the crack pipe or that the search extended beyond that necessary for a search for weapons. Consequently, we conclude that this case is distinguishable from our decision in another case where we held that because the officer "had to manipulate a bulge in [the defendant's] rear pocket to determine that it was contraband," the search exceeded its permissible scope. *Bell v. State*, 68 Ark. App. 288, 293-94, 7 S.W.3d 343, 346 (1999).

Finally, we conclude that, following the seizure of the crack pipe, Willey's continued search of appellant's person and the subsequent seizure of the cocaine was lawful as a search of appellant's person incident to an arrest for possession of the crack pipe. *Chimel v. California*, 395 U.S. 752, 762-63 (1969). Thus, we hold that the trial court did not err in denying appellant's motion to suppress the evidence seized.

Affirmed.

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

GRIFFEN, J., dissents.

WENDELL L. GRIFFEN, Judge, dissenting. I would reverse and remand for a new trial in this case because *Terry v. Ohio*, 392 U.S. 1 (1968), does not authorize an officer to search a suspect's pockets to retrieve an item that the officer knows is not a weapon. As noted by the majority, the purpose of a *Terry* search is to allow an officer to feel the outer portions of a suspect's clothing to determine if the suspect has any weapons. However, a protective pat-down may not be used as a guise for a general search for evidence of criminal activity. *See id.* Once the officer determines that a suspect does not have any weapons, the protective search must end. *See id.*

Consistent with *Terry*, Arkansas Rule of Criminal Procedure 3.4 provides that:

> 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 . . . 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 other dangerous thing which may be used against the officers or others. *In no event shall this search be more extensive than is reasonably necessary to ensure the safety of the officer or others.*

(Emphasis added.)

It is true that pursuant to *Minnesota v. Dickerson*, 508 U.S. 366 (1993), a police officer during the course of a protective search may seize nonthreatening contraband if its incriminating character is immediately apparent, as long as the officer's search stays within the bounds marked by *Terry*. However, here, the officer's search exceeded the scope of a *Terry* frisk.

The majority notes that Willey stated that when he felt the object, it was obvious to him, based on his experience and the way the object felt, that the object was a crack pipe. He further testified that he sees "lots of them," and that he did not believe the object was anything else when he retrieved it. However, I disagree that the credibility issue in this case turns on Willey's assertion that he

immediately recognized that the object was a crack pipe. Rather, the credibility issue begins and ends with the reason for the patdown: to protect the officer's safety.

Certainly, if the officer mistakenly thought that object was a weapon and it turned out to be contraband, the plain-feel doctrine would apply and the search would be proper. However, that is not the case here. To the contrary, it is clear that Willey knew the object was not a weapon when he searched appellant's pocket. Nonetheless, the protective search continued, as demonstrated by Willey's testimony. With regard to whether the search at that point was pursuant to arrest or for officer safety, Willey stated:

> At that time it was pretty much, after I found the crack pipe I went ahead and patted him the rest of the way down and all the way down his legs after I found the crack pipe. It is correct that at the time I arrested him for the crack pipe there was no other accompanying felony, possession of drugs or anything of that nature.

Thus, when Willey felt the object in appellant's pockets, he knew that it was not a weapon. Further, he was not in any danger because appellant had been handcuffed. At that point, the officer was authorized to continue with the protective pat-down of appellant's outer clothing and to ask appellant for consent to search his pocket if he believed the object was contraband, but he was not authorized to search appellant's pockets when he knew that the object was not a weapon.

The facts of this case are similar to the facts in *Bell v. State*, 68 Ark. App. 288, 7 S.W.3d 343 (1999). In that case, the officer, while performing a protective frisk, noticed a bulge in the defendant's left rear pants pocket. The officer felt of the bulge, which he stated felt like a plastic bag containing a vegetable-like substance in the pocket. The *Bell* court reversed, noting that 1) it was clear from the officer's testimony that he had to manipulate the bulge in order to determine that it was contraband and 2) that when the initial frisk yielded no weapons, the search should have ended.

The majority attempts to distinguish *Bell* on the ground that the officer had to manipulate the object to determine that it was contraband. It is true that the officer in the instant case was not required to manipulate the object to determine that it was contraband. However, this same nonmaniupulative touch also immediately assured the officer that the object was not a weapon. As in *Bell*, it is precisely because the nonthreatening nature of the object in

appellant's pocket was immediately apparent that the officer should not have retrieved the object.

Therefore, I would reverse this case and remand for a new trial.

Carl COOK and Sandra Burris *v.* STATE of Arkansas

CA CR 00-983 68 S.W.3d 308

Court of Appeals of Arkansas
Division I
Opinion delivered February 20, 2002

Sam T. Heuer and *Lessmeister Law Firm, PLLC*, by: *James J. Lessmeister*, for appellant Carl Cook.

Dale W. Finley, for appellant Sandra Burris.

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

LARRY D. VAUGHT, Judge. Appellant Carl Cook was charged with delivery of methamphetamine, conspiracy to deliver methamphetamine, aggravated robbery, and theft of property. Appellant Sandra Burris was charged with delivery of methamphetamine and conspiracy to deliver methamphetamine. Appellants were tried together and were both represented by the same counsel

at trial, but have retained separate counsel on appeal. Cook was convicted of delivery, conspiracy, and theft, and was sentenced to 420 months' imprisonment in the Arkansas Department of Correction. Burris was convicted of conspiracy to deliver and sentenced to six years' probation conditioned upon her serving 120 days in the Pope County Detention Center.

On June 25, 1999, Tom Alexander (a confidential informant) met with investigators of the Fifth Judicial District Drug Task Force (DTF) to arrange a controlled purchase of methamphetamine from appellant, Carl "Bubba" Cook. On July 12, 1999, Alexander arranged to purchase one ounce of methamphetamine from Cook. Investigators with the DTF met with Alexander prior to the arranged purchase and installed a body wire, provided him with a tape recorder, and gave him $1,200 in "buy" money. At approximately 10:30 p.m. on July 12, Alexander entered the residence of Carl Cook and Sandra Burris on Atkins Bottom Road in Pope County, Arkansas. In an area outside of the appellants' home, Alexander gave Cook the $1,200 in exchange for one ounce of methamphetamine. The transaction was recorded on audio tape. Appellant Burris was inside the home during the "buy." She was monitoring a police scanner and communicated to Cook that she could hear Cook's conversation with Alexander on the scanner. Cook demanded that Alexander follow him to the house for questioning. While walking to the residence, Alexander discarded the body wire and tape recorder before being questioned by Cook. Once inside the residence, Cook ordered a strip search. When Alexander's shirt was removed, a piece of tape was discovered. Before Cook released him, Alexander was robbed, threatened, and kept against his will for approximately two hours.

The following day, a search warrant was executed for the Cook residence for the body wire, recorder, and money. The tape recorder was recovered during the search. The following day, a van was stopped that had been seen at the Cook residence during prior surveillance of his property. The driver, David Kidd, was detained on an unrelated chancery court matter. During a routine inventory search of the van, the body wire that Alexander discarded on Cook's property was discovered.

On appeal, Cook alleges that the tape recorder and the body wire were illegally seized and should have been suppressed at trial. Additionally, he argues that the trial court committed "plain error" by allowing the same attorney to represent both defendants, and by demanding that Cook carry the burden of proving that he had been

pardoned from a prior conviction by the Governor of the State of Arkansas. Appellant Burris claims on appeal that the trial court erred in its denial of her motion for directed verdict on the charge of conspiracy to deliver methamphetamine levied against her.

I. Sandra Burris's Appeal

Burris was convicted of conspiracy to deliver methamphetamine for her involvement in the arranged "buy" that occurred on July 12, 1999. She made timely motions for directed verdict at both the close of the State's case-in-chief and at the close of all the evidence. The trial court denied both motions.

Burris argues that there was no proof of the requisite "agreement" to commit an offense. While the State characterized her as a "lookout," Burris maintains on appeal that there was no proof that she was doing anything other than checking on police who made themselves conspicuous in the area. While Burris admits that she did report to Cook that she heard his conversation with Alexander on the scanner, she denies that it is proof that she was part of a conspiracy.

A directed-verdict motion is a challenge to the sufficiency of the evidence. The test for determining sufficiency of the evidence is whether there is substantial evidence to support the verdict. *Wilson v. State*, 320 Ark. 707, 898 S.W.2d 469 (1995). Evidence is substantial if it is of sufficient force and character to compel reasonable minds to reach a conclusion beyond suspicion and conjecture. *Id.* On appeal, we review the evidence in the light most favorable to the State, considering only that evidence that tends to support the verdict. *Id.*

Arkansas Code Annotated section 5-3-401 (Repl. 1997) provides:

> A person conspires to commit an offense if with the purpose of promoting or facilitating the commission of any criminal offense:
>
> (1) He agrees with another person or persons:
>
> (A) That one (1) or more of them will engage in conduct that constitutes that offense; or

(B) That he will aid in the planning or commission of that criminal offense; and

(2) He or another person with whom he conspires does any overt act in pursuance or furtherance of the conspiracy.

A conspiracy may be proven by the circumstances and the inferences to be drawn from the course of conduct of the alleged conspirators. *Jones v. State*, 45 Ark. App. 28, 871 S.W.2d 403 (1994). A conspiracy may be shown by circumstantial evidence, and the State need not offer direct proof of a prior agreement. *Henry v. State*, 309 Ark. 1, 828 S.W.2d 346 (1992).

Here, the State presented evidence that Burris acted as a lookout for Cook. While Cook was gathering the methamphetamine that Alexander had purchased, Burris alerted Cook that "[e]verything you are talking about I can hear on the scanner." This evidence established that Burris was aware of Cook's illegal activity and aided him in the pursuit of the illegal activity. Therefore, her conviction was supported by substantial evidence, and the trial court did not err in its denial of her motions for directed verdict.

II. Carl Cook's Appeal

a. Fourth Amendment Violations

Appellant Cook argues 1) that the warrant to search his house for Alexander's body wire and other items was invalid, and therefore the tape recorder obtained in the search should be suppressed, and 2) that the inventory search of the van Kidd was driving was a pretext for an illegal search, and therefore the missing body wire discovered during the inventory search should be suppressed.

When an appellant claims that the challenged evidence was erroneously admitted in violation of the Fourth Amendment's prohibition of unreasonable search and seizure, he must demonstrate how he was prejudiced by its admission. *See Schalski v. State*, 322 Ark. 63, 69-70, 907 S.W.2d 693, 697 (1995). Appellant Cook has failed to demonstrate any prejudice resulting from the alleged violations. The jury heard a recording of the drug "buy" between Cook and Alexander. The recording was made by the police at a

remote location. The remote recording was not dependent on the introduction of the body wire and the tape recorder.[1] Additionally, Alexander testified to events that followed Cook's discovery of the recording device. The introduction of the body wire and tape recording were ancillary to the heart of the State's case, and no prejudice resulted from their introduction, regardless of the propriety of their admissibility.

b. Ineffective Assistance of Counsel

Appellant Cook argues on appeal that because his trial counsel also represented his co-defendant, Burris, his defense was prejudiced by creating a conflict of interest, and he was therefore denied his constitutional right to effective assistance of counsel. In response, the State argues that this issue is not preserved for appeal because it was not raised below. Cook argues that it falls within the "plain error" exception to the contemporaneous objection rule, and that the trial judge was obligated to make an inquiry into the conflict on his own motion.

A motion for severance was filed prior to trial by Burris. Cook references the closing statement of the motion to claim that the motion was filed on behalf of both Cook and Burris. Additionally, Cook claims that his counsel orally modified his motion to include both defendants during argument before the trial court on this issue. Burris's severance motion was the only means by which the dual representation issue was raised, and Cook has not argued that the denial of the motion to sever was error, but instead he has argued that he was denied effective assistance of counsel. However, ineffective-assistance-of-counsel claims are typically raised in post-conviction relief proceedings under Rule 37 of the Arkansas Rules of Criminal Procedure. In such a proceeding, as the State points out, the parties have an opportunity to develop a record on the conduct of the defense counsel, and the defense counsel can testify in his own behalf.

Appellant's ineffective-assistance-of-counsel argument was not raised below, and we will generally not consider errors raised for the first time on appeal. *See Nichols v. State*, 69 Ark. App. 212, 11 S.W.3d 19 (2000). There are only four exceptions to this rule: (1) when error is made by a trial court without knowledge of the

[1] The tape found in the tape recorder was not introduced at trial. The State introduced the cassette tape made by police at the remote location.

defense counsel who thus has no opportunity to object; (2) when a trial court should intervene on its own motion to correct a serious error by admonition or by mistrial; (3) when evidentiary errors affect a defendant's substantial rights although they were not brought to the court's attention; and (4) in death-penalty cases when prejudice is conclusively shown by the record and we would unquestionably require the trial court to grant relief under Ark. R. Crim. P. 37; in all other circumstances a contemporaneous objection is required to preserve a point for review. *Marshall v. State*, 316 Ark. 753, 875 S.W.2d 814 (1994).

Appellant Cook argues that the second exception, "when a trial court should intervene on its on motion to correct a serious error by admonition or mistrial," is applicable. The "serious error" exception was articulated in *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980), and the court explained that the use of this exception is a mere possibility, for it has never occurred in any case. Because appellant is raising an ineffective-assistance-of-counsel argument, instead of an immediate and egregious trial error, we do not believe that this is an appropriate case for application of the "serious error" exception. Therefore, the ineffective-assistance-of-counsel issue is not preserved and accordingly, we affirm on this point.

c. Pardon

Appellant Cook argues that he is entitled to a new trial because a pardoned sentence was introduced during the sentencing phase of his trial. When the State offered a certified copy of a 1981 conviction for carrying a prohibited weapon, Cook's attorney informed the court that his client maintained that the conviction had been pardoned. The prosecutor noted that the NCIC printout indicated a pardon for a 1979 conviction but not for the 1981 conviction. The judge asked if the appellant could produce any evidence of the pardon, and counsel noted that the circuit clerk's office was closed because it was 9:00 p.m. Counsel never requested a continuance to procure the clerk's record of the alleged pardon.

The court asked several times if appellant wanted to offer any testimony, and counsel stated that he would offer appellant's testimony on the issue of the pardon for the record, but that he did not want to put it before the jury. However, the sentencing continued and the record does not reflect that the appellant ever testified regarding the pardon. The only indication that the appellant was pardoned was the claim of his attorney, and it is well settled

that arguments of counsel are not evidence. *Wright v. State*, 67 Ark. App. 365, 1 S.W.3d 41 (1999) (citing *Johnson v. State*, 326 Ark. 430, 934 S.W.2d 179 (1996)). Once the State offered the certified copy of the conviction, it had established a *prima facie* case, and the burden shifted to the appellant to establish the pardon. *Wright, supra.* Because no evidence was introduced, the conviction was properly admitted. No motion for new trial or for resentencing was ever filed. Cook attempted to raise the issue of the pardon to the trial court when the case was initially remanded to settle the record on an unrelated issue, but the trial court correctly refused to reconsider the pardon at that time.

The State also argues that the admission of the pardoned offense did not prejudice Cook because he was sentenced to less than the potential maximum sentence, and because he was not charged as an habitual offender. The admission of the prior offense did not change the range of available sentences, nor did Cook receive the maximum sentence available to the jury.

In order to prevail on his claim, Cook must do more than allege prejudice, he must demonstrate it. *Snell v. State*, 290 Ark. 503, 721 S.W.2d 628 (1986), *cert. denied*, 490 U.S. 1076 (1988). We will not reverse on the mere potential for prejudice. *Sheridan v. State*, 313 Ark. 23, 852 S.W.2d 772 (1993). Therefore, because Cook cannot show that he was prejudiced by the admission of the conviction during the sentencing phase of the trial, his claim of error must fail. Accordingly, we affirm the trial court on this point.

Affirmed.

HART, J., agrees.

GRIFFEN, J., concurs.

WENDELL L. GRIFFEN, Judge, concurring. I agree that appellants' convictions should be affirmed. However, I write separately to express dismay with the conduct of the Pope County Prosecutor's Office and the way it dealt with Carl Cook's pardon during the sentencing phase.

Even though we remanded the case to settle the record regarding the ruling on the motion to suppress, the State remained under a continuing obligation to make truthful disclosures to the court, including the disclosure of exculpatory evidence relating to Carl Cook's sentence. Further, contrary to the representations made at

trial by the prosecutor in this case, David Gibbons, the State knew that Cook's firearm conviction had been pardoned. Despite being told by Cook's counsel that Cook had been pardoned and despite a clear ethical obligation to 1) be accurate in assertions he made to the court and 2) provide exculpatory evidence regarding sentencing, the record shows that Gibbons did not reveal that his office had documentation of Cook's pardon.

The State's continuing obligation to provide truthful disclosures, including exculpatory evidence regarding sentencing, is recited in the Arkansas Rules of Criminal Procedure, the Arkansas Model Rules of Professional Conduct, and the American Bar Association Model Rules of Professional Conduct. Pursuant to Arkansas Rule of Criminal Procedure 17.1(d), a prosecutor is under a continuing duty to disclose exculpatory evidence, that is, evidence within "his knowledge, possession, or control, which tends to . . . reduce the punishment therefore." It is well settled that the prosecution's suppression of evidence favorable to an accused violates the defendant's due process rights, where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *See Brady v. Maryland*, 373 U.S. 83 (1963).

It is also well settled that the purpose of the discovery rules is to require the State to disclose its evidence to the defendant in time for the defendant to make beneficial use of the information. *See Thomas v. State*, 312 Ark. 158, 847 S.W.2d 695 (1993). Arkansas Rule of Criminal Procedure 17.2(a) requires the prosecuting attorney to perform his obligations under Rule 17.1 "as soon as practicable."

In addition, Arkansas Model Rules of Professional Conduct 3.3 and 3.4 require an attorney to provide truthful disclosures to the court and opposing party. Arkansas Rule of Professional Conduct 3.8 and American Bar Association Model Rule of Professional Conduct 3.8 mirror each other and set out special rules that apply to prosecutors. These rules state, in relevant part, that a prosecutor in a criminal case shall:

> make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal[.]

Where the State seeks to admit evidence of a prior conviction for the purposes of sentence enhancement, the State has the burden of proving that a defendant has prior conviction. *See Byrum v. State*, 318 Ark. 87, 884 S.W.2d 248 (1994). Once *prima facie* evidence is introduced, the burden shifts to the appellant to show proof that the conviction is no longer valid and should not be considered. *See Wright v. State*, 67 Ark. App. 365, 1 S.W.3d 41 (1999). Here, the State offered a certified copy of appellant's February 13, 1981 conviction for possession of a firearm by certain persons. The State also submitted a July 21, 1997 order of probation entered for possession of drug paraphernalia, a felony, and possession of a controlled substance, a misdemeanor. Cook's counsel, Dale Finley, informed the court and Gibbons that Cook maintained that he had been pardoned for all offenses prior to the 1980s. In open court, Gibbons responded: "The NCIC [National Crime Information Computer] shows that there was a note that this is a felon in possession and the underlying felony, which was entered in 1979 in Jefferson County was pardoned, but not this, and there's nothing to indicate that. There's got to be some record of it." Gibbons referred to the NCIC printout, but did not introduce it into evidence. It is, however, part of the record.

As Gibbons stated, the NCIC does show a pardon for a felony charge entered in Jefferson Country based on an arrest made in 1979. However, contrary to Gibbons's assertion, there *was* documentation of Cook's pardon on the face of the NCIC report. This report shows that on February 13, 1981, Cook was charged with aggravated assault and possession of a firearm by certain persons. Beneath the information on the possession charge at issue here, the report plainly indicates: "Start Date: 1981/03/04 Status Pardoned." Two lines further down the report states: "Other Info: Pardon 040391/Right Poss FA."[1]

Here, Cook was charged by a criminal information on July 15, 1999; he was arraigned on July 20, 1999. The trial began on January 18, 2000, and concluded on January 20, 2000. The NCIC report was not requested until January 18, 2000 (the day the trial began), and the pen pack was not obtained until January 19, 2000. Thus, the State obtained the pen pack showing appellant's invalid

[1] It appears that the NCIC report was apparently not admitted into evidence below, but is part of the record on appeal, marked by the handwritten notation, "St # 14." However, State's Exhibit 14, as found in the record, is the search warrant for Burris's grandmother's apartment. Nonetheless, the record clearly shows that Gibbons expressly relied on the report in responding to Cook's assertion that he had been pardoned.

conviction *after* it received the NCIC report indicating that his firearms possession charge had been pardoned. Despite indications on the face of the NCIC report that appellant was pardoned for the firearms possession charge, the State asks us to believe that the prosecutor acted in good faith in relying on the report. However, pursuant to *Brady v. U.S., supra*, the good faith or bad faith of the prosecutor is irrelevant. What is relevant is that, had the State cared to do so, it had ample opportunity to discover that Cook had been pardoned for the possession conviction it chose to enter into evidence against him during the sentencing phase of the trial.

This case vividly illustrates why the State's burden should not shift *unless* the State presents evidence of a valid conviction. Lawyers are familiar with the practice of Shepardizing a case to determine whether it remains valid precedent. There should be an analogous requirement imposed upon the State to ensure that when it introduces a certified copy of a conviction, that conviction is valid. Such a requirement is simply a logical and just extension of the State's duty to provide exculpatory evidence. However, in this case, Gibbons made untruthful assertions about Cook's conviction history premised on the NCIC report when the report declared on its face that Cook had been pardoned for the firearms possession charge. Whatever the reasons were for not disclosing that material fact, nondisclosure was inexcusable.

Demetrius CURTIS *v.* STATE of Arkansas

CA CR 01-564 68 S.W.3d 305

Court of Appeals of Arkansas
Division I
Opinion delivered February 20, 2002

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

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

ANDREE LAYTON ROAF, Judge. Demetrius Curtis was charged with possession of cocaine, simultaneous possession of drugs and a firearm, and misdemeanor possession of marijuana. In a bench trial, Curtis was found guilty of all three charges, and judgment was entered on January 22, 2001, sentencing him to ten years' imprisonment in the Arkansas Department of Correction. On appeal, Curtis challenges the sufficiency of the evidence supporting his conviction for simultaneous possession of drugs and a firearm, based on the State's failure to prove that the gun he possessed met the statutory definition of a firearm. We affirm.

At trial, Pulaski County Deputy Sheriff Stacey Payton testified that on October 12, 1999, she was patrolling in the Baseline Road area. As Payton was traveling east on Baseline Road, Curtis's vehicle was ahead of her. Payton witnessed several items of trash fly out of the bed of Curtis's truck. Payton stopped Curtis for littering, and as she was getting out of her vehicle, Curtis got out of his truck and

approached her. Payton testified that she explained to Curtis why he was stopped and that he appeared very nervous. After Curtis gave Payton his driver's license and registration, she called in his driver's license number, and it came back with warrants. As Payton was checking his license, she testified that she was keeping Curtis in view. Payton testified that she saw Curtis turn to the side, reach into his right front pocket, and drop something down the side of his leg. Payton called for back up and then placed Curtis in custody. She retrieved the items that Curtis had dropped. The items were plastic bags containing what was subsequently determined to be cocaine and marijuana.

