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Sandra BURMEISTER and Keith Hutchinson *v.*
Maxyne RICHMAN

CA 01-1336 76 S.W.3d 912

Court of Appeals of Arkansas
Division II
Opinion delivered June 5, 2002

Matthews, Campbell, Rhoads, McClure, Thompson & Fryauf, P.A., by: *Mark T. Fryauf*, for appellants.

Boyer, Schrantz, Rhoads & Teague, PLC, by: *Ronald L. Boyer*, for appellees.

JOHN F. STROUD, JR., Chief Judge. In this case from Benton County, appellee petitioned the trial court to set aside a deed that she had executed to herself and appellants as joint tenants with the right of survivorship. She claimed that the deed should be set aside because appellants repudiated an agreement that, upon her death, they would sell the property and give the proceeds to the Humane Society. The court granted appellee's petition, finding that, because she had continued to live on the property and pay taxes thereon after executing the deed, the deed was never delivered to appellants. We reverse and remand.

Appellee, who is in her eighties, owns real property in Bella Vista, Arkansas upon which her home is located. She has no

spouse, children, or close relatives. She acquired the property as the result of her brother's death in 1988. In 1990, her long-time friend Oscar Shaffer rented the downstairs portion of her house and occupied it. Soon thereafter, she deeded the property to herself and Oscar as joint tenants with the right of survivorship. When Oscar died in 1996, appellee regained her status as sole owner of the house.

In 1997, appellee became close friends with appellants Burmeister and Hutchinson. Hutchinson was only six years younger than appellee, but appellee referred to the couple as her "kids." The three enjoyed a close social relationship, going to lunch and dinner and exchanging gifts. Appellants sometimes took appellee grocery shopping, and Hutchinson occasionally performed odd jobs at appellee's home, for which he was paid with gifts of nice clothing. Appellee also gave appellants a set of house keys and a garage door opener, and she put their names on her credit card and bank account.

On June 12, 1997, appellee executed a deed that conveyed her lot in Bella Vista to "SANDRA BURMEISTER, KEITH HUTCHINSON, and MAXYNE L. RICHMAN, as joint tenants with right of survivorship and not as tenants in common. . . ." The deed contained no conditions or other limiting language.

The circumstances leading to the execution of the deed are in dispute. According to appellee, she spoke with an attorney friend after Oscar Shaffer's death and learned that, if she died without close relatives, her property might escheat to the State. She testified that she communicated her concern to appellants as follows:

> I told [Hutchinson] . . . I did not want the State of Arkansas to have it, and I said, "If you would put your name on the deed with me," I said, "then I would have to ask you to be sure the home is sold and that the money is turned over to the humane society."

According to appellee, Hutchinson responded that this was "no problem." Appellee also testified that Burmeister was present during this exchange, but said nothing.

Appellee hired attorney David George, who prepared the abovementioned deed and also prepared, at her request, a will appointing appellants as executors of her estate and bequeathing the bulk of her estate to them. The will, like the deed, contained no restrictions or limiting language even though, according to appellee, she told George that she wanted her home sold and the proceeds given to the Humane Society.

Appellants testified that they offered to become executors of appellee's estate after Oscar Shaffer died. According to them, they learned for the first time at the attorney's office that appellee planned to include them on her deed and make them beneficiaries in her will. They testified that no mention was made of selling the house and giving the proceeds to the Humane Society.

Following the execution of the deed, the attorney recorded it and sent it to appellee, who kept it in a strong box in her home. Appellee continued to live in the home alone, pay taxes on it, pay for repairs and improvements, and otherwise conduct herself as if she were sole owner. Appellants paid only the property owners' assessment fees, which allowed them to play golf at Bella Vista.

Following execution of the deed, the parties continued to enjoy a good relationship, but that came to an end in August of 2000, when appellee hired a couple named Blevins to place decorative rock in her backyard. After the job had been completed, appellants criticized the type of rock that appellee had chosen and the cost of the rock. According to appellee, she became angry and told appellants that she would "turn [the house] over" to Mr. and Mrs. Blevins. She testified that, thereafter, appellants came to her house, showed her a copy of her will, and claimed to own her house and everything in it. Appellee told them to take back all their gifts and later asked them to deed their interest in the property back to her. They refused, and appellee filed suit, asking that the deed be canceled or, in the alternative, that a constructive trust be imposed.

The remaining testimony at trial was given by appellee's hairdresser, Sheila Harp; appellee's close friend, Helen Ulland; and attorney David George. Harp testified that, after the argument between appellee and appellants occurred, appellants called her to

discuss the situation. According to Harp, appellants said that, if appellee "didn't straighten out," they would purchase her one-third share and kick her out of the house. This was denied by Burmeister. Ulland testified that appellee called her when she returned from the attorney's office on June 12, 1997, and told her that she had arranged for appellants to sell the house and give the proceeds to the Humane Society. Attorney David George, who had practiced for many years in the areas of real estate and estate planning, testified in a limited fashion because he had represented both appellants and appellee, and he did not want to violate the attorney-client privilege. He said that appellee read over the deed and the will and that she understood them before she signed them.

Following the trial, the judge ruled from the bench as follows:

> I think it is clear . . . that neither [appellee] nor [appellants] believed that [appellants] had any ownership interest in this property. A presumption does arise when a deed is signed and recorded that it has been transferred, but that presumption I believe has been amply rebutted here, and I think the clear and convincing evidence shows that there has been no delivery of title. So I will set aside the deed. I think it's of no force and effect. I think the property is and always has remained [appellee's] property.

In her written order, the judge stated:

> [Appellee] has carried her burden of proof and is entitled to judgment. Although a presumption of a valid delivery of a deed attaches when the deed is recorded, this presumption can be rebutted by evidence showing the grantor continued to use and pay taxes on the property and did not intend to pass title to the property. That was the proof in this case.

We do not interpret the judge's rulings to contain a finding one way or the other regarding the credibility of appellee's contention that appellants promised to turn the house over to the Humane Society upon her death. Instead, we read her remarks from the bench and the language contained in her order to say that her finding of non-delivery rests on the fact that appellee continued to live in and pay taxes on the home after the deed was executed.

Therefore, our review of the judge's findings will be limited to whether her decision on that basis was clearly erroneous.

A deed is inoperative unless there has been delivery to the grantee, and an essential element of a valid delivery is the grantor's intention to pass title immediately, thus giving up dominion and control of the property. *Johnson v. Ramsey*, 307 Ark. 4, 817 S.W.2d 200 (1991). Presumption of delivery attaches when a deed is recorded, but that presumption may be rebutted by evidence that the grantor did not intend to give up dominion over her property. *Id.* Such rebuttal must be established by clear and convincing evidence. *See generally Corzine v. Forsythe*, 263 Ark. 161, 563 S.W.2d 439 (1978); *McCord v. Robinson*, 226 Ark. 350, 289 S.W.2d 893 (1956); *Seboly v. Seboly*, 208 Ark. 1008, 188 S.W.2d 625 (1945). However, despite this heightened burden of proof at trial, our standard of review on appeal is not whether we are persuaded that there is clear and convincing evidence to support the judge's finding, but whether we can say that the judge's finding that the fact was proved by clear and convincing evidence is clearly erroneous. *See Nichols v. Wray*, 325 Ark. 326, 925 S.W.2d 785 (1996). A finding is clearly erroneous when, although there is evidence to support it, we are left, on reviewing the entire evidence, with the firm conviction that a mistake has been committed. *See id.*

A grantor's continued use of property and payment of taxes and maintenance costs thereon are relevant considerations tending to rebut the presumption that a deed has been delivered. *See In re Estate of Tucker*, 46 Ark. App. 322, 881 S.W.2d 226 (1994). However, the significance of a grantor's continued dominion over property wanes when the grantor retains an interest in the property rather than completely divesting himself or herself of ownership. In *First National Bank & Trust Co. v. Estate of Hummel*, 25 Ark. App. 313, 758 S.W.2d 418 (1988), Mike Hummel conveyed property to himself and his brother as joint tenants with the right of survivorship. Later, Mike's estate tried to set the deed aside on the grounds that Mike had kept control over the deeded property. We were not persuaded that Mike's continued dominion over the property defeated his brother's interest, noting that, "in cases where the grantor creates a joint tenancy in himself

and another person, it is unreasonable to require that the grantor give up all control." *Id.* at 317, 758 S.W.2d at 420. This same line of reasoning has also been applied where a grantor reserved a life estate in himself. *See Barker v. Nelson*, 306 Ark. 204, 812 S.W.2d 477 (1991) (holding that where life estate retained by grantor, the deed did not need to be transferred to grantee to effect delivery); *Estate of Sabbs v. Cole*, 57 Ark. App. 179, 944 S.W.2d 123 (1997) (holding that where deed reserved life estate, grantor's retention of possession and control of the property is not inconsistent with delivery).

The trial judge in this case found that the presumption of delivery was rebutted by appellee's continued use of and payment of taxes on the property. However, appellee's conduct was not inconsistent with delivery of the deed because, as a joint tenant, she retained an interest in the deeded property. Thus, her continued dominion is not sufficient to rebut the presumption of delivery created when the deed was recorded. We therefore conclude that the trial judge's finding of non-delivery, based on appellee's continued dominion over the property, was clearly erroneous.

Appellants also challenged the trial court's imposition of a constructive trust, but our review of the court's order does not reveal that a constructive trust was imposed. We therefore reverse and remand on the basis discussed herein.

Reversed and remanded.

PITTMAN and ROAF, JJ., agree.

Ella Dee SHAW *v.* DESTINY INDUSTRIES, INC.

CA 01-1134 76 S.W.3d 905

Court of Appeals of Arkansas
Division I
Opinion delivered June 5, 2002

[redacted]

Scott Adams, for appellant.

Wright, Lindsey & Jennings LLP, by: *Roger D. Rowe* and *Erica Ross Montgomery*, for appellee.

JOHN F. STROUD, JR., Chief Judge. Appellant, Ella Dee Shaw, filed the instant complaint against appellee, Destiny Industries, Inc., the manufacturer of a mobile home that appellant had purchased in 1994. Appellee answered the complaint in the instant action, alleging affirmatively that it was barred by the doctrine of *res judicata,* and contemporaneously filed a motion for summary judgment on that basis. The trial court granted the motion and dismissed the case. For her sole point of appeal, appellant contends that the trial court erred when it granted appellee's motion for summary judgment on the ground of *res judicata.* We agree and therefore reverse and remand.

Original Action (Case No. 97-30)

According to the facts set forth in appellant's third amended complaint in the original action, she purchased a 1994 mobile home in May 1994. The home was manufactured by appellee, Destiny Industries, Inc., a foreign corporation with its principal place of business in Moultrie, Georgia, and sold by Hawk Enterprises, Inc., a mobile home dealership located in Conway, Arkansas. The purchase price of the mobile home was $27,441.50, with appellant paying $2,793.63 as a down payment and financing the remainder over 240 months at $268.13 per month. The mobile home was installed by Arkansas Transit Homes, Inc. Appellant alleged in her original complaint that the mobile home was neither built nor installed in conformity with existing standards and guidelines and that attempted repairs by both the seller and the manufacturer were not satisfactory. She named as defendants in the original action Destiny Industries, Inc., Hawk Enterprises, Inc., Security Pacific Housing Services, Inc., and Arkansas Transit Homes, Inc.

On August 27, 1999, appellee Destiny Industries, Inc., filed its motion for summary judgment in the original action on claims brought by appellant Shaw, and also sought to dismiss the cross-claim of the co-defendant in that action, Security Pacific Housing Services, Inc. The bases for its motion were that appellant sought damages against Destiny under Counts I, II, and IV of her third amended complaint; that Counts I and II were "claims for revocation of acceptance and refund of the purchase price of the mobile

home" and revocation of acceptance was a remedy available only against the seller of the home; and that Count IV was a claim for punitive damages for negligence and/or gross negligence and the allegations showed "no tortious conduct on the part of Destiny." In its order of September 27, 1999, the trial court granted Destiny's motion for summary judgment on "plaintiff's claims for revocation of acceptance" and dismissed them. The order did not contain a certification pursuant to Rule 54(b) of the Arkansas Rules of Civil Procedure.

Destiny Industries, Inc., does not dispute the fact that on January 31, 2000, approximately four months after the partial summary judgment was entered in the original action, appellant nonsuited the case pursuant to Rule 41(a) of the Arkansas Rules of Civil Procedure.

Current Action (Case No. 2001-16)

On January 26, 2001, appellant filed her complaint in the instant case, naming only one defendant, appellee Destiny Industries, Inc., the manufacturer of the mobile home that she claims is defective. The complaint restated both the rescission/revocation-of-acceptance claims and breach of warranties claims, as set forth in the original action. Appellee answered the complaint, affirmatively pleading, *inter alia,* that the causes of action were barred by the doctrine of *res judicata,* and simultaneously filed its motion for summary judgment in the instant case. Attached to the motion as supporting exhibits were: 1) the third amended complaint from the original action; 2) Destiny's motion for summary judgment and supporting brief from the original action; 3) appellant Shaw's response to the motion for summary judgment in the original action; 4) the trial court's order granting the motion for summary judgment in the original action.

At a hearing on the motion for summary judgment, counsel for Destiny contended that appellant's single claim in the instant complaint was for rescission, the common law equivalent of revocation of acceptance, that the same claim had been made in the original action, that it had been dismissed on Destiny's motion for

summary judgment in the original action, and that such claim was now barred by the doctrine of *res judicata.*

The trial court found that the matter had been adjudicated in the original action by summary judgment. Consequently, the court determined that the motion for summary judgment in the instant case should be granted based on the doctrine of *res judicata.* We disagree and find that the trial court erred in granting appellee's motion for summary judgment.

Rule 41(a)(1) of the Arkansas Rules of Civil Procedure provides:

> (1) Subject to the provisions of Rule 23(d) and Rule 66, an action may be dismissed without prejudice to a future action by the plaintiff *before the final submission of the case to the jury, or to the court where the trial is by the court.* Although such a dismissal is a matter of right, it is effective only upon entry of a court order dismissing the action.

(Emphasis added.) In *Coombs v. Hot Springs Village Property Owners Ass'n,* 75 Ark. App. 364, 366-67, 57 S.W.3d 772, 774 (2001), we explained:

> Both parties are in agreement relating to the standard for determining whether a plaintiff has a right to a nonsuit. "[T]he privilege to take a voluntary nonsuit is an absolute right prior to *final submission to a jury or to the court sitting as a jury.*" Therefore, if a voluntary nonsuit is sought before the final submission of the case, then the nonsuit is an absolute right. If the nonsuit is requested after final submission of the case, it is within the trial court's discretion to grant or not grant it.
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> . . . .
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> A case is not finally submitted until the argument is closed and the case submitted to the jury or the court. In *Wright v. Eddinger, supra,* the principal point on appeal was whether under ARCP Rule 41(a) a trial court may grant a request for voluntary nonsuit where the trial court had announced its decision to grant the defendants' motion for summary judgment. The trial court granted the nonsuit and the defendant appealed. Plaintiff contended on appeal that the argument had not been concluded because she had filed a supplemental memorandum. The supreme court did not agree, and opined that under appellee's

> theory, "the losing party could simply submit a brief after the trial court's ruling and contend the case was never finally submitted." However, the court ultimately held that the trial court did not abuse its discretion in granting the nonsuit, and affirmed.

(Emphasis added and citations omitted.)

Here, while it is true that the original trial court granted appellee's motion for summary judgment with respect to the revocation-of-acceptance claims in the original action, the order of September 27, 1999, cannot be regarded as "the final submission of the case . . . to the court . . . ." After entry of that order, there were still remaining parties and issues in the case, and it did not contain a Rule 54(b) certification. Appellant's filing of her nonsuit pursuant to Rule 41(a) of the Arkansas Rules of Civil Procedure cannot give final, binding status to a partial summary judgment that was not otherwise final and binding. The entire case had not been finally submitted and decided. Rather, one segment of it had been decided and that portion could have been reconsidered during the remaining course of the case. *See* Ark. R. Civ. P. 54(b)(2). That makes this situation distinguishable from one in which summary judgment has been entered on the entire case.

Moreover, because the September 27, 1999 order in the original action was not a final order, it cannot serve to bar appellant's claims in the current action based upon the issue-preclusion portion of the doctrine of *res judicata*. The concept of *res judicata* has two facets, one being issue preclusion and the other being claim preclusion. *Huffman v. Alderson,* 335 Ark. 411, 983 S.W.2d 899 (1998). Issue preclusion, which is the only facet involved in the instant case, requires four elements 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*; 4) the determination must have been essential to the judgment. *State v. Willis,* 347 Ark. 6, 59 S.W.3d 438 (2001) (emphasis added). The September 27, 1999 order, which, among other things, granted partial summary judgment to appellee on appellant's revocation-of-acceptance claims in the original action, does not satisfy the

requirement that the issue be determined "by a valid and final judgment." The order adjudicated fewer than all of the claims and fewer than all of the parties in the original action, and it did not contain a certification pursuant to Rule 54(b)(1) of the Arkansas Rules of Civil Procedure.

Accordingly, pursuant to Rule 54(b)(2) of the Arkansas Rules of Civil Procedure, the order did not terminate the action as to any of the claims or parties, and it was "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." Such an order cannot serve as the basis for applying either the issue-preclusion or the claim-preclusion facet of the doctrine of *res judicata*. In *Northeast Arkansas Internal Medicine Clinic v. Casey,* 76 Ark. App. 25, 61 S.W.3d 850 (2001), we were not faced with a situation involving a nonsuit, but rather an interlocutory ruling granting summary judgment and the dismissal of a subsequently filed amended complaint based upon the doctrine of *res judicata*. However, our reasoning in that case is helpful in the instant situation:

> 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 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.

76 Ark. App. at 31-32, 61 S.W.3d at 855 (emphasis added).

Reversed and remanded.

Cecil W. SMITH *v.* ALUMINUM COMPANY OF AMERICA

CA 01-645 76 S.W.3d 909

Court of Appeals of Arkansas
Division III
Opinion delivered June 5, 2002

Kaplan, Brewer, Maxey & Haralson, P.A., by: *Silas H. Brewer, Jr.*, for appellant.

Rose Law Firm, by: *Phillip Carroll*, for appellee.

JOHN B. ROBBINS, Judge. In this workers' compensation case, the Commission originally awarded benefits to appellant Cecil C. Smith for work-related hearing loss, finding that his claim was not barred by the statute of limitations. ALCOA appealed from that decision, and on June 16, 1999, we delivered an unpublished opinion reversing and remanding for additional findings of fact and conclusions of law consistent with the recent supreme court case, *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999). In that case, our supreme court held that the two-year statute of limitations applies to work-related, noise-induced hearing loss and begins to run when the hearing loss becomes apparent to the claimant.

On remand, the Commission found that, in light of the holding in *Minnesota Mining & Mfg. v. Baker, supra*, Mr. Smith's claim was barred by the statute of limitations because a May 31, 1990, audiogram indicated that all of his hearing impairment had developed and become apparent to him by that date, and his claim was not filed until March 2, 1993. Mr. Smith appealed from that decision, arguing that the Commission's finding that his claim is time-barred is not supported by substantial evidence. Mr. Smith also argued that the Commission erroneously declined to consider his estoppel argument, and that ALCOA should have been estopped from asserting the limitations period as a defense.

On February 13, 2002, we delivered our second unpublished opinion in this case. In that opinion, we agreed with Mr. Smith that his estoppel argument had been raised before the ALJ and was thus preserved for his appeal to the Commission. We thus remanded this case to the Commission for resolution of the estoppel issue, and we did not reach the sufficiency argument pertaining to the statute of limitations.

After the second remand, the Commission issued an order rejecting the merits of Mr. Smith's estoppel argument. Specifically, it found that ALCOA made no false or misleading statements and that, in any event, Mr. Smith did not demonstrate any reliance on any of ALCOA's conduct in his failure to timely file a workers' compensation claim. Based on those findings the Commission ruled that Mr. Smith failed to establish that ALCOA is estopped from raising the statute of limitations as a defense. Now, in this third appeal, we reach the merits of Mr. Smith's arguments that the Commission erred in finding that ALCOA is not estopped from relying on the statute of limitations, and that the statute of limitations bars his claim. We affirm.

We first address Mr. Smith's argument that the two-year limitations period did not expire prior to the filing of his claim. For this proposition, he argues that the limitations period in workers' compensation cases does not begin to run until the injury becomes apparent and the claimant knows or, by the exercise of reasonable diligence, should discover the causal connection between the injury and his employment. In its opinion, the Commission found that because Mr. Smith was aware of his hearing loss when being given such information on May 31, 1990, the statute of limitations started running and expired before he filed his claim on March 2, 1993. The Commission specifically found that the only inquiry in assessing ALCOA's statute-of-limitations defense is when the hearing loss became apparent to Mr. Smith, and not when he became aware of the work-related nature of the hearing loss. Mr. Smith contends that the Commission applied the incorrect test, and further argues that the limitations period was tolled because although he was aware of his hearing loss more than two years before he filed his claim, he was not aware of the fact that it was work-related.

■ ■ We are bound by our supreme court's holding in *Minnesota Mining & Mfg. v. Baker, supra,* to reject Mr. Smith's first argument. The supreme court held in that case that the limitations period for work-related, noise-induced hearing loss begins to run when the hearing loss becomes apparent to the claimant. A claimant's awareness that his hearing loss is causally related to the working environment was not announced as an element of the

inquiry. We are bound to follow the decisions of our supreme court. *Scott v. State*, 69 Ark. App. 121, 10 S.W.3d 476 (2000). Pursuant to the precedent set in *Minnesota Mining & Mfg. v. Baker, supra*, the statute of limitations in this case began to run when Mr. Smith became aware of his hearing loss. Because it is undisputed that he was made aware of his hearing loss more than two years before he filed his claim, the Commission correctly ruled that his claim was time-barred.

Mr. Smith's remaining argument is that the Commission erred in rejecting the merits of his estoppel argument.[1] Mr. Smith asserts that ALCOA should be estopped from asserting the statute of limitations as a defense because of ambiguous and misleading communications by ALCOA. He submits that ALCOA had reason to believe that his hearing loss was work-related, but in their May 31, 1990, letter to him it was not represented that his hearing loss was caused by his work. Instead, it was suggested that other sources may have contributed to his hearing loss. Mr. Smith argues that his delay in filing his workers' compensation claim was the result of ALCOA's misrepresentations.

We hold that the Commission did not err in finding the doctrine of estoppel to be inapplicable to this case. There are four necessary elements of equitable estoppel:

> (1) the party to be estopped must know the facts; (2) the party to be estopped must intend that his or her conduct be acted on or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the latter must be ignorant of the true facts; and (4) must rely on the former's conduct to his or her injury.

Miller County v. Opportunities, Inc., 334 Ark. 88, 96, 971 S.W.2d 781, 786 (1998). Mr. Smith testified that he did not remember receiving or reviewing any documents containing the alleged misrepresentations, and he failed to assert any reason for failing to file

[1] The Commission's order addressing appellant's estoppel argument is not contained in the addendum of his brief as required by Arkansas Supreme Court Rule 4-2(a)(7). However, the order is in the supplemental record. We are authorized to go to the record to affirm, *Hosey v. Burgess*, 319 Ark. 183, 890 S.W.2d 262 (1995), and we do so in this instance.

his claim before March 2, 1993. Furthermore, Mr. Smith did not testify that he was in any way misled by ALCOA as to either the cause or severity of his hearing loss. We hold that there was substantial evidence to support the Commission's finding that Mr. Smith failed to demonstrate that he relied on ALCOA's conduct to his injury.

Affirmed.

BAKER, J., agrees.

PITTMAN, J., concurs.

Fluor DANIEL and Pacific Employers Insurance Company *v.* Alfred R. BARNETT

CA 01-876 76 S.W.3d 916

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered June 5, 2002

Womack, Landis, Phelps, McNeill & McDaniel, by: *Richard Lusby* and *Mark Mayfield*, for appellants.

Frederick S. "Rick" Spencer, for appellee.

SAM BIRD, Judge. The employer in this workers' compensation case, Fluor Daniel, and its insurance carrier, Pacific Employers Insurance Company, appeal from the Arkansas Workers' Compensation Commission finding that the appellee, Alfred Barnett, is entitled to reasonable and necessary medical treatment related to his compensable injury and temporary total disability compensation. The appellants contend that there is no substantial basis for the Commission's decision awarding Barnett ongoing medical care and disability benefits as no reasonable mind would accept the evidence as sufficient to support an award. However, we cannot reach the merits of this argument because the order from which it is appealed is not final.

On July 11, 1995, appellee Alfred Barnett, along with twenty-four other workers, was on the job at Arkansas Eastman when an accidental spill of a chemical called Crotonaldehyde occurred. Barnett was approximately 100 feet away from the point of release of the chemical vapor and was working in the open air surrounded by walls that were twenty-feet tall. Barnett experienced watery eyes, burning nose and throat, and nausea. He was sent to the company doctor, Dr. Verona Brown, but was released to work light duty. Barnett developed more symptoms the next day and was sent back to Dr. Brown on several occasions. Barnett's symptoms continued to worsen over the next few weeks, and he was subsequently terminated by the appellant, Fluor

Daniel, in September 1995 for refusing to go into an area where Crotonaldehyde was being used.

Antibiotics did not clear up his symptoms, and Barnett went to see a general practitioner and then a pulmonary specialist. Examinations and studies did not yield any abnormal findings; however, Barnett remained the only employee out of the twenty-five employees exposed to the chemical who continued to experience symptoms. He went to Dr. Robert Hopkins, an internal medicine physician, who diagnosed Barnett as having reactive airway disease, based on the history given. However, Dr. Hopkins's clinical examination did not produce any significant objective findings. Additionally, Barnett consulted an allergy specialist, Dr. Aubrey Worrell. Although the tests performed did not reveal anything significant, Dr. Worrell diagnosed Barnett as disabled due to eight conditions from which he found Barnett suffered.

The administrative law judge made three findings: (1) that, *inter alia*, Barnett had proved by a preponderance of the evidence that his reactive airway disease was causally related to, arose out of, and was a compensable consequence of his compensable injury of July 11, 1995; (2) that Barnett proved that the medical treatment sought and received by him after July 11, 1995, was reasonable, necessary, and related to the treatment of his compensable injury; (3) that Barnett proved that he was entitled to temporary total disability compensation from September 15, 1995, "through a date yet to be determined." However, the administrative law judge held that the claim for permanent disability benefits was not yet ripe for determination.

After a *de novo* review of the entire record, the Arkansas Workers' Compensation Commission affirmed the administrative law judge's first two findings, but modified the third, finding that the healing period for which temporary total disabilities were due ended on December 20, 1996, instead of continuing "through a date yet to be determined." Because the Commission found that Daniels's claim for permanent disability benefits was ripe for determination, it remanded that matter to the administrative law judge for an adjudication of Barnett's entitlement to permanent

disability and vocational rehabilitation benefits, pursuant to Act 796 of 1993.

It is a well-established rule that in order for this court to review a decision of the Workers' Compensation Commission, the order from which the parties appeal must be final. *Humphrey v. Faulkner Nursing Ctr.*, 61 Ark. App. 48, 964 S.W.2d 224 (1998); *Rogers v. Wood Mfg.*, 46 Ark. App. 43, 877 S.W.2d 94 (1994); *Adams v. Southern Steel & Wire*, 44 Ark. App. 108, 866 S.W.2d 432 (1993); *TEC v. Falkner*, 38 Ark. App. 13, 827 S.W.2d 661 (1992); *American Mut. Ins. Co. v. Argonaut Ins. Co.*, 33 Ark. App. 82, 801 S.W.2d 55 (1991); *St. Paul Ins. Co. v. Desota*, 30 Ark. App. 45, 782 S.W.2d 374 (1990). To be final, an order must dismiss the parties from the court, discharge them from the action, or conclude their rights as to the subject matter in controversy. *Rowell v. Curt Bean Lumber Co.*, 73 Ark. App. 237, 40 S.W.3d 344 (2001). Ordinarily an order of the Commission is reviewable only at the point where it awards or denies compensation. *Id.* As a general rule, orders of remand are not final and appealable. *Id.*

In *Gina Marie Farms v. Jones*, 28 Ark. App. 90, 770 S.W.2d 680 (1989), a per curiam opinion, this court fully discussed the definition of a final, appealable order in a workers' compensation case, and applied the rule in *Festinger v. Kantor*, 264 Ark. 275, 571 S.W.2d 82 (1978), that "to be final the decree must also put the court's directive into execution, ending the litigation or a separable branch of it." The rule that an order must be final to be appealable is a jurisdictional requirement, observed to avoid piecemeal litigation. *See Rowell v. Curt Bean Lumber Co., supra*; Ark. R. App. P.—Civ. 2(a)(1).

Addressing only one of the issues on appeal would be to encourage piecemeal litigation. Because the Commission remanded this case to the administrative law judge for an adjudication of Barnett's entitlement to permanent disability and vocational rehabilitation benefits, pursuant to Act 796 of 1993, the order is not final, and we are required to dismiss the appeal.

Appeal dismissed.

CRABTREE, BAKER, and ROAF, JJ., agree.

ROBBINS and GRIFFEN, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting.* I do not join the majority because I view the compensability and temporary disability benefits issues in this case as final and separable, and therefore, appealable aspects of the litigation. I also think that it makes no sense to impose the strict notion of finality to workers' compensation appeals where it ultimately produces for the employer what could amount to an empty right to judicial review.

In this occupational disease case, the Commission affirmed the decision of the Administrative Law Judge (ALJ) finding that the employee sustained a compensable injury and that the employee's request for medical treatment was reasonable, necessary, and related to the compensable injury. However, the Commission modified the ALJ's finding regarding temporary total disability (TTD) benefits. While the ALJ found that the employee was entitled to TTD benefits from September 15, 1995, "through a date yet to be determined," the Commission found that his entitlement to TTD benefits ended December 20, 1996, when his healing period ended. Thus, the Commission remanded the case to the ALJ for a determination of whether appellee was entitled to permanent partial disability (PPD) and vocational rehabilitation benefits.

The majority would dismiss the present appeal for lack of finality, which will require the employer to wait until the employee's entitlement to vocational rehabilitation and PPD benefits have been adjudicated before challenging the issue of compensability. While I certainly agree that we should avoid piecemeal litigation, sound institutional principles and substantial justice operate in favor of admitting that requiring absolute finality before permitting an appeal from a TTD award defeats the purposes of the Act.

First, this notion is refuted by the plain language of the Act. Arkansas Code Annotated Section 11-9-711(b)(1) (Repl. 1996), provides that "*a compensation order or award . . . shall become final*

* *Parallel citation*: 84 S.W.3d 869.

unless a party to the dispute shall, within thirty (30) days from receipt by him of the order or award, file notice of appeal to the Arkansas Court of Appeals, which is designated as the forum for judicial review of those orders and awards." (Emphasis added.) Although the Arkansas General Assembly substantially changed the workers' compensation act in 1993, it did not change this section.

Compensation orders under section 11-9-711(b)(1) clearly encompass the determination of whether the injury is compensable, and include the award of TTD benefits, PPD benefits, medical benefits, and vocational rehabilitation benefits. We have no business pretending that the General Assembly does not understand that compensation decisions and TTD awards may logically precede determinations of entitlement to vocational rehabilitation and permanent disability benefits. Plainly, the General Assembly contemplated that compensation orders and awards will issue that do not fully dispose of *all* claims. It is the duty of this court to construe the Act consistent with the legislative intent. Thus, to the extent that we have previously erred in applying the finality doctrine to the Act, we should take the opportunity to admit the mistake and correct it.

Therefore, we should recognize an exception to the finality rule in this case, because to hold otherwise would be to defeat the benevolent purposes of the Act to timely compensate injured employees. While we may certainly look to the Arkansas Rules of Civil Procedure and Appellate Procedure in dealing with questions of finality and appealability, we should remember that these rules are not applicable to workers' compensation proceedings. However, to the extent that we apply these rules by analogy, we should apply them to the full extent appropriate. Even the Rules of Civil Procedure and Appellate Procedure allow for an appeal from separable claims or from claims of an interlocutory nature. *See, e.g.,* Ark. Rule Civ. P. 54(b) (authorizing appeals from actions involving multiple claims); Ark. Rule App. P.—Civ. 2(a)(6)(7) (authorizing appeals from certain interlocutory orders).

Our courts have apparently recognized that it makes no sense to apply the finality doctrine to workers' compensation claims

without also recognizing the well-founded exceptions to the doctrine. Thus, this court and our supreme court have held that an order from the Commission is appealable when it ends the litigation or a *separable part* of it. *See, e.g., Festinger v. Kantor*, 264 Ark. 275, 571 S.W.2d 82 (1978); *Rogers v. Wood Mfg.*, 46 Ark. App. 43, 877 S.W.2d 94 (1994). The issue of whether an employee is entitled to TTD benefits is a separable part of a claimant's worker's compensation claim because his entitlement to TTD is not contingent upon his entitlement to permanent disability benefits or vocational rehabilitation benefits.

Moreover, our supreme court has expressly recognized an exception to the finality rule where TTD benefits are at issue. In *Luker v. Reynold's Metal Co.*, 244 Ark. 1088, 428 S.W.2d 45 (1968), the supreme court allowed an appeal from the denial of TTD benefits where the claimant appealed. The *Luker* court stated that the appealability of the Commission's order in a workers' compensation claim is not limited to the final disposition of the matter before the Commission. *See id.* The *Luker* court then reasoned that "[t]he benevolent purposes of the act requiring the employer to make payments of compensation and medical expenses during the healing period would be defeated if all contested claims were permitted to lie dormant until the Commission could determine the end of the healing period and the permanent partial disability." *See id.* at 1090, 428 S.W.2d at 46. *See also Model Laundry & Dry Cleaning v. Simmons*, 268 Ark. 770, 596 S.W.2d 337 (1980) (rejecting employer's argument that penalty provision of Workers' Compensation Act did not apply with respect to late payment of medical bills and attorney fees where employer argued the Commission's order was not final because it was remanded for determination of claimant's entitlement to rehabilitation benefits).

That the Commission in *Luker* denied benefits and the appellant in *Luker* was the claimant, whereas here the Commission awarded benefits and the appellant was the employer, is of no moment. The effect on the claimant and the employer is the same: Even though the claimant's entitlement to TTD benefits has been resolved by the Commission, and even though the award of TTD benefits is not in any way contingent upon the resolution

of the remaining issues to be decided upon remand to the ALJ, both the employer and the claimant must await a "final" determination of the claimant's eligibility for the unrelated, separable benefits. This reasoning runs counter to the legislative intent that workers' compensation claims are to be resolved quickly. *See* Ark. Code Ann. § 11-9-711(b)(2) (Repl. 1996) (providing that appeals from the Workers' Compensation Commission shall take precedence over all other civil cases appealed to the court). Thus, allowing an employer to appeal on the facts of this case does no violence to the finality rule and is consistent with the *Luker* principle to advance the benevolent purposes of the worker's compensation act.

Finally, we should not rigidly adhere to the doctrine of finality where an award of TTD benefits is coupled with a remand of other issues, because to do so may put the employer in the untenable position of being forced to exercise an empty right to judicial review. Arkansas Code Annotated Section 11-9-802(c) (Repl. 1996), provides that if any installment of benefits, payable under the terms of an award, "is not paid within fifteen (15) days after it becomes due, there shall be added to such unpaid installment an amount equal to twenty percent (20%) thereof, which shall be paid *at the same time as, but in addition to, the installment unless review of the compensation order making the award is had as provided in §§ 11-9-711 and 11-9-712.*" (Emphasis added.) If an employer cannot appeal an award of TTD benefits where the case has been remanded on other issues, how can it avoid paying the TTD benefits, the award of which may ultimately be found to be in error?

While the employer awaits "finality," it remains liable for TTD and medical benefits. It cannot post a supersedeas bond for a judgment on those benefits because under the majority analysis, no appeal would lie. Therefore, it would be obligated to pay the benefits pursuant to section 11-9-802(c). Moreover, any subsequent decision by us that the award of TTD benefits was in error would be moot. The employee will have long since spent the TTD benefits and obtained the medical treatment ordered by the Commission. Our strict adherence to the principle of avoiding piecemeal appeals will have compounded error, rather than have provided for its correction.

Accordingly, I would address this case on its merits because the plain language of the Act provides that the portion of the Commission's order awarding TTD benefits is final. Fairness and judicial efficiency dictate that we recognize our jurisdiction. Practical reality compels that we do so as well.

I am authorized to state that ROBBINS, J., joins in this opinion.

Maggie CAPEL, Individually and as Guardian of Tessa Capel, *a Minor v.* ALLSTATE INSURANCE COMPANY; Jim Faye General Enterprises, Inc., *a/k/a* Jim England Co., Inc., and Jim England, Individually

CA01-1305 77 S.W.3d 533

Court of Appeals of Arkansas
Division II
Opinion delivered June 5, 2002

McHenry & McHenry Law Firm, by: *Donna McHenry*, *Robert McHenry*, and *Connie Grace*, for appellants.

Watts, Donovan & Tilley, P.A., by: *Richard N. Watts*, for appellee Allstate Insurance Company.

WENDELL L. GRIFFEN, Judge. Margaret Capel, individually and as mother and next friend of her daughter, Tessa Capel, appeals a Pulaski County circuit court award of summary judgment to appellee Allstate Insurance Company on her claims of negligence, indemnification and breach of express war-

ranty.[1] She contends that the award of summary judgment was inappropriate. We agree that material issues of fact exist as to appellant's claims regarding breach of an express warranty, indemnification, and negligence. Thus, we reverse and remand.

Factual and Procedural History

Viewing the evidence in the light most favorable to appellant, the following events occurred. In early 1990, appellant sustained storm damage to the roof of her house, and contacted Allstate, the carrier of her homeowners insurance. An Allstate claims representative visited the house, investigated the damage, and provided appellant with a check to pay for the repairs. The claims representative also presented appellant with a list of six approved roofing contractors from which appellant could choose to repair her roof. The list was compiled by Allstate and included roofing contractors with whom Allstate had previously dealt in other roof repair jobs and recommended to its insureds.

Appellant ultimately chose Jim England as her roofing contractor. She alleged that the claims representative made specific promises and express warranties to her about England's competency, insurance, and bonding. She further alleged that she relied on these representations when she chose England and that Allstate promised to be responsible for any problems incurred from the work performed by England.

After the roof was repaired, appellant and her daughter suffered carbon monoxide poisoning, allegedly because the furnace exhaust pipe had been covered by the roofer. They underwent hospitalization and treatment in hyperbaric chambers. Appellant later learned that England was neither bonded nor insured. Consequently, appellant filed suit against Allstate on the grounds of express warranty, indemnification, negligent misrepresentation, and agency. The suit also alleged negligence against England.

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[1] In two opinions, the circuit court granted summary judgment for Allstate on indemnification and negligence. Upon a renewed summary judgment motion, the court granted summary judgment on any remaining claims against Allstate and certified the order pursuant to Rule 54(b) of the Arkansas Rules of Civil Procedure.

Allstate moved for summary judgment, arguing that 1) a property insurer lacks control over a house repair contractor such as to hold the insurer liable under an agency theory; 2) there was no consideration for an alleged warranty; 3) an agreement to indemnify the tort of another must be in writing to be enforceable; and, 4) appellant did not rely on any misrepresentations made by Allstate.

In an opinion filed April 8, 1996, the circuit judge observed that appellant advanced three theories for recovery: 1) that Allstate was negligent in representing that England was bonded, insured, competent, and capable of doing the repairs properly; 2) that Allstate's actions of urging and directing her to engage England effectively rendered England Allstate's agent; and 3) that Allstate expressly warranted the quality of England's work and promised to stand behind England's work. The court considered appellant's third theory as an indemnity cause of action.

After noting that it did not read a misrepresentation allegation in appellant's complaint, the court found that Allstate failed to present any proof that England was not its agent. The court found that the claim representative's statements to appellant were less than clear or unequivocal such as to constitute a promise by Allstate to indemnify England. It then noted that the pleadings, appellant's affidavit, and the transcript failed to demonstrate that any consideration flowed to Allstate for any promise made by Allstate to indemnify England. The court granted Allstate's motion and dismissed the indemnification action. It then found that Allstate failed to present proof in opposition to appellant's negligence claim. Thus, the court granted Allstate's motion with respect to indemnification, but denied the motion with respect to agency and negligent misrepresentation.

