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Bill BISHOP and Shelli Bishop *v.*
CITY of FAYETTEVILLE, *et al.*

CA 02-399 97 S.W.3d 913

Court of Appeals of Arkansas
Division III
Delivered February 12, 2003

Kinkaid, Horne & Daniels, by: *David B. Horne*, for appellants.

Kit Williams, Fayetteville City Att'y, for appellee City of Fayetteville, Arkansas.

Friday, Eldredge & Clark, LLP, by: *Clifford W. Plunkett*, for appellee Alltel Mobile Communications of Arkansas, Inc.

Bassett Law Firm, by: *Tod C. Bassett*, for appellee Southwest PCS, LP.

JOHN MAUZY PITTMAN, Judge. This appeal involves the construction of an easement deed. Appellants' predecessors in title granted an easement to the city. The easement was specifically designated as being for two purposes: laying utilities on the easement and providing access to adjoining land that the city owned. Subsequently, the city allowed the construction of wireless communication equipment on the part of the city's land that was accessed by the easement. The appellants sued for trespass and nuisance, arguing that the use made of the easement by defendants exceeded the rights granted to them by appellants' predecessors in title. The trial court disagreed with this construction of the easement deed and granted summary judgment to appellees. This appeal followed.

For reversal, appellants contend that the trial judge erred in entering summary judgment for appellees; in denying appellants' motion for summary judgment; and in failing to construe the easement as excluding the construction, maintaining, and servicing of cellular communications facilities. We affirm.

The record reflects that appellee City of Fayetteville built a water tower on its property adjacent to land owned by Dr. Carl Covey and his wife. In March 1987, the Coveys granted the City a "right-of-way grant" over their property. The deed granted to the City and its assigns "the right of way and easement to construct, lay, remove, relay, enlarge, and operate a water and/or sewer pipeline or lines, manholes, driveway and appurtenances thereto" across the Coveys' property. The deed described the easement as "[a] permanent easement of 25 feet in width for the purpose of laying a water line and an access driveway, more particularly described as follows, to wit: a 25 foot ingress and egress

access and utility easement" and set forth a metes-and-bounds description of its location. The deed also provided:

> TO HAVE AND TO HOLD unto said Grantee, its successors and assigns, so long as such pipe line or lines, manholes, driveway and/or appurtenances, thereto shall be maintained, with ingress to and egress from the real estate first hereinabove described for the purpose of constructing, inspecting, maintaining and repairing said lines, manholes, driveway and appurtenances of Grantee above described, and the removal, renewal and enlargement of such at will, in whole or in part.

In October 1994, the City entered into an agreement with appellee Fayetteville MSA Limited Partnership, through its general partner, Alltel Mobile Communications of Arkansas, Inc., permitting the attachment of wireless communications equipment to the City's water tower. The City also leased to Alltel the ingress and egress easement over the Coveys' land. In 1998, appellants purchased the Coveys' property, after Alltel had operated the wireless equipment and used the access easement for over three years. In October 1998, the City of Fayetteville entered into an agreement with appellee Telecorp Realty, LLC, that permitted Telecorp to construct a wireless tower adjacent to the water tower on the City's property and to use the ingress and egress easement. The City and Telecorp assigned to appellee Southwest PCS, LP, the rights to locate cellular equipment on this tower and to use the easement.

Appellants sued appellees in May 2000 for trespass, nuisance, and inverse condemnation, alleging that appellees had exceeded the scope and intent of the easement. All parties moved for summary judgment, arguing that the right-of-way grant was unambiguous.

Alltel filed the affidavits of Dr. Covey and Burt Rakes, the City's land agent who had negotiated with the Coveys for the right-of-way grant in 1987. Dr. Covey stated that it was his and his wife's intent to give the City "the right to utilize the easement as a utility easement and as a driveway/access easement so that the City could have unlimited ingress and egress to its property for all lawful purposes." He added that he had not intended to restrict the City's access to its property "for any particular purpose." In

his affidavit, Mr. Rakes said that, by the right-of-way grant, the City had intended to obtain a utility easement and an access/driveway easement, for all lawful purposes, to its property and that the Coveys had understood this. He also stated that "[t]he use of the access easement was not limited to the operation of a water utility system or any other specific purpose."

On October 3, 2001, the trial judge entered partial summary judgment for appellees on the trespass and nuisance issues. She found that the easement "clearly and unambiguously grant[ed] the City an easement for an ingress and egress right-of-way and as a utility easement." She also found that the use of the easement by the City and its assigns for access to the City's property was within the scope of the grant. She reserved a decision on the inverse-condemnation issue.

Appellants again moved for summary judgment and requested clarification of the judge's previous order. Appellants argued that, even if the judge had determined that the City's easement was a right of way for utility purposes, the use of the right of way was limited to utility purposes, and cellular telecommunications businesses are not public utilities pursuant to Ark. Code Ann. § 23-1-101 (Repl. 2002). In support, they filed the affidavit of Sam Bratton, counsel to the Arkansas Public Service Commission, wherein he stated that the Commission does not regulate cellular communications businesses. In response, the City argued that the judge's order made it clear that the grant conveyed an ingress and egress right of way *and* a utility easement and, therefore, Mr. Bratton's affidavit was irrelevant. They also asserted that the grant of the ingress and egress easement was not limited in purpose.

Upon the motion of appellants, the judge entered an order on January 2, 2002, dismissing their claim for inverse condemnation with prejudice. On January 22, 2002, the judge denied appellants' second motion for summary judgment, finding that the easement clearly and unambiguously granted the City an ingress and egress right of way to its property *and* a utility easement:

> The Court finds that the ingress and egress right of way given to the City is not limited to the operation of a utility. . . . Even if

> this Court were to find that the easement is ambiguous, which it does not, the uncontradicted affidavits of Dr. Covey and the representative of the City that negotiated with Dr. Covey for the easement, Burt Rakes, state that the intention of the parties to the easement was to provide the City with a utility easement and an easement for ingress and egress for all lawful purposes.

Appellants bring this appeal from the October 3, 2001, January 2, 2002, and January 22, 2002, orders.

Appellants argue that the judge erred (1) in entering summary judgment for appellees; (2) in denying appellants' motion for summary judgment; and (3) in failing to construe the easement as excluding the construction, maintaining, and servicing of cellular communications facilities. The first and second points will be considered together.

In summary-judgment cases, this court need only decide if the granting of summary judgment was appropriate based upon whether the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered. *Inge v. Walker*, 70 Ark. App. 114, 15 S.W.3d 348 (2000). The burden of sustaining a motion for summary judgment is always the responsibility of the moving party. *Id.* All proof submitted must be viewed in a light most favorable to the party resisting the motion, and any doubts and inferences must be resolved against the moving party. *Id.* On a summary-judgment motion, once the moving party establishes a *prima facie* entitlement to summary judgment by affidavits or other supporting documents, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Welch Foods, Inc. v. Chicago Title Ins. Co.*, 341 Ark. 515, 17 S.W.3d 467 (2000). When a party cannot present proof on an essential element of its claim, there is no remaining genuine issue of material fact, and the party moving for a summary judgment is entitled to judgment as a matter of law. *Short v. Little Rock Dodge, Inc.*, 297 Ark. 104, 759 S.W.2d 553 (1988). Summary judgment is not appropriate where evidence, although in no material dispute as to actuality, reveals aspects from which inconsistent hypotheses might reasonably be drawn and reasonable minds might differ. *Lee v. Hot Springs Village Golf Sch.*, 58 Ark. App. 293, 951 S.W.2d 315 (1997).

Appellants contend that the right-of-way grant unambiguously limited its use to purposes relating to water utilities and did not permit its assignment for the purposes of constructing and servicing wireless-communications towers and equipment. In response, appellees argue that the judge correctly construed the grant as unambiguously conveying two different rights — a utility easement *and* an access driveway unrestricted in the purposes for which it can be used. Appellants further contend that, if the grant is ambiguous, the rules of construction should be employed and it should be construed against its drafter, the City. Appellees, however, point out that the unrebutted affidavits of Mr. Rakes and Dr. Covey prove that the parties intended the deed to convey an unrestricted access right of way *in addition* to the utility easement.

When interpreting a deed, the court gives primary consideration to the intent of the grantor. *Winningham v. Harris*, 64 Ark. App. 239, 981 S.W.2d 540 (1998). When the court is called upon to construe a deed, it will examine the deed from its four corners for the purpose of ascertaining that intent from the language employed. *Id.* The court will not resort to rules of construction when a deed is clear and contains no ambiguities, but only when the language of the deed is ambiguous, uncertain, or doubtful. *Id.* When a deed is ambiguous, the court must put itself as nearly as possible in the position of the parties to the deed, particularly the grantor, and interpret the language in the light of attendant circumstances. *Id.*

It is only in case of an ambiguity that a deed is construed most strongly against the party who prepared it, *see Gibson v. Pickett*, 256 Ark. 1035, 512 S.W.2d 532 (1974), or against the grantor. *Goodwin v. Lofton,* 10 Ark. App. 205, 662 S.W.2d 215 (1984). Even then, the rule is one of last resort to be applied only when all other rules for construing an ambiguous deed fail to lead to a satisfactory clarification of the instrument and is particularly subservient to the paramount rule that the intention of the parties must be given effect, insofar as it may be ascertained, and to the rule that every part of a deed should be harmonized and reconciled so that all may stand together and none be rejected. *Gibson v. Pickett, supra.* In arriving at the intention of the parties, the courts may consider and accord considerable weight to the con-

struction of an ambiguous deed by the parties themselves, evidenced by subsequent statements, acts, and conduct. *Wynn v. Sklar & Phillips Oil Co.,* 254 Ark. 332, 493 S.W.2d 439 (1973). Courts may also acquaint themselves with and consider circumstances existing at the time of the execution of a contract and the situation of the parties who made it. *Id.*

A summary judgment may be based upon an unambiguous, written instrument. *Barraclough v. Arkansas Power & Light Co.,* 268 Ark. 1026, 597 S.W.2d 861 (Ark. App. 1980). On our review of the record, we do not believe that a reasonable person could construe the deed as limiting the rights conveyed to uses relating only to water utilities, and we therefore hold that the trial judge was correct in finding the grant to be unambiguous and in construing it as conveying an unrestricted access right of way in addition to a utility easement.

Nor do we believe that the trial judge erred in finding that the City's and its assigns' use of the easement for access to the City's property was within the scope of the grant. The owner of an easement may make use of the easement compatible with the authorized use so long as the use is reasonable in light of all facts and circumstances of the case. *Howard v. Cramlet,* 56 Ark. App. 171, 939 S.W.2d 858 (1997); *Hatfield v. Arkansas W. Gas Co.,* 5 Ark. App. 26, 632 S.W.2d 238 (1982). Two circumstances of the present case are particularly worthy of note: First, the telecommunications equipment was *not* placed on the easement, but on land belonging to the city. Second, the access easement by its very terms anticipated that traffic on the easement might increase as the city developed its land, as indicated by the deed's specific grant of the right to both construct and *enlarge* a roadway on the easement across appellants' property. Given this language, we think that the deed unambiguously granted the city an access easement that anticipated expanded use, and that the trial court did not err in granting summary judgment to the appellees.

Finally, we also agree with the trial judge's conclusion that it is irrelevant whether cellular communications businesses are included within the term "public utility" in Ark. Code Ann. § 23-1-101 (Repl. 2002). The definition of "public utility"

in section 23-1-101 relates only to ratemaking by the Arkansas Public Service Commission. Additionally, it does not matter whether the uses to which the *utility* easement may be put do not include cellular telecommunications purposes, because nothing in the record limits the City's right to permit the placement of and access to cellular towers and equipment on its land that is served by the contemporaneously granted *access* easement.

Affirmed.

CRABTREE, J., agrees.

ROBBINS, J., concurs.

JOHN B. ROBBINS, Judge, concurring. I agree that the trial court's grant of summary judgment should be affirmed but write separately because I disagree with the majority's rationale. I do not share the majority's opinion that the subject easement deed to the City of Fayetteville was not ambiguous.

The deed granted to the City and its assigns "the right-of-way and easement to construct, lay, remove, relay, enlarge, and operate a water and/or sewer pipeline or lines, manholes, driveway and appurtenances thereto" across the Coveys' property. Then in the habendum clause the document provided:

> TO HAVE AND TO HOLD unto said Grantee, its successors and assigns, so long as such pipe line or lines, manholes, driveway and/or appurtenances, thereto shall be maintained, with *ingress to and egress from the real estate* first hereinabove described *for the purpose of constructing, inspecting, maintaining and repairing said lines, manholes, driveway and appurtenances of Grantee* above described, and the removal, renewal and enlargement of such at will, in whole or in part. (Emphasis added.)

I acknowledge that these provisions could be reasonably construed to grant the City the right-of-way across the subject property for uses other than incidental to laying, operating and maintaining water and/or sewer pipelines. However, the question on the issue of ambiguity is whether this language would also permit a reasonable construction that the right-of-way was limited for use only incident to the City's water and/or sewer system opera-

tions. I am of the opinion that the deed could be reasonably construed either way and, consequently, is ambiguous.

The inquiry then becomes what was the intent of the parties to the easement deed, *see Winningham v. Harris*, 64 Ark. App. 239, 981 S.W.2d 540 (1998), and whether the affidavits before the trial court in support of, and in opposition to, the parties' respective motions for summary judgment left any genuine issue of material fact in dispute. Both parties to the deed, the City, through its land agent who had negotiated with the Coveys for the grant in 1987, and the grantor Dr. Covey, avowed in their affidavits that it was the intent of the grantors and grantee that the access easement not be restricted to any particular purpose. Therefore, it does not appear that any genuine issue of material fact remained, and the trial court could properly grant summary judgment to the City.

MAGNET COVE SCHOOL DISTRICT and Risk Management Resources *v.* Shirley BARNETT

CA 02-597 97 S.W.3d 909

Court of Appeals of Arkansas
Division IV
Opinion delivered February 12, 2003

Friday, Eldredge & Clark, by: *Betty J. Demory*, for appellants.

Janie M. Evans, for appellee.

JOSEPHINE LINKER HART, Judge. Magnet Cove School District and Risk Management Resources appeal the order of the Arkansas Workers' Compensation Commission, finding that the appellee's average weekly wage should be calculated by dividing her salary by thirty-nine weeks and not fifty-two weeks. For reversal, appellants argue that the Commission erred by failing to divide her salary by fifty-two weeks. We disagree and affirm.

Appellee, Shirley Barnett, entered into an employment contract as a teacher with appellant Magnet Cove School District. The contract provided that appellee work 188 days[1] during the nine-month period from August 1999 to May 2000 for a total salary of $26,500 to be paid in twelve monthly installments.[2] During January of 2000, appellee sustained an injury to her left knee. Appellants accepted the injury as compensable and paid $339 each week for temporary total disability benefits and also paid $254 each week for permanent partial disability benefits based on an impairment rating of 14% to the lower extremity. Appellee challenged the award before the administrative law judge, contending that her average weekly wage was $718.08 based upon a salary of $27,000 earned over a period of nine months. Appellants contended that appellee's average weekly wage was $508 based upon a salary at the time of her injury of $26,500 paid over the fiscal year of fifty-two weeks. The ALJ determined that appellee's average weekly wage was $679.49. This calculation was made by the ALJ dividing appellee's total compensation of $26,500 by the thirty-nine weeks designated in appellee's employment contract.[3]

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[1] Appellants do not challenge the Commission's determination that thirty-nine weeks approximates 188 days.

[2] After a decision by the school board on May 8, 2000, her contract was amended to increase her salary by $500 for a total amount of $27,000.

[3] The ALJ noted in his opinion that the total compensation was $26,500 rather than $27,000 because the contract in force at the time of the accident did not provide for the $500 increase because the school board did not take action to increase the contract price until May 8, 2000.

On appeal, the Commission adopted the findings and conclusions of the ALJ.

■ ■ In reviewing a decision of the Workers' Compensation Commission, this court views the evidence and all reasonable inferences in the light most favorable to the findings of the Commission. *Swift-Eckrich, Inc. v. Brock*, 63 Ark. App. 118, 975 S.W.2d 857 (1998). These findings will be affirmed if supported by substantial evidence. *Georgia-Pacific Corp. v. Carter*, 62 Ark. App. 162, 969 S.W.2d 677 (1998). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Wackenhut Corp. v. Jones*, 73 Ark. App. 158, 40 S.W.3d 333 (2001). On an appeal from the Workers' Compensation Commission, the question is not whether the evidence would have supported findings contrary to those of the Commission; rather, the decision of the Commission must be affirmed if reasonable minds might have reached the same conclusion. *See Dallas County Hosp. v. Daniels*, 74 Ark. App. 177, 47 S.W.3d 283 (2001); *Barnett v. Natural Gas Pipeline Co.*, 62 Ark. App. 265, 970 S.W.2d 319 (1998).

Appellants contend that the Commission's determination of appellee's average weekly wage was clearly erroneous. Appellants argue that appellee is paid over fifty-two weeks of the year, and therefore, it is against public policy for the Commission to award her benefits based upon her employment period of thirty-nine weeks. In support of this argument, appellants note that if appellee's average weekly wage is based upon thirty-nine weeks, the payment she would receive computes to more than 66 2/3% of her wages as outlined in Arkansas Code Annotated section 11-9-501(b) (Repl. 2002). That statute provides in pertinent part that "the total disability rate shall not exceed sixty-six and two-thirds percent (66 2/3%) of the employee's average weekly wage . . . ." According to appellants, 66 2/3% of $26,500 is $17,675 and is the amount appellee would receive if granted temporary total disability benefits for a period of fifty-two weeks. Thus, appellee would, according to appellant's calculations, receive more than 66 2/3% of her salary if her average weekly wage is calculated based on thirty-nine weeks, and she was to be awarded benefits for one year.

In its decision, the Commission found that appellee's average weekly wage was $679.49, as calculated by dividing the total compensation of $26,500 by thirty-nine weeks in the designated nine-month period of employment pursuant to the contract of hire in force at the time of the accident. The Commission did note that appellee was paid in twelve installments over a period of fifty-two weeks.[4] However, the contract only provided employment for 188 days of school during a nine-month period from August 1999 to May 2000.

The Commission also found appellants' argument that appellee's daily pay rate was $102 was inconsistent with the testimony of Rebecca Moore, district bookkeeper for the Magnet Cove School District. Moore testified that appellee would be docked $143.62 per day for each day she was absent and did not have any sick leave, vacation leave or other leave remaining. The Commission cited *Bond v. Lavaca School District*, 73 Ark. App. 5, 38 S.W.3d 923 (2001) (reversed on other grounds), for the proposition that the daily rate of pay for a school teacher is calculated by dividing the contract salary by the number of days in a regular school year.

Appellee testified that she was employed as a first-grade teacher with the Magnet Cove School District, and she was required by the terms of her contract to be at school 188 days during the 1999-2000 school year. Appellee stated that during the 1999-2000 school year, she missed work after her leave was exhausted, and her pay was deducted at a rate of $143.62 each day.

In sum, appellants seek to require this court to determine that appellee's weekly income is based on the date she received her pay and not the date she earned the pay. We decline to do so. The contract provided for appellee to teach 188 days, and further that she would be docked $143.62 per diem for any absences during any leave-without-pay status. Further, Arkansas Code Annotated section 11-9-518(a)(1) (Repl. 2002) states that "compensation shall be computed on the average weekly wage earned by the employee under the contract of hire in force at the time of

[4] Arkansas Code Annotated section 6-17-803 (Repl. 1999) provides that Arkansas school districts may elect, at the option of the school board, to pay teachers either over the course of the ten-month school year or in twelve equal monthly installments.

the accident and in no case shall be computed on less than a full-time workweek in the employment."

We also note that appellee incurred the injury and took time away from work during the school year. The question of benefits during the remainder of the year or during a time period when the employee is not under contract to work is not presented in this appeal and, thus, is not addressed in this opinion. Based on the facts presented, we cannot say that the Commission's decision was not supported by substantial evidence.

As a final matter, appellee states that this court does not have jurisdiction to hear an appeal from the Commission as the appellants are barred from seeking appellate review under the provisions of Arkansas Code Annotated section 6-17-1402(d) (Repl. 1999). Section 6-17-1402(d) states that the action taken by the Commission shall be final and binding on all parties and shall not be subject to judicial review. However, this statute, when read in conjunction with section 6-17-1401 (Repl. 1999)[5], only requires that school teachers who are injured while acting within the scope of their employment must file their claims under the Workers' Compensation Act. The limitation set out in the statute provided that the Commission shall have exclusive authority to hear all work-related cases for employees of public schools, and that the Commission's exclusive authority is not subject to judicial review. Therefore, the limitation does not preclude school district employees or their employer from seeking appellate review of the Commission's decision.

We note that Arkansas Code Annotated section 11-9-711(d) states that "the action taken by the commission with respect to the allowance or disallowance of any claim filed by a school district employee shall be subject to appeal to the circuit court as provided for in subsection (b) of this section." Also, section 11-9-711(b) states in relevant part that a "compensation order or award of the commission shall become final 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

[5] Section 6-17-1401 (Repl. 1999) states that "workers' compensation coverage as provided in § 11-9-101 et seq. shall be provided for personal injuries and death of officers and employees of public schools in this state."

Appeals, which is designated as the forum for judicial review of those orders and awards." Although the two sections are obviously contradictory, we defer to our supreme court to resolve conflict.

Our supreme court has stated "[w]e decide the appellate jurisdiction of the Court of Appeals, not the legislature . . . in *Houston Contracting Co. v. Young*, 271 Ark. 455, 609 S.W.2d 895 (1980), . . . we found that the Court of Appeals was merely substituted for the Circuit Court as the first court to review an administrative order." *In Re: Amendment of Rule 29 1.d. of the Supreme Court and Court of Appeals*, 288 Ark. 644, 704 S.W.2d 625 (1986) (per curiam). Therefore, this court has jurisdiction to address the merits of this case.

Affirmed.

STROUD, CJ., and GRIFFEN, J., agree.

Howard DAVIS *v.* STATE of Arkansas

CA CR 02-564 97 S.W.3d 921

Court of Appeals of Arkansas
Division I
Opinion delivered February 12, 2003

Phyllis J. Lemons, for appellant.

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

SAM BIRD, Judge. Howard Davis was convicted in Rockport City Court for driving while intoxicated, second offense, and for failing to dim lights. He appealed to the Hot Spring County Circuit Court and was tried without a jury. The trial judge found him not guilty of failing to dim lights but found him guilty of the DWI charge. Davis was sentenced to seven days in jail and a fine of $1,135, his driver's license was suspended for six months, and he was ordered to attend driver-safety school and AA meetings. On appeal Davis contends that the trial court deprived him of his right to a jury trial; the State concedes error. We reverse and remand for a new trial.

The following colloquy occurred at the beginning of Davis's trial in the Hot Spring County Circuit Court.

> THE COURT: All right. Are y'all going to work on a plea agreement or are you ready to try it?
>
> MR. WALTHALL (PROSECUTOR): I thought we were here to try it. Am I right?
>
> MS. LEMONS (DEFENSE COUNSEL): Yeah.
>
> THE COURT: Everyone who is going to testify then, raise your right hands.
>
> *(All witnesses were sworn by the Court.)*
>
> THE COURT: Have a seat at the counsel table. Mr. Walthall, you may call your first witness.

The Sixth Amendment to the United States Constitution provides that a criminal defendant has the right to a trial by

jury. The right of trial by jury is also preserved by Ark. Const. art. 2, § 10, which states that the right remains inviolate and extends to all cases at law. Article 2, section 7, of the Arkansas Constitution further directs that a jury trial may be waived by the parties in all cases in the manner prescribed by law.

A criminal defendant bears no burden of demanding a trial by jury under our constitution and law. *Calnan v. State*, 310 Ark. 744, 841 S.W.2d 593 (1992), quoting *Elmore v. State*, 305 Ark. 426, 809 S.W.2d 370 (1991) (holding that there was "no need for Elmore to demand or move for a trial by jury, much less obtain a ruling on the issue"). This assures that the jury-trial right is not forfeited by inaction on the part of a defendant, and the contemporaneous-objection rule is inapplicable to this circumstance. *Id.* It is the trial court's burden to ensure that if there is a waiver of the right to trial by jury, the defendant waives the right in accordance with the Arkansas Rules of Criminal Procedure. *Grinning v. City of Pine Bluff*, 322 Ark. 45, 907 S.W.2d 690 (1995); *Maxwell v. State*, 73 Ark. App. 45, 41 S.W.3d 402 (2001). Although there are no jury trials in municipal court, all appeals from judgments in municipal court are *de novo* to circuit court in order that the right of trial by jury remains inviolate. Ark. Code Ann. § 16-17-703 (Repl. 1999).

Rule 31.1 of the Arkansas Rules of Criminal Procedure states that a defendant in a criminal case may not waive a trial by jury unless the waiver is assented to by the prosecuting attorney and approved by the court. Additionally, Rule 31.2 specifies the following:

> *Waiver of trial by jury: personal request.*
>
> Should a defendant desire to waive his right to trial by jury, he may do so either (1) personally in writing or in open court, or (2) through counsel if the waiver is made in open court and in the presence of the defendant. A verbatim record of any proceedings at which a defendant waives his right to a trial by jury in person or through counsel shall be made and preserved.

Pursuant to the constitution and these two rules, a defendant is entitled to be tried by a jury without even making a motion: this

holding is the common-sense reading of the constitution and the rules of criminal procedure. *Winkle v. State*, 310 Ark. 713, 841 S.W.2d 589 (1992).

In *Reaser v. State*, 47 Ark. App. 7, 883 S.W.2d 851 (1994), we voiced our concern that the holdings in *Calnan* and *Winkle* could lead to an abuse of the criminal-justice system, noting that this construction of the Arkansas Constitution and Rules of Criminal Procedure could encourage a defendant to sit silently through a non-jury trial, wait to see if he might obtain a favorable decision, and only raise the jury-trial issue later if the non-jury trial resulted in a conviction. In *Reasor* we stopped short of holding that such an abuse had occurred, concluding that the judicial system perhaps must pay this price to ensure that a defendant is not deprived of the fundamental constitutional right to trial by jury.

Again, in the case at bar, we are concerned about what may be abuse of the criminal-justice system. While a defendant in a criminal case shall be afforded the right to a jury trial in every instance, it does not follow that an attorney representing such a defendant is relieved of the responsibilities imposed upon him or her by the Model Rules of Professional Conduct. For example, Rule 3.3 requires lawyers to be candid toward the tribunal. A comment to that rule provides, in part, that "[t]here are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation." Commentary, Model R. Prof'l Conduct 3.3. Rule 3.1 prohibits lawyers from bringing or defending a claim unless there is a non-frivolous basis for doing so. While a lawyer has a duty to use legal procedure to the fullest benefit of his client, the lawyer also has a duty "not to abuse legal procedure." Commentary, Model R. Prof'l Conduct 3.1.

In *Reaser*, when the court inquired whether the parties were ready for trial, defense counsel informed the court that his client desired a jury trial, but the court denied the request because counsel had failed to notify the court forty-eight hours before the trial, as required by a written notice that the court had earlier provided to defense counsel. In the present case, however, when the court inquired as to whether the parties were ready for trial, defense

counsel simply replied, "Yeah," making no mention of her client's desire for or right to a jury trial.

Counsel's simple statement to the trial court that her client desired a jury trial would have saved the time devoted to the non-jury trial by the trial court, prosecuting attorney, defense counsel, witnesses, and court reporter; the time devoted by the court reporter to the preparation of an appeal transcript, and the expense related thereto; the time and expense of defense counsel to abstract the record and prepare a brief;[1] the time and expense of the attorney general's office to respond; the time expended by deputy clerks of this court who received and filed all the documents; and the time devoted by three judges of this court to read the briefs and prepare an opinion on an issue so well settled that the State concedes error.

Of course, we are not permitted to assume that defense counsel knew, when the trial judge inquired if the parties were ready for trial, that her client wanted a jury trial.[2] Consequently, as in *Reaser*, we refrain from concluding that defense counsel in this case has abused the system. On the other hand, if counsel did know of her client's desire for a jury trial, we wonder how her failure to so advise the court does not violate the lawyer's responsibility to exercise candor toward the court and to refrain from abusing legal procedure as required by the Model Rules of Professional Conduct.

Nonetheless, our supreme court has made it abundantly clear that it is the duty of the trial court either to afford the defendant the right to a jury trial whether the defendant demands it or not, or to ensure that the defendant has properly waived this right. As the record contains no evidence that Davis was informed by the court of his right to be tried by a jury, or that he executed a knowing, voluntary, and intelligent waiver of this right, we hold

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[1] The record indicates that defense counsel is court appointed. Consequently, all the expense related to this appeal, including attorney fees, is borne by the State.

[2] It is possible that appellant's desire for a jury trial developed and was communicated to his counsel only after his conviction and sentencing at the bench trial.

that he was deprived of his constitutional right to trial by jury. We therefore reverse and remand for a new trial.

Reversed and remanded.

VAUGHT and BAKER, JJ., agree.

Jimmie Lee BARNETT, *et al. v.*
MONUMENTAL GENERAL INSURANCE CO.

CA 01-1401 97 S.W.3d 901

Court of Appeals of Arkansas
Divisions II, III, and IV
Opinion delivered February 12, 2003

McHenry & McHenry Law Firm, by: *Donna McHenry, Robert McHenry*, and *Gregory D. Taylor*, for appellants.

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C, by: *Leigh Anne Shults* and *Stephanie M. Irby*, for appellee.

LARRY D. VAUGHT, Judge. Appellant brings this appeal from an order of summary judgment in favor of appellee. For the reasons that follow, we dismiss the appeal.

A notice of appeal should be filed within thirty days after the entry of the judgment. Ark. R. App. P.—Civ. 4(a). If it is shown that a party failed to receive notice of the judgment, the trial court may grant a fourteen-day extension. However, the extension must be requested within 180 days of the entry of the judgment. Ark. R. App. P.—Civ. 4(b)(3).

In the present case, the trial court held a hearing on a motion for summary judgment in 1996. Years passed, and an order granting summary judgment was entered on May 25, 2000. The parties, apparently, were unaware that the order had been entered. Consequently, the time allowed for filing a notice of appeal or extension expired.

When the appellants discovered that an order had been entered and the time for filing a notice of appeal had expired, they moved to vacate the judgment. Consequently, the trial court entered a *new* order granting summary judgment, identical to the previous one in all respects except for date, on July 20, 2001. Appellants then filed a notice of appeal from that order.

The determining question on appeal is whether the trial court had the authority to issue the duplicate order on July 20, 2001. It did not. An identical question was presented in *Oak Hill Manor v. Arkansas Health Servs. Agency*, 72 Ark. App. 458, 37 S.W.3d 681 (2001). There neither party was aware that an order had been entered. Despite this, we held that the trial court lacked jurisdiction to enter a duplicate order to permit the filing of a notice of appeal after the 180-day deadline had expired. In so doing we relied on and quoted authority concerning the analogous federal rules for the proposition that the 180-day deadline in

Rule 4 cannot be extended by use of Rule 60 to cure problems of lack of notice.

■ ■ *Oak Hill Manor* stands for the proposition that problems relating to lack of notice that an order has been filed are controlled entirely by Rule 4(b)(3) and that Rule 60 is simply inapplicable.[1] Consequently, we hold that the trial court lacked authority to set aside his original order and enter the duplicate order, and we must therefore dismiss this appeal.

Appeal dismissed; cross-appeal dismissed as moot.

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

PITTMAN and BIRD, JJ., concur.

HART, GRIFFEN, and ROAF, JJ., dissent.

JOHN MAUZY PITTMAN, Judge, concurring. I think that this case should have been certified to the Arkansas Supreme Court because it presents questions involving the interpretation or construction of rules promulgated by that court. However, this court declined to do so, and therefore I will vote in the case. On the merits of the issues, I agree with the majority opinion that there was no evidence of clerical misprision in this case and that, in any event, problems relating to lack of notice that an order has been entered are governed by Ark. R. App. P.—Civ. 4(b)(3).

I write separately to point out that this case illustrates the very sort of problems that we unnecessarily cause when we refuse to certify to the supreme court clearly certifiable cases. One judge is critical of our decision in *Oak Hill Manor v. Arkansas Health Services Agency*, 72 Ark. App. 458, 37 S.W.3d 681 (2001), and

[1] The dissent argues that *Oak Hill Manor, supra*, was wrongly decided, and that it should not apply in this case because of a misprision by the clerk in failing to timely notify the parties when the order was entered. We have diligently examined the record and, although it is clear that there were irregularities in the entry of the judgment and the notification of the parties, there is nothing to show that these irregularities were the fault of the clerk, rather than of the trial judge and the postal service. As the dissent candidly notes, the judgment of May 25, 2000, was "inexplicably" entered. If there were in fact errors committed by the clerk in this case, they are not apparent of record.

appears disinclined to follow it in the future. He essentially argues that *Oak Hill Manor* has minimal precedential value because it has not been adopted by the supreme court. Several other judges take issue with the majority positions both as to the proper construction to be given Ark. R. App. P.—Civ. 4(b)(3) and Ark. R. Civ. P. 60 and as to the extent of the holding in *Oak Hill Manor.* To my mind, it is unreasonable to make these arguments unless one is willing to certify the case and allow the supreme court the opportunity to speak on the issue.

Moreover, I suggest that all of these problems could have been avoided if in 2001 we had certified the *Oak Hill Manor* case for the supreme court to declare what *its* rules were intended to mean, rather than attempting to divine that intention on the basis of cases interpreting analogous, but not identical, federal rules.

SAM BIRD, Judge, concurring. I agree with the majority that this appeal must be dismissed, but I write separately to express my agreement with the dissenting opinion that the remedy afforded by Ark. R. App. P. 4(b)(3) (authorizing the trial court, upon motion within 180 days, to extend the time to file a notice of appeal when a party does not receive notice of a judgment from which appeal is sought) does not preclude the trial court from granting the relief afforded under Ark. R. Civ. P. 60(c)(3) (authorizing the trial court to vacate or modify a judgment after ninety days where entry of the judgment resulted from misprisions of the clerk).

However, the record in this case is devoid of any suggestion that the filing of the judgment, or appellant's failure to receive notice of it, resulted from misprisions of the clerk. Thus, there is no basis under Rule 60(c) for the granting of relief to appellant in this case.

On the other hand, I believe that in a case where the evidence demonstrates that a party's failure to receive notice of a judgment resulted from misprisions of the clerk, the trial court would have authority, acting pursuant to Ark. R. Civ. P. 60(c)(3), to set aside a judgment, without regard for the 180-day limitation imposed by Ark. R. Civ. P. 4(b)(3). But this is not such a case.

WENDELL L. GRIFFEN, Judge, dissenting. I mean no disrespect to the judges who make up the majority in this decision or to those who decided *Oak Hill Manor v. Arkansas Health Servs. Agency*, 72 Ark. App. 458, 37 S.W.3d 681 (2001). Nevertheless, I am unable to agree with the decision to dismiss this appeal in accordance with the decision and reasoning in *Oak Hill Manor*. *Oak Hill Manor* was wrongly decided in reliance on a 1994 decision by the United States Court of Appeals for the Eighth Circuit that has not even been cited by our supreme court, let alone followed. Moreover, the trial court in this case had no reason to look to the Arkansas Rules of Appellate Procedure when it considered appellants' motion to vacate the May 25, 2000, judgment based on misprision by the court clerk. Thus, the decision to dismiss the appeal by relying on *Oak Hill Manor* is unwise.

Furthermore, the practical effect of the majority decision is to impose on these parties a judgment that was inexplicably entered by the court clerk without notice to the trial judge or parties more than three years after it was signed. If ever a case warranted a finding of misprision by the clerk, this is such a case. The trial court vacated the judgment pursuant to the motion by appellants according to Rule 60(c)(3) of the Arkansas Rules of Civil Procedure. We pervert the whole meaning of justice when we dismiss this appeal based on the notion that it was untimely filed when everything in the record indicates that not even the trial court knew that someone in the clerk's office entered a judgment granting Monumental's summary-judgment motion.

According to the majority opinion, this is simply a case where the time allowed for filing a notice of appeal or extension expired after the "parties, apparently, were unaware that the [summary judgment] order had been entered." Respectfully, I maintain that the facts of this case demonstrate much more fundamental problems which Rule 60(c)(3) — written for the express purpose of dealing with "misprisions of the clerk" — was plainly intended to address without regard for the extension language found in Rule 4(b)(3) of our Rules of Appellate Procedure. Those facts are also so different from the situation presented in *Oak Hill Manor* that even if that decision is considered correct, we should not deem it controlling on this case.

Monumental filed its motion for summary judgment on July 14, 1995. It appears that the trial court held a summary-judgment hearing on August 15, 1996, more than a year after it was filed. Copies of correspondence from counsel to the trial court's case coordinator indicate that there was considerable controversy in 1996 surrounding the summary-judgment motion, whether the trial court had granted the motion, and Monumental's effort to have an order entered granting its motion. Whatever else may be argued, the record contains an order apparently signed by the trial court on October 2, 1996, granting Monumental's motion for summary judgment. After appellants objected to the proposed order that the trial court signed, but which had not been entered, the trial court held a hearing on appellants' objections in November 1996 and told the parties he would try to render a decision as soon as possible. For reasons nowhere shown in the record, an order was filed by the court clerk on May 25, 2000, more than three and a half years after the October 2, 1996, date on which it was signed.

On September 4, 2000, appellants' counsel wrote the trial court requesting a hearing on "the summary judgment motion still pending before this Court in the above styled case." Separate counsel for appellants wrote the trial court's case coordinator another letter dated October 9, 2000, which contained this sentence: "Please set the above matter for a hearing on defendant's Motion for Summary Judgment at the Court's convenience." Counsel for Monumental wrote the case coordinator a letter dated October 31, 2000, asserting his recollection that "the Court granted summary judgment to Defendant from the bench on November 14, 1996, and that this case was dismissed with prejudice. . . . *If no order has been entered memorializing the Court's decision, I respectfully request that the Court enter an order at this time.*" (Emphasis added.)

I cannot tell when the trial court, let alone the parties, discovered the existence of the order signed on October 2, 1996, and entered by the clerk on May 25, 2000. Not even Monumental argues that the lawyers for appellants knew about that judgment in February 2001 when appellants' counsel wrote the trial court and asserted that they were informed "by this Court that a hearing was

not necessary and an order granting summary judgment *would be entered by the Court.*" (Emphasis added.) Monumental does not even argue that the trial court knew the clerk had entered a judgment dated May 25, 2000, in February 2001.

Appellants filed their motion to vacate the order pursuant to Rule 60 of the Arkansas Rules of Civil Procedure on May 11, 2001. The opening sentence of the motion reads: "Ark. R. Civ. Proc. 60(c) provides for modifying or vacating judgments after 90 days of the filing of said judgment for misprisions of the clerk or constructive fraud." Monumental did not object to the motion as being untimely. It casually sidestepped appellants' contention that the order should have been vacated due to misprisions of the clerk pursuant to Rule 60(c)(3) by asserting that "Rule 60(c)(3) is facially alleged by counsel for Plaintiffs, but there is nothing to substantiate the allegation of improper activities within the clerk's office." Monumental contested appellants' Rule 60 motion by making the argument that appellants waived their right to appeal the summary judgment order when they failed to file a motion to extend the time for filing notice of appeal within 180 days of the judgment entered on May 25, 2000, as permitted by Rule 4(b)(3) of the Arkansas Rules of Appellate Procedure.

The trial Court did not abuse its discretion in granting appellants' motion to vacate the judgment entered on May 25, 2000

Although the majority disposes of this appeal by holding that it is untimely under Rule 4 of the Rules of Appellate Procedure, the language of Rule 4(a) compels a different result. Rule 4(a) requires that a notice of appeal "be filed within thirty (30) days from the entry of the judgment, decree or order appealed from." The short answer is that the notice of appeal in this case is not from the May 25, 2000, judgment but from the trial court's July 20, 2001, order granting summary judgment after it vacated the May 25, 2000, judgment. The proper inquiry as to the cross-appeal is whether the trial court abused its discretion when it granted appellants' motion to vacate the May 25, 2000, judgment based on allegations of misprisions of the clerk, not whether appellants filed an untimely notice of appeal.

Monumental relies, of course, on our recent decision in *Oak Hill Manor v. Arkansas Health Servs. Agency, supra.* In that case, we dismissed an appeal and held that a nursing home appellant's failure to timely file its notice of appeal within the time prescribed by Rule 4(b)(3) of the Rules of Appellate Procedure deprived the trial court of jurisdiction to vacate its judgment despite the fact that neither the appellant nor the opposing party knew that the trial court had previously entered judgment. *Id.* In doing so, the court in *Oak Hill Manor* was persuaded by the reasoning of the United States Court of Appeals for the Eighth Circuit in *Zimmer St. Louis, Inc. v. Zimmer Co.*, 32 F.3d 357 (8th Cir. 1994).

In *Zimmer*, one of the parties was unaware that the trial court had signed an order. *Zimmer, supra.* The trial court subsequently entered a duplicate order based on Rule 60(b)(6) of the Federal Rules of Civil Procedure. *Id.* The Eighth Circuit held that Rule 4(a)(6) of the Federal Rules of Appellate Procedure governed whether the notice of appeal filed after the trial court entered the duplicate order and that the 180-day deadline contained in that rule "establishes an outer time limit . . . for a party who fails to receive timely notice of a judgment." *Zimmer*, 32 F.3d at 360. Based on that reasoning, the Eighth Circuit in *Zimmer* concluded "that the district courts no longer have the discretion to grant motions to reopen the period for appeal that are filed outside that specific period [180 days], even if the appellant does not receive notice until that period has expired." *Zimmer*, 32 F.3d at 361. Persuaded by the Eighth Circuit's reasoning in *Zimmer*, our court dismissed the appeal in *Oak Hill Manor v. Arkansas Health Servs. Agency, supra.*

With all due respect to Judge Jennings, who authored the opinion in *Oak Hill Manor*, and to Judges Crabtree and Roaf, who joined the opinion, *Oak Hill Manor* was wrongly decided. The Arkansas Supreme Court has not reversed a single trial court decision to vacate a judgment pursuant to Rule 60 based on the reasoning advanced by the Eighth Circuit in *Zimmer* since *Zimmer* was decided in 1994. There is good reason why it has not done so. As the opinion in *Zimmer* makes clear, the Eighth Circuit concluded that the language and 180-day time period of Rule 4(a)(6) of the Federal Rules of Appellate Procedure was adopted to estab-

lish an outer limit for federal trial courts in exercising discretion on whether to vacate judgments under Rule 60 of the Federal Rules of Civil Procedure.

However, the Reporter's Notes to Rule 60 of the Arkansas Rules of Civil Procedure, as modified by the Arkansas Supreme Court, state that our Rule 60 is "substantially different from FRCP 60." According to the Reporter's Notes to ARCP 60, the aim of our supreme court in adopting the rule was to "make the same provision for *relatively unlimited control of judgments by circuit courts as that made for chancery courts. . . .*" (Emphasis added.) Contrary to the Eighth Circuit's decision in *Zimmer* and the opinion of our court in *Oak Hill Manor*, our supreme court has never held that the 180-day time period prescribed at Rule 4(b)(3) of the Arkansas Rules of Appellate Procedure was adopted to define the outer limit for state trial court discretion in considering motions to vacate judgments under ARCP 60. The only thing that Rule 4(b)(3) addresses is a trial court's power to extend the time to file a notice of appeal. Rule 4(b)(3) does not refer to Rule 60 of the Rules of Civil Procedure in any way.

However, even if one agrees that the decision in *Oak Hill Manor* was correct, that decision should not be considered controlling precedent involving a question of misprisions by the court clerk. Rule 60(c)(3) provides no definition for "misprisions of the clerk" and I have found no definition in Arkansas case law. However, misprision has been defined as "maladministration of public office; neglect or improper performance of official duty. . . ." *Black's Law Dictionary* (6th ed. 1991). There is no mention of misprision anywhere in the *Oak Hill Manor* opinion. The Eighth Circuit's opinion in *Zimmer* does not suggest that misprision was involved in that case.

Misprision was squarely before the trial court in this case. Nothing in the record supports even an inference, let alone a finding, that the trial court or counsel for a party in this case knew about the May 25, 2000, judgment on or before November 27, 2000, the date on which the 180-day period in Rule 4(b)(3) of our Rules of Appellate Procedure for extending the time for filing a notice of appeal would have expired. To this day, it does not

appear from the record that the trial court knows how or why the clerk's office entered an order granting Monumental's summary judgment motion on May 25, 2000. The decision reached today operates as if no misprision allegation was made or substantiated.

What is even more unsettling is that the majority opinion essentially imposes a 180-day limitations period from the date that a judgment is entered for raising and obtaining a trial court decision on a motion to vacate a judgment deemed tainted by misprisions of the clerk. The only time-sensitive aspect of Rule 60 applies to the ninety-day limitation on a trial court's power to correct errors or mistakes in judgments pursuant to Rule 60(b). By direct contrast, Rule 60(c) explicitly authorizes trial courts to vacate or modify judgments or orders "after the expiration of ninety (90) days after the filing of said judgment with the clerk of the court. . . ." Rule 60 was promulgated by the Arkansas Supreme Court. That court also promulgated Rule 4(b)(3) of our Rules of Appellate Procedure with its 180-day period for extending the time for filing a notice of appeal based on "a showing of failure to receive notice of the judgment, decree or order from which appeal is sought. . . ." Aside from the more fundamental question of justice, I do not understand why it makes sense to conclude that the supreme court intended parties prejudiced due to misprisions of the clerk to be limited to a 180-day period in which to seek relief given the total omission of such wording in the rule that the court adopted to address the misprisions possibility. If my colleagues in the majority believe it makes sense, their opinion does not explain how it does, let alone why it should.

The Arkansas Rules of Civil Procedure are intended to be "construed and administered to secure the just, speedy, and inexpensive determination of every action." Ark. R. Civ. P. 1 (2002). There is nothing just about denying litigants prejudiced by misprisions relief from judgments. I see no reason to hold that the trial court lacked jurisdiction to entertain appellants' motion to vacate the May 25, 2000, judgment. I certainly cannot hold that the trial court abused its discretion in granting appellants' motion to vacate that judgment upon appellants' allegation of misprisions of the clerk. Therefore, I would affirm as to the cross-appeal by Monumental.

The trial court erred when it granted Monumental's motion for summary judgment because a genuine issue of material fact existed about whether James Barnett's death resulted from natural causes due to accidental injury within the meaning of the insurance contract

The direct appeal is taken from the July 20, 2001, substitute order granting summary judgment to Monumental. The litigation arises from a claim for benefits under an accidental death or injury insurance policy issued by Monumental's predecessor in interest to James Barnett, deceased. The policy purported to provide accidental death or injury coverage, but contained the following exclusion: "*WE will not cover any claim arising out of bodily injury caused or contributed to by: . . . [6] disease or natural causes. . . .*" (Emphasis added.)

James Barnett was a thirty-nine-year-old logger. On April 18, 1989, Barnett died from a cardiopulmonary arrest suffered while he was manually stacking logs that had fallen into a roadway. Appellants made a claim for death benefits under the policy. Monumental denied their claim and alleged that Barnett died of natural causes rather than from an accidental cause as required by the insurance contract. Monumental relies on the death certificate for its position because the manner of death specified on the death certificate is "Natural" rather than "Accident."

After the claim was denied, appellants filed the initial complaint on November 3, 1992, alleging that Barnett's death was brought on by unusual strain and overexertion associated with manually stacking logs so as to be accidental within the terms of the insurance coverage. Appellants rely upon Barnett's previous medical history which did not include problems with heart disease and on the medical opinion of a Dr. J.S. Justus, the physician who certified the manner of death, as follows: "*At the onset of symptoms the patient was engaged in very heavy manual labor which in all likelihood [sic] caused this event. Mr. Barnett had no other risk factors or evidence of other disease. It is my feeling that this represented a sudden death episode most likely related to cardiac arrthymia which is associated with exertion.*" (Emphasis added.)

The trial court erred when it granted Monumental's motion for summary judgment because a genuine issue of material fact

existed regarding whether James Barnett died from natural causes or from an accidental cause within the meaning of the insurance contract. It has long been the law in Arkansas that causation is ordinarily a question of fact for the jury to decide. *First Commercial Trust Co. v. Rank,* 323 Ark. 390, 915 S.W.2d 262 (1996). Appellants produced a letter from Dr. Justus plus an affidavit from Dr. John Hall to support their contention that Barnett's death did not result from natural causes. Those documents stand in direct conflict with the death certificate information regarding how James Barnett died (whether from natural or accidental causes). Although a jury might not be persuaded by any evidence appellants introduce in support of their claim, summary judgment is not designed for assessing the probative strength of conflicting proof or expert opinions. That process is correctly done by the trier of fact after a trial on the merits.

Because I believe that the trial court properly exercised its discretion by vacating the judgment pursuant to Rule 60, I would affirm as to Monumental's cross-appeal. Because I believe the trial court erred by granting Monumental's motion for summary judgment, I would reverse as to the direct appeal.

ANDREE LAYTON ROAF, Judge, dissenting. I agree with the dissenting judges as to the reversal of this case on direct appeal, and concur in that portion of the dissenting opinion of Judge Griffen.

However, although I would likewise affirm on cross-appeal, I would do so on a different basis. First, I do not agree with the opinion of the other dissenting judge that *Oak Hill Manor v. Arkansas Health Serv. Agency*, 72 Ark. App. 458, 37 S.W.3 681 (2001), was wrongly decided. However, I would not dismiss this appeal based on *Oak Hill Manor*. Here, no one has taken responsibility for entry of an order some four years after the trial court indicated that it would grant summary judgment, and neither counsel was apparently aware that the four-year-old order had been entered. While this case is factually similar to *Oak Hill Manor*, it differs in several significant respects. In *Oak Hill Manor*, the trial court received the order in question and promptly signed and filed it. In later entering a duplicate order, the trial court

acknowledged the factual developments and concluded that it had signed and sent the order to be entered by the clerk and that no copies were sent to counsel.

Second, I note that the holding in *Oak Hill Manor* does not necessarily preclude relief under Rule 60(c)(3) for misprisions of the clerk, as in that case appellee sought relief under a separate provision of Rule 60. Third, the majority acknowledges in its footnote that "there is nothing to show that these irregularities were the fault of the clerk, rather than of the trial judge and the postal service." I agree with the majority that we do not know whether it was the fault of the clerk. In fact, a hearing was apparently never held on this issue. And in that regard, our case differs from *Oak Hill Manor*, where the facts surrounding the filing of the order were at least considered by the court and consequently presented to this court for our consideration. Certainly, in our case, appellees would not have complained below about the failure to have a hearing and establish who bore the fault because they were accorded the relief they sought from the trial court.

By reversing and dismissing the appeal, the majority has in essence, without knowing what happened below, determined that appellant would not be entitled to relief under Rule 60(c)(3). For four years after the trial court announced its decision, there was no order on record for appellant to discover, through diligence or otherwise, and there is no explanation in the record as to how these events transpired. It could very well have been due to misprision of the clerk, as the other dissenting judge suggests. Accordingly, I would affirm on cross-appeal rather than dismiss this appeal.

HART, J., joins.

Mary REMINGTON *v.* John T. ROBERSON

CA 02-207 98 S.W.3d 44

Court of Appeals of Arkansas
Division III
Opinion delivered February 12, 2003

[Petition for rehearing denied March 19, 2003.]

[redacted]

Stuart Law Firm, by: *J. Michael Stuart* and *Baxter & Jewell, P.A.*, by: *Samuel R. Baxter*, for appellant.