After placing Curtis in her vehicle, Payton asked him if there was anything else in his truck that she needed to know about, as she was going to do an inventory report before towing it. Curtis replied that there was a gun under his seat. Payton found the gun under the seat and testified that it had six rounds in the magazine, with one round chambered. Payton identified the gun at trial as the handgun that she found in Curtis's truck, and it was admitted into evidence without objection. Curtis testified that the handgun was his and that he kept it in his store. After Curtis's motions to dismiss were denied, the trial court found him guilty of possession of cocaine, simultaneous possession of drugs and a firearm, and misdemeanor possession of marijuana. Curtis was sentenced to ten years' imprisonment on each offense, to be served concurrently.

On appeal, Curtis argues that the trial court erred in denying his motion to dismiss the simultaneous possession of drugs and firearms charge because the State failed to introduce substantial evidence that the handgun he possessed was a device designed, made, or adapted to expel a projectile by the action of an explosive. A motion for a directed verdict, or in a non-jury trial, a motion for dismissal, is a challenge to the sufficiency of the evidence. *Boston v. State*, 69 Ark. App. 155, 12 S.W.3d 245 (2000). When reviewing a challenge to the sufficiency of the evidence, the appellate court will affirm the conviction if there is substantial evidence to support it, when viewed in the light most favorable to the State. *Rabb v. State*, 72 Ark. App. 396, 39 S.W.3d 11 (2001). Sufficient evidence, whether direct or circumstantial, is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or another without resort to speculation or conjecture. *Id.* Where the evidence is circumstantial, the appellate court must consider whether the evidence was sufficient to exclude all other reasonable hypotheses. *Boston v. State, supra.*

In order to sustain a conviction for simultaneous possession of a firearm and a controlled substance under Ark. Code Ann. § 5-74-106(a)(1) (Repl. 1997), the evidence must show that the defendant possessed a firearm while in possession of a controlled substance and that a connection existed between the firearm and the controlled substance. *Rabb v. State*, *supra*. "Firearm" is defined in Ark. Code Ann. § 5-1-102(6) (Repl. 1997) as "any device designed, made, or adapted to expel a projectile by the action of an explosive or any device readily convertible to that use, including such a device that is not loaded or lacks a clip or other component to render it immediately operable, and components that can readily be assembled into such a device."

Curtis's only argument on appeal is that the State failed to present substantial evidence that his handgun was a "firearm" within this definition. The only evidence presented at trial pertaining to the gun was the testimony of Deputy Payton, who testified that she found the handgun loaded, with six rounds in the magazine and one round chambered, and Curtis's testimony that the gun was his, and that he kept it in his store. As Curtis argues, there was no direct evidence presented at trial that the gun was "designed, made, or adapted to expel a projectile by the action of an explosive," as stated in § 5-1-102(6). However, the cases cited by Curtis in support of his contention that the State was required to present this type of direct evidence to prove that the gun was a firearm are not applicable to this case. In *Beck v. State*, 12 Ark. App. 341, 676 S.W.2d 740 (1984), the State had an expert testify as to whether a certain gun could fire automatically, where the appellant was charged with a violation of a statute prohibiting machine guns. In *S.B. v. State*, 318 Ark. 499, 885 S.W.2d 885 (1994), the Court affirmed the convictions of two juveniles for possessing handguns on school property. The testimony established that the handgun was inoperable due to several missing pieces, but the trial court found that the handgun was designed to fire a certain type of ammunition, as required by the statute defining a handgun. *Id.* Finally, in *Ward v. State*, 64 Ark. App. 120, 981 S.W.2d 96 (1998), we affirmed convictions for theft by receiving a firearm and possession of a firearm by a felon, where the rifles were modified to fire only blanks, due to testimony that the rifles could easily be reconverted to live-fire capability. Not only do all of these cases involve different offenses than the one at issue, there was a question raised as to the weapons' operability in each of these cases, whether due to a modification, a missing piece, or a specially designed gun. In this case, there was no evidence presented that the handgun was not in working order or

that it was modified in any way; to the contrary, the evidence showed that the gun was fully assembled and loaded.

Although there was no direct evidence that the handgun was designed or made to expel a bullet by the use of an explosive such as gunpowder, circumstantial evidence constitutes substantial evidence where it excludes all other reasonable hypotheses. *Boston v. State*, *supra*. There are cases that have held that evidence similar in nature to the evidence in this case was sufficient to establish that a weapon was a firearm. For example, in *United States v. Munoz*, 15 F.3d 395 (5th Cir. 1994), the evidence established that a shotgun was a firearm, where a witness testified that he purchased a shotgun from defendant and defendant told him that it worked, the gun was identified by the witness and admitted into evidence, and there was no evidence that the shotgun was not designed to, or could not readily be converted to, expel a projectile by action of an explosive. *See also United States v. Liles*, 432 F.2d 18 (9th Cir. 1970) (evidence supported conviction for being a felon in possession of a firearm, where owner of sporting goods store identified weapon as a common type of revolver, defendant had asked to see ammunition for that type of revolver, and acquaintance of defendant had seen the weapon and described it as being similar to two revolvers he himself owned). Also, in *United States v. Polk*, 808 F.2d 33 (8th Cir. 1986), the appellant made a similar argument as in the present case, and the court found that the evidence was sufficient to affirm the conviction for being a felon in possession of a firearm. The evidence presented at trial was that the weapon was a Smith and Wesson, .38 caliber revolver, and that the gun was loaded with five rounds of ammunition. *Id.* at 34. No evidence was introduced about the condition of the gun or whether it had been fired. *Id.* The gun was also introduced into evidence, and the court stated that the fact finder could properly assess whether the gun could fire or was designed to fire. *Id.*

Here, though circumstantial, the evidence is substantial enough to support the trial court's finding that Curtis's gun was a firearm. Deputy Payton identified the handgun at trial as the one she found in Curtis's truck. Payton testified that the gun was loaded, with one round of ammunition in the chamber and other rounds in the magazine. The handgun was introduced into evidence. Also, Curtis testified that the gun was his and that he kept it in his store. This evidence supports the conclusion that the gun was able to be fired, or at the least, that it was designed to be fired. Furthermore, the trial court had the opportunity to view the gun. A trier of fact may consider evidence in light of his observations and

experiences and is entitled to draw reasonable inferences from both circumstantial and direct evidence. *Duncan v. State*, 38 Ark. App. 47, 828 S.W.2d 847 (1992). From this evidence, the trial court could reasonably have inferred that the handgun was "a device designed to compel a projectile by action of an explosive." Thus, substantial evidence supports Curtis's conviction for simultaneous possession of drugs and a firearm, and we affirm.

Affirmed.

ROBBINS and CRABTREE, JJ., agree.

John DAVIDSON *v.* STATE of Arkansas

CA CR 01-713 68 S.W.3d 331

Court of Appeals of Arkansas
Division I
Opinion delivered February 27, 2002

Keil & Goodson, by: *John C. Goodson*, for appellant.

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

JOHN B. ROBBINS, Judge. Appellant John William Davidson appeals his convictions for possession of cocaine, possession of methamphetamine, possession of marijuana with intent to deliver, possession of drug paraphernalia, and possession of prohibited weapons. He was sentenced to four ten-year and one one-year prison terms, respectively, which the trial judge ordered to run consecutively for a forty-one-year prison sentence. He appeals arguing that the trial court erred in (1) denying his motion to suppress, and (2) abusing its discretion or failing to exercise its discretion in ordering the sentences to be served consecutively. We disagree with his arguments and affirm his convictions.

The following events led to the request for a search warrant to search appellant's home. On the morning of July 7, 2000, a Hempstead County sheriff's investigator participated in a helicopter patrol over Hempstead County including the rural sections of the county. Near the Hempstead and Nevada County line, the investigator observed several containers of what appeared to be marijuana plants on the bed of a trailer parked behind a barn, which was approximately 100 feet from appellant's house. There appeared to be a water hose running from the house to the trailer holding the plant containers. The investigator contacted the Nevada County Sheriff at approximately 9:15 a.m., telling the sheriff what was observed. The sheriff and three deputies drove to appellant's house, walked to

the trailer, and observed nineteen plants that they believed to be marijuana growing in five containers. The sheriff then walked to the residence and knocked on the doors, but he received no response. After about ten minutes elapsed, appellant awoke, came out of the house, and was read his *Miranda* rights by the sheriff. When asked whose trailer it was, appellant replied that it was his. Appellant denied knowing what was on the trailer, and when he was shown the plants, he began to curse and disclaimed ownership of them. The sheriff asked for consent to search the house, but it was denied. Appellant reportedly said, "If I let y'all in the house, I'm not going to be sitting well." A deputy was dispatched to obtain a warrant.

The sheriff's deputy prepared an affidavit to support his request for a search warrant to search appellant's residence. The items supposedly concealed there were contained in a list predrafted in the sheriff's computer for use in drug cases. The three-paragraph list of items expected to be in appellant's residence were:

> 1. Narcotics and/or compounds or derivatives thereof;
>
> 2. Scales, books, papers, records or narcotics notations, plastic baggies and any items which would be used to ingest narcotics and/or dangerous drugs into the human body.
>
> 3. Personal property tending to show residence on the premises and not limited to keys, safes, canceled mail, envelopes, rental agreements, receipts, bills for telephone and utility services, photographs, ledgers, phone lists, records of ownership to vehicles and personal property including clothing and/or jewelry, and any and all U.S. currency related to narcotics, any and all keys belonging to safe deposit boxes, bank books, bank records, ledgers (as it has been my training and experience that subjects dealing in profits keep ledgers), personal property affects such as non-cash items used to pay for narcotics, such as radios, scanners, jewelry, televisions, firearms, etc.

The deputy testified at the suppression hearing that these items were listed in the computer based upon training and experience as to what officers could reasonably expect to find during drug-related searches; the sheriff's office considered this "standard language" used in all drug cases. The facts listed in support of the application for a search warrant were the overhead sighting of marijuana plants, the subsequent location on the ground of the five containers of such plants, the encounter with appellant at his door and his admission of

ownership of the trailer but not the plants, the request for consent to search appellant's premises, and the denial of that request.[1] The warrant was granted to the deputy, and it was executed that day, locating the items that led to the additional charges and eventual convictions. Among the items found were guns and ammunition, cocaine, methamphetamine, marijuana, paraphernalia, and large sums of cash. A motion to suppress was heard and denied.

When this court reviews a trial court's ruling on a motion to suppress, we review the evidence and make an independent determination based upon the totality of the circumstances. *Gilbert v. State*, 341 Ark. 601, 19 S.W.3d 595 (2000); *Bangs v. State*, 338 Ark. 515, 998 S.W.2d 738 (1999). We will reverse a trial court's ruling on a motion to suppress only if the ruling was clearly erroneous. *Id.*

Appellant attacks this warrant on the basis that the affidavit did not establish reasonable cause to believe that the items listed in the affidavit would be found inside the house. Appellant cites to Arkansas Rule of Criminal Procedure 13.1(b) (2000), which provides:

> The application for a search warrant shall describe with particularity the persons or places to be searched and the persons or things to be seized, and shall be supported by one (1) or more affidavits or recorded testimony under oath before a judicial officer particularly setting forth the facts and circumstances tending to show that such persons or things are in the places, or the things are in possession of the person, to be searched. If an affidavit or testimony is based in whole or in part on hearsay, the affiant or witness shall set forth particular facts bearing on the informant's reliability and shall disclose, as far as practicable, the means by which the information was obtained. An affidavit or testimony is sufficient if it describes circumstances establishing reasonable cause to believe that things subject to seizure will be found in a particular place. Failure of the affidavit or testimony to establish the veracity and bases of knowledge of persons providing information to the affiant shall not

[1] We deem it important to point out that appellant's assertion of his constitutional right to deny consent to search his residence does not supply probable cause to search. *See, e.g., Florida v. Bostick*, 501 U.S. 429 (1991) (holding that a suspect's mere assertion of constitutional rights cannot constitute the sole basis for establishing probable cause to conduct a search); *United States v. Hyppolite*, 65 F.3d 1151 (4th Cir. 1995) (holding that the mere assertion of the constitutional right to refuse consent to search does not supply probable cause to search); *Snow v. State*, 84 Md. App. 243, 578 A.2d 816 (1990) (holding that the driver's refusal to consent to search of his automobile did not give rise to reasonable suspicion that the vehicle contained narcotics).

> require that the application be denied, if the affidavit or testimony viewed as a whole, provides a substantial basis for a finding of reasonable cause to believe that things subject to seizure will be found in a particular place.

The test for adequacy of the affidavit set out in *Illinois v. Gates*, 462 U.S. 213 (1983), and adopted by our supreme court in *Thompson v. State*, 280 Ark. 265, 658 S.W.2d 350 (1983), was recently quoted in *State v. Rufus*, 338 Ark. 305, 993 S.W.2d 490 (1999), whereby:

> [t]he 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 the 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 the reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed. *State v. Mosley*, 313 Ark. 616, 856 S.W.2d 623 (1993); *Rainwater v. State*, 302 Ark. 492, 791 S.W.2d 688 (1990).

State v. Rufus, 338 Ark. at 312. Although the existence of a fact may be proved by circumstances as well as by direct evidence, the circumstantial evidence must be sufficient to lead to the inference. *Yancey v. State*, 345 Ark. 103, 44 S.W.3d 315 (2001). Where circumstantial evidence is relied upon to establish a fact, the circumstances proven must lead to the conclusion with reasonable certainty and must be of such probative force as to create the basis for a legal inference and not mere suspicion. *Id.*

Appellant argues that the search warrant should not have been issued because it could not be inferred from the affidavit that the items listed in the warrant could be found in appellant's home. Thus, he argues that this warrant was based upon speculation and conclusory language, not facts. Appellant recognizes that computer-generated language is not fatal *per se* when that language is coupled with additional facts to support a reasonable belief that contraband will be found. *See, e.g., Coleman v. State*, 308 Ark. 631, 826 S.W.2d 273 (1992). However, he notes that the success of the search will not validate the search if it was unlawful in its inception. *Willett v. State*, 298 Ark. 588, 769 S.W.2d (1989); *Walton v. State*, 245 Ark. 84, 431 S.W.2d 462 (1968).

The State, while not agreeing that the warrant was deficient, asserts that the "good-faith exception" enunciated in *United States v. Leon*, 468 U.S. 897 (1984), would support denial of the motion to suppress. Therefore, it posits that if the officers relied in good faith on the issuance of the search warrant by the magistrate based upon the magistrate's flawed determination of probable cause, then the fruits of the search are not subject to suppression. In answering whether the officer is acting in good faith, the analysis requires an objective standard, which requires the officers to have a reasonable knowledge of the Arkansas Rules of Criminal Procedure. *Richardson v. State*, 314 Ark. 512, 863 S.W.2d 572 (1993). We agree with the State that the good-faith exception would support the denial of suppression in this instance. Thus, we need not address the existence of probable cause to issue the warrant.

The State points us to the holding in *Yancey, supra*, as support for that proposition. In that case, our supreme court refused to suppress evidence seized in searches of the homes of two suspects, which were located approximately five miles away from where the suspects were observed watering some marijuana plants, based upon the officers' good-faith reliance on a warrant, although the warrant was invalid because it had been issued without probable cause.

Appellant counters that this affidavit was so lacking in probable cause as to render official belief that probable cause resides in it entirely unreasonable, and thus the exclusionary rule should still apply. Appellant notes that there are four errors, noted in *Leon*, which an officer's objective good faith cannot cure. These errors occur (1) when the magistrate is misled by information the affiant knew was false; (2) if the magistrate wholly abandons his detached and neutral judicial role; (3) when the affidavit is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) when a warrant is so facially deficient that the executing officers cannot reasonably presume it to be valid. *Leon*, 468 U.S. at 914-15. Appellant argues that "it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued," and that these are such circumstances. *Leon*, 468 U.S. at 922; *see also Bennett v. State*, 345 Ark. 48, 44 S.W.3d 310 (2001). We disagree with appellant.

The knowledge of the police here was that there were growing marijuana plants in plain view on a trailer bed approximately 100 feet from the residence on appellant's property. Appellant was at home in his residence and claimed ownership of the trailer. Though the sheriff believed he already had probable cause to search, the law

enforcement officers waited until they had procured a warrant before searching the premises.

The purpose of the exclusionary rule is to deter police misconduct. *Landrum v. State*, 326 Ark. 994, 936 S.W.2d 505 (1996). Because the goal of the exclusionary rule is to deter future police misconduct, it only makes sense to apply the rule where its application has a deterrent effect, and where the officers acted in objective good faith or where the transgressions are minor, the magnitude of the benefit conferred upon guilty defendants offends the basic concepts of the justice system. *Leon, supra*; *Yancey, supra*. 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 correct. *Leon, supra*. Thus, once the warrant issues, there is literally nothing more the officer can do in seeking to comply with the law. *Leon, supra*. *See also Starr v. State*, 297 Ark. 26, 759 S.W.2d 535 (1988). We affirm the trial court's denial of the motion to suppress.

In his second point on appeal, appellant argues that the trial court did not exercise its discretion or abused its discretion when it sentenced him to consecutive prison terms, contrary to the jury's recommendation that the sentences run concurrently and with rehabilitation. We disagree with his contention. Arkansas Code Annotated § 5-4-403 (Repl. 1997) states in part that "when multiple sentences of imprisonment are imposed on a defendant convicted of more than one offense . . . the sentences shall run concurrently unless the court orders the sentences to run consecutively." Appellant concedes that it is solely within the trial court's discretion whether to sentence a defendant to serve concurrent or consecutive sentences, but argues that the trial court did not exercise its discretion or, alternatively, abused its discretion in mandating that his sentences run consecutively for forty-one years.

The sentencing hearing included testimony from appellant, his family, and friends, who all stated that appellant was a good person who had a drug addiction. That addiction had cost him his last marriage and a great deal of money. Appellant desired rehabilitation to assist in freeing himself of the addiction. The jury deliberated on his sentences, writing on the forms that appellant be sentenced to ten years on each of the drug charges "concurrent with rehabilitation." On the possession-of-a-prohibited-weapon conviction, the jury wrote "suspended sentence." The trial judge read these forms, stated that they were not in compliance with the law, and sent the jury back to deliberate further. The jury returned the forms with

the same notations, with the exception of the verdict form on the possession-of-a-prohibited-weapon charge, upon which the jury noted a one-year sentence but added the word "(concurrent)." The jury also recommended in writing that appellant be eligible for transfer.

The trial judge stated that he would ignore the notations. The trial judge pronounced judgment of four ten-year sentences and one one-year sentence, to run consecutively. A posttrial motion to reconsider sentencing was filed to which appellant attached a document with ten of the twelve jurors' signatures on it recommending that the sentences run concurrently. The motion went unanswered and was deemed denied.

The appellant, by challenging this determination, assumes the heavy burden of showing that the trial judge failed to give due consideration in the exercise of his discretion. *Smallwood v. State*, 326 Ark. 813, 935 S.W.2d 530 (1996). There is nothing in the record to demonstrate that the trial judge did not exercise his discretion. Indeed, he obviously exercised discretion when he departed from the jury's recommendation. It is when the trial judge has a standard manner of sentencing or merely implements whatever the jury wants that the appellate court steps in and remands for resentencing. *See, e.g., Acklin v. State*, 270 Ark. 879, 606 S.W.2d 594 (1980); *Wing v. State*, 14 Ark. App. 190, 686 S.W.2d 452 (1985); *see also Blagg v. State*, 72 Ark. App. 32, 31 S.W.3d 872 (2000) (holding that the trial judge stated that the ultimate decision would be made by the court, thereby indicating his understanding that the jury's recommendation was purely advisory). Considering that these sentences were within the statutory maximum and minimum and the trial judge contemplated whether to "stack" them or not, it is abundantly clear that the trial judge exercised discretion when sentencing, and we cannot say that the trial court abused it in that exercise.

Affirmed.

CRABTREE and ROAF, JJ., agree.

Jerry Lee STOGSDILL *v.*
James E. STOGSDILL, Jr.,
and Janet Stogsdill Osmon,
Co-Executors of the Estate of
Elizabeth Stogsdill, *Deceased*

CA 01-829 68 S.W.3d 324

Court of Appeals of Arkansas
Division IV
Opinion delivered February 27, 2002

[redacted]

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

Barrett & Deacon, P.A., by: *Berl Smith*, *Ralph W. Waddell*, and *Leigh M. Chiles*, for appellees.

WENDELL L. GRIFFEN, Judge. Jerry Lee Stogsdill appeals a Craighead County chancery court decision that issued a foreclosure decree on behalf of his siblings, James Stogsdill, Jr., and Janet Stogsdill Osmon, co-executors of the estate of their mother, Elizabeth Stogsdill, deceased, after finding that appellant owed his mother's estate $71,151.07 for personal loans secured by mortgages containing future-advance clauses. We affirm and hold that the chancellor properly found 1) that appellant's Chapter 12 bankruptcy petition tolled the statute of limitations on the estate's foreclosure action, 2) that appellant's post-bankruptcy personal debts fell outside the scope of his mother's will, and 3) that a future-advances clause in a 1984 mortgage attached to later personal loans made by decedent to appellant.

Factual and Procedural History

On January 1, 1983, appellant borrowed $35,019.99 from his parents, Elizabeth and James Stogsdill, Sr. That same day, appellant executed a promissory note, secured by a mortgage on the East Half of the Southeast Quarter, Section 27, Township 14 North, Range 7 East.[1] This mortgage included a standard future-advances clause, which read as follows:

> The mortgage shall also be security for any indebtedness of whatsoever kind that the grantee or the holders or owners of this mortgage may hold against grantor by reason of future advances made hereunder, by purchase or otherwise, to the time of the satisfaction of this mortgage.

That same day, appellant and another brother, John, also issued a promissory note from their business, Stogsdill Brothers Farms, to their parents. The note, dated January 1, 1983, promised to pay the sum of $48,000, with interest thereon at ten percent per annum. The note was secured by a crop lien on all crops as well as a mortgage on the entirety of the Southeast Quarter of Section 27, Township 14 North, Range 7 East. This mortgage also included a future-advances clause with identical language to the mortgage individually executed by appellant.

[1] The 1983 mortgages erroneously describe the location of the property as Range 7 West rather than 7 East.

On October 23, 1984, appellant borrowed $18,907.50 from his parents. He executed a promissory note, secured by a mortgage to his parents on the East Half of the Southeast Quarter of Section 27, Township 14 North, Range 7 East. This mortgage, recorded in Book 61 at page 494 of the records of Craighead County, included the following future-advances clause:

> It is also agreed that this debt herein secured shall include not only the note, above recited, but also whatever sums may be due from the mortgagor to the mortgagee at the time of foreclosing this mortgage, whether such sums be for payment of taxes on these lands for release of liens or encumbrances, for fire insurance premiums, for protecting the title and possession of these premises, or for debts not incurred in respect of this land, such as personal account or unsecured note, or a judgment of any indebtedness of whatever sort or nature that may be due from mortgagor to mortgagee at the time of foreclosing this mortgage.