Allstate renewed its motion for summary judgment and motion to dismiss on June 19, 1998, arguing that appellant failed to sufficiently state a cause of action for misrepresentation. It also asserted that England was not acting as its agent. As support for its position, Allstate presented appellant's recorded unsworn statement made shortly after the incident, appellant's amended complaint, and the April 8, 1996 order. Key portions of appellant's

unsworn, recorded statement regarding her conversation with Allstate's claims representative are as follows:

A. And then he filled out all the paperwork and stuff and we visited and I said, you know, how my husband and I were separated at that time and so I was going to have to handle all this by myself. And I had had a lot of people tell me that you really can get ripped off by roofing companies, particularly when there's a lot of damage and they had had articles like that in Family Circle and Woman's Day saying that these crooks come in and say "Oh yeah, I'll do your roof for you for half-price" or whatever and take your money and never show up again. So anyway, he was saying — I was asking how do I protect myself against that? And he said, "Well, here are six companies that we are recommending that are reputable and we'll stand behind their work. If you're not sat. . . if their work isn't satisfactory, we'll make it good if they won't and we'll guarantee that their work is going to be satisfactory. If you choose not to use these people, that's fine. You can use whoever you want to use. But your first question, the same thing that everybody else had been telling me, "are these people bonded and insured?" And he said these people will be. But you don't have to use them."

Q. He just told you some people that were preferred maybe?

A. That Allstate recommended and would stand behind their work. But that it was completely up to me who I got to do the roof. But that, you know, "if you do get some other people, somebody else other than these people, you need to ask the first thing out of your mouth, are you bonded and insured? That's one of the ways to protect yourself." So anyway, it made sense to me to use somebody that they had recommended so anyway, I called all the people and Mr. England had the best estimate.

Q. Did he write them down for you or just verbally give them to you?

A. Yeah, he wrote them down for me. And not all of them responded, I don't really remember how many. I'd say four out of six or something, but Mr. England was the most reasonable. And I asked him "Are you bonded and insured?" Yes ma'm, yes ma'm." Anyway, it was shortly thereafter that . . .

Q. So you asked him that also?

A. Yes, I also asked. And he said yeah, he said that he would have some workers come out to the roof and he said "Now there are going to be some young guys, and I hope you're okay with that. A lot of people are real picky." My only concern was that they do a satisfactory job. And they came out and worked their little butts off.

In addition, appellee supplied the trial court with an affidavit by Jim England, in which he stated 1) that his company contracted with appellant to do roof repair; 2) that he was paid by appellant for the repair work; 3) that he did not receive any money directly from Allstate; 4) that Allstate did not provide any tools or supplies; 5) that he never intended to create an employer/employee relationship with Allstate; 6) that appellant had control over the details of the work; and 7) that Allstate did not pay the salaries of his workers.

After Allstate amended and substituted its renewed motion for summary judgment and motion to dismiss, appellant responded by affidavit, in which she stated 1) that the claims representative urged and directed her to use one of a list of persons to perform the roofing repairs; 2) that the agent expressly warranted and promised her that Jim England was bonded and insured; and 3) that she would not have used England if she had known that she could choose another repair person and/or that England did not have liability insurance.

Appellant later submitted a supplemental affidavit in which she stated 1) that the Allstate representative provided her with a list of what he represented were responsible and competent contractors; 2) that the representative said that she should use one of the six contractors on the list; 3) that the representative told her that if she did not use a name on the list, she needed to make sure who-

ever she hired was bonded and insured; 4) that if she used one of the names on the list, the repair would be "risk free"; 5) that if she used one of the names on the list that Allstate would pay any difference between the repair and the check Allstate gave her; 6) that if she hired a company on the list and there were any problems, "Allstate would make it good"; 7) that the representative expressly warranted that Jim England and his company were bonded and "fully insured"; 8) that the representative promised that England was a safe, competent, and reliable contractor; 9) that she would not have accepted Allstate's check or used England had she not relied on Allstate's representations; 10) that England repaired the roof and covered the exhaust to the main furnace that caused carbon monoxide to be trapped in her home; and 11) that immediately after she turned on the heater, she and her daughter were victims of carbon monoxide poisoning caused by the acts of Jim England.

On September 11, 1998, the court entered a second order, which addressed Allstate's renewed motion for summary judgment as to negligence. The court found that appellant's evidence was not sufficient to raise a fact question with respect to proximate cause. Thus, it granted Allstate's motion for summary judgment on the grounds of negligence.

Next, on May 2, 2001, the court issued a third order. In this order, the court found that 1) England was not an agent of Allstate in performing repairs to appellant's roof; 2) that there was no showing that the statements made by the claims representative were intended to deceive or were made with knowledge of the statements' falsity such as to demonstrate misrepresentation; 3) Allstate had no duty to appellant to determine the competency of England or to investigate his qualifications; and 4) the alleged misrepresentations made by the claims representative concerning the qualifications of England did not proximately cause appellant's loss. The court stated that it did not reach the issue of whether appellant relied on the representations or whether the representations proximately caused appellant's loss. It also reaffirmed the grant of summary judgment to Allstate regarding indemnity. The court also issued a Rule 54(b) certification, citing the reasons it

issued a final judgment with respect to Allstate. This appeal followed.

Standard of Review

Our court recently outlined the procedure regarding summary judgment in *Regions Bank & Trust, N.A. v. Stone County Skilled Nursing Facility, Inc.*, 73 Ark. App. 17, 21, 38 S.W.3d 916, 919 (2001). There we stated as follows:

> The purpose of a summary judgment hearing is not to try the issues, but rather to determine if there are any issues to try. The trial court must consider all proof in favor of the non-moving party. Once the moving party proves there are no genuine issues, the burden shifts to the non-moving party to set out specific facts that demonstrate there are genuine issues of trial. On summary judgment appeal, we limit our review to the pleadings, affidavits, and other supporting documents filed by the parties in support of their arguments. We review all evidence in the light most favorable to the non-moving party, and only reverse the trial court when we determine that a material question of fact remains. We need only decide if the grant of summary judgment was appropriate, considering whether the evidentiary items presented by the moving party in support of the motion left a material question of fact not answered.

(Citations omitted.)

Characterization of Claim as Indemnification

For her first point on appeal, appellant asserts that the trial court erroneously characterized her indemnity and express warranty claims solely as an indemnity claim. She contends that this improper characterization resulted in the trial court failing to make any ruling as to her express warranty claim and the improper dismissal of her breach of express warranty claim. We agree and hold that a genuine issue of fact exists as to whether Allstate's representations of England's workmanship were relied upon by appellant to her peril.

Appellant cites *Haase v. Starnes*, 323 Ark. 263, 915 S.W.2d 675 (1996), as support for her contention that an express warranty

may relate to a service. After noting that an express warranty claim is analyzed based on contract law, the *Haase* court determined that the appellant did plead and offer proof of an express warranty, and that the appellant's complaint alleged that he relied on the misrepresentations. Thus, the court declined to affirm the summary judgment on the grounds that appellant failed to plead or prove that an express warranty existed. *See Haase v. Starnes, supra.*

When rendering its initial opinion in the present case, the trial court found that appellant alleged three causes of action: negligence, agency, and indemnity. However, in paragraph (4) of her amended complaint, appellant alleged as follows:

> [T]he Allstate Claims Representative provided the Defendant Jim England's name as a competent and responsible repairperson, and directed that Maggie use England (or others specifically set forth), and further represented to her that England would perform the job in a proper and competent manner. The Allstate agent further expressly warranted that England and/or Jim England was bonded and insured.

Contrary to Allstate's position, appellant was not required to set out a separate count of express warranty in her complaint to prevail on a motion for summary judgment. Treating appellant's allegations as true for purposes of appellate review, the record demonstrates that Allstate expressly warranted that England was bonded and insured and that Allstate represented England as bonded, insured, competent, and capable to perform the repairs needed. Appellant followed the instructions of the claims representative and employed England to repair the roof. Taken as true, appellant's allegations that the claims representative affirmed that England did good work, that England was bonded and insured, and that Allstate would make good on England's work, establish a genuine issue of fact in regards to an express warranty. Given the relationship between Allstate and appellant as insurer and insured, a material issue of fact exists as to 1) whether the claims representative had reason to believe that appellant would rely on the information he gave her, and 2) whether the

representations made as to the quality of England's workmanship were relied on by appellant to her peril.

Consideration to Support of Indemnity Agreement

Next, appellant contends that the trial court erred in holding that the indemnity agreement was not supported by consideration.

Indemnity arises by virtue of a contract, and holds one liable for the acts or omissions of another over whom he has no control. *See Pickens-Bond Const. Co. v. North Little Rock Electric Co.*, 249 Ark. 389, 459 S.W.2d 549 (1970). Contracts of indemnity are construed in accordance with our rules for the construction of contracts generally. *See id.* Given the nature of indemnification, our courts have held that the language imposing indemnity must be clear, unequivocal, and certain. *See id.* For instance, in *Arkansas Kraft Corp. v. Boyed Sanders Construction Co.*, 298 Ark. 36, 39, 764 S.W.2d 452, 453 (1989), our supreme court interpreted an indemnity contract. The court noted as follows:

> [A] subcontractor's intention to obligate itself to indemnify a prime contractor for the prime contractor's own negligence must be expressed in clear and unequivocal terms and to the extent that no other meaning can be ascribed. While no particular words are required, the liability of an indemnitor for the negligence of an indemnitee is an extraordinary obligation to assume, and we will not impose it unless the purpose to do so is spelled out in unmistakable terms.

In the present case, the trial court found that a transcript of an interview between appellant and an Allstate agent was less than clear or unequivocal that what was said was a promise for Allstate to indemnify England for any tort that he might commit or that Allstate would make good any work that he failed to perform adequately. We disagree.

First, we note that during the transcribed conversation, appellant stated that the claims representative told her, "here are six companies that we are recommending that are reputable and we'll stand behind their work." She also stated that the represen-

tative remarked, "if their work isn't satisfactory, we'll make it good if they won't. . . ."

Appellant also provided a supplemental affidavit in which she alleged that the claims representative told her that if she used one of the persons on the list, it would be a "risk free" repair and that Allstate would "stand behind" the work of the contractors on the list. She further alleged that the representative stated that if there were any problems caused by the contractors on the list, Allstate would "make it good." However, if she did not hire a contractor on the list, Allstate would not guarantee that the work would be performed competently and safely. Appellant's affidavit demonstrates that the Allstate representative clearly stated in unequivocal terms a promise that Allstate would make good any work that England failed to perform adequately.

An oral undertaking to answer for the debt of another without any new consideration is a collateral understanding and not enforceable under the Statute of Frauds. *See Landmark Savings Bank v. Weaver-Bailey Contractors, Inc.*, 22 Ark. App. 258, 739 S.W.2d 166 (1987). However, an oral contract is considered original and enforceable when the agreement is based on new consideration or benefit moving to the promisor. When considering whether the undertaking is collateral or original, courts look to the words of the promise, the situation of the parties, and the circumstances surrounding the transaction. *See id.* The determination of whether an undertaking is collateral or original is one of fact. *See id.*

Consideration is any benefit conferred or agreed to be conferred upon a promisor to which he is not lawfully entitled, or any prejudice suffered or agreed to be suffered by a promisee other than that in which she is lawfully bound to suffer. *See id.* Additional consideration is required when parties of a contract enter into an additional contract. *See Crookham & Vessels, Inc. v. Larry Moyer Trucking*, 16 Ark. App. 214, 699 S.W.2d 414 (1985). When no benefit is received except that in which the obligee was entitled to under the original contract, and the other party to the contract leaves with nothing more than what he was already bound for, there is no new consideration for the additional con-

tract. *See id.* Mutual promises may constitute consideration, each for the other. While mutual promises will sustain a contract, there is no valid agreement if there is no promise by one party as a consideration for the other's promise. *See Kearney v. Shelter Ins. Co.*, 71 Ark. App. 302, 29 S.W.3d 747 (2000).

The trial court in the present case found that neither the pleading, the affidavits, nor the transcript of appellant's conversation with an Allstate agent demonstrated that consideration flowed to Allstate for any promise Allstate allegedly made to appellant to be England's indemnitor. Appellant argues that the court's finding is incorrect because she offered an affidavit stating that in consideration for the additional indemnity agreement, she accepted Allstate's repair check and hired England without evidence of England's bonding, insurance, or written reference. The affidavit also stated that she would not have done so unless Allstate made the promises that it did. Appellant further contends that her supplemental affidavit asserts that Allstate received consideration in that she released Allstate based upon its agreement to indemnify England. Appellant also asserted in her supplemental affidavit that Allstate's claim representative told her that Allstate would pay the difference between the repair cost and the amount of the initial check if appellant used a roofing contractor on the list provided by the claims representative. Viewing the evidence in the light most favorable to appellant, appellant met proof with proof that a material fact question exists as to whether the language constituted a contract to indemnify and whether the language was supported by separate consideration.

Duty

Thirdly, appellant asserts that Allstate's action of providing appellant with a list and telling her that the list included competent contractors created a duty on behalf of Allstate to determine the competency of England or to investigate his qualifications. We hold that a genuine issue of material fact exists on this issue so as to preclude disposition by summary judgment.

The issue of what duty is owed by one party to another is always a question of law and never one for the jury. *See*

Heigle v. Miller, 332 Ark. 315, 965 S.W.2d 116 (1998). When no duty of care is owed, a negligence cause of action is decided as a matter of law and an award of summary judgment is proper. *See Smith v. Hansen*, 323 Ark. 188, 914 S.W.2d 285 (1996). A party who gratuitously undertakes a duty can be liable for negligently performing that duty. *See Steward v. McDonald*, 330 Ark. 837, 958 S.W.2d 297 (1997).

According to the *Restatement (Second) of Torts* § 323 (1965):

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

Here, Allstate presented the court with proof that it issued appellant a check to repair a roof based on its insurance contract with appellant. It admits that it gave appellant a list that included the names of contractors who had satisfactorily performed roofing repairs for Allstate in the past. Allstate further admits that it took no steps to verify that England was bonded and insured. Appellant affirmed in her affidavits that Allstate's claims representative told her that the contractors on the list were competent, licensed, and bonded. While it is true that whether duty is owed is a question of law, Allstate's gratuitous undertaking to represent the competence, insured, and bonded status of contractors created a duty. We note that Allstate's action did not consist of simply supplying appellant with a list of roofing contractors. Again, treating appellant's allegations as true, Allstate's representative said that the contractors on the list were competent, bonded, and insured. Allstate's affirmation about the contractors listed created a duty on Allstate to exercise ordinary care to ensure that the information it communicated was true, i.e., that the roofing contractors were competent, bonded, and insured. Whether All-

state breached this duty is a question of fact that precluded the trial court's grant of a summary judgment.

Proximate Causation

To demonstrate a *prima facie* cause of action in tort, a plaintiff must establish that damages were sustained, that the defendant was negligent, and that the defendant's negligence was the proximate cause of the damages sustained. *See J.E. Merit Constructors, Inc. v. Cooper*, 345 Ark. 136, 44 S.W.3d 336 (2001). Proximate cause is "a cause which, in a natural and continued sequence, produces damage, and without which the damage would not have occurred." *See Baker v. Morrison*, 309 Ark. 457, 829 S.W.2d 421 (1992). Proximate cause is typically a fact question; however, when the evidence opposing the motion for summary judgment is insufficient to raise a question of fact, summary judgment is appropriate. *See Wallace v. Broyles*, 331 Ark. 58, 961 S.W.2d 712 (1998). Proximate cause may be shown by direct or circumstantial evidence if the facts proved are of such a nature and are so connected and related to each other that the conclusion may be inferred. *See id.*

In the present case, Allstate moved for summary judgment on the grounds that appellant failed to demonstrate that its alleged negligent recommendation of England was a proximate cause of her subsequent carbon monoxide incident. In response, appellant submitted a copy of Allstate's answers to interrogatories in which Allstate acknowledged that it made no determination regarding England's ability and did not have rules in place that governed the recommendation of roofers. Appellant also provided an affidavit in which she stated that she would not have used England if Allstate had not recommended him and promised to stand behind his work and that without Allstate's assurances, she would have asked England to provide verification that he was bonded and insured. The evidence establishes that a material fact question exists as to the existence of a causal connection between Allstate's alleged negligent recommendation of England and appellant's subsequent carbon monoxide incident. As noted by appellant, the issue of whether an independent, intervening cause exists due to the

alleged negligence of England is also a question for the trier of fact.

We reverse the award of summary judgment and remand the cause for further proceedings consistent with this opinion.

Reversed and remanded.

JENNINGS and NEAL, JJ., agree.

Edward C. JILES *v.* STATE of Arkansas

CA CR 01-1042 82 S.W.3d 173

Court of Appeals of Arkansas
Division IV
Opinion delivered June 5, 2002

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

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

TERRY CRABTREE, Judge. Appellant, Edward Jiles, appeals the sentence imposed on him by a Pulaski County Circuit Court jury. Appellant contends that the trial court erred in allowing the State to introduce into evidence three prior misdemeanor convictions during the sentencing phase of the trial. We affirm.

On May 15, 2001, the appellant was tried in Pulaski County Circuit Court, on charges of attempted first-degree murder and first-degree terroristic threatening. The jury convicted him of the lesser-included offense of aggravated assault and first-degree terroristic threatening. The State introduced two prior felony convictions during the penalty phase of the trial. These felony convictions were introduced as proof of appellant's status as an habitual offender with more than one, but less than four, prior felony convictions. The appellant did not object to the introduction of the prior felony convictions. The State also introduced three prior misdemeanor convictions out of the North Little Rock Municipal Court. One conviction was for endangering the welfare of a minor and the other two were for failure to appear. The counsel for the appellant objected to these prior misdemeanor convictions being allowed into evidence. Appellant argued that the State's proof, which consisted of a certified copy of a municipal court docket sheet for each prior misdemeanor conviction, did not show that the appellant had been represented by counsel in the misdemeanor convictions. The judge overruled the appellant's objections and allowed the jury to hear evidence of the prior misdemeanor convictions. The jury was instructed that they could impose a sentence of not more than twelve years of imprisonment on each conviction. The jury sentenced the appellant to nine years' imprisonment in the Arkansas Department of Correction for aggravated assault. The jury imposed the same sentence for the first degree terroristic threatening conviction. The jury recommended that the appellant serve the sentences consecutively;

however, the circuit court sentenced appellant to serve the sentences concurrently. The appellant appeals the sentence imposed on him by the Pulaski County Circuit Court jury.

Appellant raises one point on appeal. He contends that the trial court erred in allowing the State to introduce the three prior misdemeanor convictions during the penalty phase of the trial. Appellant argues that the certified docket sheets from the municipal court that were offered as proof by the State did not show that the appellant had been represented by counsel on any of the three prior misdemeanor convictions. On each of the certified municipal docket sheets there are two initials by "Pros. Atty." and two initials by "Def. Atty." Appellant asserts that the two initials are ambiguous and are not proof that the appellant was represented by counsel for any of the three misdemeanor convictions.

■ ■ In reviewing a trial court's decision to admit evidence of prior convictions, this court recognizes that the trial court has wide discretion in allowing such evidence to be presented, and we will not reverse such a decision absent an abuse of discretion. *McClish v. State,* 331 Ark. 295, 962 S.W.2d 332 (1998). Evidence relevant to sentencing may include, but is not limited to, prior convictions. Ark. Code Ann. § 16-97-103(2) (Repl. 1997).

Appellant asserts that the initials "B.B." and "T.B." next to "Def. Atty." are not sufficient proof that appellant was represented by counsel on these convictions. Although the State specifically stated that these misdemeanor charges were "not part of the habitual charge" in response to appellant's counsel alleging that appellant had to be represented by counsel before a conviction could be presented to the jury as an habitual charge, the appellant contends on appeal that the same rules apply to prior convictions not offered for sentencing enhancement purposes.

■ ■ Appellant argues that Ark. Code Ann. § 16-97-104 (Supp. 2001) requires that the State prove misdemeanor convictions introduced in the penalty phase of a trial in the same manner that felony convictions are proved for habitual offender purposes pursuant to Ark. Code Ann. § 5-4-504 (Repl. 1997). It is settled law that a prior conviction cannot be used to enhance punishment

unless the defendant was represented by counsel or the defendant validly waived counsel. *Mangiapane v. State,* 46 Ark. App. 64, 876 S.W.2d 610 (1994). In the case at bar, the prior felony convictions were introduced by the State to prove habitual-offender status. Appellant did not object to these two prior felony convictions being introduced during the penalty phase of the trial. The State introduced the prior misdemeanor convictions as relevant evidence in the sentencing phase of the trial. This is permitted by Arkansas law as long as the relevant evidence is not unfairly prejudicial. Ark. Code Ann. § 16-97-101(2) (Repl. 1997); *McClish, supra.*

The Arkansas Supreme Court has held that under the statute, uncounseled misdemeanor convictions can be introduced as "evidence relevant to sentencing," simply allowing the jury or the court to consider all relevant evidence when making a sentencing decision. *Davis v. State,* 330 Ark. 76, 87, 953 S.W.2d 559, 565 (1997). Arkansas Code Annotated § 16-97-101, however, does not mandate automatic enhancement due to prior misdemeanor convictions. *Id.* In this case, the State specifically stated that the misdemeanor convictions were not for the habitual charge. Also, prior misdemeanors cannot be used for habitual offender status, only prior felony convictions can be used to enhance sentencing. Ark. Code Ann. § 5-4-502 (Repl. 1997); *Lawson v. State,* 295 Ark. 37, 746 S.W.2d 544 (1988). Appellant argues that the proof offered by the State to prove that he was represented by counsel on the prior misdemeanor convictions was too ambiguous. There is no question that the appellant was convicted of the misdemeanors only whether the State proved he was represented by counsel on those convictions.

The certified dockets from the municipal courts that the State introduced each had two initials next to the notation "Def. Atty." However, the trial court did not address the issue of whether the initials were sufficient to prove legal representation of the appellant. The trial court held that the prior misdemeanor convictions were admissible because the applicable statute, Ark. Code Ann. § 16-97-103(2), was silent as to the need to prove legal representation on a prior misdemeanor conviction that is only being introduced as relevant evidence in the penalty phase of the

trial. We see no reason to address the ambiguity of the initials on the docket sheets because the trial court was correct in ruling that the proof of legal representation required under the habitual-offender statute did not apply to prior convictions introduced simply as relevant evidence during the sentencing phase of the trial. The prior misdemeanor convictions were clearly presented to the jury only as relevant evidence admissible during the penalty phase of a trial. The trial court did not abuse its discretion in allowing the prior misdemeanor convictions to be presented to the jury. We affirm.

JENNINGS and ROBBINS, JJ., agree.

Terry FOREMAN, Roy Dale McGuire, and Tervonne McGuire *v.* ARKANSAS DEPARTMENT OF HUMAN SERVICES

CA 01-1175 82 S.W.3d 176

Court of Appeals of Arkansas
Division I
Opinion delivered June 19, 2002

Shannon S. Blatt, for appellant.

Dana McClain, for appellee.

JOHN F. STROUD, JR., Chief Judge. Appellant Terry Foreman is the mother of the two children involved in this case, T.M. and M.M. Appellee, Department of Human Services, filed petitions for emergency custody of the children on May 7, 1999. The orders for emergency custody were granted the same day; the probable cause orders were entered on May 19, 1999; and the

adjudication orders were both filed on June 17, 1999, finding that the children were dependent-neglected and that return to the custody of the parents was contrary to the health, safety, and best interests of the children. Allegations of sexual abuse involving Carl Foreman, the children's stepfather, arose after the children were placed in appellee's custody. At the Foremans' request, a hearing was held on the sexual abuse allegations on June 13, 2001. On June 20, 2001, appellee filed a petition for termination of parental rights, which was subsequently amended. In an order entered July 3, 2001, the trial court specifically found that "the Department has proven by a preponderance of the evidence that the herein juveniles were sexually abused and that the Defendant, Carl Foreman, was the perpetrator." Appellant appeals from this order. We are without jurisdiction to hear the appeal because the order is not final. We therefore dismiss the appeal.

Whether an order is final and appealable is a matter going to the jurisdiction of the appellate court, and it is an issue that the appellate court has a duty to raise on its own motion. *Capitol Life & Acc. Ins. Co. v. Phelps*, 72 Ark. App. 464, 37 S.W.3d 692 (2001). The rule that an order must be final to be appealable is a jurisdictional requirement, observed to avoid piecemeal litigation. *Id.* For an order to be final, it must dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy. *Id.* An order must be of such a nature as to not only decide the rights of the parties, but also to put the court's directive into execution, ending the litigation or a separable part of it. *Id.* When the order appealed from reflects that further proceedings are pending, which do not involve merely collateral matters, the order is not final *Id.* Moreover, Rule 2 of our Rules of Appellate Procedure—Civil addresses appealable matters. Rule 2(c) specifically addresses appeals from juvenile court:

> (c) All appeals from juvenile court shall be made in the same time and manner provided for appeals from chancery court.
>
> (1) In delinquency cases, the state may appeal only under those circumstances that would permit the state to appeal in criminal proceedings.

(2) Pending an appeal from any case involving a juvenile out-of-home placement, the juvenile court retains jurisdiction to conduct review hearings.

(3) In juvenile cases where an out-of-home placement has been ordered, orders resulting from the hearings set below are final appealable orders:

(A) adjudication and disposition hearings;

(B) review and permanency planning hearings if the court directs entry of a final judgment as to one or more of the issues or parties and upon express determination supported by factual findings that there is no just reason for delay of an appeal, in accordance with Ark. R. Civ. P. Rule 54(b); and

(C) termination of parental rights.

(Emphasis added.)

Here, the appealed July 3, 2001 order clearly does not arise from an adjudication hearing under subsection (c)(3)(A) of Rule 2 because the adjudication orders had been entered for more than two years. Neither does it arise from a disposition hearing under subsection (c)(3)(A) because it does not determine what action is to be taken in these dependency-neglect cases. *See* Ark. Code Ann. § 9-27-303(4) & (20) (Repl. 2002). Moreover, the order does not contain a Rule 54(b) certification so it cannot satisfy subsection (c)(3)(B) of Rule 2. Finally, the order does not satisfy subsection (c)(3)(C) of Rule 2 because it does not terminate parental rights. In fact, the order provides that jurisdiction of the matter is continued and that a hearing shall be held on the petition to terminate parental rights on Friday, September 21, 2001. Consequently, the order satisfies none of the requirements for finality, and we are required to dismiss the appeal for lack of jurisdiction.

Dismissed.

BIRD and CRABTREE, JJ., agree.

Carolyn Sue MILLER *v.* PRO-TRANSPORTATION

CA 02-83 77 S.W.3d 551

Court of Appeals of Arkansas
Division III
Opinion delivered June 19, 2002

Grimes & Craytor, by: *Bart C. Craytor*, for appellant.

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

JOHN MAUZY PITTMAN, Judge. Carl Miller was employed by Pro-Transportation as a truck driver. Appellant is Mr. Miller's wife. Appellant wanted to ride as a passenger with her husband as he drove for Pro-Transportation. To obtain Pro-Transportation's permission to do so, appellant executed a passenger authorization application on May 23, 1998. In it appellant agreed that, in consideration for her being permitted to ride as a passenger, she would hold Pro-Transportation harmless from any liability

for any damage or injury she might receive while riding in Pro-Transportation's truck. The passenger authorization application also required appellant's husband to authorize a payroll deduction of $24.00 per month to cover the cost of accident insurance for appellant. Appellant accompanied her husband and was injured in a single-vehicle traffic accident. Her medical expenses were covered by the insurance procured pursuant to the passenger authorization request. She filed suit against Pro-Transportation, alleging that it was responsible for the negligence of its employee (her husband), that the accident was caused by her husband's negligent operation of the truck, and that she was entitled to compensatory and punitive damages. Pro-Transportation moved for summary judgment on the basis of the exculpatory provision of the passenger authorization application. The trial court granted the motion and entered an order granting summary judgment to Pro-Transportation. From that decision, comes this appeal.

For reversal, appellant contends that the trial court erred in granting appellee's motion for summary judgment, arguing that the exculpatory clause was invalid and unenforceable under Arkansas law. We do not agree, and we affirm.

> [S]ummary judgment is to be granted by a trial court only when it is clear that there are no genuine issues of material fact to be litigated and the moving party is entitled to judgment as a matter of law. Once a moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of its motion leave a material fact unanswered. This court views the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. Our review is not limited to the pleadings, as we also focus on the affidavits and other documents filed by the parties. We have also stated that summary judgment is inappropriate where, although there may not be facts in dispute, the facts could result in differing conclusions as to whether the moving party is entitled to judgment as a matter of law.

Fryar v. Roberts, 346 Ark. 432, 436, 57 S.W.3d 727, 729-30 (2001) (citations omitted). In the present case, the propriety of summary judgment hinges on the validity and enforceability of the exculpatory clause.

Contracts that exempt a party from liability for negligence are not favored by the law, and they are strictly construed against the party relying on them. *Farmers Bank v. Perry*, 301 Ark. 547, 787 S.W.2d 645 (1990). This disfavor is based upon the strong public policy of encouraging the exercise of care. *Id.* The Arkansas Supreme Court has said that it is not impossible to avoid liability for negligence through contract, but that, to avoid such liability, the contract must at least clearly set out what negligent liability is to be avoided. *Id.*

Appellant asserts that the contract at issue in the case at bar is invalid because it does not clearly set out what negligent liability is to be avoided. We disagree. The exculpatory clause provided that:

> IN CONSIDERATION OF MY BEING PERMITTED TO RIDE AS A PASSENGER IN A MOTOR VEHICLE LEASED OR OWNED BY PRO TRANSPORTATION, INC., I WILL HOLD PRO TRANSPORTATION HARMLESS FROM ANY LIABILITY FOR ANY DAMAGE OR INJURY WHICH I MAY RECEIVE WHILE RIDING IN SAID MOTOR VEHICLE BOTH AS TO ANY RIGHT OF ACTION THAT MAY ACCRUE TO MYSELF AND TO MY HEIRS AND PERSONAL REPRESENTATIVES.

This language clearly and specifically sets out the negligent liability to be avoided, *i.e.*, liability for any injuries that the applicant may suffer while riding as a passenger in appellee's motor vehicle.

Furthermore, the Arkansas Supreme Court has adopted a "total transaction" approach for analyzing the validity of such a contract; under this analysis, the court will not restrict itself to the literal language of the release, but will also consider the facts and circumstances surrounding the execution of the release in order to determine the intent of the parties. *Plant v. Wilbur*, 345 Ark. 487, 47 S.W.3d 889 (2001). In the present case, we think it significant that appellant had accompanied her husband as a passenger in trucks owned by three different trucking companies, and was consequently aware of the nature of trucking operations and

the dangers inherent in them. That the parties realized that personal injury could result from these dangers is shown by the provision for medical insurance to cover appellant in the event of an accident. Finally, we think that the public policy of encouraging careful behavior that underlies the disfavor for such exculpatory clauses has little application in the present case, where the allegedly negligent party, appellant's husband, was the driver of the vehicle and, therefore had far more compelling reasons to drive carefully than the avoidance of possible tort liability.

Affirmed.

ROBBINS and BAKER, JJ., agree.

Leslie Dewayne ALEXANDER *v.* STATE of Arkansas

CA CR 01-621 77 S.W.3d 544

Court of Appeals of Arkansas
Division IV
Opinion delivered June 19, 2002

Lessmeister Law Firm, PLLC by: *James J. Lessmeister*, for appellant.

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

LARRY D. VAUGHT, Judge. A Mississippi County jury found appellant guilty of aggravated robbery and felony manslaughter and sentenced him to eighteen years' imprisonment in the Arkansas Department of Correction. The trial court also granted the State's petition to revoke probation in CR-95-182 and sentenced him to serve an additional ten years in the Arkansas Department of Correction. Appellant raises five points for reversal: 1) the charge of aggravated robbery was not supported by substantial evidence; 2) the charge of felony manslaughter was not supported by substantial evidence; 3) the trial court should have allowed an instruction on the lesser-included offense of attempted aggravated robbery; 4) the trial court erred by allowing the State to admit "inflammatory" photographs; 5) the trial court's second revocation of appellant's probation amounted to an illegal sentence. We affirm on the first four points, but reverse the revocation on the fifth point.

At trial, appellant testified that on August 6, 1999, some men identified only as "Walls Street Boys" came over to his apartment with guns, called him outside to question him about a girl, and "jumped" him. Appellant then fled to his mother's house. Patrick Cason, Lasette McDougal, and Thomas Razor joined him at his mother's house where they planned a robbery. In a taped statement to Blytheville Police Department Detective David Flora, tappellant stated that "the whole plan was to snatch some weed from 'em and just run off with it." After drinking and smoking marijuana, they went to an abandoned house to retrieve some guns on their way to Jermaine Smith's house. They rode around "for a minute," dropped off one of their companions, and then the four armed men went to see Smith at his Walls Street residence. It was around midnight when they parked the car on the side of Smith's house, and appellant had a semi-automatic rifle under his coat when he approached the residence. Cason, appellant's friend, had already entered the house after making a request to purchase a $5.00 bag of marijuana. When Cason was exiting Smith's residence, Smith was walking behind him. Appellant was wearing a stocking cap rolled down to his eyebrows.

Appellant testified that Smith fired first, that he fired back, and that Cason fell to the ground. The evidence indicated that Cason was shot by Smith. Appellant then ran to his mother's house where he was later joined by McDougal and Razor. He testified that he dropped his gun in the alley as he was fleeing and did not contact the police because he was already on probation.

Smith testified that Cason was the only person outside when he initially opened the door. Cason was admitted into the residence to purchase a "nickel" bag of marijuana. After the sale, as Smith accompanied Cason out of the house, he saw appellant with the barrel of his rifle exposed, and in response, he fired his .38 semi-automatic handgun several times. Stephen Erickson, a forensic pathologist from the Arkansas State Crime Lab, testified that Cason died as a result of multiple gunshot wounds.

In his taped statement, appellant said that Cason never made it into the house and that Smith started shooting as soon as Cason opened the door. At trial, however, appellant testified that Cason

went into the house to buy some marijuana and that Smith must have "slipped up and for some reason started shooting" when Cason was exiting. Appellant denied that he had any intent to rob Smith.

The preservation of an appellant's right to freedom from double jeopardy requires a review of the sufficiency of the evidence prior to a review of any asserted trial errors. *Young v. State*, 316 Ark. 225, 871 S.W.2d 373 (1994). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Atkinson v. State*, 347 Ark. 336, 64 S.W.3d 259 (2002). Substantial evidence is evidence of sufficient certainty and precision to compel a conclusion one way or another and pass beyond mere suspicion or conjecture. *Goodman v. State,* 74 Ark. App. 1, 45 S.W.3d 399 (2001). In reviewing the sufficiency of the evidence, we view the evidence in a light most favorable to the State and consider only the evidence that supports the verdict. *Wilson v. State*, 332 Ark. 7, 962 S.W.2d 805 (1998).

The jury may resolve questions of conflicting testimony and inconsistent evidence and may choose to believe the State's account of the facts rather than the defendant's. *Chapman v. State*, 343 Ark. 643, 38 S.W.3d 305 (2001). Flight following the commission of an offense is a factor that may be considered with other evidence in determining probable guilt. *Stewart v. State,* 338 Ark. 608, 999 S.W.2d 684 (1999). Also, a defendant's improbable explanation of suspicious circumstances may be admissible as proof of guilt. *Id.* Additionally, the longstanding rule in the use of circumstantial evidence is that the evidence must exclude every other reasonable hypothesis than that of the guilt of the accused to be substantial, and whether it does is a question for the jury. *Gregory v. State*, 341 Ark. 243, 15 S.W.3d 690 (2000).

A person commits robbery if he, with the purpose of committing a felony or misdemeanor theft, employs or threatens to employ physical force upon another person. *See* Ark. Code Ann. § 5-12-101(a) (Repl. 1997). A person commits aggravated robbery if he commits robbery and he is armed with a deadly weapon or represents by word or conduct that he is so armed, or

inflicts or attempts to inflict death or serious physical injury upon another person. *See* Ark. Code Ann. § 5-12-103 (Repl. 1997). A person acts purposefully with respect to his conduct when it is his conscious object to engage in conduct of that nature or cause such a result. *See* Ark. Code Ann. § 5-2-202(1) (Repl. 1997). Intent or purpose to commit a crime is seldom proven by direct evidence, and often is inferred from the circumstances. *Jones v. State,* 72 Ark. App. 271, 35 S.W.3d 345 (2000). Thus, a presumption exists that a person intends the natural and probable consequences of his acts because of the difficulty in ascertaining a person's intent. *Tarentino v. State,* 302 Ark. 55, 786 S.W.2d 584 (1990). Also, the jury is allowed to draw upon their common knowledge and experience to infer intent in reaching a verdict from the facts directly proved. *Robinson v. State,* 293 Ark. 243, 737 S.W.2d 153 (1987).

Based on the foregoing, it is our opinion that the trial court properly refused appellant's motion for directed verdict on the charge of aggravated robbery. There is substantial evidence of appellant's purpose to commit an aggravated robbery. He confessed that he and his accomplices went to Smith's house with the purpose of stealing some marijuana. They parked around the corner from Smith's house, and, upon arrival at the targeted house, appellant put on a stocking cap pulled down to his eyebrows. Cason was sent into the house to observe the marijuana supply; when Smith opened the door to let Cason exit, he was surprised to see appellant on his porch brandishing a weapon. Appellant fired his semi-automatic rifle at Smith, then fled the scene and discarded his weapon en route.

Appellant argues that the trial court erred in denying his motion for directed verdict on the ground that the State failed to prove the corpus delicti, as required to corroborate his statement regarding his intent to steal marijuana from Smith. Arkansas Code Annotated section 16-89-111(d) provides: "A confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that the offense was committed." The requirement for other proof is sometimes referred to as the corpus delicti rule and requires only proof that the offense occurred and nothing more. *Id.* Thus, the State must

prove (1) the existence of an injury or harm constituting a crime, and (2) that the injury or harm was caused by someone's criminal activity. *Id.* (citing *Ferrell v. State,* 325 Ark. 455, 929 S.W.2d 697 (1996)). Our supreme court has held that it is not necessary to establish any further connection between the crime and the particular defendant. *Hart v. State,* 301 Ark. 200, 783 S .W.2d 40 (1990).

In an aggravated robbery case, this rule requires the State to prove that the accused intended to commit felony or misdemeanor theft and employed or threatened to employ the use of deadly force during the commission of the crime. Both elements, the intent to commit theft and the use or threatened use of a deadly weapon may be shown by strong and unequivocal circumstantial evidence such as to leave no ground for reasonable doubt; thus, where there is some proof of the corpus delicti, its weight and sufficiency is properly left to the jury. *Jenkins v. State,* 348 Ark. 686, 75 S.W.3d 180 (2002).

There is ample direct and circumstantial evidence to establish proof of the corpus delicti. Specifically, the facts that appellant parked his car to the side of Smith's home, had a weapon secreted, and stayed out of Smith's view until after Cason had been sent in to make sure Smith had marijuana in his house are sufficient to allow the jury to conclude that appellant's intent was more than to simply harm Smith. In sum, appellant's acts and confession, coupled with the jury's ability to consider his flight from the scene, his discarding of evidence, and his improbable explanation of the suspicious events constitutes substantial evidence to prove that appellant had the requisite intent to commit theft and that he was armed with a deadly weapon while executing his purposeful act.

Accordingly, because we find that there is sufficient evidence to support his conviction for aggravated robbery, there is also substantial evidence to support the charge of felony manslaughter. A person commits felony manslaughter if "acting alone or with one or more persons, he commits or attempts to commit a felony, and in the course or furtherance of the felony or in immediate flight therefrom another person who is resisting such offense

or flight causes the death of any person." *See* Ark. Code Ann. § 5-10-104(a)(4)(B) (1997). Cason was killed by Smith as Smith was resisting the offense of aggravated robbery committed by appellant; thus, there is sufficient evidence to support the charge of felony manslaughter and appellant's argument is without merit.

Appellant also argues that he was entitled to have the jury instructed on the charge of attempted aggravated robbery because there was insufficient evidence of his intent to steal the marijuana. The State points out that appellant argued below that he was entitled to the instruction because there was some evidence that he took a "substantial step" in committing the offense of aggravated robbery. The State urges this court to bar appellant's argument because a party is bound by the nature and scope of his objection and argument made at trial. *Woods v. State,* 342 Ark. 89, 27 S.W.3d 367 (2000). However, both arguments go to whether the essential elements of aggravated robbery were established by the State, and conclude with the proposition that the elements of the lesser-included crime of attempted robbery had been met. Therefore, we will consider the merit of appellant's argument.