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

TERRY CRABTREE, Judge. George Felton died on January 15, 1999. He made several wills and trusts during his lifetime. At the time of his death, the decedent had resided in a nursing home for approximately ten months. Appellant Mary Remington[1] is a niece of the decedent. Appellant originally filed a petition seeking appointment as administrator of the decedent's estate, alleging that he died intestate. Appellee John Roberson filed a petition seeking to have a copy of a will dated July 15, 1997, admitted to probate as a "lost will." Appellee is named as executor under the July 1997 will but is not a beneficiary under that will. Appellant filed a petition seeking to have an undated holographic instrument admitted to probate as the last will of the decedent. This appeal is from an order establishing appellee's proffered document as a lost will and admitting that will to probate while denying admission to probate of the holographic instrument proffered by appellant. We reverse.

By letter opinion dated April 26, 2001, the trial court found that the July 1997 will was not found among the decedent's papers at his death, thereby raising the presumption that the decedent revoked or destroyed the will. The trial court then found that appellee had rebutted the presumption and that the July 1997 doc-

[1] Appellant and her sister, Margaret Scott, are the daughters of Francis Felton, the decedent's brother. Francis Felton predeceased George Felton. The notice of appeal lists both appellant and Margaret Scott as the parties appealing the trial court's order. A separate notice of appeal was filed on behalf of Rita Pixley and Daniel Beaudry, the great-niece and great-nephew of the decedent. We refer to Mary Remington as the appellant.

ument was a "lost will" within the meaning of Ark. Code Ann. § 28-40-302 (1987). By letter opinion dated July 24, 2001, the trial court found that the holographic document proffered by appellant was not valid because it lacked a date and, without a date, it could not be determined without speculation whether it was executed prior or subsequent to the July 1997 lost will. An order incorporating the findings of the two letter opinions and admitting the July 1997 lost will to probate was entered on August 3, 2001. This appeal followed.

On appeal, "[p]robate cases are reviewed *de novo* . . . [and] we will not reverse the probate judge's findings of fact unless they are clearly erroneous. . . . A finding is clearly erroneous when, although there is evidence to support it, we are left on the entire evidence with the firm conviction that a mistake has been committed." *Snowden v. Riggins*, 70 Ark. App. 1, 7-8, 13 S.W.3d 598, 602 (2000) (citations omitted); *see also* Ark. R. Civ. P. 52(a). Due deference will be given to the superior position of the probate judge to determine the credibility of the witnesses and the weight to be accorded their testimony. *Wells v. Estate of Wells*, 325 Ark. 16, 922 S.W.2d 715 (1996). Furthermore, "[w]hile we will not overturn the probate judge's factual determinations unless they are clearly erroneous, we are free in a *de novo* review to reach a different result required by the law." *Standridge v. Standridge*, 304 Ark. 364, 370, 803 S.W.2d 496, 499 (1991) (citations omitted).

For her first point, appellant argues that the trial court erred in admitting a copy of the July 15, 1997, will to probate as a lost will.[2] There is a presumption that a testator destroyed a will, executed by him in his lifetime, with the intention of revoking the will, if he retained custody of the will or had access to it, and if it could not be found after his death. *Garrett v. Butler*, 229 Ark. 653, 317 S.W.2d 283 (1958); *Porter v. Sheffield*, 212 Ark. 1015, 208 S.W.2d 999 (1948); *Gilbert v. Gilbert*, 47 Ark. App. 37, 883 S.W.2d 859 (1994). This presumption, however, may be overcome by proof. *Garrett, supra.* The proponent of the will has the burden of proving by a preponderance of the evidence that the

[2] Appellant does not question that the 1997 will was appropriately executed and the trial court's letter opinion stated that there was no doubt as to its execution.

decedent did not revoke the will during his lifetime. *Id.*, *see also Thomas v. Thomas*, 30 Ark. App. 152, 784 S.W.2d 173 (1990). The trial court found that appellee had rebutted the presumption.

The first reason given by the trial court in support of the conclusion that appellee had rebutted the presumption is that there was no direct evidence that the decedent destroyed the will. The presumption is that the will *was* destroyed and arises from the fact that the will cannot be located upon the testator's death. *Porter v. Sheffield, supra.* It then falls on appellee to prove that the will was *not* destroyed. *Thomas v. Thomas, supra.* Under section 28-40-302, the *proponent* of a lost will must establish the terms of the will *and* that the will was in existence or that the will was fraudulently destroyed in the lifetime of the testator. *Matheny v. Heirs of Oldfield*, 72 Ark. App. 46, 32 S.W.3d 491 (2000). The finding that there was no direct evidence that the will was destroyed cannot be used to rebut the presumption because that would turn the presumption on its head. The trial court pointed out that the decedent made statements that he was not happy with appellee serving as executor and that he was going to tear up the will. Mary Sabbs, a neighbor who regularly assisted the decedent with errands, testified that the decedent, while residing in the nursing home, wanted her to take him to attorney William Reed's office. Two attorneys testified that the decedent frequently changed his will. Such statements can be considered as strengthening the presumption of revocation. *Bradway v. Thompson*, 139 Ark. 542, 214 S.W. 27 (1919). In *Garrett v. Butler, supra*, the court held that the absence of testimony that the decedent wanted to change his will supported the trial court's finding that the presumption had been rebutted.

The second reason given by the trial court for overcoming the presumption of revocation is that, even though the original will could not be found, the decedent retained a copy of the will. This is a factor that should not be considered in determining whether the presumption of revocation has been rebutted. It is the failure to produce the original document that raises the presumption of revocation. *See Barrera v. Vanpelt*, 332 Ark. 482, 965 S.W.2d 780 (1998). Thus, the fact that only a copy has been found is evidence that establishes and promotes the presumption;

therefore, that same evidence cannot logically be considered as proof that overcomes the presumption. *See In re Estate of Millsap*, 75 Ill. 2d 247, 388 N.E.2d 374 (1979). Other courts have held that a copy of a will found after the testator's death in a place of safekeeping, such as a safe deposit box or the files of the attorney drafting the will, cannot be considered in determining whether the presumption of revocation has been rebutted. *Estate of McKeever*, 361 A.2d 166 (D.C. 1976); *In re Estate of Fowler*, 681 N.E.2d 739 (Ind. Ct. App. 1997); *New York State Library Sch. Ass'n, Inc. v. Atwater*, 227 Md. 155, 175 A.2d 592 (1961); *Bailey v. Bailey*, 171 S. W. 2d 162 (Tex. Ct. Civ. App. 1943), *overruled on other grounds by In re Estate of Glover*, 744 S.W.2d 939 (Tex. 1988).

The third reason the trial court gave for finding that appellee had rebutted the presumption is that there was no evidence that the decedent contacted an attorney. As part of his finding on this point, the trial court determined that the decedent had a practice of revoking wills by execution of a subsequent will. The execution of a subsequent will is not the only method by which one can revoke a will, nor is there any requirement that an attorney assist in such revocation. Arkansas Code Annotated section 28-25-109(a)(2) (1987) provides that "[a] will . . . is revoked [b]y being burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it by the testator or by another person in his presence and by his direction." Mary Sabbs testified that the decedent, while residing in the nursing home, wanted her to take him to attorney Reed's office.

The fourth reason given by the trial court was that the decedent was confined to a nursing home and in deteriorating physical condition. This is a proper consideration for determining whether the presumption of revocation was rebutted. *Tucker v. Stacy*, 272 Ark. 475, 616 S.W.2d 473 (1981); *Garrett v. Butler, supra*.

We do not believe that appellee has met his burden in establishing a lost will because the evidence was insufficient to rebut the presumption of revocation due to the trial court incorrectly applying the presumption that the will was destroyed.

We reverse on this point.

For her second point, appellant argues that the trial court erred in not admitting the holographic instrument to probate because the holographic document did not contain a date of execution. We do not reach the issue because it is moot. The beneficiary under the holographic document, Francis Felton, predeceased the decedent. Under Ark. Code Ann. § 28-9-203 (1987), the lapsed devise of the holographic document would pass under intestate succession.

Reversed.

PITTMAN and ROBBINS, JJ., agree.

ARROW INTERNATIONAL, INC. *v.* Misty Long SPARKS, Administratrix of the Estate of Robert "Grumpy" Long, *Deceased*

CA 02-75 98 S.W.3d 48

Court of Appeals of Arkansas
Division I
Opinion delivered February 12, 2003

[redacted]

Wright, Lindsey & Jennings LLP, by: *Roger A. Glasgow*, *Troy A. Price*, and *Kyle R. Wilson*, for appellant.

Belew & Bell, by: *John M. Belew* and *Steve Bell*; *Murphy Law Firm*, by: *Tom Thompson*; and *Rieves, Rubens & Mayton*, by: *Kent J. Rubens*, for appellee.

KAREN R. BAKER, Judge. This is an action brought by appellee Misty Sparks for the wrongful death of her father, Robert "Grumpy" Long. Mr. Long bled to death on December 18, 1997, while he was a patient at the Baptist Medical Center in Little Rock. Appellee sued the hospital, the attending physicians, and appellant Arrow International (hereafter "Arrow"), alleging that their conduct proximately caused her father's death. After settling her claims against the hospital and the physicians, appellee proceeded to trial against Arrow and received a $700,000 compensatory damage verdict. The jury apportioned twenty-five percent of the fault to Arrow, thus making it liable for $175,000 of the award. In addition, the jury held Arrow liable for 4 million dollars in punitive damages.

Arrow appeals from the verdict and makes four arguments. The first three involve evidentiary rulings by the trial court on the admission of expert testimony, the admission of prior, similar occurrences, and the exclusion of a witness's deposition testimony. The fourth argument concerns the punitive-damage award. We find no error on any issue presented and therefore affirm the jury's verdict.

Arrow manufactures a medical device called a percutaneous sheath introducer (PSI). The PSI facilitates the insertion of catheters into a patient's body. The particular device at issue in this case is a two-piece apparatus. One piece is a long, straight sheath introducer, shaped something like a straw, with a lock on the end. The second piece has a valve that attaches to the end of the sheath lock and a clear plastic tube that dangles from a side port of the valve. The tube has a sealing cap on the end. When the PSI pieces are attached and implanted into a patient, the sheath introducer is

placed in the patient's vein, usually the jugular vein; the valve remains outside the patient, as does the side tube, which may be used for the introduction of fluids. If a catheter is threaded through the valve and sheath introducer, a catheter guard is often placed around the valve.

On December 11, 1997, Robert Long had a kidney removed at the White River Medical Center in Batesville, pursuant to a diagnosis of cancer. While there, a PSI was inserted into his right jugular vein to facilitate the use of a Swan-Ganz catheter, which monitored his cardiac output. On December 17, 1997, Long was transferred to Baptist Medical Center in Little Rock with the PSI still implanted and the Swan-Ganz catheter still attached. He was kept in intensive care for a period, but thereafter, his Swan-Ganz was removed, and he was transferred to a regular room. The PSI remained implanted, although it was not in use. According to the ICU nurse, she secured the valve and the side tube against Long's body with tape before he was transferred.

On December 18, the floor nurse checked on Long at 2:40 a.m. and noted no problems. However, at 3:18 a.m., the nurse returned to the room and found a large pool of blood. Long was dead, having bled to death.

Appellee, as administratrix of her father's estate, sued appellant on a products-liability theory, alleging that the two-piece design of the PSI was inherently dangerous and that the separation of the two pieces had caused Long to bleed to death. At trial, she advanced the theory that, when the catheter guard was removed from the PSI by turning it in a counter-clockwise motion, the valve, which likewise loosened in a counter-clockwise motion, inadvertently separated from the sheath, causing blood to flow from the separation point. Arrow defended on the theory that the bleeding occurred not from the point where the two pieces of the unit conjoined but through the side tube, from which Long had apparently removed the end cap.

To support its theory, Arrow presented the testimony of two nurses who said that, when Long's condition was discovered, they saw blood coming from the side tube. Arrow also called Carl Botterbusch, the vice-president and general manager of its Cardiac

Assist Division, who testified that, in his opinion, Long bled to death out of the side tube. Another of Arrow's experts, Dr. Alfred Gervin, testified that it would have been possible for a patient to bleed to death out of the side tube in twenty minutes. To rebut this testimony, appellee called Dr. Brock Allen, who testified: "I do not think there's any way that [Long] could have ever bled to death through this tiny hole with this small amount of pressure pushing the blood in that direction because it would have clotted before he ever lost his entire blood volume and died from that." Arrow objected to Allen's testimony on the grounds that he had no expertise in fluid mechanics and his opinion had no reliable scientific basis, as required by *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993). The trial judge allowed Dr. Allen to testify, and for its first issue on appeal, Arrow contends that the admission of Allen's testimony was error.

The admission of rebuttal evidence is within the sound discretion of the trial court, and we will not reverse absent an abuse of discretion. *Farm Bureau Mut. Ins. Co. v. Foote*, 341 Ark. 105, 14 S.W.3d 512 (2000). Further, if an opponent of expert testimony contends that the expert is not qualified, the opponent bears the burden of showing that the testimony should be stricken. *See Collins v. Hinton*, 327 Ark. 159, 937 S.W.2d 164 (1997). With these standards in mind, we address Arrow's first claim that Dr. Allen testified regarding a matter that was outside his area of expertise.

Arrow contends that Dr. Allen was not qualified to offer an opinion regarding blood flow through the side tube because he was not an expert in fluid mechanics. We disagree. While experts may not offer opinions that range too far outside their area of expertise, *see, e.g., Brunson v. State*, 349 Ark. 300, 79 S.W.3d 304 (2002), the opinion rendered by Dr. Allen did not require him to be an expert in any field other than the one in which he was unquestionably qualified, the field of medicine. Dr. Allen was an emergency room physician with approximately sixteen years of experience. He was familiar with the two-piece PSI and the diameters of both its tubes (2.8 mm on the sheath introducer and 1.6 mm on the smaller side tube). In his practice, he had used "triple-lumen" catheters with small diameters like that of

the PSI's side tube. He explained to the jury that, based on his experience with the triple-lumens, which required the administration of a special solution to keep a patient's blood from clotting, Long's blood would have clotted before he bled to death through the side tube. He also told the jury about his consultation with another physician, Dr. Margaret Kuykendall, who also did not believe that Long could have bled such a large amount out of the small side tube opening. Finally, he testified that, in all his years of practice, he had never heard of a person bleeding to death through a tube like the side tube of the PSI.

Rule 702 of the Arkansas Rules on Evidence entitled "Testimony of Experts" reads:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, *experience*, training, or education, may testify thereto in the form of an opinion or otherwise.

(Emphasis added.) The rule expressly recognizes that an expert's testimony may be based on experience in addition to knowledge and training. Further, Ark. R. Evid. 704 permits an expert to rely, as Dr. Allen did, on information provided by others in the formulation of his opinion. *See Killian v. Hill,* 32 Ark. App. 25, 795 S.W.2d 369 (1990).

If some reasonable basis exists demonstrating that a witness has knowledge of a subject beyond that of ordinary knowledge, the evidence is admissible as expert testimony. *Brunson v. State, supra.* There is a decided tendency to permit the fact-finder to hear the testimony of persons having superior knowledge in a given field, unless they are clearly lacking in training and experience. *Killian v. Hill, supra.* Dr. Allen's experience as an emergency room physician and his attendant knowledge of blood flow through small tubes gave him an insight into the subject beyond that of the ordinary person. The fact that Dr. Allen's testimony was not based on flow rates, viscosity, friction, or other scientific properties of blood flowing through a 1.6 mm opening, was a matter for the jury to consider in determining the weight to

be accorded Dr. Allen's testimony.[1] The questionability of the factual underpinning of an expert's opinion goes to the weight and credibility, rather than to the admissibility, of the opinion in evidence. *See Killian v. Hill, supra.*

Arrow's other argument on this point is that Dr. Allen's testimony did not meet the *Daubert* test of reliability. This test is derived from the landmark Supreme Court case of *Daubert v. Merrell Dow Pharmaceuticals, supra,* in which the Supreme Court established an inquiry to be conducted by the trial court when faced with the admissibility of certain expert testimony. As our supreme court explained in *Farm Bureau Mutual Insurance Co. v. Foote, supra,* in adopting *Daubert,* a trial judge must determine at the outset whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. *Farm Bureau Mut. Ins. Co. v. Foote, supra.* This inquiry entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue. *Id.* A primary factor for a trial court to consider in determining the admissibility of scientific evidence is whether the scientific theory can be or has been tested. *Wood v. State,* 75 Ark. App. 22, 53 S.W.3d 56 (2001). Other factors include whether the theory has been subjected to peer review and publication, the potential error rate, and the existence and maintenance of standards controlling the technique's operation. It is also significant whether the scientific community has generally accepted the theory. *Id.*

This preliminary assessment of reliability is known as the trial court's gatekeeping function. *See Wood v. State, supra.* We observe that, in the more recent case of *Kumho Tire Co. v. Carmichael,* 526 U.S. 137 (1999), the Supreme Court clarified that the *Daubert* factors are not limited to *scientific* expert testimony but may be applied to testimony based on technical or other specialized knowledge.

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[1] In fact, Arrow's counsel ably cross-examined Dr. Allen in this regard.

Arrow argues that Dr. Allen's testimony did not meet the *Daubert* test because it was not based on testing or other scientific method but was merely "anecdotal" and that the trial court, by allowing Allen's testimony, failed to perform its gatekeeping function. However, we conclude that the *Daubert* inquiry, which seeks to determine the dependability of an expert's methods, is of little value in the present case. First of all, our court has stated that the *Daubert* factors are applicable to "novel" scientific evidence, theory, or methodology. *See Regions Bank v. Hagaman,* 79 Ark. App. 88, 84 S.W.3d 66 (2002). Allen's testimony in this case is not novel in any respect. Additionally, the *Daubert* and *Kumho Tire* opinions recognize that not all expert testimony is subject to the *Daubert* analysis. The inquiry to be made by the trial court is a flexible one, not a rigid one. *See Daubert,* 509 U.S. at 594-95; *Regions Bank v. Hagaman, supra.* Further, the *Daubert* factors neither necessarily nor exclusively apply to all experts or in every case. *Kumho Tire,* 526 U.S. at 141. The law grants a district court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination. *Id.* at 142; *Regions Bank v. Hagaman, supra.* Moreover, the factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony. *Kumho* at 150.

Dr. Allen's testimony in this case was based on experience and observations rather than methodology, and his opinion was not buttressed by scientific or technical testing or analysis. We recognize that a *Daubert* inquiry *may*, in some instances, help to evaluate the reliability of experience-based testimony, *Kumho* at 151; however, a *Daubert* inquiry into the reliability of Dr. Allen's testimony was not warranted in this particular case. Nevertheless, we note that the trial court conducted a reliability inquiry, out of the jury's presence, to determine Allen's experience and familiarity with blood flow and clotting. We conclude that the trial court did not abuse its discretion in admitting Dr. Allen's rebuttal testimony.

The next issue concerns the trial court's admission of thirty-six Medical Device Reports (MDRs), generated by Arrow pursu-

ant to federal law.[2] Such reports record incidents of medical device malfunction and contain short but detailed descriptions of what happened in each case. Appellee initially planned to introduce approximately sixty reports of incidents that occurred between 1991 and 2000 in which a patient died or suffered serious injury when a sheath introducer disconnected from a valve in an Arrow two-piece PSI. The trial judge ruled that some of the MDRs contained incidents that were not substantially similar to the incident in this case, and he excluded some of the MDRs. However, he allowed the introduction of thirty-six prior incidents that occurred between 1992 and 1997. His ruling was based in part on the testimony of Dr. Margaret Kuykendall that a substantial similarity existed between the information contained in the thirty-six MDRs and the incident that occurred in this case.[3]

The general rule with respect to the admissibility of evidence of similar occurrences is that they are admissible only upon a showing that the events arose out of the same or substantially similar circumstances. *Ford Motor Co. v. Massey*, 313 Ark. 345, 855 S.W.2d 897 (1993); *Houston Gen. Ins. Co. v. Arkansas La. Gas Co.*, 267 Ark. 544, 592 S.W.2d 445 (1980). The burden rests on the party offering the evidence to prove that the necessary similarity of conditions exists. *Massey, supra.* The relevance of such evidence is within the trial judge's discretion, subject to reversal only if an abuse of discretion is demonstrated. *Id.*

Arrow argues that appellee did not meet her burden of proving that the thirty-six incidents reflected in the MDRs were substantially similar. However, Arrow does not tell us how the thirty-six incidents differ from the one in the case at bar. Although it was appellee's burden below to prove the admissibility of the prior occurrences, it is Arrow's burden on appeal to demonstrate reversible error. *Collins v. Hinton, supra.* In any event, we hold that the prior incidents are substantially similar and

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[2] We use the term "MDR" in this case to include certain complaint logs prepared by Arrow as a prelude to filing an actual report.

[3] Arrow argues that the trial judge erred in relying on Dr. Kuykendall to establish the admissibility of the MDRs, but our review of the record indicates that the doctor's testimony was not the sole basis for the judge's decision. In other words, the judge did not abdicate his responsibility regarding the admission of evidence to an expert witness.

therefore admissible. Our review reveals that each prior incident involved the same Arrow two-piece PSI design as was used on Long. In each case, the two pieces disconnected at the valve, causing the patient to either die or suffer injury. Many of the reports contain words to the effect that the cause of the separation was unknown, although user error or the patient pulling out his catheter were sometimes suspected.

[redacted] Although appellee did not prove that the circumstances in the prior incidents matched precisely with the circumstances of this case, exact identity of circumstances is not required for admissibility of prior occurrences. *See Ford Motor Co. v. Massey, supra,* citing with approval *Four Corners Helicopters v. Turbomeca, S.A.*, 979 F.2d 1434 (10 Cir. 1992). Appellee did show that the incidents were substantially similar in that they involved the unintended separation of an Arrow PSI in such a manner that death or serious injury resulted. The reports themselves contained data sufficient to conclude that, in the prior instances, a patient died or was seriously injured when, for unknown reasons the PSI separated while the patient was hospitalized.[4] Further, whether an occurrence is substantially similar depends on the underlying theory of the case. *Massey, supra.* Appellee's theory was that the two-piece design was inherently dangerous and separated inadvertently. These prior incidents were introduced to show a propensity for the device to separate inadvertently. Finally, we note that appellee's theory on her punitive-damages claim was that appellant was aware of the dangerous nature of the device yet continued to market it without a proper warning being given to users. The substantial similarity requirement is relaxed when evidence of other incidents is used to show notice or awareness of a potential defect. *Massey, supra.* We conclude that the trial court did not abuse its discretion in admitting the prior, similar occurrences.

We turn now to Arrow's third argument regarding the trial court's decision to exclude the deposition testimony of Sue Hylton, the Risk Assessment Manager at Baptist Medical Center.

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[4] The only prior incident we question is one that specifically states that the patient's cause of death was not directly attributable to separation of the PSI device. However, this one incident out of thirty-six does not require reversal.

Hylton stated in her deposition that Baptist decided to change from a two-piece PSI to a one-piece model because the one-piece model had a clamp on the side tube. Arrow wanted to use Ms. Hylton's testimony to rebut appellee's inference that Baptist switched from a two-piece PSI to a one-piece unit as a result of Long's death. Appellee objected on the basis of hearsay. The trial court read the deposition and made a page-by-page ruling as to what parts of the deposition he would exclude. Arrow contends that the trial court, by these rulings, prevented it from offering Hylton's testimony regarding the reason for the hospital's switch to a one-piece device. In particular, Arrow argues that Hylton's statements were not hearsay and that her deposition was admissible under Ark. R. Civ. P. 32.

As appellee points out, and our review confirms, the trial court in fact did *not* exclude all the portions of Hylton's deposition that explained the hospital's switch to a one-piece unit. The trial court did not exclude all portions of Hylton's deposition explaining her desire to switch to a device with a thumb clamp. Thus, nothing in the trial court's ruling prohibited Arrow from utilizing a pertinent part of Hylton's testimony, and Arrow is therefore unable to demonstrate prejudice. We will not reverse a trial court's evidentiary ruling absent a showing of prejudice. *Belz-Burrows v. Cameron Constr. Co.*, 78 Ark. App. 84, 778 S.W.3d 126 (2002).

Finally, we address Arrow's argument that its conduct did not merit an award of punitive damages and that the damages awarded were excessive. Arrow's argument on this point asks only that we undertake a *de novo* review of the record in order to determine if the award of punitive damages in this case was unconstitutionally excessive.

A jury may be instructed on punitive damages when there is evidence that a defendant likely knew or ought to have known, in light of the surrounding circumstances, that his conduct would naturally or probably result in injury and that he continued such conduct in reckless disregard of the consequences, from which malice could be inferred. *See Edwards v. Stills*, 335 Ark. 470, 984 S.W.2d 366 (1998); *Dixon Ticonderoga Co. v. Win-*

burn Tile Mfg. Co., 324 Ark. 266, 920 S.W.2d 829 (1996). In reviewing a punitive award, we consider all circumstances, including: the extent and enormity of the wrong, the intent of the party committing the wrong, and the financial and social condition and standing of the defendant. *See Routh Wrecker Serv. v. Washington*, 335 Ark. 232, 980 S.W.2d 240 (1998). We review the proof and all reasonable inferences therefrom in the light most favorable to the appellee, and we determine whether the award is so great as to shock the conscience of the court or demonstrate passion or prejudice on the part of the trier of fact. Id. In addition, we consider whether the punitive award is excessive in light of the defendant's conduct and as compared with the compensatory award. *See BMW of N. Am. v. Gore*, 517 U.S. 559 (1996).

In the present case, the jury awarded a total of $700,000 in compensatory damages of which Arrow was responsible for $175,000. The jury also awarded $4,000,000 in punitive damages attributable to Arrow, which had a net worth of $300,000,000. The evidence showed that in 1995 Arrow was aware, through various reports from the facilities using the two-piece product, of the problem with the two-piece PSI disconnecting, and had notice that numerous deaths and injuries had occurred that were associated with the use of the two-piece product. Further, in 1995 appellant decided to begin recommending the one-peice design, which it claimed was a safer product. Nevertheless, appellant failed to provide adequate and timely warnings to users of the two-piece device, until August 1997 and continued to manufacture and sell the two-piece PSI. Employing the above-mentioned standards, we find no basis for reversal or reduction of the punitive award.

For the reasons stated herein, we affirm.

Affirmed.

BIRD and VAUGHT, JJ., agree.

Herbert MARSHALL *v.* MADISON COUNTY

CA 02-517 98 S.W.3d 452

Court of Appeals of Arkansas
Division IV
Opinion delivered February 19, 2003

[Petition for rehearing denied March 19, 2003.]

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

Roberts, Roberts & Russell, P.A., by: *J. Matthew Maulden*, for appellee.

JOHN F. STROUD, JR., Chief Judge. Appellant, Herbert Marshall, suffered a compensable mental injury as a result of his duties as chief deputy of Madison County. The facts of this case are largely undisputed and can be quickly summarized. On August 24, 1999, appellant was involved in a "shootout" during which a fellow officer was wounded, appellant was hit by bullet fragments, and appellant shot and killed the assailant. His psychological evaluation included depression, anxiety, and post-traumatic-stress disorder. He continued working for approximately six months, until February 2000, when he came close to "going totally ape," and was afraid that he was either going to have to kill someone else or somebody was going to kill him. His employer accepted the August 24, 1999 episode as a compensable mental injury and began to pay him temporary total disability benefits. It is not disputed that he received twenty-six weeks of temporary total disability benefits related to that injury, from February 7, 2000, through August 6, 2000. He then sought additional disability benefits, however, beyond those initial twenty-six weeks. The Administrative Law Judge denied his request for additional disability benefits, and the Commission affirmed and adopted the ALJ's decision. We affirm.

We affirm the Commission's decisions unless fair-minded persons with the same facts before them could not arrive at the same conclusions. *Gansky v. Hi-Tech Eng'g*, 325 Ark. 163, 924 S.W.2d 790 (1996). In cases where a claim is denied because a claimant failed to show entitlement to compensation by a preponderance of the evidence, the substantial-evidence standard of review requires that we affirm if a substantial basis for the denial of relief is displayed by the Commission's opinion. *Hooks v. Gaylord Container Corp.*, 67 Ark. App. 159, 992 S.W.2d 844 (1999).

Arkansas Code Annotated section 11-9-113 (Repl. 2002) provides in pertinent part:

> (a)(1) A mental injury or illness is not a compensable injury unless it is caused by physical injury to the employee's body, and shall not be considered an injury arising out of and in the course of employment or compensable unless it is demonstrated by a preponderance of the evidence; *provided, however, that this physical injury limitation shall not apply to any victim of a crime of violence.*
>
> (2) No mental injury or illness under this section shall be compensable unless it is also diagnosed by a licensed psychiatrist or psychologist and unless the diagnosis of the condition meets the criteria established in the most current issue of the Diagnostic and Statistical Manual of Mental Disorders.
>
> *(b)(1) Notwithstanding any other provision of this chapter, where a claim is by reason of mental injury or illness, the employee shall be limited to twenty-six (26) weeks of disability benefits.*

(Emphasis added.) Appellant contends on appeal that, because the General Assembly excepted victims of violent crime from proving that their mental injury was caused by physical injury, Ark. Code Ann. § 11-9-113(a)(1) (Repl. 2002), it likewise intended to except such victims of violent crime from the twenty-six-week limitation set forth in section 11-9-113(b)(1). We disagree.

There is nothing in the language of the quoted statute to support appellant's argument that victims of violent crime are not subject to the twenty-six-week limitation on disability benefits. Neither has he provided us with any other legal authority to support his position. Arkansas Code Annotated section 11-9-704(c)(3) (Repl. 2002) mandates that the Commission and the courts construe the provisions of the act strictly. Strict construction is a narrow construction, requiring that nothing be taken as

intended that is not clearly expressed and that the plain meaning of the language be employed. *Clayton Kidd Logging Co. v. McGee*, 77 Ark. App. 226, 72 S.W.3d 557 (2002).

The ALJ was presented with, and addressed, issues concerning an episode involving appellant and a private investigator that occurred on May 21, 2000. However, appellant has abandoned those issues on appeal; therefore, we do not address them. *Mecco Seed Co. v. London*, 47 Ark. App. 121, 886 S.W.2d 882 (1994) (explaining that an argument not raised by the appellant in his brief cannot be considered by this court on appeal).

We find that the Commission displayed a substantial basis for the denial of the relief requested by appellant.

Affirmed.

HART and GRIFFEN, JJ., agree.

Doyle Edward BROWN *v.* Betty Carlene Brown JOHNSON and Marion E. Johnson, *Her Husband*

CA 02-606 97 S.W.3d 924

Court of Appeals of Arkansas
Division IV
Opinion delivered February 19, 2003

Hall Law Offices, by: *W.Q. Hall*, for appellant.

Chris Lisle Law Firm, P.A., by: *Chris Lisle*, for appellee.

JOSEPHINE LINKER HART, Judge. Our issue here is whether the trial court properly interpreted a deed as excluding appellant, Doyle Brown, who is an adopted child, from the remainder interest created by the deed. The facts were stipulated by the parties. In 1945, Charley King and L.C. King, as husband and wife, conveyed certain land in Madison County to their daughter and son-in-law, Thelma Brown and Carl Brown. The deed's granting clause granted the property "unto Carl Brown and Thelma Brown and unto Thelma Brown's heirs by Carl Brown and unto their heirs and assigns forever. . . ." The habendum clause provided, "To have and to hold the same unto the said Carl Brown and Thelma Brown and unto their heirs and

assigns forever. . . ." At the time of the conveyance, Thelma and Carl Brown had one child, appellee Betty Brown Johnson,[1] who was eleven. Appellant, who was born in 1955, was adopted by Thelma and Carl Brown at some time between 1956 and May 1962. In March 1979, Thelma Brown and Carl Brown conveyed the property to appellee, their daughter, by warranty deed. Carl Brown died in May 1979. In 1996, appellee conveyed a portion of the property to the Arkansas State Highway Commission for a consideration of $40,370. Appellee also sold timber, rock, gravel, and dirt from the property. Thelma Brown died in October 1999.

Appellant filed this action in equity seeking to be declared entitled to an undivided one-half (1/2) interest in the property, claiming that, under the terms of the deed, he had, as a child of Carl and Thelma Brown, a remainder interest in the property. The complaint also sought partition of the property, division of the proceeds of the partition sale, and an accounting for monies received from the sale of the property and the sale of the timber, dirt, and minerals. Appellee answered, denying the factual allegations and asserting the affirmative defenses of estoppel, laches, waiver, and, by amendment on the day of trial, statute of limitations.

The trial court first found that appellant had proven that he was adopted. Next, the trial court, citing *Steele v. Robinson*, 221 Ark. 58, 251 S.W.2d 1001 (1952), which held that language similar to the language "unto Thelma Brown's heirs by Carl Brown and unto their heirs and assigns forever" created a vested remainder in the heirs subject to open, concluded that the language of the deed did not create a fee tail. The trial court also held that the above language unambiguously evidenced an intent on the part of the grantors to exclude adopted children from the class of remaindermen. Further, the court concluded that, even if the deed was ambiguous, extrinsic evidence supported the court's interpreta-

[1] Betty Johnson's husband Marion Johnson was made a party to this action. We refer only to Betty Johnson as the appellee.

tion. Judgment was entered dismissing appellant's complaint, and this appeal followed.

In two separate points, appellant argues that the trial court erred in construing the deed to exclude him, as an adopted child, from the class of remaindermen. First, he argues that the trial court erred in interpreting the language of the deed to mean that the grantors intended to exclude adopted children. Second, he argues that the trial court erred in ignoring the adoption statutes, which provided that an adopted child is to be treated for all purposes as a legitimate blood descendent of his adoptive parents. Appellee cross-appeals, contending that the trial court erred in finding that appellant had proven by clear and convincing evidence that he was the adopted child of Thelma and Carl Brown.

As an equity case, our review is *de novo*. Our courts have been precise in stating what *de novo* review entails:

> Equity cases are tried de novo on appeal upon the record made in the chancery court, and the rule that this court disposes of them and resolves the issues on that record is well established; the fact that the chancellor based his decision upon an erroneous conclusion does not preclude this court's reviewing the entire case de novo.

Conagra, Inc. v. Tyson Foods, Inc., 342 Ark. 672, 677, 30 S.W.3d 725, 728 (2000); *Ferguson v. Green*, 266 Ark. 556, 563-564, 587 S.W.2d 18, 23 (1979) (citations omitted).

When construing a deed, we ascertain the intention of the parties, and we examine the four corners of the deed to ascertain intent. *Webber v. Webber*, 331 Ark. 395, 962 S.W.2d 345 (1998). Our first duty is to give effect to every word, sentence, and provision of a deed where possible to do so. *Id.* We will not resort to rules of construction when a deed is clear and contains no ambiguities, but we will do so when its language is ambiguous, uncertain, or doubtful. *Bennett v. Henderson*, 281 Ark. 222, 663 S.W.2d 180 (1984); *Barnes v. Barnes*, 275 Ark. 117, 627 S.W.2d 552 (1982).

Appellant first argues that *Steele* settled his status as a "child" of Thelma Brown and that, after the deaths of Carl and Thelma Brown, appellant had a one-half undivided interest in the property. *Steele*, however, is not determinative, as it does not address whether adopted children are included in the term "children."

It is certainly true, as appellant argues, that "children" is a broader term than the word "heirs" and may include adopted children. *Kelly v. Kelly*, 176 Ark. 548, 3 S.W.2d 305 (1928). If a will or a deed shows it was the intention of the testator or grantor to use the words "child or children" to mean words of limitation like "heirs of his body," it has been held that that is what was meant. *See Wilkins v. Wilkins*, 212 Ark. 242, 206 S.W.2d 26 (1947). The term "heirs," in its strict legal sense, means those upon whom the law casts the inheritance of land, *Johnson v. Knights of Honor*, 53 Ark. 255, 13 S.W. 794 (1890), but this construction will yield if the face of the instrument shows sufficient intent that the meaning of the word is to be limited to "children." *Black v. Stephenson*, 166 Ark. 429, 267 S.W. 130 (1924); *Wyman v. Johnson*, 68 Ark. 369, 59 S.W. 250 (1900). When this latter construction is used, it has been held that "children" does not include after-born or adopted children, without express language. *Wyman v. Johnson, supra. See also Kelly, supra.*

The controlling question in making this determination is whether the deed's terms are susceptible to more than one equally reasonable construction. *See Fryer v. Boyett*, 64 Ark. App. 7, 978 S.W.2d 304 (1998). The remainder interest in the property was to "Thelma Brown's heirs by Carl Brown." In commonsense terms, a person's heirs "by" a particular person means that person's child or children "born or begot of," meaning natural children. *Webster's Third New International Dictionary* 307 (1993). Appellee was the only heir of Thelma Brown born of or begot by Carl Brown. Appellant, as their adopted child, was not born of or begot by Carl Brown. In these circumstances, we cannot say that the trial court clearly erred in concluding that the deed unambiguously excluded adopted children.

For his second point, appellant argues that the trial court erred in ignoring the adoption statutes, which provided that an adopted child is to be treated for all purposes as a legitimate blood descendent of his adoptive parents. Citing *Davis v. Davis*, 219 Ark. 623, 243 S.W.2d 739 (1951), appellant argues that the adoption statute in effect at the time he was adopted, Ark. Stat. Ann. § 56-109 (1949) (repealed 1977), provided that an adopted child shall be treated as a natural child for all purposes. His reliance on *Davis*, however, is misplaced because the language he cites from *Davis* is from Justice J. Seaborn Holt's dissenting opinion, not the majority opinion. Justice Holt's dissent made the same argument that appellant is now making.

[redacted] *Davis* involved a deed that conveyed real property to the grantor's children for their lives and "then to their bodily heirs." The grantor died intestate, leaving a child who eventually died and was survived by an adopted son but no natural children. The *Davis* court concluded that the adopted son was not a "bodily heir" of his father. The court rejected the argument concerning section 56-109, stating that "the question is not one of inheritance." *Id.* at 624, 243 S.W.2d at 740. The court explained: "Terms such as bodily heirs, issue, etc., have long been defined in the law, and the definition does not include adopted children. A foster child, being a stranger to the blood, is the antithesis of an heir of the body." *Id.* (Citation omitted.) *See also Cox v. Whitten*, 288 Ark. 318, 704 S.W.2d 628 (1986) (holding that a will executed in 1951 that left a life estate to siblings and remainder to their "children" did not give adopted adult a remainder interest); *Bilsky v. Bilsky*, 248 Ark. 1060, 1064, 455 S.W.2d 901, 903 (1970) (noting that, in interpreting "issue" used in a will executed in 1955, "[t]erms such as bodily heirs, issue, etc. have long been defined in the law, and the definition does not include adopted children"). Thus, the *Davis* court concluded that the adoption-inheritance laws were not intended to modify the established meaning of terms used in deeds.

[redacted] *Davis* dealt with the same adoption statute under which appellant was adopted. The supreme court has left open the ques-

tion of whether the same result would apply under the current adoption statute, Ark. Code Ann. § 9-9-215 (2002). *Sides v. Beene*, 327 Ark. 401, 938 S.W.2d 840 (1997). Because *Davis* rejected the specific argument now being made by appellant, we affirm on this point.

On cross-appeal, appellee contends that the trial court erred in finding that appellant met his burden of proving that he was the adopted child of Thelma and Carl Brown. Because we affirm the trial court's interpretation of the deed, this issue is moot.

Affirmed on direct appeal; cross-appeal moot.

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

Lamar NEILL *v.* NATIONWIDE MUTUAL FIRE INSURANCE COMPANY

CA 02-605 98 S.W.3d 448

Court of Appeals of Arkansas
Division II and III
Opinion delivered February 19, 2003

Gibson Law Office, by: *C.S. "Chuck" Gibson*, for appellant.

Watts, Donovan & Tilley, P.A., by: *Jim Tilley* and *Michael McCarty Harrison*, for appellee.

ANDREE LAYTON ROAF, Judge. Appellant Lamar Neill's home was damaged by a fire, and he filed a claim with his homeowners' insurance company, appellee Nationwide Mutual Fire Insurance Company. After finding out that Neill had previous fire losses that were not disclosed in his application, Nationwide denied Neill's claim and filed an action for declaratory relief, seeking to void the policy. Neill counterclaimed for breach of contract and bad faith. The trial court granted summary judgment in favor of Nationwide based on the misrepresentation in the application and voided the policy. On appeal, Neill argues

that the trial court erred in granting summary judgment to Nationwide and voiding the policy. We reverse and remand.

On November 18, 1993, Neill met with a Nationwide agent, Leon Anderson, to apply for homeowners' insurance for a mobile home. According to Neill, Anderson asked him several questions and typed in Neill's answers on the computer, such as whether he had ever been sued and whether he had ever filed bankruptcy. Neill testified in his deposition that Anderson did not ask him about any previous fire losses, or if he did ask him, Neill stated that he must not have understood the question because he would not have replied that he had no prior losses. After Anderson finished asking the questions, the application for insurance was printed out, and Neill testified that he signed it without reading it, as he assumed that it contained the answers he had given to Anderson. Above his signature, the application contained a clause that Neill declared that the facts in the application were true and that he was requesting the company to issue the policy in reliance thereon. It is undisputed that on that application, under a section titled "Past Losses," the answer "None" was typed.

On April 16, 1997, Neill's home was severely damaged by fire, and he made a claim for insurance benefits with Nationwide. In the course of its investigation, Nationwide learned from Neill that he had had three previous fire losses. Nationwide denied Neill's claim, stating that he made a material misrepresentation in his application, and filed a complaint for declaratory judgment, seeking to have the policy declared void *ab initio*. The trial court granted summary judgment to Nationwide based on the misrepresentation, and Neill appeals from that ruling.

■ ■ On appeal, Neill argues that the trial court committed reversible error in granting Nationwide's motion for summary judgment, thereby voiding the policy. When reviewing orders of summary judgment, the appellate court need only decide if the granting of summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered. *Chambers v. Stern*, 347 Ark. 395, 64 S.W.3d 737 (2002). If, after reviewing undisputed facts, reasonable men might reach different conclusions

from those facts, then summary judgment should be denied. *Plant v. Wilbur*, 345 Ark. 487, 47 S.W.3d 889 (2000).

■ ■ It is a well-settled proposition that where the facts have been truthfully stated by an insured to the soliciting agent, but by fraud, negligence, or mistake, the facts are misstated in the application to the insurer, the insurer cannot rely on the misstatements in avoidance of liability, if the agent was acting within his real or apparent authority, and there is no fraud or collusion on the part of the insured. *Interstate Fire Ins. Co. of Chattanooga, Tenn. v. Ingram*, 256 Ark. 986, 511 S.W.2d 471 (1974); *General Agents Ins. Co. v. St. Paul Ins. Co.*, 22 Ark. App. 46, 732 S.W.2d 868 (1987); *Time Ins. Co. v. Graves*, 21 Ark. App. 273, 734 S.W.2d 213 (1987). However, in *Carmichael v. Nationwide Life Ins. Co.*, 305 Ark. 549, 810 S.W.2d 39 (1991), the court also stated that a person is bound under the law to know the contents of the papers he signs and that he cannot excuse himself by saying that he did not know what the papers contained.

In *Graves, supra*, an insurance agent, who knew the Graveses and knew that Mrs. Graves had been operated on for cancer, told the insureds that he could provide her with coverage for her pre-existing condition. The Graveses testified that the agent filled out the application and that they truthfully answered each question asked by the agent, but that they did not read the application before they signed it. One question asked on the application, whether the insured had previously been treated for cancer, was left unanswered. Subsequently, an amendment to the application was received by the agent containing the unanswered question. The amendment already had the word "no" typed on it, and the agent testified that he got Mr. Graves to sign it. The amendment stated that Mr. Graves hereby amends "my application." Mr. Graves testified that the amendment contained his signature, but that he did not remember signing it. The court stated that the jury could have found that his signature did not constitute an untruthful statement as to Mrs. Graves's pre-existing condition. *Id.*

In *Ingram, supra*, the agent asked Ingram questions and filled out the application, which Ingram signed. Although there were

several questions answered incorrectly, Ingram testified that he answered each question that the agent asked correctly, so that the agent must have inaccurately recorded his answers. The court stated that Interstate was not entitled to a directed verdict under the evidence in that case and that there was no error in instructing the jury that where the facts were truthfully stated to an agent, but by fraud, negligence, or mistake, the agent misstated the information, the company cannot avoid liability if the agent had authority and there is no fraud or collusion on the part of the insured. *Id.*

In *Carmichael, supra*, the insured's beneficiary appealed from an order of summary judgment in favor of the insurer. The evidence showed that the agent asked questions and recorded Mr. Carmichael's answers on the application. Mr. Carmichael then signed the application. Based on misrepresentations in the policy that Mr. Carmichael did not suffer from diabetes, the insurer refused to pay the benefits under the policy. The appellant, Mrs. Carmichael, argued that the agent must have failed to ask her husband the question or that the agent must have inaccurately recorded his answer, because her husband had suffered from diabetes for many years and would not have responded negatively to the question. However, the court stated that there was no evidence to sustain Mrs. Carmichael's allegations and that the only person with personal knowledge of what transpired was the agent, because Mr. Carmichael had died. *Id.* The agent, in his affidavit, averred that he had asked every question on the application and that he had correctly recorded Mr. Carmichael's answers. The court noted that Mr. Carmichael had signed a certification that the information in the application was true and stated that this was at least probative evidence of his misrepresentation. *Id.* Because Mrs. Carmichael offered no evidence to rebut any of the assertions made by the insurer, the court found that summary judgment was appropriate. *Id.*

Nationwide relies heavily on *Carmichael, supra*, in support of its argument that summary judgment was properly granted to them in this case. However, in *Carmichael*, the insured was not alive to testify as to the circumstances surrounding the application process, the agent testified that he had asked every question and correctly recorded the insured's answers, and the appellant offered

no other evidence to rebut the insurer's assertion that the insured misrepresented a material fact in the application. As noted by the court, the appellant "would have the jury consider the credibility of a witness whose testimony is uncontroverted." 305 Ark. at 553, 810 S.W.2d at 42. Here, Neill is able to testify and has testified that he was not asked about prior losses by the agent. In contrast, Nationwide has not presented evidence by its agent that the question was asked and answered incorrectly by Neill.

Pursuant to the foregoing authorities, we find that there is a fact question as to whether Nationwide asked and correctly recorded Neill's answer about previous losses. The fact that Neill signed the certification that the information was true is merely probative evidence of his misrepresentation and not dispositive of the case. Thus, summary judgment in this instance was not appropriate, and we reverse and remand.

Reversed and remanded.

PITTMAN, ROBBINS, and CRABTREE, JJ., agree.

GLADWIN and NEAL, JJ., dissent.

ROBERT J. GLADWIN, Judge, dissenting. I dissent from the majority's opinion.

In reviewing summary-judgment cases, we need only decide if the grant of summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered. *National Union Fire Ins. Co. v. Guardtronic, Inc.*, 76 Ark. App. 313, 64 S.W.3d 779 (2002). Once the moving party has established a prima facie entitlement to summary judgment, the burden shifts to the nonmoving party to meet proof with proof and demonstrate the existence of material fact. *Little Rock Elec. Contractors, Inc. v. Entergy Corp.*, 79 Ark. App. 337, 87 S.W.3d 842 (2002).

During the insurance application process, the agent asked Neill a series of questions and entered the answers into his computer. Although Neill was never asked whether he had sustained any previous losses due to fire, the agent entered "none" in a box

headed "past losses." The application was printed and contained the following language:

> "I hereby declare that the facts stated in the above application are true and request the company to issue the insurance and any renewals thereof in reliance thereon."

Neill signed on a line that required the personal signature of the applicant. Nationwide issued a policy insuring Neill's mobile home. The mobile home burned, and it was at that time that the investigators for Nationwide first learned of Neill's three prior losses due to fire. Nationwide denied coverage based upon the misrepresentation in the application.

It is well established in Arkansas that one is bound under the law to know the contents of a paper signed by him, and he cannot excuse himself by saying he did not know what the papers contained. *Carmichael v. Nationwide Life Ins. Co.*, 305 Ark. 549, 810 S.W.2d 39 (1991); *National Union Fire Ins. Co. v. Guardtronic, Inc.*, *supra*. In *Banks v. Evans*, 347 Ark. 383, 64 S.W.3d 746 (2002), the supreme court stated that it is a rule of general application that one is bound to know the content of a document one signs, and if the signer has had the opportunity to read it before he signs it, he cannot escape the obligations imposed by the document by merely stating that it was signed without reading it.

Further, in signing the application, Neill requested that Nationwide rely on the answers given in the application to issue the insurance policy. There is nothing ambiguous or misleading about the words "past losses" and "none" which appear just inches above Neill's signature. He declared that the facts in the application were true when they were not, and Nationwide rightfully relied on that declaration.

The materiality to the risk of a fact misrepresented, omitted, or concealed is a question of fact so long as the matter is debatable. It is a question of law when the materiality to the risk is so obvious that a contrary inference is not permissible. *Old Republic Ins. Co. v. Alexander*, 245 Ark. 1029, 436 S.W.2d 829 (1969). In obtaining property insurance, there can be no doubt as to the materiality of three prior losses due to fire. Appellee established a prima facie entitlement to summary judgment, and appellant

failed to meet proof with proof. There was no material question of fact left unanswered. Therefore, I believe that the trial court was correct in granting summary judgment. I would affirm.

NEAL, J. joins.

SHERMAN WATERPROOFING, INC., and
William H. Sherman *v.* DARRAGH COMPANY

CA 02-660 98 S.W.3d 446

Court of Appeals of Arkansas
Division II
Opinion delivered February 26, 2003

Paul Johnson, for appellants.

Hilburn, Calhoon, Harper, Pruniski, Calhoun, Ltd., for appellee.

JOHN F. STROUD, JR., Chief Judge. This case arises from the granting of summary judgment on a promissory note in favor of appellee, Darragh Company. Appellants, Sherman Waterproofing, Inc., and William H. Sherman, appeal, contending that material issues of fact remain and that the trial court therefore erred in granting the motion for summary judgment. The matter was before this court once before and was dismissed because it did not arise from a final appealable order, nor did it have a Rule 54(b) certification. *Sherman Waterproofing, Inc. & William H. Sherman v. Darragh Co.*, No. CA01-883 (February 20, 2002). On February 28, 2002, the trial court issued an order in the case that was an apparent attempt to cure the problems noted in our February 20, 2002 opinion in order to make the order final and appealable. We again find it necessary to dismiss the appeal, this time because appellant paid the underlying judgment, making the appeal moot.