Following a series of unfortunate circumstances, appellant filed a voluntary Chapter 12 bankruptcy petition on January 3, 1989, and the land encumbered by the mortgages was included as a non-exempt asset. Appellant filed a reorganization plan on October 10, 1990, which listed his mother as a secured creditor who would retain the liens securing her claims. He also included a description of the mortgaged property as collateral. Although appellant included the debt to his mother in the reorganization plan, he chose not to make installment payments to his mother during the reorganization. Instead, he declared that his mother's claim was payable on demand after his discharge under the plan. Appellant continued to borrow money from his mother during his bankruptcy, with the loans ultimately totaling over $100,000. Although appellant was discharged from bankruptcy on December 13, 1996, the discharge order specifically excluded the debt appellant owed his mother.

On November 30, 1997, Mrs. Stogsdill died,[2] leaving appellees James E. "Jim" Stogsdill, Jr., and Janet Stogsdill Osmon as co-executors of her estate. Paragraph four of her will, executed April 3, 1996, read as follows:

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[2] Appellant's father predeceased Mrs. Stogsdill.

> FOUR: My late husband and I have made various loans to my sons JOHN W. STOGSDILL and JERRY LEE STOGSDILL, in connection with their acquisition of certain farmland and their farming operations. I give, devise, and bequeath all of my right, title and interest in the amounts receivable by me pursuant to said loans to JANET STOGSDILL OSMON and JAMES E. STOGSDILL, JR., and direct that said loans be repaid as follows: I direct that JOHN W. STOGSDILL shall pay the total sum of $24,000 to JANET STOGSDILL OSMON in full satisfaction of the indebtedness which he owes to me. Said amount shall be paid in annual installments of $2,400 over a period of ten years. I direct that JERRY LEE STOGSDILL shall pay the total sum of $24,000 to JAMES E. STOGSDILL, JR., in full satisfaction of the indebtedness which he owes to me. Said amount shall likewise be paid in annual installments of $2,400 over a period of ten years. The initial payments shall be due on or before the date of the first anniversary of my death, and each subsequent payment shall be due on or before the same date thereafter over the next nine years. The indebtedness of either or both JOHN W. STOGSDILL and JERRY LEE STOGSDILL may be prepaid at any time. Upon full payment of all indebtedness as directed above, the Executor of my estate, or JANET STOGSDILL OSMON and JAMES E. STOGSDILL, JR., or their respective heirs, administrators or assigns, shall release any existing mortgages in my favor upon the property of JOHN W. STOGSDILL and JERRY LEE STOGSDILL.

After reviewing their mother's business records and discovering the personal loans made by their mother to appellant during his bankruptcy, appellees filed suit against appellant seeking to recover the amount of the loans, or alternatively, to foreclose on the mortgages. Appellees did not seek recovery of farm-related loans. Appellant responded that all of the loans were for farm-related purposes, and that any amount in excess of $24,000 was precluded pursuant to the will. He also affirmatively pled the statute of limitations. Appellees filed an amended complaint seeking foreclosure against the real property described in the 1984 mortgage, and the case was transferred to chancery court.

At trial, Appellee Janet Osmon introduced into evidence checks that her mother had written to appellant, or written on his behalf, between 1990 and 1996. Osmon acknowledged that the 1983 and 1984 promissory notes were farm-related loans and testified that she did not seek recovery of the notes pursuant to her mother's will. However, she testified that she considered the mortgages securing the notes to be valid. Osmon further testified that

when her mother wrote a check that was farm-related, the check was noted as such.

Appellant testified that his mother had given him money for farm-related purposes and to make his bankruptcy payments. He testified that his mother never asked to be repaid and admitted that some of the money was used for living expenses. The family's certified public accountant testified that to the best of his knowledge, appellant had not repaid the loans.

The chancellor determined that 1) the loans were personal in nature so as to exclude their exemption under the will, 2) the repayment of the loans was not barred because the statute of limitations was tolled by appellant's action of filing for bankruptcy, 3) appellees were entitled to a judgment in the amount of $71,151.07, plus their costs and attorney's fees of $2,000, and 4) the mortgages contained future-advances clauses that secured payment of the judgment. The court entered a foreclosure decree that provided appellant thirty days to satisfy the judgment; otherwise, the decree provided for alternative foreclosure. This appeal followed. On appeal, appellant contends that the chancellor erred in determining 1) that appellant's bankruptcy petition tolled the statute of limitations on the estate's foreclosure action, 2) that appellant's post-petition bankruptcy debt fell outside the scope of his mother's will because the will provided that all indebtedness was satisfied upon appellant's payment of $24,000, and 3) that the future-advances clause of the 1984 mortgage attached to the personal loans.

Standard of Review

Chancery decisions are reviewed *de novo* on the record. *See Norman v. Norman*, 342 Ark. 493, 30 S.W.3d 83 (2000). Findings of fact are not reversed absent a determination that the finding is clearly erroneous, *i.e.*, we are left with a definite and firm conviction that a mistake has been committed. *See id.*

Whether Bankruptcy Petition Tolled Statute of Limitations

Appellant begins by asserting that the automatic stay of the bankruptcy code only tolls the period of time on actions that

existed before the filing of a bankruptcy petition. Thus, he concludes that appellees' claims are barred under Arkansas Code Annotated § 16-56-105 (1987), which provides a three-year statute of limitations for unwritten contracts, or under Arkansas Code Annotated § 16-56-111 (Supp. 2001), a five-year statute of limitations for written obligations. We disagree.

The filing of a bankruptcy petition operates as an automatic stay under certain circumstances, including:

> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
>
> (4) *any act to create, perfect, or enforce any lien against property of the estate*;
>
> (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title.

11 U.S.C. § 362 (2000). (Emphasis added.) The automatic stay serves to prevent piecemeal litigation by allowing a debtor to centralize his affairs and creditors to unify their interests. *See Sunshine Dev. Inc. v. FDIC*, 33 F.3d 106 (1st Cir. 1994). The stay begins automatically and terminates automatically when the property is no longer property of the bankruptcy estate and the case is closed, dismissed, or until such time that a discharge is granted or denied. *See* 11 U.S.C. § 362(c)(1)-(4) (2000). While § 362 is an automatic stay provision, § 541 provides that the bankruptcy estate consists of all legal or equitable interests of the debtor in property at the time the debtor initiated the bankruptcy action. *See* 11 U.S.C. § 541(a)(1) (2000). Additionally, 11 U.S.C. § 1207(a)(1) (2000) states that the bankruptcy estate includes all property specified in

§ 541, plus all property that the debtor acquires after the bankruptcy action is commenced "but before the case is closed, dismissed or converted to a case under Chapter 7 of the bankruptcy code, whichever occurs first."

Applying the applicable bankruptcy law to the present case, appellant's mother could not have foreclosed on the mortgage once the automatic stay took effect, until December 13, 1996, the date of appellant's discharge from bankruptcy. The record indicates that appellant filed a bankruptcy reorganization plan in 1990, and listed the debt he owed to his mother, which was secured by two mortgages on the East Half of the Southeast Quarter of Section 27, Township 14 North, Range 7 East. This property was included in the bankruptcy estate. However, the reorganization plan stated that Mrs. Stogsdill's rights, except as modified by the plan, remained in effect and that appellant would repay his mother on demand after the plan. The mortgages included future-advance clauses, which served to encompass the loans provided to appellant post-petition. Pursuant to § 362(a)(4), Mrs. Stogsdill was precluded from enforcing or perfecting these post-petition loans, which were secured by property included in the bankruptcy estate. Because appellees filed their action two years after appellant's discharge from bankruptcy, the action was well within the three-year statute-of-limitations period or the five-year statute-of-limitations period.

Whether Appellant's Post-Petition Debts Fell Outside Scope of Will

Next, appellant contends that the trial court erroneously found that certain debts resulted from personal loans rather than farm-related loans. To support his contention, appellant directs our attention to a sentence contained in paragraph four of his mother's will. This sentence reads, "I direct that Jerry Lee Stogsdill shall pay the total sum of $24,000 to James E. Stogsdill, Jr. in full satisfaction of the indebtedness which he owes me."

When considering the interpretation of a will, the intent of the testator is of utmost importance. *See Carpenter v. Miller*, 71 Ark. App. 5, 26 S.W.3d 135 (2000). Intent is ascertained from the four corners of the will; however, when the meaning of an expression is unclear, extrinsic evidence may be used. *See id.*

Here, appellant does not argue that paragraph four of his mother's will is ambiguous. Rather, he asserts that the language

used in paragraph four very clearly states that his mother intended his payment of $24,000 to fully satisfy the debt owed by appellant. Appellees agree that paragraph four is not ambiguous. Needless to say, they vigorously assert that paragraph four only refers to farm-related loans. We agree.

As noted by appellees, appellant limits his reading of paragraph four to a single sentence. However, a fair reading of paragraph four in its entirety supports appellees' position that the paragraph governs only farm-related loans. The paragraph begins with the sentence, "My late husband and I have made various loans to my sons, John W. Stogsdill and Jerry Lee Stogsdill, *in connection with their acquisition of certain farmland and their farming operations*." The next sentence reads as follows:

> I give, devise, and bequeath all of my right title and interest in the amounts receivable by me pursuant to *said loans* to [appellees], and direct that *said loans* be repaid as follows: . . . I direct that [appellant] shall pay the total sum of $24,000.00 to James E. Stogsdill, Jr., in full satisfaction of the indebtedness which he owes to me. Said amount shall likewise be paid in annual installments of $2,400.00 over a period of ten years.

(Emphasis added.) The language in paragraph four is not ambiguous. It leaves no doubt that appellant's mother intended to address farm-related loans in paragraph four.

Turning to the loans at issue, the chancellor specifically found that all of the checks included in Plaintiffs' Exhibit 7 were personal loans to appellant, as opposed to farm-related loans. Our *de novo* review of the record supports the chancellor's conclusion. These checks, which totaled (with interest) $26,844.52, were made payable to the order of appellant and included the word loan on the notation line. Two additional checks, in the amount of $14,052.19 and $15,052.19, were found by the chancellor to represent bankruptcy payments. Given his observation that the checks were written for payments under appellant's bankruptcy repayment plan, the chancellor correctly concluded that the checks were written to satisfy the personal obligation of appellant rather than for farm-related loans contemplated under paragraph four of the will. Next, the chancellor addressed checks included in Plaintiffs' Exhibit 9. Five of these checks, totaling $4,462.99, were drawn on Mrs. Stogsdill's account and made payable to persons other than appellant. These checks, which were related to appellant's car, were found to be personal in nature. Unlike the checks included in Plaintiffs'

Exhibits 7-9, the checks listed in Plaintiffs' Exhibit 13 included specific notations of loans for items such as tractor repair, soybeans, and diesel fuel. These checks were excluded by the chancellor. Although appellees presented checks totaling over $100,000.00, the trial judge entered a judgment for $71,151.07.

While appellant contends that his testimony at trial demonstrated that he used all of the money to farm, the chancellor had the opportunity to hear the testimony of the parties and to observe their demeanor in an attempt to resolve conflicting testimony. His decision to enter a judgment of $71,151.07 in appellees' favor indicates that he found appellees credible. Given the chancellor's careful consideration of the evidence presented, we cannot say that his ruling was clearly erroneous.

Whether Future-Advances Clause Secured Post-Petition Debt

Lastly, appellant asserts that the future-advances clause included in the 1984 mortgage did not secure the post-petition loans because appellees failed to prove that a valid debt existed at the time of the loans. As a result, he asserts that the chancellor erred in failing to grant a directed verdict in his favor. Relevant case law and the evidence presented at trial suggest otherwise.

When considering whether a trial court properly denied a motion for directed verdict, we look at the evidence presented in the light most favorable to the nonmoving party. *See Columbia Mut. Cas. Ins. Co. v. Ingraham*, 47 Ark. App. 23, 883 S.W.2d 868 (1994). We give the evidence the highest probative value and consider all reasonable inferences derived from it. When we conclude that there is substantial evidence to support the factfinder's verdict, we will affirm the trial court. *See id.*

In *Kitchens v. Evans*, 45 Ark. App. 19, 870 S.W.2d 767 (1994), our supreme court held that before a debt falling outside the statute of limitations period may be revived, an express promise to pay or an unequivocal acknowledgment of the debt must be made to the creditor or with the intention that the acknowledgment be communicated to the creditor.

Throughout the trial proceedings, appellees contended that they were not suing appellant to recover the face amount of the promissory notes. Instead, appellees asserted that they brought suit

to collect the personal loans made by Mrs. Stogsdill to appellant after he filed his bankruptcy petition.

As previously mentioned, appellant's 1984 promissory note to his mother was secured with a mortgage issued on the same date. This mortgage, executed on real property situated in the Lake District of Craighead County, included a future-advances clause, which encompassed future personal loans. As part of his 1990 bankruptcy reorganization payment plan, appellant included the debt he owed his mother as well as the real property securing the debt. The plan expressly deferred payment to Mrs. Stogsdill until after appellant's discharge from bankruptcy, and the discharge order specifically excluded money owed to Mrs. Stogsdill. No evidence was presented that appellant extinguished the 1984 promissory note or that the 1984 mortgage was released. Therefore, appellant's 1990 acknowledgment of the debt and the fact that it was payable upon demand after discharge served to revive any cause of action brought by or on behalf of Mrs. Stogsdill as of December 1996. Pursuant to *Kitchens v. Evans, supra*, the 1984 mortgage and promissory note were valid at the time appellant received the loans from his mother. Accordingly, we affirm.

Affirmed.

BIRD and BAKER, JJ., agree.

Mark JOHNSON and Catherine Johnson *v.*
Richard RAMSAY and Clair Ramsay

CA 01-404 67 S.W.3d 598

Court of Appeals of Arkansas
Division II
Opinion delivered February 27, 2002

Hilburn, Calhoon, Harper, Pruniski & Calhoon, Ltd., by: *Susan Gordon Gunter*, for appellants.

Richard L. Ramsay, for appellees.

LARRY D. VAUGHT, Judge. This is a lawsuit between adjoining landowners in a Little Rock neighborhood. Appellees Richard and Clair Ramsay claim that a document executed by their predecessors-in-interest in 1948 created an easement in their favor

in a gravel drive located along the southern border of their lot. The drive is located between the Ramsays' lot and a lot owned by appellants Mark and Catherine Johnson. The Johnsons contend that the Ramsays are not entitled to an easement in the drive because the 1948 document did not contain sufficient words of conveyance to create an easement and because the Ramsays' predecessors abandoned the easement. The chancellor found against the Johnsons on both of those issues, and we affirm.

The Ramsays' house is situated on a large lot, facing west toward Broadview Drive. A sixteen-foot-wide gravel drive abuts the approximately 212-foot southern border of the lot. Directly across this drive are side-by-side lots owned by Sally Powell on the west and the Johnsons on the east. The lots are situated in such a way that the Powell front yard overlooks the Ramsay side yard, and the Johnson front yard overlooks the Ramsay back yard. The gravel drive is actually located on the Powell and Johnson properties and runs as a sixteen-foot wide strip along their northern borders.

In 1948, a document entitled "Easement Agreement" was entered into by four landowners and their spouses, all of whom owned property in the neighborhood under discussion in this case. The landowners included G.E. and Margaret Jernigan (the Ramsays' predecessors), and Samuel and Georgia Boyce (the Johnsons' predecessors). The easement was designated for the purpose of ingress and egress. It was described in the document as L-shaped, and it included what is now Broadview Drive as its north-south segment and the sixteen-foot wide drive as its west-east segment. In 1957, the Broadview Drive portion of the easement was dedicated to the city; the sixteen-foot wide drive was not dedicated and remained in use by the landowners.

In the late 1980s, the property that is now the Ramsay lot was owned by Charles and Joann Jernigan, the son and daughter-in-law of G.E. and Margaret. Charles and Joann built a fence along the southern border of the property, just north of the gravel drive. The fence did not run the full length of the border; an opening of approximately forty feet remained between the eastern end of the fence and the eastern end of the lot. When the Ramsays purchased the property from the Jernigans in 1998, they hoped to construct a garage in their back yard and use the gravel drive and the opening beyond the fence to gain access. The Johnsons objected to the Ramsays' proposed use, as well as to the presence of a dog pen in the Ramsays' back yard, and, in November 1998, they constructed

a fence along the northern border of the gravel drive that overlapped the Ramsays' fence, thus preventing the Ramsays from gaining vehicular access to their backyard. The Ramsays filed suit seeking a declaration that they were entitled to an easement in the gravel drive and an order requiring the Johnsons to tear down their fence. The chancellor granted them that relief, and the Johnsons filed a timely notice of appeal.

■ We review chancery cases *de novo* on appeal, but we will not reverse a chancellor's findings of fact unless they are clearly erroneous. *Wilson v. Johnston*, 66 Ark. App. 193, 990 S.W.2d 554 (1999). A finding is clearly erroneous when, although there is evidence to support it, we are left, upon reviewing the entire evidence, with the firm conviction that a mistake has been committed. *See Betts v. Betts*, 326 Ark. 544, 932 S.W.2d 336 (1996).

■ The first issue on appeal is whether the document by which the Ramsays claim their easement is legally sufficient. An easement is an interest in land, and a grant of an easement must include words expressing the fact of transfer or grant. *See White v. Zini*, 39 Ark. App. 83, 838 S.W.2d 370 (1992). Although no formal words are required, there must be some operative words expressing the fact of sale or transfer in order to convey legal title to an interest in land. *See Davis v. Griffin*, 298 Ark. 633, 770 S.W.2d 137 (1989). Mere words stating that the parties agree to an easement are not sufficient. *White v. Zini, supra.*

The 1948 Easement Agreement provided that "the easement hereby created shall be for the common use and benefit of all of the persons executing this instrument for the purpose of ingress and egress to and from any lands bordering upon said easement. . . ." The document further provided that "free and uninterrupted use of said easement is hereby granted. . . ." The wives of the landowners relinquished dower and homestead rights, and the acknowledgment portion of the instrument referred to the parties as "grantors."[1]

■ When an interest in land is conveyed, it is absolutely necessary that somewhere in the instrument there should be words expressing that fact of a sale or transfer, *i.e.*, words such as "grant, bargain, and sell," or words of the same purport. *Griffith v. Ayer-Lord Tie Co.*, 109 Ark. 223, 159 S.W. 218 (1913). The holding in *Griffith*

[1] Some parts of the Easement Agreement are barely legible. A re-creation of the agreement was prepared by Beach Abstract, but the quotes contained herein come directly from the legible portions of the agreement itself.

was applied in *White v. Zini, supra*, to invalidate an easement on the grounds that the parties attempted to create it through an agreement rather than a grant. Although the document in the case before us is similar to the document in *Zini* in some respects, it differs in that it refers to use of the easement as being "granted" and in the parties' acknowledgment of the instrument as "grantors." These references evidence an intention by the parties to create an interest in land through a grant or transfer rather than through an agreement. Significantly, neither the word "grant" nor any variation of it is found in the *Zini* document.

Appellants argue that the references in the instrument to a grant of an easement are insignificant because they do not appear in a granting clause but rather in "explanatory clauses." However, none of the cases relied on by appellants hold that words expressing a transfer or conveyance are valid only if contained in a granting clause. In fact, such a holding would be contrary to the language in *Griffith* that granting words must be found "somewhere in the instrument." Further, instruments should be reviewed such that effect is given to every word, sentence, or provision of the instrument where possible to do so and to give effect to the intention of the parties. *See Davis v. Griffin*, supra. Viewing the language of the 1948 document as a whole, we cannot say that the chancellor's finding that the instrument created a valid easement is clearly erroneous.

The Johnsons argue next that, if an easement was created by the 1948 document, it was later abandoned. The facts giving rise to their argument are as follows. The lot now owned by the Ramsays was once owned by G.E. and Margaret Jernigan as part of a larger tract. In 1987, G.E. and Margaret had died, and their daughter, Jane Swope, wanted to subdivide the property into three lots. Swope submitted a preliminary plat to the Little Rock Planning Commission designating what is now the Ramsay lot as Lot #2, a tract to the north as Lot #1, and a tract to the east as Lot #3. Swope's plat proposed to extend use of the sixteen-foot-wide easement further east to give Lot #3 access to Broadview Drive. However, the Planning Commission would not allow the easement to be platted because it was not wide enough, nor was it paved; the subdivision plat would only be approved on the condition that the easement be removed from the plat. The Planning Commission minutes reflect that Swope decided that she "would not use the easement for access and would remove it from the [plat]." Swope submitted a final plat that contained the three subdivided lots but did not reflect the

easement at all. The Johnsons argue that, by these actions, Swope abandoned the easement.

An easement may be lost by abandonment. *Bank of Fayetteville v. Matilda's, Inc.*, 304 Ark. 518, 803 S.W.2d 549 (1991); *Drainage Dist. No. 16 v. Holly*, 213 Ark. 889, 214 S.W.2d 224 (1948). Abandonment will be established where the owner of the easement does or permits to be done any act inconsistent with its future enjoyment. *Goodwin v. Lofton*, 10 Ark. App. 205, 662 S.W.2d 215 (1984). Mere non-use does not constitute abandonment. *Id.* Rather, the easement owner must relinquish or give up his rights with the intent of never resuming or claiming his right or interest. *Bank of Fayetteville v. Matilda's, Inc., supra.* To abandon means to give up absolutely; to forsake entirely; to renounce utterly; to relinquish all connection with or concern in. *Id.* Whether abandonment exists in any given case depends on the particular circumstances. *Goodwin v. Lofton, supra.*

Jane Swope testified at trial that, when she removed the easement from the plat in 1987, her intention was to give up the right to use the easement for access to Lot #3. According to her, she did not ask the city to allow easement access to Lot #2 because the easement was already being used to access that portion of the property. The engineer on the subdivision project, Robert Holloway, testified likewise that the purpose of the easement as shown on the preliminary plat was to afford access to Lot #3. He further testified that the city's refusal to plat the easement did not destroy the easement, stating that the easement would "just stay in the state that it's in already."

Swope's lack of intention to abandon the easement is further buttressed by two factors. First, the issue of using the easement to access Lot #3 was again before the Planning Commission in 1988, upon Swope's petition to subdivide that lot into two lots. Had Swope intended to abandon the easement in 1987, it is not likely that she would have asked the city to extend its use one year later. Second, the Ramsays' immediate predecessor Charles Jernigan (Jane Swope's brother) who owned Lot #2 from the late 1980s until he sold it to the Ramsays in 1998, testified that he continued to use the easement up until the time he sold the property, which contradicts the idea that the easement had been abandoned.

In light of the abovementioned evidence, we cannot say the chancellor clearly erred in finding that the easement had not

been abandoned. Although there was some evidence to the contrary, such a conflict was for the chancellor to resolve, given his superior ability to evaluate the credibility of the witnesses. *See Betts v. Betts, supra.*

The Johnsons also point out that, in addition to the fact that the 1987 plat does not contain the easement, a survey commissioned by the Ramsays in 1998 does not show that the easement exists. They argue that the absence of the easement on these documents should "control." The easement's absence from the 1987 plat was explained by Jane Swope. As for its absence from the Ramsay survey, the easement is not on the Ramsay property but on the Johnson and Powell properties. The plats of those properties show the existence of the sixteen-foot-wide easement.