The jury instruction proffered by appellant, and refused by the trial court, stated:

> If you have reasonable doubt of the defendant's guilt on the charge of aggravated robbery, you will then consider the defendant's guilt on the charge of attempted aggravated robbery. To sustain the charge of attempted aggravated robbery, the [S]tate must prove beyond a reasonable doubt the following things: First, that [appellant] intended to commit the offense of aggravated robbery; Second that [appellant] purposely engaged in conduct that was a substantial step in the course of conduct intended to culminate in the commission of aggravated robbery; and Third, that [appellant's] conduct was strongly corroborative of the criminal purpose.

Appellant recognizes that precedent permits a trial court to reject the lesser-included instruction where no rational basis is presented; however, he argues a rational basis existed here. We disagree.

First, it is not error for the court to refuse or fail to instruct on the lesser offense, where the evidence clearly shows

that the defendant is either guilty of the greater offense charged or is innocent. Arkansas Code Annotated section 5-3-201 (Repl. 1997), concerning the inchoate offense of criminal attempt, provides:

> (a) A person attempts to commit an offense if he:
> (1) purposely engages in conduct that would constitute an offense if the attendant circumstances were as he believes them to be; or
> (2) purposely engages in conduct that constitutes a substantial step in a course of conduct intended to culminate in the commission of an offense whether or not the attendant circumstances are as he believes them to be.
> (b) When causing a particular result is an element of the offense, a person commits the offense of criminal attempt if, acting with the kind of culpability otherwise required for the commission of the offense, he purposely engages in conduct that constitutes a substantial step in a course of conduct intended or known to cause such a result.
> (c) Conduct is not a substantial step under this section unless it is strongly corroborative of the person's criminal purpose.

The Committee Commentary to § 5-3-201 states that sections (a) and (b) are framed so as to apply only to purposeful conduct, accompanied in subsections (a)(1) and (a)(2) by a belief in attendant circumstances and in (b) by a knowing culpable mental state regarding a result. It is noted that these sections have overlapping coverage and are not set out in alternative form solely to pick up distinct kinds of conduct. Subsection (a)(1) is directed at the completed course of conduct while subsections (a)(2) and (b) are primarily directed at situations where substantial steps not amounting to completed courses of conduct have been taken, but have not culminated in the commission of the object offense. Under subsection (b), knowledge regarding a result will generate liability when coupled with purposeful conduct.

It appears from the wording of appellant's proffered instruction that he used the language from subsection (b) of § 5-3-201. However, as previously discussed, the Committee Commentary following § 5-3-201, subsection (b), is primarily directed to situations where substantial steps not amounting to completed courses of conduct have been taken, but have not culminated in the commission of the object offense. Here, we have a completed

offense and therefore the trial court did not err in its refusal to instruct on the lesser-included charge of attempted aggravated robbery.

Next, appellant contends that the trial court erred by permitting the State to introduce two "inflammatory" photographs into evidence. However, appellant failed to include in the addendum to his brief copies of the photographs that he contends were wrongfully admitted. Because this record was lodged before our new abstracting rules went into effect, the prior Rule 4-2 of the Rules of the Supreme Court and Court of Appeals applies. Rule 4-2(a)(6) provides that whenever a map, plat, photograph, or other similar exhibit, which cannot be abstracted in words, must be examined for a clear understanding of the testimony, the appellant shall reproduce the exhibit by photography or other process and attach it to the copies of the abstract filed in the Court and served upon the opposing counsel, unless this requirement is shown to be impracticable and is waived by the Court upon motion. Appellant did not move to have this requirement waived, and the photographs in question have not been reproduced and attached as prescribed by the rule. Thus, we will not consider appellant's argument on appeal. *See Douthitt v. State,* 326 Ark. 794, 935 S.W.2d 241 (1996).

Finally, on November 6, 1995, appellant was placed on five years' probation after pleading guilty to burglary. On November 5, 1996, the State petitioned to revoke appellant's probationary sentence. On October 23, 1997, the trial court revoked appellant's probation and sentenced appellant to one year in the county jail and five years' probation. On November 8, 2000, the State filed a second petition to revoke appellant's probation and the trial court revoked his probation for a second time and sentenced him to 120 months of imprisonment.

Appellant argued below that the first revocation of his probation resulted in an illegal sentence that he had already served. Although appellant did not move to dismiss the revocation petition or specifically argue that the trial court lacked subject-matter jurisdiction to revoke his probation, he may raise subject-matter jurisdiction for the first time on appeal. *See e.g. Baldwin v.*

State, 74 Ark. App. 69, 45 S.W.3d 412 (2001). As appellant argues, and the State concedes, we agree that once a valid sentence is put into execution, the circuit court loses its jurisdiction to modify or amend its original sentence. *See McGhee v. State,* 334 Ark. 543, 975 S.W.2d 834 (1998).

Here, appellant's original sentence was put into execution when the trial court revoked his probationary sentence and sentenced him to one year in jail. Although Act 1569 § 8 of 1999 legislatively overruled *McGhee,* the act is not implicated here because it was not in effect at the time appellant committed the original offense for which he was put on probation. *See Bagwell v. State,* 346 Ark. 18, 53 S.W.3d 520 (2001). Accordingly, we reverse and dismiss appellant's illegal sentence.

Affirmed in part; reversed and dismissed in part.

HART and ROAF, JJ., agree.

Christopher BATTISHILL and Jennifer Battishill *v.*
ARKANSAS DEPARTMENT of HUMAN SERVICES

CA 01-845 82 S.W.3d 178

Court of Appeals of Arkansas
Division III
Opinion delivered June 19, 2002

Mark Rees, for appellants.

Dana McClain, for appellee.

LARRY D. VAUGHT, Judge. Christopher and Jennifer Battishill appeal from the trial court's order terminating their parental rights as to their three children. Appellants argue that the trial judge erred in finding that they had waived their right to counsel; in finding that their parental rights should be terminated as to each child; and in terminating their rights as to their youngest child without adjudicating him dependent-neglected. We reverse on the first issue and therefore do not address the remaining issues on appeal.

On April 9, 2000, the termination hearing was held, and appellants each proceeded pro se. Appellants' parental rights to each of their three children were terminated based on the finding

of the trial court that a return of the children to the family home was contrary to their health, safety, and welfare.

The United States Supreme Court has found that there is not an absolute due process right to counsel in all parental-termination proceedings. *See Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981). The Court acknowledged that due process has never been, and perhaps never can be, precisely defined, and concluded that "applying the due process clause is therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake." *Id.* at 24.

In *Lassiter,* the Court specifically left the decision as to "whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject of course to appellate review." *Id.* at 31. The Court then went on to note that "it is neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements as the facts are susceptible of almost infinite variations." *Id.* at 32. However, in *Lassiter*, the Court noted two relevant factors in its threshold determination that "fundamental fairness" did not require a due process right to counsel 1) the case presented no specially troublesome points of law, and 2) presence of counsel could not have made a determinative difference for petitioner.[1] Finally, the Court recognized that although the Fourteenth Amendment imposes on the states the standards necessary to ensure that the judicial process is fundamentally fair, a wise public policy may be for a state to require higher standards than those minimally tolerable under the Constitution. *Id.* The Court offered a final note that thirty-three states and the District of Columbia provide statutorily for the appointment of counsel in termination cases; however, they noted that these heightened stan-

[1] As Judge Baker's concurrence points out, the case at bar does present troublesome points of law, and the presence of counsel could have made a determinative difference in the outcome of the case.

dards are not constitutionally required, but are merely "enlightened and wise." *Id.* at 34.

Therefore, based on the *Lassiter* precedent, our initial inquiry in an indigent's right to counsel in a termination-of-parental-rights case must be whether or not "fundamental fairness" requires the appointment of counsel. The dissent in *Lassiter* contends that "fundamental fairness" requires appointment of counsel in every case where a relationship between a parent and a child is being permanently severed. It is our opinion that the Arkansas General Assembly has come to the same conclusion by passing Arkansas Code Annotated section 9-27-316(h) (Supp. 2000), which provides for the appointment of counsel in all parental-termination proceedings upon the request of the parent after being advised of the right by the court, thus preempting a fundamental fairness determination by the trial court prior to the due process right attaching.

Accordingly, our supreme court has found that a waiver of the fundamental right to the assistance of counsel is valid only when 1) the request to waive the right of counsel is unequivocal and timely asserted; 2) there has been a knowing and intelligent waiver of the right to counsel; and 3) the defendant has not engaged in conduct that would prevent the fair and orderly exposition of the issues. *Bearden v. Arkansas Dep't of Human Servs.*, 344 Ark. 317, 42 S.W.3d 397 (2001). In order to effectively waive counsel the parent must be "made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and that he has made his choice with his eyes open." *Bledsoe v. State,* 337 Ark. 403, 406, 989 S.W.2d 510, 512 (1999) (citing *Faretta v. California,* 422 U.S. 806 (1975)). The determination of whether there has been an intelligent waiver of the right to counsel depends on the particular facts and circumstances of each case, including the background, the experience, and the conduct of the accused. *Id.* Every reasonable presumption must be indulged against the waiver of a fundamental constitutional right to counsel. *Daniels v. State,* 322 Ark. 367, 372, 908 S.W.2d 638, 640 (1995).

Interestingly, in *Bearden*, our supreme court recognized the mother's statutory right to counsel in her termination proceeding, pointed out that the trial court failed to determine whether the due process right to counsel also attached to her particular case, and specifically declined to make its own determination regarding her due process right to counsel during the proceeding. However, the supreme court reversed this court and affirmed the trial court's ruling by determining that *if* the trial court had accepted the mother's waiver of her right to counsel, it would have erred because her request did not *satisfy constitutional standards for the waiver of counsel.* (Emphasis added.)

In the case at bar, we must determine if the appellants' waivers were both unequivocal and knowingly and intelligently offered. Here, Mrs. Battishill informed the court that she did not feel that her attorney had represented her "to the best of his ability," and then she told the court that she felt that she could represent herself. The trial court then began to inquire about the appellants' decisions to proceed pro se. As to Mrs. Battishill, the court made the following inquiry:

COURT:	. . . Miss Battishill, do you no longer want Mister Williams to represent you in these proceedings?
MS. BATTISHILL:	No, I don't.
COURT:	And why is that?
MS. BATTISHILL:	I don't feel he represented me to the best of his ability.
COURT:	I need something more than that.

* * *

MS. BATTISHILL:	I feel I can represent myself better.

* * *

COURT:	Do you understand that the Department of Human Services has now filed a petition seeking to terminate your parental rights?
MS. BATTISHILL:	Yes.

COURT: Okay. You want to represent yourself in this matter?

MS. BATTISHILL: Yes sir.

COURT: So you want to discharge Mister Williams as your lawyer?

MS. BATTISHILL: Yes sir.

COURT: And represent yourself?

MS. BATTISHILL: Yes sir.

COURT: Do you understand how serious this matter is?

MS. BATTISHILL: Yes sir.

* * *

COURT: . . . I think I heard you some comment to the effect that you wanted another attorney besides Mister Williams?

MS. BATTISHILL: Yes sir.

COURT: Which is it?

MS. BATTISHILL: I would like a different attorney.

* * *

COURT: Do you feel like there's such a conflict between you and Mister Williams that you can't continue with him being your attorney?

MS. BATTISHILL: Yes sir.

* * *

COURT: All right, Miss Battishill, I'm going to grant your request that Mister Williams be relieved as your attorney. I'll appoint another attorney to represent you. Miss Battishill, I'm going to appoint Grant DeProw . . . to represent you further in these proceedings. It goes without saying since I'm going to do that we'll have to continue this hearing until another date. . .

Ms. Battishill:	Okay, sir. Can I go ahead and represent myself then 'cause we'd like to go ahead and get this over with today.
Court:	You want to go ahead and proceed today?
Ms. Battishill:	Yes sir.
Court:	Without being represented by a lawyer?
Ms. Battishill:	Yes sir.

During the termination hearing the trial court also inquired about Mr. Battishill's desire to proceed pro se. In response to the trial court's inquiry, Mr. Battishill acknowledged that DHS was attempting to terminate his parental rights and that he wanted to represent himself. Additionally, when DHS called its first witness and Mr. Battishill objected, the trial court admonished him and told him (for the first time) that he would be held to the same standards as licensed counsel.

Based on the foregoing exchange, appellants first argue that Mrs. Battishill was equivocal in her desire to waive her right to counsel. Appellants place much emphasis on the fact that she was warned of the serious nature of the proceedings, was then offered substitute counsel, which she initially accepted, but ultimately declined.

We are satisfied that because Mrs. Battishill was asked if she wanted to proceed without counsel, coupled with her affirmative response, she was unequivocal in her waiver. Additionally, she was given the opportunity to meet with a different lawyer, but declined when she learned that the judge planned to continue the termination hearing until a meeting with her new counsel could be arranged. Accordingly, we believe that she, like Mr. Battishill, was unequivocal in her desire to waive her right to counsel.[2]

We now consider the appellants' arguments relating to the second prong of the constitutional standards for waiver of counsel. In order to establish a voluntary and intelligent waiver,

[2] Appellants concede that Mr. Battishill's waiver was unequivocal.

the trial judge must explain the desirability of having the assistance of an attorney during the trial and the drawbacks of not having an attorney. *Mayo v. State,* 336 Ark. 275, 984 S.W.2d 801 (1999). Here, the court asked Mrs. Battishill if she understood that DHS had filed a petition seeking to terminate her parental rights and if she understood the seriousness of the matter. To both questions, she responded affirmatively. However, Mrs. Battishill was not advised about the desirability of having the assistance of an attorney during the trial and the drawbacks of not having an attorney. Nor did the trial court warn Mr. Battishill about the advantages of having an attorney during the proceeding or, conversely, about the disadvantages of pro se representation.

It is our conclusion that in this case, as in the *Bearden* case, the trial court should have refused to grant appellants' request to proceed pro se. This conclusion is reinforced by the fact that our court in *Bearden v. Arkansas Department of Human Services,* 72 Ark. App. 184, 35 S.W.3d 360 (2000), *rev'd on other grounds,* 344 Ark. 317, 42 S.W.3d 397 (2001), after consideration of DHS's argument that "the statute does not authorize the parent to waive the assistance of counsel once counsel has been appointed," held that a parent does not have an absolute right to proceed without counsel in a proceeding to terminate his parental rights. The court found that the interest of the parent to proceed without counsel must be balanced against the best interest of the child, who faces the potential loss of the relationship with the natural parent.

Reversed.

GRIFFEN, J., agrees.

BAKER, J., concurs.

KAREN R. BAKER, Judge, concurring. I agree that appellants' fundamental rights of due process were denied; however, I write separately to address additional issues as they may occur on remand.

First, although it is not likely that preservation of the argument will be an issue on remand because appellants will have counsel, it should be noted that the youngest child, B.B., was never adjudicated dependent-neglected. Second, the evidence presented does not support the termination of parental rights as to C.B., Jr., and B.B. The allegations upon which termination of rights were predicated merely involved a delay in motor skills and painful dental-hygiene conditions.

Furthermore, although evidence supports the finding that A.B. is a special needs child requiring more than ordinary care, the fact that the parents may not be able to provide for the needs of a child requiring extraordinary care does not necessarily mean that they cannot raise their other two children. To address that issue, a determination of the limitations and interpretation of Section 9-27-341 (ix)(a)(4) of Arkansas Code Annotated (Repl. 2002) may be required. The section sets forth as one ground for the termination of parental rights that a "parent is found by a court of competent jurisdiction . . . to have had his parental rights involuntarily terminated as to a sibling of the child." The subsection is included among offenses significant enough to warrant termination of parental rights for parents having committed murder, voluntary manslaughter, felony battery, and other aggravated acts. Similarly, section 9-27-303(33)(6) relieves DHS from its obligation to provide reasonable efforts towards reunification where parental rights have been involuntarily terminated as to a child's sibling. Both of these references to siblings were added pursuant to Act 401 and approved by the general assembly on March 4, 1999.

During this same session, the definition of dependent-neglected was amended twice following the approval of Act 401. First, Act 1503, approved on April 4, 1999, added the reference to "a sibling" in the definition of a dependent-neglected juvenile. *See* Ark. Code Ann. § 9-27-303 (Repl. 2002). This same definition was then further amended and approved on April 16, 1999, where the reference to a sibling was deleted. Despite this deletion, the term sibling was included in the codification of the amendments.

Section 1-2-207 provides that when identical acts are enacted by the General Assembly during the same session, that the act signed last shall be deemed to have repealed the earlier enactment. However, when more than one act concerning the same subject matter is enacted during the same session, whether or not specially amending the same sections of the Arkansas Code or an uncodified act, all of the enactments shall be given effect except to the extent of irreconcilable conflicts in which case the conflicting provision of the last enactment shall prevail. The statutory construction of these sections will be necessary to address the issue dependency neglect regarding the two brothers in this case.

This statutory construction issue is even more critical because this case involves the termination of parental rights. When the issue is one involving the termination of parental rights, there is a heavy burden placed upon the party seeking to terminate the relationship. *Ullom v. Dep't of Human Servs.*, 340 Ark. 615, 12 S.W.3d 204 (2000). Termination of parental rights is an extreme remedy and in derogation of the natural rights of the parents. *Id.* Therefore, our adherence to strict compliance with our statutes is not merely a standard of review. *See Arkansas Dep't of Human Servs. v. Cox*, 349 Ark. 205, 82 S.W. 3d 806 (2002) (DHS's conduct deeply disturbing when agency took custody of child utterly without authority and outside the limited circumstances set out in our state statutes).

AMERICAN STANDARD TRAVELERS INDEMNITY COMPANY *v.* Eddie POST

CA 01-1333 77 S.W.3d 554

Court of Appeals of Arkansas
Division I
Opinion delivered June 19, 2002
[Petition for rehearing denied July 31, 2002.]

Ledbetter, Cogbill, Arnold & Harrison, LLP, by: *James A. Arnold, II*, for appellant.

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

TERRY CRABTREE, Judge. In this workers' compensation case, the Commission found that the appellee, Eddie Post, was entitled to a change of physician pursuant to Ark.

Code Ann. § 11-9-514(a)(3)(A)(iii) (Repl. 1996). On appeal, the appellant, American Standard Travelers Indemnity Company, asserts that the Commission's decision is not supported by substantial evidence as appellee did not satisfy the requirements of the statute allowing a change of physician. We affirm.

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

While working for Trane Company in March of 1996, appellee tore the rotator cuff in his left shoulder. His injury was accepted as compensable and benefits were paid to him. Initially, appellee was seen by Dr. Dudding, who referred appellee to an orthopedic surgeon, Dr. Heim. In April of 1996, Dr. Heim operated on appellee's shoulder. Dr. Heim performed a second surgery on appellee's shoulder in August of 1996. Dr. Heim last treated appellee in February of 2000. In a separate opinion, an Administrative Law Judge (ALJ) found that appellee was no longer entitled to continued medical treatment with Dr. Heim. The ALJ found that appellee should seek treatment for routine follow up with Dr. Keith Holder, who is associated with appellee's employer.

On March 30, 2001, the ALJ held a hearing wherein appellee petitioned for a change of physician from Dr. Holder to Dr. Paul Anderson, appellee's family doctor. The only evidence appellee presented was his own testimony. Appellee stated the following about Dr. Anderson:

> [He] has been my family doctor for twenty to twenty-five years. I've used him for everything from surgery on my leg to — I've had a bad problem with gout throughout my life and he's treated

> me for that. Basically everything, you know, everything a family doctor would do, and he's — you know, I've got all the confidence in the world in him because he's always done a great job for me.

Arkansas Code Annotated section 11-9-514(a)(3)(A)(iii) sets forth the following requirements for a claimant to obtain a change of physician:

> Where the employer does not have a contract with a managed care organization certified by the commission, the claimant employee, however, shall be allowed to change physicians by petitioning the commission one (1) time only for a change of physician, to a physician who must either be associated with any managed care entity certified by the commission or be the regular treating physician of the employee who maintains the employee's medical records and with whom the employee has a bona fide doctor-patient relationship demonstrated by a history of regular treatment prior to the onset of the compensable injury, but only if the primary care physician agrees to refer the employee to a physician associated with any managed care entity certified by the commission for any specialized treatment, including physical therapy, and only if such primary care physician agrees to comply with all the rules, terms, and conditions regarding services performed by any managed care entity certified by the commission.

In construing these requirements in subsection 514(a)(3)(A)(iii), we recognize that the basic rule of statutory construction to which all other interpretive guides must yield is to give effect to the intent of the legislature. *Kildow v. Baldwin Piano & Organ*, 333 Ark. 335, 969 S.W.2d 190 (1998). Arkansas Code Annotated section 11-9-704(c)(3) (Repl. 1996) states that we are to construe the workers' compensation statutes strictly. Strict construction requires that nothing be taken as intended that is not clearly expressed. *Edens v. Superior Marble & Glass*, 346 Ark. 487, 58 S.W.3d 369 (2001). The doctrine of strict construction is to use the plain meaning of the language employed. *Wheeler Const. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). Where the language of a statute is unambiguous, we determine

legislative intent from the ordinary meaning of the language used. *Leathers v. Cotton*, 332 Ark. 49, 52, 961 S.W.2d 32, 34 (1998). 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. *Id.* The statute should be construed so that no word is left void, superfluous, or insignificant; and meaning and effect must be given to every word in the statute if possible. *Locke v. Cook*, 245 Ark. 787, 434 S.W.2d 598 (1968).

We will not substitute our judgment for that of an administrative agency unless the decision of the agency is arbitrary, capricious, or characterized by an abuse of discretion. *Kildow, supra.* To reverse an agency's decision because it is arbitrary and capricious, it must lack a rational basis or rely on a finding of fact based on an erroneous view of the law. *Social Work Licensing Bd. v. Moncebaiz*, 332 Ark. 67, 71, 962 S.W.2d 797, 799 (1998). Although an agency's interpretation is highly persuasive, where the statute is not ambiguous, we will not interpret it to mean anything other than what it says. *Id.*

The language of Arkansas Code Annotated section 11-9-514(a)(3)(A)(iii) is plain and unambiguous. Appellee's testimony was sufficient to establish that Dr. Anderson was appellee's regular treating physician who maintained his medical records and with whom appellee had a bona fide doctor-patient relationship demonstrated by a history of regular treatment prior to the onset of appellee's rotator cuff tear. We recognize that appellee failed to present any proof that Dr. Anderson agreed to refer appellee to a physician "associated with any managed care entity certified by the commission for any specialized treatment, including physical therapy." Nor did appellee offer any evidence that Dr. Anderson agreed "to comply with all the rules, terms, and conditions regarding services performed by any managed care entity certified by the commission." However, the statute does not mandate that the physician agree to comply with these terms before the Commission can grant a claimant's petition to a change of physician. In this case, the Commission explicitly granted appellee's petition based upon the condition that Dr. Anderson later agree to comply

with the terms of the statute. We find this to be sufficient to meet the requirements of the statute.

Affirmed.

STROUD, C.J., and BIRD, J., agree.

BELZ-BURROWS, L.P. *v.*
CAMERON CONSTRUCTION COMPANY

CA 01-1232 78 S.W.3d 126

Court of Appeals of Arkansas
Division IV
Opinion delivered June 19, 2002

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

Henry, Walden & Halsey, by: *Troy Henry*; and *Rieves, Rubens & Mayton*, by: *Elton Rieves III*, for appellee.

ANDREE LAYTON ROAF, Judge. Appellant Belz-Burrows (Belz) engaged appellee Cameron Construction Company (Cameron) as general contractor to build a building and parking lot for Belz's tenant, Lowe's Home Center. The project was substantially completed and occupied by Lowe's in 1994. In 1996, Belz sued Cameron, alleging that the parking lot had been constructed in an unworkmanlike manner. Cameron answered that the problems with the lot were due to misuse by Lowe's. The jury found in favor of Cameron, and Belz appeals. Belz argues that the trial court erred in the admission of certain evidence, in the exclusion of other evidence, and in instructing the jury. We affirm, and our affirmance makes it unnecessary for us to address issues raised by Cameron on cross-appeal.

Cameron began construction in June of 1993, with an expected completion date of December 15, 1993. Because of delays, the parking lot was only partially paved by January of 1994. Wet ground had become a problem to the extent that Cameron's paving subcontractor, Atlas Asphalt, initially refused to complete the paving. Belz, who acknowledged that weather conditions were not optimum for paving, nevertheless instructed Atlas to complete the job and agreed to hold Atlas harmless. Atlas then paved the remaining surface area of the lot, even though the paving was done over wet ground.

Because the paving was completed under adverse conditions, Cameron expected that there would be problems with the parking lot, and it extended its contractual warranty to July 1, 1996. Pursuant thereto, Cameron made various repairs to the lot, but problems such as cracking, distress, and potholes continued to arise. Belz eventually performed extensive renovation of the lot at a cost of $170,000, and in 1996, it sued Cameron to recover that amount, asserting claims for breach of contract, breach of warranty, and negligence. Cameron denied that it was at fault and pointed to Lowe's misuse of the lot as the cause of Belz's damages. In connection therewith, it filed a third-party complaint against

Lowe's, making the same allegation. However, that complaint was nonsuited two weeks before trial, and the case went to trial in May of 2001, with Belz and Cameron as the only parties.

Prior to trial, Belz filed a motion in limine to prohibit Cameron from introducing evidence that Lowe's was at fault, arguing that Arkansas law does not permit fault to be apportioned to a non-party. The trial judge denied the motion, and as a result, Cameron introduced documents, photographs, and testimonial evidence showing that Lowe's had driven large trucks, used heavy-duty equipment, and stored heavy items in areas of the parking lot that were designed for light duty. As its first issue on appeal, Belz claims that the trial court erred in denying the motion in limine.

■ The decision to admit or exclude evidence is a matter within the court's discretion. *Madden v. Aldrich*, 346 Ark. 405, 58 S.W.3d 342 (2001). We will not reverse a decision admitting evidence absent an abuse of discretion. *See Wal-Mart Stores, Inc. v. Londagin*, 344 Ark. 26, 37 S.W.3d 620 (2001).

■ ■ Cameron is correct that a jury should not be permitted to assign a percentage of fault to a person who is not a party to the suit. *See generally Booth v. United States Indus.*, 583 F. Supp. 1561 (W.D. Ark. 1984). This rule derives from Arkansas's comparative-fault statute, which provides that a plaintiff's fault may be compared with the fault chargeable to "the party or parties *from whom [he] seeks to recover damages*." (Emphasis added.) Ark. Code Ann. § 16-64-122(a) (Supp. 2001). However, the jury in this case, in rendering its general verdict, did not assign a percentage of fault to Lowe's, nor compare Belz's (the plaintiff's) fault with Lowe's. The comparative-fault statute was therefore not implicated in the manner that Belz suggests. Instead, the jury considered a defense advanced by Cameron that it should be absolved of liability because a third person was the cause of the plaintiff's damages. Arkansas law expressly contemplates that a defendant may claim that a third person, who is not a party to the action, is responsible for the plaintiff's damages. The only proviso is that, before the jury can absolve the defendant of liability, it must find that the third person was the sole proximate cause of the plaintiff's damages. *See, e.g., Butler Mfg. Co. v. Hughes*, 292 Ark.

198, 729 S.W.2d 142 (1987); *Hill Constr. Co. v. Bragg*, 291 Ark. 382, 725 S.W.2d 538 (1987); *Beevers v. Miller*, 242 Ark. 541, 414 S.W.2d 603 (1967).

The jury in this case was instructed on Cameron's defense by virtue of AMI Civ. 4th 501 and 502. AMI 501 provides that, if two or more causes work together to produce damage, then the jury may find that each of the causes was a proximate cause. AMI 502 instructs that, when the acts or omissions of two or more persons work together as proximate causes of damages to another, each of those persons may be found liable, regardless of the relative degree of fault between them; further, if the jury finds that the negligence or other wrongdoing of the defendant proximately caused the plaintiff's damages, it is not a defense that some other person may have been to blame. These two instructions encapsulate the defense recognized in *Butler, Bragg, and Miller, supra.* Further, the Notes to AMI 502 recognize that these instructions should be used when there is evidence that a third person, not a party to the suit, may have been a proximate cause of the plaintiff's damages or may also have been at fault.[1] In light of these facts, there was no impermissible allocation of fault to a non-party in this case, but rather the assertion of a defense allowed by AMI 501 and 502.

Belz argues further that Cameron cannot rely on this defense because it requires that the third party's conduct be the sole proximate cause of the plaintiff's damages, and according to Belz, there is evidence that Cameron was at least partly to blame. Our review of the evidence does not demonstrate that Cameron's fault was so well established that it should have been prohibited from relying on its defense. While Belz points to the fact that Cameron's work on the parking lot could be deemed faulty in some respects, the evidence also shows that Cameron performed numerous repairs on the lot, from which the fact-finder could infer that Cameron had met its responsibility to Belz. Belz also

[1] The jury was also instructed with AMI 503, which concerns intervening causes, and provides that the defendant has the burden of proving that, following any act or omission on his part, an event intervened that in itself caused damage completely independent of his conduct.

points out that Cameron admitted to being responsible for at least $5,332.60 of Belz's damages. It is true that Mike Cameron initially determined that he should bear that cost of certain repairs. However, at trial he unequivocally stated that he had no responsibility whatsoever for Belz's damages. Finally, Belz contends that Cameron's president, Mike Cameron, admitted that Lowe's was not solely at fault when he answered "that's correct" to the following question posed by Belz's attorney: "Throughout this trial your attorneys have attempted to claim that *part of the blame* in regard to this project is with Lowe's, is that correct?" (Emphasis added.) We decline to attribute great significance to Cameron's simple response to this question as fashioned by opposing counsel because it is not clear that, by so answering, Cameron intended to imply that his company was partly at fault. This is evidenced by Cameron's other testimony, mentioned previously, that he had no responsibility whatsoever for Belz's damages.

For its second issue on appeal, Belz contends that the trial court erred in excluding evidence that Cameron nonsuited its third-party complaint against Lowe's. The nonsuit was taken on April 23, 2001, for reasons not revealed in the record. During trial, Belz sought permission from the court to introduce evidence of the nonsuit to show that, if Cameron truly believed that Lowe's was to blame for the parking lot damage, it would not have dismissed Lowe's from the action. Cameron objected on the grounds that the nonsuit was irrelevant, and the trial judge sustained the objection.

It is generally recognized that a withdrawn pleading may be admitted into evidence for impeachment purposes and may constitute an admission by a party. *See* 4 *Wigmore on Evidence* § 1067 (1973); 32 C.J.S. *Evidence* § 403 (1996); 29A AM. JUR.2D Evidence § 780 (2d ed. 1994). Our supreme court recently applied this rule in *Dodson v. Allstate Insurance Co.*, 345 Ark. 430, 47 S.W.3d 866 (2001), holding that Allstate's withdrawn counterclaim could be used to impeach a position that Allstate took at trial. However, there is a significant difference between the admissibility of a withdrawn pleading and the admissibility of the fact that a nonsuit was taken. The admissibility of a withdrawn pleading rests on the fact that it is considered an admission and is

inconsistent with the present position of the party who filed it. When a party states a fact in a pleading, he is averring that it is true; therefore, if at trial he takes a position contrary to the one taken in the pleading, a clear inconsistency is revealed. The same reasoning does not necessarily apply to the taking of a nonsuit. Unlike a pleading, a nonsuit is not defined by its content; it does not necessarily express a statement or assert a position. A pleader who takes a nonsuit does not necessarily admit that his suit has no basis; rather, a nonsuit is often taken for other reasons, such as settlement or trial strategy. In light of that fact, we are reluctant to accord a nonsuit the same impeachment value as a withdrawn pleading. We cannot say, therefore, that the trial court abused its discretion in excluding the nonsuit from evidence.

Belz argues next that it should have been allowed to introduce into evidence a copy of the third-party complaint filed by Cameron against Lowe's. The issue arose during trial when Cameron questioned Belz's witness, Dennis Zolper, about whether Belz had sued Lowe's:

CAMERON'S COUNSEL:	Well, Belz-Burrow didn't bring [Lowe's] in, did they?
WITNESS ZOLPER:	Well, they're already in here, if you want to get into that.
COUNSEL:	Belz-Burrow didn't file a claim against them, did they, Mr. Zolper?
ZOLPER:	We did not file suit against them, no sir. We didn't have to.

At this point in the questioning, Belz asked to admit evidence that Cameron had sued Lowe's. The judge agreed with Belz that Cameron had "opened the door" to this issue, but he would not allow Cameron's third-party complaint to be admitted into evidence because it would "make a further complication."

■ ■ On appeal, Belz contends that Cameron's complaint against Lowe's was relevant to explain that Belz did not sue Lowe's because Lowe's had already been sued. We find no reversible error on this point. In *Jackson v. Buchman*, 338 Ark. 467, 996 S.W.2d

30 (1999), our supreme court affirmed the exclusion of certain evidence by the trial court, stating:

> [W]e have consistently held that trial courts are accorded wide discretion is evidentiary rulings, and we will not reverse such rulings absent a manifest abuse of discretion. Nor will we reverse a trial court's ruling on evidentiary matters absent a showing of prejudice. Moreover, the balancing of probative value against prejudice, pursuant to A.R.E. Rule 403, is a matter left to the sound discretion of the trial judge, and that ruling will not be reversed absent a manifest abuse of discretion. Similarly, a trial court has wide latitude to impose reasonable limits on cross-examination based upon concerns about confusion of the issues or interrogation that is only marginally relevant.

Id. at 471-72, 996 S.W.2d at 33 (citations omitted).

The supreme court, in addition to applying the above-quoted standards of review, also cited Ark. R. Evid. 103(a), which provides that no error may be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. In the case before us, we hold likewise that Cameron's third-party complaint against Lowe's was of such marginal relevance that we can neither say that a substantial right of Belz was affected by its exclusion, nor that prejudice occurred that would merit reversal. While the evidence would have told the jury that Cameron had once sued Lowe's in this action, it would serve only to explain a minor point, *i.e.*, why Belz had not sued Lowe's. The question of why the parties chose to file or not file suit against Lowe's is of limited importance to the actual issues at trial. Moreover, we observe that, during opening statement, Belz's attorney told the jury that Cameron had sued Lowe's in this case, then chose to dismiss Lowe's. This statement, while not evidence, serves to further remove the prejudice from the exclusion of the complaint. *See generally Urquhart v. State*, 273 Ark. 486, 621 S.W.2d 218 (1981) (defendant in rape case not prejudiced by being required to reveal his scar to jury where, in opening statement, his counsel told jury that consent, not identification, would be the issue at trial). In light of the foregoing, we hold that no reversible error occurred on this point.

We turn now to the issues involving jury instructions. Belz argues first that the trial court erred in failing to give the following proffered instruction:

> When a contract states that "time is of the essence," then the contract is required to be performed at a specific time. Any delay in performance is a breach of contract.

A party is entitled to a jury instruction when it is a correct statement of the law and there is some basis in the evidence to support the giving of the instruction. *Coca-Cola Bottling Co. v. Priddy*, 328 Ark. 666, 945 S.W.2d 355 (1997). We will not reverse a trial court's failure to give a proffered instruction in the absence of an abuse of discretion. *Id.*

Non-AMI instructions, such as the one quoted above, should be given only when the trial judge finds that AMI does not accurately state the law or that AMI does not contain a necessary instruction on the issue. *Center v. Johnson*, 295 Ark. 522, 750 S.W.2d 396 (1988). Instructions on matters on which there is no evidence or stating only abstract legal propositions should not be given. *Parker v. Holder*, 315 Ark. 307, 867 S.W.2d 436 (1993).

The jury in this case was provided with a copy of the contract, and the contract itself stated that time was of the essence. Further, the jury was instructed, using an instruction based on AMI Civ. 4th 3027, that a party's failure to do what a contract requires of it is a breach. Therefore, the jury was told that the parties agreed that time was of the essence and that a party's failure to abide by the agreement would be considered a breach. Under these circumstances, the failure to give Belz's requested instruction did not result in prejudice to Belz and did not amount to an abuse of discretion by the trial court.

Next, Belz argues that the court erred in failing to instruct the jury that, "when the acts of two or more persons combine to produce harm, any of the actors is liable to the injured person for the entire amount." The trial judge refused the give the instruction on the ground that its subject matter was adequately covered by AMI Civ. 4th 502. We agree with the trial

court. AMI 502, as stated earlier, instructs a jury that, when the negligent acts of two or more persons work together as a proximate cause of damage to another, each of those persons may be found liable. The language of AMI 502 is so similar to the proffered instruction that we cannot see how Belz was prejudiced by the trial court's refusal to give it.

Finally, Belz objected below to the trial court's decision to instruct the jury on mitigation of damages. The court told the jury that, if it assessed damages in favor of Belz, then it should consider that Belz must use ordinary care to minimize, prevent, and avoid further damages. Belz argues that the evidence did not support the giving of this instruction. We find no error.

We note first that mitigation is a consideration in the computation of damages, not in determining the defendant's liability. *Harris Constr. Co. v. Powers*, 262 Ark. 96, 554 S.W.2d 332 (1977). Because the jury awarded zero damages, it technically found that there were no damages to mitigate, and thus, Belz was not prejudiced by the instruction. In any event, Cameron's defense in this case was based, in part, on the idea that Belz should have exercised control over its lessee, Lowe's, to avoid the parking lot damage. Such evidence supports the giving of the mitigation instruction.

Based on the foregoing, we affirm the jury's verdict in this case, and the issues on cross-appeal are rendered moot.

Affirmed on direct appeal; cross-appeal moot.

HART and VAUGHT, JJ., agree.

Angie Renee HICKMAN *v.* Wayne CULBERSON

CA 01-581 78 S.W.3d 738

Court of Appeals of Arkansas
Divisions III, IV and I
Opinion delivered June 26, 2002

Richard N. Dodson, for appellant.

Kirk D. Johnson, for appellee.

JOHN E. JENNINGS, Judge. This is a child-custody case in the context of an earlier paternity suit. Angela Renee Hickman and Wayne Culberson lived together for five years during which time they had a daughter, Chelsea. The parties separated, and Culberson married the woman he had been seeing during his relationship with Hickman. Hickman filed suit to establish paternity so that she could receive child support from Culberson. Following DNA testing confirming that he was Chelsea's father, Culberson counterclaimed for custody of the child. The chancellor awarded custody to Culberson. Appellant argues that the chancellor clearly erred because the custody award is not in Chelsea's best interest. We disagree and affirm.

While we review chancery cases de novo, we reverse only if the chancellor's findings are clearly against the preponderance of the evidence or clearly erroneous. *Fitzpatrick v. Fitzpatrick,* 29 Ark. App. 38, 776 S.W.2d 836 (1989). A finding is clearly erroneous when the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Skokos v. Skokos,* 344 Ark. App. 420, 40 S.W.3d 768 (2001). We have often recognized that there is no case in which greater deference should be given to the chancellor's position, ability, and opportunity to see and evaluate the evidence than those involving the welfare of minor children. *Calhoun v. Calhoun,* 3 Ark. App. 270, 625 S.W.2d 545 (1981).

The chancellor found that appellant had financial problems as she had written several hot checks. She had lived with a convicted felon with a violent past and was aware that he had spanked her daughter. Appellant had undergone an abortion while living with this boyfriend. She had moved six or seven times in two years and was fired for unexplained reasons from her previous employment. Appellant took Prozac for her nerves and lied to the court about pulling a knife and threatening to commit suicide. She also gave inconsistent statements about bruises on the child's body. The chancellor noted that, although Dr. Greta Parks felt that Chelsea had been abused, her report was inconclusive, and the abuse was otherwise unsubstantiated.

The chancellor also found that appellee had married the woman who broke up the parties' relationship. The chancellor noted that, while appellee's wife had a good relationship with the child, she had a confrontational relationship with appellant. Appellee's new wife had taken an overdose of pills merely to gain his attention. Appellee did not pay support until a blood test confirmed his paternity, and he did not pay any support while the child was not living with him. Appellee had given up his rights to another child. On the other hand, appellee had lived in the same location for five years and had worked consistently. He appeared to have a stable marriage and attended church regularly.