Under Arkansas law, a case becomes moot when any judgment rendered would have no practical legal effect on an existing legal controversy. *Wilson v. Pulaski Ass'n of Classroom Teachers*, 330 Ark. 298, 954 S.W.2d 221 (1997). An exception to the mootness doctrine allows review for appeals involving the public interest and the prevention of future litigation. *Id.*

The February 28, 2002 order, from which this appeal arises, provides:

> On April 6, 2001, this cause came on for hearing on the Motion for Summary Judgment filed by the Plaintiff, Darragh Company; Plaintiff appeared by its counsel, . . . and the Defendants, . . . appeared by their counsel, . . .; and upon a review of the file, the Motion, the Admissions of the Defendants, the Affidavit of Cindy Burns, the Response of the Defendants, and the arguments of counsel, and being well and sufficiently advised in the premises, the Court *finds that the Motion for Summary Judgment should be granted as it relates to the promissory note signed by the Defendants, and denied as it relates to the cash account in the name of the Defendants.*

> *Subsequent to said hearing, the Court has been informed that the Defendants have paid the judgment granted to the Plaintiff in full, and that the issue of the cash account has been resolved by the parties as well.*

(Emphasis added.) In *Hendrix v. Winter*, 70 Ark. App. 229, 231, 16 S.W.3d 272, 274 (2000), we explained:

> Turning to the merits of the matter, we have decided that the motion to dismiss this appeal must be granted. In *DeHaven v. T & D Dev., Inc.*, 50 Ark. App. 193, 901 S.W.2d 30 (1995), we held that if an appellant voluntarily pays a judgment, then the appeal from that judgment would be moot, but that if payment of the judgment is involuntary, an appeal would not be precluded. In Hendrix's response to Winter's motion in the case at bar, he does not contend that his payment of the judgment was involuntary. He alleges that the existence of the judgment on the record, constituting a lien on his land, created a financial hardship on his timber business due to his inability to obtain a bank loan. Consequently, he chose to pay the judgment debt in exchange for a satisfaction of it. In *DeHaven*, we quoted from *Lytle v. Citizens Bank of Batesville*, 4 Ark. App. 294, 630 S.W.2d 546 (1982):
>
> > [I]n the majority of jurisdictions, the effect of the payment of a judgment upon the right of appeal by the payer is determined by whether the payment was voluntary or involuntary. In other words, if the payment was voluntary, then the case is moot, but if the payment was involuntary, then the appeal is not precluded. The question which often arises under this rule is what constitutes an involuntary payment of a judgment. For instance, in some jurisdictions the courts have held that a payment is involuntary if it is made under threat of execution or garnishment. There are other jurisdictions, however, which adhere to the rule that a payment is involuntary only if it is made after the issuance of an execution or garnishment. Another variation of this majority rule is a requirement that if, as a matter of right, the payer could have posted a supersedeas bond, he must show that he was unable to post such a bond, or his payment of the judgment is deemed voluntary. . . .

Here, the issue of mootness has not been raised by the parties; rather, it is an issue that we raise on our own motion. The order from which this appeal arises could not be more clear that the judgment has been paid by the appellant. Moreover, neither

party offers us any further explanation in their briefs to this court concerning that payment. In light of that fact, and in accordance with the cases cited above, we have no choice but to conclude that appellants' payment of the judgment was voluntary, that this appeal has thereby been rendered moot, and that it does not involve the public interest or the prevention of future litigation so as to qualify as an exception to the mootness doctrine. We do not decide moot issues. *EnviroClean, Inc. v. Arkansas Pollution Control & Ecology Comm'n*, 314 Ark. 98, 856 S.W.2d 116 (1993).

Dismissed.

NEAL and VAUGHT, JJ., agree.

Randy Lee McQUAY, Personal Representative of the Estate of Aubrey McQuay, *Deceased v.* ARKANSAS BLUE CROSS and BLUE SHIELD and HealthCare Insurance of Arkansas, Inc.

CA 02-618 98 S.W.3d 454

Court of Appeals of Arkansas
Division III
Opinion delivered February 26, 2003

[Petition for rehearing denied April 2, 2003.]

Branch, Thompson, Philhours, Warmath & Hitt, by: *Robert F. Thompson III*, for appellant.

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

Womack, Landis, Phelps, McNeill & McDaniel, by: *J. V. Phelps* and *Pamela A. Haun*, for appellee HealthCare Insurance of Arkansas, Inc.

JOHN MAUZY PITTMAN, Judge. In this case, an insurer, appellee Arkansas Blue Cross and Blue Shield ("BCBS"), rescinded a health policy issued to appellant's late father, Aubrey McQuay. After appellant sued BCBS for breach of contract, BCBS filed a motion for summary judgment, which was granted by the trial court. Appellant contends on appeal that the trial court erred in granting summary judgment because genuine issues of material fact remain to be decided. We agree, and we reverse and remand.

On February 18, 2000, Aubrey McQuay visited the Jonesboro office of BCBS agent HealthCare Insurance ("HCI") and filled out an application for health coverage. There is some controversy as to whether Aubrey filled out the application by his own

hand or gave verbal responses that were recorded by the agent, but that is of no importance because it is undisputed that Aubrey answered "No" to the following question: Have you or any other person to be insured ever had any diagnosis of or been advised to have treatment for disease or disorder of the lungs or respiratory system? Despite Aubrey's negative answer to this question, he had visited his physician, Dr. Danny Holt, in February 1999, approximately one year before the application was made, and two X-ray reports were generated as a result of that visit. One reflected a physician's impression of "pulmonary fibrosis and emphysema," and the other contained an assessment of "evidence of COPD [Chronic Obstructive Pulmonary Disease]." Nevertheless, BCBS, being unaware of these diagnoses and relying on Aubrey's answer, issued a health policy to him.

Shortly after the policy was issued, Aubrey visited Dr. Holt, complaining of weight loss and difficulty swallowing. After a series of tests and other doctor visits, he was diagnosed in July 2000 with lung cancer. He received treatment from, among others, Dr. Michael Raborn, who characterized Aubrey's condition as follows: "When I treated Aubrey McQuay, he had Stage IIIB lung carcinoma and a tracheosophageal fistula. In layman's terms, Mr. McQuay had lung cancer that ate a hole in his esophagus."

Aubrey died on February 4, 2001. However, before his death, BCBS sent him a letter rescinding his policy on the ground that his answer to the above question was false.[1] Thereafter, appellant filed the lawsuit that is the subject of this appeal. Following discovery, BCBS filed a motion for summary judgment, arguing that Aubrey's negative answer regarding his diagnosis of a respiratory disorder was false and that, had Aubrey told the truth about the diagnosis, BCBS would not have issued the policy. Attached to the motion was the affidavit of Gerald LaFerney, BCBS's Manager of Individual Underwriting. LaFerney's affidavit confirmed that, had BCBS known of Aubrey's COPD, it would not have issued the policy. Laferney referenced specific under-

[1] The letter also referred to two other questions, but Aubrey's answers to those questions are not pertinent to our discussion of the issue at hand.

writing guidelines, which provided that a person diagnosed with COPD could only be insured if he was a non-smoker or had quit smoking for more than a year. The evidence is undisputed that Aubrey was a smoker at the time of his application, a fact that the application correctly reflects.

In responding to the motion for summary judgment, appellant seized upon the possibility that his father was unaware he had been diagnosed with COPD. Appellant testified in his deposition that his father did not know he had been so diagnosed, nor did he know what COPD was. Appellant argued that Aubrey's ignorance of a COPD diagnosis was significant because, upon completing the application, Aubrey signed it just above a line containing the following language: "In signing below, I . . . represent that the statements and answers given in this application . . . are true, complete, and correctly recorded *to the best of my knowledge and belief* . . . ." (Emphasis added.) In light of this language, appellant argued, Aubrey's answer on the application was not a misrepresentation because he answered "to the best of his knowledge and belief."

Following a hearing, the trial court found that Aubrey was not necessarily aware of the findings of COPD and other respiratory ailments contained in the X-ray reports, nor did he have knowledge of any sort of abnormal lung condition at the time he completed the application. Therefore, the court concluded, a fact question remained as to whether Aubrey's alleged misstatement in the application was fraudulent. The court also found that a fact question remained as to whether Aubrey's alleged misstatement was material to BCBS's acceptance of the risk. However, the court found there was no dispute that, had BCBS known of Aubrey's pulmonary condition, it would not have issued the policy, and the court granted summary judgment on that basis.

■ ■ On appellate review of summary judgment, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material question of fact unanswered. *Sweeden v. Farmers Ins. Group*, 71 Ark. App. 381, 30 S.W.3d 783 (2000). The moving party bears the burden of sus-

taining a motion for summary judgment. *Id.* All proof must be viewed in the light most favorable to the resisting party, and any doubts must be resolved against the moving party. *Id.*

Arkansas law provides three statutory grounds for which a health insurer may rescind a policy for misstatements in the application:

> (a) All statements in any application for a life or accident and health insurance policy or annuity contract, or in negotiations therefor, by or in behalf of the insured or annuitant, shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under the policy or contract unless either:
>
> (1) Fraudulent;
>
> (2) Material either to the acceptance of the risk or to the hazard assumed by the insurer; or
>
> (3) The insurer in good faith would not have issued the policy or contract or would not have issued a policy or contract in as large an amount or at the same premium or rate or would not have provided coverage with respect to the hazard resulting in the loss if the facts had been made known to the insurer as required by the application for the policy or contract or otherwise.

Ark. Code Ann. § 23-79-107(a) (Supp. 2001). The trial court found that fact questions remained as to grounds one and two, but that no factual issue remained as to ground three. However, the trial court neglected to make the threshold determination that Aubrey's answer constituted a "misrepresentation, omission, concealment of fact, or incorrect statement" as required by the preamble of subsection (a). If Aubrey's answer cannot be characterized by one of these descriptions, then subsection (a)(3), on which summary judgment was granted, is inapplicable. *See Phelps v. U.S. Credit Life Ins. Co.*, 336 Ark. 257, 984 S.W.2d 425 (1999).

Our inquiry on appeal, therefore, is whether, as a matter of law, Aubrey's answer was a misrepresentation, omission, concealment of fact, or incorrect statement. We first address appellant's contention that Aubrey's statement was not a "misrep-

resentation," an apparent reference to the possibility that Aubrey did not knowingly make a false statement. However, a misrepresentation is only one type of misstatement that may prevent recovery under a policy. Recovery may also be precluded when an applicant makes an "incorrect statement." An incorrect statement may justify rescission regardless of whether it was made with fraudulent intent. *See also Life & Cas. Ins. Co. of Tenn. v. Smith*, 245 Ark. 934, 436 S.W.2d 97 (1969); *Langlois v. Wisconsin Nat'l Life Ins. Co.*, 19 Wis. 2d 151, 119 N.W.2d 400 (1963). Thus, our analysis does not end with the fact that Aubrey's statement may not have been fraudulent. We must determine whether Aubrey's answer was "incorrect." The key to this determination is the import of Aubrey being asked to answer the application question "to the best of his knowledge and belief."

The application in this case is formatted in such a way that, following a list of health-related questions, a rather lengthy dissertation ensues, informing the insured, among other things, that he represents his answers to be true, complete, and correctly recorded to the best of his knowledge and belief. The applicant is then asked to sign the application. We believe this has the effect of prefacing each question with the phrase, "to the best of your knowledge and belief." For example, the question asked of Aubrey McQuay in this case was, effectively, "to the best of your knowledge and belief, have you or any other person to be insured ever had any diagnosis of or been advised to have treatment for disease or disorder of the lungs or respiratory system?"[2]

Viewing the application question in this light, the issue becomes whether Aubrey's answer of "no" to that question was incorrect. BCBS argues that, regardless of what Aubrey knew or believed, he had in fact been diagnosed with COPD; thus, he made an incorrect statement that provided a ground for rescission. BCBS relies on *American Family Life Insurance Company v. Reeves*,

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[2] BCBS argues that the use of the phrase serves only to inform the applicant of the serious nature of the information provided and to emphasize the criminal penalties that could be imposed for knowingly providing false information. At the least the application is ambiguous in this regard, in which case it would be construed against BCBS. *See generally Phelps v. U.S. Credit Life Ins. Co., supra.*

248 Ark. 1303, 455 S.W.2d 932 (1970), to support its contention. *Reeves* involved a cancer policy issued on the basis of the following answers contained in the application:

> 1. To the best of your knowledge, does any member of the family group to be insured now have or ever had cancer?
>
> 2. To the best of your knowledge, has any member of the family group to be insured ever had: (a) lumps, growths, or swellings; (b) sores that have not healed; (c) coughed or vomited blood.

The applicant, George Reeves, answered "no" to these questions. When his wife was diagnosed with cancer ten months later, the insurer rescinded the policy on the ground that she had suffered removal of an eye due to a malignant growth or tumor eight years prior to the effective date of the policy. Reeves asserted that neither he nor his wife had been informed that the eye was removed due to a cancerous condition. The insurer nevertheless sought rescission on the basis that it would not have issued the policy, had it known the truth. The supreme court made the following statement:

> Logically, in the circumstances of the case at bar, this affirmative defense cannot be construed to be affected by the "[t]o the best of your knowledge" qualifying phrase in the questions of the application. The "true facts" referred to in subsection (c) [now (a)(3)] relate to whether or not there was a pre-existing malignant growth, as contended by appellant, and not to whether the appellee had actual knowledge of this condition.

Id. at 1308, 455 S.W.2d at 936. Although the court appears to say that the same subsection (a)(3) ground that BCBS asserted in this case may be relied upon by an insurer as grounds for rescission regardless of how the applicant's answer is characterized, we consider the court's statement to be dicta because it did not base its decision on this statement, but instead decided the case based on Reeves's actual, firsthand knowledge that his wife had a "growth" as contemplated by question number two. Furthermore, this dicta is contrary to the court's more recent determination that, before the subsection (a) grounds may be successfully asserted, it must first be shown that the applicant has made a misrepresentation,

omission, concealment of facts, or incorrect statement. *See Phelps v. U.S. Credit Life Ins. Co., supra.*

We believe that a sound approach is evidenced by the language employed by the supreme court in *Findley v. Time Insurance Co.*, 269 Ark. 257, 599 S.W.2d 736 (1980) and *American Republic Life Insurance Co. v. Edenfield*, 228 Ark. 93, 306 S.W.2d 321 (1957). In *Findley*, a health insurance applicant was asked if, to the best of her knowledge and belief, she had ever had any menstrual irregularities. She answered "no," but in fact she had suffered such problems extensively. The supreme court agreed with the trial court that the insurer was entitled to rescind the contract, but the important point for our purposes is that the court characterized the issue as follows: "The issue presented is whether the female disorder or menstrual irregularity *manifested itself to her knowledge and belief* before or after the application. It is not whether she was in good health when she made the application." Findley, 269 Ark. at 260, 599 S.W.2d at 739 (emphasis added). In *Edenfield*, a life insurance applicant represented that he did not have arteriosclerosis and had not undergone any treatment for it. The application contained the recital that "the above statements and answers are full, true and complete to the best of my knowledge and belief." The supreme court stated: "From all the competent evidence we think the preponderance is to the effect that the deceased was justified in believing that he had no heart disease . . . ."

■ We think that these two cases stand for the proposition that, when an applicant is asked to respond to a question to the best of his knowledge and belief, his actual knowledge and belief concerning his condition are relevant. We note that other authorities so hold. *See Hauser v. Life Gen. Sec. Ins. Co.*, 56 F.3d 1330 (11th Cir. 1995); *William Penn Life Ins. Co. v. Sands*, 912 F.2d 1359 (11th Cir. 1990); *Carter v. United of Omaha Life Ins. Co.*, 685 So.2d 2 (Fla. Ct. App. 1997); *Sterling Ins. Co. v. Dansey*, 195 Va. 933, 81 S.E.2d 446 (1954).

■ In light of the above, we hold that a fact question remains as to whether Aubrey McQuay made an incorrect statement in his answer on the application. We observe that, in addi-

tion to appellant's testimony that Aubrey was unaware of his condition, Dr. Holt's progress note dated 2/18/99 (the same date the X-rays were taken) mentions only "some degree of COPD," and contains the notations "Bronchitis and sinus congestion" and prescribes a pill for sinus congestion and a Nicotrol Inhaler to help Aubrey quit smoking. Further, the trial court specifically found that Aubrey was not necessarily aware of his diagnosis. Thus, a jury might conclude that, to the best of Aubrey's knowledge and belief, he had not been diagnosed with COPD.

We also reject BCBS's alternative reason for affirmance that the incorrect statement in the application was material to its acceptance of the risk. *See* Ark. Code Ann. § 23-79-107(a)(2). The trial court explicitly found that a fact question remained on this point. Further, the subsection (a)(2) defense requires the insurer to show a causal relationship between the misrepresentation and the hazard resulting in the loss. Ark. Code Ann. § 23-79-107(c). A fact question exists on that issue by virtue of Dr. Michael Raborn's statement in his affidavit that COPD is not caused by lung cancer.

Finally, as to the separate appellee HCI, it was sued by appellant for negligence in recording an answer on the application to a question not at issue in this appeal. The trial court granted summary judgment to HCI on the basis that BCBS properly rescinded the policy. Therefore, the two rulings being intertwined, we likewise reverse the summary judgment granted to HCI.

Reversed and remanded.

NEAL, J., agrees.

VAUGHT, J., concurs.

LARRY D. VAUGHT, Judge, concurring. I concur in the result reached by the majority only because we are bound by the interpretation of Ark. Code Ann. § 23-79-107 set forth by the supreme court in *Phelps v. U.S. Life Credit Life Ins. Co.*, 336 Ark. 257, 984 S.W.2d 425 (1999). *Phelps* established that an insurer cannot rely on section 23-79-107(a)(3) to rescind a policy if an applicant, in good faith, answered a question concerning a

pre-existing medical condition in the negative, even though the empirical fact of the preexistence of the condition was proven. The trial court in this case found that a question of fact remained as to the applicant's knowledge of the lung condition; therefore, summary judgment is not appropriate, and we must reverse.

I do not agree with the majority's analysis which attempts to reach the same conclusion as *Phelps* using prior case authority. Arkansas Code Annotated § 23-79-107(a) provides:

> (a) All statements in any application for a life or disability insurance policy or annuity contract, or in negotiations therefor, by or in behalf of the insured or annuitant, shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under the policy or contract unless either:
>
> (1) Fraudulent;
>
> (2) Material either to the acceptance of the risk or to the hazard assumed by the insurer; or
>
> (3) The insurer in good faith would not have issued the policy or contract or would not have issued the policy or contract in as large an amount or at the same premium or rate or would not have provided coverage with respect to the hazard resulting in the loss if the facts had been made known to the insurer as required by the application for the policy or contract or otherwise.

This statute has been on the books in substantially this same form since 1959, having been adopted by Act 148 of 1959. The purpose of the provision is found in the first sentence where statements in insurance applications are held to be representations and not warranties. Prior to Act 148 of 1959 the law provided that such statements were warranties. *See* Ark. Stat. Ann. § 66-1015 (1947). Because insurers could no longer rely on the warranties of their applicants, they were given three grounds for rescinding a policy if it were determined that a statement made on the application was a misrepresentation, omission, concealment of fact, or incorrect statement. As quoted in *Life and Casualty Ins. Co. v. Smith*, 245 Ark. 934, 938, 436 S.W.2d 97, 99 (1969), Couch on Insurance 2d, 35:24, states:

> If it is shown that the misrepresented matter was material to or increased the risk it is immaterial and irrelevant that the insured

> had acted in good faith without any bad motive or intent to deceive. This means that if a representation is made which is untrue and material it taints the contract, whether fraudulent or not, and if untrue and fraudulent, it taints the contract, whether material or not.

This analysis was used by the supreme court to uphold the rescission of a policy where it was shown that the applicant had no knowledge of his wife's preexisting condition in *Dopson v. Metropolitan Life Ins. Co.*, 244 Ark. 659, 426 S.W.2d 410 (1968). Similarly, in *Union Life Ins. Co. v. Davis, Adm'x*, 247 Ark. 1054, 449 S.W.2d 192 (1970), the supreme court reversed and dismissed a judgment for the insured where the deceased stated on his application that he was in good health (and thought he was), but it was determined that he suffered from coronary artery disease at the time of the application. *See also Marshall v. Prudential Ins. Co.*, 253 Ark. 127, 484 S.W.2d 892 (1972), and *American Family Life Assur. Co. v. Reeves*, 248 Ark. 1303, 455 S.W.2d 932 (1970).

Each of these cases is similar to the instant case in that the applicant, in good faith, attested to good health, and the company relied on the representation and issued a policy. In each case the proof reflected that a preexisting condition caused the death or loss to the insured, and in each case the company asked for rescission based on section 23-79-107(a)(3). While there were different degrees of knowledge of the insured about the omitted condition, the court always reached the defense in subsection (a)(3). This is because the court consistently interpreted "incorrect statement" to mean what it says. The applicant's subjective belief about his health does not make a statement about his health any more or less correct. The supreme court was consistent in these cases and applied a rational analysis of the statute. Even the cases relied on by the majority do not mandate a different result. *American Republic Life Ins. Co. v. Edenfield*, 228 Ark. 93, 306 S.W.2d 321 (1957) predates the statute in question by two years and has little, if any, value in construing it. Also, *Edenfield* was primarily concerned with doctor-client privilege and scope of discovery. The other principal case relied on in the majority opinion is *Findley, Adm'x v. Time Ins., Co.*, 269 Ark. 257, 599 S.W.2d 736 (1980). This

case affirmed a judgment for the insurer and is cited by the majority for what amounts to dicta.

This brings us to *Phelps, supra*, the latest construction of section 23-79-107(a)(3). In that case, the applicant did not disclose prior heart problems because he misinterpreted a question on the application. The trial court found that the decedent answered in good faith and that the question was ambiguous, but that section 23-79-107(a)(3) applied and allowed the company to rescind. The supreme court reversed, holding that the question was ambiguous and it should be construed against the insurer. It further held that section 23-79-107(a)(3) did not apply because the applicant was truthful when he answered no to the question on the application, and therefore, there was no incorrect statement. I believe that this second holding in *Phelps* does not follow prior authority and does not reflect a reading of the clear language of Ark. Code Ann. § 23-79-107(a)(3). However, it is the law and we are constrained to follow it. Therefore, I concur.

Ann STOUFFER *v.* KRALICEK REALTY COMPANY

CA 02-621 98 S.W.3d 475

Court of Appeals of Arkansas
Division I
Opinion delivered February 26, 2003

Bagby Law Firm, P.A., by: *Philip A. Bagby*, for appellant.

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

ROBERT J. GLADWIN, Judge. Appellant, Ann Stouffer, purchased a home from Francis Brody in 2000. The listing agent was appellee, Kralicek Realty Company. After her purchase, appellant discovered problems with the foundation of the home, and she subsequently sued Brody and Kralicek for fraud in falsely representing the condition of the house. Kralicek filed a motion for summary judgment, which was granted by the trial court. Appellant now appeals that ruling. For the reasons explained hereafter, we dismiss the appeal.

Although the trial court granted summary judgment to Kralicek, it did not resolve or otherwise dispose of appellant's claim against Brody. When a trial court fails to dispose of all claims against all parties, the court has not entered a final, appealable order. Ark. R. Civ. P. 54(b)(1). Recognizing this, appellant obtained a Rule 54(b) certificate, which allows a trial court to certify what would ordinarily be a nonappealable order. However, we conclude that the certificate executed by the trial court in this case is insufficient to accomplish its intended purpose.

Rule 54(b) provides that, when multiple parties are involved in a case, the trial court may direct the entry of final judgment as to one of the parties "only upon an express determination, *supported by specific factual findings*, that there is no just reason for delay and upon an express direction for the entry of

judgment." If the court makes such a determination, it must execute a certificate "which shall appear immediately after the court's signature on the judgment, *and which shall set forth the factual findings* upon which the determination to enter the judgment as final is based." Ark. R. Civ. P. 54(b)(1) (2002) (emphasis added). The rule contains the following form for the certificate:

> Rule 54(b) Certificate
>
> With respect to the issues determined by the above judgment, the court finds:
>
> [*Set forth specific factual findings*]
>
> Upon the basis of the foregoing factual findings, the court hereby certifies, in accordance with Rule 54(b)(1), Ark. R. Civ. P., that it has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the judgment shall be a final judgment for all purposes.
>
> Certified this _____ day of _____, _____.
>
> _____
> Judge

(Emphasis added.) In the absence of the above certificate, an order adjudicating claims against fewer than all the parties does not terminate the action. *See* Ark. R. Civ. P. 54(b)(2).

The Rule 54(b) certificate in this case reads as follows:

> On March 12, 2002, this Court entered its Order granting Summary Judgment in favor of separate Defendant Kralicek Realty Company, Inc. That Order contained specific factual findings which the Court made and upon which the Court based its decision. Those findings are specifically incorporated here by reference as if set out herein word-for-word.
>
> Upon the basis of the factual findings in the March 12, 2002 Order, the Court hereby certifies, in accordance with Rule 54(b)(1), Ark. R. Civ. P., that it has determined that there is no just reason for delay of the entry of a final judgment and that the Court has and does hereby direct that the judgment shall be a final judgment for all purposes.

The certificate does not appear after the court's signature on the judgment, as required by the rule, but is contained in a sepa-

rate document. However, the more important flaw is the lack of a specific factual finding as to why an appeal should proceed at this point. The certificate contains no findings or statements as to the trial court's reason for entry of a final order, although it does refer to the specific factual findings in the court's prior order. However, those findings pertain to the merits of the summary judgment, not to the reasons for the entry of a final judgment.

Because the Rule 54(b) certificate executed in this case does not contain specific factual findings upon which the decision to enter a final judgment was based, it does not conform to the requirements of the rule and is therefore ineffective to certify the appeal. Accordingly, we dismiss the appeal without prejudice to re-file upon entry of an order that complies with Rule 54(b).

Appeal dismissed.

PITTMAN, J., agrees.

HART, J., concurs.

Virginia DOVERS *v.* STEPHENSON OIL COMPANY, Inc. and William Guffey

CA 02-548 98 S.W.3d 462

Court of Appeals of Arkansas
Division II
Opinion delivered February 26, 2003

Gary Eubanks & Associates, by: *Russell D. Marlin* and *William Gary Holt*, for appellant.

Quattlebaum, Grooms, Tull & Burrow PLLC, by: *Thomas G. Williams*, and *Preston & Cowan, L.L.P.*, by: *Michele Quattlebaum*, for appellee.

JOHN B. ROBBINS, Judge. Appellant Virginia Dovers sued appellees Stephenson Oil Company and William Guffey for negligence, alleging that she suffered damages as a result of an accident in which her car was struck from behind by a tractor-trailer rig being driven by Mr. Guffey. At the time of the accident, Mr. Guffey was an employee of Stephenson Oil Company. After a jury trial, the jury returned a verdict for the appellees. Ms. Dovers filed a motion for new trial, which was denied, and she now appeals.

For reversal, Ms. Dovers argues that the verdict was not supported by substantial evidence, and that the trial court erred in failing to grant her motion for new trial. She further argues that

the trial court made evidentiary errors in not allowing her to introduce evidence of insurance, in admitting evidence that Mr. Guffey did not receive a ticket, and in allowing the appellees to elicit hearsay testimony from the investigating officer. Finally, Ms. Dover argues that the trial court erred in allowing the appellees to elicit testimony regarding secondary gain. We agree that the trial court erred in denying Ms. Dovers's motion for new trial, and therefore, we reverse and remand.

Trooper Tim Goshon testified that he investigated the accident, which occurred on the inside lane of Highway 67 northbound near Jacksonville. He stated that a vehicle in front of Ms. Dovers's car came to a stop on the highway, causing Ms. Dovers to stop. Then, the truck being driven by Mr. Guffey collided with Ms. Dovers's car. According to Trooper Goshon, her car was "totaled" as a result of the collision. He indicated that Mr. Guffey should have stayed a least 120 feet behind Ms. Dovers's car, and gave the opinion that the accident was caused by Mr. Guffey being inattentive and following too close.

On cross-examination, Trooper Goshon testified that he did not ticket Mr. Guffey, which drew an objection from Ms. Dovers. In addition, over appellant's hearsay objection, Trooper Goshon stated that he gained information from a Cabot police officer that the officer tried to chase down the black Jeep that stopped in front of Ms. Dovers's car.

On re-direct examination, Trooper Goshon explained:

> Mr. Guffey was not given a ticket at the scene because at the time Ms. Dovers was transported to Rebsamen Hospital, I finished up with Mr. Guffey, [and] he was allowed to continue on. I had to go over and finish my investigation after I talked to her, and it took me some time after that to talk to the gentleman that gave me the statement, and other people that were around. . . . [T]here was not a normal determination made on who was the at-fault driver there. I always give a courtesy to talk to everybody involved before there is a decision made. Now that my investigation is complete, if I was back out there, I would give Mr. Guffey a ticket.

Terry Joe Stephenson, who is the son of Stephenson Oil Company's owner, testified next. He stated that Stephenson Oil Company is certified to carry gasoline, and that there are certain

rules to abide by in employing drivers. Mr. Stephenson indicated that there are certain safety procedures that are supposed to be taken prior to hiring drivers, but that this was not done prior to hiring Mr. Guffey.

On cross-examination, Mr. Stephenson testified that Stephenson Oil Company is a small, family-owned operation. Ms. Dovers objected at that time and asserted that the appellees had opened the door to being questioned about insurance. However, the trial court ruled that the door had not been opened.

Bill Mullenax, a retired police officer who teaches driving-safety courses, testified that it would not be possible to stop a fully loaded tractor trailer going sixty miles per hour in fifty feet. Dr. Larry Williams, an expert in accident reconstruction, thought that the accident at issue occurred either because the eighteen-wheeler was following too closely, the driver was not paying attention, or both.

The deposition of Mr. Guffey was admitted during the plaintiff's case. He testified that at sixty miles per hour he should stay fifty feet behind another vehicle in order to safely bring his vehicle to a stop. In recounting the accident, he stated that he was driving behind Ms. Dovers's car when a black Jeep failed to yield, entered the highway, and pulled in front of her. Mr. Guffey thought the Jeep was going to hit her, so he backed off. The Jeep braked twice, and then proceeded down the highway. Some distance after topping a hill, Mr. Guffey saw that the Jeep was stopped, with Ms. Dovers stopped behind it. Due to traffic, he could not change lanes. He attempted to stop, but testified, "I was too close to stop," and he rear-ended Ms. Dovers's car. He maintained that there was nothing he could do to prevent the accident.

Several witnesses gave testimony regarding Ms. Dovers's damages. Her sister testified that after the accident, Ms. Dovers had fusion surgery and has since experienced neck, shoulder, and back pain. Ms. Dovers's brother-in-law stated that she can no longer take care of herself and is depressed and anxious. Robert Norton, a pharmacist at the pharmacy where Ms. Dovers had worked for twelve years, stated that since the accident, she has never successfully returned to work. Ms. Dovers testified on her own behalf and stated that she has extreme pain when she turns

her neck. Dr. Edwin Barron assigned her a 3% permanent partial disability rating, and Ralph Scott Boax, a forensic economist, calculated Ms. Dovers's total damages to be $1,330,334.00.

Bob White, a vocational rehabilitation specialist, testified that the prognosis for Ms. Dovers's future in the work force is poor. He stated that unless she makes significant medical improvement, it is highly doubtful that she will ever be able to return to work. On cross-examination, and over Ms. Dovers's objection, the appellees were permitted to ask Mr. White about secondary gain. In his testimony, he acknowledged that secondary gain can contribute to a person's disability, and that there are people who may have reasons for wanting to be disabled or appear to be more disabled than they are. However, Mr. White also indicated that monetary motivations such as a lawsuit, or not wanting to return to work, do not seem to apply to Ms. Dovers.

After Ms. Dovers rested her case, Mr. Guffey testified for the defense. He stated that after the Jeep entered the highway, the Jeep and Ms. Dovers's car got about half a mile in front of him, and that he was within twenty feet of Ms. Dovers's vehicle when her brake lights came on. He stated, "She's going five miles an hour on the interstate, and I'm going at least fifty." He testified that he was paying attention and not speeding or following too closely, and that there was nothing he could have done to avoid the accident. He further stated that, after the accident, Ms. Dovers told him it was not his fault but rather the fault of the driver of the black Jeep.

Ms. Dovers's first point on appeal is that the jury's verdict in favor of the appellees was not supported by substantial evidence. She submits that for a plaintiff to lose a personal-injury case based on negligence, the jury must find one of the following: (1) that the plaintiff was not injured or that her injuries were not caused by the accident; (2) that the defendant was zero percent negligent in causing the accident; or (3) that the plaintiff was more at fault in causing her own injuries than the defendant. Ms. Dovers contends that no reasonable juror could have made any of the above findings based on the evidence in this case.

Ms. Dovers asserts that there was no serious dispute that she was severely injured as a result of the accident. She further argues

that no reasonable juror could have found Mr. Guffey free from negligence, and notes that the jury was given an instruction based on Ark. Code Ann. § 27-51-305 (Supp. 2001), which provides in pertinent part:

> (a) The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of vehicles and the traffic upon and the condition of the highway.
>
> (b)(1) The driver of any motor truck or any motor vehicle drawing another vehicle when traveling upon a roadway outside of a business or residence district shall not follow within two hundred feet (200') of another motor vehicle.

Ms. Dovers argues that, by Mr. Guffey's own admission, he violated both of the above concepts while at the same time claiming to have done all he could to avoid the accident. She further argues that comparative fault was not an issue at trial and there was no evidence of any negligence on her part. Because there was no evidence to support the jury's verdict in favor of the appellees, Ms. Dovers contends that the verdict must be reversed.

Ms. Dovers's second argument is that the trial court erred in denying her motion for new trial because the jury's verdict was not supported by substantial evidence. Ms. Dovers's motion for new trial was based, in part, on the ground that the verdict was clearly contrary to the preponderance of the evidence pursuant to Rule 59(a)(6) of the Arkansas Rules of Civil Procedure. As the trial court's denial of Ms. Dovers's new-trial motion is the basis for both her first and second arguments on appeal, we will address these as one argument.

The trial court is not to substitute its view of the evidence for that of the jury's unless the jury verdict is found to be clearly against the preponderance of the evidence. *Schrader v. Bell*, 301 Ark. 38, 781 S.W.2d 466 (1989). On appeal, our test for reviewing the denial of a motion for new trial is whether there is any substantial evidence to support the jury verdict. *Hodges v. Jet Asphalt Co., Inc.*, 305 Ark. 466, 808 S.W.2d 755 (1991). In determining the existence of substantial evidence, we must view the evidence in the light most favorable to the appellee. *Ray v. Green*, 310 Ark. 571, 839 S.W.2d 515 (1992). Substantial evidence compels a conclusion one way or the other and is more than mere

speculation or conjecture. *Id.* A jury verdict should not be disturbed unless fair-minded people can only draw a contrary conclusion. *Pineview Farms, Inc. v. Smith Harvestore, Inc.*, 298 Ark. 78, 765 S.W.2d 924 (1989).

We hold that fair-minded people could not have found that Mr. Guffey was free from negligence, and that the jury's verdict is not supported by substantial evidence. Therefore, we hold that the trial court erred in failing to grant a new trial, and we reverse and remand.

We agree with Ms. Dovers that there can be no doubt that she suffered damages as a result of the accident. Comparative fault was not an issue in this case, and the jury's duty was to determine whether Mr. Guffey was negligent and the extent to which his negligence caused the accident. From the evidence presented, including Mr. Guffey's own testimony, no reasonable juror could have found that Mr. Guffey was zero-percent negligent in causing the accident.

By Mr. Guffey's own admission, he was aware that the black Jeep was driving erratically and twice braked causing both him and Ms. Dovers to slow down. He further testified that at one point, there was a half-mile separating his truck and Ms. Dovers's car. He stated that his tractor-trailer was within twenty feet of Ms. Dovers's vehicle when he first observed brake lights. There was no evidence of any negligence on the part of Ms. Dovers, as she was able to come to a stop behind the black Jeep without colliding with it. While there was evidence that the driver of the black Jeep was negligent, fair-minded people could only have concluded that Mr. Guffey was either following too closely or being inattentive, and that his negligence contributed in some measure to his collision with Ms. Dovers's car.

The appellees contend that this case is analogous to *Ray v. Green, supra*, and *Anderson v. Graham*, 332 Ark. 503, 966 S.W.2d 223 (1998). We disagree. In *Ray v. Green, supra*, the jury returned a defense verdict and the supreme court affirmed the trial court's denial of appellant's motion for new trial. In that case, the evidence showed that the appellant was in a car stopped on the highway, with its left-turn signal blinking, and the appellee was following a pickup truck that passed the stopped vehicle using the

right shoulder of the highway, and when this occurred appellant struck appellee's car. In *Anderson v. Graham, supra*, the jury returned a defense verdict, and the supreme court affirmed. In that case, the appellants were stopped on a two-lane road because the vehicle in front of them had come to a halt trying to make a left turn. The appellee was driving a tractor-trailer rig, and had just crested a hill when he noticed the stopped car and was thereafter unable to stop in time to avoid a collision.

The cases cited by the appellees did not involve following too closely or not paying attention. Rather those cases involved situations where the appellee-drivers were using ordinary care but were confronted with dangerous situations resulting in unavoidable accidents. The present case differs in that Mr. Guffey had a clear view of the situation with which he was confronted, yet failed to take the precautions necessary to avoid an accident.

Because the trial court erred in denying Ms. Dovers's motion for new trial, the case is reversed and remanded for new trial. However, we will address the remaining evidentiary matters as they may arise again at a new trial. *See Balentine v. Sparkman*, 327 Ark. 180, 937 S.W.2d 647 (1997).

Ms. Dovers's first evidentiary argument is that the trial court erred in not allowing her to introduce evidence of appellees' insurance. As a general rule, it is improper for either party to introduce or elicit evidence of the other party's insurance coverage. *York v. Young*, 271 Ark. 266, 608 S.W.2d 20 (1980). This principle is part of the collateral-source rule, which excludes evidence of benefits received by a plaintiff from a source collateral to the defendant. *Patton v. Williams*, 284 Ark. 187, 680 S.W.2d 707 (1984). However, when a party testifies about his or her financial condition in a false or misleading manner, he or she opens the door for the introduction of evidence that might otherwise be inadmissible under the collateral-source rule. *Younts v. Baldor Elec. Co.*, 310 Ark. 86, 832 S.W.2d 832 (1992).

Ms. Dovers argues that the appellees opened the door to evidence of insurance coverage when it elicited testimony from Terry Joe Stephenson that Stephenson Oil Company is a small, family-owned operation. She contends that she was prejudiced by this testimony because it gave the false or misleading impression the

Stephenson Oil Company would be forced to absorb any loss alone, when in fact there was insurance coverage to set off the cost of any verdict.

A trial court's ruling on the admission of evidence should not be reversed absent an abuse of discretion. *O'Fallon v. O'Fallon*, 341 Ark. 138, 14 S.W.3d 506 (2000). We hold that the trial court did not abuse its discretion in refusing to allow Ms. Dovers to inquire about the appellees' insurance. Mr. Stephenson testified that Stephenson Oil Company is a trucking company certified by the Department of Transportation to carry hazardous materials, specifically gasoline, and indicated that he has worked for the business since 1991. The fact that the business is small and family owned says nothing about whether it is financially successful or whether it carries insurance. We find no error in the trial court's determination that this evidence was not misleading and did not open the door to evidence of insurance.

Ms. Dovers's next argument is that the trial court erred in allowing the appellees to introduce evidence that Mr. Guffey did not receive a ticket. She cites *Breitenberg v. Parker*, 237 Ark. 261, 372 S.W.2d 828 (1963), for the proposition that it is improper in a personal injury action to ask a question about whether the defendant received a ticket for a traffic violation. In this case, Trooper Goshon was asked whether he issued a ticket to Mr. Guffey, and he responded that he did not. Ms. Dovers objected, and now argues that the testimony was inadmissible and prejudicial, and that the trial court offered no admonition to cure the prejudice.

Although it is improper in a negligence action to inquire whether the defendant was cited for a traffic violation, Ms. Dovers's argument fails here for three reasons. While Ms. Dovers objected to the testimony that no ticket was issued, she did not obtain a ruling, and failure to obtain a ruling from the trial court is a procedural bar to the consideration of the issue on appeal. *See Madden v. Aldrich*, 346 Ark. 405, 58 S.W.3d 342 (2001). Furthermore, Ms. Dovers did not request an admonition to the jury, which could have cured any prejudice. *See generally James v. Bill C. Harris Constr. Co., Inc.*, 297 Ark. 435, 763 S.W.2d 640 (1989). Finally, no prejudice resulted because on redirect examination Trooper Goshon testified that, based on the information he gath-

ered from his investigation, he would have given Mr. Guffey a ticket if he had it to do over again.

The next evidentiary issue on appeal is Ms. Dovers's argument that the trial court erred in allowing hearsay testimony from Trooper Goshon. Specifically, she contends that the trial court erroneously allowed Trooper Goshon to testify that he gained information from a Cabot police officer that the officer tried to chase down the black Jeep after the accident. Ms. Dovers argues that this resulted in prejudice because it gave the impression that the authorities thought the driver of the black Jeep was responsible for the accident.

We agree that the statement was hearsay and was inadmissible under Ark. R. Evid. 802. The statement was offered to prove that the Cabot police officer followed the black Jeep, and was prejudicial because it tended to show that the driver of the Jeep, rather than Mr. Guffey, caused the accident. The appellees argue that the statement was not offered for the truth of the matter asserted, but we disagree. The information was not offered to show what information Trooper Goshon was acting upon during his investigation, or to explain his subsequent actions, because there was no evidence that Trooper Goshon pursued the driver of the black Jeep. We hold that the trial court abused its discretion in permitting the hearsay testimony.

Ms. Dovers's remaining argument is that the trial court erred in allowing the appellees to introduce evidence of secondary gain. We agree that evidence of secondary gain was improper because our supreme court, in *Rodgers v. CWR Constr., Inc.*, 343 Ark. 126, 33 S.W.3d 506 (2001), held that expert testimony regarding secondary gain is irrelevant and inadmissible when there is no evidence of secondary gain involved in the plaintiff's case. In the present case, there was no evidence of secondary gain and Dr. White testified that monetary concerns or lack of motivation to return to work did not seem to apply to Ms. Dovers. However, we agree with the appellees that Ms. Dovers waived this argument. Although the trial court overruled Ms. Dovers's objection to a question about secondary gain on cross-examination, the question was not answered and the line of questioning was not further pursued. It was on redirect examination

that Ms. Dovers developed the issue, and thus she opened the door to the testimony that she now asserts was inadmissible.

Reversed and remanded for further proceedings consistent with this opinion.

BIRD and GRIFFEN, JJ., agree.

LEHMAN PROPERTIES, Limited Partnership *v.*
BB&B CONSTRUCTION COMPANY, INC.

CA 02-588 98 S.W.3d 470

Court of Appeals of Arkansas
Division IV
Opinion delivered February 26, 2003

Watts, Donovan & Tilley, P.A., by: *James T. Tilley* and *Michael McCarty Harrison*, for appellant.

Davidson Law Firm, Ltd., by: *Richard Quintus* and *Charles Darwin "Skip" Davidson*, for appellee.

JOHN B. ROBBINS, Judge. This appeal is from an interlocutory order denying appellant Lehman Properties, Limited Partnership's motion to compel arbitration. The primary issues on appeal are whether the trial judge erred in holding that the Federal Arbitration Act ("FAA") does not apply to this case because interstate commerce is not involved and that the claims are not arbitrable under the Arkansas Uniform Arbitration Act ("AUAA"). We agree with the circuit judge that the FAA does not apply but reverse his finding that the claims are not arbitrable under the AUAA.

Appellee BB&B Construction Company, Inc., located in Garland County, Arkansas, entered into a contract with appellant to construct a subdivision in Bentonville, Arkansas. Appellant, which develops subdivisions, is an Arkansas partnership and maintains its principal place of business in Rogers, Arkansas. Northstar Engineering Consultants, Inc., situated in Bentonville, prepared the construction specifications for the project.

In paragraph 16.1 of the February 16, 1999, contract between appellant and appellee, the following dispute resolution provision appeared:

> All claims, disputes and other matters in question between OWNER and CONTRACTOR arising out of or relating to the Contract Documents or the breach thereof (except for claims which have been waived by the making or acceptance of final payment as provided by paragraph 14.15) will be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining, subject to the limitations of this Article 16. This agreement so to arbitrate and any other agreement or consent to arbitrate entered into in accordance herewith as provided in this Article 16 will be specifically enforceable under the prevailing law of any court having jurisdiction.

In 2001, appellee filed a complaint against appellant and Northstar in the Garland County Circuit Court, alleging that appellant and Northstar had committed fraud, deceit, fraudulent inducement, fraudulent misrepresentation, and negligence, causing it to sustain damages of not less than $380,000.

Appellant pled arbitration as an affirmative defense and filed a motion to compel arbitration pursuant to section 16.1 of the contract. According to appellant, the FAA and the AUAA required the dispute to be submitted to arbitration. As exhibits to its motion, appellant filed a copy of the parties' contract; the affidavit of Shawki Al-Madhoun, president of Northstar; and invoices from two suppliers of materials, Benton County Stone Company, Inc., and Hughes Supply, Inc.

A hearing was held on the motion to compel arbitration. In his letter opinion, the judge stated:

> As the case stands, the plaintiff has alleged negligence, fraud, deceit, and fraudulent inducement and misrepresentation against the defendants. Clearly, tort claims are not arbitrable under our statute. Based on the current state of the record, it would be improper to rule that this is actually a contract case and thus subject to arbitration and governed by the mandatory arbitration provision.

In the order denying appellant's motion to compel arbitration, the judge found that the contract did not involve sufficient interstate commerce to invoke the application of the FAA. He also found that, although the AUAA, Ark. Code Ann. §§ 16-108-201 through 16-108-224 (1987 and Supp. 2001), applied, the tort claims alleged by appellee were not arbitrable under that act. This appeal follows from that order.

Standard of Review

The denial of a motion to compel arbitration is an immediately appealable order. *Showmethemoney Check Cashers, Inc. v. Williams*, 342 Ark. 112, 27 S.W3d 361 (2000). Arkansas Code Annotated section 16-108-219(a) (1987) authorizes an appeal from an order denying an application to compel arbitration. *American Ins. Co. v. Cazort*, 316 Ark. 314, 871 S.W.2d 575 (1994). Our review of a trial court's denial of a motion to compel arbitration is *de novo*. *IGF Ins. Co. v. Hat Creek P'ship*, 349 Ark. 133, 76 S.W.3d 859 (2002); *Walton v. Lewis*, 337 Ark. 45, 987 S.W.2d 262 (1999).

Arguments on Appeal

Appellant argues on appeal that the FAA mandated arbitration of appellee's claims and that appellee's claims are arbitrable under the AUAA.

The Federal Arbitration Act

According to appellant, the contract between the parties involves interstate commerce and, therefore, came within the ambit of the FAA. That act provides that a written provision in a contract evidencing a transaction involving commerce to arbitrate a controversy arising out of that contract is valid and enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2002). When the underlying dispute involves interstate commerce, the FAA, instead of the AUAA, applies. *Walton v. Lewis, supra.* Section 1 of the FAA defines "commerce" as "commerce among the several states . . . ." 9 U.S.C. § 1 (2002). State courts have concurrent jurisdic-

tion with the federal courts to enforce rights granted by the FAA. *McEntire v. Monarch Feed Mills, Inc.*, 276 Ark. 1, 631 S.W.2d 307 (1982).

Appellant contends that interstate commerce was involved in this case because a major subdivision was to be constructed and goods crossed state lines for that purpose. Appellee, however, points out that it purchased those goods from local suppliers and argues that, as far as these parties were concerned, the fact that the suppliers ordered the goods from out of state did not amount to interstate commerce. The invoices from Hughes Supply, Inc., listed "Tontitown, AR" and an Arkansas telephone number. They also listed the company's Dallas, Texas, post office box and showed that the supplies were sold to appellee in Hot Springs, Arkansas, and shipped to the work site in Bentonville. The invoices from Benton County Stone Company, Inc., listed a Pryor, Oklahoma, post office box and telephone number, as well as an Arkansas telephone number for its quarry. Appellant does not dispute appellee's assertion that the goods were purchased from local suppliers.

The appellee purchased these supplies locally, all of the parties are situated in Arkansas, and the work was done in Arkansas. Moreover, the contract itself did not evidence a transaction involving interstate commerce. Thus, the judge was correct in finding that the FAA does not apply.

The Arkansas Uniform Arbitration Act

Appellant further argues that appellee's claims are arbitrable under the AUAA. Unlike the FAA, the AUAA may not be used to enforce agreements to arbitrate if the cause of action sounds in tort. Arkansas Code Annotated section 16-108-201(b) (Supp. 2001) provides:

> (b) A written provision to submit to arbitration any controversy thereafter arising between the parties bound by the terms of the writing is valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract; provided, that this subsection shall have no application to personal injury or tort matters, employer-employee disputes,

> nor to any insured or beneficiary under any insurance policy or annuity contract.

Appellant contends, however, that appellee's claims, which are phrased in terms of negligence and fraud, actually sound in contract and are, therefore, subject to arbitration under the AUAA. According to appellant, if a party is allowed to transform contract issues into tort issues in order to circumvent a contract's arbitration clause, the strong public policy favoring arbitration will be thwarted.

As a matter of public policy, arbitration is strongly favored. *Hart v. McChristian*, 344 Ark. 656, 42 S.W.3d 552 (2001). Arbitration is looked upon with approval by courts as a less expensive and more expeditious means of settling litigation and relieving docket congestion. *Id.* Arbitration is a matter of contract between parties. *Id.* The same rules of construction and interpretation apply to arbitration clauses as apply to agreements generally. The construction and legal effect of a written contract to arbitrate are to be determined by the court as a matter of law. *Id.* Accordingly, we will give effect to the parties' intent as evidenced by the arbitration agreement itself. *Id.* In light of the policy favoring arbitration, such agreements will not be construed strictly but will be read to include subjects within the spirit of the parties' agreement. *Id.* Any doubts and ambiguities of coverage will be resolved in favor of arbitration. *Id.* Under Arkansas law, however, claims sounding in tort are not arbitrable, regardless of the language used in the arbitration agreement. *Hawks Enters., Inc. v. Andrews*, 75 Ark. App. 372, 57 S.W.3d 778 (2001).

It is true that legitimate tort claims can arise out of contractual relationships in some situations. *Westark Specialties, Inc. v. Stouffer Family Ltd. P'ship*, 310 Ark. 225, 836 S.W.2d 354 (1992). However, unless the conduct involves a foreseeable, unreasonable risk of harm to the plaintiff's interests, a breach of contract is generally not treated as a tort if it consists merely of a failure to act (nonfeasance). The court will not declare a matter nonarbitrable under the AUAA merely because the manner in which a party chooses to characterize its action initially appears to render the matter as falling outside the AUAA; instead, the claim must legitimately sound in tort. *Terminix Int'l Co. v. Stabbs*, 326 Ark. 239, 930 S.W.2d 345 (1996).

Appellee alleged in its complaint that appellant and Northstar had prepared false plans and specifications for the development of the subdivision; had failed to obtain proper regulatory authority for the subdivision's development; and had represented certain facts in writing and verbally that were untrue, false, and misleading, causing appellee to spend hundreds of thousands of dollars in material and labor for which it had not been compensated. Appellee's list of the false and misleading statements included the following:

(a) Lehman and Northstar possess the requisite skill, education, experience and authority to develop the Heathrow Subdivision;

(b) location of streets;

(c) location of utilities;

(d) regulatory authority for work to be performed;

(e) timely performance by Lehman and Northstar to allow BB&B to timely perform its services;

(f) prompt payment by Lehman and Northstar;

(g) volumes of material present;

(h) plans and specifications were complete and accurate;

(i) BB&B would be compensated for down time caused by Lehman and Northstar;

(j) BB&B would be compensated for abnormal or unanticipated site conditions;

(k) BB&B would receive payment for stored materials; and

(l) any extra work performed by BB&B would be paid.

Appellee also asserted that appellant and Northstar had committed the following acts:

(a) failure to timely and correctly locate streets;

(b) failure to timely and correctly locate utilities;

(c) failure to timely and correctly obtain regulatory authority for work to be performed;

(d) failure to timely and correctly perform work by Lehman and Northstar to allow BB&B to timely perform its services;

(e) failure to make prompt payment by Lehman and Northstar;

(f) failure to estimate volumes of material present; and

(g) failure to complete accurate and timely plans and specifications.

According to appellee, after the project was shut down by Bentonville city officials in April 1999, Northstar's employees, as agents for appellant, promised to pay appellee if it would return to work on the subdivision; in reliance upon these representations, appellee performed services for which it had not been paid.