The Johnsons' final argument is that the chancellor should have directed a verdict in their favor for the following reasons: 1) the Ramsays produced no evidence of the accuracy of the Beach Abstract re-creation of the Easement Agreement; 2) the Ramsays produced no evidence that the easement described in the Easement Agreement was actually located on the gravel drive; and 3) the Ramsay's produced no evidence that the fence the Johnsons constructed was actually located on the easement. When a defendant makes a directed-verdict motion in a chancery case, the chancellor should evaluate the motion by deciding whether, if the proceeding were a jury trial, the evidence would be sufficient for the case to go to the jury. *See Jones v. Abraham*, 341 Ark. 66, 15 S.W.3d 310 (2000). The court should view the evidence in the light most favorable to the plaintiff and give the evidence its highest probative value, taking into account all reasonable inferences deducible from the evidence. *Id.*

The Johnsons did not abstract their directed verdict motion nor any ruling by the chancellor thereon. However, we see no error on this point. The legal description of the gravel drive portion of the easement is discernible by reference to the original Easement Agreement. Further, the Johnsons point to nothing in the Beach Abstract version of the description that is not accurate. Additionally, as mentioned earlier, both the Powell and Johnson plats reflect a sixteen-foot-wide easement on the northern borders of those lots. Finally, appellant Catherine Johnson testified that the fence she and her husband had constructed was on the easement in question.

The Johnsons assert further that the Ramsays should be barred from relying on the 1948 document to establish a private easement because, in their complaint, they asserted only that the easement was a public easement. The record reveals that, throughout the course of the trial, the Ramsays pursued the theory that they enjoyed an easement in the gravel drive by virtue of the grant in the 1948 document. Issues not raised in the pleadings but tried with the implied consent of the parties are treated as though they had been pled. *Schueck v. Burris*, 330 Ark. 780, 957 S.W.2d 702 (1997). The failure of a party to move to have the pleadings conform to the proof does not affect the trial on the issue in question. *Id.*

Affirmed.

STROUD, C.J., and PITTMAN, J., agree.

David L. BROWN *v.* Janet P. BROWN

CA 01-953 68 S.W.3d 316

Court of Appeals of Arkansas
Division I
Opinion delivered February 27, 2002

Mark S. Carter, P.A., by: *Mark S. Carter*, for appellant.

Hurley & Whitwell. by: *Stephen E. Whitwell*, for appellee.

ANDREE LAYTON ROAF, Judge. Appellant, David Brown, and appellee, Janet Brown, were divorced in 1993. In 2001, Janet filed a motion for contempt and for an increase in child support. The trial court granted an increase in child support and found David in contempt for failing to provide Janet his income tax returns as required in their divorce decree. On appeal, David argues that the trial court erred in 1) failing to consider certain evidence with regard to the practice of the parties for the payment of their child's medical expenses; 2) finding him in contempt for failing to provide Janet with his 2000 tax return; 3) disallowing certain deductions from his tax return when determining his income for purposes of calculating child support; 4) retroactively increasing child support to a date prior to the filing of Janet's petition; 5)

failing to consider certain evidence in determining that amounts paid by him in excess of his child-support obligation were gifts; 6) determining that corporal punishment is *per se* child abuse under Arkansas law; and 7) increasing his child support when Janet failed to show a change of circumstances by not introducing evidence of his income at the time of the earlier decree setting child support. We agree that the trial court erred with respect to the retroactive increase of support and in determining that corporal punishment is *per se* child abuse in Arkansas and reverse and remand on those points. We affirm the trial court on all remaining points.

Pursuant to the property settlement agreement in the parties' 1993 divorce decree, David was ordered to pay $266 a month in child support. The decree stated that David was to provide Janet with copies of his W-2s, or his tax return if he became self-employed, within thirty days of filing the return. David also agreed to pay one-half of their minor child's medical expenses not covered by insurance and to be responsible for one-half of the insurance premium for the child.

In March 1994, Janet filed a motion for contempt and for an increase in child support. After David did not appear at the hearing, Janet submitted an order to the court that found David in contempt and increased the child support to $307 per month. This order was never signed by the chancery court. Although the child support was not officially increased, the testimony of the parties in this case indicates that David assumed that the child support was raised to $307.

On February 13, 2001, Janet filed another motion for contempt and to increase child support. In her motion, Janet stated that David owed $2,400 in medical expenses for their child and that he had not provided her with copies of his recent tax returns as required by the divorce decree. After a hearing, the trial court found David in contempt for failing to provide Janet with his tax returns until a few days before the hearing. The trial court granted Janet's motion to increase child support and set the child support at $496 per month. The court retroactively increased the child support to January 1, 2001, although the motion for increase was not filed until February 13, 2001. David was given until June 1, 2001, to pay the medical expenses owed to Janet. The court also stated that corporal punishment by a parent is abuse, *per se*, in Arkansas and that David's visitation would cease immediately if the court found out that he had spanked or hit his child. David appeals from this order.

In reviewing chancery cases, this court considers the evidence *de novo*, but will not reverse a chancellor's findings unless they are clearly erroneous or clearly against the preponderance of the evidence. *Tucker v. Tucker*, 74 Ark. App. 316, 49 S.W.3d 145 (2001). Where the decision turns on the credibility of interested witnesses, we defer to the superior position of the trial court to judge that credibility. *Norman v. Norman*, 268 Ark. 842, 596 S.W.2d 361 (Ark. App. 1980).

David's first and fifth arguments are essentially the same; that the trial court erred in not considering his Exhibit 1 in finding that the amounts paid by him over the child-support amount were gifts and not agreed-upon payments for his child's medical expenses. Exhibit 1 is a medical bill for the Browns' child from 1993 that was mailed to David from Janet. Attached to the bill was a note from Janet stating, "Please send $45.13 with next child support payment. Don't forget you are to pay me $30.00 per month for Alex's insurance. This can be added to child support payment, too." David testified that, based on the note, he had been overpaying child support to compensate for medical expenses. Because the chancery court's order listed certain exhibits that the court relied on in making its decision and this exhibit was not listed, David contends that the court did not consider this evidence. This argument is without merit.

The trial court's order did list certain evidence that it relied on, but it also stated that the decision was based on "other matters before the court." Although David argues that Exhibit 1 establishes an agreement between the parties as to the payment of medical expenses, there was other evidence introduced that does not support this claim. David established the amounts that he had overpaid by introducing canceled checks, showing that the amount he had paid for child support from 1996 until 2000 was more than the $307 per month that he had been paying from 1994 until 1996. The amounts of these checks ranged from $350 to $550. Although David claims that this "agreement" as to the medical bills started with the bill in 1994, the canceled checks indicate that David did not make any extra payments until 1996 and 1997. Janet testified that David agreed to make extra payments for their child's extracurricular activities in 1997, and the timing of the extra payments supports her testimony.

Also, David testified that the only other medical bill sent to him by Janet besides the one in 1994 was in January 2000. David's record of his child-support payments, which was introduced at the

hearing, indicates that in addition to a $500 child-support check written in January 2000, he also paid an additional $92.84. David testified that this additional amount was for the medical bill that Janet had sent him. In light of the conflicting evidence, we cannot say that the chancellor's decision in regard to the medical expenses is clearly erroneous.

Moreover, it was proper for the court to find that these overpayments were gifts to Janet. As conceded by David, it is well settled that the chancery court is not required to give credit for voluntary expenditures by a parent that are above the child-support amount. *Glover v. Glover*, 268 Ark. 506, 598 S.W.2d 736 (1980); *Stuart v. Stuart,* 46 Ark. App. 259, 878 S.W.2d 785 (1994); *Buckner v. Buckner*, 15 Ark. App. 88, 689 S.W.2d 584 (1985). This is the case because the custodial parent relies on proper compliance with the decree in making arrangements for the child's care. *Glover, supra.* Thus, it was not error for the trial court to refuse to apply these overpayments towards David's medical-expense arrearages.

For his second point, David argues that the trial court erred in holding that he was in contempt for failing to provide Janet with his 2000 federal tax return when the contempt hearing was held three days prior to the filing deadline for 2000 taxes. David cites *Jones v. Jones*, 320 Ark. 449, 898 S.W.2d 23 (1995), for the proposition that a person cannot be held in contempt for failing to do something that the court did not order. The divorce decree stated that David was to provide each year's tax return within thirty days of the filing deadline. The hearing in this case was held on April 12, 2001, which was before the April 15 filing deadline in 2001. David is correct in his contention that he cannot be held in contempt for failing to provide his 2000 tax return, and Janet concedes this point. However, the chancery court's contempt order was not based solely on the 2000 tax return. The court found that David had also not provided his 1998 and 1999 tax returns until after Janet filed her motion on February 13, 2001. Thus, it was not error for the court to hold David in contempt for failing to timely provide his 1998 and 1999 tax returns.

David next argues that the trial court erred in disallowing "Schedule C" deductions from his 2000 tax return when determining the amount of future child support. As the chancery court's decision indicates, David was unable to adequately explain many of the deductions contained on his 1998, 1999, and 2000 tax returns. David argues that it was error for the court to impose on him a duty to know what his legitimate business expenses were and to know

what was contained on his tax returns. His argument is without merit.

It is the ultimate task of the chancellor to determine the expendable income of a child-support payor. *Stepp v. Gray*, 58 Ark. App. 229, 947 S.W.2d 798 (1997). This court has stated that the chancellor "may not simply utilize one of the definitions of income found in the tax code, particularly in the case of self-employed persons, to arrive at the true disposable income of the support obligor." *Id.* at 235, 947 S.W.2d at 801. It is proper for the chancellor to consider whether a depreciation deduction should be allowed in calculating expendable income. *See id.* at 236, 947 S.W.2d at 801 (discussing appellate cases where a depreciation deduction was properly added back in to the support payor's income in arriving at an accurate indicator of expendable income). The version of the child-support chart applicable when this case was tried is found at *In Re: Administrative Order No. 10: Arkansas Child Support Guidelines*, 331 Ark. 581 (1998).[1] These guidelines provided that for self-employed payors, such as David, the amount of support shall be calculated based on the last year's federal and state income tax returns and the quarterly estimates for the current year. *Id.* The chancellor should also "consider the amount the payor is capable of earning or a net-worth approach based on property, life-style, etc." *Id.*

In her decision, the chancellor conducted a thorough analysis of the evidence relating to David's income and made extensive findings of how she calculated his income for child-support purposes. The chancellor specifically noted that she did not find David's testimony about his financial status to be credible. For instance, in looking at David's affidavit of financial means, the chancellor stated that there was no way that he could support himself and his household expenses on the income that he reported on his affidavit.

Also, in reviewing the 2000 tax return, the chancellor found that David's deductions for his car and truck allowance and his insurance allowance, and another $8,000 deduction that David could not explain, were suspect. In determining the amount of

[1] The most recent revision of the child-support guidelines, *In Re: Administrative Order No. 10: Arkansas Child Support Guidelines*, 347 Ark. Appx. ___ (January 31, 2002), became effective on February 11, 2002. This version now provides that for self-employed payors, the amount of support shall be calculated based on the last two years' federal and state income tax returns.

these deductions to allow, the chancellor relied on David's testimony that his expenses went toward himself, his girlfriend, and his business. For example, David's girlfriend had been paying his $1,400 per month mortgage payments and other living expenses and worked at his business, but was not paid by the business. Also, David's business was paying for his car insurance, even though the car was used both for personal and business matters. The personal use by a support obligor of a company car has been held to constitute imputed income. *Weir v. Phillips*, 75 Ark. App. 208, 55 S.W.3d 804 (2001). The chancellor divided the questionable expenses by three and allowed the one-third of those expenses that were directly related to David but not the two-thirds that could have been related to his girlfriend or his business. Because of these calculations, the chancellor imputed $15,996.68 of additional income and came up with a net profit of $45,918.68. The chancellor then looked at all three years of the tax returns and subtracted the average percentage of taxes that were paid, which was approximately 22%. The chancellor found that David had an annual income for child-support purposes of $35,816.58 and a monthly income of $2,984.71.

It was the chancellor's task to arrive at an accurate figure for David's income, and it was not error for the court to expect David to understand and be able to explain his deductions on his tax return. He was the only witness before the court to explain this information. Although David argues that his accountant was the only person who understood this information, his accountant was not present at the hearing to answer these questions, and David provided no alternative to the trial court, nor does he on appeal, to the chancellor's calculations. Consequently, we cannot say that the trial court's method of arriving at David's expendable income was clearly erroneous.

For his fourth point, David argues that the trial court erred in retroactively increasing child support to a date prior to the filing of the motion to increase support. In its order, the chancery court retroactively increased the child support to January 1, 2001; however, Janet did not file her motion to increase support until February 13, 2001. The court stated that it was doing this to partly offset some of the attorney's fees and costs incurred by Janet in bringing the action, as David was in contempt for failing to provide her with his tax returns. We agree that it was error for the court to retroactively increase the child support to a date before February 13.

According to Ark. Code Ann. § 9-14-234 (Repl. 1998), child-support orders cannot be retroactively modified for the time

period before the filing of the petition for modification, and it is an abuse of the chancery court's discretion to do so. *Yell v. Yell*, 56 Ark. App. 176, 939 S.W.2d 860 (1997). The only exception to this rule is where there has been fraud in procuring the existing support decree, or other grounds set forth in Ark. R. Civ. P. 60(c). *Id.* The party seeking to modify the existing decree based on fraud had the burden of showing the fraud by clear, cogent, and convincing evidence. *Grubbs v. Hall*, 67 Ark. App. 329, 999 S.W.2d 693 (1999).

Here, the chancery court made no finding that David procured the existing support decree by fraud. Janet argues that it was fraudulent for David to fail to provide her with his tax returns, in that it prevented her from finding out whether his income had increased. However, Janet knew that she was not receiving the tax returns as ordered in the decree. Moreover, there is no evidence that the child-support order contained in the divorce decree was procured by fraud, which must be shown in order to modify the support prior to the time of the filing of the motion to increase, and the trial court abused its discretion in ordering the increase to be retroactive to January 1. We thus reverse and remand for entry of an order correcting the effective date of the increase in support.

David next argues that the trial court erred in determining that corporal punishment is *per se* child abuse under Arkansas law. David contends that there is no authority for the chancery court's finding on this point. His contention is correct. Arkansas Code Annotated § 12-12-503(2)(C)(i) (Supp. 2001) states that child abuse "shall not include physical discipline of a child when it is reasonable and moderate and is inflicted by a parent or guardian for purposes of restraining or correcting a child." *See also Sykes v. State*, 57 Ark. App. 5, 940 S.W.2d 888 (1997) (finding that spanking with a telephone cord was not a use of inappropriate and unreasonable physical force in disciplining eleven year-old grandson); *Arkansas Dep't of Human Servs. v. Caldwell*, 39 Ark. App. 14, 832 S.W.2d 510 (1992) (finding that the paddling of students was not abusive even where there was evidence of bruising). Therefore, corporal punishment by a parent is not *per se* child abuse under Arkansas law, and the chancery court's finding to this effect is incorrect.

The main consideration for making judicial determinations concerning visitation is the best interest of the child. *Marler v. Binkley*, 29 Ark. App. 73, 776 S.W.2d 839 (1989). During the hearing, Janet raised concerns about the manner in which David was punishing their child. The trial court declined to directly question the child as to this matter, but David admitted in his testimony

that he spanked the child with a sandal and a ping-pong paddle. The trial court found that this type of punishment was "abuse, *per se*, in the State of Arkansas," and forbade David from using corporal punishment during his visitations with the child. Because the trial court misstated the law and failed to determine whether the discipline was "reasonable and moderate" for purposes of restraining or correcting a child, we reverse and remand this issue to the trial court.

For his final argument, David contends that the trial court erred by increasing his child support when Janet failed to meet her burden of showing a change of circumstances due to her failure to introduce evidence of his income at the time of the previous support order. A change of circumstances must be shown before a court can modify a child-support order, and the party seeking modification has the burden of showing a change in circumstances. *Roland v. Roland*, 43 Ark. App. 60, 859 S.W.2d 654 (1993). The chancellor's determination as to whether there are sufficient changed circumstances to warrant an increase in child support is a finding of fact and will not be reversed unless it is clearly erroneous. *Id.*

David relies on *Ritchey v. Frazier*, 57 Ark. App. 92, 940 S.W.2d 892 (1997), for the proposition that absent evidence as to the basis for the original child-support payment, such as the payor's income, there can be no showing of a change of circumstances. David's argument is misplaced. The statute upon which *Ritchey*, *supra*, is based has three subsections. Arkansas Code Annotated § 9-14-107 (Repl. 1998) provides an additional basis upon which a party can petition the court for review and adjustment of the amount of the child-support obligation. Section 9-14-107(a), referred to in *Ritchey*, *supra*, provides that a change in the gross income of the payor by more than twenty-percent, or more than $100 per month, is a material change in circumstances sufficient to petition the court for review. However, there is another subsection that is applicable here. Section 9-14-107(c) states that "an inconsistency between the existent child-support award and the amount of child support that results from application of the family support chart shall constitute a material change in circumstances sufficient to petition the court for review and adjustment." This subsection further provides that the amount of inconsistency referred to is more than twenty-percent or more than $100 per month, as in subsection (a). In *Tucker v. Tucker*, 74 Ark. App. 316, 49 S.W.3d 145 (2001), the appellant made an identical argument, and this court found that section 9-14-107(c)

was applicable where there was an inconsistency between the original child-support award of $40 per week and the $138 per week that resulted from application of the family support chart.

The chancellor found David's income to be $2,984.71 per month, from which child support was set at $496 per month. In 1993, David's child support was set at $266 per month. This inconsistency is clearly more than the twenty-percent or $100 per month quantitative standard set forth in the statute. Thus, because section 9-14-107(c) applies in this case, the chancellor did not err in finding a change of circumstances sufficient to warrant an increase in David's child support.

Affirmed in part; reversed and remanded in part for entry of an order consistent with this opinion with respect to the issues of retroactive support and the prohibition of corporal punishment.

CRABTREE and ROBBINS, JJ., agree.

J&V RESTAURANT SUPPLY & REFRIGERATION, INC.
v. SUPREME FIXTURE COMPANY

CA 01-687 69 S.W.3d 881

Court of Appeals of Arkansas
Division III
Opinion delivered March 6, 2002

Williams & Anderson, LLP, by: *Stephen B. Niswanger*, for appellant.

Boswell, Tucker & Brewster, by: *Dennis J. Davis*, for appellee.

JOSEPHINE LINKER HART, Judge. J&V Restaurant Supply & Refrigeration, Inc. (J&V), appeals from a judgment awarding appellee Supreme Fixture Co., Inc., an Arkansas corporation, damages in the amount of $30,638. Appellant argues that the circuit court erred by finding that it was in default and had waived its defense of lack of personal jurisdiction; in rejecting its accord and satisfaction defense; and in denying its request for an enlargement of time within which to file a motion to dismiss. We affirm.

J&V, a Montana corporation that sells and installs kitchen equipment, has never had an office in Arkansas. Supreme Fixture, an Arkansas corporation, manufactures custom-built kitchen equipment in Little Rock. J&V, as subcontractor under the project's general contractor, J.E. Dunn, solicited quotes from kitchen equipment suppliers preparatory to bidding on the construction of a prison in Montana. In November 1998, J&V forwarded by facsimile a request for a quotation to Supreme Fixture. Supreme Fixture, by facsimile and mail, returned its quotation. After J&V was awarded the subcontract, using Supreme Fixture's bid, J&V sent by facsimile

a purchase order totaling $31,808 to Supreme Fixture. The purchase order provided specifications for the specially designed equipment and required J&V to take delivery of the equipment in Little Rock. Between February and June, J&V made some modifications to the specifications, which necessitated Supreme Fixture's modifying its drawings and prices. In July 1999, Supreme Fixture and J&V entered into an additional agreement detailed in a new purchase order providing that J&V would pay an extra $4,000 to Supreme Fixture for delivery of the equipment to the construction location in Montana and for on-site welding services.

Originally, J&V had provided Supreme Fixture with a projected completion date of August 20. However, in mid-July, J&V informed Supreme Fixture for the first time that, unless all of the equipment was installed by July 31, they would be fined $5,000 per day after that date. In order to meet the new deadline, Supreme Fixture entered into a separate agreement with J.E. Dunn, the general contractor, to install the equipment by July 31 for an additional expediting fee of $28,000. Supreme Fixture met the new deadline and received $28,000 from J.E. Dunn. Later, Supreme Fixture learned that J.E. Dunn had subtracted that sum from its payment to J&V. Supreme Fixture then billed J&V for $35,550. In making payment, J&V subtracted $478 in other adjustments and the $28,000 paid by J.E. Dunn. J&V sent Supreme Fixture checks for $7,022 and $1,890. According to Supreme Fixture, J&V still owed $30,638 on the purchase order; however, J&V refused to pay Supreme Fixture.

Supreme Fixture sued J&V for breach of contract, and J&V's registered agent received the summons and complaint on May 22, 2000. On June 22, 2000, thirty-one days after service, J&V filed a motion for a one-day extension within which to file a motion to dismiss. J&V's attorney stated that J&V had first contacted him about filing an answer on its behalf in the early afternoon of June 21, 2000, which was the answer's due date. The attorney stated that, although he had believed that he could complete the motion to dismiss, the brief, and the accompanying affidavit in time, he was unable to do so. On June 22, J&V also filed a motion to dismiss Supreme Fixture's complaint on the ground that J&V's contacts with the state of Arkansas did not meet the constitutionally required minimum for the courts of Arkansas to assert personal jurisdiction.

At the hearing on J&V's motions, J&V's attorney stated that the clerk's office was closed when he attempted to file the motion to dismiss on June 21, having missed the filing deadline by only a

few minutes. Carl Hampel, a salesman and chief estimator for Supreme Fixture, testified that Supreme Fixture is a specifications supplier for the owner of the prison and that J&V had called Supreme Fixture and asked if it could help J&V become a supplier for the project. He said that Supreme Fixture helped J&V obtain the necessary approval which qualified it to bid on the job. Supreme Fixture asked and obtained from the project's food-service consultant a set of plans for J&V. He testified that, after J&V supplied Supreme Fixture with the specifications, he provided a quote to J&V. Subsequently, J&V notified him that its bid had been accepted and sent Supreme Fixture a purchase order.

When Supreme Fixture received the order, it began preparing the customized shop drawings. Carl Hampel testified that the equipment was to be picked up by J&V and that Supreme Fixture was not obligated to deliver the equipment to Montana. However, during the manufacturing process, he had daily contacts by telephone and by facsimile with Steve Osmers, an employee of J&V, and during the building process, modifications required him to resubmit prices and drawings. He stated that, towards the end of the production process, J&V told him that it could not pick up the equipment or do the field welding in Montana but agreed to pay Supreme Fixture an additional amount for those services. The parties entered into an additional agreement, and J&V sent Supreme Fixture a separate purchase order reflecting those changes. According to Carl Hampel, ninety percent of the contract was performed in Arkansas.