In awarding custody to the father, the chancellor conceded that he had arrived at his decision with some difficulty. The court was particularly disturbed by appellant's poor choice in men and the fact that she had lied under oath. He ultimately awarded custody to appellee because he could not be certain that appellant would not place Chelsea in a harmful situation. The chancellor found that appellee had matured and that he had a stable marriage, steady employment, and ample support from his family in caring for the child.

Pursuant to Ark. Code Ann. § 9-10-113(a) (Repl. 1998), an illegitimate child shall be in the custody of its mother unless a court of competent jurisdiction enters an order placing the child in the custody of another party. Section 9-10-113(b) and (c) provide that a biological father, who has established pater-

nity, may petition the proper court for custody of his child wherein the child resides; however, before the biological father can obtain custody, he must show all of the following: (1) he is a fit parent to raise the child; (2) he has assumed his responsibilities toward the child by providing care, supervision, protection, and financial support for the child; and (3) it is in the best interest of the child to award custody to the biological father.

Appellant argues that it is not in Chelsea's best interest for the court to vest custody in appellee because she was the child's primary caregiver while appellee was pursuing another woman. She contends that the chancellor criticized her choice of men, including appellee, and yet awarded him custody. Appellant maintains that appellee had exercised little visitation and did not get involved with Chelsea until just before they were scheduled to go to court. Appellant points out that the allegations of child abuse were unsubstantiated. Finally, she reminds us that appellee admitted that she was a good mother.

In a child custody hearing the court considers what is in the best interest of the child. Ark. Code Ann. § 9-13-101 (Supp. 2001). The primary consideration in awarding the custody of a child is the child's welfare and best interest, and other considerations are secondary. *Eaton v. Dixon,* 69 Ark. App. 9, 9 S.W.3d 535 (2000). It seems clear from the chancellor's detailed letter opinion that he considered each party's past and present circumstances in determining what would be in Chelsea's best interest. Because the chancellor appears to have taken into account all of the points made by appellant, we cannot say that he clearly erred in concluding that custody should be awarded to appellee.

Appellant also argues that appellee had not assumed his financial obligations toward Chelsea until paternity was proven even though she and appellee were living together at the time the child was conceived. This fact was likewise duly noted in the chancellor's letter opinion. Appellee's eventual acceptance of his financial responsibility toward the child could have contributed to the chancellor's conclusion that he had matured.

As the dissent accurately notes, the chancellor did not make specific findings regarding the statutory requirements.

Appellant could have asked for such findings under Ark. R. Civ. P. 52. Her failure to do so constitutes a waiver of the issue. *Smith v. Quality Ford, Inc.*, 324 Ark. 272, 920 S.W.2d 497 (1996).

The dissent also suggests that we have ignored *Norwood v. Robinson*, 315 Ark. 255, 866 S.W.2d 398 (1993). To a certain extent this is true, because the *Norwood* issue was not raised in the trial court, nor by the appellant in her briefs in this appeal. Even so, we have no reason to conclude that the trial court was either unaware of, or refused to follow, the court's decision in *Norwood*.

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

NEAL, J., concurs.

HART, J., dissents.

OLLY NEAL, Judge, concurring. I concur that the chancellor did not commit reversible error in finding that it was in the best interest of the child to award custody to appellee. However, I write separately to express my concerns about appellee's ability to come before the court, absent him assuming financial responsibility for the child, with the same status as appellant in a petition for custody.

The United States Supreme Court has held that it is a violation of the equal protection clause when a state denies an illegitimate child the same rights as those afforded a legitimate child. *See Gomez v. Perez*, 409 U. S. 535 (1973); *see also* R.H. Helmholz, *Support Orders, Church Courts, and the Rules of Filius Nullius: A Reassessment of the Common Law*, 63 VA. L. REV. 431, 431 (1977). Our law indicates that the obligation to support an illegitimate child arises only upon a finding of paternity. *See Paul M. v. Teresa M.*, 36 Ark. App. 116, 818 S.W.2d 594 (1991) (once paternity is established, the law with regard to child support in a divorce case is applicable). However, when children are born into a marriage and the parents later separate or divorce, our law states that a parent has a legal obligation to support a minor child regardless of the existence of a support order. *See Ford v. Ford*, 347 Ark. 485, 65 S.W.3d 432 (2002); *see also Fonken v. Fonken*, 334 Ark. 637, 976

S.W.2d 952 (1998). This duty to support a child in the absence of a support order is both legal and moral. *See Fonken, supra.*

In custody cases arising out of a divorce, the parents share the same status; each is viewed as having equally shared in the care and support of their children. Arkansas Code Annotated section 9-10-113(b) and (c) provides that a biological father who has established paternity may petition the proper court for custody of his child and that the court may award him custody upon a finding that (1) he is a fit parent to raise the child; (2) he has assumed his responsibilities toward the child by providing care, supervision, protection, and financial support for the child; and (3) it is in the best interest of the child to award custody to the biological father. I interpret this section to mean that in order for the biological father to have the same status as the mother in a petition for custody, he must have provided some form of support prior to his petition. The chancellor found that appellee began paying support after the paternity determination and that he failed to support the child when she was not living with him. I believe that appellee does not share appellant's same status in seeking custody because he failed to support the child prior to the establishment of paternity.

If equal protection truly requires that we treat illegitimate and legitimate children the same, the statute should read so as to require a showing by the biological father that, prior to his petition for custody, he has assumed his responsibilities toward the child by providing care and financial support.

I also note that this case is distinguishable from *Norwood v. Robinson*, 315 Ark. 255, 866 S.W.2d 398 (1993). In *Norwood,* a father petitioned for custody of his child after a paternity order was issued against him; thus, our supreme court held that, in order to obtain custody, he was required to show a material change in circumstances. *See id.* Here, appellant first filed a complaint to establish paternity. Appellee asserted that he was not the father of appellant's child and a paternity test was ordered. When the paternity test indicated that appellee was indeed the father, he acknowledged paternity and filed a counterclaim for custody. Hence, *Norwood* is not applicable because appellee's petition was filed prior to the issuance of a paternity order.

JOSEPHINE LINKER HART, Judge, dissenting. Arkansas Code Annotated Section 9-10-113 (Repl. 2002) provides as follows:

> (a) When a child is born to an unmarried woman, legal custody of that child shall be in the woman giving birth to the child until the child reaches the age of eighteen (18) years unless a court of competent jurisdiction enters an order placing the child in the custody of another party.
>
> (b) A biological father, provided he has established paternity in a court of competent jurisdiction, may petition the chancery court, or other court of competent jurisdiction, wherein the child resides, for custody of the child.
>
> (c) The court may award custody to the biological father upon a showing that:
>
> (1) He is a fit parent to raise the child;
>
> (2) He has assumed his responsibilities toward the child by providing care, supervision, protection, and financial support for the child; and
>
> (3) It is in the best interest of the child to award custody to the biological father.

The clear wording of this statute places the custody of a child born to an unmarried woman in the mother of the child. Further, the statute unequivocally states that before the court may remove custody from the mother and place custody in the child's biological father, the father must fulfill the conditions set forth in the statute.

I note that the chancellor failed to make sufficient findings regarding the statutory requirements for an award of custody to appellee. However, the chancellor did make one finding that was pertinent to the statutory requirement. He found that appellee failed to pay support for the child until after the blood test confirmed paternity and failed to pay support when the child was not living with him. In my view, this is a finding that appellee failed to assume his responsibility toward the child by providing care, supervision, protection, and financial support as required by the statute.

Not only did the court and the majority fail to address the mandated statutory requirements, but also they failed to follow the precedent set out in *Norwood v. Robinson*, 315 Ark. 255, 866 S.W.2d 389 (1993). In *Norwood*, custody is presumed to be in the mother unless the biological father establishes a material change in circumstances and satisfies the statutory criteria for a change in custody. What we have done is take a child away from its mother despite a finding by the court that appellee failed to perform the parental duty of support as mandated by the statute and failed to show a change of circumstances as required by *Norwood*. Based on the finding that appellee failed to support the child and the lack of other findings by the chancellor, I must conclude that the chancellor's decision to award custody to appellee was clearly erroneous.

Anthony ROBERTS *v.* STATE of Arkansas

CA 01-1406 78 S.W.3d 743

Court of Appeals of Arkansas
Division IV
Opinion delivered June 26, 2002

William R. Simpson, Jr., Public Defender, by: *Stacy D. Fletcher*, Deputy Public Defender, for appellant.

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

JOHN E. JENNINGS, Judge. Anthony Roberts was a seventh-grade student at Poplar Street Middle School. In vocal music class his teacher, Ms. Cortney Meador, examined his notebook and found a page entitled "Hit List (To Shoot List)." Under the caption were nineteen names of fellow students.

The State subsequently filed a petition in Pulaski County Circuit Court seeking to have appellant adjudged delinquent on the grounds that he had committed the offense of terroristic

threatening in the first degree in violation of Ark. Code Ann. § 5-13-301 (Repl. 1997), a class D felony. After a hearing the circuit court found that he had committed the offense alleged and adjudicated him delinquent. He was placed on probation for nine months and ordered to perform forty hours of community service.

The only issue on appeal is whether the evidence is sufficient to support the court's verdict. We agree with the appellant that it is not and reverse.

While a delinquency adjudication is not a criminal conviction, it is based upon an allegation by the State that the juvenile has committed a certain crime. *Vanesch v. State*, 70 Ark. App. 277, 16 S.W.3d 306 (2000). The burden of proof in the trial court is beyond a reasonable doubt, and our standard of review is the same as it would be in a criminal case, i.e., whether the court's verdict is supported by substantial evidence. *McGill v. State*, 60 Ark. App. 246, 962 S.W.2d 382 (1998). Whether the trial court's decision is supported by substantial evidence is a question of law. *State v. Stephenson*, 330 Ark. 594, 955 S.W.2d 518 (1997).

Two witnesses testified at the adjudication hearing, Ms. Cortney Meador and the school resource officer, James Yeilding. Officer Yeilding testified that he saw the "hit list" and that Anthony was a fairly new student at the school.

Ms. Meador testified that on the day in question the children were doing a vocabulary lesson. She would write vocabulary words on the blackboard, and the students would copy them into their notebooks. She testified that she walked around the room to assess that the children were doing their jobs. She testified that when she came to Anthony's desk:

> He was writing on a page and had flipped back to another page where he was writing a note to a female, which had a female's name on it. And I asked him if he had done any work and he said—just kind of looked at me and didn't really say anything.

The questioning then proceeded:

Q. And you believe that when he saw you coming that he flipped the page?

A. Yeah, yeah.

Q. Okay. So what did you do next?

A. I just—I said, "Let me see your notebook." And he said, you know, "I didn't do anything." And I said, "Okay, well, let me see your notebook."

Q. Okay. Now, is this a notebook that you would have taken up anyway at the end of the lesson to grade?

A. I always pick them up and look at them. Yeah, during—

Q. To grade the vocabulary?

A. Yeah. Just to look at them to make sure they are doing participation so I give them participation points for doing it.

Q. Okay. And what did you discover in his notebook?

A. The page that he had written on, maybe two words, something "Dear" whatever to a girl and the other page had a "Hit List, To Shoot List," on there.

Q. What exactly did it say?

A. It said—I believe it said "Hit List, To Shoot List," and it had several students listed from Poplar Street Middle School.

Q. Did you recognize some students' names?

A. I remember one in particular.

Then, on cross:

Q. Okay. You say you take these notebooks up, but do you look completely throughout these notebooks or you just generally check the pages that they got their vocabulary words on?

A. Generally, wherever they are writing that's where I look.

Q. So when he flipped back on the page that he was writing on at that point, that was the page that you looked—that is what you normally would be looking at?

A. Yeah. On the page —

Q. Okay.

A. —that he was writing on, yeah.

Q. Okay.

Finally, on redirect:

Q. Now, he was supposed to be doing the vocabulary—

A. Yeah.

Q. —though, right?

A. Uh-huh.

Q. And the front page that you saw, when you saw, clearly wasn't vocabulary?

A. Right.

Q. And so it's possible the next page was vocabulary?

A. Well, I was thinking he was doing something that was very attentive because the other one was full up with a lot of stuff on there so I thought maybe he actually is doing his vocab.

Q. Okay. And periodically do you take their whole folder—

A. Yes I sure do.

Q. —and review it for grades at the end of the semester and stuff?

A. Uh-huh, yes.

Q. Okay. Thank you.

The applicable statute, Ark. Code Ann. § 5-13-301 (Repl. 1997), provides in pertinent part:

(a)(1) A person commits the offense of terroristic threatening in the first degree if:

(A) With the purpose of terrorizing another person, he threatens to cause death or serious physical injury or substantial property damage to another person;

(2) Terroristic threatening in the first degree is a Class D felony.

At trial appellant relied on *Knight v. State*, 25 Ark. App. 353, 758 S.W.2d 12 (1988), and the State relied on *Trammell v. State*, 70 Ark. App. 210, 16 S.W.3d 564 (2000). While *Trammell* bears some facial similarity to the case at bar, appellant is entirely correct that it has no application here because we held that Trammell had waived his argument as to the sufficiency of the evidence and therefore did not reach that issue.

We also agree with the appellant that *Knight* is controlling. While it is clear that the statute does not require that the threat be communicated directly to the person threatened, the gravamen of the offense is communication, not utterance. *Knight* at 356. We held in *Knight* that our statute does not impose criminal liability for threats made in reckless disregard of the risk of causing terror.

The question before us is whether the evidence in the case at bar will force or compel the mind to pass beyond speculation and conjecture to find that this appellant had the "purpose of terrorizing another." We conclude that the evidence is insufficient.

Reversed and dismissed.

ROBBINS and CRABTREE, JJ., agree.

HELENA/WEST HELENA SCHOOLS and
Arkansas School Boards Association *v.* Regina HISLIP

CA 02-013 79 S.W.3d 404

Court of Appeals of Arkansas
Division III
Opinion delivered June 26, 2002

Roberts, Roberts & Russell, P.A., by: *Michael Lee Roberts* and *Mary-Marsha Porter*, for appellants.

Philip M. Wilson, for appellee.

JOHN B. ROBBINS, Judge. Appellee Regina Hislip sustained a compensable neck injury while working for appellant Helena/West Helena Schools on October 24, 1998. Dr. Gregory Ricca subsequently performed a fusion surgery, which was unsuccessful. He recommended a second fusion surgery, but benefits for the second surgery were controverted by the appellant based on its contention that Mrs. Hislip's continued smoking constituted an independent intervening cause, which prolonged her need for treatment. The Workers' Compensation Commission agreed and denied Mrs. Hislip's claim for additional medical treatment, and Mrs. Hislip appealed.

In *Hislip v. Helena/West Helena Schools*, 74 Ark. App. 395, 48 S.W.3d 566 (2001), we reversed the decision of the Commission. In remanding the case, we announced:

> The medical proof relied on by the Commission supports a finding that Mrs. Hislip's smoking triggered the need for the second surgery. However, it does not support the more specific finding that her smoking, after her doctor advised her to stop, triggered the need for the second surgery. In fact, the Commission acknowledged that Dr. Ricca could not distinguish between the effect of post-operative and pre-operative smoking on the failed fusion. Dr. Ricca's testimony indicated that he could not determine whether the pre-accident or post-accident smoking was the major cause of the failure. Consequently, the Commission's determination that the need for a second surgery was caused by an independent intervening cause is not supported by substantial evidence.

Id. at 400, 48 S.W.3d at 569.

Pursuant to our remand, the Commission issued a decision awarding additional treatment related to the compensable injury, including all treatment provided by Dr. Ricca. Helena/West Helena Schools now appeals from that decision, arguing that the Commission failed to make specific findings of fact to support the award, and that the decision is not supported by substantial evidence. We affirm.

The appellant asserts in its argument that the second opinion of the Commission is "conclusory, contrary to the evidence presented, and not based on satisfactory, sufficient findings of fact." The appellant submits that substantial evidence supports the Commission's finding in its first opinion that Mrs. Hislip's smoking was unreasonable under the circumstances, and constituted an independent intervening cause that prolonged her need for treatment and thus absolved appellant from further liability.

We hold that the issue being raised on appeal is barred by the law-of-the-case doctrine. The law-of-the-case doctrine provides that on second appeal the decision of the first appeal becomes law of the case, and is conclusive of every question of law or fact decided in the former appeal, and also of those that might have been, but were not presented. *Slaton v. Slaton*, 336 Ark. 211, 983 S.W.2d 951 (1999). In the original appeal, we reversed the Commission's finding that Mrs. Hislip's continued smoking was an independent intervening cause. The appellant then filed a petition for rehearing in this court, and a petition for review in the supreme court, both of which were denied. On remand, the Commission's duty was to issue an order in compliance with our opinion reversing its prior decision, and this the Commission did. Now, in this second appeal, the appellant raises an issue that was decided in the first appeal.

In its reply brief, appellant argues that the Commission's decision should be reversed because it fails to address whether the second surgery constitutes reasonably necessary treatment pursuant to Ark. Code Ann. § 11-9-508(a) (Repl. 2002). However, the posture of this case made it unnecessary for the Commission to make such a finding, since appellant agreed in the first appeal with the Commission's conclusion that the first surgery failed and that an additional surgery was necessary to treat Mrs. Hislip's back condition. More importantly, we do not consider arguments raised for the first time in a reply brief because the appellee would have no opportunity to rebut the argument. *See Schueck Steel, Inc. v. McCarthy Bros. Co.*, 289 Ark. 436, 711 S.W.2d 820 (1986). Because appellant first raised this argument in its reply brief, it is not properly before this court.

In her brief, Mrs. Hislip asserts that the same arguments presented in this appeal were presented in the previous appeal, and that the additional delay resulting from appellant's behavior should not be tolerated. She submits that the appellant should be sanctioned for its frivolous attempt to appeal a case that has already been decided. We agree that appellant has exhibited a clear reluctance to comply with our prior mandate, and that its appeal appears to be frivolous. Accordingly, we feel obliged to invoke Rule 11 of the Arkansas Rules of Appellate Procedure—Civil, and in doing so, order appellant and its counsel to show cause why sanctions should not be imposed against them. *See Jones v. Jones*, 328 Ark. 684, 944 S.W.2d 121 (1997).

The decision of the Commission is affirmed. Appellant and counsel's written response(s) shall be filed with the clerk of this court within twenty-one days of the date of this opinion.

PITTMAN and BAKER, JJ., agree.

Lovell JOHNSON, II *v.* ARKANSAS DEPARTMENT OF HUMAN SERVICES, *et al.*

CA 01-1093 82 S.W.3d 183

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered June 26, 2002

Charles R. Hoskyn, for appellant.

Dana McClain, for appellee.

JOHN B. ROBBINS, Judge. Appellant Lovell Johnson II appeals the termination of his parental rights as to three young boys, Marquis, Lovell III, and Ladarius, as entered by the Pulaski County Circuit Court on June 29, 2001. The boys were approximately one year apart in age and under school-age when parental rights were terminated. The mother does not appeal. As appellant's sole point for reversal, he argues that the chancellor was clearly erroneous in finding that the Department of Human Services ("DHS") made a meaningful effort to rehabilitate the home and correct the conditions that caused removal of the children. More specifically, appellant asserts that DHS did not provide sufficient services to him such that the statutory grounds to support termination found in Ark. Code Ann. § 9-27-341(b)(3)(B)(i)(a) are not met. We disagree and affirm.

The three children involved in this case were born on April 2, 1996 (Marquis), June 5, 1997 (Lovell III), and August 12, 1998 (Ladarius). The current appeal stems from the second case file opened on the family. The first case file was opened on December 29, 1997, after Lovell III was referred by a doctor, who was treating the mother, to Arkansas Children's Hospital. Lovell III was suffering from extreme malnourishment, unnoticed by the parents. Lovell III was diagnosed with failure to thrive, caused by

the parents feeding the infant watered-down formula. The family was given services, including psychological examinations and therapy, in-home parenting classes, transportation, and supervised visitation. Appellant was ordered to complete paternity testing because he claimed the children as his own but had not been adjudicated to be their father. Appellant did not establish paternity. The first case was closed from the court's perspective some time in 1998.

The second case file was opened on November 4, 1999, after appellant dropped the mother and the three boys, ages three, two, and one at the time, at a Salvation Army Shelter in Little Rock, Arkansas, without informing the mother of his whereabouts. The mother called DHS, and a case worker initiated another case file on the family. DHS took emergency custody of the children on November 9, 1999. A hearing was conducted on November 16, 1999, at which probable cause was found to continue the children in the custody of DHS because, despite services rendered, the family had no means to support the children. The children were placed together in a foster home, where they remained throughout the case.[1]

An adjudication hearing was set for January 4, 2000, and commenced on that date. The children were found to be dependent-neglected, but not due to poverty per se. Both parents appeared, and it was demonstrated that they lived together at the Heritage House Inn, a motel; that they had a prior DHS case on Lovell III; that appellant had been directed to establish his paternity in the earlier case by an order on January 29, 1998, but had not done so; that appellant was working but the mother was not; and that they somehow could not manage the income earned by appellant. Appellant testified that he did not want to be tested for paternity because he wanted to avoid a child support obligation, and the trial judge informed appellant that reunification services were not going to be offered to him unless and until he proved

[1] There was one exception when the eldest child was removed from the foster home for a brief time due to abuse inflicted by another foster child, but the boys were reunited in the same foster home.

paternity other than by his verbal claim. The case was continued to May 23, 2000, for purposes of permanency planning.

At the permanency planning hearing, the testimony established that the mother and appellant were living in the Cimmaron Motel, and the mother was pregnant again. Appellant told the judge that he was "gonna handle" the paternity testing but just could not get it done up to that point due to his work schedule. Services, including parenting classes, therapy, transportation, and visitations were provided to the mother, and the children received services in foster care. Due to the obvious cash-flow problem, the trial judge ordered random drug testing of the parents.[2] A termination hearing was set for November 14, 2000, unless circumstances changed.

On November 14, 2000, the termination hearing was held. Both parents were represented by counsel at this point. Appellant appeared but the mother did not. She had fled to Texas to give birth. Although her rights were terminated, that is not the subject of this appeal. Evidence presented at the termination hearing relevant to appellant demonstrated that appellant tested positive for cocaine on June 28, 2000, and that he was arrested on charges of aggravated robbery and theft of property on July 18, 2000, with regard to a gas station in southwest Little Rock. Appellant's counsel argued that sufficient services were not rendered to appellant such that his rights should not be terminated. The judge held termination in abeyance with regard to appellant, who was currently jailed, so that he could receive some services as best as they could be administered. Services to be rendered included parenting classes, a housing referral, a therapy referral, a drug and alcohol

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[2] The trial court expressed concern as to where appellant's income was going. While the dissenting opinion characterizes the cause of the children's removal as resulting from poverty, the record reflects that appellant did not have an unreasonably low income. There was evidence at the adjudication hearing held on January 4, 2000, that appellant worked for a chemical-spill recovery business and he testified that his last bi-weekly paycheck was for a net of $700. At the permanency planning hearing held May 23, 2000, appellant testified that he continued to be employed by this employer and that he had worked 71 ½ hours, which included significant overtime, within the week just preceding the hearing.

assessment and screening, and a second psychological evaluation.[3] Appellant was ordered, again, to prove his paternity. A permanency planning hearing was set for March 6, 2001.

At the March hearing, it was learned that appellant was convicted of his charges and was sentenced to ten years in prison, of which he would have to serve at least seventy percent. He was appealing.[4] Appellant had undergone a second psychological evaluation by Dr. DeYoub. The results were poor; appellant had borderline intellectual functioning and a personality disorder. Dr. DeYoub was concerned because appellant had not made any progress over the last year, and in the last six months he had been incarcerated. Dr. DeYoub opined that if appellant had not been incarcerated and the children were placed with him, he would likely flee Arkansas and probably go to Texas. Dr. DeYoub did not recommend reunification but suggested drug screens if appellant were released. He summarized, "I thought at one point his prognosis was good, but this has changed over time with the demonstration that he has not done well." Appellant had also undergone a drug and alcohol assessment. DHS and the attorney ad litem for the children requested to move forward to termination. A formal motion was filed on March 19. The judge agreed, setting the termination hearing for May 22, 2001.

At this hearing, appellant argued that though he had not established paternity, he wanted more time to see how his appeal would be resolved and wanted DHS to provide additional services. Appellant had received services for six months. DHS resisted his request. DHS personnel testified that the children had been out of the home for approximately one and one-half years, they were together, and they had a high probability of being adopted together, but this would diminish as they got older. The judge terminated appellant's parental rights, noting among other things that reunification could not be accomplished in a reasonable period of time with his criminal conviction and incarceration.

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[3] Appellant had undergone an earlier evaluation by the same psychological examiner in the first DHS case file opened with regard to Lovell III.

[4] Appellant's appeal, *Johnson v. State*, CACR01-682, is briefed in a no-merit form under submission with our court.

The judge also found that even without the incarceration, appellant could not be reunited with his children in a reasonable period of time. The judge found that appellant had not complied with the case plan or orders of the court, whereas DHS had complied with the orders and made reasonable efforts to deliver reunifications services. An order of termination followed, and this appeal resulted.

When the issue is one involving the termination of parental rights, there is a heavy burden placed upon the party seeking to terminate the relationship. *J.T. v. Arkansas Dep't of Human Servs.*, 329 Ark. 243, 947 S.W.2d 761 (1997). Termination of parental rights is an extreme remedy and in derogation of the natural rights of the parents. *Wade v. Arkansas Dep't of Human Servs.*, 337 Ark. 353, 990 S.W.2d 509 (1999). Parental rights, however, will not be enforced to the detriment or destruction of the health and well-being of the child. *Id.* The facts warranting termination of parental rights must be proven by clear and convincing evidence, and in reviewing the trial court's evaluation of the evidence, we will not reverse unless the court's finding of clear and convincing evidence is clearly erroneous. *Baker v. Arkansas Dep't of Human Servs.*, 340 Ark. 42, 8 S.W.3d 499 (2000). Clear and convincing evidence is that degree of proof which will produce in the fact finder a firm conviction regarding the allegation sought to be established. *Id.* In resolving the clearly erroneous question, we must give due regard to the opportunity of the trial court to judge the credibility of witnesses. *Id.* Additionally, we have noted that in matters involving the welfare of young children, we will give great weight to the trial judge's personal observations. *Ullom v. Arkansas Dep't of Human Servs.*, 340 Ark. 615, 12 S.W.3d 204 (2000).

An order forever terminating parental rights must be based upon clear and convincing evidence that the termination is in the best interests of the child, taking into consideration the likelihood that the child will be adopted and the potential harm caused by continuing contact with the parent. Ark. Code Ann. § 9-27-341(b)(3)(A) (Repl. 2002). In addition to determining the best interests of the child, the court must find clear and convincing evidence that circumstances exist that, according to the statute,

justify terminating parental rights. Ark. Code Ann. § 9-27-341(b)(3)(B) (Repl. 2002). One such set of circumstances that may support the termination of parental rights is that the child "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." Ark. Code Ann. § 9-27-341(b)(3)(B)(i)(a) (Repl. 2002). It is not necessary that the twelve-month period out of the home be consecutive. Ark. Code Ann. § 9-27-341(b)(3)(B)(i)(b) (Repl. 2002).

Appellant challenges only the finding that DHS provided meaningful effort to rehabilitate the home and correct the conditions that caused removal of the children. Appellant argues that this was not met when services were directed toward him for only six months and at best they could be delivered while he was incarcerated. We disagree that appellant has shown clear error.

The legislative intent of this section is found in Ark. Code Ann. § 9-27-341(a)(3) and is important to our inquiry:

> The intent of this section is to provide permanency in a juvenile's life in all instances where return of a juvenile to the family home is contrary to the juvenile's health, safety, or welfare and it appears from the evidence that a return to the family home cannot be accomplished in a reasonable period of time, as viewed from the juvenile's perspective.

The mere fact that appellant was incarcerated at the time of the termination hearing is not dispositive of the termination issue. *See Crawford v. Dep't of Human Servs.*, 330 Ark. 152, 951 S.W.2d 310 (1997). However, our supreme court has stated that a parent's imprisonment does not toll a parent's responsibilities toward his or her children. *See Zgleszewski v. Zgleszewski*, 260 Ark. 629, 542 S.W.2d 765 (1976). The distinction is important: the trial judge did not terminate appellant's rights because he had been incarcerated; his parental rights were terminated because the statutory requirements for termination were met by clear and convincing evidence. The children had been adjudicated dependent-neglected; the children had been out of the home for more than

twelve months; DHS made a meaningful effort to rehabilitate the home and correct the conditions that caused removal; and despite that effort, appellant did not remedy those conditions.

Undisputedly, the children's mother was consistently given services during the duration of this case until the mother's rights were terminated, including counseling, homemaker services, transportation, and housing referrals. . Appellant was absent much of the time that services were directed toward the family home. When appellant manifested interest in receiving services, he created the circumstances that made those services difficult to deliver. The statutory definition of "family services" found at Ark. Code Ann. § 9-27-303(23)(A) includes child care, homemaker services, counseling, cash assistance, transportation, therapy, psychological or psychiatric evaluations and treatment. Most, if not all, of these services were rendered to the family while this case file was open. Appellant himself has received a drug and alcohol assessment and a second psychological evaluation, and he has not suggested what services are lacking. The trial judge was not clearly erroneous in concluding that DHS made a meaningful effort to rehabilitate the home and correct the conditions that caused removal. We are not left with a distinct and firm conviction that a mistake has been committed.

Moreover, in our de novo review, we could alternatively hold that grounds for termination were met under Ark. Code Ann. § 9-27-341(b)(3)(B)(vii)(a), which provides:

> That, subsequent to the filing of the original petition for dependency-neglect, other factors or issues arose which demonstrate that return of the juvenile to the family home is contrary to the juvenile's health, safety, or welfare and that, despite the offer of appropriate family services, the parent has manifested the incapacity or indifference to remedy the subsequent issues or factors or rehabilitate the parent's circumstances which prevent the return of the juvenile to the family home.

Appellant's incarceration and ten-year sentence arose after the case file was initiated. Additionally, Dr. DeYoub's psychological evaluation changed from a good prognosis in his earlier report to an unfavorable one in his more recent one, and he observed that appellant was now displaying more antisocial traits. Furthermore,

appellant has never established paternity, despite orders to do so. The other biological parent is no longer a part of these children's lives because her parental rights have been terminated. With these facts, there is no family home to which to return the children, nor will there be one in the foreseeable future. These subsequent circumstances prevent the placement of the children in appellant's custody, in light of appellant's manifested incapacity or indifference to remedying the causes of the children's removal.

Affirmed.

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

HART and BAKER, JJ., dissent.

KAREN R. BAKER, Judge, dissenting. I would reverse finding that the failure to provide any services to the father within the twelve-month period when the children were in out-of-home placement fails to meet the statute's requirement that a meaningful effort be made by DHS to rehabilitate the home and correct the conditions that caused removal. Because the statutory prerequisites for termination of parental rights were not met, the State had no authority to terminate this father's rights.

The facts of this case make it clear that the conditions and circumstances that caused removal of these three children are related to poverty. The parents' second child was diagnosed with failure to thrive, caused by the parents feeding the infant watered-down formula. It takes no leap in logic to understand that parents with limited resources might water down formula to make it go further when feeding their child. In that case, DHS did provide services to the family. The condition that caused the removal was remedied and was not repeated with either the first child or the two subsequent children.

The second case the State filed concerning this family occurred when the parents found themselves without housing. The reason stated for the second case file being opened was that the father dropped the mother and his three sons off at a shelter "not telling the mother of his whereabouts." The abstract contains documents that indicate that when the family was asked to leave the motel in which they had been living, the mother con-

tacted DHS, and DHS told the family to go to the shelter. When the mother contacted DHS a second time, she was unable to say where the father was. Again, it is logical that a man looking for housing might not be able to provide an address or give information as to his specific location at any given time.

At the probable cause hearing held less than two weeks later, it was found that despite services rendered, the family had no means to support the children, and the State took custody of the children from their parents. Two months later at the adjudication hearing, the children were found to be dependent-neglected. While the majority states that this determination was "not due to poverty per se," there is no explanation of factors relied upon by the trial court or this court that establish the basis for the removal of these children except poverty. At the time of the adjudication hearing, both parents were living together in another motel.

By the time of the permanency planning hearing, both parents were still living together at yet another motel. This time, the mother was pregnant with the parents' fourth child. The judge asked her if she understood the cause of pregnancy and how to prevent it and emphasized that he had already taken away her other three children. Given this exchange, it is not surprising that the mother left the State of Arkansas with her unborn child before the next hearing. Until faced with the threat that she might lose yet another child to the State's custody, she had attended every hearing and worked with DHS in the receipt of services.

At the time DHS took these children away from their parents, the family had lived for years as a two-parent family. No allegations that the parents were abusive or that the children were in danger were ever made.[1] While living from motel to motel may not be the optimal living situation, the family had consistently lived from motel to motel. Although testimony revealed that the cost of motel rental was generally more than for other housing

[1] The majority footnotes that with one exception when the eldest child was removed from the foster home for a brief time, that the boys were reunited in the same foster home. It should be noted that the reason for the removal was abuse of the child while in foster care, in the custody of the State.

rental, nothing in the record explains why DHS's rental assistance failed to help stabilize the parents' living accomodations.

Throughout their life together as a family, the parents had never married and all three children were born out-of-wedlock. As the psychologist who performed the psychological evaluation of the father observed, if this man were given his children back (had he not been incarcerated) he would likely go to Texas. This is a logical conclusion given that the mother of these three children was in Texas with their fourth child and the two had consistently lived together with their children. Although the majority emphasizes throughout its opinion that the father had been ordered to establish his paternity, there is no dispute that this man consistently acknowledged these children as his family. Not only did he acknowledge them, he was the sole provider of support of these children without any state assistance at the time the children were removed from his custody. Despite this fact, the judge ordered that no reunification services be provided to him until he established paternity by some means other than his verbal claim to it.

The hearing for termination of parental rights was held on November 14, 2000. For the first time since the beginning of these proceedings, counsel was appointed for appellant.[2] At the hearing, the father argued that DHS had not made a meaningful effort to reunify him with his children because he had been provided absolutely no reunification services during the case. DHS conceded that the agency had not provided appellant with any reunification services. This concession was necessary since DHS was under court order to *not* provide any services to the father until he established his legal paternity.

First, the court ordered DHS not to provide services to the father. Then the court ordered DHS to provide services merely as a prerequisite to termination of his parental rights. Ordering that services be provided to the father, at that stage of the proceedings, was inherently contradictory to the requirement that a meaningful

[2] This hearing was also the first time that the mother of the children was represented by counsel, although she was not physically present. Counsel was appointed for the purpose of the termination proceeding and relieved upon its conclusion.

effort be made by DHS to rehabilitate the home and correct the conditions which caused removal.

Furthermore, the correlation between the father's failure to establish legal paternity to the children and the condition of his being unable to support his family and provide appropriate housing, eludes me. However, if it is so significant as to be a basis for terminating parental rights, then I must point out that once DHS was finally ordered to provide services to the father, DHS provided no services related to the court's order regarding paternity.

The majority offers an alternative grounds for termination based upon Ark. Code Ann. § 9-27-341(b)(3)(B)(vii)(a) citing the father's incarceration. The majority is careful to try to make the distinction that the trial judge did not terminate his parental rights because the father had been incarcerated, but because the statutory requirements for termination had been met. However, that section of the code also requires that DHS offer appropriate family services and that despite the offer of appropriate family services the parent has manifested incapacity or indifference.

The trial court's order precludes any such finding. On March 6, 2001, the court entered a permanency planning order in relation to the father alone that found that DHS had complied with the case plan, in that DHS "had made reasonable efforts to deliver reunification services. Specifically, the Department has offered a drug and alcohol assessment and a psychological evaluation." Testimony at trial indicated that the father completed both the drug and alcohol assessment and a psychological evaluation while incarcerated. The court then concluded that the father had not complied with the case plan or orders of the court. "Specifically, he has not received therapy nor has he participated in drug treatment. The Court realizes he has been incarcerated since the last hearing and not free to participate in these activities." Testimony of the DHS representative conceded that appellant was cooperative in relation to the offered services, but that some services were not offered because the representative was unfamiliar with the prison system and whether some services were available. Specifically, the representative stated that she thought that drug treatment had been available in other cases of incarceration, but

was not offered here. The court then relieved DHS from providing any further reunification services unless appellant obtained a lawful release from custody.

The father cooperated in every service offered. DHS conceded that failure to offer some services to that point fell upon DHS. Then the court, for a second time, relieved DHS from providing any services. Nothing could support the finding that the father manifested indifference or incapacity when the testimony presented by DHS established that he was cooperative and completed the services offered to him.

The facts of this case are disturbing, but the fact that it is not an isolated case makes reversal even more imperative. Trial judges have a duty to insist upon strict compliance with the statutory criteria before entering an order terminating parental rights. This "[i]nsistence upon strict compliance with the statutory criteria . . . enhances the child's best interests by promoting autonomous families and by reducing the dangers of arbitrary and biased decisions amounting to state intrusion disguised under the rubric of the child's best interests." *In re Danuael D.*, 724 A.2d 546, 553 (Conn. 1999)(citations omitted). Therefore, our adherence to strict compliance with our statutes is not merely a standard of review. *See Arkansas Dep't of Human Servs. v. Cox*, 349 Ark. 205, 82 S.W.3d 806 (2002) (finding DHS's conduct deeply disturbing when agency took custody of child utterly without authority and outside the limited circumstances set out in our state statutes). As one law journal notes, statistical data on neglect and children living in poverty show that "[s]tate governments appear to be destroying family ties of a large number of poor families with no concomitant benefit to children." *Second Chances: Insuring That Poor Families Remain Intact by Minimizing Socioeconomic Ramifications of Poverty*, 102 W. VA. L. REV. 607, 613 (Spring 2000).

In this State, we require strict compliance with our statutes before destroying those family ties. That was not done here, and this case should be reversed.

HART, J., joins.

Yvette P. LOVELACE *v.* DIRECTOR,
Employment Security Department

E 01-162 79 S.W.3d 400

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered June 26, 2002

David P. Henry, for appellant.

Allan Franklin Pruitt, for appellee.

SAM BIRD, Judge. Appellant Yvette P. Lovelace appeals the decision of the Arkansas Board of Review denying her unemployment benefits. For reversal, Lovelace argues that the Board erred in failing to find that the untimely appeal was a result of circumstances beyond her control. We affirm.

Lovelace, a former employee of Pulaski County, applied for unemployment compensation benefits. Notice of the denial of benefits was mailed on March 16, 2001, and she received the notice on March 20, 2001. The next day, March 21, Lovelace employed counsel, David Henry, to file an appeal. Pursuant to Ark. Code Ann. § 11-10-524(a)(1) (Repl. 2002), Lovelace's appeal of that decision was required to be postmarked no later

than twenty days from the date the notice of determination was mailed to her, which would be no later than April 5, 2001. Lovelace's notice of appeal was not postmarked until April 6, 2001. However, the filing may be considered timely if the Board of Review finds that the late filing was "beyond the control" of the appealing party. Ark. Code Ann. § 11-10-524(a)(2) (Repl. 2002). The Appeal Tribunal considered the timeliness of the filing at a telephone hearing on May 3, 2001. At the hearing, Lovelace's attorney testified that the circumstances that resulted in the untimely filing of the appeal were that his only secretary was out of the office on leave during the week of April 2 through 6 and that he was out of his office on April 4 and 5, 2001, due to severe tendinitis in his right knee. He said that when he returned to his office on April 6, the first thing he did was to type the appeal.

The Appeal Tribunal held that the circumstances resulting in the late appeal were not beyond Lovelace's control and dismissed the appeal. Lovelace then appealed to the Arkansas Board of Review, arguing that the untimeliness of the filing was beyond her control and that her counsel's illness and absence from his office during the last two days of her appeal time constituted unavoidable casualty and excusable neglect. On June 27, 2001, the Board of Review affirmed the decision of the Appeal Tribunal and again dismissed Lovelace's appeal. From that decision comes this appeal.