Our review of appellee's allegations leads us to conclude that, although appellee characterized its claims in tort, they do not legitimately sound in tort and that this is actually a breach-of-contract action. Accordingly, appellee's claims are arbitrable under the AUAA.

Affirmed in part; reversed in part and remanded.

BIRD and GRIFFEN, JJ., agree.

Howard W. CURRY and Linda Curry *v.*
William S. THORNSBERRY and Delores Thornsberry

CA 02-583 98 S.W.3d 477

Court of Appeals of Arkansas
Division IV
Opinion delivered February 26, 2003

[Petition for rehearing denied April 2, 2003.]

Charles A. Brown, P.A., for appellants.

Peel Law Firm, P.A., by: *Richard L. Peel* and *Jennifer L. Modersohn*, for appellees.

LARRY D. VAUGHT, Judge. Appellants Howard Curry and his wife Linda, sued appellees William Thornsberry and his wife Delores, the builder and original seller of appellants' home, for damages allegedly caused by appellees during construction. The trial court directed a verdict against appellants at the close of their proof, finding insufficient evidence of fraudulent concealment so as to toll the statute of limitations. The trial court also awarded appellees a portion of their attorney fees under Ark. Code Ann. § 16-22-308 (1999). Appellants bring this appeal challenging both rulings. We affirm.

Appellee William Thornsberry was the owner-developer and contractor of the Lakehill Subdivision in Pope County[1]. The bill of assurance for the subdivision was filed of record on November

[1] Appellee had a partner, Lee Taylor, involved in the development of the subdivision. Title to the property was solely in appellee's name, and Taylor was not made a party to this suit.

6, 1986. The lot at issue, Lot 11, was sold by appellees to Gary and Linda Harris by warranty deed dated May 13, 1987. The Harrises conveyed the property back to appellees on August 31, 1988. The property was then conveyed to Richard Rigby on March 21, 1989. A foreclosure then ensued, and appellants purchased the property from the Secretary of Housing and Urban Development (HUD) by deed dated June 17, 1991.

On March 17, 1995, appellants filed suit[2] alleging that appellees were negligent in the construction of the home by failing to properly determine the type of soil on which the house was built that allowed the house to settle and crack its foundation. The complaint alleged that the subdivision was on top of "Enders soil," a type of soil that expands and contracts with moisture. Appellants alleged that appellees were aware of this type of soil because a 1981 Pope County soil survey had been published and was available to those in the construction industry. Appellants also alleged that appellees breached the implied warranties of fitness, habitation, and merchantability.

Appellees admitted certain undisputed factual allegations in the complaint but denied that they were negligent or that they breached any warranties. Because the suit was filed seven years after the completion of the construction, appellees asserted the five-year limitations period of Ark. Code Ann. § 16-56-112 (Supp. 2001)[3] in their answer.

William Hegeman, a contractor who had known appellee for twenty years, testified that he worked on some of the houses in the Lakehill subdivision, including appellants'. He testified that he put in the footings for appellants' house, with feathered corners instead of square corners. He also testified that he, after consultation with appellee and Taylor, made repairs to cracks in the foundation approximately two years after the original construction by caulking and covering the cracks but not painting them. He testified that the cracks would not be visible to a person who did not

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[2] The original complaint was nonsuited on August 13, 2001, and refiled on August 14, 2001.

[3] The statute was amended in 2001. However, the amendment is not germane to this appeal.

know that repairs had been made. He also testified that, in 1988, the grout sloped out one-half inch and estimated that, at time of trial, it had come out another inch.

Appellee William Thornsberry testified that he was notified by the Harrises that there was a crack in the foundation and that he directed Taylor and Hegeman to make repairs but not to paint over the repairs. Appellee testified that, when the property was conveyed to Rigby in March 1989, he disclosed the defects to Rigby and allowed him a credit for appellees' not making repairs.

Appellant Howard Curry testified that, when he inspected the house with a realtor prior to purchasing it in 1991, he noticed grout in the foundation blocks and cracks along mortar joints and in the sheetrock. He testified that the foundation on the northeast corner cracked and part of it fell to the ground. He testified that, in 1994, he had a conversation concerning the house with appellee during which appellee stated that he (appellee) had no further obligation. Appellant testified that, in his 1996 deposition, he admitted that he had no evidence that anything was done to conceal the defects.

Appellees made an oral motion for directed verdict at the close of appellants' case, stating that the statute of limitations in section 16-56-112 had run and that there was no fraudulent concealment. The trial court ruled that there was insufficient evidence that appellees fraudulently concealed the defects in the house. After the verdict was directed, appellees made a motion for attorney's fees and the trial court awarded appellees $9,000 in attorney's fees and $740 in costs. This appeal followed. Appellants raise two points: first, that the trial court erred in directing the verdict against them and, second, that the trial court erred in awarding attorney's fees and costs.

Appellants' first point is that the trial court erred in granting appellees' motion for directed verdict. In determining the correctness of the trial court's ruling, we view the evidence in the light most favorable to the party against whom the verdict is sought and give it the highest probative value, taking into account all reasonable inferences deducible from it. *City of Little Rock v. Cameron*, 320 Ark. 444, 897 S.W.2d 562 (1995). A motion for

directed verdict should not be granted if there is any substantial evidence that tends to establish an issue in favor of that party. *Minor v. Failla*, 329 Ark. 274, 946 S.W.2d 954 (1997); *Scott Truck & Tractor Co. v. Alma Tractor & Equip., Inc.*, 72 Ark. App. 79, 35 S.W.3d 815 (2000). Evidence is insubstantial when it is not of sufficient force or character to compel a conclusion one way or the other or if it does not force a conclusion to pass beyond suspicion or conjecture. *Cameron, supra.*

In directing the verdict, the trial court found no evidence of fraudulent concealment that would toll the statute of limitations found in Ark. Code Ann. § 16-56-112(a), which provides that "[n]o action in contract . . . to recover damages caused by any deficiency in the design, planning, supervision, or observation of construction or the construction and repair of any improvement to real property . . . shall be brought against any person . . . more than five (5) years after substantial completion of the improvement." Section 16-56-112(d) contains an exception for fraudulent concealment. Section 16-56-112 is a statute of repose and cannot be used to extend what would otherwise be a three-year statute of limitations period under Ark. Code Ann. § 16-56-105 (1987) for negligence or for implied contracts. *East Poinsett County Sch. Dist. No. 14 v. Union Std. Ins. Co.*, 304 Ark. 32, 800 S.W.2d 415 (1990).

The supreme court recently addressed what constitutes fraudulent concealment:

> In order to toll the statute of limitations, we said that plaintiffs were required to show something more than a continuation of a prior nondisclosure. We said that there must be evidence creating a fact question related to "some positive act of fraud, something so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed, or perpetrated in a way that it conceals itself."

Shelton v. Fiser, 340 Ark. 89, 96, 8 S.W.3d 557, 562 (2000) (quoting *Martin v. Arthur*, 339 Ark. 149, 3 S.W.3d 684 (1999)). Accordingly, it is clear from our case law that not only must there be fraud but the fraud must be furtively planned and secretly executed so as to keep the fraud concealed.

Most of the evidence presented goes to whether appellees were negligent in the construction of the house and the damages suffered by appellants. Here, we are not concerned with the merits of the appellants' underlying claims, but instead we address whether their complaint was timely filed. *See Adams v. Arthur*, 333 Ark. 53, 969 S.W.2d 598 (1998). The arguments made by appellants basically assert that appellee and his partner Taylor fraudulently concealed the condition of the house by building the house with knowledge that the property was on "Enders soil" without taking countermeasures to keep the soil from expanding and contracting. Even if this could be called concealment, it was "discovered" when the Harrises discovered cracks in the foundation between May 1987 and August 1988. Appellants also contend that Hegeman's repairing the cracks constituted another concealment that would toll the limitations period. However, when appellees conveyed the property to Rigby in March 1989, they disclosed the defects to Rigby and allowed him a credit for appellees' not making repairs. The notice of a prior purchaser of defects in the construction of the house is imputed to the subsequent purchaser and bars the subsequent purchaser's action for negligence or breach of implied warranties. *Briggs v. Riversound Ltd. P'ship*, 942 S.W.2d 529 (Tenn. Ct. App. 1996) (collecting cases). Appellant testified that, in his 1996 deposition, he admitted that he had no evidence that anything was done to conceal the defects. Further, appellant testified that, when he inspected the house with a realtor prior to purchasing it in 1991, he noticed grout in the foundation blocks and cracks along mortar joints and in the sheetrock. Appellant argues that appellee concealed the fraud when he (appellee) met with appellant in 1994 to discuss drainage problems appellant was experiencing. According to appellant, appellee denied that he built the house and that this constituted fraudulent concealment. This is not concealment because appellant, by his own testimony, shows that he was aware of problems with the construction of the house when he met with appellee. If the problem was serious enough for appellant to meet and discuss the problem with appellee, it was sufficient knowledge to commence the running of the statute of limitations. *See First Pyramid Life Ins. Co. v. Stoltz*, 311 Ark. 313, 843 S.W.2d 842 (1992).

For their second point, appellants argue that the trial court erred in awarding attorney's fees to appellees because appellants' action was not based on a contract but, instead, was based in tort or on an *implied* contract. After the trial court directed the verdict in favor of appellees, appellees filed a motion seeking attorney's fees of $13,110 and costs of $1,256. A detailed invoice was attached to the motion. The trial court entered an order granting appellees $9,000 in attorney's fees and $740 in costs, after deleting certain time entries for work for appellees in other similar cases then pending.

Arkansas Code Annotated section 16-22-308 (1999) provides that "[i]n any civil action to recover on . . . [a] breach of contract, unless otherwise provided by law or the contract which is the subject matter of the action, the prevailing party may be allowed a reasonable attorney fee to be assessed by the court and collected as costs." A trial court is not required to award attorney's fees and, because of the trial judge's intimate acquaintance with the trial proceedings and the quality of service rendered by the prevailing party's counsel, appellate courts usually recognize the superior perspective of the trial judge in determining whether to award attorney's fees. *Jones v. Abraham*, 341 Ark. 66, 15 S.W.3d 310 (2000); *Chrisco v. Sun Indus. Inc.*, 304 Ark. 227, 800 S.W.2d 717 (1990). The decision to award attorney's fees and the amount to award are discretionary determinations that will be reversed only if the appellant can demonstrate that the trial court abused its discretion. *Nelson v. River Valley Bank & Trust*, 334 Ark. 172, 971 S.W.2d 777 (1998); *Burns v. Burns*, 312 Ark. 61, 847 S.W.2d 23 (1993). A grant of attorney's fees is an issue within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Chrisco, supra.*

Appellants alleged in their complaint that appellees were negligent in the construction of the subdivision and that they breached the implied warranties of fitness and habitability. There is some overlap in the proof required for each cause of action. *Briggs, supra.* Appellants argue that, because their cause of action was based in tort and on a duty imposed by an *implied* contract, section 16-22-308 does not authorize an award of fees.

There is an implied warranty of habitability in the sale of a new house in Arkansas. *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970). An action alleging a breach of the warranty of habitability is an action on the contract that authorizes the recovery of fees pursuant to an attorney fee provision in the agreement or by statute. *Fairchild v. Park*, 90 Cal. App. 4th 919, 109 Cal. Rptr. 2d 442 (2001); *Cabal v. Donnelly*, 302 Or. 115, 727 P.2d 111 (1986); *Brickler v. Myers Constr. Inc.*, 92 Wash. App. 269, 966 P.2d 335 (1998). In *Rogers v. Mallory*, 328 Ark. 116, 941 S.W.2d 421 (1997), the supreme court assumed, but did not decide, that an action for breach of an implied warranty was a contract action.

Further, whether an action is based on contract or tort depends upon the nature of the right sued upon, not the form of the pleading or relief demanded. *Bankston v. Pulaski County Sch. Dist.*, 281 Ark. 476, 665 S.W.2d 859 (1984). If based on breach of promise it is contractual; if based on breach of a non-contractual duty it is tortious. *L.L. Cole & Son, Inc. v. Hickman*, 282 Ark. 6, 665 S.W.2d 278 (1984). In the final analysis we look to the pleadings to determine the nature of plaintiff's claim. *Id.*

In *Bankston*, the supreme court noted that breach of warranty actions are often hybrids of tort and contract. The court held that the complaint was primarily for tort but that it also stated a cause of action for breach of the implied warranty of fitness for habitation where it alleged the installation of a defective septic system and sought damages for the repair of the defect. The court also said that, in ascertaining whether the action is for tort or for contract, one can look to the type of damages sought. In the present case, there are allegations that appellees breached the implied warranty because the home's foundation was defective due to the soil properties and sought damages in the amount of repairs made by appellants. Therefore, the present case was a contract action, providing the trial court with a basis to award fees under section 16-22-308.

As noted above, an attorney's fee determination is a discretionary decision for the trial court. Here, the trial court exercised its discretion by reducing the amount of hours claimed

by appellees for work on other, similar cases then pending against appellees. The trial court found that, with the elimination of these hours, the hours claimed and fees charged were reasonable. Appellants do not challenge the fees except to argue that they should have been allowed to cross-examine appellees' attorney to determine whether there was still duplicative work in the fees that were awarded. It has been held that it is not even necessary that the trial court hold a hearing on the amount of attorney's fees, because, having presided over the proceeding, he is familiar with the services rendered by the attorney. *See Potter v. Potter*, 280 Ark. 38, 655 S.W.2d 382 (1983); *Lytle v. Lytle*, 266 Ark. 124, 583 S.W.2d 1 (1979). We cannot say that the trial court abused its discretion.

Affirmed.

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

Martha Ann RUTHERFORD *v.* Donald R. RUTHERFORD

CA 02-551 98 S.W.3d 842

Court of Appeals of Arkansas
Division I
Opinion delivered March 5, 2003

Dick Jarboe, for appellant.

William David Mullen, for appellee.

JOSEPHINE LINKER HART, Judge. Appellant, Martha Ann Rutherford, argues that the trial court erred in refusing to enforce a marital separation agreement that she and appellee, Donald Rutherford, entered into. The separation agreement was filed on the same date as the complaint for divorce. While the trial judge granted appellee a divorce, he declined to enforce the agreement between the parties, finding that appellant had breached the agreement. Further, the trial judge accepted appellee's contentions that appellant used undue influence, duress, and fraud in the inducement to obtain appellee's consent to the agreement. We conclude that the trial court properly refused to enforce the agreement.

After more than ten years of marriage, appellee filed a complaint for divorce on June 21, 2001, that provided in part that the parties and their attorneys had executed and filed a separate "waiver, entry of appearance, agreement, and stipulation" (hereinafter "settlement agreement") for the trial court's consideration and approval. The agreement provided, among other things, for a division of the parties' property upon divorce. Although no answer was filed, appellant did file a counterclaim requesting that the court enforce the property-settlement agreement, which was signed by both parties and approved by their attorneys. Before the case was presented, appellee filed a withdrawal of agreement and petition for an equitable property division on January 25, 2002.

Following a hearing on March 4, 2002, the trial court entered a divorce decree on April 10, 2002. The court refused to incorporate the June 2001 settlement agreement that divided the personal property, gave appellant the marital home, required appellee to pay the outstanding indebtedness owed on the home, and gave appellee seven acres of "hill ground." Instead, the trial

court determined that the property was incapable of division, and with the exception of personal jewelry and clothing, all real and personal property was to be sold by the clerk of the court with the proceeds to be applied to the payment of marital debts and any remainder to be split equally between the parties. From that order comes this appeal.

Our standard of review in this case is *de novo*. *Dalrymple v. Dalrymple*, 74 Ark. App. 372, 47 S.W.3d 920 (2001). In *Middleton v. Lockhart*, 344 Ark. 572, 43 S.W.3d 113 (2001), our supreme court concluded that a court of equity is a court of conscience and it should consider the relative position of the parties and "render a decree that does substantial justice to all." We will not reverse the chancellor unless his findings are clearly erroneous. *Bagwell v. Bagwell*, 282 Ark. 403, 668 S.W.2d 949 (1984). Further, the supreme court has "gone on to say that under ARCP Rule 52 we will not reverse the [C]hancellor's division of property in divorce unless that division can be said to be clearly against the preponderance of the evidence." *Id.* at 406, 668 S.W.2d at 951 (citing *Russell v. Russell*, 275 Ark. 193, 628 S.W.2d 315 (1982)). Due deference is given to the chancellor's superior ability to determine the credibility of the witnesses and the weight to be accorded their testimony. *Dalrymple*, *supra* (citing *Hunt v. Hunt*, 341 Ark. 173, 15 S.W.3d 334 (2000)).

For her sole point on appeal, appellant contends that the trial court erred in refusing to enforce the June 2001 settlement agreement as part of the divorce decree. Appellant argues that the motivating force in appellee's desire to obtain a divorce was that he was involved with another woman. In support of her argument, appellant directs our attention to appellee's testimony that his attorney prepared the settlement agreement because appellee wanted out of the marriage and that appellee had an opportunity to ask his attorney's advice before signing. Appellee testified that nothing else influenced him to consent to the agreement other than the fact that he "wanted out of the marriage." Moreover, appellant notes that appellee stated that he knew that she was "getting more under the agreement" than he was at the time he signed it. Appellant concludes that appellee's testimony belies any claim

of undue influence, duress, or fraud in the inducement by appellant.

According to the settlement agreement, appellee was to receive the washer and dryer from the parties' prior home. Referring to the appliances, appellee testified that appellant threatened to "cut it up" before he would get them. He testified that following the execution of the agreement, appellant slashed the tires on the trailer he had used to move his personal property and that she broke into his house and cut the hoses off the washer and dryer, broke the commode, and left the faucet on the bathtub running. Appellant admitted at the hearing that she pled guilty to the charges of DWI and disorderly conduct after she had broken into appellee's home and damaged the washer and dryer. Moreover, appellant admitted to cutting appellee's tires but asserted that she paid appellee for the damage he had incurred as a result of her actions.

Appellee also testified that he was influenced to consent to the agreement because appellant threatened to burn the house if she did not receive the home in the settlement agreement. Appellee stated that he was actually concerned that appellant would in fact burn down the house because she had burned their previous home. In testimony concerning the previous fire, appellee stated that appellant told him that she would "burn it to the ground," and he stated that she set fire to that house while he went to Black Rock to visit her father.

Jamie Lois Ellis, an acquaintance of appellant, testified that she spoke with appellant two or three days after the agreement was signed. According to Ellis, appellant told her that after getting drunk she broke into appellee's house, and tore up the washer and dryer. Further, appellant told Ellis that she "broke the contract and was afraid she was going to lose everything." Ellis's testimony reflects that she was aware that the parties' previous house had burned. Ellis stated that appellant told her after the parties had separated that "she used lighter fluid and set the house on fire."

Appellant, however, testified that she "accidently left grease on the stove and went outside and . . . burnt [the] house by leaving grease on the stove." Appellant noted that no charges were

filed in connection with the fire, and that she and appellee did not collect insurance for the damage.

In the divorce decree, the trial court found that appellee anticipated an easy, inexpensive, and uncontested divorce pursuant to the terms of the settlement agreement. In refusing to incorporate the agreement into the divorce decree, the trial court found that appellant had substantially breached the terms of the agreement less than ten days after its execution and before any approval by the court. Moreover, the trial court accepted appellee's contentions that undue influence, duress, and fraud in the inducement were exerted by appellant to obtain the agreement.

The question presented by this appeal is whether an agreement of the parties may usurp the authority of the court to divide the marital property before a divorce is granted. Arkansas Code Annotated section 9-12-315 (Repl. 2002) clearly directs that all marital property shall be distributed at the time the decree of divorce is entered. That statute defines marital property as "all property acquired by either spouse subsequent to the marriage except: . . . property excluded by valid agreement of the parties."

Neither appellant nor appellee has cited any cases where the trial court refused to accept a property-settlement agreement and incorporate it into the divorce decree. Appellant relies on *Helms v. Helms*, 318 Ark. 143, 875 S.W.2d 849 (1994), and *Carden v. McDonald*, 69 Ark. App. 257, 12 S.W.3d 643 (2000), to support her first argument. However, both of these cases involve post-decree requirements for modifying agreements that had been incorporated into the divorce decree. In *Helms*, our supreme court held that in the absence of fraudulent inducement in executing an integrated property settlement agreement, a divorce decree may not be judicially modified. *Id.* The court further stated that the fact that the husband had entered into an agreement which was not to his liking was no ground for relief. *Id.* Likewise, appellant cited *Carden* for the proposition that one party's displeasure with an agreement that she had previously entered into is no ground for relief.

Appellant relies on Arkansas Code Annotated section 9-12-313 (Repl. 2002) as authority for the proposition that the court

should enforce a valid agreement of the parties. Section 9-12-313 provides in part that a court "may enforce the performance of a written agreement between husband and wife made and entered into in contemplation of either separation or divorce and decrees or orders for alimony and maintenance by sequestration of the property of either party."

However, in *Womack v. Womack*, 16 Ark. App. 108, 110, 697 S.W.2d 930, 931 (1985), this court discussed two cases in which the supreme court explained that it was not bound by the parties' agreement in a divorce action:

> In *Pryor v. Pryor*, 88 Ark. 302, 114 S.W. 700 (1908), the court said: "The court is not, in the first instance, bound by the agreement of the parties concerning the amount of alimony to be allowed to the wife." The Court explained the matter in this way: "This is so because the court is moved to action by principles of justice and equity, and is not bound to follow the agreement of the parties against what appears to be the justice of the case."

In *Bachus v. Bachus*, 216 Ark. 802, 227 S.W.2d 439 (1950), the court said:

> The parties to a divorce action may agree upon the alimony or maintenance to be paid. Although the court is not bound by the litigants' contract, nevertheless if the court approves the settlement and awards support money upon that basis there is then no power to modify the decree at a later date.

Further, we note that in *McCue v. McCue*, 210 Ark. 826, 832, 197 S.W.2d 938, 941 (1946), our supreme court stated, "[C]ertainly the Court is not bound by an agreement [that a] disputing husband and wife may enter into, in order to terminate a controversy; and this is true even in the absence of fraud or coercion."

In our view, the court is not bound by a stipulation entered into by the parties: rather, it is within the sound discretion of the court to approve, disapprove, or modify the agreement. Arkansas Code Annotated section 9-12-313 merely provides the court with the means to enforce an agreement entered into and approved by the court and does not limit the court's discretion to accept or reject the agreement of the disputing parties. Even so,

the trial court in exercising its discretion in the division of property matters must consider the factors set out in section 9-12-315. Thus, based on the evidence in this case, we cannot say that the trial court's refusal to enforce the settlement agreement was clearly erroneous.

In view of our holding, we do not address appellant's second argument that appellee's consent was not the result of undue influence, duress, or fraud in the inducement. Therefore, we affirm.

Affirmed.

PITTMAN and GLADWIN, JJ., agree.

John CLOUD and Yvonne CLOUD *v.*
REGIONS INVESTMENTS COMPANY, Inc.

CA 02-647 98 S.W.3d 846

Court of Appeals of Arkansas
Division II
Opinion delivered March 5, 2003

John David Cloud, for appellants.

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

ROBERT J. GLADWIN, Judge. On January 10, 2001, John and Yvonne Cloud entered arbitration proceedings with Regions following a dispute about the Clouds' investment in Wal-Mart stock. Arbitration resulted in an award in favor of Regions on February 14, 2001. On May 14, 2001, the Clouds filed a motion to vacate the award in the Clark County Chancery Court and mailed a copy of that motion to Stephen A. Rowe in Alabama because he was the attorney who had represented Regions in the arbitration proceedings. Events finally culminated in an order entered by the trial court on March 15, 2002, in which the court granted Regions' motion to dismiss the Clouds' petition "with prejudice." From that order comes this appeal.

In order to gain a full understanding of the issues on appeal, we must first discuss the procedural history of this case. After the Clouds moved to vacate the award following the arbitration proceedings, the trial court entered an order on July 13, 2001, purporting to vacate the award, but, on that same date, it also entered an order denying the Clouds' motion to vacate with a handwritten notation that it was denied because there was no proof of service. Thereafter, on July 23, 2001, the trial court entered an order to disregard the July 13 order vacating the award, but on the same date entered another order vacating the award. On October 8, 2001, the trial court set aside the July 23 order vacating the award and instructed the Clouds to serve Regions with their motion as required by the Arkansas rules.

Unaware of the October 8 order, Regions filed a motion to set aside the July 23 order and motion to dismiss on October 22, 2001, on the grounds that the Clouds failed to timely and properly serve it as required by Ark. Code Ann. § 16-108-216 (Repl. 1987) and Ark. R. Civ. P. 4(i). At a hearing on January 14, 2002, the trial court granted Regions' motion. On January 16, the court entered its order dismissing the Clouds' motion to vacate "without prejudice" pursuant to Ark. R. Civ. P. 4(i). The court found that Regions was not properly served in accordance with Ark. Code Ann. § 16-108-216 in that Mr. Rowe was not authorized to accept service on behalf of Regions and service was not otherwise properly obtained within 120 days. Meanwhile, on January 15, 2002, the Clouds had re-filed their motion to vacate the arbitration award and requested that a summons be issued. Subsequently, on February 1, 2002, Regions filed a motion to dismiss the Clouds' motion to vacate "with prejudice." On March 15, 2002, the trial court held a hearing and entered its order of dismissal "with prejudice."

Arkansas Code Annotated section 16-108-212(b) (Repl. 1987) provides that, when seeking to vacate an arbitration award, an application shall be made within ninety days after delivery of a copy of the award to the applicant. According to Ark. Code Ann. § 16-108-216 (Repl. 1987), "Except as otherwise provided, an application to the court under this subchapter shall be by motion and shall be heard in a manner and upon the notice provided by

law or rule of court for the making and hearing of motions. Unless the parties have agreed otherwise, notice of an initial application for an order shall be served in the manner provided by law for the service of a summons in an action." Arkansas Rule of Civil Procedure 4(i) provides that, if service of the summons is not made upon a defendant within 120 days after the filing of the complaint, the action shall be dismissed as to that defendant without prejudice.

The Clouds argue on appeal that the trial court erred when it forever barred the refiling of their motion to vacate the award because Ark. R. Civ. P. 4(i) requires a dismissal to be without prejudice. Although the Clouds filed their original motion to vacate the award within ninety days, they failed to serve the summons within 120 days as required by Ark. R. Civ. P. 4(i). As such, their cause of action was not "commenced" in accordance with Ark. R. Civ. P. 3. *See Bodiford v. Bess*, 330 Ark. 713, 956 S.W.2d 861 (1997). By the time the Clouds refiled their motion to vacate, the ninety-day deadline for filing suit under Ark. Code Ann. § 16-108-216 had expired. Ordinarily, a dismissal under Rule 4(i) is without prejudice; however, if the suit is otherwise barred, as it is here, the dismissal is with prejudice. *See Kangas v. Neely*, 346 Ark. 334, 57 S.W.3d 694 (2001); *Bodiford v. Bess*, 330 Ark. 713, 956 S.W.2d 861 (1997).

The Clouds also argue that "viable" motions must be answered pursuant to Ark. R. Civ. P. 6(c) and (d), and thus their service was not inadequate. However, although they styled their initial pleading as a motion to vacate, Ark. Code Ann. § 16-108-212 itself sets forth the procedure to follow in order to serve vacation of an arbitration award, and section 216 clearly provides that an initial "application" for such relief shall be served in the manner provided by law for the service of a summons in an action. The trial court, therefore, correctly found that service of their motion was governed by Ark. R. Civ. P. 4(i).

Likewise, the Clouds' final argument on appeal must fail. The Clouds contend that the trial court erred when it determined that the so-called saving statute did not apply. Arkansas Code Annotated section 16-56-126 provides that if any action is

commenced within the time prescribed by a statute and the plaintiff suffers a nonsuit, he may commence a new action within one year. The Clouds cannot avail themselves of the saving statute where they have failed to complete timely service on Regions and have not, thus, "commenced" their cause of action. *See Nef v. AG Services of America, Inc.*, 79 Ark. App. 100, 86 S.W.3d 4 (2002). Moreover, the Clouds did not take a nonsuit, *i.e.*, a voluntary dismissal pursuant to Ark. R. Civ. P. 41(a).

Affirmed.

ROAF and BIRD, JJ., agree.

Brenda GAUSE *v.* SHELTER GENERAL INSURANCE

CA 02-616 98 S.W.3d 854

Court of Appeals of Arkansas
Division II
Opinion delivered March 5, 2003

[Petition for rehearing denied April 2, 2003.]

Henry, Halsey & Thyer, PLC, by: *Troy Henry*, for appellant.

Womack, Landis, Phelps, McNeill & McDaniel, by: *J.V. Phelps* and *Pamela A. Haun*, for appellee.

JOHN B. ROBBINS, Judge. On October 20, 1999, appellant Brenda Gause was injured in an automobile collision with an uninsured motorist. Ms. Gause was a named insured under a policy issued by appellee Shelter General Insurance Company. The policy provided limits of $25,000.00 in uninsured-motorist coverage and $5,000.00 in medical pay coverage, for which separate premiums were paid. Ms. Gause filed suit against Shelter on January 2, 2001, for uninsured-motorist benefits, and amended her complaint on April 4, 2001, to seek payment of medical expenses. In January 2002, Shelter agreed to pay all medical expenses, which totaled $2071.12. The case proceeded to a jury trial on the issue of underinsured-motorist coverage.

Prior to trial, Shelter made a motion to introduce evidence that it had paid all of Ms. Gause's medical expenses pursuant to the medical-payment provision of the policy. Shelter argued that introduction of the medical bills would be misleading if it was not allowed to introduce evidence of payment. Ms. Gause objected, arguing that Shelter was not entitled to an offset for these payments, and that the payments were inadmissible because they were part of a compromised settlement. The trial court granted Shelter's motion and permitted evidence of payment. In addition, the trial court refused to give Ms. Gause's proffered jury instruction that included medical expenses as a measure of damages. The jury returned a verdict awarding Ms. Gause $16,000.00 in damages.

Ms. Gause now appeals, raising two arguments. She first contends that the trial court erred in permitting Shelter to offset from its uninsured-motorist coverage the amount it had paid under its medical-expense coverage. In the alternative, she argues that the trial court erred in allowing evidence of payment of her medical bills because such payment was part of a compromised settlement and inadmissible under Ark. R. Evid. 408. We agree with appellant's first argument, and we reverse and remand on that basis.

■ ■ The outcome of this case is controlled by our supreme court's holding in *Shelter Mut. Ins. Co. v. Tucker*, 295 Ark. 260, 748 S.W.2d 136 (1988). In that case, the jury awarded the appellee $25,000.00 under her uninsured-motorist policy, plus $9979.70 in medical expenses under the medical-payment provision of the policy. One of the issues raised on appeal by the appel-

lant insurance company was that it was entitled to a setoff for the award of medical expenses. The supreme court disagreed, and reasoned:

> In the alternative, the appellant contends that the trial court should have allowed it to set off the damages due under the medical payment provisions by the amount paid under the uninsured motorist coverage. This court has held that an insurance company is prohibited from setting off one payment under its policy against another one under the same policy. *State Farm Mut. Auto Ins. Co. v. Sims*, 288 Ark. 541, 708 S.W.2d 72 (1986). We have recognized that the right of reimbursement and credit is allowed pursuant to Ark. Code Ann. § 23-89-207 (1987) in a situation where there are payments from more than one source. *Id.* That is not the case here.

In the present case, the trial court effectively gave Shelter a setoff for its medical payments, and this was erroneous because an insurance company cannot set off one payment under its policy for another one under the same policy.

Shelter argues that the setoff was proper and cites *Shelter Mut. Ins. Co. v. Bough*, 310 Ark. 21, 834 S.W.2d 637 (1992), and *State Farm Mut. Automobile Ins. Co. v. Rose*, 52 Ark. App. 175, 916 S.W.2d 764 (1996). However, those cases are distinguishable from the instant case because in each of those cases the appellee had received the policy limits of the tortfeasor's liability coverage, and the issue involved whether he could collect under both his underinsured-motorist coverage and medical-payment provision of the policy. In *Shelter Mut. Ins. Co. v. Bough*, *supra*, the supreme court held that the appellant insurance company had a right to subrogation for the medical payments it made. However, this credit was authorized pursuant to Ark. Code Ann. § 23-89-207 (1987), because there were payments from more than one source.

Shelter further argues that *Shelter Mut. Inc. Co. v. Tucker*, *supra*, is inapplicable because in that case the appellee recovered the full policy limits of her uninsured-motorist coverage, and thus recovery of her medical expenses did not amount to a double recovery. It maintains that Ms. Gause has been made whole, and will be given a double recovery if she is allowed to recover under both coverages because her damages were less than the policy limits. However, we do not interpret the supreme

court's holding so narrowly. The supreme court in that case did not draw the distinction that is now being suggested by Shelter, and it is well settled that this court is bound to follow the precedents of the Arkansas Supreme Court. *See Smith v. Aluminum Co. of America*, 78 Ark. App. 15, 76 S.W.3d 309 (2002).

Because Shelter was not entitled to a setoff for medical payments made to Ms. Gause, the trial court erred in allowing evidence of such payments and in failing to instruct the jury to consider medical expenses as a measure of damages. Based on our disposition of the first issue, it is unnecessary to address Ms. Gause's argument that evidence of payment was inadmissible as part of a compromised settlement.

Reversed and remanded.

BIRD and GRIFFEN, JJ., agree.

Jerome GRAVES *v.* Loran Graves STEVISON

CA 02-600 98 S.W.3d 848

Court of Appeals of Arkansas
Division II
Opinion delivered March 5, 2003

W. Marshall Prettyman, for appellant.

J. Shane Baker, for appellee.

SAM BIRD, Judge. This appeal is from an order denying appellant Jerome Graves's motion, on the ground of fraud, to abate his child-support obligation for a child who was born to his ex-wife, appellee Loran Graves Stevison, a few weeks before the parties' divorce was final. The Crittenden County circuit judge denied his motion on the basis of *res judicata*. We affirm the denial of appellant's motion for two reasons not expressed by the judge.

The parties were married in September 1986 and separated in May 1987. On March 14, 1988, appellee filed for divorce and stated in her complaint that she was expecting a "child of the marriage." Although appellant was served with process, he did not file an answer or otherwise defend the action. The child, Julia, was born on July 20, 1988. The judge granted appellee a divorce on August 10, 1988. Finding that the parties had one minor child, the judge awarded appellee custody of Julia and ordered appellant to pay child support in the amount of $20 per week. In a later URESA action from Tennessee filed in the Crittenden County Chancery Court, Case No. E89-1750, the Office of Child Support Enforcement (OCSE) obtained a judgment against appellant for arrearages and an order requiring appellant to pay $20 per week for the support of the child.

On January 26, 2000, appellant filed a petition for relief from judgment in the original divorce action, alleging that, at the time of the divorce he did not doubt that he was Julia's father but had since learned otherwise. He requested that he be relieved of his obligation to pay child support for Julia. To his complaint, appellant attached appellee's affidavit, wherein she stated:

> 3. During the marriage, one child was born to me, namely Julia Renee Graves, born July 20, 1988. This child was listed as a child of the marriage in the divorce decree. However, Jerome Graves is not the father of Julia Renee Graves. Jerome Graves was listed as the father of the child because we were still married at the time of her birth.
>
> 4. Julian Partee is the father of the child. He is also the father of my child Asia Graves, born May 31, 1989. I believe he lives in Memphis, Tennessee, but I do not know his address.

The OCSE's action against appellant in E89-1750 was consolidated with this case, and the OCSE assumed the status of an intervenor. Blood tests that were performed later determined that appellant is not Julia's father.

Appellant argued below that, pursuant to Ark. R. Civ. P. 60(c)(4), he was entitled to have the determination of his paternity in the divorce decree set aside because appellee had committed intrinsic fraud. Formerly, a judgment could be set aside under that rule for extrinsic, but not intrinsic, fraud. Rule 60(c)(4) was amended in January 2000. The amendment abolished the traditional distinction between intrinsic and extrinsic fraud and provided that, after ninety days, a judgment may be set aside for "fraud (whether heretofore denominated intrinsic or extrinsic) by an adverse party." According to appellant, the amendment to the Rule made it possible for the court to set aside the determination of his paternity of Julia. The OCSE argued in response that the determination of the child's paternity was *res judicata* and could not be relitigated by the parties. It also argued that, although Lord Mansfield's Rule[1] had been abrogated, the best interests of the child would not be served in this situation by relitigating her paternity. The OCSE further argued that appellant had failed to prove that any fraud, intrinsic or extrinsic, had occurred.

A hearing was held on the motion. The record does not reveal that any testimony was taken. On December 18, 2000, the judge issued a letter opinion, wherein he stated:

> It is true, as defendant asserts, that fraud in procurement of the judgment is a defense against application of the doctrine of res judicata. *Wells v. Ark. Public Service Commission,* [272] Ark. 481, 616 S.W.2d 718 (1981). The query here, is the non-disclosure of plaintiff to defendant that he may not be the father, such fraud as to defeat the defense of res judicata? Clearly, prior to amendment of Rule 60(c), it was not, the extrinsic/intrinsic rule holding sway. *Alexander v. Alexander,* 217 Ark. 230, 229 S.W.2d 234 (1950).

[1] In 1915, Arkansas adopted Lord Mansfield's Rule, which barred a husband and wife from testifying in a paternity proceeding as to the husband's non-access during the period of conception. *Thomas v. Pacheco,* 293 Ark. 564, 740 S.W.2d 123 (1987).

> The holding, tone and tenor of *OCSE v. Williams*, 338 Ark. 347, 995 S.W.2d 338 (1999), suggests that this type fraud is tolerated in Arkansas, as well as other jurisdiction[s], on some public policy basis that children of such marriages are entitled to be supported. To this Court, it is bad policy to reward an adulterous, deceitful, nefarious, lying litigant to saddle an unsuspecting man with such a burden, but it appears to be the law, and this Court is obliged to enforce it, as distasteful as it is. It is not as though the child will remain in blissful ignorance of the true fact. Here, her mother has filed an affidavit, admitting her perjured testimony, and named the true father.
>
> Defendant cites *OCSE v. Mitchell*, 61 Ark. App. 54, 964 S.W.2d 218 (1998), but that case dealt with a child out-of-wedlock, and *Williams* seems to hold cases of that sort are on a different footing than children born during a marriage.
>
> In sum, the Court find[s] that *Williams* controls the outcome here, and the January, 2000 amendment to Rule 60(c) does not offer a reason to escape the effect of res judicata on the prior holding that defendant is the father.

The order denying appellant's motion to abate child support on these grounds was filed on March 8, 2002. It is from that order that this appeal follows.

Arguments

Appellant contends on appeal as he did below that, pursuant to the January 2000 amendment to Ark. R. Civ. P. 60(c)(4), which abolished the distinction between intrinsic and extrinsic fraud, he was entitled to relief from the judge's finding that he is the father of the child and to abatement of his child-support obligation. He argues that judicial determinations of paternity are no exception to the remedy provided by Rule 60(c)(4) to litigants who have been defrauded. He also asserts that he did not have a fair opportunity to litigate the issue of paternity prior to the entry of the divorce decree because of the application of Lord Mansfield's Rule, which has since been abrogated by Ark. Code Ann. § 16-43-901 (Repl. 1999). Appellant further contends that *Office of Child Support Enforcement v. Williams,* 338 Ark. 347, 995 S.W.2d 338 (1999), on which the judge relied, is factually and legally dis-

tinguishable from this situation. We need not decide these issues because Rule 60 does not apply in this case and appellant failed to establish fraud.

Rule 60(c)(4), Rule 55(c), and Fraud

Appellant's reliance upon Rule 60 is misplaced because the divorce decree was a default judgment, to which Rule 60 does not apply. Although appellant was served with process, he did not file an answer or otherwise appear in the divorce action before the decree was filed. Arkansas Rule of Civil Procedure 55(a) states: "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, judgment by default may be entered by the court." Rule 60(c)(4) expressly provides that it does not apply to default judgments:

> (c) *Grounds for Setting Aside Judgment, Other Than Default Judgment, After Ninety Days.* The court in which a judgment, other than a default judgment [which may be set aside in accordance with Rule 55(c)] has been rendered or order made shall have the power, after the expiration of ninety (90) days of the filing of said judgment with the clerk of the court, to vacate or modify such judgment or order:
>
> . . . .
>
> (4) For misrepresentation or fraud (whether heretofore denominated intrinsic or extrinsic) by an adverse party.

Additionally, the Reporter's Notes to Rule 55 state that it is "the exclusive basis for setting aside a default judgment" and that, "[a]s amended in 1990, Rule 60 does not apply to default judgments." The court may, upon motion, set aside a default judgment previously entered for the reason of fraud. *See* Rule 55(c)(3).[2] Unlike Rule 60(c)(4), Rule 55(c) was not amended to include intrinsic fraud as a basis for setting aside a judgment. Therefore, we conclude that extrinsic fraud is still required to set aside a default judgment.

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[2] Appellant does not argue any reason besides fraud as a basis for setting aside the decree.

Our next question is whether appellant established extrinsic fraud. In *Ward v. McCord,* 61 Ark. App. 271, 966 S.W.2d 925 (1998), we discussed extrinsic fraud, which was then required to set aside a decree under Rule 60(c)(4):

> [T]he fraud for which a decree will be canceled must consist in its procurement and not merely in the original cause of action. *First Nat'l Bank v. Higginbotham Funeral Serv., Inc.,* 36 Ark. App. 65, 818 S.W.2d 583 (1991). It is not sufficient to show that the court reached its conclusion upon false or incomplete evidence, or without any evidence at all, but it must be shown that some fraud or imposition was practiced upon the court in the procurement of the decree, and this must be something more than false or fraudulent acts or testimony the truth of which was, or might have been, an issue in the proceeding before the court which resulted in the decree assailed. *Id.* . . . The party seeking to set aside the judgment has the burden of showing that the judgment was obtained by fraud, and the charge of fraud must be sustained by clear, strong, and satisfactory proof. [*Id.*] Whether the procurement of a judgment amounted to fraud upon the court is a conclusion of law. *Hardin v. Hardin,* 237 Ark. 237, 372 S.W.2d 260 (1963).

61 Ark. App. at 279-81, 966 S.W.2d at 928-30 (citations omitted). The only evidence offered by appellant was Ms. Stevison's affidavit, quoted above. The record contains no testimony from the divorce trial or from the hearing on appellant's motion. The conclusion is inescapable that appellant did not establish extrinsic fraud.

The standard of review of an order denying a petition to set aside a default judgment is whether the trial judge abused his discretion. *Collins v. Keller,* 333 Ark. 238, 969 S.W.2d 621 (1998); *Layman v. Bone,* 333 Ark. 121, 967 S.W.2d 561 (1998). Based on the foregoing considerations, the judge did not abuse his discretion in refusing to grant appellant's motion.

Affirmed.

ROBBINS, J., agrees.

GRIFFEN, J., concurs.

WENDELL L. GRIFFEN, Judge, concurring. I agree with the result and reasoning announced in the principal opinion authored by Judge Bird and file a separate concurrence to address two concerns. First, as author of our decision in *Golden v. Golden*, 57 Ark. App. 143, 942 S.W.2d 282 (1997), I want to highlight the differences between that case and the one at hand. In *Golden*, we held that a trial judge did not err in a divorce proceeding by refusing to find the wife *estopped* from denying her husband's paternity of a minor child born during the marriage under the doctrine of *res judicata*. *Golden* involved a challenge to paternity made by the wife during the context of the divorce action itself. Unlike in this case, where the trial court has already entered a decree finding that the parties had a minor child born of the marriage, awarded child custody, and ordered payment of child support, in *Golden* there was no previous court finding — accurate or not — that the child was born of the marriage. As such, the doctrine of *res judicata* did not apply. We are confronted with a much different scenario in this case.

My second reason for filing this concurring opinion relates to the candid and, in my view, compelling observation made by Judge VanAusdall, the trial judge in this case.

> The holding, tone and tenor of *OCSE v. Williams*, 338 Ark. 347, 995 S.W.2d 338 (1999), suggests that this type fraud is tolerated in Arkansas, as well as other jurisdictions, on some public policy basis that children of such marriages are entitled to be supported. To this Court, it is bad policy to reward an adulterous, deceitful, nefarious, lying litigant to saddle an unsuspecting man with such a burden, but it appears to be the law, and this Court is obliged to enforce it, as distasteful as it is. It is not as though the child will remain in blissful ignorance of the true fact. Here, her mother has filed an affidavit, admitting her perjured testimony, and named the true father.

Appellee alleged in her divorce complaint and testified during the uncontested divorce proceeding that she was "expecting a child of the marriage." Appellant did not contest the divorce and apparently did not controvert the allegation of paternity in the divorce complaint despite having been served with process. Thus, the divorce decree declares: "[t]he parties have one (1) minor

child, namely: Julia Renee Graves, born July 20, 1988," and ordered appellant to pay child support.

As the principal opinion states, this case is not controlled by Rule 60(c) of the Arkansas Rules of Civil Procedure, but by Rule 55(c), the rule that governs default judgments. Rule 60(c) has ended the intrinsic/extrinsic fraud distinction for vacating judgments tainted by fraud so that litigants in contested matters can obtain relief. What I do not understand is why we apparently recognize the value of allowing truth to prevail over fraud in contested matters so as to permit judgments procured through fraud to be vacated under Rule 60(c), but have not amended Rule 55 to permit similar treatment for default judgments. Uncontested divorces are not unusual, nor do they indicate lack of interest in the judicial proceeding by the uncontesting litigants. In some instances, persons of meager income may decide that engaging in a legal contest will take money away from other more pressing needs. Litigants who do not respond to divorce complaints involving allegations of paternity and petitions for child support may, as shown in this case, not know that they have countervailing grounds for divorce, let alone reasons to contest paternity.

Julia Graves and other children in her situation deserve child support, to be sure. However, they deserve to be supported by the men responsible for their existence, not men deceived by their mothers so the mothers can collect child-support payments. We do not allow perpetrators of fraud to profit from their deceit in any other area of the law. I see no reason why we should make an exception in family law.

The idea expressed in *Williams* that we should not look behind a trial court's determination of paternity because we want to preserve the relationship between children and their fathers is well-intentioned, but unpersuasive. I suspect that some men who discover that they have been the victims of adultery and deceit have established nurturing relationships with their putative children and will desire to maintain those relationships. In *Golden* we affirmed the trial court's decision recognizing visitation rights for the stepfather precisely for that reason.

But there is another concern we must not ignore. Men who discover they have been tricked into paying child support will not forget that they have been tricked when it comes to dealing with the children they are compelled to support. The law can take a man's money by court order, however, no court can force a man to love a child he knows is not his own. Refusing to relieve men from the obligation to pay child support for children they never sired, but were tricked into acknowledging, does not turn them into fathers. It simply makes the law the oppressive ally of fraudulent mothers.

The consequences of following *Williams* are troubling in another respect. Men who are compelled to pay child support based on court orders that declare them fathers of children they did not sire may wonder, with justification, how they can obtain financial reimbursement for the money they lost. If they sue the women whose allegations led to the mistaken judicial findings of paternity, the *Williams* holding seems to protect the women from liability. If they seek contribution from the actual fathers, it is unclear how the actual fathers might be held liable to reimburse putative fathers for support payments ordered by trial courts upon explicit paternity findings. This may not concern some observers, but it should. After all, the whole purpose of our legal system is to fashion orderly and *just* outcomes to disputes.

Like Judge VanAusdall, I am obliged to apply the law set forth by our supreme court in *Williams*. But I agree that it is unsound policy to force unsuspecting men to pay child support for children they never fathered simply because the men and judges have been deceived into believing allegations by mothers about paternity. If we have enough sense to recognize the effects of paternity testing when we get them, we should have enough sense to vacate inaccurate legal pronouncements of paternity in divorce decrees and child- support orders whether they occur in contested matters or not. After all, a judicial process based on lies will be legal as long as it can compel obedience. Any process that defies the truth it discovers in favor of a lie it formerly believed is ultimately unjust and undeserving of respect, no matter how much we rationalize it and despite our success in compelling deceived men to obey it.

Allean WILLIAMS *v.* DIRECTOR, Employment Security Department and Conagra

E 02-313 98 S.W.3d 856

Court of Appeals of Arkansas
Division II
Opinion delivered March 5, 2003

Appellant, pro se.

Allan Franklin Pruitt, for appellee.

SAM BIRD, Judge. In this unbriefed employment security case, Allean Williams appeals the Board of Review's denial of her claim for unemployment benefits. The Board based its decision upon a finding that Williams voluntarily and without good cause connected with the work, left last work due to a compelling personal emergency, but without making reasonable efforts to preserve her job rights. The Board affirmed the decision of the Appeal Tribunal, which affirmed and modified the department's determination to deny benefits. We reverse and remand for an award of benefits.

The employer did not appear in the telephone conference before the Appeal Tribunal. Williams testified that her household consisted of herself, her disabled husband, her mentally retarded twenty-nine-year-old daughter, and her eighty-six-year-old father. She stated that her daughter was not able to do anything for herself, that her husband had undergone back surgery and could barely walk, and that her father, although mobile, was unable to care for himself because of his age. Williams said that she quit work when her babysitter of five years died and Williams took over the babysitter's duties. She said that she had no one to care for her family at the time, and that she would not have left her job except for these personal issues.

Arkansas Code Annotated section 11-10-513 (Repl. 2002) provides that, as a prerequisite to receiving unemployment benefits, an employee is required to make every reasonable effort to preserve her job rights before leaving employment. *Brooks v. Director*, 62 Ark. App. 85, 966 S.W.2d 941 (1998). The statute reads in part:

> (a)(1) If so found by the Director of the Arkansas Employment Security Department, an individual shall be disqualified for benefits if he or she voluntarily and without good cause connected with the work left his or her last work.
>
> . . . .

> (b) No individual shall be disqualified under this section if, after making reasonable efforts to preserve his or her job rights, he or she left his or her last work due to a personal emergency of such nature and compelling urgency that it would be contrary to good conscience to impose a disqualification. . . .

On review of unemployment-compensation cases, the factual findings of the Board of Review are conclusive if they are supported by substantial evidence; but that is not to say that our function on appeal is merely to ratify whatever decision is made by the Board of Review. *Boothe v. Director*, 59 Ark. App. 169, 954 S.W.2d 946 (1997). We will reverse the Board's decision when it is not supported by substantial evidence. *Id.* Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.*

Williams testified that she initially asked personnel manager Mattie Bullock for a leave, and that Bullock told her to go to her supervisor about the matter. Williams testified that she then went to Reggie, her head supervisor; that Reggie would not give her the leave; and that she did not return to Bullock. Williams further testified that she had not been told about a Family Medical Leave, that she never had been given a personnel handbook, and that she could not file a grievance because she was not in the union.

The Board of Review viewed Williams's failure to seek assistance after her supervisor denied her request as persuasive evidence that she did not make reasonable efforts to preserve her job rights. We disagree. We hold that reasonable efforts to preserve job rights would not have included Williams's seeking authority above her supervisor under the facts of this case: she had been informed by the personnel manager that the leave had to be granted by the supervisor, she had tried that avenue, and there was no evidence of any policy directing her to pursue a particular chain of command. We therefore hold that there is no substantial evidence to support the Board's finding that Williams did not make reasonable efforts to preserve her job rights.

Reversed and remanded for an award of benefits.

ROBBINS and GRIFFEN, JJ., agree.

Herb ADAMS and Agri Air Services, LLC *v.*
WACASTER OIL COMPANY, Inc.

CA 02-199 98 S.W.3d 832

Court of Appeals of Arkansas
Divisions II and III
Substituted Opinion[1] upon Grant of Petition
for Rehearing delivered March 5, 2003

[1] *Reporter's note*: The original opinion was unpublished.