The circuit judge found that J&V was properly served with the summons and complaint but failed to file a timely responsive pleading. He determined that J&V, by failing to file its motion to dismiss for lack of personal jurisdiction within thirty days after service, had waived its right to assert a lack of jurisdiction of the person. He also found that J&V had failed to demonstrate that it had, under Arkansas Rule of Civil Procedure 6(b)(2), cause for an enlargement of the response time.

At the hearing on damages, John Hampel, the president and chief executive officer of Supreme Fixture, testified that Supreme Fixture had received two checks from J&V, leaving a balance due of $30,638. Referring to Supreme Fixture's accounts receivable statement, he said that the phrase "Less 28,000 Dunn" indicated that J&V must have put a notation to that effect on its check or in an accompanying letter. He said that the payment of $28,000 from J.E. Dunn, the general contractor, was for the separate contract with

Supreme Fixture to meet the new deadline of July 31. He emphasized that it was not paid in connection with the fabrication or delivery of the equipment covered by the original purchase order.

Carl Hampel also testified that Supreme Fixture did not receive the final drawings from J&V until June 23 and that, before that date, it could not fulfill the contract. Explaining the time line, Carl Hampel said it normally would take between six and eight weeks to produce the order. Further, based on J&V's failure to inform him until July 7 that the project had to be completely finished by the end of July, he told Mr. Osmers that Supreme Fixture could not meet the new and earlier deadline. After that, J.E. Dunn contacted him about entering into a separate contract to stop production on Supreme Fixture's other projects and to focus entirely on this job. He also said that Supreme Fixture's $28,000 fee from J.E. Dunn was an additional expediting fee and that the expediting fee was not intended as a credit towards the original purchase order with J&V.

At the conclusion of this hearing, the circuit judge found that there was a separate agreement between J.E. Dunn and Supreme Fixture whereby J.E. Dunn would pay an additional $28,000 expediting fee and that J&V owed Supreme Fixture $30,638. Following the court's ruling, J&V's attorney asked the circuit judge to take notice of a comment in the accounts receivable that made reference to "Less 28,000 Dunn." Counsel then argued that the comment amounted to an accord and satisfaction. The circuit judge disagreed, finding that the annotation on the document did not amount to an accord and satisfaction of the debt. He entered a judgment finding J&V in default and granting judgment to Supreme Fixture in the amount of $30,638, plus interest at the rate of 9.5%, costs of $100, and an attorney's fee of $3,063.

J&V's Arguments on Appeal

J&V raises four points on appeal: (1) the constitutionally required minimum contacts did not exist between J&V and Arkansas; (2) J&V did not waive its objection to personal jurisdiction; (3) Supreme Fixture's acceptance of J&V's checks was an accord and satisfaction; and (4) the circuit judge abused his discretion in denying J&V's motion to enlarge the response time.

Waiver of the Personal Jurisdiction Defense

Citing *Glenn v. Student Loan Guaranty Foundation of Arkansas,* 53 Ark. App. 132, 920 S.W.2d 500 (1996), J&V argues that defects in personal jurisdiction are not waived when a party fails to appear or to respond and that the trial court erroneously held that J&V had waived its objection to personal jurisdiction. We agree. A default judgment is void if the trial court lacked jurisdiction over the person. *Id.* Therefore, the defendant is not required to defend the suit or show a meritorious defense in order to attack the default judgment. *Crockett v. Johnson,* 259 Ark. 6, 530 S.W.2d 671 (1975). *See also Pounders v. Chicken Country, Inc.,* 3 Ark. App. 220, 624 S.W.2d 445 (1981). Because a judgment entered by default without personal jurisdiction over a defendant who has not appeared is void, it necessarily follows that a default judgment entered without personal jurisdiction cannot be deemed valid if the defendant filed an untimely responsive pleading asserting that defense. Our disagreement, however, does not require reversal, as we conclude that the trial court had personal jurisdiction over the parties.

Personal Jurisdiction

A trial court's determination that the court has personal jurisdiction over the parties is normally a question of fact. *See Moran v. Bombardier Credit, Inc.*, 39 Ark. App. 122, 839 S.W.2d 538 (1992). Absent a ruling on an issue, this court is ordinarily precluded from reviewing that issue on appeal. *See Ross Explorations, Inc. v. Freedom Energy, Inc.*, 340 Ark. 74, 8 S.W.3d 511 (2000). However, the facts necessary to determination in this case are essentially undisputed by the parties and therefore, in our view, present a question of law that we may address. *See Evans v. White*, 284 Ark. 376, 682 S.W.2d 733 (1985); *South Miller County Highway Dist. v. Dorsey*, 174 Ark. 553, 297 S.W.2d 833 (1927).

J&V argues that its contacts with Arkansas cannot sustain personal jurisdiction in this state and points out the following undisputed facts: (1) all communications between Supreme Fixture and J&V were by telephone, facsimile, and mail; (2) J&V's agents never traveled to Arkansas, although Supreme Fixture's agents did travel to Montana and perform some installation work there; (3) J&V signed the purchase order in Montana; (4) J&V is a Montana corporation and has never had an office in Arkansas; and (5) although

Supreme Fixture contends that it had an ongoing business relationship with J&V, none of its previous bids had been accepted by J&V in the past.

In *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), the United States Supreme Court stated that due process requires only that certain minimum contacts exist between the nonresident and the forum state such that the maintenance of the suit will not offend traditional notions of fair play and substantial justice. It is essential for a finding of personal jurisdiction that there be some act by which the defendant purposefully avails himself of the privilege of conducting business in the forum state. *Hanson v. Denckla,* 357 U.S. 235 (1958). Whether the "minimum contacts" requirement has been satisfied is a question of fact that is to be decided on a case-by-case basis. *Chemical Methods Leasco, Inc. v. Ellison,* 46 Ark. App. 288, 879 S.W.2d 467 (1994).

As appellant argues, it is true that the use of interstate mail and banking facilities, standing alone, is insufficient to satisfy due process in asserting long-arm jurisdiction over a nonresident. *John Norrell Arms, Inc. v. Higgins,* 332 Ark. 24, 962 S.W.2d 801 (1998); *Glenn v. Student Loan Guar. Found., supra.* However, it has been established that a single contract can provide the basis for the exercise of jurisdiction over a nonresident defendant if there is a substantial connection between the contract and the forum state. *See McGee v. International Life Ins. Co.,* 355 U.S. 220 (1957); *Nelms v. Morgan Portable Bldg. Corp.,* 305 Ark. 284, 808 S.W.2d 314 (1991). A promise to pay for services to be performed within a state is a relevant factor to consider in determining whether that state may assert personal jurisdiction over the party making the promise. *See Williams Mach. & Fabrication, Inc. v. McKnight Plywood, Inc.,* 64 Ark. App. 287, 983 S.W.2d 453 (1998).

The parties disagree as to whether the $4,000 purchase order for delivery of the equipment to Montana and field welding was a modification of the original contract or a separate contract. However one characterizes that transaction, the conclusion is inescapable that the parties engaged in a continuing course of conduct that was more than sufficient to justify personal jurisdiction in Arkansas. Their original agreement contemplated that appellee would prepare shop drawings and manufacture custom-built equipment that was specifically designed to meet J&V's requirements. This agreement also necessitated continuing communication between the parties for a substantial period of time from the first contact between the parties until delivery date of the equipment. As

the United States Supreme Court stated in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985): "[I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted." The following quotation from *Burger King Corp. v. Rudzewicz, supra*, applies with equal force to the case before us: "It is these factors — prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing — that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum." *Id.* at 479.

The record clearly demonstrates that J&V purposefully availed itself of the privilege of conducting activities within this state, *see Hanson v. Denckla*, 357 U.S. at 253, and has caused Supreme Fixture to perform extensive services here. *See Williams Mach. & Fabrication, Inc. v. McKnight Plywood, Inc.*, 64 Ark. App. at 290, 983 S.W.2d at 455. In the fall of 1998, J&V requested its assistance in obtaining approval to bid on the prison project in Montana, and Supreme Fixture did so. Supreme Fixture instructed the project's food-service consultant to send a set of the specifications for the project to J&V. J&V then supplied a set of the specifications to Supreme Fixture so that it could prepare a quote. After obtaining the bid, J&V accepted Supreme Fixture's quote and sent a purchase order to Supreme Fixture requesting that it manufacture custom-made kitchen equipment that was to be delivered at Little Rock. Between November 1998 and July 1999, Supreme Fixture and J&V frequently communicated by facsimile and telephone. As a result of those communications, several modifications and additions were made to the plans and original purchase order. These modifications necessitated a resubmittal and approval of the changes in prices and shop drawings. At J&V's request, Supreme Fixture delivered the material to Montana and performed field welding there. In our view, J&V's contract with the appellee exceeded the minimum required to enable Arkansas to exact jurisdiction over appellant.

Accord and Satisfaction

On the merits, J&V also argues that Supreme Fixture's acceptance of its checks constituted an accord and satisfaction of its claim against J&V. J&V, however, did not raise this issue until the damages hearing, after the trial judge had ruled on the amount it owed. Accord and satisfaction is an affirmative defense, which must

be proved by the party asserting it. *Fort Smith Serv. Fin. Corp. v. Parrish,* 302 Ark. 299, 789 S.W.2d 723 (1990). Arkansas Rule of Civil Procedure 8(c) requires that all affirmative defenses must be contained in the response to a complaint. Additionally, J&V was not entitled to raise an affirmative defense after it had been found in default and its liability had been established. *See B & F Eng'g, Inc. v. Cotroneo,* 309 Ark. 175, 830 S.W.2d 835 (1992); *Gardner v. Robinson,* 42 Ark. App. 90, 854 S.W.2d 356 (1993). Because J&V failed to raise and develop this defense in a timely manner, we affirm on this point.

The Motion to Enlarge

J&V also argues that the trial judge abused his discretion in denying its motion to enlarge the time within which to file its motion to dismiss. Arkansas Rules of Civil Procedure 6(b) and 55 give trial courts discretion in deciding whether to enter a default judgment. *See Moore v. Taylor Sales, Inc.,* 59 Ark. App. 30, 953 S.W.2d 889 (1997). Under these rules, J&V had the burden of proving that its failure to file the motion in a timely manner was the result of mistake, inadvertence, surprise, excusable neglect, or other just cause. Rule 6(b)(2) allows a trial court, in its discretion, to enlarge the time for answering, even after the initial period for answering has passed. *Layman v. Bone,* 333 Ark. 121, 967 S.W.2d 561 (1998). The rule, however, does not permit the filing of late answers in any circumstance; when a defendant's actions can be characterized as "neglect" that was not "excusable," rather than "mistake," the appellate court will not say that the trial judge abused his discretion in declining to enlarge the time for the defendant to file his answer. *Id.; Tyrone v. Dennis,* 73 Ark. App. 209, 39 S.W.3d 800 (2001). A trial judge does not abuse his discretion in granting a default judgment where the delay was due to carelessness or a failure to attend to business. *Moore v. Taylor Sales, Inc., supra.*

J&V's attorney stated that he was not contacted about preparing the response until early afternoon of the day that the answer was due; therefore, it appears that J&V was not attending to its business. Accordingly, we hold that the trial judge did not abuse his discretion in denying the motion.

Affirmed.

JENNINGS and NEAL, JJ., agree.

Kisha ILO *v.* STATE of Arkansas

CA CR 01-1066 69 S.W.3d 55

Court of Appeals of Arkansas
Division I
Opinion delivered March 6, 2002

[redacted]

Bill Luppen, for appellant.

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

JOHN B. ROBBINS, Judge. Appellant Kisha Ilo appeals her convictions for possession of marijuana with intent to deliver, maintaining a drug premises, and possession of drug paraphernalia. The convictions arose from the evidence seized in a search of her home located at 1906 Dave Ward Drive in Conway, Arkansas, and the subsequent denial of her motion to suppress. Appellant entered a conditional guilty plea reserving her right to appeal the suppression issue. Appellant was sentenced to six years of probation and a $5000 fine. We reverse and remand.

When this court reviews a trial court's ruling on a motion to suppress, we make an independent determination based upon the totality of the circumstances. *Gilbert v. State*, 341 Ark. 601, 19 S.W.3d 595 (2000); *Bangs v. State*, 338 Ark. 515, 998 S.W.2d 738 (1999). We will reverse a trial court's ruling on a motion to suppress only if the ruling was clearly erroneous or clearly against the preponderance of the evidence. *Id.* Since the determination of a preponderance of the evidence turns on questions of credibility and the weight to be given testimony, we defer to the trial judge's superior position. *Lemons v. State*, 310 Ark. 381, 836 S.W.2d 861 (1992).

We first examine the facts as developed in the Faulkner County Circuit Court. On January 18, 2000, George Weatherly's vehicle was seen at appellant's residence for a few minutes. After the vehicle left, it was followed until police officers initiated a traffic stop due to an equipment violation. A search revealed a substantial amount of marijuana. Weatherly was arrested and questioned. The police stated that Weatherly told them that he had purchased marijuana at appellant's house for about a year and that he had seen a handgun in the house on at least two occasions as recently as two weeks ago.

Officers applied for a search warrant on January 19, 2000. An affidavit was provided to the magistrate issuing the warrant. The facts in support of the search warrant were as follows: an officer observed that during approximately fifteen hours of surveillance conducted over six weeks that there was short term, heavy traffic of persons coming and going from appellant's residence, many of whom only stayed two to three minutes; appellant's husband had a prior arrest for possession of a controlled substance in February 1998; on one occasion in December 1999, a vehicle occupant was seen discarding the interior tobacco of a cigar on the driveway, providing a vessel to pack marijuana and smoke it, a common practice in smoking marijuana; the officer approached the house on December 21, 1999, and spoke to the residents, during which time the officer smelled burning marijuana emanating from the opened door; a vehicle that was observed at the residence on January 18, 2000, (belonging to Weatherly) was stopped by police officers after leaving, and a search revealed one-quarter pound of marijuana; and the occupant of the vehicle searched told officers that he had been purchasing marijuana at this residence for approximately one year and had seen a handgun at the residence on at least two occasions and as recently as two weeks ago. The affidavit specifically requested that the knock-and-announce rule be excluded for the safety of the officers involved. The warrant was issued, though it did not specifically state that the no-knock requirement was waived. Later that day, the door of appellant's home was rammed, and the occupants were arrested and evidence seized.

Appellant moved to suppress the evidence gained in the search. At the suppression hearing, Weatherly, who had a prior felony, testified that he told officers about his purchase of marijuana but that he never said anything about guns being in the house. He did not recall ever seeing guns present. Two officers who were directly involved in the investigation contradicted that assertion in their testimonies. One officer did testify that though the request to forego the knock-and-announce rule was requested, no mention of dispensing that rule was made in the search warrant issued and that this was an oversight.

We examine the constitutional principles and case law as they apply to this situation. The Fourth Amendment protects an individual's legitimate expectation of privacy against unreasonable searches and seizures. *See Wilson v. Arkansas*, 514 U.S. 927, 115 S. Ct. 1914, 131 L.Ed.2d 976 (1995). The United States Supreme Court announced in *Wilson* that the common-law rule of knock-and-announce constitutes a portion of the Fourth Amendment

reasonableness inquiry. The Court traced the knock-and-announce principle back to early English common law. *See id.* The principle later became part of early American common law when many states, in conjunction with ratification of the Fourth Amendment, enacted constitutional provisions or statutes that incorporated English common law. *See id.* The Court observed that knock-and-announce was never treated as a blanket rule and that the courts inherently recognized the application of certain circumstances that justified an exception. *See id.*

Although the principle was accepted by American courts, it was not until *Wilson* that knock-and-announce was held to be a part of the reasonableness inquiry contemplated under the Fourth Amendment. The Court again addressed the knock-and-announce principle in *Richards v. Wisconsin*, 520 U.S. 385, 117 S. Ct. 1416, 137 L.Ed.2d 615 (1997). The Court expanded its holding in *Wilson* and stated that police seeking to justify a "no-knock" entry must meet the following test:

> [T]he police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.

Id. at 394 (citations omitted). The Court chose the lower standard of reasonable suspicion rather than probable cause in order to strike a proper balance between the valid concerns of law enforcement officials who execute search warrants and the privacy interests of individuals who are affected by no-knock entries. *See id.* It cautioned that even though a knock-and-announce challenge involves a lower standard of proof, the police are required to show reasonable suspicion whenever the reasonableness of an unannounced entry is at issue. *See id.* The Court held that trial courts facing the issue of whether an unannounced entry is reasonable should apply the *Richards* test to the facts and circumstances of the particular entry to determine if the entry is justifiable.

Our supreme court later held in *Mazepink v. State* that the requirement for police to knock and announce is not merely perfunctory. *See Mazepink v. State*, 336 Ark. 171, 182-83, 987 S.W.2d 648, 653 (1999). However, the flexible rule of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests. *Richards v. Wisconsin, supra* (citing *Wilson, supra*).

It is the duty of a court confronted with the question to determine whether the facts and circumstances of a particular entry justified dispensing with the knock-and-announce requirement. *Id.* We will not reverse that finding unless it is clearly against the preponderance of the evidence. *Thompson v. State*, 42 Ark. App. 254, 856 S.W.2d 319 (1993).

Appellant initially argues that the warrant was facially invalid because the warrant did not include the judge's approval of dispensing with the knock-and-announce rule requested in the affidavit. We disagree. The State points out that in order to conduct a no-knock search, it is not necessary that the search warrant specifically dispense with the knock-and-announce requirement because the reasonableness of the officers' decision to make a no-knock entry may be evaluated at the time of the entry. *See Foster v. State*, 66 Ark. App. 183, 991 S.W.2d 135 (1999). We agree with the State that the failure to include this language in the warrant itself does not defeat the propriety of the search.

The crux of the issue is whether the officers' belief that weapons were in the house justified their no-knock entry. Credibility determinations are left to the trial court. *See Campbell v. State*, 27 Ark. App. 82, 766 S.W.2d 940 (1989). The trial judge apparently believed the officers over Weatherly, a convicted felon. Knowledge of weapons in the residence to be searched has been held to justify execution of a no-knock warrant. *See Foster v. State, supra.* However, appellant successfully distinguishes these facts from those in *Foster.* The search warrant in *Foster* was premised upon the officers' personal knowledge of guns being in the Foster residence within "days" of the application for a warrant. Appellant argues that the information in the present appeal was stale as to the presence of a handgun, and we agree. The trial court's decision to the contrary is clearly against the preponderance of the evidence.

The evidence, at its strongest, suggested that Weatherly saw a gun at the house on two occasions, most recently two weeks before the day his car was stopped. Weatherly gave no indication that a gun was present, however, when he was in the house on the day just prior to the request for a search warrant and its execution. While we cannot discern how many days elapsed between the sighting of guns and the no-knock entry in *Foster*, we hold that merely seeing a handgun at a residence two weeks earlier is too remote in time to predicate a fear that such handgun will continue to be present and endanger officers, absent any other compelling facts to suggest otherwise.

After reviewing the totality of the circumstances, we hold that the trial court erred when it denied appellant's motion to suppress. Therefore, we reverse and remand.

CRABTREE and ROAF, JJ., agree.

IN RE: The Matter of ONE 1995 FORD SEARCHER JAMBOREE, VIN 1FDKE30G7SHA15989

CA 01-495 69 S.W.3d 442

Court of Appeals of Arkansas
Division II
Opinion delivered March 13, 2002

R. Allen Waters, III, for appellant.

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

JOHN F. STROUD, JR., Chief Judge. This appeal concerns the forfeiture of a 1995 Ford Searcher Jamboree owned by John

Brooks, a resident of Pennsylvania. The vehicle was seized by the Conway Police Department in 1997 following the arrest of the vehicle's driver, Michael Christopher, who was allegedly using it to transport marijuana. The Faulkner County Prosecutor's Office subsequently obtained an order forfeiting the vehicle, as Arkansas law permits when a vehicle has been used to transport a controlled substance. On appeal, Brooks contends that the forfeiture order was erroneously entered. We agree and reverse and remand, with directions to the trial court to order the immediate return of the vehicle to its owner.

The Faulkner County prosecutor began this forfeiture action in February 1997, pursuant to the uncontested forfeiture statute in effect at that time. *See* Ark. Code Ann. § 5-64-509 (Repl. 1997) (later repealed by Act 1120 of 1999). Uncontested forfeiture permitted a prosecutor to obtain forfeiture of a vehicle without resort to judicial process. However, if, within thirty days after being notified of the seizure, the vehicle's owner filed a notice of judicial referral, the owner became entitled to a judicial proceeding, pursuant to Ark. Code Ann. § 5-64-505 (Repl. 1997) (subsequently amended by Act 1120 of 1999). That statute required that judicial proceedings be "instituted promptly" to determine whether grounds for forfeiture existed.

John Brooks received a notice of uncontested forfeiture from the prosecutor's office on February 28, 1997. According to the prosecutor, Brooks did not file a timely notice of judicial referral. However, the prosecutor did not execute an order of forfeiture as he could have done under the uncontested forfeiture law; in fact, he took no further action to obtain forfeiture of the vehicle until January 26, 2000. On that day, the prosecutor sought and obtained an order from the circuit court finding that Brooks's vehicle should be forfeited. Brooks moved to set that order aside, which the court did, but the original order of forfeiture was eventually reinstated upon a finding that Brooks had not filed a notice of judicial referral. As his first point on appeal, Brooks contends that the trial court's finding in this regard was erroneous.

A circuit court's findings of fact will not be set aside unless they are clearly erroneous. Ark. R. Civ. P. 52(a); *In re: the Matter of One 1994 Chevrolet Camaro*, 343 Ark. 751, 37 S.W.3d 613 (2001). However, we do not defer to a trial judge's ruling on a question of law. *See generally Lowell v. M & N Mobile Home Park*, 323 Ark. 332, 916 S.W.2d 95 (1996). We will simply reverse if the trial judge rules erroneously on a legal issue. *Id.*

The evidence regarding whether Brooks filed a notice of judicial referral was conflicting. However, we need not evaluate that evidence because we hold that the prosecutor's failure to answer certain discovery propounded by Brooks resulted in an admission that Brooks filed a timely notice of judicial referral. During a March 1, 2000 hearing, Brooks presented the prosecutor with the following requests for admission:

> REQUEST FOR ADMISSION NO. 4: Please admit that the correspondence of March 4, 1997, attached hereto as Exhibit "B", is a true and correct copy of a letter of transmission accompanying the Notice of Judicial Referral and Motion to Retrieve Vehicle from [Brooks's counsel] to the State's representative, [Prosecutor] H.G. Foster.
>
> REQUEST FOR ADMISSION NO. 5: Please admit that the State's representative, H.G. Foster, Prosecuting Attorney, actually received the correspondence attached hereto as Exhibit "B", and accompanying pleadings on or about March 4, 1997.
>
> REQUEST FOR ADMISSION NO. 6: Please admit that the Notice of Judicial Referral attached hereto as Exhibit "C" is a true and correct copy of the Notice of Judicial Referral that was forwarded to the State's representative H.G. Foster on March 4, 1997.