On appeal, the findings of the Board of Review are conclusive if they are supported by substantial evidence. *Walls v. Director, Employment Sec. Dep't*, 74 Ark. App. 424, 49 S.W.3d 670 (2001). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* We review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board's findings. *Id.* Even when there is evidence upon which the Board might have reached a different decision, the scope of judicial review is limited to a determination of whether the Board could reasonably reach its decision upon the evidence before it. *Id.*

In a case where an appeal has been deemed untimely, pursuant to *Paulino v. Daniels*, 269 Ark. 676, 599 S.W.2d 760 (Ark. App. 1980), a hearing is conducted to determine whether

the untimeliness of the appeal was due to "circumstances beyond the [claimant's] control." Lovelace contends that after she received the notice, she instructed her attorney to proceed with an appeal and that he did not do so in a timely fashion. It is a rule of general application that a client is bound by the acts of his attorney within the scope of the latter's authority, including the attorney's negligent failure to file proper pleadings. *See Allen v. Kizer*, 294 Ark. 1, 740 S.W.2d 137 (1987); *DeClerk v. Tribble*, 276 Ark. 316, 637 S.W.2d 526 (1982). In *Peterson v. Worthen Bank & Trust Co.*, 296 Ark. 201, 753 S.W.2d 278 (1988), the court stated:

> The rules of agency generally apply to the relationship of attorney and client. The editors of 7A C.J.S. Attorney & Client § 180, provide this summary:
>
> > [U]sually the general rules of law which apply to agency apply to the relation of attorney and client. [citing *White & Black Rivers Bridge Co. v. Vaughan*, 183 Ark. 450, 36 S.W.2d 672 (1931)]. Accordingly, the omissions, as well as commissions, of an attorney are to be regarded as the acts of the client whom he represents, and his neglect is equivalent to the neglect of the client himself. [citing *Blackstad Mercantile Co. v. Bond*, 104 Ark. 45, 148 S.W. 262 (1912)]. Attorney's acts are attributed to the client. Thus, in the absence of fraud, the client is bound, according to the ordinary rules of agency, by the acts, omissions, or neglect, of the attorney within the scope of the latter's authority, [citing *Riley v. Vest*, 235 Ark. 192, 357 S.W.2d 497 (1962), and *Beth v. Harris*, 208 Ark. 903, 188 S.W.2d 119 (1945)] whether express or implied, apparent or ostensible. In other words, whatever is done in the progress of the cause by such attorney is considered as done by the party, and is binding on him. . . .

296 Ark. at 204-05, 753 S.W.2d at 280.

In this case, the Board of Review found that there was no evidence presented that the notice of appeal was filed late due to circumstances beyond the control of either Lovelace or her attorney. The testimony of Lovelace's counsel during the telephone hearing merely established that he was absent from his office due to a severe case of tendonitis in his right knee on April 4 and 5, 2001. The attorney did not offer any excuse for putting off the

filing of the appeal other than that he had not anticipated being gone on April 4 and 5. There was no evidence presented that there was anything that prevented the attorney from filing the appeal before he was out sick nor that he was so incapacitated that he could not have mailed the appeal from his home. Further, even though Lovelace sought counsel, she did not lose responsibility in making sure that the appeal was timely filed. The actual appeal filed did not contain any legal offerings or any factual information that Lovelace herself could not have provided.

The dissenting opinion suggests that by our reasoning, no circumstances would amount to circumstances beyond the claimant's control if notice of appeal is not mailed on the first day of the twenty-day period. We do not agree that this is the effect of our decision. By our decision in this case we simply hold that, if the claimant fails to file the notice within the twenty-day period, evidence must be presented that the late filing of the appeal was due to circumstances beyond the claimant's control. The Board of Review concluded that no such evidence had been presented in this case, and our holding is that the Board's decision is supported by substantial evidence.

The dissenting opinion also speculates that there may be any number of reasons why claimant's attorney did not file the notice from his home. However, none of these reasons were offered as evidence. We are not permitted to make assumptions to fill in the gaps in claimant's evidence.

We hold that there was substantial evidence to support the Board's finding that the late filing of the appeal was not due to circumstances beyond Lovelace's control. Therefore, we affirm.

Affirmed.

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

PITTMAN, J., concurs.

HART, J., dissents.

JOSEPHINE LINKER HART, Judge, dissenting. As the majority notes, appellant had twenty days in which to file a notice of appeal by mail. Ark. Code Ann. § 11-10-524(a)(1)

(Repl. 2002). Also, the majority correctly states that appellant's counsel, David P. Henry, mailed the notice of appeal one day beyond the twenty-day period. The majority also properly asserts that, on appeal, the findings of fact of the Board of Review are conclusive if they are supported by substantial evidence. Ark. Code Ann. § 11-10-529(c)(1) (Repl. 2002). Further, it notes that if the appeal is "not perfected within the twenty-day period as a result of circumstances beyond appellant's control, the appeal may be considered as having been filed timely." Ark. Code Ann. § 11-10-524(a)(2) (Repl. 2002). However, relying on a line of cases that a client is bound by the acts of her attorney, the majority erroneously concludes that the one-day delay was not "a result of circumstances beyond the appellant's control," which would have excused the delay.

While the notice of appeal had to be mailed by April 5, 2001, it was postmarked one day later. Appellant testified that on March 21, she asked Henry to file a notice of appeal, and she further stated that she did not know why her appeal was filed on April 6. Henry testified that he is a sole practitioner, that his only secretary was absent from his office from April 2 to April 6, and that on April 4 and 5, he was absent from his office with "a severe case of tendonitis" in his right knee. When he returned to the office on April 6, he prepared the notice of appeal. Henry testified that the delay in the filing of the notice of appeal was attributable to his being ill, his secretary being absent, and his not being at the office to prepare it. When the hearing officer asked why he did not file the notice before April 4, Henry stated that he did not know he was going to be ill.

The majority states that "[t]here was no evidence presented that there was anything that prevented the attorney from filing the appeal before he was out sick. . . ." The majority's conclusion that Henry could have filed the appeal prior to the onset of his illness misses the point. Certainly, there is nothing in the statute requiring a claimant to act prior to the last day of the twenty-day period, and there is no indication that Henry knew prior to the onset of his tendonitis that he would subsequently suffer from the onset. By the majority's reasoning, no circumstance would be beyond a claimant's control if the claimant did not file his notice

on the first day of the twenty-day period. Adoption of the majority's reasoning would constrict the twenty-day period and effectively eliminate the statutory excuse.

The majority further states there was no evidence that Henry "was so incapacitated that he could not have mailed the appeal from his home." I note that the hearing officer, who assumed the role of adversary in questioning appellant and Henry, did not ask Henry whether he could have mailed the notice of appeal from his home. There may have been numerous reasons why Henry did not file the notice of appeal from home. The majority further states that appellant could have filed the notice herself. Again, the hearing officer never asked whether appellant knew Henry was ill. The statute does not make the proof of either fact a condition precedent to establishing circumstances beyond appellant's control, and there was no reason that appellant could have anticipated that development of such facts was required.

The real issue, rather, is whether there were circumstances beyond appellant's control, and here, there was substantial evidence establishing circumstances beyond appellant's control. The majority's observations that appellant failed to establish that Henry could have filed the notice from his home and that appellant could have filed the notice herself cannot be considered as substantial evidence to support the denial of the appeal. Thus, the majority's stated reasons for reaching its decision are pure speculation. What we have is this court concluding, as a matter of law, that an attorney's illness does not constitute circumstances beyond appellant's control. Based on this record, this is far too much to conclude, and, therefore, I respectfully dissent.

Yen My Tran VO *v.* Hoa Van VO

CA 01-908 79 S.W.3d 388

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered June 26, 2002

Jones & Harper, by: *Niki T. Cung*, for appellant.

Hal W. Davis, for appellee.

WENDELL L. GRIFFEN, Judge. Yen My Tran Vo appeals from a chancery court order placing custody of her son, Henry, with Hoa Van Vo, her ex-husband and the appellee in this case. She argues that the chancellor erred in changing custody because appellee did not prove a material change in circumstances. We agree, reverse the order changing custody, and hold that the findings upon which it is based are clearly erroneous whether viewed separately or in the aggregate.

The parties are originally from Vietnam. Appellant and her family moved to Santa Ana, California, in 1993 and lived there for one year before moving to Fort Smith, Arkansas. Appellee and his family moved to Fort Smith in the early 1990s. The parties were married in 1995. The marriage produced one son, Henry, born on April 14, 1996. They were divorced on December 2, 1997, by a consent decree in which the parties agreed that appellant should have custody of Henry.

In November 13, 2000, appellee filed a motion to modify custody, citing the fact that appellant intended to relocate to California. Shortly thereafter, on November 21, 2000, appellant filed a petition to move to Santa Ana, California. The chancellor held hearings on these motions on February 27 and on May 30, 2001. The parties' testimony was taken through an interpreter. During the first hearing, the chancellor denied appellant's motion to move Henry to California, and thereafter heard testimony relevant to

appellee's change-of-custody motion. At the conclusion of the testimony, the court ordered appellant, who at that time was living with her parents and brothers, to obtain her own place to live, and further ordered that home studies be conducted. The final hearing was held on May 30, 2000. By this time, appellant had obtained her own apartment, which the case worker found to be adequate although it was incompletely furnished.

In his written order, the chancellor cited several changes in circumstances that he found warranted a change of custody. Specifically, he cited: 1) the fact that the father has maintained a loving, stable home with Henry's extended family, while the mother petitioned for removal to an unknown location in California with a boyfriend she met over the Internet and whom she had seen no more than five times in three years; 2) the fact that the father's family had placed a premium on education, whereas the mother's attitudes, beliefs, traditions, and ambitions did not reflect such a desire; 3) the fact that the mother had raised Henry in a home with her two brothers, both of whom have criminal records, including felony charges of DWI and false imprisonment, whereas, the father's family are seeking diligently to assimilate and act as good citizens; 4) the mother's home did not provide a suitable home environment for Henry; and 5) the mother appeared to lack concern for Henry's best interest. Appellant was ordered to pay child support and was awarded standard visitation. This appeal followed.[1]

Appellant first argues that the chancellor erred in finding that a material change in circumstances warranted a change of custody. Second, she argues that the chancellor's finding that she was less credible than appellee and his witnesses is erroneous, given the language barriers involved in this case. Finally, she argues that the chancellor erred in modifying custody because he did so without finding that she was an unfit parent. We reverse based on appellant's first argument.

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[1] Appellant filed a motion for reconsideration which was denied, but she does not appeal from the denial of that motion.

The standard governing the review of custody modifications is well-settled. Custody will not be modified unless it is shown that there are changed conditions demonstrating that a modification is in the best interest of the child. *See Lloyd v. Butts*, 343 Ark. 620, 37 S.W.3d 603 (2001). The chancellor's findings in this regard will not be reversed unless they are clearly erroneous. *See Campbell v. Campbell*, 336 Ark. 379, 985 S.W.2d 724 (1999). When an appeal is taken from a custody order, we afford great deference to the chancellor's determination; there are no cases in which the superior position, ability, and opportunity of the chancellor to observe the parties carries a greater weight than those involving the custody of minor children. *See Taylor v. Taylor*, 345 Ark. 300, 47 S.W.3d 222 (2001). While custody is always modifiable, our courts require a more rigid standard for custody modification than for initial custody 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). However, evidence showing facts affecting the best interest of the child that were not presented or not known by the chancellor at the time the original custody order was entered may be entered into evidence. *See Campbell v. Campbell, supra.*

I. The Stability of Appellee's Home

We turn now to each of the factors cited by the chancellor that he found warranted a change of custody. It is true that this court does not examine each finding cited by a chancellor in isolation. *See Hollinger v. Hollinger,* 65 Ark. App. 110, 986 S.W.2d 105 (1999). It is also true that certain factors, when examined in the aggregate, may support a finding that a change in custody is warranted where each factor, if examined in isolation, would not. *See Hollinger v. Hollinger, supra* (holding that the non-custodial parent's remarriage, the custodial parent's move, or the passage of time, when examined in the aggregate, supported a change in custody). We hold that none of the factors in this case, either alone or in combination with the remaining factors, constituted a material change sufficient to warrant a modification of custody.

The first factor cited by the chancellor was appellant's request to relocate to California. He stated:

> [Appellant] came before this Court requesting permission to move with Henry to some unknown location in California with her boyfriend from Kansas, whom she communicates with principally on the internet and has only seen once in the last year and less than five (5) times total in three years; [appellant] had no plans to marry this man and had no employment arranged, nor did she even know where they would live in California. Although the Court denied [her] request to remove Henry to California and [she] apparently had elected to stay in this area, the Court finds that [her] plans (or lack of plans) pertaining to placing a five-year old boy in those circumstances, constituted such irresponsibility and immaturity on the part of [appellant] as to be in an of itself a substantial change of circumstances. The Court considers a person's ability to place a child in the correct priority in one's life and to make responsible and mature decisions pertaining to the best interests of the said child. This certainly was not done by [appellant] pertaining to her decision-making ability with regard to the request to move to California.

By contrast, the chancellor found that appellee had maintained a stable home and environment for Henry, which includes appellee's new wife and his parents, sisters and brothers. Appellee notes that appellant was not concerned about where she and Henry would live because her boyfriend would pay her expenses; that she did not think moving Henry away from his father's family was important, and that she failed to inform appellee of the intended move. He argues this demonstrates her inability to provide reasonable, responsible and mature parenting for Henry, which is a relevant consideration in determining with which parent a child should reside. *See Hollinger v. Hollinger, supra* (stating that when the best interest inquiry is opened, the method or style of parenting between two parents is pertinent).

[redacted] The short answer is that appellant's request to move, however improvident, did not constitute a material change of circumstances because the relocation issue was moot when the chancellor decided to change custody. Appellant did not move to California. She obeyed the chancellor's order to move away from

her parents and into her own residence. The chancellor knew she had done so when he decided to change custody. Thus, there was no reason to decide the change-of-custody dispute using evidence the chancellor knew was no longer pertinent.

No Arkansas law holds that a simple request to relocate warrants a change of custody. Rather, the chancellor is to consider the request and determine whether such a move is in the best interests of the family unit as a whole. *See Staab v. Hurst,* 44 Ark. App. 128, 868 S.W.2d 517 (1994). Notably, the standard governing whether a chancellor should grant a petition to relocate (the best interest of the family unit as a whole) is different from the standard governing custody changes (the best interest of the child). In short, whether a chancellor should grant a petition to relocate does not necessarily bear on whether the chancellor should modify custody. If this is true where relocation petitions are pending and ripe for decision, it certainly holds true where no relocation petition is before the chancellor because it has been rendered moot.

Therefore, we hold that the chancellor erred in considering evidence relating to the mooted petition to relocate as a basis for determining whether custody should be modified.[2] Because the evidence concerning the nature and amount of communication between appellant and her boyfriend was not offered until after the court had denied appellant's motion to relocate, the chancellor properly deemed the evidence was inadmissible. Nonetheless, the chancellor clearly considered this evidence in making his custody determination. He should not have relied upon that evidence in reaching his decision regarding the change of custody.

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[2] Although appellant does not appeal from the denial of the motion to relocate, because the chancellor cited the fact that she desired to relocate as a basis for changing custody, we note that the chancellor's order mischaracterizes appellant's motivation for requesting permission to move. His order clearly implies that appellant desired to relocate to an unknown location in California with a man she barely knows, whom she met over the Internet. To the contrary, it is undisputed that appellant and her boyfriend grew up together in the same Vietnamese village and have known each other since childhood. Further, appellant had been told by a friend in Santa Ana that appellant would likely be able to obtain employment at a store there earning more money than she currently earned.

II. Appellee's Stable Home Life and Educational Goals

The chancellor also found that appellee's home was more suitable for Henry because appellee has maintained a stable home environment for his son and because appellee's family placed "a premium on education."

Appellant first responds that modification cannot be based solely on a change in the life of the noncustodial parent. *See Jones v. Jones*, 326 Ark. 481, 931 S.W.2d 767 (1996). Therefore, she asserts, the facts that appellee remarried (in August 2000), that his family has provided a loving and stable home, and that his family is more highly educated do not constitute material changes warranting a change of custody. Moreover, she argues that her financial inability to provide Henry with certain material items does not support a change of custody where the evidence demonstrates that his needs are otherwise met. *See Malone v. Malone*, 4 Ark. App. 366, 631 S.W.2d 318 (1982). Finally, she asserts that her financial means, as well as her lack of education and alleged attitude toward education, were known to appellee when he agreed that she should have custody; therefore, these are not changes that have occurred since the divorce decree was entered and cannot constitute grounds for a change of custody. *See Jones v. Jones, supra.*

We agree that the factors cited by the chancellor do not warrant modification of custody. Appellee lives with his wife and his extended family. The caseworker concluded that his home "is very adequately furnished and decorated and the upkeep and maintenance is excellent." She also concluded that it would be acceptable for Henry to reside with his father, if the chancellor chose. The chancellor found that appellee's home was more suitable because appellant's apartment was not completely furnished until after the home study was performed and did not provide an outdoor play environment for Henry.

However, the home-study case worker also concluded that appellant's income was sufficient, with child support, to adequately provide for Henry's needs. Henry had his own bedroom at appellant's apartment, his own computer, and the apartment was well-kept. Understandably, because appellant moved shortly before the home study was conducted, she had yet to completely

furnish the apartment. Nonetheless, the caseworker indicated that appellant's living arrangements were acceptable and that appellant was managing with the resources that were available to her. The caseworker also found that Henry was well-cared for and that his behavior was appropriate. Finally, the caseworker concluded that it was acceptable for the court to leave Henry in appellant's care.

We hold that the chancellor's finding that appellee's home environment constituted a material change in circumstances warranting a change in custody was clearly erroneous. The chancellor's finding flies directly in the face of the home-study report indicating that appellant's home was acceptable. Moreover, the lack of an outdoor play environment does not constitute a material change; if so, many apartment complexes would be deemed, per se, unsuitable living environments for children. In any event, Henry does not lack a suitable outdoor play environment because appellant testified that she takes him to the local park to play.

This is not simply a matter of the chancellor exercising his discretion to choose between two satisfactory home environments. Rather, in finding that appellant's home environment was unsuitable, the chancellor implicitly found that appellee's move from her parent's house to her own apartment, in compliance with his order, resulted in an environment that was so unsatisfactory that it warranted a custody change. This finding is not supported by the facts in this case.

In *Jones v. Jones, supra,* as in the instant case, the parties voluntarily entered into an agreement in which the mother was awarded custody of the parties' child. The father later remarried and filed for a change of custody, citing, in part, his subsequent remarriage. The *Jones* court held that remarriage alone was not a sufficient reason to change custody. The *Jones* court further held that, because the father was aware of the circumstances that he now alleged on appeal constituted a material change at the time of the custody agreement, the father could not use those grounds, nor grounds he had created (i.e., his remarriage) as grounds to modify custody.

Appellee's argument is similar to the argument rejected in *Jones v. Jones, supra,* and we likewise reject his argument

here. The fact that appellee lives with his extended family and they provide a warm, loving environment does not warrant a change in custody in the absence of a finding that appellant's home is in some way inadequate or that she is not providing the supervision, love, and care that her son requires.

Relatedly, the chancellor also cited as a basis for changing custody the fact that appellee's family has placed a "premium on education." Appellee argues that education is not a priority for appellant and her family, in stark contrast to his family. Appellee has worked and assisted all four of his siblings in obtaining college degrees. In addition, he has accumulated twenty-two hours of college credits while working full time, and his siblings intend to reciprocate and support him in pursuing his education.

The chancellor stated that the evidence concerning appellee's siblings' education was not "terribly relevant" to a determination of the issue in this case. Yet, he allowed the evidence as a "comparison" between the two families and expressly relied upon that testimony in reaching his decision. We hold that the chancellor erred in finding that the educational status and attitude of appellee's family justified a custody change.

This is one area in which it appears the chancellor found appellant to be less than credible because she indicated to the home-study case worker on April 3, 2000, that Henry was in preschool when he had not been there since February or March. Appellant indicated the reason she removed him was because the preschool center leaked and had no operable kitchen facilities due to an ice storm. The chancellor specifically cited appellant's decision to remove Henry from preschool in both his oral findings and his written order.

Certainly, the noncustodial parent's desire to pursue educational and vocational training in order to support her child is a relevant factor to consider when determining the child's best interests. *See e.g., Phillips v. Phillips*, 241 Ark. 90, 406 S.W.2d 325 (1986)(changing custody to mother where she obtained a G.E.D., obtained her cosmetology license, and became gainfully employed). However, here, appellant was already gainfully employed and had worked for the same employer for nearly seven

years. She was not required to pursue an advanced degree in order to provide for her son. This is supported by the fact that the caseworker testified that appellant's income, with child support, was sufficient. In short, the simple fact that appellee and his family have pursued advanced degrees does not warrant a change in custody. Such a finding smacks of elitism, particularly absent evidence that appellant has acted to hinder Henry's education.

Even giving weight to the chancellor's credibility determinations, the testimony does not demonstrate that appellant evinces a detrimental attitude toward Henry's education. To the contrary, the chancellor's order evinces a cultural and gender bias against appellant. Appellant is not uneducated. She received the equivalent of a high-school education in Vietnam, and was working to obtain her G.E.D here; she testified that she hoped to further her education beyond that point. She also testified that Henry would go to school when the time came, that she would encourage Henry to obtain a proper education, and that he would be raised speaking both Vietnamese and English.

To affirm the chancellor's finding in this regard is tantamount to punishing appellant for her decision to remove her child from a preschool that leaked and lacked kitchen facilities due to an ice storm, and to allow the child to stay with a friend. On one hand, the chancellor applauded appellee for observing the Vietnamese tradition of living with his extended family. On the other hand, the chancellor criticized appellant for allowing her son to stay with a close friend rather than a preschool care center. Appellant's decision to allow her son to stay with a close friend is consistent with the same cultural norm, lauded by the chancellor, that encourages extended families to live together. Appellant was not required to enroll her son in preschool; it was certainly within her discretion as the custodial parent to determine Henry's daycare arrangements. There was no testimony or any other evidence that suggested that the provider she chose was unfit. In short, there was no evidence that the arrangement appellant made was not in Henry's best interests.

III. Criminal Convictions of Appellant's Brothers

Appellant also argues that the fact that she previously resided in her parents' home with her brothers who had criminal convictions does not support a change in custody. Appellee's brothers have been convicted of DWI, false imprisonment, and carrying a weapon. We recognize that evidence concerning the moral character of a parent is relevant to the best interest of the child and to the issue of parental custody. *See James v. James*, 29 Ark. App. 226, 780 S.W.2d 346 (1989). This court has held that allowing persons with criminal convictions to be in the presence of one's children reflects on the parent's morality in allowing persons of questionable reputation and character to be around his child. *See Stone v. Steed*, 54 Ark. App. 11, 923 S.W.2d 282 (1996) (affirming change of custody to father where the mother allowed persons convicted of misdemeanors in her home and allowed persons to smoke marijuana in front of her child).

However, we agree that the fact that appellant once lived with her brothers who had criminal convictions is not sufficient to warrant a change in custody. Here, when made aware of the criminal records of appellant's brothers, the chancellor ordered appellant to find her own place to live, but he did not order her to prevent Henry from visiting his uncles. Appellant complied with all of the chancellor's orders. Therefore, because appellant no longer resided in the same home as her brothers at the time of the final hearing, the chancellor erred in citing the fact that she had lived with them as a ground for a change of custody. In this regard, the chancellor made the same error that he made when he considered appellant's mooted relocation petition.

Moreover, unlike the situation in *Stone v. Steed, supra*, appellant testified that her brothers did not drink in front of Henry and there was no evidence that they had ever acted inappropriately around him. Finally, this court has held that a custodial's stepparent's DWI conviction was not an adequate ground to warrant a change of custody. *See Bennett v. Hollowell*, 31 Ark. App. 209, 792 S.W.2d 338 (1990). If a DWI conviction of a custodial step-parent with whom the children reside is not sufficient to warrant a change of custody, then the convictions of the custodial parent's

siblings, with whom the parent no longer resides and with whom the chancellor did not forbid contact, does not warrant change of custody.

IV. Appellant's Credibility

The chancellor further found that appellant's testimony was not forthcoming and was inconsistent, and that she appeared to lack concern for Henry's welfare. The chancellor stated in his written order that he considered "the moral turpitude, veracity and integrity of the parties and that in this instance, those factors constitute a change of circumstance . . . ."

Appellee maintains the chancellor's order is proper because the evidence demonstrates that appellant is not likely to allow Henry frequent and continuing contact with him. Further, he maintains that the order was proper because he is able to provide a better home with a more wholesome environment. *See Digby v. Digby*, 263 Ark. 813, 567 S.W.2d 290 (1978); *Walker v. Walker*, 262 Ark. 648, 559 S.W.2d 716 (1978); *Riley v. Riley*, 45 Ark. App. 165, 873 S.W.2d 564 (1994). However, these cases do not compel affirmance here because the conduct of the offending parent in those cases simply is not comparable to appellant's conduct.

For example, in *Riley*, the custodial parent surreptitiously removed the children from Arkansas without the father's knowledge. In *Digby*, the custodial mother obtained permission from the court to move to Tennessee, alleging that she had obtained a better-paying job when she had never even applied for one; she also had an affair with a married man and had slept with him in her children's presence. Further, in *Digby,* there was no evidence that the children had maintained the religious affiliations that had been fostered during the parties' marriage. In *Walker*, the noncustodial mother had moved five times in three years, had no permanent address, lived with a man who was not her husband in her daughter's presence, worked sixteen hours a day, and often left her daughter with her mother for an indefinite period of time.

By contrast, here, appellee lives alone. She regularly attends a Buddhist temple in Fort Smith and Henry sometimes accompanies her. Although she testified that she and her boyfriend intend to

enter into a romantic relationship, she maintained they had not done so yet. She does not work excessive hours, although she does sometimes work on Saturdays. Although it is regrettable that communications between appellant and appellee have ceased since the divorce, and although appellant did not allow extra visitation outside of the court-ordered visitation schedule, it is undisputed that she complied with each of the chancellor's orders, and that she continues to abides by the custody agreement. Even if appellant was not initially forthcoming regarding the fact that she removed Henry from preschool and regarding her motivation for seeking to relocate to California, her conduct in remaining in Arkansas with Henry and abiding by all of the court's orders demonstrates that she is willing to put Henry's needs before her own.

Moreover, it appears that some of the problems with appellant's testimony were due to the language barrier and difficulty of translation in this case. The chancellor acknowledged the difficulty caused by the language barrier. However, the fact that appellant had difficulty understanding and answering the questions posed to her did not make her less credible, nor does her demeanor on the stand, alone, justify a custody change, especially when considered in light of the language barrier. In short, even giving full weight to the chancellor's credibility findings, we hold that his credibility findings did not demonstrate a material change in circumstances sufficient to warrant a change of custody.

Finally, appellant also argues that the chancellor erred in modifying custody because he did so without finding that she was an unfit parent. However, the chancellor did not err in this regard because between parents, a showing of unfitness is not necessary to warrant a change of custody. *See, e.g., In re Milam v. Evans*, 27 Ark. App. 100, 766 S.W.2d 944 (1989).

Reversed.

HART, ROBBINS, and BAKER, JJ., agree.

STROUD, C.J., and JENNINGS, J., dissent.

JOHN F. STROUD, JR., Chief Judge, dissenting. I would affirm because I do not believe that the chancellor's decision to change custody to the appellee was clearly erroneous when

all of the factors considered by the chancellor are viewed together, as contemplated by *Hollinger v. Hollinger*, 65 Ark. App. 110, 986 S.W.2d 105 (1999).

Custody should not be modified "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." *Id.* at 112, 986 S.W.2d at 106. In this case, the parties agreed that appellant would have custody of Henry at the time of their divorce, so no evidence was presented to the court regarding this issue.

With regard to weighing appellant's petition to relocate to California as a part of his basis for modifying custody, the majority finds that such consideration was improper because the petition had been rendered moot as a result of its denial by the chancellor. While the petition itself may be a moot issue, the chancellor is certainly entitled to assess appellant's thought processes in bringing such a request to the court.

In the instant case, appellant testified that if she was allowed to move to California, she intended to live with her boyfriend without the benefit of marriage, but after the chancellor stated that he would not permit that, she said that she would find another living arrangement if the court ordered her to do so. Appellant testified that she was not concerned about expenses because her boyfriend would pay those. She stated she would work in a store in California and that she anticipated making more money, but she admitted that she had not yet even talked to the store owner about the prospect of employment. She said that if the job at the store did not work out, she had other friends who would help her.

Appellant was willing to move her young child to California and into a house with a man with whom she was romantically involved but to whom she was not married until the chancellor told her that he would not allow her to do so. Evidence concerning the moral character of a parent is relevant to the best interest of a child and the issue of parental custody. *Stone v. Steed*, 54 Ark. App. 11, 923 S.W.2d 282 (1996). Appellant had no solid job prospects in California, as she had not even contacted the store

owners regarding employment. Appellant's thought processes, as evidenced by her testimony, indicate that she is irresponsible and does not make major life decisions based upon the best interests of her child. Certainly, when determining whether a change of custody was warranted, the chancellor was entitled to take into consideration appellant's lack of ability to place Henry in the correct priority in her life.

The majority, citing *Jones v. Jones*, 326 Ark. 481, 931 S.W.2d 767 (1996), also agrees that a custody modification cannot be based solely on a change in the life of the custodial parent. However, in *Hollinger, supra*, this court distinguished *Jones* from the facts in that case:

> We are cognizant that in *Jones v. Jones*, 326 Ark. 481, 931 S.W.2d 767 (1996), the supreme court held that the remarriage of the father, standing alone, was not enough to support a change in circumstances because he was aware of his impending new marriage at the time of the divorce when he gave custody to his ex-wife. Such was not the case here. Appellee was not contemplating this current marriage at the time of the original decree when custody was given to the mother. Those particular facts are not the same as are before us today.

65 Ark. App. at 114, 986 S.W.2d at 107. In the instant case, there was no testimony regarding whether appellee was contemplating remarriage at the time of his divorce from appellant or not, and no presumption can be drawn from this lack of evidence. Therefore, it was proper for the chancellor to consider appellee's remarriage and stable home environment along with his other bases for modifying custody.

The majority also criticizes the chancellor's decision to base his decision to modify custody in part on appellant's removal of Henry from the preschool in which he was enrolled and allowing him to remain with a friend. Appellant did remove Henry from the preschool in February or March of 2000 because of damage to the school due to an ice storm, for which she cannot be blamed; however, she indicated to the home-study caseworker in April 2000 that Henry was still in the daycare at that time. The chancellor was certainly entitled to interpret this deception as an indication that appellant was not being truthful and that she believed

that she would appear in a better light if the court thought that Henry was still enrolled in preschool.

The chancellor also based his decision to modify custody in part on the fact that appellant's brothers, with whom appellant was living until ordered by the court to make other living arrangements, had various criminal convictions, including false imprisonment and DWI. Although the majority states in a footnote that appellant asserted that appellee knew of the false imprisonment conviction and a carrying a weapon conviction, such an assertion does not appear in the abstract of appellant's testimony. However, in appellee's testimony, he stated that he was not aware of the false imprisonment offense at the time of his divorce from appellant, nor was he aware that each brother had been arrested for public intoxication. The chancellor apparently found appellee more credible with regard to this testimony.

The majority cites *Bennett v. Hollowell*, 31 Ark. App. 209, 792 S.W.2d 338 (1990), for the principle that a custodial stepparent's isolated DWI conviction was not an adequate ground to warrant a change of custody. However, in that case, this court *affirmed* the chancellor's decision, not reversed it. Furthermore, in the present case, it was not an isolated incident; rather, there were multiple convictions for various offenses.

Much is also made of the fact that the chancellor simply ordered appellant to move, which she did, and did not order appellant to keep Henry away from his uncles. In *Stone v. Steed, supra*, this court affirmed the modification of custody from the mother to the father, holding that "evidence of misdemeanor convictions [of the mother's new husband and of persons frequenting the mother's residence] reflected on [the mother's] morality in allowing persons of questionable reputation and character to be around her child. Such information was relevant in deciding the best interest of the child and who should have custody." 54 Ark. App. at 14, 923 S.W.2d at 284. Although the chancellor changed custody upon this basis in *Stone*, there was no indication that he ordered the appellant to keep her child away from these persons, who included her new husband. Likewise, in the present case, the chancellor changed custody based in part

upon appellant having Henry live with persons of questionable reputation and character. He ordered her to move into her own residence, which should certainly indicate that it is not in the best interest of Henry to be living with convicted criminals. This action again shows the lack of appellant's thought process in the context of what is in the best interest of her son.

Lastly, with respect to the chancellor's credibility determinations, the majority opinion suggests that the use of a translator for appellant's testimony may have unjustly had a bearing on the chancellor's assessment of her credibility. However, both appellant and appellee used the same translator, so it would seem that the language barrier played no part in the chancellor's credibility determinations.

There are no cases in which the superior position, ability and opportunity of the chancellor to observe the parties carries a greater weight than those involving the custody of minor children. *Taylor v. Taylor,* 345 Ark. 300, 47 S.W.3d 222 (2001). Based upon the discrepancies in appellant's testimony, the chancellor had the right to determine that appellee was more credible than appellant; furthermore, it is not the province of this court to second-guess such determinations, as the chancellor had the opportunity to observe the parties and hear their testimony.

In sum, I find that the circumstances cited by the chancellor as bases for a change in custody, while not sufficient standing alone, when viewed together as a whole constitutes a material change in circumstances. Furthermore, the decision that a change of custody to appellee is in Henry's best interest was not clearly erroneous. I would affirm the chancellor's decision to modify custody to appellee, and I am authorized to state that Judge JENNINGS joins in this dissent.

Billy Reece CRAIN *v.* STATE of Arkansas

CA CR 01-944 79 S.W.3d 406

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered June 26, 2002

Robert L. Herzfeld, Jr., for appellant.

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

LARRY D. VAUGHT, Judge. Appellant was found guilty of manufacturing methamphetamine, possession of a con-

trolled substance, possession of drug paraphernalia with the intent to manufacture, and maintaining a drug premise. Appellant received the minimum sentence for each crime, and the sentences were ordered to run concurrently. Appellant argues that the trial court erred in its determination that sufficient grounds to support a nighttime search were stated in the affidavit for a search warrant. Additionally, appellant argues that the good faith exception to the exclusionary rule is inapplicable to the case at bar. We affirm.

On or about September 23, 1999, the Grant County Sheriff's Office received information, via the Pine Bluff Sheriff's Office, from a confidential informant that there was a methamphetamine lab on County Road 213 in Grapevine. After investigating the alleged site of the lab and noticing a strong odor of ether near appellant's residence, Sheriff Bob Adams requested a warrant to perform a nighttime search of appellant's trailer. In addition to the boilerplate language contained in most affidavits to support a nighttime search, the affiant stated that he "observed a subject standing at the side of the residence, apparently acting as a lookout" and that he smelled a chemical known to be used in the preparation of methamphetamine. Sheriff Adam's request for a warrant authorizing a "no-knock" nighttime search of appellant's trailer was granted at 1:00 a.m. on September 24, 1999. The warrant was executed shortly thereafter. Appellant filed a motion to suppress the evidence obtained during the search, alleging that there was not sufficient probable cause to support a nighttime search. Appellant's motion to suppress was denied and a Grant County jury ultimately found him guilty of the aforementioned charges. This appeal follows.

In support of his first point on appeal, appellant argues that there was not reasonable cause to justify a nighttime search and that the trial court should have suppressed the evidence discovered during the illegal search. 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). 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.* Because 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 in this regard. *Lemons v. State*, 310 Ark. 381, 836 S.W.2d 861 (1992).

Before a nighttime search warrant may be issued, the issuing judicial officer must have reasonable cause to believe that 1) the place to be searched is difficult to access speedily; or 2) that the objects to be seized are in danger of imminent removal; or 3) that the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which are difficult to predict with accuracy. Ark. R. Crim. P. 13.2(c); *Townsend v. State,* 68 Ark. App. 269, 6 S.W.3d 133 (1999). The affidavit must set out facts showing reasonable cause to believe that circumstances exist which justify a nighttime search. *Hall v. State*, 302 Ark. 341, 789 S.W.2d 456 (1990).

As appellant correctly points out, there was no specific information in the affidavit presented to the magistrate that falls under any of the three justifications for nighttime searches. The only information in the affidavit specific to appellant's residence was the smell of a chemical emanating from the area and a person standing outside of his home. Our supreme court has clearly held that a strong odor of ether is not a reasonable basis for a nighttime search. *Fouse v. State*, 337 Ark. 13, 989 S.W.2d 146 (1999).

The State contends that the allegation of a lookout is sufficient to establish probable cause for a nighttime search because of "safety concerns." While it is true that the State need only show the existence of a single factor to justify a nighttime search, *see Owens v. State*, 325 Ark. 110, 926 S.W.2d 650 (1996), we cannot accept that an allegation of a person standing in front of a residence (that the officer concludes is a lookout) is proof that "the warrant can only be safely or successfully executed at nighttime." The State argues that *McCormick v. State*, 74 Ark. App. 349, 48 S.W.3d 549 (2001), supports a contrary conclusion. However, in *McCormick,* the affidavit established that the safety concern relating to the suspects' use of high-tech surveillance equipment to observe persons approaching the area justified a nighttime search. Observing a person standing outside of a residence is far less per-

suasive on the issue of safety than the known use of high-tech surveillance and in the present case does not justify a nighttime search. Therefore, we are convinced that there was not sufficient probable cause to support a warrant for a nighttime search of appellant's trailer.

We now turn to the issue of the good-faith exception to the exclusionary rule. When an officer relies in "good-faith" on a search warrant that is later determined to be unsupported by probable cause, any evidence discovered by reason of that search will not be suppressed. *United States v. Leon,* 468 U.S. 897 (1984). While *Leon* involved analysis of probable cause for a search under the Fourth Amendment, and this case involves consideration of a nighttime search under the Arkansas Rules of Criminal Procedure, our supreme court has adopted and applied the reasoning contained in *Leon* to nighttime searches in Arkansas. *See, e.g., Fouse, supra.* However, the application of the good-faith exception is not absolute. A police officer may not rely entirely on the magistrate's finding of probable cause; any material false statements or misrepresentation in the police officer's affidavit will deny the State the benefit of the exception to the exclusionary rule. *See Malley v. Briggs,* 475 U.S. 335 (1986); *Leon, supra*; *Yancey v. State,* 345 Ark 103, 44 S.W.3d 315 (2001).[1]

In our determination of whether or not the good-faith exception applies, we look to the totality of the circumstances and may consider unrecorded testimony given to the magistrate as well as facts known by the officer but not communicated to the magistrate. *Moya v. State,* 335 Ark. 193, 981 S.W.2d 521 (1998). We must decide if it was objectively reasonable for a "well-trained police officer" to conclude that the nighttime search was supported by probable cause. *Anderson v. Creighton,* 483 U.S. 635 (1987); *Moya, supra.*

The United States Court of Appeals for the Eighth Circuit provides guidance for our understanding of the objective standard of good faith articulated by the *Leon* court in determining what a

[1] Contrary to the dissent's understanding of the majority viewpoint, we do not contend that a magistrate's finding of probable cause is dispositive on the "good-faith" question and affirmatively so state in this section of the opinion.

reasonable, "well-trained police officer" would have believed constitutes probable cause. In *United States v. Martin,* 833 F.2d 752 (8th Cir.1987), the court reasoned:

> Although a police officer may not rely entirely on the magistrate's finding of probable cause, in cases where, as here, the courts cannot agree on whether the affidavit is sufficient, it would be unfair to characterize the conduct of the executing officers as bad faith, particularly where there has been no material false statements or misrepresentations in the affidavit and where the officer is acting in good faith.
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>
> When judges can look at the same affidavit and come to differing conclusions, a police officer's reliance on that affidavit must, therefore, be reasonable. . . . The facts of this case closely resemble those in *United State v. Fama,* 758 F.2d 834 (2d Cir. 1985), wherein the court applied the good faith exception and reversed the order of the district court suppressing illegally seized evidence of drug trafficking. After reviewing the facts the court concluded that any error must be attributed to the issuing magistrate rather than the investigating officers. "The affidavit provided evidence to create disagreement among thoughtful and competent judges as to the existence of probable cause. Under these circumstances, the officers' reliance on the judge's determination of probable cause was objectively reasonable, and application of the extreme sanction of exclusion is inappropriate."

Id. at 755-56 (citation omitted).

Our supreme court in *Yancey, supra,* looked to *Leon* in deciding how to apply the good-faith exception in the "ordinary case":

> In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient. "[O]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law." Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.