Ogles Law Firm, by: *Johnson D. Ogles*, for appellants.

Mark Alan Mayfield, for appellee.

ANDREE LAYTON ROAF, Judge. Appellants, Herb Adams and Agri Air Services, appeal a Garland County Circuit Court award of summary judgment to the appellee, Wacaster Oil Company, Inc., on their claims for breach of contract, breach of express warranty, breach of implied warranty of fitness for a particular purpose, and implied warranty of merchantability. Appellants assert that the trial court erred in granting appellee's motion for summary judgment. In our original unpublished opinion in this case, issued October 23, 2002, we dismissed the appeal based upon the lack of a final order. The appellee timely filed a petition for rehearing and contended that the order appealed from was final because it dismissed the appellants' complaint with prejudice. We have granted the petition and reinstated the appeal. In this substituted opinion, we affirm the trial court's decision.

Appellants engage in the business of providing crop-dusting services. Appellee is a business that sells various types of fuel. On May 1, 1996, appellants purchased 1,500 gallons of aviation fuel from appellee. On June 17, 1996, a plane owned by appellants crashed. A Federal Aviation Administration investigation revealed that the plane did not contain the proper fuel.

Appellants filed suit on March 22, 2000, asserting breach of contract, breach of express warranty, breach of the implied warranty of fitness for a particular purpose, and breach of the implied warranty of merchantability. Appellee answered, asserting lack of notice as one of its defenses. Appellee then filed a motion for summary judgment. In its motion, appellee asserted that appellants had accepted the fuel and failed to give reasonable notice of the breach pursuant to Ark. Code Ann. § 4-2-607(3)(a) (Repl. 2001).

Following a hearing, the court granted appellee's motion. In its order, the court characterized the action as a breach-of-warranty action. The court found that Ark. Code Ann. § 4-2-607(a)(3) requires a buyer to give reasonable notice to the seller upon the discovery of any breach. The court also found that the giving of notice was a condition precedent to recovery and that appellants had failed to give appellee reasonable notice. While the order did not specifically address the appellants' breach-of-contract claim, it recited that "the plaintiff's complaint is dismissed . . . with prejudice." We have concluded that this is a final, appealable order, and we therefore address the merits of appellants' appeal.

The appellants argue that the trial court erred in granting the appellee's motion for summary judgment with respect to their claims for breach of contract and breach of warranty. Summary judgment should only be granted when it is clear that there are no disputed issues of material fact, and it is appropriate to sustain a grant of summary judgment if the evidence brought before the trial court by the moving party shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *O'Mara v. Dykema*, 328 Ark. 310, 942 S.W.2d 854 (1997). With regard to the contract claim, they assert that there was a contract because it is undisputed that appellants purchased 1,500 gallons of aviation fuel from appellee as evidenced by the written purchase order, that the fuel was defective and caused the crash of appellants' crop duster, and that the trial court ignored the breach-of-contract claim in the final order. Specifically, appellants contend that a breach-of-contract claim is not displaced by a breach-of-warranty claim pursuant to Ark. Code Ann. § 4-1-103 (Repl. 2001), which provides:

> Unless displaced by the particular provisions of this subtitle, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

The trial court found that appellants were required to give notice of breach pursuant to Ark. Code Ann. § 4-2-607, which provides in pertinent part:

> Where a tender has been accepted the buyer must within a reasonable time after he observed or should have observed any breach notify the seller of breach or be barred from any recovery.

Ark. Code. Ann. § 4-2-607(3)(a).

Although not relied upon by the trial court or appellee, the Uniform Commercial Code further provides, in Ark. Code Ann. § 4-2-714 (Repl. 2001) "Buyer's damages for breach in regard to accepted goods":

> (1) Where the buyer has accepted goods *and given notification* (§ 4-2-607(3)) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.
>
> (2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.
>
> (3) In a proper case any incidental and consequential damages under the next section may also be recovered.

(Emphasis added.) Additionally, Ark. Code Ann. § 4-2-715 (Repl. 2001) is referenced in the preceding section, and provides in pertinent part:

> (2) Consequential damages resulting from the seller's breach include:
>
> (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had rea-

son to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.

Finally, we note that the supreme court has stated in *Microsize, Inc. v. Arkansas Microfilm, Inc.*, 29 Ark. App. 49, 780 S.W.2d 574 (1989), that an action involving the sale of defective machinery was controlled by the Uniform Commercial Code rather than common law and that the giving of jury instructions on a breach-of-contract theory was error. We conclude that the trial court did not err in ruling that Ark. Code Ann. § 4-2-607 was applicable to the appellants' claim.

With regard to the claim for breach of warranty, the appellants contend that no particular form of notice to the seller is required and that the notice need not be in writing. They further assert that because they did not discover that the aviation fuel was defective until their airplane crashed, Ark. Code Ann. § 4-2-607 is inapplicable to the facts of this case. Finally, appellants contend that whether sufficient notice had been given was a question of fact and should not have been resolved through summary judgment.

Appellants' argument must fail for several reasons. In *Williams v. Mozark*, 318 Ark. 792, 888 S.W.2d 303 (1994), the appellant had bought a fire-extinguishing system from appellee. The system failed, causing a fire and extensive damages. The trial court directed a verdict on appellant's claim for breach of warranty on the basis of lack of notice. In affirming, the supreme court stated:

> Williams next argues that the trial judge erred in directing a verdict in favor of Mozark on her count for breach of implied warranty of fitness for a particular purpose. Williams first indicated a reliance on this theory of recovery in her second amended complaint, filed July 16, 1993, more than five years after the fire. At trial, after Williams's case-in-chief, appellee moved for a directed verdict on the basis of lack of notice of this theory of recovery. The trial judge granted the motion.
>
> The Uniform Commercial Code provides that a "buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred

> from any remedy." Ark. Code Ann. § 4-2-607(3)(a) (Repl. 1991). We have held that the giving of reasonable notice is a condition precedent to recovery under the provisions of the commercial code and that the giving of notice must be alleged in the complaint in order to state a cause of action. *L.A. Green Seed Co. v. Williams*, 246 Ark. 463, 438 S.W.2d 717 (1969). In *L.A. Green Seed Co.*, we affirmed a directed verdict in favor of the defendant because the giving of notice was not alleged in the complaint. We have additionally stated that the notice must be more than a complaint. *Cotner v. International Harvester Co.*, 260 Ark. 885, 545 S.W.2d 627 (1977). Thus, under the statute, Williams failed to give proper notice by the filing of her second amended complaint.
>
> Williams contends that the purpose behind the notice requirement is not present in this case because the product was destroyed, and, therefore, we should not follow the literal wording of the statute. The purpose of the statutory notice requirement of a breach is twofold. First, it is to give the seller an opportunity to minimize damages in some way, such as by correcting the defect. Second, it is to give immunity to a seller against stale claims. *L.A. Green Seed Co.*, 246 Ark. at 468, 438 S.W.2d at 720. While it is true that the system was destroyed and the seller can no longer minimize damages, the other statutory purpose is present. Thus, we decline to ignore the statutory requirement.

318 Ark. at 796-97, 888 S.W.2d at 305-06.

Clearly, *Williams v. Mozark* mandates that reasonable notice of the claim of breach of warranty was required even though appellants' airplane had crashed before the defect in the fuel was discovered, that the giving of notice must be more than a complaint, and that the giving of notice must be alleged in the complaint itself. Here, appellants did not allege the giving of notice in their complaint or in their response to the motion for summary judgment, and do not do so on appeal.

Under the circumstances of this case, the trial court did not err in granting summary judgment and dismissing appellants' complaint in its entirety with prejudice based upon the failure to give notice of "any breach" as required by Ark. Code Ann. § 4-2-607. We therefore affirm.

Affirmed.

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

NEAL and VAUGHT, JJ., would deny.

OLLY NEAL, Judge, dissenting. I would deny rehearing in this case because I believe the parties do not have a final appealable order.

Rule 2(a)(1) of the Arkansas Rules of Appellate Procedure—Civil provides that an appeal may be taken only from a final judgment or decree entered by the trial court. *Jackson v. Delis*, 76 Ark. App. 436, 67 S.W.3d 596 (2002). Whether a final judgment, decree, or order exists is a jurisdictional issue that this court has the duty to raise, even if the parties do not, in order to avoid piecemeal litigation. *Van DeVeer v. George's Flowers Inc.*, 76 Ark. App. 408, 65 S.W.3d 488 (2002). Arkansas Rule of Civil Procedure 54(b) further provides that when more than one claim for relief is presented in an action or when multiple parties are involved, an order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not a final appealable order. *See* Ark. R. Civ. P. 54(b). When a court directs the entry of a final judgment as to fewer than all of the claims and finds no just reason for delaying an appeal, the court must execute a certificate of final judgment. *See Jackson v. Delis*, *supra*; Ark. R. Civ. P. 54(b).

In their complaint appellants asserted breach-of-contract and breach-of-warranty claims, and in their briefs the parties discuss both breach of contract and breach of warranty. However, in its order granting summary judgment, the court described the cause of action as merely a breach-of-warranty action and failed to address appellants' breach-of-contract claim. I believe the court failed to address all of appellants' claims. We also lack a certificate of final judgment. Therefore, we do not have a final appealable order. Thus, I believe this court is without jurisdiction to hear this case and the case should be dismissed.

VAUGHT, J., joins in this dissent.

Ken CRENSHAW and Barbara Crenshaw *v.*
DOUBLETREE CORP.; Promus Corp.;
Capital City Hotel Ltd. Partnership;
Seymour N. Logan Assocs., Inc.;
and Doubletree Hotel Systems, Inc.

CA 02-490 98 S.W.3d 836

Court of Appeals of Arkansas
Division II
Opinion delivered March 5, 2003

Cuffman and Phillips, by: *James H. Phillips*, for appellants.

Barber, McCaskill, Jones & Hale, P.A., by: *John S. Cherry, Jr.* and *D. Keith Fortner*, for appellees.

ANDREE LAYTON ROAF, Judge. Ken and Barbara Crenshaw appeal the trial court's grant of summary judgment in favor of Doubletree Corp., *et al.* (Doubletree), and dismissal of their case with prejudice. Ken Crenshaw, while a guest at the Doubletree Hotel, was injured when he fell while alighting from a Doubletree van. The trial court found that Doubletree was a private rather than a common carrier and, thus, owed Crenshaw only the duty to exercise ordinary care, and that the duty was not breached because there was no reasonable foreseeability that Crenshaw would fall under the circumstances presented. On appeal, Crenshaw argues that the trial court erred in granting the summary judgment because Doubletree breached its duty in (1) failing to provide him a safe place to alight, and (2) failing to offer assistance to him in alighting from the van. We affirm.

Ken Crenshaw and Barbara Crenshaw sued Doubletree for injuries sustained by Ken Crenshaw in March 1996 when he fell while exiting a van owned and operated by Doubletree and used for transporting guests in connection with their stay at the hotel. On the night of the accident, the Crenshaws and several other hotel guests were driven to Doe's Eat Place around dusk in the Doubletree van. The driver of the van, Larry Batch, was employed by Doubletree Hotel as a bell captain and had driven hotel patrons to Doe's at least fifty times without incident prior to Crenshaw's accident. The Crenshaws stated in their depositions that Batch stopped in the street in front of Doe's because vehicles were parked along the curb in front of the restaurant. Batch testified that there were no vehicles in front of the restaurant and that he stopped the van at the curb. Crenshaw testified in his deposition that the other passengers, including his wife, alighted from the van without incident and, when asked what caused him to fall, stated:

> Don't know, other than it was a high step down; and when we come out the door, I was trying to hold myself to go down; it was apparently just further down than I thought it was.
>
> . . . .
>
> . . . you've got the frame of the door around it as you grab it, but there was no equipment there like a rail or something — a grab bar, or anything like that, to hold on to.

Doubletree filed a motion for summary judgment alleging that it only owed a duty of ordinary care and did not breach its duty under the circumstances in which Crenshaw was injured. The trial judge granted the motion and dismissed the Crenshaws' complaint with prejudice. The court found that Doubletree was a private carrier and did not breach the duty to use ordinary care by parking the van away from the curb, thereby requiring passengers to alight from the van in the street. The court further held that the driver did not breach the duty to use ordinary care in failing to assist Ken Crenshaw when he alighted from the van, even though the driver had rendered such assistance to the Crenshaws the previous evening. The Crenshaws appeal.

[redacted] It is well settled that summary judgment is regarded simply as one of the tools in a trial court's efficiency arsenal; however, the granting of the motion is only approved when the state of the evidence as portrayed by the pleadings, affidavits, discovery responses, and admission on file is such that the nonmoving party is not entitled to a day in court, that is, when there is not any genuine remaining issue of fact and the moving party is entitled to judgment as a matter of law. *Flentje v. First Nat'l Bank of Wynne*, 340 Ark. 563, 570, 11 S.W.3d 531, 536 (2000). Summary judgment is not proper "where evidence, although in no material dispute as to actuality, reveals aspects from which inconsistent hypothesis [*sic*] might reasonably be drawn and reasonable minds might differ." *Thomas v. Sessions*, 307 Ark. 203, 208, 818 S.W.2d 940, 943 (1991). The object of summary-judgment proceedings is not to try the issues, but to determine if there are any issues to be tried, and if there is any doubt whatsoever, the motion should be denied. *Id.* (*citing Rowland v. Gastroenterology Assoc., P.A.*, 280 Ark. 278, 657 S.W.2d 536 (1983)).

The Crenshaws argue on appeal that the trial court erred in granting the summary-judgment motion. They do not take issue with the trial court's finding that Doubletree operated its passenger vans as a private carrier rather than a common carrier. Arkansas Code Annotated section 23-13-203(a)(5) and (18) (Repl. 2000) define common and private carriers, as follows:

> (5) "Common carrier by motor vehicle" means any person who or which undertakes, whether directly or indirectly, or by lease of equipment or franchise rights, or any other arrangement, to transport passengers or property or any classes of property for the general public by motor vehicle for compensation whether over regular or irregular routes,
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> . . . .
>
> (18) "Private carrier" means any person engaged in the transportation by motor vehicle upon public highways of persons or property, or both, but not as a common carrier by motor vehicle or a contract carrier by motor vehicle and includes any person who transports property by motor vehicle, where the transportation is incidental to or in furtherance of any commercial enterprise of the person, which enterprise is one other than transportation;

The supreme court has held that "the law imposes the highest degree of skill and care on common carriers," including the duty "to furnish their passengers a safe place to get on and off." *Halperin v. Hot Springs Street Ry. Co.*, 227 Ark. 910, 302 S.W.2d 535 (1957); *Checker Cab & Baggage Co. v. Harrison*, 191 Ark. 564, 87 S.W.2d 32 (1935); *Arkansas Power & Light Co. v. Hughes*, 189 Ark. 1015, 76 S.W.2d 53 (1934). However, the Crenshaws do not dispute that the duty of a private carrier is that of ordinary care and diligence rather than the heightened care owed by common carriers. *See Alpha Zeta Chapter of Pi Kappa Alpha Fraternity by Damron v. Sullivan*, 293 Ark. 576, 740 S.W.2d 127 (1987); *Forbes v. Reinman & Wolfort*, 112 Ark. 417, 166 S.W. 563 (1914). The Crenshaws instead argue that there are material facts remaining on the question of whether Doubletree breached this duty by parking its van in such a manner that Crenshaw was required to step out onto an uneven street, in poor lighting, and

further down than he had anticipated, and in failing to offer assistance as Crenshaw alighted from the van.

The Crenshaws contend that the risk to Crenshaw was foreseeable in that Doubletree's driver had parked at the curb and provided assistance when he drove the Crenshaws to another restaurant on the previous evening. They, therefore, contend that the element of foreseeability is present in this case, and whether Crenshaw was provided a safe place and manner in which to alight from the van was a jury question inappropriate for summary judgment. The Crenshaws cite two cases for this general proposition, *Yellow Cab Co. v. Dossett*, 244 Ark. 554, 426 S.W.2d 792 (1968) and *Capitol Transit Co. v. Burris*, 224 Ark. 755, 276 S.W.2d 56 (1955); however, both of these cases involved common carriers. In *Capitol Transit Co. v. Burris*, *supra*, the supreme court affirmed a judgment for a child who was injured when she was struck by a car while attempting to cross the street after alighting from a public bus. The bus had stopped at an unusual place rather than the regular bus stop, and a driver attempting to pass the bus because he did not expect it to stop there, struck and injured the girl. *Id.* The court held that whether the bus driver stopped at a safe place for a seven-year-old child was a question of fact for the jury. *Id.* In *Yellow Cab v. Dossett*, *supra*, a woman passenger was likewise struck by an oncoming car after being discharged by the driver in the middle of the street. The supreme court, in affirming a judgment against the cab company, held that whether a particular point is a safe place for a passenger to alight must be viewed in the light of the particular circumstances and is generally a jury question. *Id.* Neither of these cases have been cited for the proposition relied on by the Crenshaws since *Yellow Cab* was decided in 1968 and, more significantly, both involved common carriers.

The cases relied upon by Doubletree in support of its argument that it did not breach the duty of ordinary care in this instance are likewise not helpful because they do not involve carriers, common or private. *See Jenkins v. Hestand's Grocery, Inc.*, 320 Ark. 485, 898 S.W.2d 30 (1995) (affirming summary judgment for grocery store where customer fell on a wheelchair ramp and there was no evidence to show the ramp presented a dangerous or unreasonable risk to invitees); *Gann v. Parker*, 315 Ark. 107, 865

S.W.2d 282 (1993) (affirming summary judgment for homeowners in suit by a serviceman shocked by wiring while removing a stove where there had been no prior notice to the homeowners of defective or inadequate wiring); *Kay v. Kay*, 306 Ark. 322, 812 S.W.2d 685 (1991) (affirming directed verdict for homeowners in suit by housekeeper bitten by a brown recluse spider where there was no prior knowledge by the owners of the existence of the danger or showing of acts or omissions amounting to negligence). While these authorities do involve the duty of ordinary care and the absence of prior similar incidents as in the Crenshaws' case, they are so distinguishable factually as to provide little guidance in this case.

On the question of whether Doubletree breached the duty of ordinary care in stopping its van in the street, Crenshaw contends that he was forced to alight from the van under conditions that were not safe because of the high step-down, uneven conditions of the roadway, dim lighting, and because the van was not equipped with hand rails, grab bar, or lighted steps. However, Crenshaw testified that the driver stopped at "the only place he could" because cars were parked along the curb. The passengers were not discharged into oncoming traffic as in *Yellow Cab v. Dossett, supra.* The trial court found that it was not foreseeable that Crenshaw would fall, stating in its order that "[I]t is not negligence to fail to anticipate that someone will step and fall upon an apparently safe road." A "place of safety" in this context has been held to generally mean an area of firm ground which is itself reasonably safe. *Cooperider v. Peterseim*, 103 Ohio App. 3d 476, 659 N.E.2d 882 (1995). We agree that, under the circumstances presented in this case, there is not a genuine issue of material fact as to whether Doubletree breached its duty of ordinary care in stopping away from the curb in the street.

The trial court also found that Doubletree did not breach its duty by failing to offer assistance to Crenshaw, and we agree. We can find no authority involving the failure to offer assistance to passengers by a private carrier. However, case law and other authority involving common carriers are instructive on this issue.

> In the absence of circumstances showing that a passenger about to board, or alight from, the vehicle of a carrier requires assistance, there is as a general rule of no duty personally to assist him, particularly in the absence of any request for assistance . . .
>
> . . . .
>
> A custom of assisting passengers is not binding on the carrier unless it has knowledge thereof, or unless the custom is so well known that it may reasonably be presumed to be a part of the contract of carriage.

13 C.J.S. *Carriers* § 547 (1990). Even under a heightened duty of care, our supreme court has found negligence in this regard by a common carrier only under special circumstances. *See, e.g., Missouri Pac. Transp. Co. v. Guthrie*, 227 Ark. 566, 299 S.W.2d 829 (1957) (affirming judgment for bus passenger who told driver she was practically blind and would need help in getting off where driver failed to help her); *Yazoo & Miss. Valley R.R. Co. v. Littleton*, 177 Ark. 199, 5 S.W.2d 930 (1928) (affirming judgment where railroad company failed to assist boy weakened by illness in alighting from train after agreeing to take care of him in transit and in getting off); *Pittman v. Hines*, 144 Ark. 133, 221 S.W. 474 (1920) (reversing judgment for railroad company where it failed to render assistance to prevent appellant whom its employees had been notified was "crazy and wild," from jumping from a moving train).

[redacted] In this instance, Crenshaw was neither disabled nor suffering from any special condition and did not request assistance from Doubletree's driver or indicate that he was in need of assistance. We further note that passengers of private carriers have the duty to exercise ordinary care for their own safety, including a reasonable use of their faculties of sight, hearing, and intelligence to observe and appreciate danger or threatened danger of injury. *See, e.g., Rone v. Miller*, 257 Ark. 791, 520 S.W.2d 268 (1975); *Elmore v. Dillard*, 227 Ark. 260, 298 S.W.2d 338 (1957). Finally, while one authority has said that the general duty of private carriers to exercise ordinary care in transporting passengers includes the duty to "warn passengers of nonapparent dangers," *Pemberton v. Lewis*, 235 N.C. 188, 69 S.E.2d 512 (1952), there is no evidence or allegation that the height of the van floor was not apparent to

Crenshaw. Crenshaw has failed to present evidence or authority to support his argument that Doubletree owed a specific duty to assist him in alighting, or that it breached its general duty to exercise ordinary care under the circumstances involved in his fall. Crenshaw has in essence asserted that he simply misjudged how far down to step in exiting the van, not that this distance was not readily apparent to him or that he had any special need for assistance that was made known to Doubletree. We conclude that the trial court properly found that there was no duty to assist in this case and, consequently, there was no breach of the duty of ordinary care.

Affirmed.

GLADWIN and NEAL, JJ., agree.

Kenneth Nolnor MARBLEY *v.* STATE of Arkansas

CA CR 02-689 100 S.W.3d 48

Court of Appeals of Arkansas
Division III
Opinion delivered March 12, 2003

William R. Simpson, Jr., Public Defender, by: *Erin Vinett*, Deputy Public Defender, for appellant.

Mark Pryor, Att'y Gen., by: *Ka Tina Hodge*, Law Student # 678 Admitted to Practice Pursuant to Rule XV of the Rules Governing Admission to the Bar of the Arkansas Supreme Court

Under Supervision of *Clayton K. Hodges*, Ass't Att'y Gen., for appellee.

JOHN F. STROUD, JR., Chief Judge. Kenneth Marbley was convicted by a Pulaski County Circuit Court jury of the offenses of rape and kidnapping. He was sentenced to the Arkansas Department of Correction for twenty-five years on the rape conviction and fifteen years on the kidnapping conviction, with the sentences to be served consecutively. His sole point on appeal is that the trial court erred in denying his motions for directed verdict on the offense of kidnapping because there was insufficient evidence of nonconsensual restraint for the purpose of kidnapping.[1] We affirm.

The victim, A.R., testified that on January 8, 2001, she was on her way to a friend's house when appellant pulled up beside her in his car and asked her name. She gave him a false name, because although she had seen him before in the neighborhood, she did not know him. Appellant told her that his name was Kenneth and offered her a ride to her friend's house. A.R. asked him if he was going to hurt her, and appellant told her no, that he was just going to take her where she needed to go. A.R. asked if appellant could take her to the store; he agreed to take her to the store and then to her friend's house. A.R. willingly got into appellant's car, went to the store, purchased a soft drink, and then got back into the car with appellant. When she got back into the car, appellant told her to put her seatbelt on, and he drove her to her friend's house. A.R. testified that when they arrived at her friend's house and she started to get out of the car, appellant pulled a gun wrapped in a blue Wal-Mart bag from the back seat and pressed it to her thigh. Appellant told A.R. to lean back and place her hands under her thighs; he then drove from Little Rock to Mayflower, Arkansas. During the drive, appellant asked A.R. if she was "clean," just in case they decided to have sex. A.R. testified that she knew when appellant asked her that "that something was gonna happen that I did not want to happen."

A.R. said that appellant took her to his house, told her to take off her clothes, and raped her. She said that appellant told her that as long as she did what he told her to do, he would take her

[1] Marbley does not appeal his rape conviction.

home. She did not try to run away because she knew he had a gun and she thought he might catch her and hurt her. After appellant initially raped A.R., he made her perform oral sex on him, and when she gagged, he raped her a second time. After that, he gave A.R. her clothes and took her outside to the bathroom to "make sure the evidence was gone." He waited while she used the bathroom and then the two of them got back into appellant's car. They stopped in North Little Rock at a gas station; appellant pumped gas and then went inside to pay. A.R. testified that she did not try to run away at that point because appellant was going to take her home. Appellant did take A.R. almost all of the way home, dropping her off a couple of blocks from her house. After arriving home, A.R. told her mother what had happened, called the police, and was taken to the hospital for an examination.

At the close of the State's case, appellant's counsel made the following motion for directed verdict:

> Your Honor, we make our motion for directed verdict specifically as to the kidnapping. The State must prove that there was restraint without consent. There was at least one period of time where the victim could have left and didn't. . . . [S]he may be able to say she did not choose to leave, nonetheless, she was not restrained at that period of time.

This motion was denied; appellant called no witnesses and renewed his motion for directed verdict, which was again denied.

■ ■ On appeal, appellant argues that he did not restrain A.R. without consent other than the restraint that was incidental to the rape. The State contends that appellant did not make this argument below and is therefore now barred from making this argument on appeal. We agree. A party cannot change the grounds for an objection or motion on appeal, but is bound by the scope and nature of the arguments made at trial. *Pyle v. State*, 340 Ark. 53, 8 S.W.3d 491 (2000). Although both arguments concern the issue of nonconsensual restraint, appellant's argument to the trial court was that A.R. was not restrained without consent because there were at least two times that she could have left and did not do so. On appeal, he does not challenge his rape conviction, but instead argues that he did not use any more restraint on A.R. than was necessarily incidental to the rape. Because this

argument was not made to the trial court in appellant's motion for directed verdict, appellant cannot now make this argument on appeal, and his conviction for kidnapping is affirmed.

Nevertheless, even if we were to address the merits of appellant's argument, we hold that there is sufficient evidence to support his conviction for kidnapping. For purposes of this case, the relevant portion of the kidnapping statute is Ark. Code Ann. § 5-11-102(a)(4) (Repl. 1997), which provides, "A person commits the offense of kidnapping if, without consent, he restrains another person so as to interfere substantially with his liberty for the purpose of inflicting physical injury upon him, or of engaging in sexual intercourse, deviate sexual activity, or sexual contact with him." "Restraint without consent" is defined as "restraint by physical force, threat, or deception." Ark. Code Ann. § 5-11-101(2) (Repl. 1997).

In *Summerlin v. State*, 296 Ark. 347, 350, 756 S.W.2d 908, 910 (1988), our supreme court held that "it is only when the restraint exceeds that normally incidental to the crime that the rapist (or robber) should also be subject to prosecution for kidnapping." In that case, the appellant grabbed his victim as she jogged past him and a struggle ensued. The victim screamed for the appellant to let her go as he was ripping her shorts. Although the appellant was able to get on top of his victim, she was able to get away from him and escape. Our supreme court affirmed the conviction for attempted rape but reversed the kidnapping conviction, holding that the restraint employed on the victim was no greater than that which the State was required to prove on the attempted rape charge and therefore could not form the basis for the separate crime of kidnapping.

In *Shaw v. State*, 304 Ark. 381, 802 S.W.2d 468 (1991), our supreme court again reversed and dismissed a kidnapping charge while affirming the conviction for rape. In that case, the victim and the appellant were to go on a dinner date; instead, they went to a liquor store and purchased some whiskey. Then, on the pretense of purchasing "a part," appellant drove the victim to a remote camp site, where they listened to music. When the appellant asked the victim if he could kiss her, she said no, and he told her that he could just "blow her head off" and no one would find her. The victim began to walk down the road, but she got back

into the truck after appellant followed her and apologized. Appellant then drove to a dead-end and told the victim to get out of the truck; he then pulled a gun on her and raped her. In reversing the kidnapping conviction, the supreme court held that there was no substantial interference with the victim's liberty to warrant a separate conviction for kidnapping because by the victim's own testimony her actions were consensual until appellant pulled a gun and forced her to take off her clothes.

Appellant relies on the above cases in his argument and urges this court to find that the facts and circumstances in his case are analogous. He also cites *Chism v. State*, 312 Ark. 559, 853 S.W.2d 255 (1993); however, we find that the facts of that case are inapplicable to appellant's case. Furthermore, we hold that the circumstances in the present case are more analogous to those in *Thomas v. State*, 311 Ark. 609, 846 S.W.2d 168 (1993), than the facts found in *Summerlin* or *Shaw*.

In *Thomas*, the victim was waiting for her school bus when the appellant, with his son and nephew in the car, offered her a ride to school. The victim accepted the ride, but the appellant did not take her to school; instead, he took her down a dirt road. Appellant told the victim that he would kill her if she did not stop hitting him and kicking him. Appellant got the victim out of the car, took her clothes off, threatened her with a knife, and then raped her. The supreme court distinguished *Shaw*, stating that while the victims both voluntarily entered the vehicles, the victim in *Shaw* continued to consent to her rapist's actions when he deviated from the agreed-upon destination whereas the victim in *Thomas* began to revoke her consent as soon as it became apparent that the appellant was not taking her to the agreed-upon destination — school. In affirming, the supreme court held:

> In reaching our conclusion, we emphasize the fact that appellant continued to remove the victim from the point of their initial contact after she expressed a desire to be returned to the agreed-upon destination. Appellant did not rape the victim at the point of initial contact as was the case in *Summerlin*, 296 Ark. 347, 756 S.W.2d 908, nor at the point where the victim revoked her consent to appellant's actions as was the case in *Shaw*, 304 Ark. 381, 802 S.W.2d 468.

311 Ark. at 612, 846 S.W.2d at 170.

In the present case, appellant did not rape A.R. at the point of initial contact; therefore, this case is distinguishable from *Summerlin*. Although appellant took A.R. to her friend's house, he did not let her out; rather, he placed a gun to her leg and told her to lean back and place her hands under her thighs. We hold that A.R. revoked her consent at that time. However, appellant did not rape A.R. until after he drove her to Mayflower; therefore, *Shaw* is also distinguishable. In the case at bar, although the victim willingly entered appellant's car, appellant restrained her liberty without her consent prior to the rape by forcing her at gunpoint to go with him to his home in Mayflower rather than letting her get out of his car at her friend's house. This restraint was not incidental to the rape and is sufficient to satisfy the "restraint without consent" element of the offense of kidnapping. Appellant's kidnapping conviction is affirmed.

Affirmed.

NEAL and VAUGHT, JJ., agree.

ARKANSAS DEPARTMENT of HUMAN SERVICES *v.* Merle HAEN

CA 02-365 100 S.W.3d 740

Court of Appeals of Arkansas
Division II
Opinion delivered March 12, 2003

Richard Neil Rosen, for appellant.

Donald C. Tippett, for appellee.

JOHN B. ROBBINS, Judge. Appellant Arkansas Department of Human Services appeals the entry of an order of the Craighead County Circuit Court that found appellee Merle Haen, a certified nursing assistant, not to have abused an eighty-seven-year-old female resident of the Rose Care Nursing Home. DHS prevailed before the administrative agency on its complaint that such abuse occurred on May 15, 2000, resulting in Haen being placed on the Certified Nursing Abuse Registry. Haen appealed, and the circuit court reversed the agency decision, expunging Haen's name from the abuse registry. This appeal followed, and DHS argues to us that the agency decision should be reinstated. We disagree and affirm the circuit court's order.

This court's review is limited in scope and is directed not to the decision of the circuit court but to the decision of the administrative agency. *Arkansas Cont. Lic. Bd. v. Pegasus Renovation Co.*, 347 Ark. 320, 64 S.W.3d 241 (2001); *Tomerlin v. Nickolich*, 342 Ark. 325, 27 S.W.3d 746 (2000). Review is limited to ascertaining whether there is substantial evidence to support the agency's decision. *Tomerlin v. Nickolich*, 342 Ark. at 331, 27 S.W.3d at 749; *Arkansas Bd. of Exam'rs v. Carlson*, 334 Ark. 614, 976 S.W.2d 934 (1998); *Arkansas Dep't of Human Servs. v. Thompson*, 331 Ark. 181, 959 S.W.2d 46 (1998). Substantial evidence is 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." *Tomerlin v. Nickolich*, 342

Ark. at 333, 27 S.W.3d at 751 (*quoting Arkansas State Police Comm'n v. Smith*, 338 Ark. 354, 362, 994 S.W.2d 456, 461 (1999)). The challenging party has the burden of proving an absence of substantial evidence. *Id.* To establish an absence of substantial evidence, the challenging party must demonstrate that the proof before the administrative tribunal was so nearly undisputed that fair-minded persons could not reach its conclusion. *Id.* The question is not whether the testimony would have supported a contrary finding but whether it supports the finding that was made. *Id.* We review the entire record in making that determination. *Arkansas Bd. of Exam'rs v. Carlson, supra.* Administrative agencies are better equipped than courts, by specialization, insight through experience, and more flexible procedures to determine and analyze underlying legal issues affecting their agencies, and this recognition accounts for the limited scope of judicial review of administrative action and the refusal of the court to substitute its judgment and discretion for that of the administrative agency. *Tomerlin v. Nickolich, supra.*

These standards are consistent with the provisions of the Administrative Procedure Act at Ark. Code Ann. §§ 25-15-201 to 25-15-214 (Repl. 1996). Under the Administrative Procedure Act, the circuit court or appellate court may reverse the agency decision if it concludes:

> (h) [T]he substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
>
> (2) In excess of the agency's statutory authority;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error or law;
>
> (5) Not supported by substantial evidence of record; or
>
> (6) Arbitrary, capricious, or characterized by abuse of discretion.

Ark. Code Ann. § 25-15-212(h) (Repl. 1996).

The allegations in this case were predicated on the laws found in Chapter 28 of the Code, titled "Abuse of Adults," Ark. Code Ann. §§ 5-28-101, *et seq.* These laws were designed primarily to protect the health, welfare, safety, and dignity of elder Arkansans. In the definitions, "abuse" is defined as:

> (A) Any intentional and unnecessary physical act which inflicts pain on or causes injury to an endangered or impaired adult, including sexual abuse; or
>
> (B) Any intentional or demeaning act which subjects an endangered or impaired adult to ridicule or psychological injury in a manner likely to provoke fear or alarm[.]

Ark. Code Ann. § 5-28-101 (Repl. 1997). The administrative law judge specifically noted section 5-28-101 in her letter opinion and found that Mr. Haen negligently pushed the wheelchair of a nursing home resident, Ms. Shelby, into Shelby's room, causing the wheelchair and Shelby's foot to hit a wall. The judge further found that despite the small size of the room at the nursing home, this negligent act was not necessary and that Haen should have taken care to make sure that Shelby was placed in her room without causing harm to her or her wheelchair.

The evidence taken at the administrative hearing included the testimony of eyewitness Brenda Welch, whose mother was Shelby's roommate at the Jonesboro, Arkansas, facility. Welch said that in May 2000, as she sat in a chair in her mother's room, she saw Shelby's wheelchair come through the door "pretty fast" and then hit the wall. Shelby cursed and cried out. Welch could not see who pushed the wheelchair in, and Shelby replied that it was "that boy." Welch asked Haen if he pushed her in, and Haen said that he did, expressed remorse, and said that they were short-handed. Welch believed that Shelby had severe arthritis such that it hurt her to move or be touched based on her observations of Shelby constantly complaining. The nursing-home administrator testified that Haen was subsequently terminated, but not for this incident.

Haen presented two former employees to explain the working conditions at the nursing home and their experience with Ms. Shelby. Melissa Efird testified that Ms. Shelby suffered from

arthritis and that she always "hollered" every time she was moved. Efird also said that the rooms were so small that it was difficult not to scrape the door with a resident's wheelchair. John Green essentially echoed Efird's testimony about Ms. Shelby and the difficulty of maneuvering wheelchairs in the rooms. Green added that Haen's bedside manner was really good. There was a stipulation that additional witnesses, residents of the nursing home where Haen was currently working, would testify that Haen gave them good care. Haen then stated on the record that there was no evidence whatsoever that Ms. Shelby was injured. Haen also asked the ALJ to review the criminal reports that had cleared him of any wrongdoing and noted that Shelby was examined and found to be without injury and even said nothing was wrong with her foot.

Haen argues that the ALJ found Haen's act to be negligent and unnecessary but that this does not meet the threshold statutory requirement to constitute abuse. Haen is correct. The ALJ concluded that Haen's conduct "was abusive under Arkansas Code Annotated § 5-28-101(1)," without specifying which of the two definitions of abuse in § 5-28-101(1) she was applying. However, in the ALJ's discussion of the case, she only refers to the definition of "abuse" contained in subsection (A) of § 5-28-101(1), *i.e.*, "Any intentional and unnecessary physical act which inflicts pain on or causes injury to an endangered or impaired adult." She further found that the appellant's act was "not necessary." The ALJ's opinion does not evince that any consideration was given to whether appellant's conduct would come within the definition of "abuse" contained in subsection (B) of § 5-28-101(1), *i.e.*, whether this would be a "demeaning act which subjects an endangered or impaired adult to ridicule or psychological injury in a manner to provoke fear or alarm." Nor did appellant contend on appeal to the circuit court or now before our court that subsection (B) was applicable. Consequently, our consideration is limited to a review of the findings and legal rationale announced by the ALJ.

■ ■ Arkansas Code Annotated section 5-28-101(1)(A) requires that the wrongful act be both "intentional and unnecessary." Although an agency's interpretation of a statute is highly

persuasive, where the statute is not ambiguous, we will not interpret it to mean anything other than what it says. *Social Work Licensing Bd. v. Moncebaiz*, 332 Ark. 67, 71, 962 S.W.2d 797, 799 (1998). Simply put, the ALJ did not make the requisite findings to support the violation she found. Therefore, substantial evidence does not support the agency decision.

DHS attempts to change the basis of the agency decision by arguing that the intent of this chapter in the Code found at Ark. Code Ann. § 5-28-102 would necessarily bring Haen's act into the definition of abuse. The legislature recognized that "rehabilitative and ameliorative services are needed to provide for the detection and correction of the abuse, maltreatment, or exploitation of adults who are unable to protect themselves." Ark. Code Ann. § 5-28-102(a). This section goes on to state that:

> "Abuse, maltreatment, or exploitation" includes any willful or negligent acts which result in neglect, malnutrition, sexual abuse, unreasonable physical injury, material endangerment to mental health, unjust or improper use of an adult for one's own advantage, and failure to provide necessary treatment, attention, sustenance, clothing, shelter, or medical services by a caretaker or by the impaired individual.

Id. at subsection (b). We agree that the overriding purpose is to protect the elderly and incapacitated from willful or negligent acts in general, but the specific section cited by the agency as found to be true was not supported by the findings that were made. Courts may not accept the appellate counsel's post hoc rationalizations for an agency action; an agency's action must be upheld on a basis articulated by the agency itself. *Motor Vehicle Mfr. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *AT&T Communications of Southwest, Inc. v. Arkansas Pub. Serv. Comm'n*, 40 Ark. App. 126, 843 S.W.2d 855 (1992).

The agency decision is reversed, and the circuit court's order is affirmed.

BIRD and GRIFFEN, JJ., agree.

Robert Stephen HILL *v.* STATE of Arkansas

CA CR 02-700 100 S.W.3d 84

Court of Appeals of Arkansas
Division II
Opinion delivered March 12, 2003

[redacted]

James E. Hensley, Jr., for appellant.

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

JOHN B. ROBBINS, Judge. This appeal arose from a bench-trial criminal conviction of appellant, Robert Stephen Hill, in Lonoke County, following a purported conditional plea of guilty to the charge of possession of controlled substance, methamphetamine, a Class C felony. Appellant argues that (1) the arresting officers lacked the requisite suspicion to detain him, as established by Ark. R. Crim. P. 3.1 and Ark. Code Ann. § 16-81-203, (2) the arresting officers exceeded the scope of a Terry frisk and Ark. R. Crim. P. 3.4, (3) that appellant did not consent to the search of his person, and (4) that the denial of his motion to suppress was reversible error. Because appellant's purported conditional guilty plea did not conform with Ark. R. Crim. P. 24.3(b) (2002), we dismiss the appeal for lack of jurisdiction.

On January 29, 2002, the trial court held a suppression hearing pursuant to appellant's motion to suppress. During that hearing, the following facts developed in testimony. On September 5, 2000, England police officer Todd Brown received a dispatch to the home of Judy Holladay. When he arrived at that home, Holladay informed him that there had been a disturbance involving drugs. She told the officer that the suspects, a male and a female, were in a blue S-10 pickup truck. Holladay also stated that the suspects had crystal meth "on them." Brown relayed that information to his chief. Brown testified that he "believed the suspect would be in possession of drugs after talking with Ms. Holladay." Chief Cook later testified that he "would not characterize the stop as being for the sole purpose of finding drugs," but that it was a stop conducted in response to a disturbance call. However, Cook also stated that there "were allegations of drugs being in the vehicle," that he was "familiar with the people who made the complaint," that this "was not an anonymous tip," that there "were previous drug problems in that area and at that residence," and

that his department "had never used the informant before and [he] did not know if she has ever lied to [him]."

Chief Cook was the first to stop appellant's vehicle based on the information thus received. Officer Brown arrived second. Appellant was the driver of the truck. Cook informed them of the reason for the stop. According to Cook's testimony, he asked appellant out of the truck and conducted a "protective pat-down for weapons and found none." After that, Cook checked appellant's papers. Cook testified that he conducts pat-down searches as a matter of policy "whenever there is a possible narcotics or a disturbance involved or where there is a weapon present, whether it is reported or unreported." However, Cook also testified that appellant had done nothing in his presence that would have led Cook to believe that appellant had weapons.

Appellant then gave verbal permission for the officers to search the truck. The officers did not find drugs or other contraband inside the vehicle. However, Chief Cook had noticed, and felt during the pat-down, a bulge in appellant's right front jeans pocket. Thus, after completing the search of the vehicle, Chief Cook asked appellant "if he would mind showing [him] what he had in his right-hand front pocket." Cook testified later that at that point he suspected that the item in appellant's pocket might be a pill bottle often used in narcotics crimes. Appellant testified that Cook "stayed at [his] pocket and kept squeezing from the outside of [his] pants," but that Cook never reached into the pocket. Appellant "complied" with the officer's request and handed over a plastic bottle without a label—according to Cook, he did so "immediately, without hesitation." Apparently, though, appellant at first just pulled out a lighter, upon which Cook specifically requested that he wanted to see the "round object" in appellant's pocket. Cook specifically testified that he did not himself remove the item from appellant's pocket because appellant then was not yet under arrest. When Cook asked appellant what was in the bottle, appellant claimed that he did not know. Appellant later testified that he believed the substance to be Tylenol because the bottle was a Tylenol bottle. Appellant also stated that he never looked into the bottle, but that he had received it for headaches at the home of Berniece Holladay, Judy Holladay's mother and a

friend of his female passenger, where they had stopped earlier. Cook saw a white, powdery substance in the bottle. At that point, the officers arrested appellant and his passenger. Both arrestees received their *Miranda* readings at that time.

Because Chief Cook's police car did not have a police camera and Officer Brown's patrol unit arrived behind Cook's patrol car, Brown did not use his police camera in the incident at issue.

Appellant testified that he did not know Judy Holladay, that he had not been at her house, and that he had not smoked drugs with her. He stated—when Chief Cook informed him of the reason for the stop—that his female passenger told him that "some girl had a problem with her." The passenger later testified that Judy Holladay did not like her.

Toward the end of the hearing, counsel for appellant argued that the holding of *Terry v. Ohio*, 392 U.S. 1 (1968), required a conclusion that a *Terry* search was not warranted. Furthermore, counsel for appellant specifically argued that Ark. R. Crim. P. 11.1 requires a finding that consent cannot be the product of actual or implied duress or coercion, and that an officer asking a defendant to remove the items from his pocket would be more in the form of an order than a request. The trial court found that there was a conflict in testimony regarding whether the officer asked to see the contents of the pocket or whether he ordered appellant to empty his pockets. After hearing the State's closing argument, the trial court denied the motion to suppress the evidence.

On March 20, 2002, less than two months after the suppression hearing, appellant entered what he asserts to be a conditional plea of guilty to the charge of possession of controlled substance, methamphetamine, a Class C felony. Appellant received a sentence of 60 months' imprisonment, with 30 months suspended. From this, he brings the current appeal.

Lack of Jurisdiction to Hear Appeal

Notably, the State does not argue that appellant's attempted conditional guilty plea fails to comply with the require-

ments of Ark. R. Crim. P. 24.3(b) (2002). However, whether a defendant has complied with Rule 24.3(b) is a jurisdictional question, *see Ray v. State*, 328 Ark. 176, 941 S.W.2d 427 (1997), and as such, we must raise the issue *sua sponte*. When a defendant pleads guilty to a charge, he or she waives the right to appeal that conviction. *Green v. State*, 334 Ark. 484, 978 S.W.2d 300 (1998). For relevant purposes before us, only a conditional plea pursuant to Rule 24.3(b) enables a defendant to retain the right to appeal an adverse suppression ruling. Ark. R. App. P.—Crim. 1(a) (2002); *Barnett v. State*, 336 Ark. 165, 984 S.W.2d 444 (1999).

Rule 24.3(b) states:

> With the approval of the court and the consent of the prosecuting attorney, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of an adverse determination of a pretrial motion to suppress evidence. If the defendant prevails on appeal, he shall be allowed to withdraw his plea.

Our supreme court has interpreted Rule 24.3(b) to require strict compliance with the requirement that the right to appeal be reserved in writing. *Barnett v. State*, *supra*. This is so even when there has been an attempt to enter a conditional plea below. *Ray v. State*, *supra*. In addition, the writing must be contemporaneous with the defendant reserving his or her right to appeal. *Tabor v. State*, 326 Ark. 51, 930 S.W.2d 319 (1996). We also look for an indication that the conditional plea was entered with the approval of the trial court and the consent of the prosecuting attorney. *Noble v. State*, 314 Ark. 240, 862 S.W.2d 234 (1993).

In the present case, the record contains a writing entitled "GUILTY PLEA AGREEMENT," with the handwritten word "Conditional" appearing above it. The document is signed by the prosecuting attorney, appellant's attorney, and appellant, with a handwritten date of March 20, 2002, and a court file stamp of the same date. The document contains the following pre-typed list of rights:

> I understand that I have the following rights:
>
> (a) The right to remain silent and make no statements.

(b) The right to be represented by an attorney.

(c) The right to a speedy, public trial by a jury which must unanimously find me guilty beyond a reasonable doubt on each element of any charge.

(d) The right to be found guilty of a lesser charge and/or punishment than the original charge.

(e) The right to personally confront and cross-examine every witness, and the right to call witnesses to testify for me.

(f) [Illegible.]

(g) The right to question all facts, circumstances and evidence, and the right to confront and raise all legal issues, rights and theories.

(h) To file a petition within 30 days that my attorney was ineffective, and my right to appeal be thus extended 30 days past a hearing on this motion.

I understand that if I plead guilty I give up and waive all my rights, and if the plea is accepted by the Court, it cannot be changed nor the punishment reduced.

By pleading guilty I will lose my right to vote and the right to possess firearms. I may also incur employment and various other indirect problems from this conviction.

Each prior or later conviction can increase the time of punishment required before parole eligibility [sic].

No one has threatened me nor promised me anything that has caused me to plead guilty.

I understand the Prosecuting Attorney will make a sentence recommendation to the Court based on our plea agreement, but if the plea agreement is not accepted, my guilty plea will be withdrawn and the statements herein will not be held or used against me.

I hereby plead guilty to having committed the above stated crime(s), and understand by doing so I give up all my rights.

Appellant hand-initialed every enumerated item quoted above, from (a) to (h), except (f), by marking them with "RSH" on the

left hand margin. Item (f) has been marked out to the point of being illegible.

Applying *Barnett v. State, supra,* to the instant case, we hold that appellant failed to strictly comply with Rule 24.3(b). The document does not specifically state that appellant reserves his right to appeal the outcome of the suppression hearing. Rather, the document contains language to the effect that if he pleads guilty, he gives up and waives all his rights. Moreover, the document fails to demonstrate that the trial court approved a conditional plea. Therefore, we lack jurisdiction and dismiss the appeal.

Appeal dismissed.

BIRD, J., agrees

GRIFFEN, J., concurs.

WENDELL L. GRIFFEN, Judge, concurring. I concur in the outcome of this case because existing case law appears to leave us no room to decide otherwise. However, I write separately to express my concern that Ark. R. Crim. P. 24.3(b) (2002) requires either a clarifying rule revision or else clear, elucidating guidance from our supreme court. Upon my review of applicable Arkansas law, it appears that litigants and our courts are struggling to understand what constitutes strict compliance with Rule 24.3(b). Thus, despite what trial counsel and the trial court in this case might have intended, we must dismiss the present appeal where (1) appellant claimed that law enforcement officers violated his Fourth Amendment rights; (2) appellant properly reserved his arguments for appeal, were it not for the jurisdictional question involving his proper strict compliance with Rule 24.3(b); (3) appellant and the State appear to have attempted to enter into a valid conditional plea agreement, and where (4) the document purporting to demonstrate the existence of a conditional plea was part of the circuit-court-certified trial record, despite lacking the trial court's signature or other indices of its approval.

Existing law applicable to Arkansas conditional pleas is quickly summarized. *See, e.g.,* David J. Sachar, *Overview of Ark. Warrantless Search and Seizure Law,* 23 U. ARK. LITTLE ROCK L.

REV. 423 (2001) (discussing Rule 24.3(b) generally, but not detailing what strict compliance entails specifically). Specifically, Ark. R. Crim. P. 24.3(b) states:

> With the approval of the court and the consent of the prosecuting attorney, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of an adverse determination of a pretrial motion to suppress evidence. If the defendant prevails on appeal, he shall be allowed to withdraw his plea.

Our supreme court requires strict compliance with the Rule's requirement that the right to appeal be reserved in writing. *Barnett v. State*, 336 Ark. 165, 984 S.W.2d 444 (1999). This requirement applies even when there has been an attempt to enter a conditional plea below. *Ray v. State*, 328 Ark. 176, 941 S.W.2d 427 (1997). The writing must be contemporaneous. *Tabor v. State*, 326 Ark. 51, 930 S.W.2d 319 (1996) (finding that a subsequent order by the trial court with an attached signed plea statement, following a remand from the court of appeals, was insufficient to "breathe life into a moribund appeal where no jurisdiction originally vested" because appellant failed to make his conditional plea contemporaneously). There must be an indication that the conditional plea was entered with the approval of the trial court and consent of the prosecuting attorney. *Noble v. State*, 314 Ark. 240, 862 S.W.2d 234 (1993). Furthermore, the supreme court emphasized that conditional guilty pleas only preserve arguments for appeal stemming from hearings upon motions to suppress evidence. *Payne v. State*, 327 Ark. 25, 937 S.W.2d 160 (1997). Under Arkansas law, a conditional plea of guilty becomes final when the appellant does not prevail on appeal. *Scalco v. City of Russellville*, 318 Ark. 65, 883 S.W.2d 813 (1994) (finding that there was a proper conditional plea of guilty, but that appellant had failed on appeal, and that therefore the trial court had no jurisdiction to rule on appellant's motion to withdraw his guilty plea following his failure on appeal).