The record does not reveal that the prosecutor ever answered these requests or made any excuse for neglecting to do so. Where excusable neglect is not pleaded or proven and a response to a request for admission is not timely filed, the untimely response results in an admission. Ark. R. Civ. P. 36(a); *Borg-Warner Acceptance Corp. v. Kesterson*, 288 Ark. 611, 708 S.W.2d 606 (1986). In this case, the prosecutor's unexplained failure to respond to the above-quoted requests resulted in an admission that Brooks filed a timely notice of judicial referral.

The State argues that the Rules of Civil Procedure do not apply to this forfeiture action. It cites Ark. R. Civ. P. 81, which provides that the Rules of Civil Procedure do not apply where a statute that creates a right, remedy, or proceeding specifically provides for a different procedure. Although the Rules of Civil Procedure may not have applied had the prosecutor proceeded strictly under the uncontested forfeiture statute, *see Union Nat'l Bank v. Nichols*, 305 Ark. 274, 807 S.W.2d 36 (1991), the prosecutor chose to invoke the judiciary's participation by seeking a forfeiture order.

The Rules of Civil Procedure *do* apply to judicial forfeiture proceedings. *See Sims v. State*, 326 Ark. 296, 930 S.W.2d 381 (1996). Further, a proceeding that is not ordinarily subject to the Rules of Civil Procedure may become so once the matter is brought before a circuit court. *See Sosebee v. County Line Sch. Dist.*, 320 Ark. 412, 897 S.W.2d 556 (1995).

Based upon the foregoing, we hold that as a result of the prosecutor's failure to respond to requests for admission, it is deemed admitted that Brooks filed a timely notice of judicial referral. By doing so, Brooks was entitled to a judicial forfeiture proceeding, pursuant to Arkansas Code Annotated section 5-64-505. The question is whether his right to such a proceeding is governed by the version of that statute in effect at the time of the 1997 seizure or the version in effect at the time the forfeiture order was sought in 2000.

The two statutes differ considerably in that the latter version sets out very stringent time periods within which forfeiture may be accomplished (at the most, within 120 days of seizure), while the former version merely required that proceedings be "instituted promptly." *See* Ark. Code Ann. § 5-64-505(g)(3) (Supp. 2001) and Ark. Code Ann. § 5-64-505(c) (Repl. 1997). However, we need not reach the question of which of these two statutes applies because the prosecutor did not institute forfeiture proceedings in a timely fashion under either law. Nearly three years passed between the time the prosecutor first notified Brooks of the seizure of his vehicle and the time he began forfeiture proceedings in circuit court. The record reveals no reason for this delay and, as far as we can determine, the three-year limbo between seizure and institution of forfeiture proceedings was indefensible. Obviously, the 120-day requirement of the new statute was not met. Further, the three-year delay is so great that no court could reasonably conclude, under the circumstances of this case, that proceedings were "instituted promptly" as required by the former statute.[1]

Because the prosecutor failed to comply with the requirements of the forfeiture law, either as it existed in 1997 or 2000, we reverse the trial court's forfeiture order and remand the case with

[1] Although such a determination might ordinarily be a question for the trial judge to decide, where the facts necessary to make a particular finding are undisputed, a question of law is presented that we may address. *See J&V Restaurant Supply & Refrig., Inc. v. Supreme Fixture Co., Inc.*, ___ Ark. App. ___, ___ S.W.3d ___ (March 6, 2002).

directions to order the immediate return of the subject vehicle to its owner.

Reversed and remanded.

PITTMAN and VAUGHT, JJ., agree.

Lisa PRIVETT *v.* EXCEL SPECIALTY PRODUCTS and Crawford and Company

CA 01-963 69 S.W.3d 445

Court of Appeals of Arkansas
Division IV
Opinion delivered March 13, 2002

Walker, Shock & Cox, P.L.L.C., by: *Eddie H. Walker, Jr.*, for appellant.

Hardin, Jesson & Terry, PLC, by: *J. Rodney Mills* and *J. Leslie Evitts, III*, for appellee.

SAM BIRD, Judge. This is an appeal from the decision of the Arkansas Workers' Compensation Commission affirming the administrative law judge's decision that appellant, Lisa Privett, had suffered a compensable injury. Privett sustained an injury on May 27, 2000, while working for appellee Excel Specialty Products. Excel accepted the injury as compensable; however, in an unusual twist, Privett contends that she was not performing employment services at the time of her accident. Therefore, she argues that the Commission should have determined that she was not entitled to receive workers' compensation benefits. Privett readily admits that her motive is to circumvent the exclusive-remedy provisions of Ark. Code Ann. § 11-9-105 so that she can file a civil action against Excel. We do not agree with Privett's argument; thus, we affirm.

Excel operates a meat-processing facility, and Privett was employed by Excel to cut meat in the "after-trim" department. Privett's job involved pulling trays of meat that had been cut into steaks from a conveyor line, trimming the steaks with knives, weighing the steaks, then placing them back onto a tray and returning them to the conveyor line. For both sanitary and safety reasons, Privett was required to wear a hard hat, hair net, steel-mesh apron, smock, steel-mesh gloves, and a steel-mesh sleeve while working in the after-trim department. Because sharp knives are used in the job, she was also required to have a knife scabbard with her. Excel provided all of the required clothing and equipment. Privett was required to be on the production line at 5:30 a.m., but she could not begin performing her job unless she had the proper equipment and clothing.

On May 27, 2000, the day of the accident, Privett arrived at the plant at about 5:00 a.m. She clocked in and went to the locker room to get her equipment, and then she went to the laundry room to get dressed. A few minutes before she was to report to the production line, Privett left the dressing area and entered the production area of the plant. However, when she realized that she had left her knife scabbard in the laundry room, she proceeded back to

the laundry room to retrieve the scabbard. As Privett exited the production room, she slipped and fell, and was injured.

Privett signed an Arkansas Workers' Compensation Form "N," Notice of Injury, dated May 30, 2000. Excel accepted the claim as compensable, and Privett accepted all workers' compensation benefits provided by Excel, including medical expenses and temporary total disability benefits. After Privett had been released by her physician and returned to work for Excel, she initiated this action, requesting the Commission to determine that she was not performing employment services when she was injured and that, therefore, her injury was not compensable under the Workers' Compensation Act. At a hearing conducted on November 20, 2000, the administrative law judge held that Privett was performing employment services at the time of her injury and that, therefore, her injury is covered by the provisions of the Arkansas Workers' Compensation Act. The Commission affirmed and adopted the administrative law judge's decision as the opinion of the Commission.

■ Prior to our supreme court's decision in *VanWagoner v. Beverly Enterprises*, 334 Ark. 12, 970 S.W.2d 810 (1998), circuit courts had concurrent jurisdiction with the Workers' Compensation Commission to make the threshold determination of whether an employment relationship existed between the parties. *Nucor Holding Corp. v. Rinkines*, 326 Ark. 217, 931 S.W.2d 426 (1996); *Craig v. Traylor*, 323 Ark. 363, 915 S.W.2d 257 (1996); *Rankin v. Farmers Tractor & Equip. Co.*, 319 Ark. 26, 888 S.W.2d 657 (1994); *Nucor-Yamato Steel Co. v. Circuit Court of Miss. County*, 317 Ark. 493, 878 S.W.2d 745 (1994); *Fore v. Circuit Court of Izard County*, 292 Ark. 13, 727 S.W.2d 840 (1987), *overruled on other grounds*, 315 Ark. 333, 869 S.W.2d 6 (1994); *Campbell v. Waggoner*, 235 Ark. 374, 360 S.W.2d 124 (1962); *Co-Ark. Constr. Co. v. Amsler*, 234 Ark. 200, 352 S.W.2d 74 (1961). However, in *VanWagoner*, *supra*, our supreme court abandoned the rule of concurrent jurisdiction, and held that the exclusive remedy for injury or death arising out of and in the course of employment is a claim under the Workers' Compensation Act, and that the Workers' Compensation Commission has exclusive, original jurisdiction to determine the facts that establish jurisdiction, unless the facts are so one-sided that the issue is no longer one of fact, but one of law, such as an intentional tort. In accordance with *VanWagoner*, Privett sought a determination by the Commission that her injury is not compensable, that her injury does not provide the basis for a claim under the Workers' Compensation Act, and that the Workers' Compensation Commission lacks

jurisdiction to decide the merits of any claim arising from her injury.

In determining the sufficiency of the evidence to sustain the findings of the Commission, we review the evidence in the light most favorable to the Commission's findings and affirm if they are supported by substantial evidence. *Weldon v. Pierce Bros. Constr.*, 54 Ark. App. 344, 925 S.W.2d 179 (1996). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Frances v. Gaylord Container Corp.*, 341 Ark. 527, 20 S.W.3d 280 (2000). The question is not whether the evidence would have supported findings contrary to the ones made by the Commission; there may be substantial evidence to support the Commission's decision even though we might have reached a different conclusion if we sat as the trier of fact or heard the case *de novo*. *Tucker v. Roberts-McNutt, Inc.*, 69 Ark. App. 150, 12 S.W.3d 640 (2000).

Arkansas Code Annotated section 11-9-102(4)(A) (Supp. 2001) defines "compensable injury" as "an accidental injury causing internal or external physical harm . . . arising out of and in the course of employment." Employment services are performed when the employee does something that is generally required by his or her employer. *Collins v. Excel Spec. Prod.*, 347 Ark. 811, 69 S.W.3d 14 (2002); *Pifer v. Single Source Transp.*, 347 Ark. 851, 69 S.W.3d 1 (2002). We use the same test to determine whether an employee was performing "employment services" as we do when determining whether an employee was acting within "the course of employment." *Collins, supra*; *Pifer, supra*. The test is whether the injury occurred "within the time and space boundaries of employment, when the employee [was] carrying out the employer's purpose or advancing the employer's interests directly or indirectly." *Collins, supra*; *Pifer, supra*. This test has also been previously stated as whether the employee is "engaged in the primary activity that [s]he was hired to perform or in incidental activities that are inherently necessary for the performance of the primary activity." *Olsten Kimberly Quality Care v. Pettey*, 55 Ark. App. 343, 934 S.W.2d 956 (1996), *aff'd*, 328 Ark. 381, 944 S.W.2d 524 (1997).

Privett contends that because her work day had not yet begun, her injury cannot be compensable. Although Privett had clocked in and was in the locker room getting ready for her shift to begin, the fact that a worker is not directly compensated for the activity engaged in when an accident occurs is not controlling as to whether the worker was performing employment services. *See id.*

By getting the necessary equipment, Privett was manifestly advancing the employer's interest. Privett was required and expected to wear the necessary clothing and have her scabbard as part of her job. Everything in the record indicates that Privett was engaged in incidental activities that were necessary for the performance of the primary activity she was hired to perform.

Most instructive on this issue is *Ray v. Wayne Smith Trucking*, 68 Ark. App. 115, 4 S.W.3d 506 (1999). In *Ray*, the appellant sustained his injury on his day off while preparing his truck for a cross-country drive by equipping it with items necessary for the efficient performance of his job. Notwithstanding the fact that the appellant was performing these tasks on his day off, this court held that the appellant was performing an incidental activity which was inherently necessary for the performance of his primary employment activity and was, therefore, entitled to benefits. Similarly, Privett was injured while preparing the equipment she needed in order to perform her job. It is irrelevant whether or not she was being compensated at the time of the injury because Privett was performing an incidental activity, inherently necessary for the performance of her job. Therefore, we hold that Privett was engaged in employment services when she fell, and we affirm the Commission's decision.

Because we hold that there is substantial evidence that a reasonable mind might accept as adequate to support the conclusion that Privett was performing employment services at the time of her injury, we affirm the Commission's decision that she was performing employment services when she fell while returning to retrieve her scabbard.

Affirmed.

GRIFFEN and BAKER, JJ., agree.

HUFFY SERVICE FIRST and Lumbermens
Mutual Casualty *v.* Anita LEDBETTER

CA 01-989 69 S.W.3d 449

Court of Appeals of Arkansas
Division IV
Opinion delivered March 13, 2002

Rieves, Rubens & Mayton, by: *Eric Newkirk*, for appellants.

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

WENDELL L. GRIFFEN, Judge. The employee in this workers' compensation case, Doyle Ledbetter, suffered a fatal heart attack while employed by appellant, Huffy Service First. The

Workers' Compensation Commission awarded his wife, Anita Ledbetter, dependency benefits. Mrs. Ledbetter is the appellee in this case. Appellant appeals from the Commission's order awarding benefits, arguing that the Commission erred because 1) appellee failed to prove that an accident was the major cause of Ledbetter's heart attack; 2) its interpretation of the "extraordinary and unusual exertion" requirement was flawed; and 3) its decision that Ledbetter sustained a compensable heart attack is not supported by substantial evidence. We disagree and affirm.

Ledbetter had been employed by appellant since 1996 as an assembler for lawn tractors, exercise equipment, grills, and similar items. This job required him to perform on-site assembly at various stores such as Sears, Wal-Mart, and Lowe's. On August 11, 1997, at approximately 3:00 p.m., Ledbetter suffered a heart attack while assembling lawn tractors at the Sears store in Hot Springs. He was transported to the emergency room at St. Joseph's Regional Health Center. The ambulance service record indicated that he complained of heat exhaustion. The emergency-room doctor's note indicated, "pt had worked hard on tractor became diaphoratic [profusely perspirated]."

Dr. Balakrishna Pai, a cardiologist who treated Ledbetter on the day he died, testified by deposition that he arrived at the emergency room at 4:00 p.m. At that time, Ledbetter was complaining of chest pain and was sweating. Dr. Pai suspected that he was having a heart attack. However, Dr. Pai was not present at the time of Ledbetter's death because he had another cardiac emergency at a different hospital.

The emergency-room record, as dictated by Dr. James Tutton, indicated that Ledbetter's chief complaint was severe shortness of breath and profuse sweating. Dr. Tutton noted that there were no preceding symptoms and that Ledbetter experienced chest discomfort that was "hard to discern." Dr. Tutton also noted that Ledbetter was in marked distress, was sweating profusely, and appeared to be cool. Ledbetter's heart rate varied from 120-135 and his diastolic blood pressure reading was 100. Dr. Tutton further noted that Ledbetter proceeded on a "downhill fashion," and the doctors "were never able to convert him to a completely sinus rhythm." Two other doctors considered taking Ledbetter to the heart catheter laboratory. However, before further action was taken, Ledbetter went into heart failure and could not be resuscitated. He died at approximately 5:45 p.m that same day. Dr. Tutton's clinical impression was that Ledbetter suffered a heart attack.

Appellant controverted appellee's claim and a hearing was held before an Administrative Law Judge (ALJ). The ALJ found that appellee did not prove that the work activity in which Ledbetter was engaged in was the major cause of his heart attack and, therefore, denied her request for dependency benefits.

At the hearing before the ALJ, Allen Murford, Ledbetter's former coworker, testified regarding the conditions under which he and Ledbetter worked. According to Murford, a normal load contained fifteen to twenty tractors and each tractor required the assembly of fifteen to twenty pieces. He testified that all tractors that were delivered had to be assembled on the same day because Sears had no place to store the unassembled pieces. Murford estimated that a load of fifteen tractors would take them approximately four to four-and-one-half hours to assemble.

When Ledbetter and Murford assembled bicycles, grills, or sporting equipment, they worked indoors. However, when they assembled lawn tractors, they worked outside in Sears's pick-up/delivery area. The ground in the area was covered with black asphalt and the space was enclosed by two walls that prevented air from circulating. Murford testified that the heat in this area was "unbearable," was hot enough to "fry an egg," and caused them to burn their hands on the tools. Because of the heat, they began work early in the morning, around 7:00 or 7:30, in order to escape the afternoon heat. However, there were times when they were required to work in the afternoon heat and sometimes worked as late as 8:30 p.m. Murford indicated that, unlike Sears, other stores, such as Lowe's or Wal-Mart, allowed them to bring the tractors inside to assemble or provided fans to use when the weather was hot.

Murford left his employ with appellant because he could not handle the working conditions in the Sears location in Hot Springs. He said when he and Ledbetter worked together that Ledbetter never complained about having a heart condition or suffering from chest pains. Murford stated that a load of twenty or twenty-five tractors would be a very unusual load for one person and would be very difficult to assemble in one day. He further stated that it would be very unusual to be working outside where the temperature reached 100 degrees.

Appellee testified that the high temperature on August 11 was between 103 and 105 degrees Fahrenheit. She said that her husband told her that he had about thirty tractors to assemble that day, which she stated was an unusually large amount. Appellee further

stated that Ledbetter told her that it was going to be difficult to assemble thirty tractors and that it was going to be "awfully hot." Appellee, a cardiac nurse, testified that her husband made no complaints of chest pain nor displayed any of the symptoms of heart trouble prior to his death.

Vicki Norman, the Ledbetters' daughter, arrived at the hospital at approximately 4:30 p.m. Norman is a critical-care nurse. She testified that the heat index for that day was 105 degrees. She said that when she saw her father in the emergency room, he was pale and clammy and appeared to be dehydrated. Norman stated that his clothes were "frosted white with dried salt" from sweating, which was unusual. She testified that when she asked him what happened, he said, "I just worked too hard and it was too hot." He also told her that he was attempting to assemble thirty lawn tractors that day. Norman stated that her father did not complain of chest pains nor display symptoms of heart trouble prior to his heart attack. To her knowledge, the maximum number of tractors that her father had assembled in one day was twelve.

Dr. Pai testified that he had seen Ledbetter in 1994 because he was experiencing chest pain. Dr. Pai conducted a stress test and tested him for plaque build-up at that time, but the results were negative and Dr. Pai released Ledbetter to the care of his regular physician. Dr. Pai testified that it is not uncommon for an individual to pass a stress test but still have heart disease. However, he also testified that most heart attacks are caused by the accumulation of plaque in the arteries and that most people have a preexisting accumulation of plaque. Dr. Pai could not state for certain whether Ledbetter had a prior build-up of plaque, but he was treating him under the assumption that he had a blockage in his arteries because that was the way Dr. Pai treated almost all heart attacks. He stated that the build-up of plaque is a process, not a one time event, and that plaque continues to build up

> it becomes unstable and ruptures. That is the real reason for the heart attack. But somewhere down the line, the external events can hasten this rupture . . . medically I would say that the plaque is the reason for the heart attack, but the plaque rupture can be due to severe exertion.

However, Dr. Pai agreed that Ledbetter had no prior cardiac problems of which he was aware. When asked whether Ledbetter's physical exertion on August 11 was the precipitating factor resulting in his heart attack, Dr. Pai testified that it was "more likely than

not" that Ledbetter's "extreme exhaustion . . . precipitated the event." When asked specifically if the physical exertion was more than fifty percent of the cause of the heart attack, he responded, "Yes. I would say more likely than not."

According to Michael Kidd, appellant's area manager, Ledbetter requested to be off the week prior to August 11, 1997, because he was having chest pains and wanted to see a doctor. He conceded that other employees had complained about the working conditions at Sears and that it was "very possible" that Ledbetter had complained to him about the working conditions there. Kidd corroborated appellee's testimony regarding the number of tractors to be assembled and Murford's testimony that the tractors were assembled outside. He also confirmed that Ledbetter was working alone on August 11.

Kidd admitted that Sears preferred for all of the tractors to be assembled the same day. He said that "whatever Sears pulled out there that day, they wanted it assembled." He further admitted that when Ledbetter and Murford worked together, their practice was to assemble all of the tractors the same day the pieces were delivered. However, Kidd maintained there was no quota and that whatever remained unassembled could be assembled later in the week. Kidd also testified that he would never expect one person to assemble thirty tractors in one day and that Ledbetter could have completed the remainder of the work later that week and could have obtained assistance. He stated that Sears could have pulled the tractors inside overnight to allow Ledbetter to finish assembling later in the week.

Kidd asserted that assembling lawn tractors does not require any heavy lifting or carrying of heavy objects. He explained that there are two different types of lawn tractors that Ledbetter assembled: preassembled tractors with a deck and preassembled tractors without a deck. For the tractors without a deck, Ledbetter would be required to assemble the deck, assemble the belts and tighten them to the frame. At that point, the work on both types of tractors is the same. Ledbetter would then be required to attach the steering wheels, hook up the batteries, and attach any accessories using impact wrenches or sockets.

Based on this evidence, the ALJ denied appellee's requests for benefits. Appellee appealed to the Commission, which reversed. The Commission attached significant weight to Dr. Pai's opinion regarding the major cause of the heart attack and found that his

testimony was stated within a reasonable degree of medical certainty. The Commission noted that Dr. Pai testified that Ledbetter tested negative for any cardiac abnormalities, including cholesterol plaque, in 1994. Further, the Commission noted that although Dr. Pai testified that most heart attacks are due to an accumulation of plaque in the arteries, he could not state whether Ledbetter suffered from a pre-existing build-up of arterial plaque, and the Commission did not find any credible evidence indicating such a condition existed. The Commission found that an inference that a buildup of plaque caused Ledbetter's heart attack would be "speculative and conjectural."

Further, the Commission found that Dr. Pai's opinion was stated within a reasonable degree of medical certainty, noting that he agreed it was "most likely or most probable" that the physical exhaustion was the precipitating event for the onset of the heart attack.

Citing Murford's testimony regarding the exhaustive heat environment that he and Ledbetter were subjected to while assembling lawn tractors at the Sears store, the Commission further found that appellee proved that the work Ledbetter was performing on August 11, 1997, was unusual work in the course of his regular employment. The Commission noted that Ledbetter was not allowed to assemble the tractors indoors, that his practice was to assemble the tractors the same day the pieces were delivered, and that the testimony established he was attempting to assemble thirty tractors that day. However, the Commission also noted that the exact number of tractors to be assembled was not the controlling factor in determining whether Ledbetter's work was extraordinary and unusual in comparison to his usual work.

Although Ledbetter had worked in the same location with Murford, he and Murford typically worked during the cooler hours of the morning and between them, may have assembled twenty to twenty-five tractors. The Commission found that regardless of the number of tractors Ledbetter was required to assemble, his work that day was extraordinary and unusual because he was working alone in the intense heat in the afternoon sun, outside on black asphalt, in an enclosed space with no air circulation, where no other store required him to work in similar conditions. Further, although Ledbetter had worked at Sears for two consecutive summers, two to three days per week, his usual and regular employment had never before required hospitalization. Therefore, the Commission

reversed the decision of the ALJ and awarded appellee dependency benefits. This appeal followed.

I. Whether Ledbetter's Accident was the Major Cause of His Heart Attack

Appellant maintains that the Commission made an error of law with regard to the causation requirement and the "extraordinary and unusual" requirement and that these factors show that its decision was not supported by substantial evidence. Appellant argues that reasonable minds could not conclude that Ledbetter's heart attack was the result of any single work activity that required significant exertion. To the contrary, we hold that the same evidence supporting the Commission's findings that Ledbetter's accident was the major cause of his heart attack and that his work required extraordinary and unusual exertion also supports the Commission's award of dependency benefits.

■ In reviewing a decision of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission and affirm that decision if it is supported by substantial evidence. *See Geo Specialty Chemical v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). The issue on appeal is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm the Commission's decision. *See Cont'l Express, Inc. v. Freeman*, 66 Ark. App. 102, 989 S.W.2d 538 (1999). Even where a preponderance of the evidence might indicate a contrary result, we will affirm if reasonable minds could reach the Commission's conclusion. *See Henson v. Club Prod.*, 22 Ark. App. 136, 736 S.W.2d 290 (1987).