Id. at 118, 44 S.W.3d at 325 (citations omitted). The application of *Leon's* objective prong to the "ordinary case" is further

explained in *United States v. Wunder,* 663 F. Supp 803 (W.D. Mo. 1987):

> One defendant in *Leon* contended that "no reasonably well trained police officer could have believed that there existed probable cause to search his house. . . ." The Court concluded that where more than a "bare bones" affidavit is presented, "the officers' reliance on the magistrate's determination of probable cause was objectively reasonable, and application of the extreme sanction of exclusion is inappropriate." *Leon* stated a general rule that "[i]n the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." The admonitionary gloss that we believe is reflected by the majority opinion in *Leon* is that the modification of the Fourth Amendment exclusionary rule made in that case requires that district courts should deny motions to suppress in all except exceptional cases "so as not to bar the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." The pending case, in our judgment is an ordinary run-of-the-mill case involving an invalid warrant issued by a State judicial officer.

Id. at 806 (citations omitted). Like *Wunder,* the case at bar is also an "ordinary run-of the-mill case" involving an invalid warrant issued by a State judicial officer.

When assessing a "good faith" reliance on the magistrate's determination of probable cause, we can, and must, look to the totality of the circumstances including what Sheriff Adams knew, but did not include in his affidavit.[2] In the case at bar, Sheriff Adams offered the following information (in addition to the "bare-bones" or boilerplate language) in his affidavit to support

[2] Two facts contained in the trial court's letter opinion are beyond the scope of even an examination of the "totality of the circumstances." Specifically these facts are 1) that when appellant answered the officer's knock on the door of his residence (immediately prior to executing the search) he was armed with a handgun, and 2) that Sheriff Adams had been informed that an officer in Cleveland County's Sheriff Office believed that appellant was a "violent person."

his request for a nighttime search: 1) he received credible information that appellant was presently manufacturing methamphetamine; 2) within two hours of the request, while conducting surveillance of appellant's residence, he smelled a chemical known to be used in the manufacture of methamphetamine; 3) he observed a person acting as a lookout. Additionally, in the hearing on the motion to suppress the following facts (that were known to Sheriff Adams, but that he did not include in the affidavit) were established: 1) a large bonfire was burning at the side of the residence; 2) the residence was located about sixty yards from the road; 3) anyone who approached the residence would be in open view.

There is no evidence that Sheriff Adams made "material false statements or misrepresentations" in the affidavit, there is no evidence that the judicial officer "abandoned his detached and neutral role," and the affidavit provided evidence to "create disagreement among thoughtful and competent judges as to the existence of probable cause." Sheriff Adams offered an affidavit that contained more than boilerplate language and conclusions to justify his search request. Both the issuing magistrate and Sheriff Adams believed that sufficient probable cause existed to support a nighttime search. We conclude that a reasonable, "well-trained police officer" would have also believed, albeit incorrectly, that a nighttime search of appellant's home was justified. Therefore, the good-faith exception to the exclusionary rule is applicable to the case at bar and supports the trial court's denial of appellant's motion to suppress. We affirm.

Affirmed.

JENNINGS, ROBBINS, and CRABTREE, JJ., agree.

GRIFFEN and BAKER, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. I agree with the majority decision that the affidavit failed to demonstrate reasonable cause to justify a nighttime search and that the failure was a substantial violation. However, I would hold that the police officers failed to act in "good faith" pursuant to *United*

States v. Leon, 468 U.S. 897 (1984), such as to salvage the defective nighttime search. *Leon* utilizes an objective standard, and considers what a reasonably well-trained police officer would have believed to be reasonable cause to warrant a nighttime search. *See id.* There is simply no basis for finding that the officers had a "good faith" basis for believing that there was good and sufficient probable cause to justify a nighttime search of appellant's residence. Therefore, I respectfully dissent from the decision to affirm. Instead, I would reverse and remand the conviction.

As I understand the majority's viewpoint, the fact that two judges (the initial magistrate and the circuit judge) found the affidavit for a nighttime search warrant adequate is dispositive on the "good faith" question. If that is the standard, I have not found it in any cases. Moreover, that reasoning cannot withstand scrutiny when one remembers that in every instance where the legality of a search is challenged on appeal following issuance of a warrant — for a nighttime search or otherwise — the question would not be before us on appeal if the initial request for a warrant had not been granted by at least one judicial officer, *i.e.*, the judge to whom the affidavit for search warrant was initially presented.

In *Garner v. State,* 307 Ark. 353, 820 S.W.2d 446 (1991), the appellant moved to suppress evidence, and argued that the affidavit contained insufficient facts to support a nighttime search. Our supreme court agreed. After determining that the violation was substantial, the court considered whether the officers acted in "good faith" pursuant to *Leon, supra.* The court recognized four situations in which an objective "good faith" by police officers will not overcome a defective search. These situations include when 1) the officers misled the judicial officer with information that the officers knew to be false or should have known to be false, 2) the judicial officer acts as an adjunct police officer, 3) the affidavit is so deficient on its face that it is unreasonable for an officer to consider that reasonable cause existed, and 4) the warrant fails to sufficiently identify the place to be searched or the items to be seized. In examining the "good faith" exception, the *Garner* court stated as follows:

> Our concern today is for the integrity of our Rules. If they are to have any meaning relative to nighttime searches, more must be shown the municipal judge than was offered in this case. Subjectively, the executing officers no doubt believed that they were complying with the law because they were using a printed form. Objectively, the affidavit and warrant were lacking in any indicia of a reasonable cause for a nighttime search other than a reiteration of the conclusory language in our Rules.

Id. at 359-60, 820 S.W.2d 446, 450.

This is not a question of federal law. Arkansas law and our Rules of Criminal Procedure prescribe certain standards before a nighttime search warrant can issue. Our case law is controlling. Given that a nighttime search is, in itself, an exception under our own law, our courts have resisted the temptation to lower the threshold for conducting nighttime searches. This decision flies in the face of that reluctance.

Although Adams did not mention the following facts in the affidavit or in sworn testimony to the magistrate, the trial court allowed him to testify over appellant's objection that: 1) the area was dark except for a large bonfire that was burning beside the residence that illuminated the outside structure; 2) a female was pacing in front of the residence between the house and the fire; 3) the female would watch with intensity as vehicles drove by; 4) the female was outside the first time the officers drove by; 5) the female was still outside ten minutes later when the officers drove by again; 6) Adams contacted the Cleveland County authorities, who indicated that appellant had a temper and that "he did have a propensity for violence somewhat." Taken together, Adams's statements could not have led a reasonably well-trained police officer to believe that reasonable cause existed to justify a nighttime search. The officer's reference to a large bonfire that illuminated the structure contradicts the "cover of darkness" that often justifies a nighttime search. Also, the mere fact that a female was pacing in front of the residence when the officers initially drove by and was still present when the officers drove by ten minutes later does not support a reasonable inference, let alone compel the con-

clusion on the part of a reasonably well-trained officer, that the female was acting as a lookout such as to necessitate a nighttime search.

In rendering its ruling, the trial court noted that it considered extraneous evidence known to the officers at the time of the application to determine whether the officers acted in "good faith" pursuant to *Moya v. State*, 335 Ark. 193, 981 S.W. 2d 521 (1998). While the trial court did not err in considering unrecorded oral testimony to determine whether the officers acted in good faith, the court did err in considering facts that were not supported by the evidence, and circumstances that occurred after the warrant was executed. These facts included 1) that anyone who approached the residence would be in open view, and 2) that the affiant had been informed by a deputy sheriff that in his opinion appellant was a violent person, 3) that appellant came to the door armed with a loaded handgun and 4) that numerous items used to manufacture methamphetamine were confiscated as a result of the search.

Given the deficiencies in the affidavit, the lack of indicia of a reasonable cause for a nighttime search provided by Adams's unsworn testimony, and the trial court's reliance on facts that were not supported by the evidence, I would hold that the totality of the circumstances fail to demonstrate that the officers had a "good faith" basis for believing that there was good and sufficient probable cause to justify a nighttime search of appellant's residence. Thus, I respectfully dissent from the decision to affirm the conviction, and would reverse and remand instead.

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

Gaya SHARP *v.* LEWIS FORD, INC.,
and Crockett Adjustment, Inc.

CA 01-1115 78 S.W.3d 746

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered June 26, 2002

[redacted]

Conrad T. Odom, for appellant.

Davis, Wright, Clark, Butt & Carithers, PLC, by: *Constance G. Clark*, for appellees.

LARRY D. VAUGHT, Judge. Gaya Sharp, appellant in this workers' compensation case, appeals the decision of the

Commission denying her additional benefits for treatment of her compensable injuries because the treatment was not reasonable and necessary, and because she failed to follow proper change-of-physician procedures. We affirm.

The incident leading to this case arose on December 21, 1998, when appellant stepped onto the porch at her place of employment, slipped on the ice, and tumbled down seven steps. Appellant's coworkers contacted her husband, who transported her to the emergency room of Washington Regional Hospital. She was examined and x-rays were taken. No bones were broken. Dr. Sammy Turner, the emergency room physician, in his medical report stated that "she reported that she fell down essentially seven steps, fell to a seated position and tumbled from side to side. She did not strike her head or neck or back area per se, she reports." Appellant was given prescriptions for pain medication and sent home.

Appellee accepted the injury as compensable and assisted appellant in obtaining treatment from Dr. Moffitt at the Arkansas Occupational Health Clinic in Lowell. In his examination notes from her initial visit on December 29, 1998, Dr. Moffitt observed that appellant complained of right elbow pain, swelling in her right hand, pain in her right shoulder, and tenderness in her left hip. He prescribed medication and physical therapy for her contusions and strain. He indicated that appellant did not hit her head and had no loss of consciousness at the time of her fall. She was released to return to work with no restrictions.

Subsequent to this initial examination, Dr. Moffitt saw appellant on January 5, 13, and 21, 1999. On these visits appellant complained of pain primarily in her shoulder, hip, and lower back. Dr. Moffitt continued to prescribe pain medication, heat therapy, and physical therapy. On her next visit on February 5, 1999, appellant reported that her shoulder was better, but that she still had pain in her lower and upper back. Dr. Moffitt's progress notes from this visit indicate "she is having headaches," and this is the first written documentation of appellant's complaint of headaches. The doctor prescribed additional pain medication and

medicine for sinusitis. He further noted that she was not sleeping well or coping with her injury.

Appellant sought treatment from Dr. Garrett Goss, her HMO family physician, on February 10, 1999. She complained of headaches, stiff neck, earache, dizziness, and vomiting. She had the flu and also reported having migraines in the past. She stated that she was under another physician's care for neck pain associated with the fall. Two days later appellant went to the emergency room at St. Mary's Hospital complaining of a headache. She underwent a CT scan which was negative. The ER physician recommended she see a neurologist.

On February 16, 1999, she saw Dr. Bryan Abernathy, a partner of Dr. Moffitt. Dr. Abernathy noted that appellant had been seen at St. Mary's for occipital tension-type headaches and was told that she might need to see a neurologist. He continued her therapy and pain medication and indicated that a referral to a psychologist or psychiatrist might be of benefit. Appellant testified that she did not keep her follow-up appointment with Dr. Abernathy because she did not like his demeanor.

On February 23, 1999, appellant sought treatment from Dr. Michael Morse with Neurological Associates. Dr. Michael McGhee of Garrett Goss Clinic made the referral to Dr. Morse. In his notes, Dr. Morse reported that appellant fell down steps at work and hit her left temple. He stated that appellant reported having headaches after the fall but not before. Appellant told Dr. Morse that she had been going to physical therapy, but that the therapy made the headaches worse. Dr. Morse diagnosed appellant with post-traumatic migraines.

At the suggestion of her sister, appellant next sought treatment from Dr. Tomlinson at the Orthopedic Institute. Dr. Tomlinson noted that appellant hit her head and injured her neck and shoulder in a work-related incident. His report stated that after the injury appellant had migraine headaches, neck pain and right shoulder pain. Dr. Morse diagnosed appellant with cervical strain/sprain, scapulothoracic myofascial syndrome, right shoulder, and Type II rotator-cuff tendinitis.

Appellant continued to seek treatment from Dr. Morse even though appellee informed her that it would not pay because she had bypassed the change-of-physician procedures. Dr. Morse continued to treat her up to the time of the hearing. He prescribed Prozac and Zomig for her headaches, loss of memory, loss of concentration, depression, and mood swings.

Upon referral from Dr. Morse, appellant began seeing Dr. Betty Back, Dr. Morse's wife. Appellant testified that at the time of her initial visit with Dr. Back, she was experiencing severe headaches, dizziness, occasional blackouts, pain, extreme depression, short-term memory loss, and loss of concentration. Dr. Back diagnosed appellant with post-concussional disorder. She treated appellant with outpatient cognitive rehabilitation, participation in a traumatic brain injury support group, biofeedback for headaches and neck pain, and individual counseling.

Appellant admitted that she did not recall whether she hit her head in the fall because it happened so quickly. She also testified in her deposition that she had bad headaches before the injury, and that she tended to have headaches about once a week. She testified that although she told Dr. McGhee that she had migraines before the accident, she was never diagnosed with migraines. She stated that she stopped going to the Lowell clinic because she was not getting results.

At the hearing, appellant admitted that her treatment with Drs. Morse, Back, and Tomlinson was not authorized, but that she did not realize that she was required to request authorization. She testified that she was never sent any forms on how she should request a change of physician. However, on cross-examination, she testified that she recognized an AR-N form that was brought home by her husband, who worked for Lewis Ford at a different store. She admitted signing the form, and that in response to the question contained in the form: what part of your body was injured, she answered "my right shoulder, right arm, my middle and lower back, left hip, left leg, knee, and ankle." The sentence immediately proceeding appellant's signature on the form states, "my signature below indicates that I have been provided with my rights regarding change of physician."

During her testimony, appellant agreed that the initial emergency room report, as well as her first few visits with Dr. Moffitt up to February 5, 1999, did not include any indications that she experienced any head injury. She testified that she did not have any memory of hitting her head during the fall, and that she did not know why Dr. Morse's records indicated that she hit her left temple on a step.

Although appellee initially accepted appellant's injury as compensable, it controverted her additional claims on the grounds that the medical treatment she obtained was unauthorized and was not reasonable and necessary for her injury. The administrative law judge (ALJ) found that appellant failed to prove by a preponderance of the evidence that she was entitled to additional medical treatment for her compensable injuries. In addition, the ALJ found that the treatment by Drs. Tomlinson, Morse, and Back was not authorized because appellant failed to follow the change of physician protocol.

After a de novo review, the Commission affirmed and adopted the findings of the ALJ, noting that appellant's contention that she sustained a concussion during a tumble down the steps was not established by a preponderance of the evidence; that there was no objective medical evidence of a concussion or other brain injury; and that the hand delivery of Form AR-N satisfied the statutory delivery requirements. It also noted that because appellant's additional treatment did not involve emergency treatment, appellees were not liable for the unauthorized treatment. This appeal followed.

When considering the appropriateness of the Commission's decision regarding workers' compensation benefits, this court views the evidence in the light most favorable to the Commission's decision. *See Crudup v. Regal Ware, Inc.,* 341 Ark. 804, 20 S.W.3d 900 (2000). Our determination is not based on whether we would have reached a different result than the Commission or whether the evidence supports a contrary finding. *See Wackenhut Corp. v. Jones,* 73 Ark. App. 158, 40 S.W.3d 333 (2001). Rather, the decision is affirmed when this court determines that the Commission's ruling is supported by substantial

evidence, *i.e.*, evidence that would allow fair-minded persons to reach the same conclusion as the Commission when presented with the same facts. *See id.*

Appellant contends that the Commission's decision that her medical care was not compensable because it was not reasonable and necessary and because she did not follow the change of physician rules is not supported by substantial evidence. We disagree and affirm.

The issue before the Commission concerned the extent of appellant's injuries following her work-related fall, and whether objective medical findings established the existence and extent of a brain injury allegedly sustained during her fall. Compensable injuries must be established by medical evidence supported by objective findings, *i.e.*, findings that do not come within the voluntary control of the claimant. *See* Ark. Code Ann. § 11-9-102(4)(D); (16)(A)(i) (Repl. 2002).

The first indication in any medical record that appellant suffered headaches subsequent to her December 21, 1998, injury was recorded on February 5, 1999. The initial notations regarding appellant's headache symptoms were reported in conjunction with diagnoses of flu and sinusitis-type symptoms. The medical report prepared by the emergency room physician shortly after the accident specifically notes that appellant did not strike her head, and diagnosed only musculoskeletal soft tissue contusions and strains.

Dr. Back evaluated appellant on October 19, 1999, and diagnosed her with a post-concussional disorder. Although Dr. Back testified in her deposition that it is not necessary for someone to strike her head in order to suffer post-concussion syndrome, she agreed that it is more common to have a concussion in conjunction with a blow to the head. She also agreed that a concussion would not likely occur in a slip-and-fall accident absent a direct blow to the head. Additionally, the objective CT scan of appellant's brain did not indicate an abnormality. Although Dr. Back opined that the Halsted-Reitan battery that she administered to appellant is an objective test that would be difficult to manipulate, she conceded that her neuropsychological testing relied on responses made by appellant. We therefore conclude that substan-

tial evidence exists to support the Commission's finding that appellant failed to establish evidence of a concussion or other brain injury.

When a claimant desires a change of physician, she must petition the Commission for approval. *See* Ark. Code Ann. § 11-9-514(a)(2)(A) (Repl. 2002). The claimant is entitled to petition the Commission one time only for a change, and the Commission may approve the change with or without a hearing. *See id.* Subsections (c)(1)-(3), which outline delivery by the employer of a form that explains the employee's rights and responsibilities concerning the change, are pertinent to the appeal and read as follows:

> (c)(1) After being notified of an injury, the employer or insurance carrier shall deliver to the employee, in person or by certified or registered mail, return receipt requested, a copy of a notice, approved or prescribed by the Commission, which explains the employee's rights and responsibilities concerning change of physician.
>
> (2) If, after notice of injury, the employee is not furnished a copy of the notice, the change of physician rules do not apply.
>
> (3) Any unauthorized medical expense incurred after the employee has received a copy of the notice shall not be the responsibility of the employer.

We are obliged to strictly construe and apply the workers' compensation act. Ark. Code Ann. § 11-9-704(c)(3) (Repl. 2002). In this case, it is not disputed that appellant sought additional unauthorized, non-emergency treatment from Drs. Tomlinson, Morse, and Back. Appellant further admitted that the day after her injury, her husband, who also worked for appellee Lewis Ford, brought her a Form AR-N, which appellant signed and which was admitted into evidence. Above her signature is the confirmation that "I have been provided with my rights regarding change of physician." The personnel director for Lewis Ford testified that she believed that she had sent the form home with appellant's husband, who worked in her office. The Commission found that this was sufficient delivery to satisfy the statute. Construing the statute strictly, as we must, there is sufficient evidence

upon which the Commission could find that that the employer "furnished" a copy of the form, which was "deliver[ed] to the employee, in person." Even under strict construction, the point of the statute is clearly that there must be proof that appellant received the form after her injury, and there is such proof. Therefore, we affirm.

JENNINGS, ROBBINS, and GRIFFEN, JJ., agree.

CRABTREE and BAKER, JJ., dissent.

KAREN R. BAKER, Judge, dissenting. In my opinion, this case should be reversed. I do not disagree with the majority that there is substantial evidence to support a finding that appellant received a notice regarding her right to a change of physician from some source. However, I do not feel that this is the relevant inquiry. Instead, there must be substantial evidence that the employer complied with Ark. Code Ann. § 11-9-514 (Repl. 2002). No evidence supports the Commission's finding that appellee employer complied with the provisions of Ark. Code Ann. § 11-9-514 in giving appellant notice of the procedure involved in changing physicians.

Arkansas Code Annotated § 11-9-704(c)(3) (Repl. 1996) states that we are to construe the workers' compensation statutes strictly. Arkansas Code Annotated § 11-9-514(a)(2)(A) allows a one-time-only change of physician. Sub-section (c)(1) mandates that the employer, after being notified of an injury, deliver a copy of a notice to the employee, *in person or by certified or registered mail, return receipt requested*, explaining the employee's rights and responsibilities concerning change of physician. (Emphasis added.) If the employee is not furnished a copy of the notice, the change of physician rules *do not apply*. Ark. Code Ann. § 11-9-514(c)(2) (Emphasis added.)

In this case, Linda New of Crockett Adjustment testified that she had no proof that the ARN form was actually sent to appellant. Moreover, she testified that ARN forms were not sent by certified or registered mail per the statutory requirements. Connie Proctor, personnel director for appellee, testified that it is the company's practice to send the injured worker an ARN form;

however, she had no recollection of the manner in which the form was given to appellant. She testified, without any certainty, as to the possibility that she gave the form to appellant's husband to give to her and that she was unsure of how she got the form back from appellant. Appellant testified that she recognized the ARN form; however, she stated that, "I believe that it was brought home to me — either this document or a copy of it — by my husband. I'm not sure, though." She had no recollection of ever seeing the notice of the change of physician procedures which should have been attached to the ARN form. Above appellant's signature on the ARN form the following statement appeared. "My signature below also indicates that I have been provided with my rights regarding change of physician." The majority believes this is sufficient to show she received the notice. I do not disagree. However, whether or not appellant actually received the notice, there must be substantial evidence that the employer complied with Ark. Code Ann. § 11-9-514.

The Commission based its decision on the finding that the husband was acting as appellee's agent when delivering the ARN form to appellant. Substantial evidence has been defined as valid, legal, and persuasive evidence that a reasonable mind might accept as adequate to support a conclusion and force the mind to pass beyond conjecture. *Arkansas State Racing Comm'n v. Wayne Ward, Inc.*, 346 Ark. 371, 57 S.W.3d 198 (2001). In this case, the Commission's finding is troublesome in that there was a complete lack of evidence that the husband was under appellee's authority and acting as appellee's agent when he purportedly delivered the ARN form to appellant. I am persuaded that the Commission could not logically and reasonably find that the husband was acting as appellee's agent, given the lack of evidence in this case. Thus, there is not substantial evidence to support the Commission's finding that the husband was acting as appellee's agent or that he actually delivered the ARN form to appellant.

Based on our substantial evidence standard of review, this case should be reversed due to the lack of evidence that the employer complied with Ark. Code Ann. § 11-9-514.

CRABTREE, J., joins.

Kirk J. RANKIN *v.* DIRECTOR,
Employment Security Department

E 02-40 79 S.W.3d 885

Court of Appeals of Arkansas
Division II
Opinion delivered July 3, 2002

[Petition for rehearing denied August 28, 2002.]

Appellant, pro se.

Phyllis A. Edwards, for appellee.

JOHN E. JENNINGS, Judge. Kirk Rankin appeals from a decision of the Board of Review denying him unemployment benefits on a finding that he voluntarily left his last work pursuant to Ark. Code Ann. § 11-10-513 (Repl. 2002). We hold

that the finding is not supported by substantial evidence and reverse.

Rankin was an inmate at the Arkansas Department of Correction. While there he participated in a work release program. He was employed by Ready Temps Employment, LLC, and was placed by Ready Temps at the Nucor-Yamato Steel Mill just outside of Blytheville, Arkansas. While working at Nucor Steel he was transferred by the Department of Correction to the Brickeys Unit for the purpose of his eventual parole and was no longer allowed to participate in the work release program.

Although the hearing officer found that Rankin had no choice in the matter, she also found that he "voluntarily left his last work without good cause connected with the work." The Board of Review affirmed and adopted the decision of the Appeal Tribunal.

We will affirm the decision of the Board of Review if it is supported by substantial evidence. *Hiner v. Director*, 61 Ark. App. 139, 965 S.W.2d 785 (1998). The question is whether the Board could reasonably reach its decision upon the evidence before it. *Rodriguez v. Director*, 59 Ark. App. 8, 952 S.W.2d 186 (1997). In *Dingmann v. Travelers Country Club*, 420 N.W.2d 231 (Minn. Ct. App. 1988), the Minnesota Court of Appeals interpreted the term "voluntarily quit." The court held that the test is whether the individual has exercised his own free will or choice in the separation. *See Dingmann*, 420 N.W.2d at 233.

In the case at bar the Board found that Rankin had no choice in the matter and the evidence was undisputed that this was so. It follows that the Board's finding that Rankin voluntarily left his last work is not supported by substantial evidence. We therefore reverse and remand this case to the Board of Review for further proceedings consistent with this opinion.

Reversed and Remanded.

GRIFFEN and NEAL, JJ., agree.

Timothy SWAIM *v.* STATE of Arkansas

CA CR 01-1224 79 S.W.3d 853

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered July 3, 2002

[redacted]

David L. Dunagin, for appellant.

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

OLLY NEAL, Judge. Appellant Timothy Swaim tried to break into a Pepsi truck at an equipment construction site located at Fort Chaffee, but was prevented from doing so when several people approached him. He got into the passenger side of a car driven by another fellow and left the area, pursued by the police. A Fort Chaffee security chief set up a road block using his vehicle. As the vehicle that appellant was in approached the roadblock, the security chief, Michael Hardy, drew his weapon and ordered the occupants of the vehicle to stop and step from the vehicle. The driver continued at a slow pace. During that episode, appellant displayed a chrome-plated revolver, but did not point it at Hardy. Following a jury trial, appellant was convicted of aggravated robbery, four counts of aggravated assault, felony fleeing, and possession of an instrument of crime. He was sentenced to a term of thirty-three years in the Arkansas Department of Correction. On appeal, he challenges only the aggravated-assault conviction involving Chief Michael Hardy, for which he received a two-year sentence. Specifically, appellant alleges that the trial court erred in denying the motion for a directed verdict. We find merit in appellant's argument and therefore reverse and dismiss the aggravated-assault conviction.

Motions for directed verdict are treated as challenges to the sufficiency of the evidence. *Burmingham v. State,* 342 Ark. 95, 27 S.W.3d 351 (2000); *Johnson v. State,* 71 Ark. App. 58, 25

S.W.3d 445 (2001). This review includes an evaluation of otherwise inadmissible evidence. *Burmingham v. State, supra* (citing *Harris v. State*, 284 Ark. 247, 681 S.W.2d 334 (1984)). When reviewing the denial of a directed verdict, the appellate court will look at the evidence in the light most favorable to the State, considering only the evidence that supports the judgment or verdict and will affirm if there is substantial evidence to support a verdict. *Johnson v. State, supra.* Evidence is sufficient to support a verdict if it is forceful enough to compel a conclusion one way or another. *Johnson v. State, supra.*

After the close of the State's case, appellant moved for a directed verdict, arguing that the State had failed to prove the elements of aggravated assault because it did not show that the defendant created a substantial danger of death or physical injury, and because the defendant never pointed the firearm at the officer. A person commits aggravated assault, if under circumstances manifesting extreme indifference to the value of human life, he purposely engages in conduct that creates a substantial danger of death or serious physical injury to another person. Ark. Code Ann. § 5-13-204 (Repl. 1997). A person acts purposely with respect to his conduct when it is his conscious object to engage in conduct of that nature or to cause such a result. Ark. Code Ann. § 5-2-202 (Repl. 1997).

■ ■ Appellant likens this case to the situation in *Wooten v. State*, 32 Ark. App. 198, 799 S.W.2d 560 (1990). In *Wooten*,

> [t]he officer testified that as he pulled into the parking lot he saw Wooten. He testified that Wooten reached into his right pants pocket and started backing away. Officer Puckett got out of his car with his own pistol drawn and ordered Wooten several times to stop and get on the ground. Wooten continued to back away and appeared to Officer Puckett to be trying to pull something out of[ ] his pocket that was stuck. The officer testified that when Wooten had backed up behind a parked car[,] he pulled his hand out of his pocket, and the officer saw that he was holding a small handgun. Puckett testified that Wooten dropped to his knees behind the car, and that he "could see him lifting his head up slightly as if to try to locate my position."

Wooten v. State, 32 Ark. App. at 199. In that case, we recognized that our aggravated-assault statute is not based upon the use of a deadly weapon or the creation of fear, but requires the creation of "substantial danger of death or serious physical injury to another person." *Schwede v. State*, 49 Ark. App. 87, 896 S.W.2d 454 (1995) (citing *Wooten v. State, supra).* We found in *Wooten* that, based on the evidence that appellant did not point the gun at the officer or expressly threaten the officer, the appellant was not guilty of aggravated assault. We also referred in *Wooten* to the case of *Johnson v. State*, 132 Ark. 128, 130, 200 S.W. 982, 982 (1918), where it was said that "the act of drawing a pistol, if accompanied by threats evidencing an intention to use it on the person threatened, constitutes an assault." *Wooten v. State, supra.* The display of a gun instills fear in the average citizen and, consequently, creates an immediate danger that a violent response will ensue. *Holloway v. State*, 18 Ark. App. 136, 711 S.W.2d 484 (1986) (overruled on other grounds in *Flurry v. State*, 290 Ark. 417, 720 S.W.2d 699 (1986) and in *Doby v. State*, 290 Ark. 408, 720 S.W.2d 694 (1986)).

The State, in essence, relies on *Schwede v. State, supra*, and states that the case stands for the proposition that "a person who brandishes a gun so as to create a dangerous situation is guilty of aggravated assault whether or not the gun is loaded." However, that case is factually different than the one at hand. In *Schwede, supra*, the appellant actually made a threatening statement, pointed a pistol at two men, and then cocked the hammer. Here, as in *Wooten, supra*, the appellant did not point the gun at the officer or expressly threaten the officer.

On these facts, we cannot say that the conviction for aggravated assault is supported by substantial evidence. Nor is the evidence amply sufficient to sustain a conviction for assault in the third degree as the State has requested in the alternative. Arkansas Code Annotated section 5-13-207 (Repl. 1997) provides, "[a] person commits assault in the third degree if he purposely creates apprehension of imminent physical injury in another person." Assault in the third degree is a lesser-included offense of aggravated assault. *Wooten v. State, supra* (citing *Holloway v. State, supra).*

There is simply no evidence that appellant created apprehension of imminent physical injury in the officer. Appellant was attempting to flee from the scene of the crime, when at the roadblock, he encountered Chief Michael Hardy. Chief Hardy testified that the appellant "brought a weapon of some type, he didn't point it directly at me. I don't know why, but I had mine on him pretty well, so I think he decided to drop it down. . . . I just remember the weapon coming up. It was a chrome plated revolver type weapon."

Some may argue that there was the possibility that appellant's conduct created apprehension to the passenger in his vehicle. However, appellant was not so charged. Appellant was charged with aggravated assault against the officer and it was the officer's apprehension, not appellant's passenger's, that is relevant. Therefore, we reverse and dismiss.

Reversed and dismissed.

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

PITTMAN, J., concurs.

Al MORGAN *v.* CENTURY 21 PERRY REAL ESTATE

CA 01-1076 79 S.W.3d 878

Court of Appeals of Arkansas
Divisions I, II, and III
Opinion delivered July 3, 2002

Randy Rainwater, for appellant.

John Maddox, for appellee.

LARRY D. VAUGHT, Judge. This is an appeal from an order denying appellant Al Morgan's motion to set aside a default judgment entered against him. On appeal, he contends that the trial court erred in finding (1) that there was no evidence of fraud in obtaining the default judgment, and (2) that there was no inadvertence, surprise or excusable neglect, nor any other reason justifying the setting aside of the default judgment. We affirm.

On September 8, 2000, appellee Century 21 Perry Real Estate filed a complaint against appellant, alleging that he entered into an exclusive listing agreement to sell his property through appellee's agent, Dennis Hughes, and that he violated the agreement by selling the property to Basil and Penny Kesterson. On September 29, 2000, Hughes filed an affidavit for warning order on behalf of appellee, stating, "According to the best information I have, from an investigation of the matter, the best known address of [appellant] is P.O. Box 413, Wickes, AR 71973. . . ." The affidavit requested that a warning order be issued and published to warn appellant of the action and that an attorney ad litem be appointed for the same purpose. Bob Keeter was appointed on September 29, 2000, as an attorney ad litem for the purpose of notifying appellant of the lawsuit and warning him that a judgment would be rendered against him if he did not respond within thirty days. The warning order was issued the same day.

Bob Keeter filed a report on October 30, 2000, stating that he sent appellant a copy of the complaint, the affidavit for warning order, the warning order, and the order appointing an attorney ad litem to "Al Morgan, P.O. Box 413, Wickes, AR 71973" on October 6, 2000, via certified mail, return receipt requested, restricted delivery. It was returned to sender bearing the notation "unclaimed." The warning order was published in the *Mena Star* on October 5, 12, 19, and 26 of 2000. Appellant never filed an answer, and a default judgment was entered on November 15, 2000. Appellee was awarded $8850, plus costs and attorney's fees. Appellee garnished monies owed by the Kestersons to appellant for the purchase of the house.

Appellant filed a motion to set aside the default judgment on March 9, 2001, and an amended motion on March 12, 2001. Appellant alleged that the judgment should be set aside for the following reasons: he received no notice of the action; he was out of state, his mail was not forwarded, and he did not see the warning order published in the *Mena Star*; the default judgment was a surprise; appellee had no knowledge of his whereabouts and appellee's agent signed an affidavit as to appellant's best known address without having any knowledge of his whereabouts or how to locate him; no efforts were made by appellee or its agent to

locate appellant; and that appellee committed fraud and misrepresentation in obtaining the listing agreement, which was the basis for its cause of action. After a hearing, the trial court denied the motion finding that there was no evidence of fraud in obtaining the judgment, that there was no mistake, inadvertence, surprise or excusable neglect, or any other reason justifying the setting aside of the judgment. A timely notice of appeal was filed on July 19, 2001.

When a party against whom a judgment for affirmative relief is sought fails to plead or otherwise defend as provided by the Arkansas Rules of Civil Procedure, a default judgment may be entered against him. *See* Ark. R. Civ. P. 55(a). Rule 55(c) of the Arkansas Rules of Civil Procedure provides:

> The court may, upon motion, set aside a default judgment previously entered for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) the judgment is void; (3) fraud, misrepresentation, or other misconduct of an adverse party; or (4) any other reason justifying relief from the operation of the judgment. The party seeking to have the judgment set aside must demonstrate a meritorious defense to the action; however, if the judgment is void, no other defense to the action need be shown.

Default judgments are not favorites of the law and should be avoided when possible. *Miller v. Transamerica Com. Fin. Corp.*, 74 Ark. App. 237, 47 S.W.3d 288 (2001). When a trial judge denies a motion to set aside a default judgment, we must determine on appeal whether the trial judge abused his discretion. *Id.*

Appellant first argues that the trial court erred in finding that there was no evidence of fraud in obtaining the judgment. Specifically, he contends on appeal that appellee committed fraud because its agent filed an affidavit for warning order without making a diligent inquiry as to appellant's whereabouts. However, he did not make this argument to the trial court as a basis for his motion to set aside the default judgment. Rather, the motion only alleges that appellee's agent committed fraud and misrepresentation in obtaining the listing agreement and that the listing agreement was the basis for appellee's cause of action; the fraud allegation was only a defense to appellee's complaint. Appellant, at the hearing, testified that he was not alleging any type of fraud

with respect to service, but only that appellee committed fraud in not complying with the agreement between the parties. Appellant's argument is not preserved for our review because he failed to allege fraud in obtaining service of process as a basis for his motion to set aside the default judgment. It is well settled that we will not consider an issue raised for the first time on appeal. *Sutter v. Payne*, 337 Ark. 330, 989 S.W.2d 887 (1999). However, appellant did sufficiently raise the issue of the validity of service of process in his motion to set aside the default judgment by arguing that no efforts were made by appellee or its agent to locate the appellant.

Appellee's agent, Dennis Hughes, testified that the only address he had for appellant was the post office box in Wickes and that he knew that appellant had left the area. He called the post office to see if there was a forwarding address, and there was not. No other inquiry was made. Appellant testified that he left town, left no forwarding address, went to Alaska where he had no permanent address, did not check his mail, and had no one check it for him. There is no indication that appellee failed to use available information or even that appellant's whereabouts could have been ascertained. Unlike *Smith v. Edwards,* 279 Ark. 79, 648 S.W.2d 482 (1983), where the record reflected that Smith could have easily discovered Edwards's whereabouts, but he failed to utilize the available information, there is no indication from this record that Morgan could be located. Under these facts we do not find that the trial judge abused his discretion by denying the motion to set aside the judgment.

Appellant also argues that the trial court erred in finding that there was no inadvertence, surprise or excusable neglect, nor any other reason justifying the setting aside of the default judgment. Here, appellant testified that he kept the post office box and did not have a forwarding address in Alaska. He did not check his mail for a couple of months and did not have anyone check it for him. He also added that he was surprised when he learned of the default judgment. These facts do not demonstrate the surprise or excusable neglect contemplated in Rule 55 of the Arkansas Rules of Civil Procedure, and we cannot say that the

trial court abused its discretion in refusing to set aside the default judgment.

Affirmed.

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

PITTMAN, GRIFFEN, NEAL, and ROAF, JJ., dissent.

JOHN MAUZY PITTMAN, Judge, dissenting. I agree with Judge Roaf's dissenting view that appellee failed to comply with the requirement of Ark. R. Civ. P. 4(f) that the affidavit must show that a diligent inquiry was conducted into the defendant's whereabouts. I write separately to note two points in which I disagree with her dissenting opinion.

First, I disagree with the dissenting opinion's statement that a telephone call to the post office seeking a forwarding address can never constitute a diligent inquiry. Whether or not an inquiry is diligent is not a question that can be decided in the absence of a factual background. Essentially, the question is twofold: what avenues of inquiry were reasonably available, and what inquiries were in fact made? The reasonable availability of various lines of inquiry depends on a host of factors, including the availability of sources that could conceivably lead to information about the defendant's whereabouts, *e.g.*, family members, friends, former employers, or public records. In short, I believe that the inquiry that must be conducted under Rule 4(f) is nothing more and nothing less than a *reasonable* inquiry, and that what is reasonable depends on the facts of the case as stated in the affidavit.

Second, I disagree with the methodology used in the dissent to determine that Rule 4(f) was not complied with. In my view, the question in this case is not whether the facts adduced at the hearing to set aside show that a diligent inquiry was in fact made. Rule 4(f) specifically requires that the facts establishing that a diligent inquiry was made must appear in the affidavit, and I believe that a proper analysis should limit itself to the facts as they were set out in the affidavit. Here, the affidavit asserts only that appellee conducted an "investigation" — without even stating in a conclusory fashion that this investigation was a diligent one — and includes no facts whatsoever that would permit a conclusion that

the inquiry was reasonably diligent under the circumstances. Consequently, I believe that the affidavit was facially defective, and I would reverse solely on that basis. *See Gilbreath v. Union Bank*, 309 Ark. 360, 830 S.W.2d 854 (1992).

ANDREE LAYTON ROAF, Judge, dissenting. I cannot agree to affirm this case because it is clear to me that the appellee has failed to comply with the requirements of Ark. R. Civ. P. 4(f) (2001) that a "diligent inquiry" be conducted before service by warning order may be substituted for personal service upon a defendant.

At all relevant time during the proceeding, Arkansas Rule of Civil Procedure 4(f)(1999) provided in pertinent part:

> (f) *Service Upon Defendant Whose Identity or Whereabouts Is Unknown*
>
> (1) Where it appears by the affidavit of a party or his attorney that, after diligent inquiry, the identity or whereabouts of a defendant remains unknown, service shall be by warning order issued by the clerk and published weekly for two consecutive weeks in a newspaper having general circulation in a county where the action is filed and by mailing a copy of the complaint and warning order to such defendant at his last known address, if any, by any form of mail with delivery restricted to the addressee or the agent of the addressee.

The standard by which our appellate courts determine the adequacy of constructive service was set forth in *Davis v. Schimmel*, 252 Ark. 1201, 482 S.W.2d 785 (1972), in which the supreme court stated:

> A method of service required for nonresidents is by publication of warning order. Ark. Stat. Ann. §§ 52-203, 27-354—357. The rule is well established that when constructive notice only is given, the requirements of the statute must be strictly complied with. *Sinclair Refining Co. v. Bounds, supra; Swartz v. Drinker*, 192 Ark. 198, 90 S.W.2d 483; *Missouri Pacific R. Co. v. McLendon*, 185 Ark. 204, 46 S.W.2d 626; Lawrence v. State, 30 Ark. 719. Where essential statutory provisions governing service by publication are not strictly complied with as to nonresident defend-

ants, all proceedings as to them are void. *Beidler v. Beidler*, 71 Ark. 318, 74 S.W. 13.