Of all our cases generally citing or addressing Rule 24.3(b) and its requirements, few detail what constitutes strict compliance with the Rule. At this point it may be worth noting that Arkansas appears to be in a somewhat distinct group of states in which

compliance with various, differing conditional-plea requirements is strictly enforced — i.e., as opposed to states using a "substance-over-form" approach. *See State of Hawai'i v. Lei*, 95 Haw. 278, 21 P.3d 880 (2001) (providing a very useful overview of both federal and state cases analyzing conditional-plea rules substantially similar to Arkansas's Rule 24.3(b)). A number of Arkansas cases summarily refer to facts indicating that the appellant failed to perfect a conditional guilty plea, but do so in a manner suggesting that there was no document that even remotely falls under the scope of Rule 24.3(b). *See, e.g.*, *Noble v. State*, *supra* (finding nothing to show that appellant conditioned his guilty plea by reserving, in writing, his right to appeal); *Ray v. State*, *supra* (finding nothing in the record to support appellant's claim that a conditional plea existed where the plea in the record simply states that appellant pleads guilty, acknowledges his rights he is waiving, the offenses to which he pleads guilty, and the agreed recommendation of punishment). In one such case, *Burress v. State*, 321 Ark. 329, 330, 902 S.W.2d 225, 226 (1995), the supreme court stated that the record reveals a reference by the trial court to a "document entitled Guilty Plea Statement," but neither the abstract nor the trial record contained any reference to a writing reserving the right to review. In yet another case, our supreme court stated that the requirement of "reserving in writing" the right of review was not met, explaining the relevant law surrounding Rule 24.3(b), but without going into factual detail. *Bilderback v. State*, 319 Ark. 643, 646-47, 893 S.W.2d 780, 782 (1995).

In *Barnett v. State*, *supra*, the supreme court held that the appellant's purported conditional plea of guilty was not in strict compliance with Rule 24.3(b). In that case, the plea statement in question contained language that the appellant "understood that if he pleaded guilty, he would give up various legal rights, including his 'right to appeal a verdict against [him].'" *Id.* at 169, 984 S.W.2d at 446. Furthermore, the court in *Barnett* stated that the plea agreement failed to demonstrate that the trial court approved a conditional plea, or that the prosecutor consented to a conditional plea—without explaining how such demonstration ought to appear. *Id.* at 170, 984 S.W.2d at 447.

The *Barnett* court distinguished that case from the earlier opinion in *Green v. State*, 334 Ark. 484, 978 S.W.2d 300 (1998). In *Green*, the supreme court held that Rule 24.3(b) was satisfied where the handwritten word "conditional" appeared above the typed heading "PLEA STATEMENT," signed by the defendant, and where that portion of the plea statement acknowledging waiver of the right to appeal was crossed out and initialed by the defendant. Notably, *Green* did not address what constitutes a *contemporaneous* writing for purposes of Rule 24.3(b), or whether the writing sufficiently documented consent of the prosecutor, or approval of the court.

The Arkansas Court of Appeals addressed the issue of strict compliance in more detail in *Simmons v. State*, 72 Ark. App. 238, 34 S.W.3d 768 (2000). In that case, we found that the appellant failed to perfect his conditional guilty plea. The case involved a "guilty plea statement," signed by the appellant and his attorney. The statement set forth various rights that are waived upon the entry of a guilty plea, "including a waiver of the 'right to appeal from the verdict and judgment, challenging all issues of fact and law.'" *Id.* at 241, 34 S.W.3d at 770. The two-page guilty-plea statement was attached to what was labeled as page 3 and entitled as "sentence recommendation," dated earlier than the guilty-plea statement, and signed by the prosecuting attorney. Page 3 contained a handwritten statement of unknown origin, stating: "Conditional plea — re suppression — No objection to boot camp. No further charges to be filed. May appeal suppression pursuant to Rule 28 [*sic*] of Arkansas Rules of Criminal Procedure." *Id.* In a footnote, this court remarked that the handwritten statement appeared in two different handwritings, both of which were different from the handwriting of the person who filled in the handwritten portions of the sentence recommendation. *Id.* On appeal, we found no indication that the prosecutor consented to the conditional plea and that he clearly had not been present during the sentencing hearing. *Id.* at 243, 34 S.W.3d at 771. Furthermore, the guilty-plea statement contained express language to the effect that the appellant waived his right to appeal by making his plea.

In yet another opinion by our court, we pointedly stated that Rule 24.3(b) does not specify how courts and prosecutors are to convey approval and consent in order to manifest strict compliance with the rule. *McCormick v. State*, 74 Ark. App. 349, 48 S.W.3d 549 (2001). There, we held that where the prosecutor was present when a defendant entered a conditional plea of guilty, contested any objectionable aspects of the disposition of the case, and allowed the plea to be entered as a "negotiated plea of guilty," the requirement of subsection (b) of Rule 24.3 was satisfied. *Id.* Specifically, we held that "negotiated" implies consent by the prosecutor, because such a negotiation could only take place between the defendant and the State. *Id.*

Finally, in *McMullen v. State*, 79 Ark. App. 15, 82 S.W.3d 827 (2002), we held that a plea questionnaire and written judgment and commitment order did not satisfy the writing requirement for a conditional plea of guilty. Specifically, the questionnaire did not reflect that the guilty plea was conditional and instead contained the question: "Do you understand the effect of a plea of guilty to the charges against you, in that there is no appeal and you can't withdraw your plea later on?" Defendant answered this question with "yes." The judgment and commitment order contained the handwritten notation "Conditional Plea," but was not signed by the defendant and gave no indication as to who wrote it or when it was written. *Id.*

Thus, we are faced with a procedural rule that apparently creates confusion for Arkansas litigants and courts, even though it obviously would be of crucial importance to defendants to know precisely how to perfect their conditional pleas of guilty. As previously stated, the law is anything but clear on what exactly constitutes strict compliance. Whereas some cases specifically mention lack of proof that the prosecutor and trial court consented and approved the conditionality of the guilty plea, others merely focus on one or two elements of the strict-compliance rule—without making any findings that the remaining elements were sufficiently met. *See, e.g.*, *Green v. State*, *supra* (finding a handwritten "conditional" above the typed words "plea statement" sufficient, where waiver of appeal was crossed out, and

defendant had signed; but not finding that either the court or prosecutor approved and consented).

In the present case, for instance, the document entitled "guilty plea agreement" does not contain an express waiver of appeal. Instead, it contains statements such as the right to question facts, to confront factual and legal issues, the right to a trial, and a statement to the effect of giving up and waiving "all [his] rights." These statements appear to refer to a defendant's rights regarding trial — all of which he waives upon pleading guilty — and not his rights regarding appeal. Furthermore, the signatures of the defendant, his attorney, and the prosecutor appear on one page. The page is dated March 20, 2002, next to the defendant's signature. The document does not provide for any further dating next to any of the other signature lines. The document carries a file-stamp by the circuit court, dated the same day. Both the handwritten word "Conditional" and the signature of the prosecutor could very well stem from the same hand—and lest there be doubt, we did consider handwriting at least implicitly in *Simmons v. State, supra.* And finally, the document in question is part of the certified trial record. It is difficult to imagine how the "conditional" plea of guilty made its way into the trial record without the trial court's approval. Even so, the document does not contain the trial court's signature, let alone evidence that the signature connoted trial court approval of an explicit agreement by the defendant, his counsel, and the prosecutor that the right to appeal the denial of the suppression motion was reserved.

After a thorough review of the applicable case law, one is left with the impression that, to be effective, a conditional guilty plea agreement must be evidenced by a contemporaneous writing which unequivocally declares that the defendant pleads guilty, but expressly reserves the right to appeal the trial court's decision to deny a suppression motion as permitted by Rule 24.3(b). Furthermore, such conditional guilty-plea agreements should bear the signature of the defendant and defense counsel, and demonstrate the prosecutor's consent and the court's approval as proven by their signatures and appropriate text in the document. Until our supreme court declares that this is what must be done to constitute strict compliance with Rule 24.3(b), perhaps supplemented by a

model form that trial courts, prosecutors, and defense counsel can use when defendants indicate that they want to enter conditional guilty pleas, trial courts, prosecutors, defense counsel, defendants, and appellate judges will continue to trip and stumble.

OFFICE of CHILD SUPPORT ENFORCEMENT;
Leslie M. King Pevelko *v.* Charles W. KING

CA 02-481 100 S.W.3d 95

Court of Appeals of Arkansas
Division II
Opinion delivered March 12, 2003

Amy L. Ford, Att'y Specialist, Office of Child Support Enforcement, for appellant.

Cuffman and Phillips, by: *James H. Phillips*, for appellee.

SAM BIRD, Judge. Arkansas Office of Child Support Enforcement and Leslie Pevelko appeal a 2001 order of the Pulaski County Circuit Court denying their motion for judgment for child-support arrearages against Charles King for a period of time between 1986 and 1995. The appellants raise the following points of error: (1) the trial court erred in finding that the failure to raise the issue of child-support arrearages, accrued under an existing order, at the time a new order of child support was entered, acted as a bar by *res judicata* in a later motion to seek judgment and collection of arrears; (2) the trial court erred in finding that Leslie Pevelko had the opportunity to raise the issue of past-due child support in Oregon; (3) the trial court erred in finding that OCSE or Pevelko was required to raise the issue of child-support arrearages in a 1995 action to set support based upon King's ability to pay. We agree that these findings were made in error; therefore, we reverse and remand for entry of judgment for the accrued support.

We first summarize the proceedings and orders that led to this appeal. Leslie Pevelko and Charles King were divorced on February 28, 1986. They were awarded joint custody of their only child, with physical custody to Pevelko, and King was ordered to pay monthly child support of $100. A court order of November 13, 1990, abated the order of child support and changed custody to King, who by that time had taken physical custody of the child. Pevelko petitioned the court to set aside the November 13 order, alleging that neither she nor her attorney had received notice of the hearing. She also filed a motion alleging that King was $400 in arrears on child-support payments as of February 19, 1991; praying that King be made to show cause why he should not be held in contempt, and praying for increased child-support payments. On May 13, 1991, the trial court set aside and voided *ab initio* the November 1990 order that had changed custody to King and abated his child support.

A hearing date was set on Pevelko's motion for payment of child-support arrearages, and Pevelko filed a motion to transfer the custody issue to the State of Oregon pursuant to the Uniform Child Custody Jurisdiction Act. In an order of December 16, 1991, the court noted that King was a resident of Texas, and that Pevelko and the child had lived in Oregon since September 1989; the parties were ordered to maintain joint custody of the child, who would continue to live primarily with Pevelko. Finding Oregon to be the most convenient forum for the parties, the court deferred future actions to the appropriate court in that state and declined further jurisdiction over subsequent matters in the case. The order stated that Pevelko's motion for back child support and for increase in child support was not heard, and that she "may pursue any such actions through the State of Oregon."

A "motion to set support" was filed on November 28, 1995, by OCSE on behalf of Pevelko after she and the child returned to Arkansas. The motion recited the history of the case beginning with the 1986 decree and order of child support. On March 26, 1996, pursuant to the motion to set support, the court ordered King to pay $297 a month, $270 as current support and $27 to be applied to retroactive support from the date of the motion to the date of the hearing.

In November 2000 King moved to abate his child support for a period of time when the child had resided with him in Dallas. Pevelko counterclaimed for back child support from March 1986 to March 1996, and for increased future support. The court deferred child-support matters until OCSE was notified. OCSE then filed a motion adopting Pevelko's counterclaim.

After a hearing in October 2001, both sides filed posttrial briefs on the issue of whether Pevelko was entitled to seek child-support payments for alleged arrearages before November 1995. A resulting order of November 2001 granted abatement of child support during the time that the child had lived with King in Dallas, granted $1971 in child-support arrears against him, and found that he was not in contempt of court. Appellants' request for child-support arrears prior to December 1995 was denied.

At the request of OCSE, the court subsequently entered findings of fact and conclusions of law regarding its decision. The conclusions of law included the following:

> 1. Ms. Pevelko's motion is barred by *res judicata* in that she did not raise the issue of arrearages in her November 1995 motion to set support. That motion resulted in a final order on child support and even awarded a small amount for arrearages dating back to the date of the filing of the motion. No allegation was made regarding arrearages prior to 1995. *See State of Arkansas Child Support Enforcement v. Thornell Williams*, 995 S.W.2d 336 (1999).
>
> 2. Further, Ms. Pevelko had the opportunity to raise the issue of back child support in Oregon, based on the order of December 16, 1991, and in the November 1995 motion to set support.
>
> 3. Finally, the November 1995 motion resulted in an order setting support as if for the first time. . . . By failing to pursue the alleged arrearages when the case was pursued again in this state in 1995, Mr. King and the Court were led to believe that all issues, including arrearages, had been resolved up to that point.
>
> 4. Therefore, Ms. Pevelko is not entitled to seek arrearages behind the November 1995 motion.

As shown earlier in this opinion, the divorce decree of 1986 included the order that King pay child support. In 1995 the court entered an order for an increased amount of child support without mention of arrearages. In November 2000 King filed a motion to abate support for a period of time that the child had resided with him, and Pevelko counterclaimed for back support for a period from 1986 to 1996. As their first point of appeal, appellants contend that the court erred as a matter of law in finding that *res judicata* barred them from seeking judgment on past-due child support that had accrued before 1995. We agree, and we reverse the ruling of the trial court on this issue.

When the amount of child support is at issue, we will not reverse the fact-finder absent an abuse of discretion. *McWhorter v. McWhorter*, 346 Ark. 475, 58 S.W.3d 840 (2001). However, the trial judge's conclusion of law is given no deference on appeal. *Duchac v. City of Hot Springs*, 67 Ark. App. 98, 992 S.W.2d 174 (1999). If the law has been erroneously applied and the appellant has suffered prejudice, the erroneous ruling is reversed; manifestly, the trial judge does not have a better opportunity to apply the law than does the appellate court. *Id.*

Where a case is based on the same events as the subject matter of a previous lawsuit, *res judicata* will apply even if the subsequent lawsuit raises new legal issues and seeks additional remedies. *Office of Child Support Enfcm't v. Williams*, 338 Ark. 347, 995 S.W.2d 338 (1999). *Res judicata* bars relitigation of a subsequent suit when five factors are present: (1) the first suit resulted in a final judgment on the merits; (2) the first suit was based upon proper jurisdiction; (3) the first suit was fully contested in good faith; (4) both suits involve the same claim or cause of action; (5) both suits involve the same parties or their privies. *Moon v. Marquez*, 338 Ark. 636, 999 S.W.2d 678 (1999). *Res judicata* bars not only the relitigation of claims that were actually litigated in the first suit but also those that could have been litigated. *Id.* The policy of the doctrine is to prevent a party's relitigating a matter on which it has already been given a fair trial. *Id.*

Here, in ruling that appellants' motion for child-support arrearages prior to November 1995 was barred by *res judicata*, the trial court relied upon *Office of Child Support Enfcm't v. Williams*, 338 Ark. 347, 995 S.W.2d 338 (1999). The *Williams* court held that, as between parties to a divorce, *res judicata* bars a former husband and wife from relitigating paternity after having agreed in the divorce action that a child was born of the marriage. With respect to child support, custody, and even the changing of a child's surname, the supreme court has applied a modified *res judicata*, which is subject to changed circumstances and the best interest of the child. *Moon v. Marquez*, *supra*; *see Thurston v. Pinkstaff*, 292 Ark. 385, 730 S.W.2d 239 (1987).

Once a child-support payment falls due, it becomes vested and a debt due the payee. *Roark v. Roark*, 34 Ark. App. 250, 809 SW.2d 822 (1991). Under Arkansas Code Annotated section 9-14-234(b) (Supp.1995), enacted as part of Act 383 of 1989, any order providing for payment of child support becomes a final judgment subject to writ of garnishment or execution for any money which has accrued until the time either party moves through proper motion filed with the court and served on the other party to set aside, alter, or modify the decree, judgment, or order. Ark. Code Ann. § 9-14-234(b) (Repl. 1991). Furthermore, the court may not set aside, alter, or modify any decree, judgment or order which has accrued unpaid support prior to the filing of a motion to do so. Ark. Code Ann. §§ 9-14-234(c) and 9-12-314(c).

These statutes were enacted in order to comply with federal regulations and to insure that the State will be eligible for federal funding. *Sullivan v. Edens*, 304 Ark. 133, 801 S.W.2d 32 (1990). Enforcement of child-support judgments are treated the same as enforcement of other judgments, and a child-support judgment is subject to the equitable defenses that apply to all other judgments. *Burnett v. Burnett*, 313 Ark. 599, 855 S.W.2d 952 (1993), *citing* 54 Fed. Reg. 15,761 (April 19, 1989). If the obligor presents to the court or administrative authority a basis for laches or an equitable estoppel defense, there may be circumstances

under which the court or administrative authority will decline to permit enforcement of the child-support judgment. *Id.* The elements of equitable estoppel are these: (1) the party to be estopped must know the facts; (2) she must intend that her conduct shall be acted on or must so act that the party asserting estoppel has a right to believe the other party so intended; (3) the party asserting estoppel must be ignorant of the facts; (4) the party asserting estoppel must rely on the other's conduct to his detriment. *Arkansas Dep't of Human Servs. v. Cameron,* 36 Ark. App. 105, 818 S.W.2d 591 (1991).

In summary, any past-due child support accrues and is a judgment until altered prospectively by proper motion and order of the court. Ark. Code Ann. § 9-14-234(b) and (c). Because in the present case there was no court order modifying the 1986 order, "modified *res judicata*" does not come into play regarding past opportunity to litigate issues of accrued support. Nor did King argue an equitable basis to prevent the collection of past-due child support. Through his attorney, he stated to the trial court that this was not a matter of equity, but a matter of *res judicata.* Even questions raised at the trial level, if left unresolved, are waived and may not be relied upon on appeal; the trial court's ruling on a challanged issue is a prerequisite to our review of that issue. *Office of Child Support Enfcm't v. Neely,* 73 Ark. App. 198, 41 S.W.3d 423 (2001).

We reverse the trial court's finding that the failure to pursue alleged arrearages when the case was pursued in 1995 acted as a bar by *res judicata* to appellants' later motion for judgment and collection of arrearages. In light of this holding, we need not address the second and third points on appeal. We reverse and remand for proceedings consistent with this opinion.

Reversed and remanded.

ROBBINS and GRIFFEN, JJ., agree.

Judi TOMLIN *v.* WAL-MART STORES, INC.

CA 02-147 100 S.W.3d 57

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered March 12, 2003
[Petition for rehearing denied April 16, 2003.]

McMath Woods P.A., by: *J. Bruce McMath* and *Charles D. Harrison*, for appellant.

Quattlebaum, Grooms, Tull & Burrow PLLC, by: *Thomas G. Williams*, for appellee.

SAM BIRD, Judge. In this slip-and-fall case, Judi Tomlin filed a negligence complaint against Wal-Mart Stores, Inc., regarding the presence of a strapping band in the aisle of a Wal-Mart store at Camp Robinson. The case proceeded to trial, and the jury returned a verdict against Wal-Mart in the amount of $51,500. The trial court subsequently granted a motion by Wal-Mart for judgment notwithstanding the verdict. Ms. Tomlin raises two points of appeal, contending that the trial court erred in granting the motion for judgment notwithstanding the verdict and in refusing to instruct the jury on spoliation of evidence. For the reasons discussed hereunder, we affirm.

We briefly set forth the facts of the case. In the late afternoon of January 22, 1998, Ms. Tomlin entered the Camp Robinson store to return merchandise at the customer service desk. She tripped and fell in the aisle after completing her transaction, and assistant manager Mike Wasson was called to the front of the store where the accident occurred. His incident report stated that Ms. Tomlin slipped and fell because her foot "caught on a plastic string," and that she bruised her knee. Ms. Tomlin received medical treatment and eventually underwent knee surgery.

1. Whether the trial court erred in granting Wal-Mart's motion for judgment notwithstanding the verdict.

A trial court may grant a motion for judgment notwithstanding the verdict only if there is no substantial evidence to support the jury verdict and the moving party is entitled to judgment as a matter of law. *Fayetteville Diagnostic Clinic v. Turner*, 344 Ark. 490, 42 S.W.3d 420 (2001). Substantial evidence is evidence of sufficient force and character that it will compel a conclusion one way or another; it must force the mind beyond mere suspicion or conjecture. *Ellis v. Price*, 337 Ark. 542, 990 S.W.2d 543 (1999). On appeal we review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the party against whom the judgment notwithstanding the verdict was rendered. *Id.* Possible causes of a fall, as opposed to probable causes, do not constitute substantial evidence of negligence. *Safeway Stores, Inc. v. Willmon*, 289 Ark. 14, 709 S.W.2d 623 (1986).

Mike Wasson, the store's assistant manager on the date in question, testified that Ruth Doyle called him to the front of the store and told him that someone claimed to have fallen. He testified that he could remember only that the fall was supposedly caused by a clear plastic strapping band, about an eighth of an inch thick; that he thought the strapping band was found in the vestibule; and that he did not remember picking it up. He stated that Ms. Doyle "might have showed it, held it out there"; that he was uncertain about the location, Ms. Doyle's holding the band, and whether the band was broken or was a hoop.

Mr. Wasson further testified that inventory for Wal-Mart is sometimes delivered with strapping bands around multiple items of the same product, that the bands were of "the same type of material that I saw," that personnel ordinarily removed the bands before putting products on shelves or unboxing them, and that he could not remember a product being displayed with strapping bands on it. He said that he had no idea how the strapping band in question came to be on the floor, but that it might have been blown in from outside or have been tracked in on someone's shoe. He said that the strapping was also used inside of packages, that he

had seen customers open packages before leaving the store, that he had seen customers return merchandise with packages ripped open and packing material out, and that a customer could drop packaging on the floor and never know it.

Judi Tomlin testified that her fall occurred near the exit doors, in an area near the service desk and check-out counter. She said that she felt a narrow article across her foot— an item like a strapping band or wire. She said that Wasson also tripped when he came around the end of the counter, that he bent down and picked up a white or clear plastic strapping band, and that he threw it into the trash. She remembered commenting at the time, "That's what I tripped on." She testified that she had shopped at Wal-Mart for years, that she had seen packages with strapping bands toward the back of the store but not in the front, and that she had never seen a customer wrestling a band off of a package on display. She testified that there were no return registers set up at the time of her fall, and that customers were lined up at the service desk within a foot or two of the location of the strapping band.

Roger Doyle testified that he was a former assistant manager at the Camp Robinson store. He testified that he frequently had seen customers come in the store's exit door in January when a lot of returns were being made to "return registers" one through four, and he opined that it was an "above average" possibility that the strapping band in question had been dropped by a customer rather than by store personnel. Mr. Doyle testified that the store was constantly being restocked, that employees removed big boxes from boxes with strapping bands on them, and that the majority of stocking took place between 5:00 a.m. and 3:00 p.m.

Mr. Doyle further testified that magazines and other goods with strapping bands on them were brought into the store; and that vendors had to remove the bands, which were usually clear or white. He said that magazines' bands were cut in the back of the store in receiving. He said that vendors cleaned up after themselves, that managers were supposed to check the area as well, that the service desk was responsible for making sure that nothing ended up on the floor, and that personnel were trained to pick up

items lying in the main exit aisle. He said that customers sometimes removed strapping bands from large boxes. He testified that items packaged in large boxes were located in sporting goods, which was about ten aisles from the center and at the back of the store; in lawn and garden, all the way to the right from front checkout; where the safes were sold, about five aisles from the front of the store; and in housewares; approximately two aisles past the safes.

The principles that govern slip-and-fall cases are set against the general backdrop that an owner has a duty to exercise ordinary care to maintain the premises in a reasonably safe condition for the benefit of invitees. *Fayetteville Diagnostic Clinic v. Turner, supra.* To establish a violation of that duty, a plaintiff must prove either that the presence of a substance upon the floor was the result of the defendant's negligence, or that the substance had been on the floor for such a length of time that the defendant knew or reasonably should have known of its presence and failed to use ordinary care to remove it. *Id.* The mere fact that a person slips and falls does not give rise to an inference of negligence. *Id.*

In *Wal-Mart Stores v. Kelton*, 305 Ark. 173, 806 S.W.2d 373 (1991), the supreme court held that there was substantial evidence from which the jury could readily infer that water had collected inside the building on the floor for an undue period of time, and that failure to warn of its presence or to wipe the floor clean constituted a breach of ordinary care. The court noted testimony that the day in question was rainy, that a ceiling tile was missing and that water had dripped onto someone's face, that there was water on the store's floor between the counter and the exit door, that employees entered through the exit door, and that there were foot tracks through the water.

In *Bank of Malvern v. Dunklin*, 307 Ark. 127, 817 S.W.2d 873 (1991), the plaintiff slipped and fell when she entered the bank a few minutes after it opened on a rainy morning. The plaintiff testified that she did not see the substance that caused her fall but believed it was accumulated water from the clothes or shoes of a customer or employee. The supreme court held that this evidence was speculative and insufficient to show that the substance was on

the floor due to the Bank's negligence, and that the evidence was also found to be insufficient to establish that a substance had been on the lobby floor for such a substantial period that employees knew or should have known of its existence. The case was distinguished from *Wal-mart Stores, Inc. v. Kelton, supra,* in that the few minutes' time in which the Bank of Malvern had been opened left very little time to notice water possibly brought in by customers or employees, there was no evidence of foot tracks indicating that employees had walked through the water and ignored the danger, and there was no evidence of a leak in the ceiling.

In *Fayetteville Diagnostic Clinic v. Turner, supra,* the supreme court affirmed the trial court's denial of the clinic's motion for judgment notwithstanding the verdict. In that case the plaintiff slipped and fell in water in the hallway of the clinic where she had an appointment. She testified that her doctor there told her afterwards that he was aware of the slippery condition in the area where she fell. The *Turner* court held that this was substantial testimony from which the jury reasonably could have inferred that the doctor, as one of the owners of the clinic, was aware of the condition that caused the plaintiff's fall, that the slippery condition had existed for such a length of time that the owner knew of its presence, and that he failed to take ordinary care to correct it.

Wal-Mart Stores, Inc. v. Regions Bank Trust Dept., 347 Ark. 826, 69 S.W.3d 20 (2002) (in which the trial court was reversed on other grounds), was another case in which the supreme court found the evidence sufficient to sustain a jury verdict in a negligence suit against Wal-Mart. The plaintiff in that case slipped and fell on the store's floor where a puddle of liquid apparently had come from a broken snow globe in a Christmas display. The supreme court found that there was sufficient evidence that Wal-Mart knew or should have known of the presence of the substance on the floor. The evidence included testimony of another shopper who saw the plaintiff fall and minutes earlier had noticed a "puddle of stuff" having a "milky color like when wax gets wet and then it starts to dry"; based on her experience working in hotels, she opined that the discoloration indicated that the liquid had been on the floor for some time. The supreme court also noted the expert testimony of a chemist that the substance inside

the snow globe was primarily water with some dissolved solids, and that it would take at least twenty-four hours for the liquid to even begin to dry; and the concession of a Wal-Mart employee that the liquid may have been on the floor for up to a day.

In *Safeway Stores, Inc. v. Willmon, supra,* where the plaintiff slipped on a liquid substance and fell while pushing a shopping cart down an aisle, witnesses said that the water might have been brought from the water fountain, that someone could have spilled a soft- drink cup filled with ice, and that jugs of distilled water were shelved nearby. The supreme court held that there was only sheer speculation and rank conjecture that the water was on the floor as a result of negligence, and held that the trial court erred in submitting the issue of negligence to the jury. Similarly, where the evidence showed that the aisle had been swept an hour and fifteen minutes before the fall and that employees had been up and down the aisle in the intervening time until the fall, there was no proof that the water had been on the floor for such a length of time that the storekeeper knew, or should have known of its presence and failed to use ordinary care to remove it.

In the present case, the evidence viewed in the light most favorable to the jury's verdict is as follows. Strapping bands were brought into the store on a wide variety of products, and employees handled the strapping bands daily in the receiving and stocking of merchandise. Ms. Tomlin felt a narrow band across her foot when she fell after returning merchandise at the customer service desk, and when shown the strapping tape immediately afterwards she said, "That's what I tripped on." Magazines were sold near the area where Ms. Tomlin fell, magazines were brought into the store in bundles bound with strapping bands similar to the one she described, and nearly all products that were displayed with strapping bands intact were located some distance from the customer service desk and the main exit. The store manager at the time of Ms. Tomlin's fall could not remember a product being displayed with the strapping bands on it. Managers were responsible for insuring that areas restocked by outside vendors were safe for shoppers, and strapping bands returned with return merchandise were the responsibility of store employees. Ms. Tomlin had

shopped at Wal-Mart for years and had never seen a customer remove a strapping band from a package on display.

Ms. Tomlin's complaint alleged that negligence by Wal-Mart or its employees resulted in the presence of the strapping band on the floor, or that Wal-Mart had been negligent in failing to remove the band from the floor within a reasonable period of time and had failed to act reasonably to ensure that foreign objects did not remain on the floor so as to pose a danger to customers. We hold that the evidence was insufficient to prove these allegations. Although several possibilities were presented, there was no testimony or other evidence from which the jury could have determined without speculation or conjecture how the strapping band came to be on the floor or how long it remained there prior to the accident. Thus, we hold that the trial court did not err in granting Wal-Mart's motion for judgment notwithstanding the verdict.

The dissenting opinion suggests that there was "an abundance of circumstantial evidence" from which Wal-Mart's negligence could properly be inferred, such as proof that Wal-Mart employees are responsible for removing the strapping bands from shipments of merchandise, and that the bands are not generally accessible to the public. While it is true that negligence can be inferred from circumstantial evidence, the examples of circumstantial evidence mentioned in the dissenting opinion offer no clue, absent speculation and conjecture, as to how the strapping band upon which Ms. Tomlin tripped migrated from the merchandise or warehouse area of the store, where the evidence established that the straps were removed, and came to be located near the service desk where Ms. Tomlin fell, or how long the strap had been there. There was no evidence presented from which a jury could infer that such migration resulted from the negligence of Wal-Mart or its employees.

2. *Whether the trial court erred in refusing to instruct the jury on spoliation of evidence.*

Spoliation is the intentional destruction of evidence; when it is established, the fact-finder may draw an infer-

ence that the evidence destroyed was unfavorable to the party responsible for its spoliation. *Goff v. Harold Ives Trucking Co.*, 342 Ark. 143, 27 S.W.3d 387 (2000), *citing Black's Law Dictionary* 1401 (6th ed. 1990). An aggrieved party can request that a jury be instructed to draw a negative inference against the spoliator. *Id.*

At trial, Ms. Tomlin requested that the jury be given a spoliation instruction regarding both the strapping band that was thrown into the trash and any video surveillance tapes of events at issue. She contends that the strapping tape may have reflected partial shoe prints and may have been discolored, which evidence the jury could have used to find that the band belonged to Wal-Mart and that it had been on the floor for a long time. She also contends that surveillance tapes may have shown that a Wal-Mart employee dropped the strapping band, or that the band had lain on the floor for an unreasonably long period of time.

Ms. Tomlin contends that without access to evidence within the control of the proprietor, it is nearly impossible under Arkansas law for an injured party to prove negligence in slip-and-fall cases; therefore, she contends that it is imperative that property owners suffer sanction for destroying pieces of evidence critical to the plaintiff's case. She notes that other jurisdictions have shifted the burden of proof in slip-and-fall cases, specifically requiring a premises owner to overcome a presumption of negligence once the plaintiff establishes a prima facie case by showing that a foreign substance was present, that the fall was on account of that substance, and that he was injured as a result of the fall.[1] Ms. Tomlin argues that Wal-Mart directs its managers on what items to save according to its own pecuniary and best interest. She notes that although Mike Wasson was required to report whether the injured person commented about suing or about medical bills, he was not instructed to preserve the foreign object involved. Regarding the strapping band, she points to testimony by Roger Doyle that items involved in customer incidents are likely to be thrown away rather than taken as evidence, that Wal-Mart's policy is to preserve such

[1] Appellant relies in part upon *Fitzgerald v. Gulf Intern. Cinema Corp.*, 489 So.2d 306 (La. Ct. App. 1986), and *Simoneaux v. Humedicenters, Inc.*, 642 So.2d 318 (La. Ct. App. 1994).

objects only in a products liability case, and that discarding the strapping band was not contrary to any policy of Wal-Mart. Regarding the surveillance tapes, she notes Mr. Doyle's testimony that the entrance, exit, and service desk were always under surveillance or within a camera's view; that tapes were changed out and stored each morning; that the tapes were held from two weeks up to thirty days before being reused, but Mr. Doyle had taken tapes out of the rotation and secured them only in instances of internal theft; and that in the case of a customer accident, Wal-Mart had no policy of checking and securing a tape to see if the accident had been recorded.

The trial court, speaking from the bench, set forth it's reasons for refusing to give the spoliation instruction on the strapping band:

> [T]he idea is that if the defendant does some spoiling or losing or intentionally discarding evidence in the case, there ought to be some inference that it was bad evidence. I think it doesn't reach that point in this case. . . . It didn't reach that level to me that Wal-Mart had this policy, or even in this case, that they had intentionally destroyed evidence. She wasn't even sure that was what she had stepped on.

Regarding the surveillance tapes, the court stated, "They did that in a routine manner. There has been no evidence that they went in and erased the tape. They said they do that routinely, keeping them two weeks to a month."

In *Rodgers v. C.W.R. Construction, Inc.*, 343 Ark. 126, 33 S.W.3d 506 (2000), the plaintiffs requested a spoliation instruction regarding evidence that was lost or had never been received; they insisted that the record clearly revealed that the appellee physically possessed and controlled certain pre-demolition safety reports and a pipe, clamp, and bolt involved in the accident at issue. Although viewing these pieces of evidence as unquestionably important, the supreme court held that the trial court's refusal to give the instructions was not error for the following reasons:

> First, the trial court specifically found that the evidence was not intentionally lost or destroyed. Second, the trial court permitted counsel to argue the same points to the jury even though it

> elected not to submit the instructions. Third, and most importantly, the evidence was available in appellee's office shortly after the accident, but no meaningful discovery commenced until five years following the accident. In the absence of any intentional misconduct, we cannot say that the trial court abused its discretion by failing to give the jury an instruction on spoliation of evidence.

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; moreover, a trial court's refusal to give a proper jury instruction will not be reversed absent an abuse of discretion. *Coca-Cola Bottling Co. v. Priddy*, 328 Ark. 666, 945 S.W.2d 355 (1997). Here, the trial court found that there was no indication that the evidence was "bad," that Wal-Mart had destroyed it in other than a routine manner, or even that it was intentionally destroyed. There was no evidence that anyone at Wal-Mart knew that the surveillance tape actually showed the presence of the strapping band on the floor, how it got there, or how long it had been there. Neither was there any indication that the store manager who allegedly disposed of the strapping band knew at the time that it was potentially helpful to the plaintiff. Therefore, we hold that the trial court did not err in refusing to give the spoliation instruction.

Affirmed.

VAUGHT, CRABTREE, and ROAF, JJ., agree.

PITTMAN and HART, JJ., dissent.

JOHN MAUZY PITTMAN, Judge, dissenting. There are two ways to establish a violation of the owner's duty to exercise ordinary care to maintain the premises in a reasonably safe condition for the benefit of invitees. The plaintiff must prove *either* that the presence of a substance upon the floor was the result of the defendant's negligence, *or* that the substance had been on the floor for such a length of time that the defendant knew or reasonably should have known of its presence and failed to use ordinary care to remove it. *Wal-Mart Stores, Inc. v. Regions Bank Trust Dep't*, 347 Ark. 826, 69 S.W.3d 20 (2002). Although the majority recites

this rule, it fails to recognize that it establishes two distinct kinds of slip-and-fall cases.

The first type of case, and the more common of the two, is the type in which an invitee slips on a substance that is not under the exclusive control of the owner of the premises. In such a case there is a very real possibility that the substance was dropped or spilled by a customer, and the owner of the premises will not be deemed liable unless it can be shown that the substance or object remained on the floor for so long that the premises owner knew or should have known of its presence. All of the cases cited by the majority fall into this category. Water is not an instrumentality under the exclusive control of a business owner, particularly on rainy days, and can easily be tracked in by invitees.

Consequently, *Wal- Mart Stores, Inc. v. Kelton*, 305 Ark. 173, 806 S.W.2d 373 (1991); *Bank of Malvern v. Dunklin*, 307 Ark. 127, 817 S.W.2d 873 (1991); *Fayetteville Diagnostic Clinic v. Turner*, 344 Ark. 490, 42 S.W.3d 420 (2001); and *Safeway Stores, Inc. v. Willmon*, 289 Ark. 14, 709 S.W.2d 623 (1986), all turn — and properly so — on the length of time the water was on the floor in determining whether the owner of the premises was liable. The same approach was correctly taken in *Wal-Mart Stores, Inc. v. Regions Bank Trust Dep't*, 347 Ark. 826, 69 S.W.3d 20 (2002), where the broken snow-globe had been on display and it was equally accessible to customers and employees.

The majority's reliance on these cases shows beyond dispute that it fails to understand that the case at bar is of the second sort, where the presence of the substance on the floor is itself the direct result of the defendant's negligence. The appellant provided substantial evidence that strapping bands were an instrumentality under Wal-Mart's direct control. It was the responsibility of Wal-Mart's employees to remove these bands before placing merchandise on display. It follows that it was also Wal-Mart's responsibility to safely dispose of these bands so they would not present a hazard to invitees. As the majority notes, apparently without appreciating its import, Wal-Mart's store manager herself admitted that she could not remember a product being displayed with the strapping bands not having been first removed. Appellant testified that she

had shopped at Wal-Mart for years and had never seen a customer remove a strapping band from an item on display. There was evidence that magazines were displayed in the area where appellant fell, and that these magazines were brought into the store by vendors. The testimony that the vendors removed the strapping bands from the magazines does not relieve Wal-Mart from liability because, in stocking the magazine racks, they were acting as Wal-Mart's agents.

Under these circumstances, the length of time that the strapping band was on the floor, or whether it "migrated" from some other location to the spot where appellant fell, are immaterial. Appellant provided evidence to show that its very presence on the floor was more probably than not the direct result of Wal-Mart's negligence, and that is all the law requires in this type of case. *Fayetteville Diagnostic Clinic v. Turner, supra.*

The trial court was wrong to grant Wal-Mart's motion for judgment notwithstanding the verdict. Entry of judgment notwithstanding the verdict is proper only if there is no substantial evidence to support the jury verdict and the moving party is entitled to judgment as a matter of law. *Fayetteville Diagnostic Clinic v. Turner*, 344 Ark. 490, 42 S.W.3d 420 (2001). Although there was no direct evidence in the present case to show that the strapping band appellant slipped on was on the floor because of Wal-Mart's negligence, there was an abundance of circumstantial evidence from which this fact could properly be inferred, including evidence that Wal-Mart employees are responsible for removing these bands from shipments while stocking merchandise, and that such bands are not generally accessible to customers.

Any material fact in issue may be established by circumstantial evidence; the fact that evidence is circumstantial does not render it insubstantial, because the law makes no distinction between direct evidence of a fact and circumstances from which a fact can be inferred. *Muskogee Bridge Co. v. Stansell*, 311 Ark. 113, 842 S.W.2d 15 (1992). Here, Wal-Mart's negligence could properly be inferred on the basis of the extensive evidence offered at trial to show that strapping bands are almost invariably in the control of and removed by Wal-Mart's employees. In contrast, there

is no evidence whatsoever to establish Wal-Mart's alternative hypotheses for the presence of the strapping band on the floor, *e.g.*, that any strapping bands were brought into the store by customers on the day in question, or that any strapping bands happened to blow in the front door from parts unknown. The jury rejected these far-fetched possibilities and made a finding based on substantial evidence, and I believe that it was error to disturb that verdict.

I respectfully dissent.

HART, J., joins in this dissent.

IN the MATTER of the ESTATE of
Joe Thomas GARRETT, Deceased;
Joni Garrett Hart *v.*
Carolynne J. GARRETT and Richard Larry Garrett

CA 02-170 100 S.W.3d 72

Court of Appeals of Arkansas
Division II
Opinion delivered March 12, 2003

Raymond C. Smith, for appellant.

Everett Law Firm, by: *John C. Everett* and *Elizabeth Storey*, for appellees.

WENDELL L. GRIFFEN, Judge. Joni Hart appeals from an order of the Circuit Court of Washington County denying her petition contesting her father's will and finding that her father executed the will absent undue influence and with the requisite testamentary capacity. We hold that the trial court's decision upholding the will was not clearly erroneous and affirm.

Appellant's father, Joe Thomas Garrett, the decedent, was diagnosed with lung cancer and underwent surgery in Little Rock, Arkansas, on January 13, 2000. He suffered complications after surgery that prevented him from leaving the hospital and returning to his home in Springdale, Arkansas. On February 8, 2000, at the decedent's request, his wife, Carolynne Garrett, contacted the decedent's brother, Richard Larry Garrett (Larry), and

asked him to come to Little Rock to help the decedent arrange his affairs. Larry was a certified public accountant living in Nashville, Tennessee, who served as the decedent's CPA and financial advisor for many years. Larry met with the decedent on February 10, 2000, to discuss the decedent's wishes concerning disposition of his property. At that time, Larry had the decedent sign a power of attorney he drafted before leaving Tennessee and coming to Little Rock.

On February 11, 2000, at the direction of the decedent, Larry traveled to Springdale, Arkansas, to meet with John Neihouse, an attorney specializing in tax and estate planning, to discuss preparing a will and a trust for the decedent. The decedent and his wife consulted Neihouse in December 1999 about creating two trusts for Carolynne's grandchildren, which Neihouse prepared, and on at least two other occasions between December 1999 and January 2000 (to sign the trusts and make a second funding to the trusts). During those meetings, the decedent discussed having Neihouse draft a will for him.

Based on the information that Larry had provided, Neihouse prepared a revocable trust, a will, and a second power of attorney. On February 12, 2000, Neihouse faxed a copy of the will, the signature page of the trust, and the power of attorney to the hospital. Neihouse faxed those documents to the decedent because Carolynne or Larry informed him that the decedent might be placed on a respirator and sedated later that day. Upon receiving the documents, Larry asked Dr. Manyusha Kota, one of the decedent's treating physicians, to perform a competency evaluation on the decedent to determine if he was capable of executing the documents. He then recruited a nurse, Gwen Hart, and a social worker, Anne Stroud, from the hospital to witness execution of the will. After the will was read to him by Larry, the decedent executed the will, the signature page of trust, and the second power of attorney in the presence of Dr. Kota, the nurse, the social worker, Carolynne, and other relatives. Because it was Saturday, Larry was unable to locate a notary to notarize the witnesses' signatures on the proof of will; however, a hospital notary notarized the witnesses' signatures two days after the decedent executed the will.

The decedent died on February 18, 2000, at the age of sixty-four. His will was admitted to probate on May 24, 2000. The will provided that all property owned by the decedent at death was to go to the acting trustee of the Joe Thomas Garrett Revocable Trust. Carolynne Garrett and Richard Larry Garrett were named co-trustees under the Trust. In the will, the decedent acknowledged appellant, Toni Ritchie, and Sheila Garrett as his children from prior marriages; specifically excluded Toni and Sheila from inheriting anything under the will; and provided that any distribution of property to appellant or her descendants was set forth in the Trust. Under the Trust, at the death of Carolynne, the Trust assets were to be distributed in the following percentages: fifty percent to Carolynne's children; twenty percent to Richard Garrett; fourteen percent to Mary Katherine Garrett; fourteen percent to Marti Lewis; and two percent to Joni Hart. Since 1969, appellant had seen the decedent only three or four times.

On September 18, 2000, appellant filed an amended petition to contest the will and trust alleging that the will was the product of undue influence by both Carolynne and Larry and that the decedent lacked the necessary mental capacity to execute the will. At a hearing on the matter, Larry, Carolynne, Dr. Kota, Anne Stroud, Gwen Hart, and Dr. Laura Hutchins all testified that the decedent was fully competent and was not subject to any undue influence at the time he signed the will. Specifically, Dr. Kota testified that she performed the standardized "mini-mental examination" of the decedent on February 12, 2000, prior to him executing the will and that he received the maximum score. From this test, Dr. Kota determined that the decedent was alert and oriented as to time, place, and person.

During the hearing, appellees moved for a directed verdict on the grounds that there was insufficient evidence to support appellant's allegations of undue influence and diminished mental capacity. The trial court granted the motion, finding no evidence that Carolynne or Larry procured the will or exercised undue influence over the decedent in securing the will, nor any proof that the decedent lacked sufficient testamentary capacity to execute the will. Accordingly, the trial court dismissed appellant's

petition with prejudice. It is from this judgment that appellant has appealed.

On appeal, probate cases are reviewed *de novo*; however, an appellate court will not reverse the trial court's findings unless they are clearly erroneous. *Wells v. Estate of Wells*, 325 Ark. 16, 922 S.W.2d 715 (1996). Due deference is given to the superior position of the trial court to determine the credibility of the witnesses and the weight to be accorded their testimony. *Id.*

In a typical will contest, the party contesting validity of the will has the burden of proving by a preponderance of the evidence that the testator lacked mental capacity at the time the will was executed or that the testator acted under undue influence. *Looney v. Estate of Wade*, 310 Ark. 708, 839 S.W.2d 531 (1992). Where, however, a beneficiary procures the making of a will, a rebuttable presumption of undue influence arises and the beneficiary must prove beyond a reasonable doubt that the testator enjoyed both the required mental capacity and freedom of will. *Pyle v. Sayers*, 344 Ark. 354, 39 S.W.3d 774 (2001).

In the instant case, the trial court found that Carolynne and Larry did not procure the decedent's will notwithstanding undisputed proof that Carolynne contacted Larry to come to Arkansas, that Larry directed Neihouse to prepare the will, and that both were beneficiaries. Therefore, pursuant to longstanding precedent in Arkansas, we hold that the trial court erred in finding that Carolynne and Larry did not procure the will. As such, appellees were obligated to rebut the presumption of undue influence by proving beyond a reasonable doubt that the decedent executed the will while possessed with testamentary capacity and freedom of will. *See Pyle v. Sayers, supra.*

The trial court further found that there was no evidence that Carolynne, as the decedent's wife, and Larry, as decedent's brother and financial advisor, exercised undue influence over the decedent or that the decedent was incompetent when he executed the will. The record reveals that Larry acted only as requested and instructed by the decedent in securing the will. Although Carolynne and Larry assisted the decedent in getting his affairs in order, nothing in the record suggests that their influence

with the decedent operated to override his discretion and destroy his free will. Further, appellant's medical doctor and other disinterested witnesses testified that the decedent was of sound mind when he executed his will; that they did not believe he was being unduly influenced to execute this will; and that the decedent was doing what he wanted to do. Thus, based on our review of the record, we cannot hold that the trial court erred in finding that the decedent's will was valid, being executed absent undue influence and with the requisite testamentary capacity. Although the trial court erred by finding that no procurement occurred, its error was rendered harmless by proof regarding the decedent's testamentary capacity and freedom from undue influence.

However, on appeal, appellant has abandoned her challenge to the will on the basis of undue influence and lack of mental capacity. Instead, appellant now challenges whether a durable power of attorney can empower or authorize an agent or attorney-in-fact to make a will on behalf of the principal or testator. Appellant argues that her father's will is invalid because the power to make a will is personal and nondelegable; thus, the power of attorney executed by the decedent could not have empowered Larry to make a will for the decedent, even though the decedent instructed Larry how he wanted his property distributed.

This argument was not raised below, and thus is not preserved for appellate review. *Reid v. Frazee*, 72 Ark. App. 474, 41 S.W.3d 397 (2001). We note, however, that a power of attorney, durable or otherwise, cannot bestow upon the attorney-in-fact the power to create a will on behalf of a principal. A power of attorney is an instrument in writing by which one person, as principal, appoints another as his agent and confers upon that agent the authority to perform certain specified acts or kinds of acts on behalf of the principal. *Black's Law Dictionary* 1171 (6th ed. 1990). Under a power of attorney, an agent is "authorized to act with respect to any and all matters on behalf of the principal with the exception of those which, by their nature, by public policy, or by contract require personal performance." 3 AM. JUR. 2d *Agency* § 21 (2002). The decision of who, what, when, and how one's property is to be distributed upon death is clearly personal and that of the principal alone, and thus falls within the exception.

However, the facts of this case do not indicate that Larry, as the attorney-in-fact, was the maker of decedent's will. Instead, the record reveals that the decedent engaged Neihouse to draft the will, trust, and a power of attorney. The decedent instructed Larry to tell Neihouse how he wanted his property distributed. The decedent reviewed and signed the will. Larry merely acted as a conduit or messenger between the decedent and Neihouse concerning the decedent's wishes because the decedent was ill and unable to leave the hospital. Under these facts, it was the decedent, and not Larry, who was the maker of the will.

Affirmed.

ROBBINS and BIRD, JJ., agree.

Leo TIMMONS *v.* STATE of Arkansas

CA CR 02-657 100 S.W.3d 52

Court of Appeals of Arkansas
Division II
Opinion delivered March 12, 2003

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

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

WENDELL L. GRIFFEN, Judge. This appeal arose from revocation of a probation and a subsequent sentencing in Pulaski County Circuit Court. Leo Timmons argues that the trial court lacked jurisdiction to hold a revocation hearing and to sentence him because in a previous judgment and disposition order the same court had imposed a sentence, probation, and a fine, which had been put into execution. Alternatively, appellant argues that the trial court sentenced him illegally when, after granting the State's amended probation revocation petition, it sentenced him to eight years' imprisonment, two of which are in excess of the maximum punishment available for the crime to which appellant had pleaded guilty. We affirm on the first point and dismiss the second point because appellant's appeal is untimely. In doing so, we urge counsel to ensure that oral sentencing terms be reflected in the judgment and commitment orders entered by trial courts.

On November 24, 1998, the State charged appellant with three felony offenses, all relating to an incident on July 12, 1998. In relevant part, the State alleged that appellant was a felon in possession of a firearm. The State also alleged that appellant had previously been convicted of a prior violent felony and that he was a habitual offender with four or more prior felony convictions.

On March 15, 1999, appellant pleaded guilty to one count of being a felon in possession of a firearm — as he now claims on appeal, at the Class D felony level. The State subsequently moved to dismiss the other two criminal charges — terroristic threatening and third-degree domestic battery — as well as the allegations that appellant had a prior, violent felony conviction and that he was a habitual offender, for the purpose of foregoing potential sentence enhancement. The trial court never explicitly stated that it accepted appellant's "Class D" felon in possession of a firearm guilty plea, but made the following remarks to appellant at the guilty-plea proceeding: "Are you aware I can send you to the penitentiary for up to six years and fine you $10,000?" Also, the trial court concluded the proceeding with this announcement: "All right, it will be the judgment and sentence of the Court that you serve a term of four years on probation, pay a fine of $50 and court costs." On March 26, 1999, the trial court filed a judgment and disposition order reciting that appellant had pled guilty to the Class B felony of being a felon in possession of a firearm.

On August 8, 2001, the State filed a petition against appellant requesting revocation of his probation. The State asserted that appellant violated a condition of his probation in that he had used alcohol or illegal drugs, "as evidenced by testing positive to THC on March 30, 2001, June 13, 2001, and July 12, 2001." On August 22, 2001, the State amended its petition, alleging as an additional ground for revocation of probation that appellant committed the offense of first-degree sexual abuse on July 18, 2000.