■ Compensation for injuries due to heart or lung illness are governed by Arkansas Code Annotated section 11-9-114 (1996), which provides:

> (a) A cardiovascular, coronary, pulmonary, respiratory, or cerebrovascular accident or myocardial infarction causing injury, illness, or death is a compensable injury only if, in relation to other factors contributing to the physical harm, an accident is the major cause of the physical harm.

> (b)(1) An injury or disease included in subsection (a) of this section shall not be deemed to be a compensable injury unless it is shown that the exertion of the work necessary to precipitate the disability or death was extraordinary and unusual in comparison to the employee's usual work in the course of the employee's regular employment or, alternately, that some unusual and unpredicted incident occurred which is found to have been the major cause of the physical harm.
>
> (2) Stress, physical or mental, shall not be considered in determining whether the employee or claimant has met his burden of proof.

Thus, this statute requires a claimant to show that the injury is the major cause of his harm and that the work precipitating the injury was extraordinary and unusual in comparison to his regular employment. Major cause means more than fifty percent of the cause. *See* Ark. Code Ann. § 11-9-102(14)(A) (Supp. 2001).

Appellant maintains that the Commission failed to address the "accident" portion of the statute and that there is no evidence to suggest that a specific event caused the heart attack. It argues that continuous exertion and work under extreme conditions is not a specific incident, but is a gradual-onset type of injury, and that heart attacks are not compensable as a gradual-onset injury. Appellant also asserts that the medical evidence does not establish that Ledbetter's work-related conditions were the major cause of his heart attack because Dr. Pai did not indicate within a reasonable degree of medical certainty that the major cause of Ledbetter's heart attack was work-related as opposed to being caused by preexisting heart disease.

Appellant's argument is without merit for two reasons. First, there is no evidence that Ledbetter had any preexisting heart disease. Dr. Pai testified that he had seen appellant in 1994 because he was experiencing chest pain at that time. Dr. Pai conducted a stress test on him at that time, but the results were negative and Dr. Pai released Ledbetter to the care of his regular physician. Other than Ledbetter's checkup in 1994, which revealed negative tests results for heart disease, there is no further treatment of record indicating that Ledbetter suffered cardiac problems until his treatment at the emergency room on August 11. Although Dr. Pai was treating appellant under the assumption that he had a blockage in his arteries because that was the way he treated almost all heart attacks, he could not state for certain whether Ledbetter had a prior

build-up of plaque and he agreed that Ledbetter had no prior cardiac problems of which he was aware.

Further, although Kidd testified that Ledbetter complained of chest pains the week prior to his death, his testimony is contradicted by Ledbetter's wife and daughter, both of whom are nurses and who are familiar with the symptoms of heart disease. It is the exclusive function of the Commission to determine the credibility of witnesses and the weight to be given their testimony. *See Williams v. Prostaff Temps.*, 64 Ark. App. 128, 979 S.W.2d 911 (1998).

Second, appellant's argument must fail because Dr. Pai's testimony was stated with sufficient certainty. Our supreme court has held that where a medical opinion is sufficiently clear to remove any reason for the trier of fact to have to guess at the cause of the injury, that opinion is stated within a reasonable degree of medical certainty. *See Howell v. Schroll Tech.*, 343 Ark. 297, 35 S.W.3d 800 (2001). However, expert opinions based upon "could," "may," or "possibly" lack the definiteness required to meet claimant's burden to prove the causal connection. *See Francis v. Gaylord Container Corp.*, 341 Ark. 527, 20 S.W.3d 280 (2000).

Although Dr. Pai did not use the words, "within a reasonable degree of medical certainty," his opinion is sufficiently clear that the trier of fact is not required to guess at the cause of the injury. When asked whether Ledbetter's physical exhaustion on August 11 was the precipitating factor resulting in his heart attack, Dr. Pai testified that it was "more likely than not" that the Ledbetter's "extreme exhaustion . . . precipitated the event." When asked specifically if the physical exertion was more than fifty percent of the cause of the heart attack, Dr. Pai responded, "Yes. I would say more likely than not." The Commission correctly noted that Dr. Pai did not use such language as "could," "may," or "possibly," and found that Dr. Pai's opinion that Ledbetter's duties "more than likely" precipitated his heart attack was stated within a reasonable degree of medical certainty. *See Wentz v. Service Master*, 75 Ark. App. 296, 57 S.W.3d 753 (2001).

It is true, as appellant argues, that the term "accident" within the meaning of section 11-9-114(a) has been construed to require proof that it is caused by a specific incident and identifiable by time and place of occurrence. *See City of Blytheville v. McCormick*, 56 Ark. App. 149, 939 S.W.2d 855 (1997). However, Dr. Pai's testimony, when combined with the fact that Ledbetter had been working in extreme heat for the immediate seven or eight hours

preceding the heart attack and was still working when the heart attack occurred, satisfies the requirement to show a specific incident identifiable by time and place leading to the heart attack. *See Williford v. City of North Little Rock*, 62 Ark. App. 198, 969 S.W.2d 687 (1998) (reversing and awarding benefits where claimant was a fireman who suffered a heart attack within two days after taking the Firefighters Encounter and Agility Test under extremely hot and humid conditions). Finally, even if Ledbetter had a preexisting heart condition, this would not preclude a finding that his work conditions were the major cause of his heart attack. *See id.* (reversing and awarding benefits where claimant had severe preexisting cardiovascular disease).

Therefore, we hold that the Commission did not err in finding that Ledbetter's work-related conditions were the major cause of his heart attack.

II. Whether the Commission Properly Interpreted the "Extraordinary and Unusual Exertion" Requirement

In addition to proving that the accident is the major cause of the physical harm, a claimant seeking benefits under section 11-9-114 must also show that "the exertion of the work necessary to precipitate the disability or death was extraordinary or unusual." *See* Ark. Code Ann. § 11-9-114(b). Appellant's second argument is that the Commission misinterpreted or misapplied the extraordinary and unusual exertion requirement.

Specifically, appellant argues that the Commission erred as a matter of law because it did not address the exertion requirement, and because Ledbetter's job did not require unusual exertion the day of his heart attack. It also argues that the heat of the day should not "even remotely" be a consideration, because it was not extraordinary and unusual in comparison to his usual work. Appellee counters that her husband's working conditions required extraordinary and unusual exertion because he had to assemble a large load of tractors on an extremely hot day and because Sears was the only store that did not provide some type of shade or ventilation fan.

Appellant asserts that the Commission disregarded the number of tractors to be assembled and, therefore, its ruling is erroneous because it does not address the exertion requirement. This assertion

is itself erroneous. The Commission specifically noted that the number of tractors to be assembled was not dispositive and further stated, "[w]hether there were 30 lawn tractors for assembly[1] or only an average of 15-20, the preponderance of the evidence shows that the decedent's work was extraordinary and unusual in comparison to his usual work."

The Commission may not have relied on the number of tractors to be assembled to reach its findings, but it did not fail to address the exertion requirement. It found that the work required unusual and extraordinary exertion because Ledbetter was working alone in the intense heat in the late afternoon sun, on black asphalt, in an enclosed space with no circulation. The Commission further noted that no other store required Ledbetter to work in similar conditions; that is, other stores allowed him to work indoors or provided some sort or ventilation or fan. Each of these facts relates to the exertion required to perform Ledbetter's job duties. Thus, the Commission did not ignore the exertion requirement.

Nor did the Commission err in finding that this requirement was met. Appellant argues that Ledbetter's job did not require unusual exertion. It maintains that Kidd's testimony demonstrates Ledbetter's work was not physically strenuous because it did not require Ledbetter to lift or carry any heavy objects, but merely required him to attach various small parts to the pre-assembled main frame with impact wrenches or sockets. Relatedly, appellant argues that the level of exertion is related solely to how difficult a task is to perform and does not depend on whether it is performed in a warm or a cool environment. It maintains that although the heat may make the work environment, "less pleasant," heat is "simply a factor of the work environment and does not by any means in and of itself cause the 'exertion' or effort required to assemble a lawn tractor to become more strenuous."

Appellant further argues that the conditions that Ledbetter was working under the day of his heart attack were not unusual or

[1] Appellant asserts that there was not "one shred of evidence" that Ledbetter was attempting to assemble thirty tractors in one day. This assertion is contrary to the evidence in this case. Both appellee and her daughter testified that Ledbetter indicated to them that he had thirty tractors to assemble. Kidd also agreed that there were "probably" thirty tractors that required assembly and he testified that Sears preferred to have them all assembled in one day and that "whatever Sears pulled out there that day, they wanted it assembled." Appellant asserted that only ten or twelve of the tractors were placed outside for Ledbetter to work on that day; however, there was no evidence as to how many he had assembled at the point he suffered his heart attack.

extraordinary because he had worked under similar conditions for two consecutive summers. It notes that although Ledbetter preferred to work in the mornings, there were times when he was required to work outside during the afternoon heat. In addition, he had on occasion worked from 7:00 a.m. until 8:30 p.m. at night, but he had only been working for approximately eight hours when he had his heart attack.

Appellant's argument implies that Ledbetter cannot receive benefits under section 11-9-114 unless his *usual job duties* are physically strenuous. This is an absurd interpretation of the statute. Section 11-9-114 only requires that the exertion of the work must be extraordinary and unusual *in comparison* to the course of the employee's regular employment. *See, e.g., City of Blytheville v. McCormick*, 56 Ark. App. 149, 939 S.W.2d 855 (1997) (holding the extraordinary and unusual requirement was met where the claimant suffered a heart attack immediately after venting a fire and inhaling smoke, where he was normally assigned to drive a fire truck).

Moreover, this court is not required to abandon common sense in reaching a decision. It is untenable to argue that any type of work would not be more strenuous if performed in extreme heat, on black asphalt, without any ventilation. There is substantial evidence to support the Commission's finding that the circumstances in this case required extraordinary and unusual exertion. Although Ledbetter had worked outside in the afternoon heat on occasion, he did not, in the normal course of his employment, work outside, alone, without proper ventilation, when the heat index reached over 100 degrees. As demonstrated by his daughter's testimony, his usual course of employment did not cause him to perspire so much that his clothes were frosted with salt from his sweat. Morever, working outdoors in the heat had never caused Ledbetter to be hospitalized before this incident.

Viewing the facts in this case in the light most favorable to the Commission's findings, we hold that the Commission did not err in finding that appellee was entitled to dependency benefits. In reaching our decision, we note the unusual facts of this case and do not purport to hold that a claimant is required to demonstrate such extreme facts in order to recover under section 11-9-114.

Affirmed.

BIRD and BAKER, JJ., agree.

ALLTEL ARKANSAS, INC., *et al. v.*
ARKANSAS PUBLIC SERVICE COMMISSION, *et al.*

CA 00-855 69 S.W.3d 889

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered March 13, 2002

Stephen B. Rowell; and *Friday, Eldredge & Clark*, by: *Kevin A. Crass* and *R. Christopher Lawson*, for appellant Alltel Arkansas, Inc. and Alltel Communications, Inc.

Cynthia Barton and *H. Edward Skinner, P.A.*, by: *H. Edward Skinner* and *Monica L. Mason*, for appellant Southwestern Bell Telephone Co.

Mark Pryor, Att'y Gen., by: *Eric B. Estes*, Ass't Att'y Gen., for appellant Consumer Utilities Rate Advocacy Division.

Paul J. Ward, for appellee Arkansas Public Service Commission.

Chisenhall, Nestrud & Julian, P.A., by: *Lawrence E. Chisenhall, Jr.* and *Mark W. Hodge*, for GTE Southwest Inc.; GTE Arkansas Inc.; GTE Midwest Inc.; CenturyTel of Northwest Arkansas, LLC; and CenturyTel of Central Arkansas, LLC.

OLLY NEAL, Judge. This appeal comes from a Public Service Commission (PSC) order approving the sale of assets by one telecommunications utility to another. In 1999, GTE Southwest, Inc., GTE Arkansas, Inc., and GTE Midwest, Inc. (hereafter "GTE"), sold 213,000 lines and accompanying plants and equipment to CenturyTel of Northwest Arkansas, LLC and CenturyTel of Central Arkansas, LLC (hereafter "CenturyTel"). The sale was opposed by appellants Alltel Arkansas, Inc., Alltel Communications, Inc. (collectively "Alltel"), and Southwestern Bell Telephone Company because, in connection with the sale, CenturyTel proposed to raise the rates it charged those companies for intrastate switched-access service.[1] Appellants argue on appeal that the order approving the sale should be overturned. We vacate the orders appealed from and remand the case to the Commission.

On June 29, 1999, CenturyTel entered into an agreement to purchase GTE's assets for $843.3 million. The companies petitioned the PSC for approval of the sale, pursuant to Arkansas Code Annotated section 23-3-102 (1987), which requires that utility asset transfers be consistent with the public interest. The petition stated that the sale was consistent with the public interest because CenturyTel focused on rural and small-town markets, which were the types of lines purchased from GTE, and because CenturyTel intended to open greeter stations and retail stores in local service areas, broaden the availability of customer services, and offer employment to GTE workers. The application further stated that CenturyTel would maintain the current GTE rates for local and toll service. However, with regard to switched-access rates, the petition stated: "CenturyTel intends to comply with the Commission's Order in Docket No. 83-042-U, Order No. 56."

The underlying import of that phrase was that CenturyTel planned to calculate and file its switched-access rates based on

[1] This is a per-minute rate charged by local exchange carriers such as GTE and CenturyTel to long distance carriers and other phone companies for using that local exchange carrier's switches and wires to originate and terminate their customers' calls. Intrastate rates are charged by the local exchange carrier based on the use of its equipment for intrastate calls; intrastate rates are regulated by the PSC. Interstate switched-access rates, for interstate calls, are regulated by the FCC.

Order 56 and a connected order, known as the parity order, entered in Docket No. 83-042-U. The parity order (Order No. 37) provided that intrastate access rates must be the same as, *i.e.*, in parity with, interstate access rates. The order was entered in 1986 as the result of a signed agreement executed by several telecommunications companies in existence at the time. However, the order no longer applies to most companies who, having chosen alternative regulation under the Act 77 of 1997, are not subject to it. However, GTE did not choose alternative regulation but remained rate-of-return regulated, and was thus subject to the parity order. CenturyTel, as GTE's successor-in-interest, also claims to be subject to the parity order. The significance is that CenturyTel's use of the parity order will result in a substantial increase in intrastate switched-access rates. This may be explained as follows. At the time of the sale, GTE's interstate switched-access rates were regulated by the FCC on a price cap, rather than a rate-of-return basis.[2] CenturyTel asked the FCC for permission to convert from price-cap to rate-of-return regulation. Rate-of-return regulation is accomplished in the federal jurisdiction with the assistance of the NECA, a non-profit corporation. The NECA divides companies that charge switched-access rates into groups, based on the similarity of their costs of doing business. Each similar group is assigned to a band, which establishes an access rate that is to be charged by all companies in the band. CenturyTel asked the NECA to assign it to a band if the FCC granted the price-cap waiver. This was eventually accomplished.

Because of the manner in which certain types of costs were allocated in the federal jurisdiction, CenturyTel's conversion from price-cap to rate-of-return regulation meant that its interstate switched-access rates would almost double the rates that GTE had charged. Consequently, use of the parity order meant that intrastate rates would also increase correspondingly.

Appellants Alltel and Southwestern Bell suspected that the mention of Docket 83-042-U in the application meant that CenturyTel would attempt to use the parity order to raise rates. They intervened and argued that, because of the potential switched-access

[2] When a utility is rate-of-return regulated, it is allowed to charge rates that would permit it to recover its costs, plus a reasonable rate of return. Such regulation necessarily calls for the regulatory authority to scrutinize the utility's costs of doing business. By contrast, price-cap regulation does not concern itself with a utility's costs. Instead, the regulatory authority simply establishes a maximum rate that may be charged for a particular service, with allowances for inflation.

rate increase, the sale was inconsistent with the public interest. They further contended that the parity order should either be rescinded or declared inapplicable and that the PSC had an obligation to set rates not by mere reliance on the parity order but by determining if the rates proposed by CenturyTel were just and reasonable. Later in the case, the Consumer Utilities Rate Advocacy Division of the Attorney General's office intervened to assert that proper notice of a potential rate increase had not been given as required by law.

Following a hearing, the PSC entered Order No. 15 approving the sale and refusing to rescind the parity order. The order did not expressly approve a rate increase because, at the time it was entered, NECA had not assigned a band to CenturyTel, nor had the FCC approved a price-cap waiver; thus, CenturyTel had not yet filed the actual rates it proposed to charge.[3] Alltel, Southwestern Bell, and the Attorney General's office appeal from that order and Order No. 16 denying their petitions for rehearing.

Our review of appeals from the PSC is limited by Arkansas Code Annotated section 23-2-423(4) (Supp. 2001), which provides that judicial review shall not be extended further than to determine whether the Commission's findings are supported by substantial evidence and whether the Commission has regularly pursued its authority, including a determination of whether the order under review violated any rights of the appellants under the laws or constitutions of the United States or the State of Arkansas. *See Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 69 Ark. App. 323, 13 S.W.3d 197 (2000). The PSC has broad discretion in exercising its regulatory authority, and we may not pass upon the wisdom of the Commission's actions or say whether the Commission has appropriately exercised its discretion. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 58 Ark. App. 145, 946 S.W.2d 730 (1997). We have often said that, if an order of the Commission is supported by substantial evidence and is neither unjust, arbitrary, unreasonable, unlawful, or discriminatory, then we must affirm the Commission's action. *Id.* The Commission's action may be regarded as arbitrary and capricious only where it is not supportable on any rational basis, and something more than mere error is necessary to meet the test. *Bryant v. Arkansas Pub. Serv. Comm'n*, 55 Ark. App. 125, 931 S.W.2d 795 (1996).

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[3] Those rates were ultimately filed and approved in the dockets that are the subject of the companion appeal, *Consumer's Utility Rate Advocacy Division, et al. v. Arkansas Public Service Commission*, No. CA00-1109, also handed down today.

We have been asked by appellants to address several arguments involving the application of the parity order in this case. Among those arguments are that the parity order should be rescinded because the reasons that led to its entry no longer exist in the current regulatory environment and that the order does not apply to CenturyTel because CenturyTel was not a party to it. A crucial inquiry on the latter point is whether the order was intended to be applicable only to those who were parties to Docket 83-042-U or whether it was intended to be applied as a general rule, to be used by future telecommunications companies as well. Unfortunately, the record is not developed enough for us to answer these questions. The parity order is not abstracted nor is it a part of the record. Further, the testimonial evidence tells us little more than the basic rationale behind the order. Consequently, we do not know all the considerations that led to the parity order, nor the identity of all parties to it, nor whether it was intended to be applied on a limited or an industry-wide basis. If we are to address the continued viability of this order, we must have it before us and evidence of how it was intended to operate.

Appellants also argue that the Commission abdicated its responsibility to ensure that rates charged by utilities (other than alternatively-regulated utilities) are just and reasonable. Arkansas Code Annotated section 23-4-103 (1987) provides that all rates received by any public utility "shall be just and reasonable, and to the extent that the rates . . . may be unjust or unreasonable, [they] are prohibited and declared unlawful." The Arkansas Public Service Commission is vested with the sole and exclusive jurisdiction and authority to determine the rates to be charged by utilities. Ark. Code Ann. § 23-4-201(a) (1987). Further, the Commission has the responsibility, when faced with unreasonable rates, to fix reasonable ones. Ark. Code Ann. § 23-4-101(b) (1987). The Commission has some flexibility in establishing rates. For example, Arkansas Code Annotated section 23-4-108 (1987) permits the Commission to fix a sliding scale of rates, but it too must be just and reasonable. Also, the Commission may, in the telecommunications field, deviate from ordinary rate-of-return regulation, but only upon a showing that such deviation is in the public interest. *See* Ark. Code Ann. § 23-2-304(b) (Supp. 2001).

The question we are ultimately faced with on this point is whether the application of the parity order results in just and reasonable intrastate switched-access rates. The record is not developed sufficiently for us to decide this issue. The appellees claim that parity produces just and reasonable intrastate rates because those

rates correspond with the interstate rates established by the FCC. However, we do not have enough information regarding the manner in which the FCC establishes interstate rates. We know that the FCC groups companies with like costs into bands, but we have no data before us on what costs are considered by the FCC, nor do we know how CenturyTel's actual, company-specific costs compare with the average cost assigned to the band rate. Without that information, we cannot say whether the Commission has exercised its responsibility to see that just and reasonable rates are charged in the State of Arkansas.

■ We vacate orders No. 15 and 16 and remand to the Commission.

HART, J., agrees.

ROBBINS and GRIFFEN, JJ., concur.

VAUGHT and BAKER, JJ., dissent.

WENDELL L. GRIFFEN, Judge, concurring. I agree that the Public Service Commission's decision in this case, approving the assets sale (CA 00-855), and in the companion case, approving the rate increase (CA 00-1109), should be vacated and remanded. I write separately to encourage the parties to request rebriefing and further oral argument before this Court after the record has been supplemented with the parity order that, strangely, was not made part of the record by the Commission or by any of the parties to these appeals. As the principal opinions in these companion cases state, the record lacks a sufficient basis for us to determine whether the Commission's decisions, which hinged on the application of the parity order, was supported by substantial evidence.

The appeal in CA 00-855 is from Order No. 15, issued by the Commission on March 29, 2000. In this order, the Commission approved the joint application of Century Tel and General Telephone Electric (GTE) to purchase and sell, respectively, certain GTE assets and properties for $843,000,000. The Commission affirmed the finding of its Administrative Law Judge (ALJ), that the sale was consistent with the public interest pursuant to Arkansas Code Annotated section 23-3-102 (1987). The Commission also affirmed the ALJ's denial of a motion by Alltel Arkansas, Inc., AT&T, Sprint, and Southwestern Bell (SWB) to rescind the parity

order prescribing that intrastate access switching rates be the same as interstate access rates.[1] Alternatively, Alltel, AT&T, Sprint, and SWB sought a determination from the Commission that the parity order is inapplicable to the asset purchase and sale. The Commission denied that motion when it approved the asset purchase.

On appellate review, our task is to determine whether the Commission's determination that the asset sale and purchase was consistent with the public interest, pursuant to section 23-3-102, is supported by substantial evidence and was taken in regular pursuit of its authority. This review includes a determination of whether Order No. 15 violated any of appellants' rights under the United States Constitution or the Arkansas Constitution. *See* Ark. Code Ann. § 23-2-423(c)(3), (4) (Supp. 2001). We have often said that if an order of the Commission is supported by substantial evidence and is neither unjust, arbitrary, unreasonable, unlawful, or discriminatory, then we must affirm the Commission's action. *See Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 58 Ark. App. 145, 946 S.W.2d 730 (1997).