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Where an action is based on constructive service, no action is commenced or cause pending until the proceedings provided for in the governing statute are complied with and if there is no such compliance, the proceedings are void, and the court has no power to take affirmative action. *Swartz v. Drinker, supra*; *Missouri Pacific R. Co. v. McLendon, supra*; *Sinclair Refining Co. v. Bounds, supra; Frank v. Frank, supra.* It is only where the affidavit prescribed by Ark. Stat. Ann. § 27—354 has been made and warning order based thereon has been issued that the action can be said to have been commenced or the cause pending, and until this is done, the court has no jurisdiction. *Swartz v. Drinker, supra*; *Missouri Pacific R. Co. v. McLendon, supra*; *Frank v. Frank, supra.*

The affidavit for warning order must show that the plaintiff has made diligent inquiry and that it is his information and belief that the defendant is a nonresident. It must strictly comply with the statute. *Holloway v. Holloway*, 85 Ark. 431, 108 S.W. 837; *Waggoner v. Fogleman*, 53 Ark. 181, 13 S.W. 729; *Turnage v. Fisk, Executor*, 22 Ark. 286; *Allen & Hill, Admrs. v. Smith*, 25 Ark. 495. The supreme court affirmed the trial court's order setting aside the appointment of a receiver and entry of an oil and gas lease because the affidavit for warning order against the defendant/appellee failed to comply strictly with statutory requirements.

This standard of requiring strict compliance has been followed by the supreme court in a number of Arkansas cases where constructive service was obtained. *See Gilbreath v. Union Bank*, 309 Ark. 360, 830 S.W.2d 854 (1992)(affirming trial court's order setting aside a quiet-title decree where appellant did not state in the affidavit for warning order that defendant's whereabouts were unknown); *Smith v. Edwards*, 279 Ark. 79, 648 S.W.2d 482 (1983)(affirming trial court's dismissal of cross-complaint where appellant failed to conduct a diligent search before obtaining constructive service upon appellee by warning order); *Pierce v. Pierce*, 259 Ark. 312, 532 S.W.2d 747 (1976) (affirming trial court's vacation of divorce decree where appellant failed to strictly com-

ply with the requirements of constructive service). Significantly, in *Gilbreath*, the supreme court stated:

> Where no diligent inquiry is made under rule 4(f)(1), we have affirmed dismissal of a complaint for improper service of process. See Horne v. Savers Federal Savings & Loan Ass'n, 295 Ark. 182, 747 S.W.2d 580 (1988); Smith v. Edwards, 279 Ark. 79, 648 S.W.2d 482 (1983). *It is obvious in the case before us that the requisite inquiry was not made because the appellant did not conclude in his affidavit that the location of Catherine Morgan was unknown.* Accordingly, we hold that the appellant's affidavit for a warning order is facially defective under Rule 4(f)(1).

Gilbreath v. Union Bank, supra. (emphasis added). In the case before us, the affiant likewise did not state that Morgan's whereabouts were unknown.

This court has followed the rationale and decisions of the supreme court where we have addressed the adequacy of constructive service. In *Black v. Merritt,* 37 Ark. App. 5, 822 S.W.2d 853 (1992), this court reversed the trial court's denial of motions to set aside default judgments where the defect complained of was that appellee's attorney, rather than the clerk, issued the warning order, and stated:

> It is a well-settled rule that constructive service is a departure from the common law, and statutes providing for such service are mandatory and must be complied with exactly. This rule applies equally to the service requirements imposed by rules of the court. Proceedings conducted where the attempted service was invalid render judgments arising under them void. *Wilburn v. Keenan Companies, Inc.*, 298 Ark. 461, 768 S.W.2d 531 (1989); *Edmonson v. Farris*, 263 Ark. 505, 565 S.W.2d 617 (1978); *Davis v. Schimmell [Schimmel]*, 252 Ark. 1201, 482 S.W.2d 785 (1972).
>
> Here, the appellees' attempts to obtain service by publication did not comply with the provisions of either section of Rule 4. Both sections require that the warning order be issued by the clerk. Here, although the warning orders were published, they were not issued by the clerk of the court as required by the rule but by appellees' attorney. The supreme court has held that compliance with provisions such as this is an essential prerequisite to the publication of warning orders. Absent such compliance,

> no jurisdiction can be acquired over the defendants and all proceedings as to them are void. *Beidler v. Beidler*, 71 Ark. 318, 74 S.W. 13 (1903).
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> Nor do we find merit in appellees' argument that even though service might have been improper, appellant was required to show meritorious defenses in support of her motions under Ark. R. Civ. P. 60 d). It is well settled that in cases where a judgment is void for lack of jurisdiction, no proof of a meritorious defense is required under that rule. *Cole v. First National Bank*, 304 Ark. 26, 800 S.W.2d 412 (1990); *Wilburn v. Keenan Companies, Inc.*, supra.

See also Self v. Self, 46 Ark. App. 250, 878 S.W.2d 436 (1994).

In this case, the affidavit for warning order was signed by the plaintiff-realtor. In it he asserts that from an "investigation" of the matter "the last known address for appellant is his post office box." At the hearing, the realtor testified only that he made a phone call to the post office to see if appellant left a forwarding address. However, appellee made no further attempt to locate appellant and made no attempt to personally serve him using the post office address. Instead, apparently because he believed appellant had left the area following the sale of his home, he simply filed the affidavit and obtained and ran the warning order. An attorney ad litem was appointed and did subsequently send the complaint and warning order to the appellant's post office box as required, but the certified letter was returned, marked "unclaimed."[1]

One phone call clearly does not constitute diligent inquiry unless the term diligent is simply verbiage. Here, the appellee did not make such an inquiry, did not attest that he did so in his affidavit, and did not attest that Morgan's whereabouts were unknown. *See Gilbreath, supra.* The majority has opined that any further attempts to locate the appellant would have been futile in this instance. However, appellee did not try to locate him, and it

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[1] Although not an issue in this appeal, I note that Ark. R. Civ. P. 4(d)(8)(A), provides that a summons, complaint, and notice shall be mailed to the defendant by first-class, regular mail where delivery of certified mailed process is "refused," but Rule 4 fails to address perfecting service where the mailed process is "unclaimed."

remains to be seen whether he could have done so, as appellant had sold his home by retaining a vendor's lien, was receiving monthly payments from the purchasers, and testified that he was gone for only two months and that he still had friends in the area. The majority has incorrectly placed upon appellant the burden of demonstrating that he could have been located, when the proper analysis should be whether the rule allowing for constructive service was strictly complied with in this instance. It clearly was not, and I would reverse and dismiss.

GRIFFEN and NEAL JJ., join.

Sheree HOLLANDSWORTH *v.* Keith KNYZEWSKI

CA 01-982 79 S.W.3d 856

Court of Appeals of Arkansas
Divisions I, II, and IV
Opinion delivered July 3, 2002

Andy E. Adams, for appellant.

Taylor Law Firm, by: *Scott Smith* and *Chris D. Mitchell*, for appellee.

KAREN R. BAKER, Judge. Appellant Sheree Hollandsworth appeals the entry of an order by the Benton County Chancery Court that denied her request to relocate out of state with the children and changed custody from her to her ex-husband, appellee Keith Knyzewski. Sheree argues that the chancellor's decision is clearly erroneous. We agree and reverse and remand.

A chancellor's decision is reviewed *de novo*, but the chancellor's findings will not be reversed unless they are clearly erroneous. *See Wagner v. Wagner*, 74 Ark. App. 135, 45 S.W.3d 852 (2001). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake was committed. *Id.* Under these facts, we are left with such a conviction.

The parties divorced on October 10, 2000. There were two children born of the marriage, Ethan, born February 1, 1996, and Katherine, born February 17, 1998. Pursuant to the divorce decree, Sheree had primary custody of the two children. Nonetheless, the parties, subsequent to the entry of the decree, agreed that each would have physical custody of the children one-half of the time until the oldest child entered kindergarten in the fall of 2001. Sheree remarried on December 31, 2000, and planned to relocate with the children to be with her new husband, Brian Hollandsworth, in Clarksville, Tennessee. On January 11, 2001, Keith filed a petition for a change of custody. Sheree filed a response asking for permission to relocate on January 17. The petitions were heard on April 26, 2001, and the judge entered an order granting a change of custody on May 21, 2001.

Keith lived in Rogers, Arkansas, with his parents. He worked nights, and was dependent upon his parents for the children's care and supervision. When asked whether he would facilitate visitation with Sheree's side of the family if he prevailed, Keith assured the chancellor that he would encourage it. However, he was concerned that if Sheree's petition to relocate was granted, the children might have to move from Clarksville eventually due to Brian's career in the military. He was also concerned that the children would be leaving their family and friends and would have to make new friends in Tennessee. Keith agreed that Sheree would be devastated if she could not move the children with her, as he would be if they were permitted to move away, but thought that the children's needs would be better served in northwest Arkansas.

Sheree and her new husband Brian were expecting a child in October 2001. Sheree had worked as a waitress in northwest Arkansas but, due to Brian's financial stability, she would have the opportunity to be a stay-at-home mother in Tennessee. She thought that the children would benefit from a two-parent household and the opportunity to have a relationship with their half-sibling. Sheree stated that Brian was a good step-parent and a good provider. She thought the children would be devastated if she were not permitted to take them. Both parties complimented the other on their parenting skills and on their ability to see to the children's needs.

The chancellor announced her findings at the conclusion of the hearing, finding that Sheree's petition should be denied, and Keith's petition should be granted. Her findings included: that Sheree had the threshold burden of showing some real advantage to herself and the children in the proposed move; that she failed in that burden; that the children enjoyed a strong connection to their father, their extended family, and to northwest Arkansas; and that they had spent extensive amounts of time with their father since the divorce. The chancellor determined that neither party had improper motives for their respective requests and that Sheree would likely comply with any modified visitation orders, but the children's best interests would not be served by permitting Sheree to relocate with them. This appeal followed.

Although the chancellor considered to some extent the factors articulated in *Staab v. Hurst*, 44 Ark. App. 128, 868 S.W.2d 517 (1994), her decision was clearly based on the finding that appellant, Sheree Hollandsworth, failed to meet the threshold burden of proving a real advantage to both the children and herself in the move. In reaching this conclusion, the chancellor relied heavily on this court's holding in *Hickmon v. Hickmon*, 70 Ark. App. 438, 19 S.W.3d 624 (2000). However, the chancellor erred as a matter of law in holding that Sheree must, as a threshold matter, prove a real advantage specific to the children in the proposed move, and erred in interpreting *Hickmon* to require such proof. *See Haas v. Haas*, 74 Ark. App. 49, 44 S.W.3d 773 (2001) (reversing chancellor who indicated that custodial parent was required to show advantage unique to minor child). *Hickmon* held that a cus-

todial parent seeking to relocate with the parties' minor children must first meet the burden of demonstrating some real advantage to the children and himself or herself from the move. *Hickmon*, 70 Ark. App. at 445, 19 S.W.3d at 629. Because the factual concerns of visitation with the father and extended family were similar to the facts in *Hickmon*, the chancellor stated that she "felt compelled" to deny the mother's request to relocate. Yet, we upheld the chancellor in *Hickmon* primarily on the basis that the psychologists who testified were united in their opinions that the move would have a detrimental psychological effect on the children. *Hickmon*, 70 Ark. App. at 446, 19 S.W.3d at 629-30; *see also Parker v. Parker*, 75 Ark. App. 90, 55 S.W.3d 773 (2001). The record in this case contains no evidence that the move would be psychologically detrimental to the children, and a correct analysis of the *Staab* factors favors granting the petition to relocate.

In *Staab v. Hurst*, 44 Ark. App. 128, 133-35, 868 S.W.2d 517, 519-20 (1994), we articulated a framework by which courts should be guided in deciding relocation disputes. We said therein that achieving the "best interests of the child" remains the ultimate objective in resolving all child custody and related matters, and we adopted the rationale announced in *D'Onofrio v. D'Onofrio*, 144 N.J.Super. 200, 365 A.2d 27, *aff'd* 144 N.J.Super. 352, 365 A.2d 716 (App. Div. 1976). *D'Onofrio* provided that, where the custodial parent seeks to move with the parties' children to a place so geographically distant as to render weekly visitation impossible or impractical, and where the noncustodial parent objects to the move, the custodial parent should have the burden of first demonstrating that some real advantage will result to the new family unit from the move. The *D'Onofrio* opinion explained:

> Where the residence of the new family unit and that of the noncustodial parent are geographically close, some variation of visitation on a weekly basis is traditionally viewed as being most consistent with maintaining the parental relationship, and where, as here, that has been the visitation pattern, a court should be loath to interfere with it by permitting removal of the children for frivolous or unpersuasive or inadequate reasons.

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

D'Onofrio further provided that, where the custodial parent meets this threshold burden, the court should then consider a number of factors in order to accommodate the compelling interests of all the family members. These factors should include: (1) the prospective advantages of the move in terms of its likely capacity for improving the general quality of life for both the custodial parent and the children; (2) the integrity of the motives of the custodial parent in seeking the move in order to determine whether the removal is inspired primarily by the desire to defeat or frustrate visitation by the noncustodial parent; (3) whether the custodial parent is likely to comply with substitute visitation orders; (4) the integrity of the noncustodial parent's motives in resisting the removal; (5) whether, if removal is allowed, there will be a realistic opportunity for visitation in lieu of the weekly pattern which can provide an adequate basis for preserving and fostering the parent relationship with the noncustodial parent.

We hold that the chancellor erred in finding that a real advantage to the new family unit of Sheree and the children was not proven in this case. The evidence demonstrated that Sheree will benefit by living with her husband and the father of her expected child. The children will benefit from living in a two-parent household with their half-sibling. The family will benefit from the financial advantages of Brian's career, which includes the benefit of allowing Sheree the opportunity to be a stay-at-home mother. These advantages are not insignificant, and they benefit the members of the family both individually and collectively.

We have previously held that both compelling job opportunities or the chance to finish an education provide a real advantage to the children and custodial parent. *See Wagner v. Wagner*, 74 Ark. App. 135, 45 S.W.3d 852 (2001); *Hass v. Hass*, 74 Ark. App. 49, 44 S.W.3d 773 (2001). The choice and opportunity to be a stay-at-home parent can be a compelling job opportunity providing a real advantage to the children. Our precedent also clearly acknowledges that "psychological and emotional aspects of relocation can be as advantageous as economic or educational aspects." *Parker v. Parker*, 75 Ark. App. 90, 99, 55 S.W.3d 773, 779 (2001).

The chancellor's findings reflect that the *Staab* factors weighed in favor of granting Sheree's petition. In *Staab*:

> We reversed the chancellor's ruling and recognized that, while the best interests of the children remain the ultimate objective in resolving all child custody and related matters, the standard must be more specific and instructive to address parental relocation disputes. Determination of a child's best interests cannot be made in a vacuum, we said, but requires that the interests of the custodial parent be taken into account as well. We further acknowledged that, following a divorce, children belong to a different family unit than they did when their parents lived together. The new family unit consists of the children and the custodial parent, and what is advantageous to the unit's members as a whole, to each of its members individually, and to the way they relate to each other and function together is in the best interests of the children.

Parker, 75 Ark. App. at 98, 55 S.W.3d at 779.

In applying the *Staab* analysis, the chancellor specifically stated, "[t]he prospective advantages, I do think that Corporal Hollandsworth is a good influence in the lives of the children and in the life of Mrs. [Hollandsworth]. I think there is no doubt [Corporal Hollandsworth] will be a good provider. I have no question about that." Moreover, she stated that, "Whether or not Sheree would comply with substitute visitation orders, I don't have any doubt that she would. I believe that she would comply with whatever order the Court set out for her, that she would absolutely get the children to and from each visitation. I don't think there is any improper motive by either of the parties." Thus, when weighing the *Staab* factors, the chancellor clearly found that there was some benefit to the move. Even slight differences that are important to the custodial parent that offer distinct personal appeal may be significant enough to support a move. *See Parker, supra.*

Based on our *de novo* review of the facts in this case, we hold that the chancellor clearly erred in denying Sheree's petition to relocate and in granting Keith's petition to change custody. Thus, we reverse and remand with instructions to enter an order consistent with this opinion.

Reversed and remanded.

PITTMAN, J., concurs; BIRD, J., concurs separately; GRIFFEN and VAUGHT, JJ., agree.

STROUD, C.J., ROBBINS, CRABTREE, and ROAF, JJ., dissent.

JOHN MAUZY PITTMAN, Judge, concurring. I agree with the result obtained in the prevailing opinion in this case. I also agree with Judge Bird's concurring view that our decision in *Hickmon v. Hickmon*, 70 Ark. App. 438, 19 S.W.3d 624 (2000), was incorrectly decided and should be overruled. I write separately only to address misconceptions concerning our holding in *Staab v. Hurst*, 44 Ark. App. 128, 868 S.W.2d 517 (1994).

Staab holds that, where the custodial parent seeks to relocate with the parties' children to a place so geographically distant as to render weekly visitation impossible or impractical, and where the noncustodial parent objects to the move, the custodial parent has the burden of first demonstrating that some real advantage will result to the new family unit from the move. Where the custodial parent meets this threshold burden, the court should then consider a number of factors in order to accommodate the compelling interests of all the family members, including (1) the prospective advantages of the move in terms of its likely capacity for improving the general quality of life for both the custodial parent and the children; (2) the integrity of the motives of the custodial parent in seeking the move in order to determine whether the removal is inspired primarily by the desire to defeat or frustrate visitation by the noncustodial parent; (3) whether the custodial parent is likely to comply with substitute visitation orders; (4) the integrity of the noncustodial parent's motives in resisting the removal; and (5) whether, if removal is allowed, there will be a realistic opportunity for visitation in lieu of the weekly pattern which can provide an adequate basis for preserving and fostering the parent relationship with the noncustodial parent. *Id.* at 134, 868 S.W.2d at 520.

Judge Bird's concurring opinion notes that the New Jersey caselaw that we found persuasive in *Staab* was subsequently modified by the New Jersey Supreme Court. This is interesting, as a matter of historical fact, but has no significance to our analysis. In

Staab, we did not adopt New Jersey's law of child custody, but were merely persuaded by the rationale applied in a single case from that jurisdiction. We still find that rationale to be sound.

Judge Bird also argues in favor of a presumption in favor of parental location, and asserts that *Staab* was a departure from prior Arkansas law upholding such a presumption. This is simply wrong. By its terms, *Staab* is limited to cases where the planned relocation is to a place so geographically distant as to render weekly visitation impossible or impractical. In contrast, the case cited by Judge Bird for the supposed "relocation presumption" in Arkansas law did not involve such circumstances. To the contrary, the supreme court in *Ising v. Ward*, 231 Ark. 767, 332 S.W.2d 495 (1960), specifically noted that:

> In our earlier cases the objection to an application of this kind has usually sprung from the loss of visitation rights that the protesting parent would suffer upon the child's departure. That point is not involved here, for the proposed home in Oklahoma is not so far from Fort Smith as to interfere with the appellee's decreed right to have his daughter with him every other week end.

Id. at 768, 332 S.W.2d at 496.[1]

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[1] Nor do the cases cited in *Ising* establish the supposed presumption in favor of permitting relocation. At best, these cases can be seen as standing for the proposition that permitting a custodial parent to move to another state "would not be beyond the power of the court." *Thompson v. Thompson*, 213 Ark. 595, 599, 212 S.W.2d 8, 10 (1948); *see also Antonacci v. Antonacci*, 222 Ark. 881, 263 S.W.2d 484 (1954), from which Judge Bird's reference to custodial parents as "prisoners" in Arkansas is presumably drawn, but which in *Antonacci* was in reference to a unique circumstance in which the custodial parent had actually established a home in California following the divorce without objection; had employment in California; but briefly returned to Arkansas, whereupon a proceeding for change of custody was instituted and she was restrained from returning with the child to their established home in California. The *Antonacci* court affirmed the trial court's order permitting her to return to California with the child in an opinion that makes no reference to any supposed presumption in favor of relocation, and that is wholly consistent with the principles enunciated in *Staab*. The remaining cases cited in *Ising*, *Nutt v. Nutt,* 214 Ark. 24, 214 S.W.2d 366 (1948), and *Langston v. Horton*, 229 Ark. 708, 317 S.W.2d 821 (1958), are squarely based on the long-abandoned "tender years" doctrine, a presumption that custody of young children should almost invariably be vested in the mother; *e.g.,* "In view of the tender years of the child, we think the custody should be awarded to the mother," *Nutt,* 214 Ark. at 33, 214 S.W.2d at 371; *compare Langston,* 229 Ark. at 710, 317 S.W.2d at 822, where the court opined that "the children should be placed in their mother's care rather than remaining in a home where there is no woman to look after their needs."

Perhaps the most fundamental misconception concerning *Staab* is the notion that it was intended to make parental relocation more difficult than had previously been the case. In fact, *Staab* was intended simply to regularize the law of parental relocation and render it less arbitrary. Prior to *Staab*, we had been presented with relocation cases demonstrating that some chancellors were unshakably opposed to permitting relocation and would deny virtually every request to do so that came before them. Given the enormous degree of deference that is rightly afforded to chancellor's decisions in cases involving child custody and the absence of any established framework for analyzing the often-competing considerations involved in relocation cases, we often found these cases to be especially difficult to resolve on a reasoned basis. *Staab* was intended to do no more than provide the framework for analysis that was previously lacking.

It has been rightly said that rules involving mechanical tests and modes of analysis are particularly ill-suited to cases involving child custody. *Riddle v. Riddle*, 28 Ark. App. 344, 775 S.W.2d 513 (1989). In the final analysis, all considerations must yield to the overriding concern for the best interest of the child that is the fundamental concern of the law of child custody, *see id.*, and any test or list of factors enunciated with respect to this law should be seen simply as flexible devices intended to aid the court in determining what the best interest of the child may be. In this context, I believe that it is regrettable some Arkansas jurists have tended to overemphasize *Staab*'s requirement that the parent desiring to relocate to a distant site must meet the preliminary burden of showing a real advantage to the new family unit.[2] To my mind, this is a minimal burden to show an advantage that, although real, need not be measurable and that may embrace the entire realm of human activity. Economic, social, spiritual, even aesthetic factors may provide a real advantage. Nor need that advantage be exclusively, or even primarily, extended to the child, or to the custodial parent, or to any other member of the new family unit. A rising tide lifts all boats, and an advantage to one member of the new

[2] *See, e.g., Hickmon v. Hickmon*, 70 Ark. App. 438, 19 S.W.3d 624 (2000), and the trial courts' decisions in *Parker v. Parker*, 75 Ark. App. 90, 55 S.W.3d 773 (2001), and in *Hass v. Hass*, 74 Ark. App. 49, 44 S.W.3d 773 (2001).

family unit may indeed benefit, albeit indirectly, the entire family. It should be emphasized, too, that the list of factors enunciated in *Staab* is merely a framework for analysis, not a multi-part test consisting of elements that must all be satisfied or that are entitled to equal weight. Nor are the factors listed in *Staab* exclusive; in any individual case there may be other factors that also merit consideration. For example, in the case of a child suffering from a serious medical condition, ready access to appropriate health care facilities may be an overriding concern. Used properly, the framework enunciated in *Staab* provides a convenient starting point for analysis while retaining all the flexibility necessary to ensure that the best interests of the child are identified and protected in these difficult cases.

SAM BIRD, Judge, concurring. I agree with the majority that the chancellor's denial of appellant's petition to relocate with her children to Tennessee and the change of custody of the children to the appellee should be reversed. I also agree generally with much of the rationale expressed in the majority opinion and the concurring opinion of Judge Griffen. However, I write separately because I would go further and modify our decision in *Staab v. Hurst,* 44 Ark. App.128, 868 S.W.2d 517 (1994), and I would overrule, rather than attempt to distinguish, this court's decision in *Hickmon v. Hickmon*, 70 Ark. App. 438, 19 S.W.3d 624 (2000). *Hickmon*, a case that was neither reheard by this court nor reviewed by our supreme court, is inconsistent with our established precedent, and our established precedent itself merits revisiting, as the law in this area has not and cannot remain static; yet, this court has chosen to apply a rationale that has clearly not adequately achieved its purpose throughout the nation. Our precedent has essentially placed custodial parents in the untenable position of being prisoners in the State of Arkansas due to the unfortunate circumstances of a divorce, and the situation has worsened as a result of the misapplication of our precedent in *Hickmon.*

Analysis of Staab v. Hurst

In 1994, this court, in deciding *Staab v. Hurst*, *supra*, adopted the criteria set forth in *D'Onofrio v. D'Onofrio*, 365 A.2d 27, *aff'd,* 365 A.2d 716 (N.J. Super. Ct. App. Div. 1976), as the criteria to

be applied in Arkansas in determining whether the custodial parent should be permitted to relocate with the children to a place so geographically distant that weekly visitation with the noncustodial parent is not practical. In *D'Onofrio*, the New Jersey court noted that after parents divorce, their children belong to a different family unit consisting only of the children and the custodial parent, and that what is advantageous to this new family unit as a whole, to each of its members individually and the way they relate to each other and function together, is obviously in the best interests of the children. Consequently, the criteria promulgated by the New Jersey court in *D'Onofrio*, and adopted by this court in *Staab*, allowed for consideration of more than just the children's best interests in deciding whether to permit a custodial parent to relocate. In recognition of the fact that "the day-to-day routine of the children, especially young ones, and the quality of their environment and their general style of life are that which are provided by the custodial parent," the *D'Onofrio* court allowed for consideration of the interests of the custodial parent along with the interests of the children that made up the new family unit. *Id.* at 29.

The *D'Onofrio* court concluded, and this court in *Staab* found the *D'Onofrio* conclusions to be sound, that in cases where the custodial parent can initially demonstrate that a "real advantage" to herself or himself and the children will result from their relocation to a distant place, referred to in *Staab*, *supra*, as the custodial parent's "threshold burden," then the court must consider the following factors in order to accommodate the compelling interests of all of the family members: (1) the prospective advantages of the move in terms of its likely capacity for improving the general quality of life for both the custodial parent and the children; (2) the integrity of the custodial parent's motives in seeking the move in order to determine whether the removal is inspired primarily by the desire to defeat or frustrate visitation by the noncustodial parent; (3) whether the custodial parent is likely to comply with substitute visitation orders; (4) the integrity of the noncustodial parent's motives in resisting the removal; and (5) whether, if the removal is allowed, there will be a realistic opportunity for visitation in lieu of the weekly pattern that can provide

an adequate basis for preserving and fostering the parent relationship with the noncustodial parent. *D'Onofrio*, 365 A.2d at 30.

Although our opinion in *Staab* cited *Cooper v. Cooper,* 491 A.2d 606 (N.J. 1984), as being in accord with the *D'Onofrio* decision, the *Staab* opinion does not mention that in *Cooper*, the New Jersey Supreme Court, while recognizing *D'Onofrio* as the leading case in the area of parental relocation, modified *D'Onofrio*'s requisite "threshold burden" of the custodial parent, holding that "to establish sufficient cause for removal, the custodial parent initially must show that there is a real advantage to that parent in the move and that the move is not inimical to the best interests of the children." *Cooper*, 491 A.2d at 613. Thus, while the custodial parent's threshold burden in *D'Onofrio* was to demonstrate a "real advantage to *herself and the children*," under *Cooper*, the threshold burden is met by merely demonstrating a "real advantage to the *parent and that the move is not inimical to the best interests of the children*," a significant modification ignored by the *Staab* court, even though *Cooper* preceded our *Staab* decision by ten years. *Id.* The "real advantage" contemplated by the *Cooper* court "need not be a substantial advantage but one based on a sincere and genuine desire of the custodial parent to move and a sensible good faith reason for the move." *Id.* Addressing the inquiry into the effect on the child, the court stated that "[t]o establish that the move is not inimical to the best interests of the children, the moving party must show that no detriment to the children will result from the move." *Id.* The *Cooper* court merged the five *D'Onofrio* criteria that we adopted in *Staab* into three inquiries: (1) the prospective advantages of the move, including its capacity for maintaining or improving the general quality of life of both the custodial parent and the children; (2) the integrity of the custodial parent's motives in seeking to move, as well as the noncustodial parent's motives in seeking to restrain the move; (3) whether a realistic and reasonable visitation schedule can be reached if the move is allowed. *Id.*

The New Jersey Supreme Court addressed the parental relocation yet again in *Holder v. Polanski,* 544 A.2d 852 (N.J. 1988). Adopting almost a presumption of entitlement to relocation, the *Holder* court rejected its former requirement of a "real advantage" to the parent, and held that "any sincere, good-faith reason will

suffice" and that a custodial parent may move with the children "as long as the move does not interfere with the best interests of the children or the visitation rights of the non-custodial parent." *Id.* at 855-56. Though still recognizing the importance of the quality of the noncustodial parent's visitation, the court instructed that the important inquiry "should not be on whether the children or the custodial parent will benefit from the move, but on whether the children will suffer from it. Motives are relevant, but if the custodial parent is acting in good faith and not to frustrate the noncustodial parent's visitation rights, that should suffice." *Id.* at 857. The court further opined that "[s]hort of an adverse effect on the noncustodial parent's visitation rights or other aspects of the child's best interests, the custodial parent should enjoy the same freedom of movement as the noncustodial parent." *Id.* at 856. Recognizing that potential adverse effects on visitation could in some circumstances be adequately mitigated, the court stated that "[m]aintenance of a reasonable visitation schedule by the noncustodial parent remains a critical concern, but in our mobile society, it may be possible to honor that schedule and still recognize the right of the custodial parent to move." *Id.* at 857. These substantial modifications by the *Holder* court, though occurring six years prior to *Staab*, were not addressed or acknowledged by the *Staab* court.

Finally, in 2001, the New Jersey Supreme Court again visited this issue, further defining its *Holder* decision in *Baures v. Lewis*, 770 A.2d 214 (N.J. 2001). After setting forth an extensive list of criteria that the trial court should consider in determining good faith and whether the move would be detrimental to the child's best interests, the *Baures* court emphasized that a mere change, even a reduction, in the noncustodial parent's visitation is not an independent basis on which to deny the removal. The *Baures* court recognized that under *Holder*, "it is not any effect on visitation, but an adverse effect that is pivotal. An adverse effect is not a mere change or even a lessening of visitation, it is a change in visitation that will not allow the non-custodial parent to maintain his or her relationship with the child." *Id.* at 227. A mere change, even a reduction, in the noncustodial parent's visitation is not an

independent basis on which to deny removal, the *Baures* court opined, rather:

> [i]t is one important consideration relevant to the question of whether a child's interest will be impaired, although not the only one. It is not the alteration in the visitation schedule that is the focus of the inquiry. Indeed alterations in the visitation scheme when one party moves are inevitable and acceptable. If that were not the case, removal could never occur and what *Cooper* and *Holder* attempted to achieve would be illusory.

Id. at 230. The court further held that it was the noncustodial parent's burden to produce evidence, "not just that the visitation will change, but that the change will negatively affect the child." *Id.* at 231.

Although our court adopted the *D'Onofrio* criteria in *Staab, supra*, we failed to acknowledge the substantial modifications that *D'Onofrio* had undergone by the New Jersey Supreme Court. This court acknowledged the relevance of *Cooper* in *Staab*, but failed to address the modifications of *Cooper* and *Holder*, and offered no explanation for rejecting the modifications in favor of the original *D'Onofrio* criteria. While this court is free to select all, some, or none of another jurisdiction's law, when we look to other jurisdictions, it is usually because the issue presented is one of first impression or one in which our courts have not fully developed the existing law. When *Staab* was decided in 1994, our supreme court had already addressed the issue of custodial parent relocation decades previously. *Ising v. Ward*, 231 Ark. 767, 332 S.W.2d 495 (1960). *Staab* gave passing credence to this supreme court guidance, noting that our supreme court had recognized in *Ising* that the custodial parent is "ordinarily entitled to move to another state and to take the child to the new domicile." *Staab,* 44 Ark. App. at 132, 868 S.W.2d at 519 (quoting *Ising*, 231 Ark. at 767, 332 S.W.2d at 495). While the *Staab* court determined that the standard "must be more specific and instructive to address relocation disputes," the court did not merely more clearly define the standard, the court changed the standard. *Id.* at 133, 868 S.W.2d at 519. No longer presuming that the custodial parent is entitled to relocate with the child as our supreme court had intimated, the *Staab* court instead chose to adopt the law of a New

Jersey lower court; law that had subsequently been modified by their supreme court in *Cooper* and *Holder.*

Thus, while acknowledging our supreme court's opinion that the custodial parent is ordinarily entitled to move and the court's disdain for imprisoning custodial parents in this state, the *Staab* court nevertheless adopted criteria that, even for the state that initially adopted the criteria, did not survive without substantial modification. The rationale of both the *Cooper* and the *Holder* court was available for review by this court when *Staab* was decided in 1994. I submit that this court erred in its adoption of the *D'Onofrio* threshold burden, and that the *Holder* burden more closely follows our supreme court's position.

Our society is developing at a greatly accelerated pace, and technology has advanced multiple fold since our supreme court last addressed the right of a custodial parent to relocate with the children. Despite the lack of our current technology and conveniences, such as e-mail, cellular phones, and affordable airfare, our supreme court in 1964 chose freedom for the custodial parent, even though such freedom may result in less contact between the noncustodial parent and the child. Certainly today, the burden to maintain visitation is greatly reduced, yet we have increased the burden that the custodial parent must meet in order to enjoy the same freedom of choice that the noncustodial parent takes for granted.

I advocate a return to the established law, before this court began down an erroneous path beginning with *Staab*, and hopefully ending with the modification of *Staab*, to allow for the adoption of a presumption in favor of the custodial parent's right to relocate with the children, absent a finding that such relocation would be detrimental to the child.

Analysis of Hickmon

Unlike the majority and Judge Griffen, I believe that reversal of the case at bar would require the overruling of *Hickmon, supra.* The *Hickmon* court, in affirming the denial of the mother's relocation, stated that:

> Obviously, the move would have significant advantages for [the mother]; she would be with her husband and she would be away from her ex-husband, whom she perceives as an antagonist in her life. Although the evidence was somewhat sparse in this regard, she also would apparently be moving to a better-paying job, requiring fewer hours, and the flexibility to work at home. However, it is not apparent that there would be any "real advantage" for [the child].

Id. at 445, 19 S.W.3d at 629.

With *Staab*, this court adopted an erroneous approach to parental relocation issues; with *Hickmon*, this court further erred by misapplying the erroneous approach that it purports to utilize. The *Hickmon* court failed to follow the *Staab* instruction that "what is advantageous to [the new family unit] as a whole, to each of its members individually and to the way they relate to each other and function together is obviously in the best interest of the children." *Staab*, 44 Ark. App. at 127, 868 S.W.2d at 519. Without taking into account the effect that the advantages to the parent would have on the child, the *Hickmon* court failed to consider the advantages of the relocation to the new family unit as a whole; thus, erroneously looking for advantages specific only to the child, an erroneous application of an erroneous standard.

Adopting the rationale of *Cooper* and *Holder* would certainly necessitate the overruling of *Hickmon*, as the *Hickmon* court's decision to affirm the denial of the relocation petition based upon a failure to meet the threshold burden could not stand when the modified threshold burden is applied.

> Because the best interests of a child are so interwoven with the well-being of the custodial parent, the determination of the child's best interest requires that the interests of the custodial parent be taken into account. . . . We do not . . . equate the best interests of the child with the best interests of the custodial parent. We do maintain, however, that a determination of the best interests of the child requires taking into account the interests of the custodial parent."

Cooper, 491 A.2d at 612. Not only was the *Cooper* burden of a real advantage to the parent clearly met in *Hickmon*, but most certainly the *Holder* burden of a sincere, good-faith reason was presented for

the move in *Hickmon*, the mother's remarriage and opportunity to spend more time at home with her child.

Whether the threshold burden of demonstrating a "real advantage" remains the law in the future, or whether the rationale advocated herein is adopted, no inquiry can be made in a vacuum. The custodial parent necessarily affects the well-being of the child; thus, it is unavoidable to conclude that the better the well-being of the custodial parent, the better the child's well-being is likely to be. Because the *Hickmon* decision is premised upon the failure to meet the *D'Onofrio* threshold burden, its overruling by the adoption of the *Holder* rationale and the return to rationale that is consistent with our supreme court's precedent is inescapable, and is not capable of distinguishment.

The supreme court has expressed its disdain for imprisoning custodial parents in the state of Arkansas. Yet, I recognize that each set of parents, each new family unit, and each new set of circumstances requires a fact-intensive inquiry and that there can be no black-letter rule in areas such as this. The trial judge is faced with balancing a custodial parent's freedom to relocate with the non-custodial parent's rights to visitation and maintenance of a meaningful relationship with the child. Recognizing a presumption in favor of the custodial parent's freedom to relocate will not give custodial parents unfettered permission to relocate, as the trial judge is still the gatekeeper and guardian of the well-being of the child, and relocation would not be allowed when the trial judge determines that the relocation would be detrimental to the child. A presumption is such because, in the usual course of events, a particular behavior, result, or event is the most probable, *ceteris paribus*, given a certain set of circumstances. *Hickmon* has been the only post-*Staab* case in which we affirmed a denial of a petition to relocate. Recognizing a presumption in favor of relocation merely recognizes the fact that, in the usual course of events, *ceteris paribus*, relocation is not detrimental to the child.

I agree that the case at bar must be reversed. Further, I advocate that this court modify the *Staab* relocation analysis to reflect the modifications pursuant to *Cooper*, *Holder*, and *Baures*, and adopt a presumption in favor of a custodial parent's right to relo-

cate with the child unless such relocation is found to be detrimental to the child.

VAUGHT and BAKER, JJ., join in this concurrence.

WENDELL L. GRIFFEN, Judge, concurring. I join Judges BAKER, PITTMAN, BIRD, and VAUGHT, in today's decision to reverse the trial judge's decision that denied appellant's request to relocate out-of-state with the children (Ethan Knyzewski and Katherine Knyzewski) from her previous marriage to appellee, and which changed custody of those children from her to her ex-husband. I join Judge Baker's opinion because I agree that the trial judge clearly erred when she denied appellant's relocation petition and ordered a change of custody based on what she deemed advantages to the children in reliance on the holding in *Hickmon v. Hickmon*, 70 Ark. App. 438, 19 S.W.3d 624 (2000). However, I write separately to express the following distinct concerns: (1) to the extent that the decision below relied upon *Hickmon*, the facts of this case are materially different; and (2) this case exposes deep flaws in the rationale underlying *Hickmon*. Those flaws show that our longstanding reliance on the "best interest of the child" standard for deciding child-custody disputes is being misapplied in disputes involving relocation petitions by custodial parents. Furthermore, the rationale advanced in the dissenting opinion reflects a biased perspective on relocation and child custody that unjustly penalizes custodial parents. Rather than extend *Hickmon* to this and future relocation controversies, I favor returning to the five factors for deciding relocation cases that our court announced in *Staab v. Hurst*, 44 Ark. App. 128, 868 S.W.2d 517 (1994).

Following a September 19, 2000 hearing, appellant and appellee were divorced pursuant to a decree entered on October 10, 2000. The divorce decree awarded appellant primary custody of Ethan and Katherine. Appellant began dating Brian Hollandsworth, a soldier in the United States Army whom she has known for several years. She married Hollandsworth on December 31, 2000, and thereafter informed appellee that she intended to relocate to Clarksville, Tennessee, to live with her new husband. On January 11, 2001, appellee filed a "Petition for Modification,"

which asserted that appellant's remarriage and announced intent to relocate Ethan and Katherine to Clarksville, Tennessee, would defeat his visitation schedule with the children and sever the ties the children had established in Northwest Arkansas so as to constitute a material and substantial change in circumstances warranting modification of the divorce decree insofar as child custody was concerned. The matter was heard by the trial judge on April 26, 2001, and the judge found that the appellant "failed to satisfy the burden of proof establishing that it would be in the best interests of the minor children for this Court to allow said minor children to be relocated to Clarksville, Tennessee." The trial judge primarily based her finding and decision on evidence that the children enjoyed a strong connection with their father (appellee) based on the time spent with him since the divorce as well as "the strong ties to the family and community enjoyed by said minor children in Northwest Arkansas."