On February 25, 2002, the trial court held a hearing concerning the amended petition to revoke probation. Appellant concedes in his brief that at that hearing the State proved he had notice of the conditions of probation and that he had violated at least one condition. At the same hearing, the State also noted to the trial court that the "offense that [appellant] was convicted of was a D felony[,] so the range would be five to ten." The trial court revoked appellant's probation and subsequently sentenced him to eight years' imprisonment. On March 1, 2002, the clerk of the court filed a judgment and commitment order against appellant. That order reflected that appellant was to serve an eight-year sentence on a Class B felony. This appeal followed that order.

Jurisdiction to Revoke Probation

For his first argument, appellant asserts that the trial court lacked jurisdiction to hold a revocation hearing and sentence him because in a previous judgment and disposition order, the same court imposed a sentence, probation, and a fine, which had been put into execution. Appellant argues that because the judgment and disposition order had been put into execution, the trial court lacked jurisdiction to modify his sentence, pursuant to *McGhee v. State*, 334 Ark. 543, 975 S.W.2d 834 (1998). Appellant further argues that Act 1569 of 1999 — which supersedes the holding in *McGhee* concerning a trial court's jurisdiction to modify a sentence — does not apply to his case because he committed the offense underlying this probation revocation in July 1998. Act 1569 of 1999 did not become effective until April 15, 1999. Furthermore, Act 1569 is not applied retroactively. *See Bagwell v. State*, 346 Ark. 18, 53 S.W.3d 520 (2001).

However, in a recent opinion our court addressed this argument. *Pierce v. State*, 79 Ark. App. 263, 86 S.W.3d 1 (2002). In that case, the appellant challenged the jurisdiction of the trial court to revoke his probation and sentence him to prison terms. *Id.* The trial court imposed probation as well as a fine on the appellant. *Id.* We held that the filing of the judgment and disposition order constituted a valid execution of the appellant's sentence. *Id.* We recognized that the trial court did not have jurisdiction to modify the sentence and that Act 1569 does not apply retroactively, but we held that the trial court did not lose jurisdiction to revoke Pierce's probation. *Id.* We specifically rejected the argument that *McGhee* or other cases held that a probated sentence which includes a fine cannot be revoked. *Id.*

In the present case, the fact pattern and legal argument are practically identical with the *Pierce* case. Appellant received a probated sentence, including a fine, and the trial court subsequently revoked the probation. The trial court did not purport to modify or change the sentence in question. We hold that the trial court properly acted within the scope of its jurisdiction.

Illegal Sentence

For his second point, appellant argues that the trial court sentenced him illegally when, after granting the State's amended probation revocation petition, it sentenced him to eight years' imprisonment, two of which exceed the maximum punishment available for the crime to which appellant had pleaded guilty.

In response, the State correctly argues that appellant's appeal is untimely. The timely filing of a notice of appeal is a jurisdictional requirement. *See Cannon v. State*, 58 Ark. App. 182, 947 S.W.2d 409 (1997). In his notice of appeal, appellant referred to the judgment and commitment order filed on March 1, 2002, that reflected his being sentenced to an eight-year sentence on a Class B felony. Appellant never appealed to this court from his March 1999 order, and thus did not comply with the thirty-day time frame within which to raise an appeal under Ark. R. App. P.—Crim. 2(a)(1) (2002). Nor did appellant ever file a post-trial motion challenging the classification of the felony in the judgment and disposition order. *See J.C.S. v. State*, 336 Ark. 364, 985 S.W.2d 312 (1997) (finding challenge to sentence barred when no notice of appeal or posttrial motion was made raising or preserving challenge); *Brimer v. State*, 301 Ark. 540, 785 S.W.2d 458 (1990) (finding that failure to appeal earlier order precluded challenging restitution amount in later revocation proceeding). We therefore hold that appellant failed to file a timely appeal to preserve the issue for our consideration.

It is correct that the question of a void or illegal sentence is an issue of subject-matter jurisdiction that cannot be waived by the parties and may be addressed for the first time on appeal. *Thomas v. State*, 349 Ark. 447, 79 S.W.3d 347 (2002). However, for *Thomas v. State* to apply, the sentence in question must have been illegal. *Id.* An illegal sentence is one that is illegal on its face. *Delph v. State*, 300 Ark. 492, 780 S.W.2d 527 (1989). In order to construe judgments, we look for the intention of the court, which is derived from the judgment and the record. *Bramucci v. State*, 76 Ark. App. 8, 62 S.W.3d 10 (2001). Inconsistencies between the judgments entered and the record of the proceeding are resolved in favor of the trial record. *See McCuen v. State*, 338 Ark. 631, 999 S.W.2d 682 (1999) (finding upon review of the trial record that a clerical error could be corrected by the

trial court where the initial judgment and commitment order only reflected a prison sentence and not a fine, even though the trial record reflected a sentence of a prison term and a fine); *see also Carmichael v. State*, 296 Ark. 479, 757 S.W.2d 944 (1988) (holding that when there is a conflict between the trial judge's oral pronouncement of sentence and the recitation on the face of the judgment, the oral pronouncement of sentence governs).

During the proceeding in the present case, the trial judge informed appellant that he could be sentenced to up to six years in prison. The six-year maximum applies to the Class D felony level of felon in possession of a firearm, pursuant to Ark. Code Ann. § 5-4-401(a)(5) (Repl. 1997). Appellant argues that had the trial judge intended to sentence appellant to a Class B felony level of the same offense, the judge would have told him that he could sentence him for up to twenty years, pursuant to Ark. Code Ann. § 5-4-401(a)(3) (Repl. 1997).

Specifically, however, for a conviction of felon in possession of a firearm, two elements must be proved: possession or ownership of a firearm and prior conviction of a felony. *Ferrell v. State*, 305 Ark. 511, 810 S.W.2d 29 (1991). To prove prior conviction of a felony, the State merely must show a docket sheet as evidence of appellant's prior conviction. *See Ussery v. State*, 308 Ark. 67, 822 S.W.2d 848 (1992). A defendant is guilty of a Class B felony if he has been convicted of a violent felony. Ark. Code Ann. § 5-73-103(c)(1) (Repl. 1997). A defendant is guilty of a Class D felony only if the prior felony was for a nonviolent offense and the possession of the firearm did not involve the commission of another crime. Ark. Code Ann. § 5-73-103(c)(2) (Repl. 1997).

In the present case, the State presented to the trial court that appellant's prior felony conviction was for aggravated robbery, thus falling under the scope of a violent offense, and that appellant's possession of the firearm involved the commission of another crime, namely third-degree domestic battery. As such, the State ostensibly met its burden of proof for a conviction of felon in possession of a firearm, Class B level. Because appellant's conviction on the Class B level is not illegal on its face, we hold that the trial court did not impose an illegal sentence upon him when resentencing him after his probation revocation — notwith-

standing any possible confusion of the trial court's intent concerning which felony level of felon in possession of a firearm applies. Therefore, *Thomas v. State, supra,* does not apply to appellant's situation. The appeal is untimely as to this point.

Oddly, counsel for defendants in criminal cases often do not receive judgment orders, unlike in civil cases where judgments are routinely sent, a few days after they are entered. The decision in this case demonstrates why it is important for defense counsel to obtain a copy of the judgment and commitment orders affecting their clients and verify that the orders reflect the sentence pronounced by the trial court.

Affirmed.

ROBBINS and BIRD, JJ., agree.

Jack Jay PETERSON, Jr. *v.* STATE of Arkansas

CA CR 02-761 100 S.W.3d 66

Court of Appeals of Arkansas
Division III
Opinion delivered March 12, 2003

Paul M. Gehring, Deputy Public Defender, for appellant.

J. Leon Johnson, Att'y Gen., by: *Katherine Adams*, Ass't Att'y Gen., for appellee.

OLLY NEAL, Judge. Appellant Jack Peterson, Jr., appeals from an order of the Washington County Circuit Court finding him guilty of driving while intoxicated, fifth offense, violating the implied-consent law, and revoking his suspended sentence for driving while intoxicated, fourth offense. For reversal, appellant challenges the sufficiency of the evidence to support his convictions and the revocation of his suspended sentence. Appellant also asserts that the trial court erred by allowing the jury to set his sentence by applying both the DWI sentencing enhancement provision and the general habitual offender enhancement statute. We conclude that there was sufficient evidence to support appellant's convictions and the revocation of his suspended sentence; thus, we affirm on these points. However, we agree that the court could not use the habitual offender statute in conjunction with the DWI sentencing enhancement provision, and thereby we modify appellant's sentence from fifteen to ten years' imprisonment.

The facts of this case are as follows. At around 3:30 p.m. on December 5, 2001, Sergeant Robert Sanchez of the Springdale Police Department was dispatched to investigate an altercation at Harp's North. En route, dispatch informed Sergeant Sanchez that one of the suspects had left in a white Camaro. Sergeant Sanchez observed the vehicle traveling west on Christian Street and followed the vehicle to the Union Drive Apartments. At the apartment complex, Sergeant Sanchez made contact with the driver. At trial, he identified appellant as the driver. Sergeant Sanchez suspected that appellant was under the influence of alcohol and asked for appellant's identification. At that time, Officer Jeff Taylor arrived to assist Sergeant Sanchez. Officer Taylor had appellant perform a series of field sobriety tests. After appellant failed each test, he was placed under arrest and transported to the Springdale Police Department for a Breathalyzer test. At the station, appellant refused to submit to the Breathalyzer test. He was subsequently charged with driving while intoxicated, fifth offense, and violation of the implied consent law. The State also petitioned to revoke appellant's thirty-six months' suspended sentence for driving while intoxicated, fourth offense.

At appellant's April 4, 2002, jury trial on the driving while intoxicated charge and violation of the implied-consent law, the

court also considered the revocation of appellant's suspended sentence. During the trial, Sergeant Sanchez testified that:

> He [appellant] was pretty rattled trying to tell me about this fight and I noticed he had obviously been drinking, he had a strong odor of intoxicants coming from him and at that point I realized he was probably DWI. I think it was obvious in his demeanor that he'd been drinking. By his demeanor, I mean the way he was talking and he was extremely rattled.

Sergeant Sanchez also testified that during his contact with appellant he did not observe any drowsiness, nausea, or vomiting. He further testified that he did not have an opportunity to determine if appellant's pupils were unequal in size or whether appellant had any unusual eye movements.

Officer Taylor testified that while talking to appellant he too noticed a strong odor of intoxicants coming from appellant's person. He said that when questioned, appellant admitted to consuming two beers. Officer Taylor also testified that during his contact with appellant, he noted that appellant had slurred speech, unusual eye movement, and that he appeared confused.

Officer Taylor stated that he had appellant perform a series of field sobriety tests and that the first test was the horizontal gaze nystagmus test (HGN). Officer Taylor explained that there are six clues that he looks for during the test and that appellant failed the test after he found six of six clues. He stated that during the HGN test "I had lack of smooth pursuit of both eyes which means it was moving like windshield wipers. I had maximum deviation on both eyes. When I pulled it out to the maximum deviation both eyes were jerking, and then prior to onset forty-five degrees both eyes were jerking."

Officer Taylor testified that the next test was the walk-and-turn test. He stated that he explained and demonstrated the test to appellant and that appellant said he could not perform the test even if he was sober. Officer Taylor went on to state that:

> When he [appellant] started the test, he touched heel to toe, and on the fourth step he raised his arms to his side or actually about shoulder level. He was supposed to keep his arms to his side. He took ten steps instead of nine and then when he turned around he did the same thing. He took ten steps and raised his arms to

> his side or to his shoulders. He failed the walk and turn test in my opinion. There are eight clues we look for on that test. If they perform two of those clues they're considered failing. The clues are failing to keep balance while walking, stepping off the line, taking an incorrect number of steps, raising arms for balance, failing to touch heel to toe, performing an improper turn, failing to complete the test, or failing to take all the required steps. He took too many steps and he raised his arms to his shoulder.

Officer Taylor explained that during the walk-and-turn test the subject is allowed to raise his arms six inches.

Officer Taylor testified that prior to performing the one-leg stand test, appellant informed him that his left leg was bad and that he gave appellant the option of choosing which leg he wanted to stand on. He stated that appellant chose to stand on his left leg. Officer Taylor further stated that appellant "stood there for about three seconds and started hopping a little bit and then put his foot down and switched legs and then raised his left leg and stood on his right leg for about five seconds before putting it down again." Officer Taylor testified that because appellant hopped and put his foot down, he failed the test. Based on the totality of the circumstances, Officer Taylor stated that he placed appellant under arrest for driving while intoxicated. Officer Taylor testified that when appellant indicated he did not understand the "implied consent warning," he read the warning to appellant. He stated that after having the warning read to him several times, appellant still did not understand the warning. Officer Taylor testified that due to appellant's failure to understand, his only option was to enter a refusal into the Breathalyzer. Officer Taylor testified that he also read the "right to another test form" to appellant. He stated that appellant refused to sign the form and that he refused to initial as to whether he understood the form.

The jury returned a guilty verdict, and the court revoked appellant's suspended sentence, finding that appellant had violated the terms and conditions of his suspended sentence. He was sentenced as a habitual offender to fifteen years' imprisonment for driving while intoxicated, fifth offense, and violation of the implied consent law, and was sentenced to three years' imprisonment for the revocation of his suspended sentence. The court ran the sentences consecutively.

In his first point for reversal, appellant asserts that the trial court erred in failing to grant his motions for directed verdicts. A motion for directed verdict is a challenge to the sufficiency of the evidence. *Burley v. State*, 348 Ark. 422, 73 S.W.3d 600 (2002). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Alexander v. State*, 78 Ark. App. 56, 77 S.W.3d 544 (2002). Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Turner v. State*, 349 Ark. 715, 80 S.W.3d 382 (2002). When the defendant challenges the sufficiency of the evidence convicting him, the evidence is viewed in the light most favorable to the State. *Id.*

Appellant challenges the sufficiency of the evidence to support his conviction for driving while intoxicated, fifth offense. He specifically asserts that there was no evidence that he was intoxicated. Pursuant to our DWI statute, a person violates the law by either operating a motor vehicle while intoxicated or operating a motor vehicle with a blood-alcohol content of eight-hundredths (0.08) or more. Ark. Code Ann. § 5-65-103 (Supp. 2001); *see also White v. State*, 73 Ark. App. 264, 42 S.W.3d 584 (2001). Intoxicated is defined as:

> influenced or affected by the ingestion of alcohol, a controlled substance, any intoxicant, or any combination thereof, to such a degree that the driver's reactions, motor skills, and judgment are substantially altered and the driver, therefore, constitutes a clear and substantial danger of physical injury or death to himself and other motorists or pedestrians.

Ark. Code Ann. § 5-65-102(1) (Repl. 1997). The observations of police officers with regard to the smell of alcohol and actions consistent with intoxication can constitute competent evidence to support a DWI charge. *Johnson v. State*, 337 Ark. 196, 987 S.W.2d 694 (1999). Opinion testimony regarding intoxication is admissible. *Id.* Furthermore, the refusal to be tested is admissible evidence on the issue of intoxication and may indicate the defendant's fear of the results of the test and the consciousness of guilt. *Id.*

Here, appellant failed the field sobriety tests and refused to submit to a Breathalyzer test. Officer Taylor and Sergeant

Sanchez both testified that they smelled intoxicants on appellant's person. They opined that they believed appellant was intoxicated. There was also evidence that appellant had four prior driving while intoxicated convictions. Therefore, we cannot say that appellant's conviction for driving while intoxicated, fifth offense, was not supported by substantial evidence.

Appellant also challenges the sufficiency of the evidence to support his conviction for violating the implied-consent law. He asserts that there was no evidence that the officer had reasonable cause to suspect that he was intoxicated. Our implied-consent law provides that:

> (a) Any person who operates a motor vehicle or is in actual physical control of a motor vehicle in this State shall be deemed to have given consent, subject to the provisions of § 5-65-203, to a chemical test or tests of his or her blood, breath, or urine for the purpose of determining the alcohol or controlled substance content of his or her breath or blood if:
>
> (1) The driver is arrested for any offense arising out of acts alleged to have been committed while the person was driving while intoxicated or driving while there was an alcohol concentration of eight-hundredths (0.08) or more in the person's breath or blood; or
>
> (2) The person is involved in an accident while operating or in actual physical control of a motor vehicle; or
>
> (3) At the time the person is arrested for driving while intoxicated, the law enforcement officer has reasonable cause to believe that the person, while operating or in actual physical control of a motor vehicle, is intoxicated or has an alcohol concentration of eight-hundredths (0.08) or more in the person's breath or blood.

Ark. Code Ann. § 5-65-202 (Supp. 2001). In *Parsons v. State*, 313 Ark. 224, 853 S.W.2d 276 (1993), our supreme court stated that it reads section 5-65-202(a)(3) to mean that the officer must develop a reasonable belief of intoxication at the time of arrest. Based on the evidence before us, Officer Taylor had a reasonable belief that appellant was intoxicated.

Appellant further asserts that the revocation of his suspended sentence was not supported by substantial evidence. To revoke probation or a suspension, the trial court must find by a

preponderance of the evidence that the defendant inexcusably violated a condition of that probation or suspension. *Rudd v. State*, 76 Ark. App. 121, 61 S.W.3d 885 (2001). In order for appellant's suspended sentence to be revoked, the State need only prove that the appellant committed one violation of the conditions. *Id.* On appeal, the trial court's findings will be upheld unless they are clearly against a preponderance of the evidence. *Lamb v. State*, 74 Ark. App. 245, 45 S.W.3d 869 (2001). Evidence that is insufficient for a criminal conviction may be sufficient for the revocation of probation or suspended sentence. *Id.* Since the determination of a preponderance of the evidence turns on questions of credibility and the weight to be given testimony, we defer to the trial judge's superior position. *Id.*

Appellant's suspended sentence was conditioned upon his good behavior, paying fines and costs, and following the recommendations of the Ozark Guidance Center. Appellant's arrest and subsequent convictions were in violation of the terms of his suspended sentence; therefore, we affirm the revocation of appellant's suspended sentence.

In his last point for reversal, appellant asserts that the trial court erred by allowing the jury to set his sentence by applying both the DWI enhancement provision for a fifth offense under Ark. Code Ann. § 5-65-111(b)(4) (Supp. 2001), and the general habitual-offender enhancement statute under Ark. Code Ann. § 5-4-501(a)(3)(F) (Supp. 2001). We interpret this as an assertion that his sentence is illegal on its face.

The State concedes that appellant's sentence was not authorized under section 5-65-111(b)(4), and we agree. Section 5-65-111(b)(4) provides that:

> Any person who pleads guilty or nolo contendere to or is found guilty of violating § 5-65-103 or any other equivalent penal law of another state or foreign jurisdiction shall be imprisoned or shall be ordered to perform public service in lieu of jail as follows:
>
> * * *
>
> (4) For at least two (2) years but no more than ten (10) years for the fifth or subsequent offense occurring within five (5) years of the first offense or not less than two (2) years of community service and shall be guilty of a felony.

In *Lawson v. State*, 295 Ark. 37, 746 S.W.2d 544 (1988), our supreme court held that the DWI enhancement statute should not be coupled with the habitual-offender statute for the purpose of creating a greater sentence than if either statute had been applied singly. Thus, appellant's sentence is illegal on its face because it exceeded the maximum sentence allowed under section 5-65-111(b)(4). *See Cooley v. State*, 322 Ark. 348, 909 S.W.2d 312 (1995). Where the trial court's error has nothing to do with the issue of culpability and relates only to punishment, we may correct the error in lieu of reversing and remanding the case. *Roberts v. State*, 324 Ark. 68, 919 S.W.2d 192 (1996). Therefore, we modify appellant's sentence to ten years' imprisonment.

Affirmed as modified.

STROUD, C.J., and VAUGHT, J., agree.

IN RE: THREE PIECES of PROPERTY
LOCATED in MONTICELLO, ARKANSAS

CA 02-223 100 S.W.3d 76

Court of Appeals of Arkansas
Division III
Opinion delivered March 12, 2003

Hough & Hough, P.A. by: *Stephen G. Hough*, for appellant.

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

LARRY D. VAUGHT, Judge. This is an appeal from a decision of the Drew County Circuit Court in which three pieces of property located in Monticello, Arkansas,[1] were forfeited subsequent to the drug convictions of the property owners, Glen and Kathy Rabb, and an equitable lien in one of the properties was granted to Glen Rabb's mother, Betty Rabb. On appeal, the Rabbs assert that the State failed to show by a preponderance of the evidence that the property was subject to forfeiture. On cross-appeal, the State contends that the trial court erred in finding that Betty Rabb held an equitable interest in the 509 South Main Street property. We affirm the trial court's decision regarding the forfeiture of the properties but reverse the grant of the equitable lien to Betty Rabb.

On October 28, 1998, Glen Rabb was arrested in California on a probation violation. During a search of Glen Rabb's apartment, California authorities found evidence of a drug link to his wife, Kathy Rabb, then living in Monticello, Arkansas. The California authorities contacted Arkansas authorities, and eventually

[1] The legal descriptions for the three properties are: (a) S 70' N 210' W 200' of Block 219 Monticello Original Plat, City of Monticello, Drew County, Arkansas, also known as 509 South Main Street, Monticello, Arkansas; (b) S 70' N 140' W 200' of Block 210 Monticello Original Plat, City of Monticello, Drew County, Arkansas, also known as 513 South Main Street, Monticello, Arkansas; (c) All of Block 4 of Monticello Original Plat except for 125 feet on the south side, City of Monticello, Drew County, Arkansas, also known as 507 North Church Street, Monticello, Arkansas.

two search warrants were executed on the residence of Kathy Rabb located at 507 Church Street in Monticello, Arkansas. On October 29, 1998, the initial search of the property was conducted, from which authorities seized approximately $4,000 in cash, drugs, and drug paraphernalia. A second search of the property on November 13, 1998, yielded approximately seven ounces of methamphetamine, $7,000 hidden in the bathroom, $141,000 hidden in the kitchen, and $177,000 hidden in a safe concealed in the floor of an upstairs bedroom closet. These items were seized by authorities, along with numerous documents such as phone and tax records, and handwritten records which appeared to be "pay and owe" ledgers involved in drug trafficking.

On November 18, 1998, the State filed an *in personam* complaint in Drew County Circuit Court for the seizure of property located at 507 North Church Street and sought an *ex parte* temporary restraining order pending convictions of Glen and Kathy Rabb for drug trafficking. That same day, the circuit court entered an *ex parte* order enjoining and restraining Glen and Kathy Rabb from "selling, encumbering, mortgaging, contracting to sell, or otherwise disposing of or removing" the 507 North Church Street property or its contents. On November 19, 1998, the State filed a notice of *lis pendens* concerning three parcels of property: 507 North Church Street, and 509 and 513 South Main Street.[2]

On November 23, 1998, the State filed a motion for an *ex parte* temporary restraining order regarding the two properties located at 509 and 513 South Main Street. That same day, the circuit court entered an *ex parte* order enjoining and restraining Glen and Kathy Rabb from "selling, encumbering, mortgaging, contracting to sell, or otherwise disposing of or removing" the two Main Street properties. Both Glen and Kathy Rabb filed answers to the *in personam* complaint denying that the real properties were subject to forfeiture.

Glen and Kathy Rabb were charged with conspiracy to deliver a controlled substance, methamphetamine; and Kathy

[2] 507 North Church Street was owned at the time by Glen and Kathy Rabb; the 509 and 513 South Main Street properties were held only in the name of Kathy Rabb.

Rabb was additionally charged with possession with intent to deliver, and simultaneous possession of a firearm and a controlled substance. On June 17, 1999, Kathy Rabb was convicted on all charges. *See Rabb v. State*, 72 Ark. App. 396, 39 S.W.3d 11 (2001) (affirming the convictions with the exception of the simultaneous possession conviction). On August 24, 1999, the circuit court entered an order in which the parties stipulated that all three parcels of property "shall remain subject to the orders granting temporary injunctive relief." On February 17, 2000, Glen Rabb was convicted of conspiracy to deliver a controlled substance (methamphetamine). *See Rabb v. State*, CACR 00-01010, (Ark. App. Sept. 2001) (affirming the conviction).

On April 14, 2000, the State filed an *in rem* complaint for the forfeiture of the three Monticello, Arkanas, properties located at 507 Church Street, 509 Main Street, and 513 Main Street, alleging that both Glen and Kathy Rabb had been convicted of violating the Arkansas Uniform Controlled Substances Act. On May 8, 2000, a warranty deed was filed regarding the 507 North Church Street property, attempting to transfer the property from Glen and Kathy Rabb to Glen's mother, Betty Rabb. On June 2, 2000, a warranty deed was filed regarding the 509 South Main Street property, attempting to transfer it from Kathy Rabb to Betty Rabb.

On January 30, 2001, a warning order was filed notifying potential claimants that the State had filed an *in rem* forfeiture action against the three parcels of property. On February 2, 2001, Betty Rabb, as a potential claimant, was served with notice of the warning order. Additionally, the proof of publication showed that the warning order was published for two consecutive weeks, beginning February 7, 2001. On February 27, 2001, Glen, Kathy, and Betty Rabb filed an answer, claiming an interest in all three properties. Additionally, Betty Rabb claimed an equitable interest in all three properties based upon her payment of real property taxes on the properties, and specifically, an equitable lien as to the 509 South Main Street property based upon her payoff of the Commercial Bank mortgage on May 11, 1999, in the amount of $15,764.36.

A trial on the *in rem* action was held on May 14, 2001, after which the judge took the case under advisement. On September 21, 2001, the judge entered an order finding that all three parcels of land were acquired and used for the purpose of possession, sale, and distribution of controlled substances in violation of Ark. Code Ann. § 5-64-401 (Supp. 1999), and accordingly forfeited all three pieces of property to the State. Additionally, he found that Betty Rabb held an equitable lien in the amount of $15,764.36, based upon her paying off the mortgage on the property located at 509 South Main Street. From that order, comes the appeal regarding the forfeiture of the three pieces of property and the cross-appeal by the State seeking to set aside Betty Rabb's equitable lien in the 509 South Main Street property.

A forfeiture is an *in rem* civil proceeding, independent of the criminal charge, and to be decided by a preponderance of the evidence. This court will set aside the trial judge's findings only if they are clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. *See* Ark. R. Civ. P. 52(a); *In Re: One 1994 Chevrolet Camaro*, 343 Ark. 751, 37 S.W.3d 613 (2001); *Reddin v. State*, 15 Ark. App. 399, 695 S.W.2d 394 (1985). A finding is "clearly erroneous" when, although there is evidence to support it, the appellate court is left, upon viewing the entire evidence, with the definite and firm conviction that a mistake has been made. *Statco Wireless, LLC v. Southwestern Bell Wireless, LLC*, 80 Ark. App. 284, 95 S.W.3d 13 (2003).

I. Whether the State failed to show by a preponderance of the evidence that the property was subject to forfeiture.

Arkansas Code Annotated section 5-64-505 is part of the Uniform Controlled Substances Act and sets forth the property that is subject to forfeiture under the act along with the procedures to be followed. The relevant parts of section 5-64-505(a)(6) & (7) (Supp. 1999)[3] state:

[3] Although the State refers to the 2001 supplement of Ark. Code Ann. § 5-64-505, we cite to the 1999 supplement, which was in effect at the time of the forfeiture trial on

> (a) ITEMS SUBJECT TO FORFEITURE. The following are subject to forfeiture upon the initiation of a civil proceeding filed by the prosecuting attorney and when so ordered by the circuit court in accordance with this section . . . :
>
> (6) Everything of value furnished or intended to be furnished in exchange for a controlled substance or counterfeit substance in violation of this chapter, *all proceeds and profits traceable to such an exchange* . . . .
>
> (7) Real property may be forfeited under this chapter if it substantially assisted in, facilitated in any manner, or was used or intended for use in the commission of any act prohibited by this chapter . . . .

(Emphasis added.) The Rabbs argue that the State failed to show by a preponderance of the evidence that any of the three properties either substantially assisted in, facilitated in any manner, or was used or intended for use in the commission of any act prohibited by the Uniform Controlled Substances Act, and that there was no "active" participation between the real property and the criminal defendants in the facilitation of any offense committed.

The Rabbs argue with respect to the property located at 513 South Main Street that it has never even been the subject of the execution of a search warrant or sting operation, and that the only evidence related to it was the introduction of the deed, its location, and the year it was purchased. They assert that there was little more evidence offered related to the property located at 509 South Main Street. Reference is made to a handwritten document relating to some insurance and tax payments made either from an unidentified savings account or by Kathy Rabb. Their basic argument is that the State failed to provide any evidence that either piece of property was related to the Rabbs' drug activities.

While admitting that the property located at 507 Church Street presents more of a problem, as it was the property that was subject to the two searches that yielded drugs, large amounts of hidden cash, and records relating to the criminal activities in ques-

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May 14, 2001. The 2001 amendment became effective as of August 13, 2001; however, the text of the relevant subsections is identical in both the 1999 and 2001 supplements.

tion, the Rabbs still maintain that the State failed to meet its burden by a preponderance of the evidence that the property was subject to forfeiture. They claim that although there were drugs and money in the residence, that is insufficient proof because the State failed to provide any evidence that drugs were sold out of the house.

The State points to the drugs and large amount of hidden cash seized from the 507 North Church Street property during the two searches, and claims that the evidence showed that the property was used in the commission of the drug-trafficking activities and as a storage location both for illegal narcotics and for the proceeds of illegal drug activity. We agree that there is clearly a strong nexus between the 507 North Church Street property and the Rabbs' illegal drug activity, thus making it subject to forfeiture under Ark. Code Ann. § 5-64-505(a)(7).

The State argues, pursuant to Ark. Code Ann. § 5-64-505(a)(6), that the two properties located on South Main Street were purchased with proceeds and profits traceable to drug-trafficking activities in violation of the Uniform Controlled Substances Act. We agree that this is appropriate because there is not a strong enough nexus between those properties and the Rabbs' illegal drug activity to satisfy the requirement of Ark. Code Ann. § 5-64-505(a)(7) that the property "substantially assisted in, facilitated in any manner, or was used or intended for use in the commission of any act prohibited by the Uniform Controlled Substances Act."

Arkansas Code Annotated section 5-64-505(g)(5)(B) (Supp. 1999), sets forth the burden of proof in a forfeiture proceeding:

> If a timely answer has been filed, the prosecuting attorney shall have the burden of proving *by a preponderance of the evidence* that the seized property should be forfeited. After the prosecuting attorney has presented such proof, any owner or interest holder of the property seized shall be allowed to present evidence why such property should not be forfeited. If the court determines that grounds for forfeiting the property exist and that no defense to forfeiture has been established by the owner or interest holder, the court shall enter an order pursuant to subsection (h) of this section. However, if the court determines either that the prose-

> cuting attorney has failed to establish that such grounds exist or that the owner or interest holder has established a defense to forfeiture, the court shall order that the property be immediately returned to the owner or interest holder.

(Emphasis added.) The State was required to prove by a preponderance of the evidence that the South Main Street properties were purchased with proceeds traceable to the drug-trafficking activities. The federal forfeiture statute, found at 21 U.S.C. § 881, is substantially similar to the Arkansas statute; however, under the federal statute the burden of proof shifts to the defendant once the government has established probable cause. While Arkansas case law has not addressed the evidence necessary to sustain the forfeiture of real property under Ark. Code Ann. § 5-64-505, federal cases provide some guidance. Probable cause under the federal statute has been upheld where the drug activity of the owner has been established and there is evidence that the owner had no legitimate source of income at the time the property in question was purchased. *See United States v. Carrell*, 252 F.3d 1193 (11th Cir. 2001); *United States v. Two Parcels of Real Property Located in Russell County, Alabama*, 92 F.3d 1123 (11th Cir. 1996); *United States v. Thomas*, 913 F.2d 1111 (4th Cir. 1990); and *U.S. v. Certain Property Situated at Route 3, Box 247E, Mountain Home, AR*, 568 F.Supp. 434 (W.D. Ark. 1983). Although the federal cases rely on shifting the burden of proof to the defendant once probable cause has been established, they are instructive with regard to types of proof accepted by courts.

The Arkansas forfeiture statute does not shift the burden of proof to the Rabbs to show that the property was purchased with legitimate sources, but it does require a defense to be articulated once the State has met its burden. The State provided evidence at the forfeiture trial that in 1996 and 1997, at the time the South Main Street properties were purchased, Kathy Rabb had no legitimate source of income. There was testimony from Lieutenant DeMent, and additional evidence discovered from a review of the documents and records seized from 507 North Church Street, that the drug-trafficking conspiracy began in late 1993 or early 1994. The State introduced Social Security records found at the 507

North Church Street property that listed no reported income for Kathy for 1994, 1995, or 1996; and that neither 1997 nor 1998 income had been reported. Lieutenant DeMent testified that authorities checked all her personal records, bank records, bank account statements, etc. and never found check stubs from a place of employment, tax returns, or any other indication that she had a legitimate source of income for the period during which the South Main Street properties were purchased. Although she was unemployed and reported no income to the federal government for the years in question, evidence was introduced that she wrote checks in the amount of $16,000 and $9,000 on her Commercial Bank account for part of the purchase price for the South Main Street properties.

There was also evidence relating to a document retrieved from the North Church Street property, which read "Check T savings to see if taken from it. If not then Kathy paid with her money, $270.00 2/96 (509 South Main)(insurance)," and "$272.00 2/97 (509 South Main)(insurance)," and "10/97 (real taxes.)" Lieutenant DeMent testified that the document referenced various payments made on the 509 South Main Street property for insurance and taxes. He explained that authorities never discovered a legitimate savings account in any bank that corresponded to all the references in the narcotics documentation to the "T savings account" and that they presumed it to be funds received from the drug pay and owe sheet. When specifically asked if his office was making the allegation that the properties on [South] Main Street were purchased from the illegal drug funds, Lieutenant DeMent stated unequivocally, "Yes, I am." He referenced the $16,000 and $9,000 checks written from Kathy Rabb's account during the period she was unemployed and stated that he did believe it was drug money.

■ Subsequent to the testimony of Lieutenant DeMent and the introduction of the evidence related to her sources of income, Kathy Rabb presented absolutely no evidence rebutting the evidence that the properties were purchased with proceeds of the drug-trafficking activities. While the burden of proof is on the

State, the lack of evidence showing that the property should not be subject to forfeiture was specifically something to be weighed by the trial court pursuant to Ark. Code Ann. § 5-64-505(g)(5)(B).

■ ■ The State contends that this evidence was sufficient to meet its burden of proof. While the evidence is more persuasive on the North Church Street property, we hold that the State provided the bare minimum needed to meet its burden, giving due regard to the opportunity of the trial court to judge the credibility of the evidence and witnesses. *See Reddin, supra.* The preponderance of the evidence shows that the three properties in question were subject to forfeiture, and we cannot say that the trial court's decision is clearly erroneous as we are not left with the definite and firm conviction that a mistake has been made. Accordingly, we affirm the decision forfeiting the property.

II. Whether the trial court erred in finding that Betty Rabb held an equitable interest in the 509 South Main Street property.

This is a cross-appeal filed by the State, to which no reply was filed. As set forth above, on November 18, 1998, the circuit court granted the State's motion for a temporary restraining order enjoining and restraining the Rabbs from "selling, encumbering, mortgaging, contracting to sell, or otherwise disposing of or removing" the 507 North Church Street property or its contents. On November 19, 1998, the State filed a notice of *lis pendens* concerning all three parcels of property. On November 23, 1998, the circuit court granted the State's motion for a temporary restraining order enjoining and restraining the Rabbs from "selling, encumbering, mortgaging, contracting to sell, or otherwise disposing of or removing" the two South Main Street properties.

On May 11, 1999, $15,764.36 was withdrawn from Commercial Bank savings account No. 310-904 which presumably belonged to Betty Rabb. She is the person who signed the withdrawal slip, and no one disputed that it was her account. On the same day, a cashier's check in the same amount was drawn on Commercial Bank and made payable to Portland Bank, listing as

the remitter Kathy and Glen Rabb, for the payoff of loan No. 8060029. At the forfeiture trial, Betty Rabb testified that she obtained a loan, which she deposited in her savings account, and then used the proceeds to pay off the mortgage on the *507 North Church Street property*. Contrarily, Betty Rabb's pleadings asserted and, the circuit court granted her, an equitable interest for that amount in the *509 South Main Street property*. Almost three and a half months subsequent to that transaction, on August 24, 1999, the trial court entered an order in which Glen and Kathy Rabb stipulated that both the 507 North Church Street and 509 South Main Street properties would remain subject to the temporary restraining orders previously issued.

The State argues that regardless of which loan she paid off, Betty Rabb did not obtain an equitable interest in any of the properties in question. The State asserts that there was neither an express nor implied agreement to create a lien on the property, real or personal, as security for an obligation, and that the loan itself does not give rise to a lien unless there was fraud in its procurement. *See Mitchell v. Mitchell*, 28 Ark. App. 295, 773 S.W.2d 853 (1989). There is no evidence that Betty Rabb purchased the loan from Commercial Bank or that the bank gave her an assignment entitling her to stand in place of the bank as a secured creditor. At most, there is testimony from Betty Rabb that she spoke to lawyers for both Kathy Rabb and the bank regarding her position if she paid off the mortgage, and that they told her she would stand in the bank's position. Betty Rabb contended that they were supposed to "fix up" papers conveying an interest to her but that it never happened. She admits that she neither sought independent representation to make sure her interests were protected nor checked to see if the property was in any way encumbered prior to paying off the mortgage.

The only documentation regarding her alleged interest in the property provided by Betty Rabb consisted of the savings account withdrawal slip for $15,764.36, the cashier's check by which she paid off loan No. 8060029, a warranty deed for the 509 South Main Street property dated June 2, 2000, and a warranty deed for

the 507 North Church Street property dated May 8, 2000. She has no claim that she was a bona fide purchaser of the property without notice, actual or constructive, or that the property was encumbered by a *lis pendens* filing and a temporary restraining order prohibiting the transfer of the property. *See Orr v. Orr*, 211 Ark. 1062, 204 S.W.2d 545 (1947). The State maintains that Betty Rabb gratuitously paid off the loan without properly retaining any rights to or interest in the property, in effect making the loan a gift to Glen and Kathy Rabb.

We have held that "the mere loan of money for the purchase of property does not result in an equitable lien in favor of the lender." *Warren v. Warren*, 11 Ark. App. 58, 61, 665 S.W.2d 909, 910-11 (1984). Betty Rabb did not assert that her payoff of the loan was premised upon any agreement that she would be secured by an equitable lien, or that either Glen or Kathy Rabb would repay her. She failed to present evidence that there was any express or implied agreement to create a lien on the property. Further, she did not argue that the payoff was somehow obtained by trickery or fraud. Because the evidence does not show any agreement to give the lender, Betty Rabb, a lien, or that the loan was acquired through trickery or fraud, it was error for the trial judge to impress an equitable lien upon the property based upon her payoff of a loan six months after the *lis pendens* was filed and the trial court had entered an order enjoining and restraining the Rabbs from doing anything that might affect the properties. Accordingly, we reverse and remand on that point with directions to cancel the equitable lien awarded to Betty Rabb.

Appeal affirmed.

Cross-appeal reversed and remanded.

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

Anthony JACKSON *v.* Elizabeth Tatum JACKSON

CA 02-539 100 S.W.3d 92

Court of Appeals of Arkansas
Division IV
Opinion delivered March 12, 2003

Kearney Law Office. by: *Jack R. Kearney*, for appellant.

Karen Moskowitz, Center for Arkansas Legal Services, for appellee.

ANDREE LAYTON ROAF, Judge. Anthony Jackson appeals from the trial court's dismissal of his motion to set aside a divorce decree obtained by appellee, Elizabeth Tatum Jackson. Service on Anthony had been obtained by warning order, without the filing of an affidavit that a diligent inquiry had been made into Anthony's whereabouts as required by Ark. R. Civ. P. 4(f) (Supp. 2002). On appeal, Anthony argues that the trial court erred in (1) finding insufficient evidence that Elizabeth obtained service by warning order through fraud and misrepresentation; and (2) failing to set aside the decree upon proof that the warning order had been issued without the requisite affidavit. We agree that Anthony's second point has merit, and reverse and dismiss.

Anthony and Elizabeth were married in California in 1989 and lived together only in California. During their marriage, they had two children. In 1993, Elizabeth moved to Arkansas leaving the children in Anthony's care. Elizabeth filed for divorce in Arkansas on August 8, 1996. A warning order was obtained from the chancery clerk on September 17, 1996. However, there was no affidavit showing that a diligent inquiry had been made to determine Anthony's whereabouts as required by Ark. R. Civ. P. 4(f). The complaint and summons were sent certified mail, restricted delivery to Anthony by Elizabeth's attorney to an address given him by Elizabeth on September 18, 1996. The address provided was the address of Anthony's parents. The letter was subsequently returned unclaimed after attempted delivery on September 27 and October 7, 1996.

The warning order was published in the Lonoke Democrat on September 25, 1996, and again on October 2, 1996. It is

undisputed that Anthony has always been a resident of California and has never been an Arkansas resident. Anthony did not appear at the Arkansas divorce proceeding to defend the suit. Elizabeth was granted a divorce by default in March 1997, and was awarded custody of the couple's minor children. The court also ordered Anthony to pay child support in the amount of $30 per week and allowed for supervised visitation. The parties continued to communicate and exchange custody of the children between Arkansas and California, however, Anthony alleged that Elizabeth never notified him of the decree.

Anthony filed for divorce in California on November 10, 2000. A hearing was held in California on January 16, 2001, in which Elizabeth presented the Arkansas divorce decree and custody order. The California court declined to exercise jurisdiction because of the existence of the Arkansas judgment. Anthony then filed a Motion to Set Aside the Decree in Lonoke County, asserting that the decree had been issued upon fraud, misrepresentation and/or other misconduct. The motion was denied after a hearing held on January 30, 2002. This appeal follows that decision.

On appeal, Anthony argues that the trial court erred when it (1) found insufficient evidence existed to establish that Elizabeth caused service by warning order to be issued through the use of fraud and misrepresentation, and (2) when it issued a warning order without affidavit that a diligent inquiry had been made as to Anthony's whereabouts as required by Ark. R. Civ. P. 4(f) and the due process clauses of the both the Arkansas and United States Constitution.

In regard to his second point, Anthony argues that it was error both to issue the decree upon the record absent the affidavit of diligent inquiry, and for the trial court to fail to set aside the decree upon proof of this error. At the hearing, there was extensive colloquy between the trial court and counsel concerning the absence of the affidavit. Elizabeth's counsel acknowledged that there was no affidavit in the record, and that the judgment might be "void," but asserted that the only issue the trial court should address was whether Elizabeth or her attorney made a diligent inquiry. In denying the motion to set aside the decree, the trial

court stated that Anthony was served by warning order that was "published according to Rule 4." However, the trial court also stated "for the record" that "there was no proof in front of me today that the warning order was issued after an affidavit was filed," and he refused to make a specific finding that the affidavit was filed before the warning order was issued. The order entered denying the motion to set aside decree provides in pertinent part, "the Court finds that the defendant was properly served in the action by warning order which was published pursuant to Rule 4(f) of the Arkansas Rules of Civil Procedure."

We have found no cases where a warning order has been issued without an affidavit, or where the warning order was obtained before personal service was first unsuccessfully attempted, both of which occurred in this case. However, the supreme court has addressed the requirements for valid constructive service on a number of occasions. In this regard, we first note that Arkansas Rule of Civil Procedure 4(f) (1999) provides 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 for determining 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, in setting aside the appointment of a receiver where the affidavit for warning order was not in compliance, 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* [198 Ark. 149, 127 S.W.2d 629]; *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 defendants, all proceedings as to them are void. *Beidler v. Beidler*, 71 Ark. 318, 74 S.W. 13.
>
> . . . .
>
> 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* [175 Ark. 285, 298 S.W. 1026]. 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.

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 comply with the requirements of constructive service).

This court has likewise followed the rationale and decisions of the supreme court when 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*, 252 Ark. 1201, 482 S.W.2d 785 (1972).

In the case before us, Elizabeth's attempt to obtain service by publication did not comply with the provisions of Rule 4 because no affidavit whatsoever was filed. The supreme court has held that compliance is an essential prerequisite to the publication of warning orders. Absent such compliance, no jurisdiction can be acquired over a defendant and all proceedings as to him are void. *Beidler v. Beidler*, 71 Ark. 318, 74 S.W. 13 (1903).

Because we conclude that this case must be reversed and dismissed on this point, we do not address Anthony's argument that service was obtained through fraud and misrepresentation.

Reversed and dismissed.

CRABTREE and BAKER, JJ., agree.

Mark McGHEE, *et ux.* *v.* Jim WITCHER, *et ux.*

CA 02-546 101 S.W.3d 262

Court of Appeals of Arkansas
Division III
Opinion delivered March 19, 2003

[Petition for rehearing denied April 23, 2003.]

Mark Alan Jesse, for appellants.

Walker & Hickey, by: *Paul Hickey* and *Steven R. Davis*, for appellees.

JOHN MAUZY PITTMAN, Judge. The appellees are residents of the Pleasant Valley Subdivision in Little Rock. When the subdivision was platted, a bill of assurance prohibiting any commercial or business use of property in the subdivision was filed and recorded. Commercial use of that location was also prohibited by municipal zoning ordinances. Nevertheless, appellees operated a commercial day-care center out of their home, applying for and receiving a special-use permit from the city of Little Rock without disclosing, as required by the permit application, that the requested use violated a bill of assurance. Appellants reside directly next door and share a common property line with

appellees. After learning that appellees were operating a day-care center in their home, appellants made complaints about increased traffic and safety concerns to the Little Rock Police Department, the Arkansas Department of Human Services, the Neighborhood Association Board, and to the appellees themselves. These efforts were ineffective, and appellants ultimately sued to enjoin operation of the day care, asserting that it constituted a nuisance and that it violated the bill of assurance. After a hearing, the trial court found that the appellees' operation of the day care did not rise to the level of a nuisance, and that appellants waived the right to assert the bill of assurance by failing to assert it until three years after they were notified that appellees had filed for a permit to operate a day care in their home. From that decision, comes this appeal.

For reversal, appellants contend that the trial court erred in considering the waiver issue because waiver is an affirmative defense that was not specifically raised until after the hearing was concluded. They also argue that the trial court erred in finding that they waived the right to assert the bill of assurance. We reverse on the second point.

Appellants correctly assert that waiver is an affirmative defense that must be specifically pled in one's answer or other responsive pleading, *see Ward v. Russell*, 32 Ark. App. 86, 796 S.W.2d 588 (1990), and it is true that appellees did not raise the issue in their initial responsive pleading, or even before the hearing on the merits, but instead first mentioned their theory of waiver in a letter to the court some time after that hearing had been concluded. However, at a posttrial hearing on the issue of waiver, appellants never objected to the untimely manner in which the waiver issue was raised, and therefore acquiesced in it. While we will not imply consent merely because evidence relevant to a properly pled issue incidentally tends to establish an unpled one, a party who knowingly acquiesces in the introduction of evidence relating to issues that are outside the pleadings is in no position to oppose a motion to conform. *Id.* Consequently, we cannot say that the trial court erred in considering the issue of waiver.

Nevertheless, giving due deference to the trial court's superior opportunity to assess the credibility of the witnesses, *see McGuire v. Bell*, 297 Ark. 282, 761 S.W.2d 904 (1988), we think that the trial court clearly erred in finding that appellants

waived their right to rely on the bill of assurance by failing to immediately file suit upon learning that appellees were operating a day-care facility on their property. The bill of assurance expressly provided that failure to immediately proceed upon learning of a violation thereof would not result in a waiver of rights. Furthermore, although appellants did wait approximately three years before filing suit to enforce the bill of assurance, they were not idle during that time. The record is replete with evidence that appellants complained numerous times to the police department and to DHS in connection with appellees' operation of the day care. Although it is true that appellants did not base their preliminary complaints on their contractual rights under the bill of assurance, the witnesses generally agreed that appellants continuously and actively opposed the operation on several other grounds. This issue frequently arises in the context of election-of-remedies cases, where the general rule is that, where a party has cumulative and consistent remedies, he may pursue all or one, so long as he receives only one satisfaction. *Davis v. Lawhon*, 186 Ark. 51, 52 S.W.2d 887 (1932). This was explained more fully in *Kapp v. Bob Sullivan Chevrolet Co.*, 232 Ark. 266, 335 S.W.2d 819 (1960), where the supreme court said that:

> Where the law affords several distinct but not inconsistent remedies for the enforcement of a right, the mere election or choice to pursue one of such remedies does not operate as a waiver of the right to pursue the other remedies. In order to operate as a waiver or estoppel, the election must be between coexistent and inconsistent remedies. To determine whether coexistent remedies are inconsistent, the relation of the parties with reference to the right sought to be enforced as asserted by the pleadings should be considered. If more than one remedy exists, but they are not inconsistent, only a full satisfaction of the right asserted will estop the plaintiff from pursuing other consistent remedies. All consistent remedies may in general be pursued concurrently even to final adjudication; but the satisfaction of the claim by one remedy puts an end to the other remedies.

Id. at 269, 335 S.W.2d at 821. In the present case, the thrust of all of appellants' various legal efforts against appellees was directed toward preventing appellees from employing their property for uses that were inconsistent with and detrimental to the residential

character of the neighborhood. This is perfectly consonant with the terms and intention of the bill of assurance.

Nor were appellants barred by the doctrines of estoppel and laches. Both doctrines are founded on the principle of detrimental reliance, and, perhaps because the issue was not raised until after the hearing was concluded, there is no evidence that appellees incurred any expenses or otherwise relied to their detriment on appellants' three-year delay in asserting their rights under the bill of particulars. *See generally Cavaliere v. Skelton*, 73 Ark. App. 188, 40 S.W.3d 844 (2001); *compare Baldischwiler v. Atkins*, 315 Ark. 32, 864 S.W.2d 853 (1993).

In light of appellants' continued opposition to the prohibited use through other consistent avenues, and the express provision in the bill of assurance that failure to immediately proceed upon learning of a violation thereof will not result in a waiver of rights, we hold that the trial court erred in finding that the appellants waived their rights under the bill of assurance.

Reversed and remanded.

ROBBINS and CRABTREE, JJ., agree.

Dana TROTTER, *et al.* *v.* Robin BOWDEN

CA 02-663 101 S.W.3d 264

Court of Appeals of Arkansas
Division III
Opinion delivered March 19, 2003

Gary Eubanks & Associates, by: *Russell D. Marlin*, for appellant.

Laser Law Firm, P.A., by: *Alfred F. Angulo, Jr.* and *Brian A. Brown*, for appellee.

JOHN MAUZY PITTMAN, Judge. The appellee in this tort case was driving an automobile that collided with two eight-year-old boys riding a bicycle. The boys were injured, and they and their parents sued appellee for negligence. At the close of trial, appellee moved for a directed verdict. The trial court granted the motion and dismissed the case. This appeal followed.

For reversal, appellants contend that the trial court erred in directing a verdict in favor of appellee. We agree, and we reverse and remand.

In reviewing an order granting a motion for directed verdict, we view the evidence in the light most favorable to the party against whom the verdict was directed. *Allstate Insurance Company v. Voyles*, 76 Ark. App. 334, 65 S.W.3d 457 (2002). If any substantial evidence exists that tends to establish an issue in favor of that party, then a jury question is presented and the directed verdict should be reversed. *Id.*

Viewing the evidence, as we must, in the light most favorable to the appellants, the record shows that appellee was driving her car on a residential street, on a school day, at approximately 4:00 p.m. Appellee knew that this was a residential neighborhood and that it was important to be cautious there because people frequently walk in the street. She testified that she saw two little boys riding a bicycle on the right side of the road. They were approximately two feet from the curb. Appellee was driving between fifteen and twenty miles per hour when she first saw the boys. There were no vehicles or anything else in the street that obstructed her view. Appellee applied her brakes but did not take evasive action. Approximately five seconds after first seeing the boys, she struck them with her vehicle. The boys were injured and taken away in an ambulance.