It is a basic principle of appellate review that the decision being reviewed must be accompanied by a sufficient record containing the evidence pertinent to that decision. *See Greene v. Pack*, 343 Ark. 97, 32 S.W.3d 482 (2000). That principle affects our appellate review of the instant appeal, as well as the appeal from the companion decision in this case. Although both decisions are explicitly dependent upon the Commission's application of the parity order, the order itself is not part of the record. Moreover, the record does not demonstrate the manner in which the order was adopted nor the parties to whom the order was intended to apply. Therefore, we have no way to intelligently conclude whether the Commission's application of the parity order is supported by substantial evidence. We do not know whether the order applies to adjudication involving the parties to the instant appeals or is limited to other parties. Nor do we know whether the parity order is perpetual or limited in its duration. We do not know whether the order resulted from a decision on the merits of a controversy or resulted from a settlement. If it is a settlement, we do not know who the settling parties were, let alone what their settlement has to do with the decisions now being appealed.

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[1] Order No. 37 in Docket 83-042-U.

It follows, then, that we must vacate the Commission's decision in Order No. 15 approving the sale, remand the matter to the Commission, and direct the Commission to supplement the record by forwarding the parity order discussed so prominently in its order and in the briefs submitted by the parties to this appeal. I join the decision to vacate and remand for that purpose. I also venture to suggest that the parties may desire to petition our Court to rebrief the case and orally argue it afresh once we have reviewed the order that is so critical to the appeals.

KAREN R. BAKER, Judge, dissenting. I disagree with the majority's decision to vacate and remand the orders of the Public Service Commission. I believe we have sufficient information before us to decide the case on the merits and, if the merits were reached, I would affirm.

Numerous arguments are raised by the appellants in this appeal and the companion appeal, some twenty in all. I would affirm on all issues; however, I write to address what I believe is the crux of both appeals, *i.e.*, the Commission's decision to allow CenturyTel to use the parity order to establish intrastate switched access rates.

Despite the majority's concern about gaps in the development of the record, I believe we can glean enough information from the testimony and exhibits to reach the issues presented. The record shows that the parity order was entered in 1985 to implement certain policy considerations, among them, to lower intrastate access rates to the same level as interstate rates.[1] From the date of its implementation, all companies that filed intrastate switched access rates filed them as "parity filings," that is, they filed intrastate rates that simply mirrored the corresponding interstate rates. In 1997, however, most telecommunications companies chose alternative regulation, pursuant to Act 77 of 1997. As a result, they were no longer subject to the parity order. GTE, however, did not choose alternative regulation; it remained subject to the order as would its successor CenturyTel if this sale were approved. The appellants' primary argument on appeal is that, because of these changes in the regulatory environment and because of the unique situation in which an order that once had industry-wide application is now applicable to only one company, the Commission should not allow use of the parity order to establish intrastate access rates.

[1] I am disturbed by all parties' failure to include the parity order in the record, but I believe that the testimony at the hearing, which is abstracted, provides sufficient information regarding the relevant content of the order.

Appellants make some rather persuasive arguments on this point, but we cannot ignore the standard by which we review orders of the Public Service Commission. As the majority points out, the Commission has broad discretion in exercising its regulatory authority, and we may not pass upon the wisdom of the Commission's actions or say whether the Commission has appropriately exercised its discretion. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 58 Ark. App. 145, 946 S.W.2d 730 (1997). Further, the Commission's action may be regarded as arbitrary and capricious only where it is not supportable on any rational basis. *Bryant v. Arkansas Pub. Serv. Comm'n*, 55 Ark. App. 125, 931 S.W.2d 795 (1996). In this case, the Commission might well have determined, as suggested by the PSC staff, that parity continued to be viable because it assured that like services would be charged at the same rate. That is a rational basis for the Commission's action, and, because that rational basis exists, we should affirm the Commission's decision. Further, I am hesitant, in the absence of clearly arbitrary decision-making, to direct the Commission to rescind one of its own orders.

I am also concerned that the majority opinion has branched into a realm that need not be visited in this case. Part of the majority's decision to remand is based on the idea that there is not sufficient evidence in the record to allow us to determine whether the parity order produces just and reasonable rates. I do not believe we need to go behind the parity order to determine whether it produces just and reasonable rates, *i.e.*, whether there is something inherently flawed about the parity order itself. The parity order, which was entered over fifteen years ago and has been in effect ever since, is not the order appealed from. The relevant inquiry is whether the Commission has regularly pursued its authority in continuing to apply one of its legitimately issued orders.

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

CONSUMER UTILITIES RATE ADVOCACY DIVISION
of the Arkansas Attorney General's Office, *et al.* *v.*
ARKANSAS PUBLIC SERVICE COMMISSION, *et al.*

CA 00-1109 69 S.W.3d 896

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered March 13, 2002

Stephen B. Rowell; and *Friday, Eldredge & Clark*, by: *Kevin A. Crass* and *R. Christopher Lawson*, for appellant Alltel Arkansas, Inc. and Alltel Communications, Inc.

Cynthia Barton; and *H. Edward Skinner, P.A.*, by: *H. Edward Skinner* and *Monica L. Mason*, for appellant Southwestern Bell Telephone Co.

Mark Pryor, Att'y Gen., by: *Eric B. Estes*, Ass't Att'y Gen., for appellant Consumer Utilities Rate Advocacy Division.

Paul J. Ward, for appellee Arkansas Public Service Commission.

Chisenhall, Nestrud & Julian, P.A., by: *Lawrence E. Chisenhall, Jr.* and *Mark W. Hodge*, for appellees CenturyTel of Northwest Arkansas, LLC; and CenturyTel of Central Arkansas, LLC.

OLLY NEAL, Judge. This appeal comes from two Public Service Commission (PSC) orders, one of which granted certificates of convenience and necessity to appellees CenturyTel of Northwest Arkansas, LLC, and CenturyTel of Central Arkansas, LLC (collectively "CenturyTel"), and the other approving CenturyTel's intrastate switched-access rate filing. In a prior proceeding, the PSC approved a sale of assets from GTE to CenturyTel, and that approval is the subject of *Alltel Arkansas, Inc. v. Arkansas Public Service Commission*, No. CA 00-855 (hereafter "the companion appeal"), also handed down today. Both cases present, as their primary issue, the question of whether CenturyTel should have

been permitted to use an order from a 1983 docket known as the parity order to increase its intrastate switched-access rates. These are the per-minute rates charged by local exchange carriers such as CenturyTel to long distance carriers and other telephone companies, such as appellants Alltel and Southwestern Bell Telephone Company, for their use of the local exchange carrier's wires and switches. Appellants argue that the certificates of convenience and necessity should not have been issued, nor should the rate filing have been approved. As in the companion appeal, we vacate the orders appealed from and remand the case to the Commission.

On September 2, 1999, CenturyTel filed applications with the PSC for certificates of convenience and necessity, seeking authorization for the two abovementioned LLCs to operate as local exchange carriers, once the sale of GTE assets was approved. On April 5, 2000, CenturyTel filed the intrastate switched-access rates it intended to charge if the certificates were issued. Those rates were arrived at by use of the aforementioned parity order.[1] The parity order was entered in 1986 and declared that intrastate access rates should be the same as, *i.e.*, in parity with, interstate access rates. As explained in the companion appeal, CenturyTel petitioned the FCC for a particular type of waiver that would ultimately allow it to almost double the interstate switched-access rates that GTE had charged. Once those interstate rates were established, CenturyTel used the parity order to mirror those rates in the intrastate jurisdiction, thus almost doubling them as well.

On May 30, 2000, and June 29, 2000, the PSC issued orders granting the certificates of convenience and necessity and approving CenturyTel's parity rate filing. Appellants appeal from those orders.

Our review of appeals from the PSC is limited by Arkansas Code Annotated section 23-2-423(4) (Supp. 2001), which provides that judicial review shall not be extended further than to determine whether the Commission's findings are supported by substantial evidence and whether the Commission has regularly pursued its authority, including a determination of whether the order under review violated any rights of the appellants under the laws or constitutions of the United States or the State of Arkansas. *See Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 69 Ark. App. 323, 13 S.W.3d 197 (2000). The PSC has broad discretion in

[1] CenturyTel's use of the parity order had just been approved in the sale-of-assets proceeding, as described in the companion appeal.

exercising its regulatory authority, and we may not pass upon the wisdom of the Commission's actions or say whether the Commission has appropriately exercised its discretion. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 58 Ark. App. 145, 946 S.W.2d 730 (1997). We have often said that, if an order of the Commission is supported by substantial evidence and is neither unjust, arbitrary, unreasonable, unlawful, or discriminatory, then we must affirm the Commission's action. *Id.* The Commission's action may be regarded as arbitrary and capricious only where it is not supportable on any rational basis, and something more than mere error is necessary to meet the test. *Bryant v. Arkansas Pub. Serv. Comm'n*, 55 Ark. App. 125, 931 S.W.2d 795 (1996).

As in the companion appeal, we are asked to address several arguments regarding CenturyTel's use of the parity order to establish intrastate access rates. However, the parity order is neither abstracted nor made a part of the record. Further, the testimonial evidence tells us little more than the basic rationale behind the order. We are also asked to address whether the PSC, by allowing CenturyTel to use the parity order, abdicated its responsibility to determine whether those rates were just and reasonable. As explained in the companion appeal, that issue necessarily involves an examination of the federal rate-making process and evidence of how CenturyTel's actual costs compare with the costs assigned to it for federal purposes. We do not have sufficient information to say whether the rates calculated in the federal jurisdiction produce just and reasonable rates in the State of Arkansas.

■ We vacate the orders appealed from in the subject dockets and remand to the Commission.

HART, JJ., agrees.

ROBBINS and GRIFFEN, JJ., concur.

VAUGHT and BAKER, JJ., dissent.

WENDELL L. GRIFFEN, Judge, concurring. I agree that we must vacate the order approving the rate increase entered by the Arkansas Public Service Commission in this appeal and that we must remand the matter to the Commission. As stated in my concurring opinion in the companion appeal, CA 00-855, I hope the parties will request rebriefing and a second oral argument after the record has been supplemented by the addition of the parity order upon which both Commission decisions appear to rest.

The need for the parity order is more obvious and compelling in this case. Here, the Commission has approved a rate increase based upon the parity order that, strangely, was never made part of the record. I do not begin to understand how we can be expected to intelligently determine whether the rate decision is supported by substantial evidence and upon the exercise of the Commission's regular pursuit of its authority when the decision is based on an order that we are not allowed to read.

KAREN R. BAKER, Judge, dissenting. I dissent for reasons stated in the companion appeal in CA 00-855. Judge VAUGHT joins in this dissent.

Anthony NESTERENKO, D.C. *v.* ARKANSAS BOARD of CHIROPRACTIC EXAMINERS

CA 01-902 69 S.W.3d 459

Court of Appeals of Arkansas
Division I
Opinion delivered March 13, 2002

William Bruce Blevins, for appellant.

Mark Pryor, Att'y Gen., by: *Kim Evans*, Ass't Att'y Gen., for appellee.

ANDREE LAYTON ROAF, Judge. This is an appeal under the Administrative Procedures Act, Ark. Code Ann. §§ 25-15-201 *et seq.*, from the Pulaski County Circuit Court. The Board of Chiropractic Examiners (Board) imposed a civil penalty of $2,500 on the appellant, Dr. Anthony Nesterenko, for each of two violations of the Board's regulations prohibiting misleading advertisements and prohibiting unprofessional conduct by violating any other law or rule. The Board also placed appellant on probation for one year. The circuit court found that the Board did not misinterpret its own regulations, and therefore, its findings were not erroneous as a matter of law. The circuit court also found that the Board's

decision was supported by substantial evidence and was not arbitrary and capricious. The court, therefore, affirmed the Board's decision. Appellant argues two points on appeal: (1) that the Board's decision is not supported by substantial evidence, and (2) that punishment for violation of both regulations subjects him to double jeopardy because the same conduct was found to violate both regulations.

The Board received a complaint from another chiropractor, Dr. George Gray, Jr., alleging that an advertisement appellant had published in the *Arkansas Democrat-Gazette* was misleading. The advertisement's third paragraph stated:

> I am one of only two Specific Chiropractors in Arkansas. Specific Chiropractors understand the role that the nervous system plays in the overall health of people. We attempt to restore normal function to the nervous system to allow the body to achieve its fullest potential. Clinical experience indicates that the majority of patients with nervous system interference respond favorably to Specific Chiropractic, regardless of condition. Specific Chiropractic is the removal of interference to the nervous system with the sole intent of restoring normal function to the body without the use of dangerous drugs or surgery.

(Abstract p. 6.) Based on Dr. Gray's complaint, the Board issued an Order and Notice of Hearing, charging appellant with violations of regulation D(1), which states that "[a]dvertising by doctors of chiropractic should conform to professional standards, shall be truthful, not misleading, fraudulent or dishonest," and C(2)(c), which states that "[t]he following acts or activities by a licensee of this Board are considered to constitute unprofessional conduct and grounds for disciplinary action. . . . (c) Violating any rule or law or being a party to . . . the violation of the regulations of this Board or the laws of the State of Arkansas regulating the practice of chiropractic."

After a hearing, the Board issued an order finding that appellant had published an ad that discussed fibromyalgia and contained the quoted portion above; that appellant's action in publishing the ad violated regulation D(1); that the violation of regulation D(1) was itself a violation of regulation C(2)(c); and that the violation of the two regulations constituted grounds for the Board to levy a fine of not more than $5,000 for each violation, to place appellant on probation, or to suspend or revoke his license to practice chiropractic, or any combination thereof. Based on these findings, the Board

fined appellant $2,500 for each violation, for a total of $5,000, and placed appellant on probation for one year.

In its order, the Board does not specifically find that the ad is misleading, fraudulent, or dishonest. Further, the Board's findings do not state *how* appellant's ad violated the Board's regulation against advertising that is not truthful, or is misleading, deceptive, fraudulent, or dishonest. Appellant could have been disciplined under the rule for having an ad that did not meet professional standards, a term not defined by the regulations. Without more specific findings of fact, we are left to guess how and which part of regulation D(1) the Board determined that appellant had violated.

The threshold question in a case brought to this court from an administrative agency is whether the agency has followed the dictates of Ark. Code Ann. § 25-15-210(b)(2) (Repl. 1996) in providing concise and explicit findings of fact and conclusions of law, separately stated in its order. *See Gordon v. Cummings*, 262 Ark. 737, 561 S.W.2d 285 (1978); *Olsten Health Servs., Inc. v. Arkansas Health Servs. Comm'n*, 69 Ark. App. 313, 12 S.W.3d 656 (2000). If an agency fails to make adequate findings, the case may be remanded to it to correct any deficiencies. *See Floyd v. Arkansas State Bd. of Pharmacy*, 251 Ark. 626, 473 S.W.2d 866 (1971).

Because the Board has merely recited the conclusion that appellant violated regulation D(1), we are unable to determine the Board's view of the facts or the theory of law on which appellant's sanction was based. We addressed a similar situation in *Wright v. American Transp.*, 18 Ark. App. 18, 709 S.W.2d 107 (1986), where we quoted the following language from *Whispering Pines Home for Senior Citizens v. Nicalek*, 333 N.E.2d 324 (Ind. Ct. App. 1975):

> Once again, therefore, we attempt to tell the Board what a satisfactory specific finding of fact is.
>
> It is a simple, straightforward statement of what happened. A statement of what the Board finds has happened; not a statement that a witness, or witnesses, testified thus and so. It is stated in sufficient *relevant* detail to make it mentally graphic, *i.e.*, it enables the reader to picture in his mind's eye what happened. And when the reader is a reviewing court the statement must contain all the specific facts relevant to the contested issue or issues so that the court may determine whether the Board has resolved those issues in conformity with the law.

Wright, 18 Ark. App. at 21, 709 S.W.2d at 109 (emphasis in original). The Board in the case at bar did not explain in its findings of fact the basis for its conclusion that the ad was in violation of the regulations. Reviewing courts may not supply findings by weighing the evidence themselves, because that function is the responsibility of the administrative agency, which sees the witnesses as they testify. *Arkansas Sav. & Loan Ass'n Bd. v. Central Ark. Sav. & Loan Ass'n*, 256 Ark. 846, 510 S.W.2d 872 (1974).

> The findings are insufficient because there was a failure to incorporate therein a proper and acceptable finding of the basic or underlying facts drawn from the evidence. The Board's decision only amounts to the statement "We have heard the evidence. The evidence does not meet the requirements of the law." This is not enough.

Id. at 848, 510 S.W.2d at 873 (quoting *Oklahoma Insp. Bur. v. State Bd. for Prop. & Cas. Rates*, 406 P.2d 453 (Okla. 1965)). We remand to the Board for further proceedings consistent with this opinion.

Although we are remanding this case to the Board for further findings of fact and conclusions of law, we take this opportunity to address appellant's remaining argument.

Appellant's second argument is that, because he was punished under both regulations D(1) and C(2)(c) for the same conduct, he has been subjected to multiple punishments in violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Article 2, § 8, of the Arkansas Constitution. However, he makes no separate argument under the Arkansas Constitution. Therefore, his argument under the Arkansas Constitution must fail because he has given no reason to interpret similar provisions of the two constitutions differently. *See Diffee v. State*, 319 Ark. 669, 894 S.W.2d 564 (1995); *Ridenhour v. State*, 305 Ark. 90, 805 S.W.2d 639 (1991).

The Double Jeopardy Clause of the Fifth Amendment provides in part: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." In *Blockburger v. United States*, 284 U.S. 299 (1932), the Court held:

> The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact

> which the other does not. . . . "A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."

Blockburger, 284 U.S. at 304 (quoting *Gavieres v. United States*, 220 U.S. 338, 342 (1911)).

In *Grady v. Corbin*, 495 U.S. 508 (1990), the Supreme Court held that, in addition to passing the *Blockburger* test, a subsequent prosecution must satisfy a "same-conduct" test to avoid the double jeopardy bar. In *United States v. Dixon*, 509 U.S. 688 (1993), the Court overruled *Grady* and held that the *Blockburger* test was the only one to be applied.

> In both the multiple punishment and multiple prosecution contexts, this Court has concluded that where the two offenses for which the defendant is punished or tried cannot survive the "same-elements" test, the double jeopardy bar applies. The same-elements test, sometimes referred to as the "Blockburger" test, inquires whether each offense contains an element not contained in the other; if not, they are the "same offence" and double jeopardy bars additional punishment and successive prosecution.

Dixon, 509 U.S. at 696; *see also Craig v. State,* 314 Ark. 585, 863 S.W.2d 825 (1993); *Penn v. State,* 73 Ark. App. 424, 44 S.W.3d 746 (2001); *Beasley v. State*, 47 Ark. App. 92, 885 S.W.2d 906 (1994).

The Double Jeopardy Clause protects only against the imposition of multiple *criminal* punishments for the same offense, *Hudson v. United States*, 522 U.S. 93 (1997); *Helvering v. Mitchell*, 303 U.S. 391 (1938), and then only when such occurs in successive proceedings, *see Missouri v. Hunter*, 459 U.S. 359 (1983). The Arkansas Supreme Court has also adopted this interpretation of double jeopardy. *Pyron v. State*, 330 Ark. 88, 953 S.W.2d 874 (1997); *Reed v. Alcoholic Beverage Control Div.*, 295 Ark. 9, 746 S.W.2d 368 (1988).

In *Pyron, supra,* the Arkansas Supreme Court rejected a double jeopardy challenge to a DWI prosecution based on the fact that the motorist had already had his driver's license suspended for 180 days. The court began by quoting from *Helvering v. Mitchell, supra*: "Remedial sanctions may be of varying types. One which is characteristically free of the punitive criminal element is revocation

of a privilege temporarily granted." *Pyron, supra,* at 90, 953 S.W.2d at 875.

The court then quoted *Sims v. State*, 326 Ark. 296, 930 S.W.2d 381 (1996), for the standard for determining whether a civil forfeiture is "punishment" for double jeopardy purposes and held that this standard applied to the suspension provision. The *Sims* test first asks whether the legislature intended for the statute to be a remedial civil sanction or a criminal penalty. Second, it asks whether the administrative proceedings are so punitive in nature as to establish that they may not legitimately be viewed as civil in nature, "despite any legislative intent to establish a civil remedial mechanism." *Id.* at 298, 930 S.W.2d at 382 (citing *United States v. Ursery*, 518 U.S. 267 (1996)). The court did not find that the penalty "is so divorced from any remedial goal that it constitutes 'punishment' [under] double jeopardy analysis." *Pyron, supra,* at 92, 953 S.W.2d at 876 (quoting *United States v. Halper*, 490 U.S. 435, 443 (1989)). The court then held that the temporary revocation of the privilege of driving for refusal to submit to a chemical analysis is rationally related to the purpose of the statute, which is to protect the public from intoxicated drivers and to reduce alcohol-related accidents.

In *Reed v. Alcoholic Beverage Control Division, supra,* Reed argued that her acquittal of criminal charges barred the administrative suspension of her liquor license based on that same conduct. The court affirmed the suspension and held that the Double Jeopardy Clause is limited to criminal proceedings and does not preclude separate civil proceedings arising out of the same incident. *Reed, supra.*

Appellant is not being "punished" in the double jeopardy sense. First, the sanction at issue is labeled a "civil penalty" by statute. He is not being suspended from practice. Second, a license to practice as a chiropractor is a privilege granted by the State and may be withdrawn if a practitioner fails to meet certain standards of professional conduct. *See, e.g., Eclectic State Med. Bd. v. Beatty*, 203 Ark. 294, 156 S.W.2d 246 (1941). Third, the remedial goal served by the penalty is the protection of the public from false, deceptive, or misleading advertising by chiropractors concerning what ailments, illnesses, and conditions can and cannot be effectively treated by a chiropractor. Because the Board supervises chiropractors in order to protect the public from harm, *see* Ark. Code Ann. § 17-81-301 (Repl. 1995), the type of administrative sanction issued by the Board in this case falls within *Pyron's* holding that, if a sanction

is not so divorced from any remedial goal, then it does not constitute "punishment" under double jeopardy analysis. *Pyron, supra,* at 92, 953 S.W.2d at 876.

Courts of other jurisdictions have held that double jeopardy does not apply in administrative disciplinary cases where there has been no criminal conduct leading to the disciplinary sanction at issue. *See Hudson v. United States,* 522 U.S. 93 (1997) (holding that administrative proceeding resulting in monetary sanctions and occupational disbarment was civil, not criminal, and thus presented no double jeopardy bar to subsequent criminal prosecution for banking law violations); *Devine v. Goodstein,* 680 F.2d 243 (D.C. Cir. 1982) (holding that double jeopardy did not apply in civil administrative disciplinary hearings, especially where there was no threat of criminal prosecution).

Finally, the fact that the Board is authorized by statute to levy civil penalties for each violation is sufficient to take this case out of the reach of double jeopardy. In *Missouri v. Hunter, supra,* the Supreme Court held that, where a legislature specifically authorizes cumulative punishments under two separate statutes, regardless of whether the two statutes proscribe the same conduct under the *Blockburger* test, a court's task of statutory construction is at an end, and a person may be punished under both statutes in a single proceeding.

Affirmed in part; reversed and remanded in part with directions.

ROBBINS and CRABTREE, JJ., agree.

[redacted]

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