The Holding in Hickmon *is Distinguishable*

In this case, the trial judge emphasized the evidence regarding the strong connection Ethan and Katherine have with their father and their ties to other family and friends in Northwest Arkansas. In doing so, the judge signaled that her decision on appellee's petition for modification of the custody arrangement was based on the impact relocation would have on visitation by appellee and other relatives. The trial judge cited *Hickmon* as the basis for her decision.

However, *Hickmon* involved a very different set of facts from those found in this case. In *Hickmon,* the parent parties agreed to joint legal custody following their divorce, with the ex-wife appellant having primary physical custody of their seven-year-old daughter. The ex-husband appellee in *Hickmon* had extensive visitation pursuant to the agreement. However, the record contained clear evidence of disputes between the parents that impacted visitation and custody. The ex-wife appellant in *Hickmon* had a history of psychological illness which, although treated and improved, prompted one psychologist to opine that it "changed this whole situation a little bit" and "skewed a little bit more in the father's favor, in terms of maintaining that parental involvement."

Hickmon, 70 Ark. App. at 441, 19 S.W.3d at 627. Two psychologists testified that the relocation would mean the child's loss of contact with her father (the noncustodial parent), her home, pets, friends, and teacher. The *Hickmon* opinion also included one psychologist's opinion that the appellant-mother's desire to relocate was "in part inspired by her desire to get away from [her ex-husband] and noted that [the ex-wife appellant] expressed concern about [the child's] step-mother attempting to assume her role." Not only did that case involve evidence that the noncustodial parent was "highly involved" in the life of the minor child, "to her obvious advantage," but Judge Roaf's opinion contained the following concluding sentence: "Significantly, both experts opined that the move was not in Miranda's best interest." *Id.* at 446, 19 S.W.3d at 630.

None of those significant facts occurred in this case. Appellant was awarded primary legal custody of Ethan and Katherine in the divorce decree. She and appellee amicably agreed, however, to share joint physical custody whereby each had custody of both children half the time each week. Unlike the situation in *Hickmon*, the former spouses in this case maintained an amicable relationship even after appellant remarried. Appellant and appellee apparently convinced the trial judge that their amicable relationship was not a charade. The trial judge expressly declared that appellant's motives for wanting to relocate the children to Tennessee were pure and not an attempt to interfere with the relationship the children shared with their father. The trial judge also declared from the bench her conviction that appellant would comply with substitute visitation orders and "that she would absolutely get the children to and from each visitation." Unless one believes that the facts in *Hickmon* were immaterial to the outcome and rationale given for the holding in that case, I do not understand how *Hickmon* compels the result reached by the trial judge in this case.

The analysis I advance is not new. In *Parker v. Parker*, 75 Ark. App. 90, 55 S.W.3d 773 (2001), our court reversed a chancellor's decision that denied permission to a custodial ex-wife to relocate with her three children from Jonesboro to Little Rock, notwithstanding that the a temporary agreed order which awarded custody to the wife and provided that neither parent would remove the

children from Craighead County for five years from entry of a final divorce decree. Judge Vaught, writing for the majority in *Parker*, reviewed our appellate decisions following *Staab v. Hurst, supra,* and correctly observed that *Hickmon* was — at that time —

> [t]he only post-*Staab* decision in which we have upheld a chancellor's decision to deny permission to relocate. . . . We affirmed primarily on the basis that the psychologists who testified were united in their opinions that the move would inflict a loss on the child and would alienate the child from her father and all the family, friends, and pets that she loved. By contrast, there is no testimony in this case that the move would have such a detrimental psychological effect on the children.

Parker, 75 Ark. App. at 99-100, 55 S.W.3d at 780. Similar to *Parker,* this case contains no proof that the appellant's relocation to Clarksville, Tennessee will present the risk of the emotional injury to Ethan and or Katherine that was found controlling in *Hickmon.*

The Rationale Upon Which Hickmon *Rests is Flawed*

Besides being so factually different as to be of dubious precedential value, this case exposes deep flaws in the underlying reasoning on which the *Hickmon* holding purports to stand. The *Hickmon* court concluded that our decision in *Staab v. Hurst, supra,* "did not abolish the best-interest-of-the-child standard in cases where a custodial parent wishes to move a child out of state." *Hickmon*, 70 Ark. App. at 444, 19 S.W.3d at 628. Rather, the *Hickmon* opinion asserts that in *Staab,* "this court merely provided more guidance for chancellors when they are confronted with this situation." *Id.*, 19 S.W.3d at 629. With no disrespect intended to the members of the current minority who also decided *Hickmon*, a fair reading of that opinion and the dissenting opinion in this case shows that what is supposed to be an inquiry into whether the proposed relocation presents some real advantage to the custodial parent and the children is often nothing more than an inquiry about whether the relocation poses an advantage to the children no matter what advantage it may present for the family unit as a whole (custodial parent and children). As such, *Hickmon* retreats from the *Staab v. Hurst* standard while purporting to honor it.

For example, the opinion in *Hickmon* quoted with apparent approval the comment in *Staab* that the pertinent standard "must be more specific and instructive to address relocation disputes."

Hickmon, 70 Ark. App. 444, 19 S.W.3d at 628. The *Hickmon* opinion also quoted the statement from *Staab* that "we think it important to note that determining a child's best interests in the context of a relocation dispute requires consideration of issues that are not necessarily the same as in custody cases or more ordinary visitation cases." *Id.*, 19 S.W.3d at 628-29. The *Hickmon* court also quoted with approval the requirement that before a trial judge considers the five relocation factors announced in *Staab*, "the custodial parent bears the threshold burden to prove some real advantage to the children and himself or herself in the move." *Id.* at 445, 19 S.W.3d at 629 (citing *Wilson v. Wilson*, 67 Ark. App. 48, 991 S.W.2d 647 (1999)).[1]

Despite reaching the consensus on *de novo* review that the proposed relocation "would have significant advantages" for the custodial parent, the outcome in *Hickmon* plainly turned on the conclusion that: "it . . . is not apparent that there would be any 'real advantage' to [the minor child]." *Hickmon*, 70 Ark. App. at 445, 19 S.W.3d at 629. That conclusion was reached based on the following reasoning:

> We cannot say that there is compelling evidence of improper motive on Sandra's [the custodial parent and *Hickmon* appellant] part in wanting to move, or Randy's [the *Hickmon* appellee] part in opposing it; that any visitation order would not be complied with; or that the visitation Sandra offered would not be substantial. *Nonetheless, we have before us a case in which Miranda's father is highly involved in her life, to her obvious advantage, and a paucity of evidence of any real advantage for Miranda in moving to Phoenix.* Significantly, both experts opined that the move was not in Miranda's best interest.

Id. at 446, 19 S.W.3d at 630 (emphasis added).

The trial judge in this case was greatly influenced by the foregoing reasoning from *Hickmon*, because both cases involved situations where the noncustodial parents were "highly involved" in the lives of the children. Several problems arise from this analysis, nonetheless.

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[1] I consider this "threshold burden" merely duplicative of the first *Staab* factor, *i.e.*, "the prospective advantages of the move in terms of its likely capacity for improving the general quality of life for both the custodial parent and the children." *See Staab, supra.*

First, this reasoning implies that custodial parents bear a greater burden of proving that relocation outside the state presents an advantage to them and their children when the non-custodial parents are "highly involved" with the children. On its face, the fairness of that proposition seems self-evident. Serious questions arise, however, when one ponders the matter more deeply. Does this mean that the freedom of custodial parents to relocate depends on how involved noncustodial parents are despite proof that visitation will not be materially compromised and even when custodial parents prove that relocation will be advantageous for them and the children? Apparently so, because *Hickmon* and the present case include express findings by the trial judges that the custodial parents would comply with visitation orders. The *Hickmon* court refused to conclude that the custodial parent would offer anything other than substantial visitation; it also found no improper motive on her part in seeking to relocate. Thus, one wonders how custodial parents who successfully prove that relocation will not involve a substantial deprivation of the visitation rights exercised by noncustodial parents will ever meet the burden of proving that relocation will benefit *them and their children* when the noncustodial parents are deemed "highly involved" with the children. One also wonders why the fact that "highly involved" custodial parents who relocate will necessarily be less involved due to loss of custody is not viewed at least as detrimental to the children as would be the supposed loss of involvement by noncustodial parents posed by relocation.

This is not merely a hypertechnical concern. As previously stated, current law obligates the custodial parent to prove that relocation poses a real advantage to the children and the custodial parent. If the advantage demonstrated by such proof is nullified, if not trumped altogether, by proof that the noncustodial parent is "highly involved" in the lives of the children, then the inquiry actually turns on whether relocation poses an advantage to the children *and the non-custodial parent.*

Outside the visitation context, custodial parents have no control over how much noncustodial parents are involved with their children. Even within the context of visitation, custodial parents cannot control the involvement of noncustodial parents aside from ensuring that the child is available. This is true even when both parents live in the same community. To impose such an eviden-

tiary burden on custodial parents who want to relocate to another state is unrealistic, to put it mildly.

Yet, this is but one flaw in the *Hickmon* rationale exposed by this case. Another involves the effect of *Hickmon* on custodial parents who want to remarry, retain custody of their children, and live outside Arkansas. In *Hickmon*, the custodial parent who remarried lost custody of her child, *despite declaring that she would not relocate if it meant she would lose custody*. Her petition for permission to relocate was denied and she lost custody, to boot. In this case, appellant remarried and forthrightly declared that she would relocate even if it meant losing custody. Despite concluding that appellant's relocation presented a benefit to herself and the two children of her marriage to appellee was not an attempt to interfere with the relationship of Ethan and Katherine with appellee, and that appellant would comply with substitute visitation orders, the trial judge denied the relocation petition and the custody arrangement.

One would ordinarily think that courts encourage marriage. After all, judges and other officiants at marriage ceremonies profess that marriage is an honorable estate. I know of no caveat that holds remarriage to be less honorable or less worthy of affirmation. Furthermore, our courts have affirmed decisions to change custody in numerous cases upon proof of cohabitation by a custodial parent with another person without marriage while children of a former marriage are present. *See Hamilton v. Barrett*, 337 Ark. 460, 989 S.W.2d 520 (1999); *Walker v. Walker*, 262 Ark. 648, 559 S.W.2d 716 (1978); *Ketron v. Ketron*, 15 Ark. App. 325, 692 S.W.2d 261 (1985). So it is more than a little strange that the law would essentially penalize a custodial parent who takes the honorable step of marriage following divorce if remarriage carries the prospect of life outside Arkansas.

The dissenting opinion and the *Hickmon* rationale on which it stands would produce a bizarre scenario. Formerly married custodial parents risk losing custody of their children if they cohabit without the benefit of marriage, whether in Arkansas or elsewhere. Formerly unmarried noncustodial parents risk nothing if they cohabit without marriage. If a custodial parent marries someone from another state and seeks permission to relocate with the children, under the dissenting judges' reasoning the custodial

parent would risk loss of custody even when relocation poses no substantial interference with visitation rights exercised by the noncustodial parent when the court determines that the noncustodial parent is "highly involved" with the children. If a noncustodial parent is "highly involved" with a child, but becomes less involved for whatever reasons, neither the holding in *Hickmon* nor the position advocated by our dissenting colleagues in this case suggest that the reduced involvement will constitute a material change of circumstance sufficient to restore the pre-relocation custody arrangement. One can easily conceive of situations where noncustodial parents remarry and remain "highly involved" with their children with the effect of including their new spouses with that involvement. Presumably, we would view the involvement by spouses of noncustodial parents to be advantageous to the children. Yet, "highly involved" custodial parents would never be able to even attempt comparable involvement of a subsequent spouse upon remarriage to a person living outside Arkansas if the position asserted by appellee and the decision of the trail court is upheld.

Beyond that, a noncustodial parent can relocate at will — without leave from or even providing notice to any court — no matter what impact relocation may have on the children or the ability of the custodial parent to fulfill parenting functions. Had the appellee in this case decided to remarry and move to Kentucky, for example, nothing in *Hickmon* or the dissenting opinion today suggests that appellant would have a right to oppose the relocation or otherwise object to it. No matter how that relocation might affect Ethan and Katherine emotionally, socially, or otherwise, no one suggests that appellant is entitled to seek a decree ordering her former husband to remain in Arkansas to continue his relationship with Ethan and Katherine, let alone make sure that the children interact with their grandparents on either side of the family. A rule of law that effectively requires custodial parents to gamble custody of their children before they can live with their children and new spouses outside Arkansas — while imposing no similar limitations on noncustodial parents who profess to be "highly involved" in the lives of their children — seems the very antithesis of domestic stability. It is also grossly unfair.

Judging from *Hickmon* and the dissenting opinion today, the fact that this disquieting inconsistency disproportionately affects women more than men seems irrelevant. In *Parker v. Parker, supra,*

Judge Vaught observed that we have approved parental relocations in four published cases applying the *Staab* factors. I find it more than coincidental that in each of those cases, the custodial parent seeking relocation was the mother. In *Wilson v. Wilson, supra*, we affirmed the chancellor's decision to allow relocation to California because the custodial parent felt she could find employment there. In *Friedrich v. Bevis*, 69 Ark. App. 56, 9 S.W.3d 556 (2000), we affirmed a chancellor's decision to allow a relocation to Texas because the custodial parent had obtained a better-paying job with less travel. In *Wagner v. Wagner*, 74 Ark. App. 135, 45 S.W.3d 852 (2001), we affirmed a chancellor's decision to allow relocation to Florida because the custodial parent had a job opportunity there and would be near her mother. In *Hass v. Hass*, 74 Ark. App. 49, 44 S.W.3d 773 (2001), an intrastate relocation case like *Parker*, we reversed the chancellor's decision to prohibit the custodial mother from moving to El Dorado from Fayetteville to accept better employment. In *Gerot v. Gerot*, 76 Ark. App. 138, 61 S.W.3d 890 (2002), we reversed a chancellor's decision changing custody to the noncustodial father because there was neither allegation nor proof of a material change of circumstances. We remanded the case to the chancellor for reconsideration of the appellant and custodial mother's petition to relocate to Florida where she had obtained more attractive employment.

Our society has long practiced a double standard regarding social freedom and gender. That men can be custodial parents and, as such, would be bound by the *Hickmon* rationale is merely a truism. The more relevant truth is that men are unentitled beneficiaries of greater social, economic, and cultural freedom than women who, for reasons largely due to gender, labor under greater social, economic, and cultural burdens when they try to exercise freedoms men often take for granted. Men are less likely to encounter social ostracism than women after divorce, no matter the reason for the divorce. They are less prone to encounter discrimination on account of their gender in the workplace, whether they are custodial parents or not. In Arkansas and elsewhere throughout American society, men earn decisively more money than women, even when performing the same work. Thus, the social, economic, and cultural forces that might influence a divorced woman to relocate to another state usually will not affect men the same way.

More women are pursuing job opportunities outside Arkansas, whether they remarry or not. With per capita income being higher and job prospects often more attractive in other states than in Arkansas, continued adherence to the *Hickmon* holding will mean even more difficult times for formerly married women striving to raise their children and themselves through higher pay and life in more socially-progressive settings. Although I do not suggest that the decision in *Hickmon* reflects gender bias on our court, I cannot ignore the gender-specific consequences it portends. Even when relocation and remarriage mean a custodial parent will be able to spend more time with the children and provide other advantages — as shown by this case — the result today and in *Hickmon* show that custodial parents — women in many instances — face an onerous task in convincing judges that relocation is advantageous for them and their children where the children are "highly involved" with noncustodial parents.

The Staab v. Hurst *Remedy*

I believe that we can reverse the trial judge without disturbing *Hickmon*. As stated before, the facts in *Hickmon* regarding the expert opinion testimony about the perceived negative impact that relocation would have on the emotional welfare of the child are factually distinguishable from this case. We distinguished *Hickmon* on that basis when we reversed a chancellor's decision to deny intrastate relocation in *Parker*. I see no reason not to do so now.

On the other hand, the decision below in this case shows that the holding and rationale in *Hickmon* create more problems than they purport to solve. Whatever else may be disputed, it is unmistakably clear that the trial judge in this case felt bound by *Hickmon* to deny appellant's relocation petition. Rather than decide whether relocation posed a real advantage to the family unit consisting of the custodial parent and the children, the judge focused on whether relocation was advantageous to the children in view of the fact that the noncustodial parent was "highly involved" with them.

The remedy for this mis-analysis lies in basing relocation decisions on the five-fold test prescribed by *Staab v. Hurst*, 44 Ark. App. at 134, 868 S.W.2d at 520. These factors are as follows:

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

(Emphasis added.) These factors accomplish the valid purposes of considering whether the relocation presents a real advantage to the custodial parent and the children while also considering the effect of removal on the opportunity for visitation by the noncustodial parent.

When I analyze this case in view of the *Staab* factors, I have no difficulty agreeing that we should reverse the trial judge's denial of appellant's relocation petition and the decision to change custody to appellee. The trial judge was unequivocal during her bench ruling: she did not doubt that appellant would comply with substitute visitation orders and "that she would absolutely get the children to and from each visitation." However, the trial judge decided that there "was not a way to substitute the long distance visitation for what the children have been used to with their father. . . These children are used to being with their dad three and a half days a week and with their mom three and a half days a week. They are used to seeing grandparents very regularly in their home every week on a weekly base [*sic*]. There are maternal grandparents here as well . . ."

The trial judge correctly observed that appellee and appellant equally divided the time that the children spent in their respective homes. However, that arrangement reflected an agreement that was likely to change even had appellant not remarried and decided to move to Tennessee to live with her new spouse. At the hearing, Ethan, the older child, was due to enter kindergarten soon. By now, Katherine is kindergarten age. Appellant lived in Fayetteville, appellee lived in Rogers. While it may be pleasant to

imagine that the equal time arrangement would continue once Ethan began school, that assumption is unrealistic.

Furthermore, our decision in *Parker, supra,* shows that even when the parties have entered into a formal and court-approved agreement providing against relocation, their agreement is "nothing more than an indicator that, at some point, appellant and appellee shared the attitude that the children should not be moved." *Parker*, 75 Ark. App. at 100, 55 S.W.3d at 780. If the court-approved agreement in *Parker* did not trump proof that the appellant's relocation presented a real advantage to herself and her children and otherwise was consistent with the *Staab* factors, I see no reason why the parties' arrangement in this case should do so. Given the trial judge's conclusion that appellant would comply with substitute visitation orders and that the relocation was not based on a desire to interfere with the relationship the children had with appellee, I must conclude that the judge's decision was clearly erroneous.

My view is further strengthened by the fact that appellant now has a third child, born from her union with her current spouse. The trial judge's decision not only severed the family unit consisting of appellant, Ethan, and Katherine. It effectively precluded appellant's third child from joining that family unit. I see no value whatsoever in preventing appellant, Ethan, and Katherine from establishing and nurturing appellant's third child — the half-sibling of Ethan and Katherine — as part of their family unit consistent with the first factor in *Staab v. Hurst.* I certainly see a detriment to that family unit by the effect of the trial judge's decision denying relocation.

Finally, I join the decision to reverse the trial judge's decision to change custody to appellee. It is established law that the party seeking modification of a previous child custody order has the burden below to show a material change of circumstances sufficient to warrant a change of custody. *See Gerot v. Gerot, supra; see also Hollinger v. Hollinger*, 65 Ark. App. 110, 986 S.W.2d 105 (1999). 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). Appel-

lant's relocation to Tennessee and remarriage are not, considering the other proof, material circumstances affecting the welfare of the children so as to warrant a change of custody to appellee.

JOHN B. ROBBINS, Judge, dissenting. I cannot agree to reverse the decision of the chancellor in this case. Moreover, I cannot ignore the fact that, of the five-judge majority, four issued opinions to express their distinctly different views. There should be a clearly stated consensus by those who would reverse a chancellor's decision in a case bearing on the lives of children, to whom custody will be vested, and the myriad of persons affected by this decision. While we perform a de novo review of the record, we are obligated to give substantial deference to the chancellor's superior position to evaluate the evidence and the witnesses in these fact-intensive inquiries. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake was committed. *See Wagner v. Wagner*, 74 Ark. App. 135, 45 S.W.3d 852 (2001). I am not left with such a conviction.

The majority fairly expresses some basic facts relevant to this appeal, but more are necessary for our de novo review. Sheree's parents, Keith and his parents, and several of their respective relatives lived in and around northwest Arkansas. Sheree had no relatives in Tennessee, other than her new husband, whose military career required that he be away from home much of the time. Sheree planned to join her new husband at his military base, Fort Campbell, in Clarksville, Tennessee, regardless of the chancellor's decision. Though Sheree was staying with her parents pending the litigation, she and her husband had already set up a household in Tennessee. Sheree had worked as a waitress in northwest Arkansas and stated that she intended to work parttime as a waitress after moving to Tennessee. In fact, she already had a job "lined up" in Tennessee prior to the litigation ensuing, and the only reason she had not commenced her waitress job there was because she had stayed in Arkansas pending these proceedings. Her testimony reflects that there would be some period of time wherein she could rely solely on her new husband's income before her re-employment, but she was planning on putting the children in a day-care setting. She candidly admitted that she could not

articulate any advantages specific to the town of Clarksville, Tennessee, over what the children enjoyed in northwest Arkansas, and the children had never been to Clarksville to date.

Keith planned to finish his degree at the university and make a down payment on a house in the near future, with assurances from his mother that she could help with the children. If Keith were permitted to have custody, the children had friends in the neighborhood, and Ethan's school that he would be attending for kindergarten was located at the end of the street. Keith testified that the move would be hard on the children because they had no family or friends in Tennessee other than Sheree and Bruce, and that the children's needs were paramount and would be better served in the home that they have had all their lives in northwest Arkansas.

The first finding made was that the initial burden to demonstrate some real advantage to Sheree and the children was not carried. I cannot say that this is clearly erroneous. Obviously the move holds significant advantages for Sheree because she will be living with her new husband, she plans to be a stay-at-home mother for a while, and she will enjoy housing and lesser overhead costs provided by her husband's career. However, it is not apparent that there would be any real advantage to the children. They would have substantially less contact with their highly involved father, extended relatives, and the familiar surroundings they have known all their lives. When this petition to relocate was filed, Sheree and her husband were adjusting to a new marriage of seventeen days and a new home, and Sheree was unaware that she would be expecting a child at that time. Sheree's husband would be absent a great deal of time due to his military obligation, and he had not spent much time with the children to date for this reason. The only real benefit to the established family unit as it stood (Sheree and the children) would be that it would remain intact, which would be true in every petition to relocate and cannot equate to meeting this threshold burden placed on the party seeking to relocate. I cannot say that the chancellor clearly erred in so finding.

The majority acknowledges our precedent in those cases in which we held that a "real advantage" would occur where the custodial parent trained to work in a certain career and has a com-

pelling job opportunity, *see e.g. Hass v. Hass*, 74 Ark. App. 49, 44 S.W.3d 773 (2001), or the chance to finish an education, *see Wagner v. Wagner*, 74 Ark. App. 135, 45 S.W.3d 852 (2001), or where there is generally less of an attachment with the noncustodial parent/relatives as compared with relatives where the move would take them. *See Wagner, supra*. However, no "real advantage" was found on facts similar to the present appeal in *Hickmon, supra*. The chancellor noted *Hickmon* when rendering her findings. I disagree that the chancellor was wrong to note the similarity of facts, as the majority holds. I also disagree that the present appeal is wholly distinguishable on the basis that psychologists testified that the move in *Hickmon* would have a detrimental psychological effect on the children.

> [W]here, as here, that has been the visitation pattern [weekly visitation], a court should be loathe to interfere with it by permitting removal of the children for frivolous or unpersuasive or inadequate reasons. . . . [Nevertheless,] the court should not insist that the advantages of the move be sacrificed and the opportunity for a better and more comfortable lifestyle for the [custodial parent] and children be forfeited solely to maintain weekly visitation by the [non-custodial parent] where reasonable alternative visitation is available and where the advantages of the move are substantial.

D'Onofrio v. D'Onofrio, 144 N.J. Super. 200, 365 A.2d 27, 30 (App. Div. 1976).

We must give due deference to the superior position of the chancellor to view and judge the credibility of the witnesses. *Noland v. Noland*, 330 Ark. 660, 956 S.W.2d 173 (1997). Such deference to the chancellor is even greater in cases involving child custody, as a heavier burden is placed on the chancellor to utilize to the fullest extent his or her powers of perception in evaluating the witnesses, their testimony, and the best interest of the children. *Anderson v. Anderson*, 18 Ark. App. 284, 715 S.W.2d 218 (1986). The chancellor herein did not clearly err, and we usurp the fact-finding function of the chancellor by holding otherwise in this case. I respectfully dissent.

I am authorized to state that STROUD, C.J., CRABTREE, and ROAF, JJ., join in this opinion.

K II CONSTRUCTION COMPANY and Bituminous Casualty Corporation *v.* Harold CRABTREE

CA 01-727 79 S.W.3d 414

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered July 3, 2002

[redacted]

Anderson, Murphy & Hopkins, L.L.P., by: *Randy P. Murphy* and *Julia M. Hancock*, for appellants.

No response.

ANDREE LAYTON ROAF, Judge. K II Construction Company and Bituminous Casualty Corporation appeal the Workers' Compensation Commission's findings in favor of Harold Crabtree, who sustained an admittedly compensable back injury on November 3, 1998. For reversal, appellants contend that the Commission erred in finding that Crabtree was entitled to surgical treatment and in awarding additional temporary total disability (TTD) benefits. We affirm.

On November 3, 1998, Harold Crabtree suffered an injury to his back while employed by K II Construction. K II Construction accepted the injury as compensable, paid temporary total disability benefits from November 4, 1998, through October 19, 1999, and paid permanent disability benefits pursuant to a ten-percent rating.

On November 9, 2000, a hearing was held before the administrative law judge, and Crabtree claimed that he was entitled to additional medical treatment, including surgery. K II Construction argued that Crabtree had received all the benefits to which he was entitled and that his current back problems were unrelated to his compensable injury, but were instead related to an incident involving lifting a gas can that occurred away from work. The ALJ found that Crabtree was entitled to temporary total disability benefits from November 4, 1998, through September 22, 1999, and from February 23, 2000, to a date yet to be determined, and that K II Construction should pay all reasonable hospital and medical expenses arising out of the November 3, 1998, injury, including the recommended surgery. The full Workers' Compensation Commission affirmed and adopted the findings of the ALJ.

On appeal, KII Construction argues that the Commission erred in finding that Crabtree was entitled to additional medical treatment in the form of surgery to be performed by Dr. Contreras and in awarding temporary total disability benefits from February 23, 2000, through a date yet to be determined. On appeal in workers' compensation cases, the appellate court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Workers' Compensation Commission's findings and will affirm if those findings are supported by

substantial evidence. *Jeter v. B.R. McGinty Mechanical*, 62 Ark. App. 53, 968 S.W.2d 645 (1998). Substantial evidence is that relevant evidence which reasonable minds might accept as adequate to support a conclusion. *Georgia-Pacific Corp. v. Carter*, 62 Ark. App. 162, 969 S.W.2d 677 (1998). If reasonable minds could reach the conclusion of the Workers' Compensation Commission, its decision must be affirmed. *Id.* The appellate court cannot undertake a *de novo* review of the evidence and is limited by the standard of review in workers' compensation cases. *Id.*

K II Construction contends that Crabtree received all the benefits to which he was entitled for the November 3, 1998, injury because the medical records established that the incident on November 3rd did not result in a disc protrusion or herniation. Crabtree's counsel did not file a brief. The issue of whether treatment is reasonable and necessary is a question of fact for the Commission. *Wackenhut Corp. v. Jones*, 73 Ark. App. 158, 40 S.W.3d 333 (2001). However, when the primary injury is shown to have arisen out of and in the course of the employment, the employer is responsible for any natural consequence that flows from that injury, and the basic test is whether there is a causal connection between the injury and the consequences of such. *Id.* A nonwork-related independent intervening cause does not require negligence or recklessness, but if the claimant is engaged in unreasonable conduct, the result may be an independent intervening cause. *Davis v. Old Dominion Freight Line, Inc.*, 341 Ark. 751, 20 S.W.3d 326 (2000); *see* Ark. Code Ann. § 11-9-102(4)(F)(iii) (Supp. 1999).

K II Construction contends that "there is no medical evidence to establish a causal connection between the disc herniation and the injury of November 3, 1998," and that "[t]he only reasonable explanation for the herniated disc is that the appellee injured his back while engaged in an activity having nothing to do with his employment." We do not agree. After his November 3, 1998, injury, Crabtree was seen at the emergency room and received a referral to Dr. McCrary and then to Dr. Contreras, a neurosurgeon. Although the initial MRI on November 6, 1998, did not reveal a disc protrusion or herniation, Dr. Contreras ordered that Crabtree receive conservative treatment, including

epidural steriod injections, additional diagnostic tests, and physical therapy. Both a myelogram and CT scan performed in February 1999 revealed a disc bulge at L4-L5, with the S-1 nerve root affected.

On July 21, 1999, Crabtree reported to Dr. Contreras that he had tried to pick up a gasoline can containing a gallon and a half of gasoline and felt significant pain. Dr. Contreras performed a second lumbar MRI on July 28, 1999. It showed a "new disc protrusion" in the area of the bulging disc, which was diagnosed as a herniated L5-S1 disc. Dr. Contreras recommended decompression surgery; Crabtree initially declined the surgery, but on February 23, 2000, indicated to Dr. Contreras that he was ready to proceed with surgery. On March 13, 2000, Dr. Contreras wrote a report reflecting that he would recommend surgical intervention for Crabtree's herniated disc. After being evaluated by Dr. Anthony Russell, a neurosurgeon, pursuant to K II Construction's request, Dr. Russell agreed with Dr. Contreras that surgical intervention was the best hope for long-term improvement in Crabtree's condition and opined that while the abnormality of the disc noted in February 1999 may have predisposed Crabtree to the subsequent herniation, there was no way of stating with any reasonable degree of medical certainty that the herniation seen in July 1999 was any more related to the bulge seen in February or some other unforeseen event.

With regard to Crabtree's herniation, Dr. Contreras testified in a deposition that there was a "new finding" in the July 1999 MRI of a small herniation and that he related the disc rupture to Crabtree picking up a gasoline can. However, he also testified that "a small protrusion or little small focal disc rupture can turn into a larger disc rupture," that the earlier myelogram showed "a little bit of a bulge of the disc to the right of the midline," and that he thought that when Crabtree lifted the gas can, "more disc materials squished out of the lining and by then he had a much larger local rupture of the disc that was amendable to surgery."

The ALJ found that it was not disputed that Crabtree sustained an injury to his lower back arising out of and in the

course of his employment with K II Construction. The ALJ further found that

> [C]laimant has been consistent in relaying complaints of pain in his low back. . . .all attributable to the November 3, 1998, injury. . . .Claimant asserts that the account regarding lifting the gas can contained in the July 21, 1999, chart note of Dr. Contreras was the product of miscommunication. . . .The more credible of the evidence is that claimant did in fact lift the gas can containing approximately a gallon and a half of gas and experienced an increase in low back symptoms. . . . There is no evidence however to reflect that the same constituted an independent intervening event, such that the liability of the respondents is severed. Claimant was within his healing period at the time of the occurrence.

The ALJ and the Commission found Crabtree's testimony to be credible and that the incident involving the gas can did not result in a second injury or intervening cause that would break the causal connection, but simply amounted to an increase in Crabtree's symptoms, which he reported to his treating physician. Dr. Contreras's testimony supports this finding, and the ALJ specifically cited to Drs. Russell's and Contreras's testimony in reaching the conclusion that Crabtree was entitled to medical benefits for the herniation. What constitutes reasonable and necessary medical treatment is a fact question for the Commission. We find substantial evidence to support its decision to award medical expenses, including the recommended surgery.

K II Construction further contends that it has paid all the benefits that Crabtree is entitled to and that he is no longer within his healing period. Specifically, K II Construction argues that "[t]he credible proof demonstrates that the need for surgery and continued disability was caused by an independent intervening cause" because if Crabtree were completely incapacitated from earning wages it would be "unreasonable for him to lift and carry around a gas can." This argument is unavailing.

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. *American Greetings Corp. v. Garey*, 61 Ark. App. 18,

963 S.W.2d 613 (1998). When an injured employee is totally incapacitated from earning wages and remains in his healing period, he is entitled to temporary total disability. *High Capacity Prods. v. Moore*, 61 Ark. App. 1, 962 S.W.2d 831 (1998). The healing period ends when the employee is as far restored as the permanent nature of his injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. *Id.* The question of when the healing period has ended is a factual determination for the Commission that will be affirmed if it is supported by substantial evidence. Here, the ALJ concluded that

> [a]t the point claimant decided that he did not want to proceed with surgery, he was no longer entitled to the payment of temporary total disability benefits. Claimant's entitlement to medical benefits as a result of the November 3, 1998, compensable injury did not cease. Claimant is entitled to ongoing medical treatment. . . . Clearly the underlying condition causing the claimant's disability has not become stable and further treatment is available which would improve that condition. The preponderance of the evidence reflects that surgical intervention recommended relative to the treatment of claimant's herniated lumbar disc is reasonable, necessary, and related to the November 3, 1998, compensable injury. . . . The evidence preponderates that when claimant elected to proceed with surgical intervention on February 23, 2000, . . . he continued within his healing period and [was] totally incapacitated from engaging in gainful employment.

The Commission's decision to award temporary total disability benefits from February 23, 2000, to a date yet to be determined is supported by substantial evidence. Crabtree's condition has not stabilized, and the testimony established that surgery was the only option to allow him relief from his disability and pain.

Affirmed.

STROUD, C.J., GRIFFEN, VAUGHT, and BAKER, JJ., agree.

PITTMAN, J. dissents.

JOHN MAUZY PITTMAN, Judge, dissenting. I dissent. The Commission's opinion does not explain the action it has taken sufficiently to allow meaningful review, and we should therefore remand for the Commission to make specific findings as required by *Wright v. American Transportation*, 18 Ark. App. 18, 709 S.W.2d 107 (1986).

The appellee in this workers' compensation case sustained an admittedly compensable back injury while lifting plywood in the course of his employment with appellant construction company on November 3, 1998. Appellee never worked for appellant or any other employer after that incident. An MRI examination conducted on November 6, 1998, revealed mild degenerative disc disease at L1-L2 and L5-S1, but no evidence of acute injury or disc rupture. Appellee was treated conservatively without notable improvement. He continued to complain of pain, stating that his back hurt terribly after he tried to pick up a gas can. A repeat MRI was performed on July 28, 1999. It showed a new disc protrusion at L5-S1. Appellee ultimately agreed to have decompression surgery. He filed a claim seeking additional temporary total disability benefits and additional medical treatment in the form of the recommended surgery. In an opinion quoting appellee's physician's statement that it was impossible to state with any reasonable degree of medical certainty that the herniation was related to his work-related back injury, the Commission awarded these benefits, and this appeal followed.

For reversal, appellant contends that the Commission erred in finding that appellee was entitled to surgical treatment and in awarding additional temporary total disability benefits. I would reverse and remand for further consistent proceedings.

The Commission's opinion does not contain findings adequate to support the award of benefits. The general rule with regard to the compensability of subsequent injuries was stated in *Guidry v. J & R Eads Construction Co.*, 11 Ark. App. 219, 222, 669 S.W.2d 483, 485 (1984):

> When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows

> from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own negligence or misconduct.

In the present case, there was nothing stated in the Commission's opinion to support a finding that appellee's disc herniation was a "natural consequence" of his work-related injury. The extent of the Commission's findings and reasoning on this issue is, essentially, that the herniation must have been a natural consequence of the work-related injury because there is no evidence of appellee having sustained any prior or subsequent back injury. This would be a rational conclusion, perhaps, if one assumed that disc herniations are caused only by trauma. However, there is no such evidence in the record. Furthermore, appellee's own physician stated that it was impossible to say with any reasonable degree of medical certainty that the herniation flowed from appellee's work-related injury. In this context, our supreme court has held that, where the only evidence of a causal connection is a speculative and indefinite medical opinion, it is insufficient to meet the claimant's burden of proving causation. *Crudup v. Regal Ware, Inc.,* 341 Ark. 804, 20 S.W.3d 900 (2000).

The Commission was not bound to believe the medical testimony regarding causation. However, although the Commission found this medical testimony to be significant enough to include in its opinion, it failed to reconcile that testimony with its finding that appellee's herniation was in fact caused by his work. In the absence of any explanation for rejecting this testimony, it appears that the Commission rejected it arbitrarily, and it is well-settled that the Commission may not arbitrarily disregard medical testimony. *Hill v. Baptist Medical Center,* 74 Ark. App. 250, 48 S.W.3d 544 (2001); *Swift-Eckrich, Inc. v. Brock,* 63 Ark. App. 118, 975 S.W.2d 857 (1998); *Foxx v. American Transp.*, 54 Ark. App. 115, 924 S.W.2d 814 (1996); *Crow v. Weyerhaeuser Co.*, 46 Ark. App. 295, 880 S.W.2d 320 (1994); *Reeder v. Rheem Mfg. Co.*, 38 Ark. App. 248, 832 S.W.2d 505 (1992).

In the absence of an explanation for the Commission's rejection of the physician's testimony and finding that the herniation

was the natural consequence of appellee's compensable injury, the opinion is inadequate to permit any meaningful review, and I believe we should remand for satisfactory and specific findings as required by *Wright v. American Transportation, supra.*

I respectfully dissent.

Pauline HARTWICK, *et al. v.* Bradley R. HILL and Connie Lee Hill

CA 01-891

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered July 3, 2002
[Dissenting opinion only]

JOHN MAUZY PITTMAN, Judge, dissenting. I disagree with the majority's conclusion that the February 2001 order was final for purposes of appeal.

The appeal arises from an order granting appellees a roadway across appellant's land pursuant to Ark. Code Ann. § 27-66-401 (Repl. 1994). That statute allows an owner of land, situated so as to make an access road over the land of another necessary, to compel an adjacent landowner to permit the establishment of an access road. The landowner from whom the right-of-way is taken is entitled to recover money damages for the land actually taken and for any damage done to the balance of his land. *Arkansas Game & Fish Commission v. Lindsey*, 299 Ark. 249, 771 S.W.2d 769 (1989).

Here, the trial judge entered an order in February 2001 establishing appellees' right to a roadway across appellant's land. The majority has declared that this was a final order from which the appeal should have been taken. I disagree. Express exceptions

aside, an appealable order is one that dismisses the parties from the court, discharges them from the action, or concludes their rights to the subject matter in controversy. *Petrus v. Nature Conservancy*, 330 Ark. 722, 957 S.W.2d 688 (1997).

The February order patently fails to resolve all the outstanding issues presented to the trial court. As previously noted, the landowner from whom a right-of-way is taken is entitled to recover money damages for the taking, but the February order did not finally resolve the issue of money damages. Instead, the February order specifically orders that a survey be made by a qualified and licensed surveyor so as to "provide a legal description of the property to be conveyed and an exact quantity of the land taken" so that money damages could be awarded on the basis of the quantity of land actually taken. Simply put, the February order reserved for later decision the question of monetary damages; ergo, that order does not conclude the parties' rights to the subject matter in controversy and is, by definition, not a final order.

The majority appears to argue that the February order is nevertheless final because it provides a formula for determining the monetary damages by announcing that the ultimate award will be computed on the basis of $6,000.00 per acre. I do not understand this argument. No monetary award can be computed on the basis of the February order because that order expressly leaves unresolved the other variable necessary to compute the monetary damages, *i.e.*, the exact quantity of the land taken. Even ignoring the glaring absence of a money judgment, the February order could be viewed as a final resolution of the parties' rights only were we to assume that the trial judge wholly abdicated his duty to pass on the credibility of the ordered survey and intended to accept the results of the surveyor without regard to whether the surveyor's measurement of the area taken amounted to a few square inches or the entire North American continent. But it would be error for the trial judge to abdicate his responsibility to make the necessary factual findings, and we may not presume that he made such an error in the absence of a showing to the contrary. To the contrary, in the absence of a showing otherwise, the presumption attendant upon every judgment of a court of competent jurisdiction is that it was entered in accordance with the law. *See,*

e.g., Davis v. Schimmel, 252 Ark. 1201, 482 S.W.2d 785 (1972). In the present case, there is no indication that the trial judge considered that the February order concluded the rights of the parties to the subject matter in controversy. Any lingering doubts should be removed by the trial judge's own statement, in a subsequent order, that he did not consider the February order to be final because it did not conclude the rights of the parties by awarding money damages.