We think that the testimony recounted above constitutes substantial evidence of negligence. A driver is bound to be constantly vigilant for persons along a highway and exercise reasonable care to avoid injuring them. *Thomas v. Newman*, 262 Ark. 42, 553 S.W.2d 459 (1977). A motorist cannot rely upon the assumption that a child pedestrian will act with the same degree of care, caution, and circumspection or will remain in a place of safety or obey the rules of the road to the same extent he could if an adult were involved. *Id.* Significantly, although there was evidence that appellee had up to five seconds to react to the presence of the little boys and there were no other vehicles in the street, there was no indication that she either sounded her horn or took evasive action. *See id.; see also Collett v. Loews*, 203 Ark. 756, 158 S.W.2d 658 (1942). Furthermore, although appellee makes much of the fact that the boys did not testify at trial, the injured party is presumed to be free from negligence until the contrary is made to appear. *Thomas v. Newman, supra.*

The evidence introduced by the appellants was substantial evidence, and whether it was true or not was a question for the determination of the jury, not the court. *Collett v. Loews, supra.* We hold that the trial court erred in directing a verdict in favor of appellee, and we reverse and remand.

Reversed and remanded.

ROBBINS and CRABTREE, JJ., agree.

Danny K. SNYDER *v.* DIRECTOR,
Employment Security Department, and Eaton Aeroquip, Inc.

E 02-254 101 S.W.3d 270

Court of Appeals of Arkansas
Divisions I, III, and IV
Opinion delivered March 19, 2003

[redacted]

Appellant, pro se.

Phyllis A Edwards, for appellee Director.

SAM BIRD, Judge. The appellant, Danny K. Snyder, was discharged from his employment with Eaton Aeroquip, Inc., and filed a claim for unemployment benefits. The Board of Review denied benefits upon finding that Snyder was discharged for misconduct in connection with the work, and Snyder appeals. He contends that the Board erred in finding that he was discharged for misconduct in connection with the work. We find no error and we affirm.

We do not conduct a *de novo* review in appeals from the Board of Review. *Brooks v. Director*, 62 Ark. App. 85, 966 S.W.2d 941 (1998). In appeals of unemployment compensation cases we instead review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Board of Review's findings. *Id.* The findings of fact made by the Board of Review are conclusive if supported by substantial evidence; 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 have reasonably reached its decision based upon the evidence before it. *Bennett v. Director*, 73 Ark. App. 281, 42 S.W.2d 588 (2001); *Brooks v. Director, supra.* Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion. *Bennett v. Director, supra.*

Pursuant to Ark. Code Ann. § 11-10-514(a) (Repl. 2002), an individual shall be disqualified for employment benefits if he is discharged from his last work for misconduct in connection with the work. If the discharge was for misconduct in the form of dishonesty, he or she shall be disqualified from the date of filing the claim until he or she shall have ten weeks of employment in each of which he or she shall have earned wages equal to at least his weekly benefit amount. Ark. Code Ann. § 11-10-514(b) (Repl. 2002).

We have said that the term "misconduct," as used in this statute, involves disregard of the employer's interests, violation of the employer's rules, disregard of the standards of behavior which the employer has the right to expect of his employees, and disregard of the employee's duties and obligations to his employer. *Nibco, Inc. v. Metcalf*, 1 Ark. App. 114, 613 S.W.2d 612 (1981).

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

Id. at 118, 613 S.W.2d at 614.

In the present case, the Board of Review based its conclusion that appellant was discharged for misconduct in connection with the work on account of dishonesty on the following findings of fact:

> The claimant worked in the finishing work cell. On October 26, 2002, while working, the claimant injured his left hand, for which he underwent surgery. The claimant was placed on light duty and since that time he has continued to work under this restriction. In late April, the claimant coiled hose, which was classified as work outside the scope of his restriction. The claimant used [another employee's] number to log the work. This was brought to management's attention, and the claimant was discharged for falsifying company records.

At the hearing, Snyder was asked several times by the Appeal Tribunal hearing officer why he used another employee's number, instead of his own, in signing off on work that he had performed:

> HEARING OFFICER: Why didn't you use your own number?

SNYDER:	Well, I should have, but I didn't.
HEARING OFFICER:	Why didn't you?
SNYDER:	Because Kellay Rand was going to use it to finish under his number.
HEARING OFFICER:	Why did you use, Mr. Snyder, someone else's number rather than your own number?
SNYDER:	There is no real reason.
HEARING OFFICER:	There had to be a reason for you not to use your number. What were you attempting to hide or conceal?
SNYDER:	I wasn't trying to attempt anything.
HEARING OFFICER:	Well, why didn't you use your number?
SNYDER:	Well, like I said, I have no excuse, for not, I should have.
HEARING OFFICER:	Were you supposed to be doing this type of work?
SNYDER:	Technically, no.
HEARING OFFICER:	Why?
SNYDER:	Well, I was limited to one hand.
HEARING OFFICER:	You were on light-duty work?
SNYDER:	Right.

From this series of questions and answers, it is clear that Snyder knew he had been limited by his employer to light-duty work; that he knew Kellay Rand's job was not light-duty work; that he knew he was not supposed to use another employee's number in signing off on work that he performed; and that he knew he was wrong to have used Rand's number on this occasion. Furthermore, later in the hearing, Snyder testified that he agreed with his employer that using Rand's employee number was "a bad mistake, [and he] should not have done it." Snyder even agreed that his action justified disciplinary action, such as a warning or a three-day suspension without pay, but he did not think that his mistake justified being fired. Snyder never claimed that he did not know about his employer's prohibition against using another employee's number to sign off on work that he performed. Rather, he thought that his punishment was too harsh, and he complained

that he was not aware he could be fired for using another employee's number.

The dissenting judges consider it noteworthy that the Board of Review made no finding that Snyder had been warned that using another employee's number on work he performed would result in his discharge. It is not the function of the Employment Security Division, the Appeal Tribunal, or the Board of Review to determine which infractions of an employer's rules justify an employee's discharge. Rather, it is the function of those agencies to determine whether the employee was discharged for misconduct in connection with the work. *See Baldor Elec. Co. v. Arkansas Empl. Sec. Dep't*, 71 Ark. App. 166, 27 S.W.3d (2000). On the basis of the evidence presented at the hearing, the Appeal Tribunal concluded:

> The claimant admitted that while medically restricted to light-duty work, he performed work that included heavy lifting and used Rand's employee number to log the work. His actions were dishonest. Therefore, the claimant was discharged from last work for misconduct in connection with the work on account of dishonesty.

The Board of Review adopted the decision of the Appeal Tribunal. It is the duty of this court to affirm the decision of the Board of Review if it is supported by substantial evidence. *See Bennett, supra.* It is difficult to imagine how evidence of an employee's dishonesty could be any more substantial than to have the employee admit that he knew of his employer's policy, admit that he violated it, admit that he knew he was violating it, and offer as the only explanation for his conduct that, "I made a bad mistake. I shouldn't have done it."

The dissenting judges also consider it significant that the Board of Review made no finding that Snyder was untruthful when he testified that he had earlier, at the request of his supervisor, performed work that was outside his medical restriction. While it is true that Snyder testified that he had been requested by his supervisor to coil hoses on an earlier occasion, he also testified that on that occasion he used his own employee number to sign off on the work that he performed. He offered no explanation as to why he used his own number on the earlier occasion but Rand's number on the occasion that led to his discharge. The Board of Review concluded that Snyder was discharged not for misconduct in performing work outside his medical restriction,

but for dishonesty in falsifying the work order that the company used to determine who performed the work on the hoses.

Because reasonable minds could conclude, on this evidence, that appellant intentionally falsified his employer's records to conceal the fact that he had performed certain work, we affirm the Board's decision.

Affirmed.

PITTMAN, VAUGHT, and CRABTREE, JJ., agree.

GRIFFEN, J., concurs.

STROUD, C.J., HART, ROBBINS, and BAKER, JJ., dissent.

JOHN B. ROBBINS, Judge. Today a five-judge majority of a nine-judge expanded panel of our court has affirmed the denial of unemployment benefits to an employee who was discharged for nothing more than being a team player and helping one of his employer's crews complete a task. I respectfully disagree with their decision and dissent.

Arkansas Code Annotated section 11-10-514(a) provides that a claimant shall be disqualified from receiving benefits for eight weeks if he has been discharged from his last employment for misconduct in connection with the work. Arkansas Code Annotated section 11-10-514(b) recognizes a heightened degree of misconduct that disqualifies a claimant until he subsequently has ten weeks of employment. These more serious forms of misconduct include (1) dishonesty, (2) drinking on the job, (3) reporting for work under the influence of intoxicants or a controlled substance, (4) testing positive on a drug screen, and (5) a willful violation of a bona fide rule or custom of the employer pertaining to the safety of fellow employees, persons or company property.

In an apparent recognition that additional findings of fact are needed to shore up the Board's decision, the majority's opinion makes its own findings, including the following:

> 1) that Snyder knew Kellay Rand's job was not light-duty work;
> 2) that Snyder knew that he was wrong in using Rand's number on this occasion;
> 3) that Snyder agreed that his action justified disciplinary action;
> 4) that Snyder never claimed that he did not know about his employer's prohibition against using another employee's number;

5) that Snyder has used his own number on earlier occasions when his supervisor had requested him to coil hose; and

6) that Snyder intentionally used Rand's number for the purpose of concealing the fact that he had performed this work.

Even if all of these findings could be pertinent and could be supported by a review of the evidence in the record, such findings are irrelevant for at least two reasons. First, we do not make findings, we review findings of the Board, and the Board made no such findings. Secondly, these findings might lend some support to a conclusion that Mr. Snyder was guilty of the type of misconduct designated as (5) above, *i.e.*, a willful violation of a bona fide rule or custom of his employer pertaining to the safety of fellow employees, persons or company property, but the Board did not base its decision on such a conclusion. Rather it held that Mr. Snyder's misconduct was dishonesty.

It is noteworthy that the Board neither found that Mr. Snyder had been warned at any time that logging work under another employee's number would subject him to a discharge, nor that he was untruthful when he testified that he had performed work outside his restrictions on earlier occasions at his supervisor's request.

Consistent with *Black's Law Dictionary* (1991), we have defined "dishonesty" as "a disposition to lie, cheat or defraud; untrustworthiness; lack of integrity." *Olson v. Everett, Director*, 8 Ark. App. 230, 650 S.W.2d 247 (1983). Here, at the very worst, the claimant committed a good-faith error in judgment or discretion, devoid of wrongful intent or evil design. This falls short of constituting misconduct within the meaning of Ark. Code Ann. § 11-10-514(a), and even further short of the more serious forms of misconduct described in § 11-10-514(b). Consequently, the Board's conclusion that claimant committed misconduct by being dishonest, as we have defined the term, is not supported by its scant findings of fact.

The legislature has declared that the public policy in Arkansas is to provide benefits to workers who are unemployed through no fault of their own. Ark. Code Ann. § 11-10-102(3). The statutory misconduct provisions of the unemployment compensation law must be given an interpretation consistent with that declared policy, and it should not be so literally construed as to effect a

forfeiture of benefits by an employee except in clear cases of misconduct. *Willis Johnson Co. v. Daniels*, 269 Ark. 795, 601 S.W.2d 890 (1980).

What suffices to support termination from employment and what suffices to disqualify one from unemployment benefits are two different inquiries. Public policy is not served, and we do Mr. Snyder a significant disservice when we deny him unemployment benefits; we add insult to injury by affirming a conclusion that he has a disposition to lie, cheat, or defraud.

I would reverse the Board's decision and remand for an award of benefits.

Stroud, C.J., Hart, and Baker, JJ., join in this opinion.

METROPOLITAN NATIONAL BANK *v.*
LA SHER OIL COMPANY

CA 02-673 101 S.W.3d 252

Court of Appeals of Arkansas
Division II
Opinion delivered March 19, 2003

[Petition for rehearing denied April 16, 2003.]

Williams & Anderson LLP, by: *John Kooistra, III*, and *Kelly S. Terry*, for appellant.

Byrne Law Firm, P.A., by: *Russell J. Byrne*, for appellee.

WENDELL L. GRIFFEN, Judge. Metropolitan National Bank (Bank) appeals from the trial court's decision that it did not properly identify funds from accounts receivable of its customer, North Little Rock Materials (NLRM), in which the bank holds a security interest and which were deposited into NLRM's account at the bank. As a result of the ruling, the trial court denied appellant's motion to quash a writ of garnishment sought by appellee La Sher Oil Co., a judgment creditor of NLRM. The trial court stayed its order pending this appeal. We reverse and remand.

In 1998, the bank made a loan to NLRM and was granted a security interest in, among other things, NLRM's inventory, equipment, accounts, accounts receivables, and the proceeds of those accounts. The financing statements were filed with the Pulaski County Circuit Clerk and the secretary of state. On April 15, 2001, the bank and NLRM entered into a work-out agreement where the bank agreed to loan an additional $100,000 to NLRM. A financing statement for this transaction was filed with both the circuit clerk and the secretary of state.

On April 24, 2001, La Sher obtained a $133,967.44 consent judgment against NLRM, which was filed on April 25, 2001. On May 18, 2001, La Sher had a writ of execution and a writ of garnishment issued against NLRM, which was served on the bank on May 23, 2001. The bank answered the garnishment on May 24, 2001, stating that the NLRM account had a balance of $34,358.46. On June 13, 2001, the bank amended its answer to the writ of garnishment to assert that it had a prior perfected security interest in the account because the account consisted of proceeds from NLRM's accounts receivables. La Sher replied to the motion to quash, alleging that the security interest arose after the judgment was obtained and that not all of the funds in the account were proceeds from NLRM's accounts receivables.

At the hearing on the bank's motion to quash, Gary Griffin, executive vice-president of the bank in charge of lending, testified that the bank entered into a work-out agreement with NLRM in which the bank agreed to loan NLRM up to $100,000. The security interest granted to the bank covered NLRM's accounts receivables and proceeds from those receivables. He also testified

that, after the work-out agreement, he monitored NLRM's account to insure that money from the receivables was placed into this account and appropriate bills were paid. He admitted that Sharon Tankersley made between two and four deposits of $10,000 each into this account and that funds from other companies affiliated with NLRM were also deposited into the same account. He testified that the account balance prior to the April 15 work-out loan was $11,349.69 and that the funds from the loan were deposited into the account in two deposits: $42,250.47 on April 20, and $57,749.43 on April 27. He testified that, on the date of the garnishment, the account balance was $34,358.46.

Sharon Tankersley testified that she worked in NLRM's office, handling accounts payable and accounts receivable, paying bills, writing checks, and making deposits. She testified that she understood an account receivable of NLRM was money owed to NLRM by one of its customers and that payment of those receivables were "proceeds." She testified that some affiliated businesses that were operated by her and her husband deposited money into NLRM's account and paid some of its bills after the garnishment. She identified several deposit slips for bank deposits made by NLRM and recognized that the money was for payment on NLRM's accounts receivables, totaling $82,232.23. She also identified two loans she made to NLRM totaling $13,000. She testified that NLRM was excluded from its offices and that, when she was allowed to return to the office, she found the records in disarray. She admitted that she did not have the supporting invoices for the deposit slips and that, without those invoices, it would be impossible to verify that the money came from collections of accounts receivables.

At the conclusion of the hearing, the trial judge requested briefs on whether the holder of a perfected security interest in the accounts receivables of a debtor loses that security interest in the proceeds from the receivables when they have been commingled in a bank account with other funds. The trial court found that, because Sharon Tankersley testified that she could not verify that the deposits were from accounts receivables without the supporting documentation, the bank failed to produce sufficient evidence to identify the funds in the account as coming from "proceeds" in which it had a security interest. The trial court denied the bank's motion to quash the garnishment. This appeal followed.

The bank raises three issues on appeal: (1) that the trial court erred by imposing on it an erroneous burden of proof, inconsistent with the Uniform Commercial Code, to show that the funds were "identifiable proceeds"; (2) that the trial court erred in imposing on it a heightened burden of proof; (3) that the trial court erred in ruling that the deposits in NLRM's account were not "identifiable proceeds" within the meaning of Ark. Code Ann. § 4-9-306 (1991).[1] We hold that the trial court imposed an erroneous standard of proof when it concluded that the deposits in NLRM's account were not "identifiable proceeds." Consequently, we must reverse the judgment below and remand the litigation so that the trial court can decide the case using the proper evidentiary standard and applying what is known as the "lowest-intermediate-balance rule."

The standard of review of a circuit court's findings of fact after a bench trial is whether those findings are clearly erroneous. Ark. R. Civ. P. 52; *Burke v. Elmore*, 341 Ark. 129, 14 S.W.3d 872 (2000). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *McQuillan v. Mercedes-Benz Credit Corp.*, 331 Ark. 242, 961 S.W.2d 729 (1998). Disputed facts and determination of the credibility of witnesses are within the province of the judge, sitting as the trier of fact. *Ford Motor Credit Co. v. Ellison*, 334 Ark. 357, 974 S.W.2d 464 (1998).

Arkansas Code Annotated section 4-9-306 (1991) does not define "identifiable proceeds." Section 4-9-306(1) defines "proceeds" as "whatever is received upon the sale, exchange, collection, or other disposition of collateral or proceeds. . . . Money, checks, deposit accounts, and the like, are 'cash proceeds.'" Section 4-9-306(2) provides that a security interest continues in identifiable proceeds, including collections received by the debtor. Section 4-1-103 directs that the Uniform Commercial Code be supplemented by "principles of law and equity." Neither this court nor the

[1] In 2001, the General Assembly adopted a new Article 9 to govern secured transactions, effective July 1, 2001. 2001 Ark. Acts 1439. The present case was commenced prior to July 1, 2001, and the prior version governs this case. *See* Act 1439, § 1(c). All references will be to the 1991 version of the statute unless otherwise noted. Former Ark. Code Ann. § 4-9-306 (1991) now corresponds, with modifications, to Ark. Code Ann. § 4-9-315 (2001).

supreme court has decided a case determining whether proceeds are "identifiable" under the Uniform Commercial Code.

However, it is established law that a secured creditor has the burden to trace and identify the funds as the proceeds from secured collateral. *Ragland v. Davis*, 301 Ark. 102, 782 S.W.2d 560 (1990). *See also C.O. Funk & Sons, Inc.*, 89 Ill. 2d 27, 431 N.E.2d 370 (1982). When proceeds of a sale of collateral are placed in the debtor's bank account the proceeds remain identifiable, and a security interest in the funds continues even if the funds are commingled with other funds. *Anderson, Clayton & Co. v. First Am. Bank*, 614 P.2d 1091 (Okla. 1980). The rules employed to distinguish the identifiable proceeds from other funds are liberally construed in the creditor's favor by use of the "intermediate-balance rule." Most courts that have considered the question have adopted this test.[2] This rule provides a presumption that proceeds of the sale of collateral remain in the account as long as the account balance equals or exceeds the amount of the proceeds. The funds are "identified" based on the assumption that the debtor spends his own money out of the account before he spends the funds encumbered by the security interest. If the account balance drops below the amount of the proceeds, the security interest in the funds on deposit abates accordingly. This lower balance is not increased if non-proceeds funds are later deposited into the account. *See* 4 Ronald Anderson, *Uniform Commercial Code* § 9-306:30 at 233 (3d ed. 1999); Robert H. Skilton, *The Secured Party's Rights in a Debtor's Bank Account Under Article 9 of the Uniform Commercial Code*, 1977 So. Ill. Univ. L.J. 120, 140-43 (1977). The rule is analogous to the presumption which arises when a trustee commingles trust funds with his own. *See Covey v. Cannon*, 104 Ark. 550, 149 S.W. 514 (1912). If a presumption such as the lowest intermediate balance rule were not

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[2] *See, e.g., Sony Corp. of Am. v. Bank One*, 85 F.3d 131 (4th Cir. 1996) (applying West Virginia law); *Ex parte Alabama Mobile Homes, Inc.*, 468 So. 2d 156 (Ala. 1985); *ITT Commercial Fin. Corp. v. Tech Power, Inc.*, 43 Cal. App. 4th 1551, 51 Cal. Rptr. 2d 344 (1996); *C.O. Funk & Sons, Inc. v. Sullivan Equip., Inc., supra*; *Ellefson v. Centech Corp.*, 606 N.W.2d 324 (Iowa 2000); *Bank of Kansas v. Hutchinson Health Servs.*, 12 Kan. App. 2d 87, 735 P.2d 256 (1987); *Conagra, Inc. v. Farmers State Bank*, 237 Mich. App. 109, 602 N.W.2d 390 (1999); *Fricke v. Valley Prod. Credit Ass'n*, 778 S.W.2d 829 (Mo. Ct. App. 1989); *Michigan Nat'l Bank v. Flowers Mobile Home Sales, Inc.*, 26 N.C. App. 690, 217 S.E.2d 108 (1975); *Anderson, Clayton & Co. v. First Am. Bank, supra.*

used, no funds placed in an account with funds from other sources could be "identified."

> The rule, which operates on a common-sense view that dollars are fungible and cannot practically be earmarked in an account, provides a presumption that proceeds remain in the account as long as the account balance is equal to or greater than the amount of the proceeds deposited. The proceeds are "identified" by presuming that they remain in the account even if other funds are paid out of the account.

C.O. Funk & Sons, 89 Ill. 2d at 31, 431 N.E.2d at 87.

The trial court ruled that the bank had not produced sufficient evidence to allow the account balance to be identified as coming from NLRM's accounts receivables. Specifically, the trial court found that, "aside from Mrs. Tankersley's testimony, the bank failed to produce evidence, such as NLRM's business records, that would conclusively establish that any of the funds deposited into the account were identifiable cash proceeds from NLRM's accounts receivable."

We believe that the reference to the failure to "conclusively establish" that account funds were identifiable proceeds imposed an erroneous burden of proof on the bank. The trial court was referring to Tankersley's testimony concerning her lack of the corresponding invoices. She also stated that, because NLRM was excluded from its offices, she did not have those invoices. Tankersley had firsthand knowledge of the checks listed in the deposit slips and could establish that the proceeds came from NLRM's accounts receivables. *See JAG Consulting v. Eubanks*, 77 Ark. App. 232, 72 S.W.3d 549 (2002). The invoices would have added certainty to the evidence but were not required because La Sher offered no evidence that the deposits testified to by Tankersley came from sources other than accounts receivable. The bank's burden of proof was by a preponderance of the evidence, meaning the evidence having greater weight or convincing force. *See Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

Reversed and remanded.

ROBBINS and BIRD, JJ., agree.

Jacob SISK *v.* STATE of Arkansas

CA CR 02-649 101 S.W.3d 248

Court of Appeals of Arkansas
Division II
Opinion delivered March 19, 2003

[redacted]

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

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

WENDELL L. GRIFFEN, Judge. This appeal arose from a revocation of probation and resulting prison sentence in Crawford County. Jacob Sisk argues that (1) the trial court erred in sentencing him pursuant to revocation of an illegal sentence; (2) the trial court erred in revoking his probation because there was insufficient evidence to revoke his probation; and (3) the trial court erred in failing to furnish him with a written statement of the evidence relied on and reasons for revoking his probation. We affirm.

On November 13, 2000, the State charged appellant with possession of methamphetamine and drug paraphernalia. On February 27, 2001, appellant pleaded *nolo contendere* to both possession charges. In March of 2001, the trial court placed appellant on

probation for one year, suspended imposition of sentence for five years, and imposed court costs and a fine. Appellant did not object nor appeal from that judgment. The conditions of appellant's suspended sentence included complying with all laws, performing thirty days of community service, and not using, selling, or possessing any controlled substance. Additionally, he was required to enroll in, and complete, drug rehabilitation.

On September 28, 2001, the State filed a petition to revoke, alleging that appellant failed to report to his probation officer, failed to pay probation fees, failed to complete community service, tested positive for THC, and failed to obey all federal and state laws. On March 5, 2002, appellant moved that his case be transferred to Crawford County Drug Court. That motion was granted on March 6, 2002. The next day, on or around March 7, 2002, appellant pleaded guilty to the allegations in the petition to revoke. The court resentenced him to three years of probation but did not expressly revoke appellant's probation, and conditioned that sentence on not using controlled substances, submitting to any medical, counseling, or psychiatric program required by his probation officer, and suspended imposition of a fine conditioned on his completion of drug court. This resentencing complied with the recommendation of a plea agreement.

On March 14, 2002, a bench warrant was issued for appellant's arrest based on his failure to appear at drug court. On March 22, 2002, the State filed a new petition to revoke on the ground that appellant failed to comply with "any rules of Drug Court, including failing to appear for Drug Court," and that the failures violated his probation conditions. After a hearing, the trial court revoked appellant's probation and sentenced him to ten years' imprisonment in the Arkansas Department of Correction, with four years suspended. From this judgment comes the current appeal.

Before addressing the merits of appellant's arguments, we point out that appellant's counsel failed to properly include the notice of appeal either in his abstract or in the addendum. Thus, he does not comply with the Rules of the Arkansas Supreme Court and Court of Appeals, Rule 4-2(a)(8) (2002). We could order rebriefing pursuant to the Rules of the Arkansas Supreme Court and Court of Appeals, Rule 4-2(b)(3). However, the record reveals that appellant filed a notice of appeal on May 15, 2002, referring to a judgment on April 22, 2002, which was filed

May 1, 2002. Thus, the notice of appeal is timely for purposes of reviewing the April 2002 judgment involved in this case.

Underlying Illegal Sentence from March 2001 Judgment

Appellant argues in essence that the March 2001 judgment constituted an illegal sentence because the trial court imposed both probation and a suspended sentence. The State responds that appellant never objected to that judgment or filed an appeal concerning that issue. The timely filing of a notice of appeal is a jurisdictional requirement. *Cannon v. State*, 58 Ark. App. 182, 947 S.W.2d 409 (1997).

Normally, to preserve an issue for appeal, an appellant must file a notice of appeal within thirty days of the judgment filing. Ark. R. App. P.—Crim. 2(a)(1) (2002). Alternatively, an appellant may file a post-trial motion challenging the simultaneous sentences of probation and suspended sentence. *Brimer v. State*, 301 Ark. 540, 785 S.W.2d 458 (1990) (finding that the failure to appeal an earlier order precluded challenging restitution amount in later revocation proceeding). However, allegations of a void or illegal sentence constitute an issue of subject-matter jurisdiction, and as such, cannot be waived by parties and may be addressed for the first time on appeal. *Thomas v. State*, 349 Ark. 447, 79 S.W.3d 347 (2002).

It is settled law that a trial court may not impose probation and a suspended sentence simultaneously. *Culpepper v. State*, 268 Ark. 263, 595 S.W.2d 220 (1980). However, the remedy for an illegal sentence is not dismissal of all related proceedings in the trial court or dismissal of the State's petition to revoke. *Bangs v. State*, 310 Ark. 235, 835 S.W.2d 294 (1992). If the original sentence is illegal, even though partially executed, the sentencing court may correct it. *Id.* In the *Bangs* case, the supreme court specifically stated that on appeal it could "not dismiss the petition to revoke and thereby allow appellant to benefit from his failure to seek the appropriate remedy by petitioning the trial court." *Id.* at 241, 835 S.W.2d at 297.

Here, appellant received an illegal sentence initially when he was sentenced to probation and suspended imposition of sentence. However, he was not prejudiced by the original sentence. In the first place, the trial court resentenced appellant pursuant to a plea argreement entered on March 7, 2002. Appellant does not

contend that the trial court imposed an illegal sentence on that date when he was resentenced to three years' probation subject to certain previously stated conditions. The trial court corrected the defect in the original sentence. Therefore, we affirm on this point.

Insufficient Evidence to Revoke Probation

Appellant also argues that there was insufficient evidence to support the revocation of his probation in April 2002. In revocation proceedings, a trial court must find by a preponderance of the evidence that a defendant inexcusably violated a condition of probation. Ark. Code Ann. § 5-4-309(d) (Supp. 2001); *Shaw v. State*, 65 Ark. App. 186, 986 S.W.2d 129 (1999). We do not reverse a trial court's findings on appeal unless they are clearly against the preponderance of the evidence. *Petty v. State*, 31 Ark. App. 119, 788 S.W.2d 744 (1990). We review the sufficiency of the evidence supporting revocation by viewing the evidence in the light most favorable to the State. *Billings v. State*, 53 Ark. App. 219, 921 S.W.2d 607 (1996). Notably, the State need only prove one violation of the probation conditions for the trial court to revoke a probation. *Ross v. State*, 22 Ark. App. 232, 738 S.W.2d 112 (1987).

In the present case, appellant's second probation resulted from the trial court's resentencing of appellant to a longer probation term, following appellant's guilty plea in March 2002. Appellant's probation, pursuant to the resentencing, contained a prohibition against using controlled substances and an order to submit "to any medical, counseling, or psychiatric program required by his probation officer." In addition, the trial court also suspended the imposition of a fine, conditioned on appellant's "completion of drug court." The State's petition to revoke appellant's second probation specifically alleged that "on the 13th day of March, 2002, the Adult Probation Office requested that the State file a Petition to Revoke on [appellant] based upon his failure to comply with any rules of drug court, including failure to appear for drug court; that said conduct is in violation of the terms and conditions of his suspended sentence."

The conditions of appellant's probation expressly held him to "submitting to any medical, counseling, or psychiatric program required by his probation officer." We hold that the trial court did not err in concluding that appellant inexcusably violated

one of his probation conditions — namely, to attend any program his probation officer deemed necessary and to cooperate with such program efforts. Furthermore, appellant admitted that he failed to contact his probation officer and failed to appear in drug court. Therefore, we hold that there was sufficient evidence for the trial court to revoke his resentenced probation.

Failure to Furnish Written Statement of Evidence

Finally, appellant argues that the trial court should have provided him with a written statement of the evidence relied upon, pursuant to Ark. Code Ann. § 5-4-310(b) (Repl. 1997). However, appellant did not object to that failure below. Therefore, he waived his right to a written statement. *See Box v. State*, 71 Ark. App. 403, 30 S.W.3d 754 (2000).

Affirmed.

ROBBINS and BIRD, JJ., agree.

Robert McCREE *v.* Shirley WALKER, *et al.*

CA 02-398 101 S.W.3d 276

Court of Appeals of Arkansas
Division I
Opinion delivered March 19, 2003

James M. Pratt, Jr., for appellant.

Claudell Woods, for appellees.

TERRY CRABTREE, Judge. This is an appeal from an order upholding the validity of a church meeting at which a majority of the congregation voted to dismiss appellant, Robert McCree, as their interim pastor. Appellant contends on appeal that the trial court's decision is clearly against the preponderance of the evidence. We disagree and affirm.

This case involves a dispute within the New Mount Hebron Baptist Church in Camden, Arkansas. In April 2000, the church's pastor and seventy-one of its members left to form a new, non-Baptist church. At that time, a majority of the congregation voted that the departing pastor and members would be allowed to take half of the church's funds with them. A church meeting was held

on April 14, 2000. Upon invitation, the meeting was conducted by Reverend E.A. Porchia, a moderator of the Ouachita Baptist District Association, an organization to which Mount Hebron Church belonged. At this meeting, a majority selected appellant to serve as the interim pastor. Later, a pulpit committee was formed for the purpose of finding a permanent minister.

Conflict arose almost immediately between appellant and members of the congregation. Chief among the problems was appellant's decision to file suit to recover the money that had been given to the departing pastor and former members of the church. Another matter of concern was appellant's decision to open another church bank account without consulting the membership or seeking its approval. A church meeting was held to address these and other concerns on May 9, 2001. A majority of those present voted to dismiss appellant as the interim pastor and to write the attorneys hired by appellant to inform them that the church had not authorized appellant to institute the litigation.

Appellant called a "special meeting" on May 12th. Reverend Porchia was again in attendance upon appellant's invitation. Reverend Porchia advised the membership that the actions taken by them in the May 9 meeting were invalid on the ground that the meeting was not properly called because the meeting and its purpose were not announced for two weeks prior to its being held. As a result, the members voted to rescind appellant's dismissal.

On July 24, another meeting was held at the church. Testimony was presented on behalf of appellees that the place, time, and purpose of the meeting were announced in church on two, consecutive Sundays by Willie Johnson, Chairman of the Board of Deacons. Witnesses for appellant stated that only one announcement was made by Deacon Johnson and that he did not state the purpose of the meeting in his announcement. All witnesses agreed, however, that after Deacon Johnson made an announcement, appellant called the proposed meeting "out of order" and declared that it would not be held. Nevertheless, thirty-seven members convened on the scheduled date. The meeting was conducted in the church parking lot because the doors to the church had been locked. A sheriff's deputy was called to the church, who had a phone call placed to appellant requesting that the doors be opened. Appellant advised, however, that the members had no business being there and that they should leave. In the parking lot,

the members present unanimously voted to remove appellant as the interim pastor.

Appellant, however, refused to vacate the pulpit, and a few days later during a Bible study class appellant "silenced" those members who had been present at the July 24 meeting.[1] It was said that a member who has been "silenced" is stripped of his or her voice in the church and is not allowed to vote on church matters.

In February 2001, a meeting was called for the purpose of selecting a permanent pastor. Some forty-five members were in attendance, and appellant was one of two candidates on the ballot. It is undisputed that appellant refused those members who had been silenced the opportunity to vote. Of the remaining twenty members who were permitted to vote, thirteen voted for appellant.

In June 2001, this lawsuit was filed seeking an order declaring that appellant was not the lawful pastor of the church and an injunction enjoining him from occupying the pulpit. An accounting was also requested.[2] The trial court ruled that the meeting held on July 24, 2000, was valid, that appellant had been properly dismissed, and that any subsequent acts taken by appellant after that meeting, including the silencing of the members and his calling of the February 2001 meeting, were null and void. This appeal followed.

Honoring the principle of keeping church and State separate, courts do not intervene to determine controversies relating to purely ecclesiastical or spiritual features of a church or religious society. *Elston v. Wilborn*, 208 Ark. 377, 186 S.W.2d 662 (1945). However, courts do not hesitate to assume jurisdiction when a schism affects property rights. *Holiman v. Dovers*, 236 Ark. 211, 366 S.W.2d 197 (1963).

Baptist churches are congregational churches in form and structure. *Carter v. Phillips*, 291 Ark. 94, 722 S.W.2d 590 (1987). In congregational churches, the affairs of a particular

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[1] The record also shows that appellant silenced several other members who questioned appellant's handling of church finances.

[2] The financial records appellant provided disclosed that, in addition to his salary of $300 a week, appellant was paid a $3,000 bonus in February 2001. An expenditure of $4,500 was made for the purchase of a computer, which appellant kept at his home. Also, appellant's wife was paid $271 a month for her services as church clerk and janitor.

church are determined by the vote of the majority of the members of that church and not by some other hierarchical form of church government. *Id.* Each church is considered independent of any external authority with respect to its own affairs. *Ables v. Garner*, 220 Ark. 211, 246 S.W.2d 732 (1952). Our courts have followed the rule that where a minister of a congregational church is dismissed by the action of the majority of the church, and thereafter usurps the pastoral duties, the majority is entitled to an injunction to restrain him and to prevent him and his adherents from occupying and using the church without the consent of the majority. *Rush v. Yancey*, 233 Ark. 883, 349 S.W.2d 337 (1961).

On appeal, such cases are reviewed *de novo*, but the trial court's findings will not be disturbed unless they are clearly against the preponderance of the evidence. *Jones v. Bethlehem Baptist Church*, 75 Ark. App. 152, 57 S.W.3d 217 (2001). Due deference is given to the superior position of the trial court to judge the credibility of the witnesses. *Id.*

In this appeal, appellant argues that the July 24 meeting was called in an improper manner. He bases his argument on testimony that meetings may only be called by the pastor, not by a deacon or any individual member of the church. It was further stated that, if the pastor refuses to call a meeting, then the members may override the pastor's veto by voting to hold a meeting. Appellant contends that the meeting was invalid because, in light of his objection, there was no evidence that the members voted to have the meeting. We find no merit in appellant's argument.

First, the trial court found that the meeting was properly called because the place, time, and purpose of the meeting were announced two weeks in advance and that this was the only requirement the majority deemed necessary to call a meeting. The trial court obviously rejected the testimony, as a matter of credibility, that there was an additional requirement that a majority must also meet and vote to call a meeting prior to the announcements. Even so, we note that there was testimony that a majority of the members did ask Deacon Johnson to call the meeting. Therefore, even accepting appellant's view as to proper procedure, there was testimony that the procedure was followed. Moreover, the procedure appellant advocates came out of reference books used by the Ouachita Baptist Association. However, it is undisputed that the church membership had not specifically

adopted those procedures and that the association had no authority over the church. Since the procedures appellant relies on had not been adopted by the church, and because the association cannot impose its own procedures upon the church, it cannot be said that the church was bound by the procedures appellant espouses. We further observe that appellant was elected to temporarily fill the vacancy in the pulpit. There was testimony that in that capacity appellant only had so much authority as the majority saw fit to give him. As shown by their actions, it is clear that the majority did not grant appellant the authority to prevent the calling of meetings and thereby allow him to occupy that position indefinitely, despite the will of the majority.

Affirmed.

HART and BIRD, JJ., agree.

Gena C. ROSSINI *v.* DIRECTOR, Arkansas Employee Security Department and Arkansas Democrat-Gazette

E 02-166 101 S.W.3d 266

Court of Appeals of Arkansas
Divisions IV and I
Opinion delivered March 19, 2003

Goheen Legal Services, LLC, by: *Robert (Jake) Goheen*, for appellant.

Phyllis Edwards, for appellee.

TERRY CRABTREE, Judge. After being terminated from her job, the appellant, Gena C. Rossini, sought unemployment benefits from the Arkansas Employment Security Department. When the Department denied her benefits, she appealed the decision to the Arkansas Appeal Tribunal. On March 13, 2002, the Appeal Tribunal reversed the Department's determination and awarded her benefits. On June 13, 2002, the

Board of Review reversed the Appeal Tribunal and denied appellant unemployment benefits after finding that she was discharged from her last work for misconduct in connection with the work. For our review, appellant maintains that the Board of Review erred: (1) when it reversed the Appeal Tribunal's decision "based on the receipt of no new evidence;" (2) when it relied heavily on a fax sent by appellant to appellee after she was terminated; (3) when it incorrectly interpreted the testimony of the witnesses; (4) when it failed to recognize "the everyday use of foul language;" and (5) when it failed to acknowledge the absence of an investigation in which both parties were able to explain the event that lead to appellant's termination. We affirm.

Appellant worked as a salesperson for the appellee, the *Arkansas Democrat-Gazette*, for one and one-half years. On the morning of March 1, 2002, appellant and her coworker, Dennis Perkins, an account executive, became involved in a verbal disagreement about a customer's account. Appellant claims that during the argument Perkins called her a b——. She testified that she responded by calling him a pansy a—. Their supervisor, Robert Shearon, who observed the confrontation, testified that he told them to calm down. Shearon stated that "at that point [appellant] started calling [Perkins] some names, including 'a kid who couldn't make a sale.'" Shearon also stated that appellant then called Perkins an a—hole and left the building. Approximately an hour later, appellee paged appellant and informed her that she was terminated.

As an initial matter, we must note that appellant did not make three of her arguments below that she now complains of on appeal. The record does not reflect that appellant argued (1) that the Board should not consider the fax she sent to appellee, (2) that the Board should recognize the everyday use of foul language, or (3) that the Board should acknowledge the absence of an investigation in which both parties were able to explain the event that lead to her termination. We decline to address the merits of these arguments. They were not made below, and this court does not consider issues raised for the first time on appeal. *Rucker v. Price*, 52 Ark. App. 126, 915 S.W.2d 315 (1996); *Perdrix-Wang v. Director*, 42 Ark. App. 218, 856 S.W.2d 636 (1993).

For appellant's remaining two points on appeal, she essentially complains that substantial evidence did not support the Board's decision. The findings of the Board of Review are con-

clusive if they are supported by substantial evidence. *Walls v. Director*, 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. *Lovelace v. Director*, 78 Ark. App. 127, 79 S.W.3d 400 (2002). 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.*

An individual shall be disqualified for unemployment benefits if she is discharged from her last work for misconduct in connection with the work. Ark. Code Ann. § 11-10-514(a)(1) (Repl. 1999). "Misconduct," for purposes of unemployment compensation, involves: (1) disregard of the employer's interest; (2) violation of the employer's rules; (3) disregard of the standards of behavior which the employer has a right to expect of his employees; and (4) disregard of the employee's duties and obligations to his employer. *Greenberg v. Director*, 53 Ark. App. 295, 922 S.W.2d 5 (1996). To constitute misconduct, however, the definitions require more than mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies, ordinary negligence in isolated instances, or good faith error in judgment or discretion. *Carraro v. Director*, 54 Ark. App. 210, 924 S.W.2d 819 (1996). There must be an intentional or deliberate violation, a willful or wanton disregard, or carelessness or negligence of such degree or recurrence as to manifest wrongful intent or evil design. *Id.* In sum, there is an element of intent associated with a determination of misconduct. *Rollins v. Director*, 58 Ark. App. 58, 945 S.W.2d 410 (1997).

Appellee's employment policy states that disciplinary action, including discharge, may occur for violation of company rules and regulations including insubordination, using abusive language, and interfering with fellow employees or their work. Appellant received a copy of appellee's rules, regulations, and policies at the time she was hired. At the hearing, appellant admitted that she used abusive language toward Perkins during their argument. She attempted to justify her actions by claiming that Perkins called her a name. Appellant's supervisor, Robert Shearon,

testified that Perkins did not call appellant any name during the argument. The Board of Review found that "the record contains no evidence other than [appellant's] which would support her assertion that [Perkins] called her a 'b——.'" We recognize that the credibility of witnesses and the weight to be accorded their testimony are matters to be resolved by the Board. *Niece v. Director*, 67 Ark. App. 109, 992 S.W.2d 169 (1999).

It is undisputed that appellant chose to continue using abusive language even after her supervisor instructed her and Perkins to calm down. The Board of Review found appellant's behavior to be intentional as she sought to belittle Perkins in front of others in the office. The Board also noted the fact that appellant sent a fax to appellee hours after she was terminated in which she referred to Perkins as "your boy" and stated, "[a]t this point, I'm reasonable to deal with. By Monday, who knows[?]"

We distinguish this case from *Rollins, supra*, where we reversed the Board of Review's finding that a claimant had committed misconduct. In that case, the claimant told a coworker to stop meddling in her business and to shut up. *Id.* The Board found those words were harsh and provocative. *Id.* However, we did not believe that they rose to the level of misconduct as defined by the statute.

By contrast in the case at bar, we agree with the Board that appellant's actions were malicious and contained willful intent. Her statements to Perkins reflect more than a lack of judgment. Even after the supervisor, Shearon, instructed appellant and Perkins to "calm down," she continued with her verbal attacks and abusive language. This is clear evidence of a deliberate violation of appellee's rules and standard of behavior that appellee had a right to expect.

Based upon our review of the evidence, we hold that substantial evidence supports the Board's decision that appellant was discharged from her last work for misconduct in connection with the work.

Affirmed.

PITTMAN, GLADWIN, and BAKER, JJ., agree.

HART and ROAF, dissent.

ANDREE LAYTON ROAF, Judge, dissenting. I do not believe that the Board of Review's decision to deny Gena C. Rossini's claim for unemployment benefits based upon misconduct is supported by substantial evidence or by our case law. The sole basis for Rossini's termination was that she called a male coworker a name during a heated argument over an account, in the presence of two other male employees, including her supervisor. Rossini testified that the coworker first called her a name but he denied this, and the others present testified that they did not hear it. There is extensive testimony in the record about the common use of profanity by employees in this department, including prior use by Rossini and the coworker involved in the dispute with her. Rossini had not been warned or reprimanded when she used the "F" word in anger in the presence of the supervisor two months before her termination. The policy Rossini was alleged to have violated prohibited "committing immoral acts, using abusive language or making racial slurs." Although the Board of Review and the majority do not find *Rollins v. Director*, 58 Ark. App. 58, 945 S.W.2d 410 (1997), controlling , I disagree. Moreover, *Reynolds v. Daniels, Director*, 1 Ark. App. 262, 614 S.W.2d 525 (1981), is distinguishable, because it found *unprovoked* profanity directed at the employee's *immediate supervisor* to be misconduct.

In *Rollins*, this court found that harsh words spoken by an employee to a coworker immediately preceding a fight may have been spoken in poor judgment, but did not rise to the level of misconduct as defined by statute and the court. In this instance, Rossini's actions in tossing off a parting comment at her coworker while retreating from the encounter certainly did not rise to the level of the provocative and confrontational encounter described in *Rollins*, and was not directed at her supervisor as was the profanity used in *Reynolds*. As in *Rollins*, Rossini's words may have been spoken out of lack of judgment, but in the circumstances do not show malicious or willful intent or a recurrence of poor judgment so as to constitute misconduct.

HART, J., joins.

Mary Dawn May CARVER *v.* Paul Jared MAY

CA 02-685 101 S.W.3d 256

Court of Appeals of Arkansas
Division III
Opinion delivered March 19, 2003

Bill Walters, for appellant.

Brenda Austin, Ltd., for appellee.

KAREN R. BAKER, Judge. Appellant, Mary Dawn May Carver, appeals from an order of the Sebastian County Circuit Court changing custody of the parties' minor children to appellee, Paul Jared May, the children's father. She argues on appeal that the trial court erred when it granted appellee's petition to modify custody and placed custody with appellee. She further asserts that there was no material change of circumstances from the decree filed December 8, 2000, granting her initial custody of the parties' two preschool-aged daughters, and that it was not in the best interests of the children to change custody. We affirm.

The parties were divorced in December 8, 2000. There were two children born of the marriage, H.M., born May 24, 1997, and A.M., born December 12, 1998. Appellant was awarded custody of the two minor children because she was the primary caretaker of the children, and as specifically stated in the divorce decree, because "the extreme animosity of [appellee] and his family toward [appellant] would be prohibitive to [appellant] having a continued relationship with the minor children should the Court award custody to [appellee]." In the decree, appellant was granted permission to move with the children to her home state of Washington. Appellee was granted standard visitation in Arkansas for Christmas and summer vacations. All other visitation was to be in Washington. Appellee was also ordered to pay child support of $68 a week and to provide appellant with her share of the 1999 income-tax refund of $1,574.

On December 12, 2000, less than one month after the divorce decree had been filed, appellee was refused his first visitation by appellant. Appellant testified that she was attempting at that point to postpone visitation until the attorneys and the court could be involved because the children were only allowed to go to Arkansas twice a year, and they had already been to Arkansas twice prior to the divorce. On May 15, 2001, appellee filed a motion for extension of summer visitation, requesting three full months of summer visitation. On May 30, 2001, appellee filed a petition to modify custody alleging that appellant would not agree to the three-month summer visitation and that appellant was interfering with phone visitation. Appellant responded with a letter agreeing to give appellee more summer visitation, but less than three months. On June 6, 2001, appellant filed a motion for contempt, alleging that appellee had failed to pay his child support, was in arrears, and that appellee had failed to provide her with the money from the income-tax return.

Appellee next attempted to exercise visitation in June 2001. He drove to Washington, where he was surrounded by police and drug agents as he stepped out of his hotel. The incident was the result of an anonymous tip generated by appellant, her mother, and a third person. The officers searched appellee and his vehicle. The search proved fruitless, and he was allowed to resume his visitation with his children. On June 27, 2001, appellee filed a motion for contempt alleging that appellant had caused him to be searched by drug officers for drugs upon his arrival in Washington for visitation. At the conclusion of the summer visitation, appellant arrived at appellee's home in Greenwood, Arkansas, with a sheriff's deputy who proceeded to search the children's luggage. The search revealed nothing. Shortly after their return to Washington, following appellee's summer visitation, appellant made allegations of sexual abuse of the children by appellee. The resulting investigation was closed as unsubstantiated and on November 13, 2001, appellee filed a motion alleging that appellant falsely accused him of molesting his children. Despite the results of the investigation, on December 11, 2001, appellant filed a petition and affidavit for a protective order in Washington based upon the same allegations of sexual abuse. In December 2001, appellee once again made the trip to Washington to exercise his Christmas visitation. When he arrived at the appellant's home, he was served with a protection order prohibiting him from contacting

the children and notice of a hearing in twelve days. Appellee remained in a hotel in Washington for the twelve days until the hearing. Following the hearing regarding the protection order, appellee was allowed four hours of visitation with the children, which was supervised by appellant at her home.

At the conclusion of the hearing in Arkansas on appellee's petition to modify custody, the trial court found that there had been a material change of circumstances and that it was now in the best interest of the children that custody be placed with the father. This appeal followed.

In child-custody cases, we review the evidence *de novo*, but we do not reverse the findings of the court unless it is shown that they are clearly contrary to the preponderance of the evidence. *Thompson v. Thompson*, 63 Ark. App. 89, 974 S.W.2d 494 (1998). We also give special deference to the superior position of the trial court to evaluate and judge the credibility of the witnesses in child-custody cases. *Hamilton v. Barrett*, 337 Ark. 460, 989 S.W.2d 520 (1999). We have often stated that we know of no cases in which the superior position, ability, and opportunity of the trial court to observe the parties carry as great a weight as those involving children. *Watts v. Watts*, 17 Ark. App. 253, 707 S.W.2d 177 (1986). A finding is clearly against the preponderance of the evidence, when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Hollinger v. Hollinger*, 65 Ark. App. 110, 986 S.W.2d 105 (1999).

The principles governing the modification of custodial orders are well-settled and require no citation. The primary consideration is the best interest and welfare of the child. All other considerations are secondary. Custody awards are not made or changed to punish or reward or gratify the desires of either parent. Although the chancery court retains continuing power over the matter of child custody after the initial award, the original decree is a final adjudication of the proper person to have care and custody of the child. Before that order can be changed, there must be proof of material facts which were unknown to the court at that time, or proof that the conditions have so materially changed as to warrant modification and that the best interest of the child requires it. The burden of proving such a change is on the

party seeking the modification. *Word v. Remick*, 75 Ark. App. 390, 58 S.W.3d 422 (2001) (citing *Watts v. Watts, supra.*)

Appellee asserts that appellant has become so combative, uncooperative, and hostile concerning his parental rights that a substantial change in circumstances has occurred. Appellee contends that it was appellant's goal to make visitation so miserable and expensive that appellee would give up his parental rights. There is a two-step process through which a court must proceed in deciding a petition for change of custody. *Riley v. Riley*, 45 Ark. App. 165, 873 S.W.2d 564 (1994). First, the chancellor must determine whether there has been a significant change in the circumstances of the parties since the most recent custody decree. *Id.* If the trial judge finds that a significant change in circumstances has occurred, the court must then decide custody placement with the primary consideration being the best interest of the children. *Id.* (citing *Anderson v. Anderson*, 43 Ark. App. 194, 197, 863 S.W.2d 325, 327 (1993)). In the present case, the trial judge stated in his opinion that previously "in making its visitation order that it was going to be very difficult for [appellee] to maintain a relationship with his children and that the full cooperation of [appellant] was going to be absolutely necessary."

In *Hepp v. Hepp*, 61 Ark. App. 240, 968 S.W.2d 62 (1998), we held that violation of the court's previous directives does not compel a change in custody. The fact that a party seeking to retain custody of a child has violated court orders is a factor to be taken into consideration, but it is not so conclusive as to require the court to act contrary to the best interest of the child. *Johnson v. Arledge*, 258 Ark. 608, 527 S.W.2d 917 (1975); *Kerby v. Kerby*, 31 Ark. App. 260, 792 S.W.2d 364 (1990). To hold otherwise would permit the desire to punish a parent to override the paramount consideration in all custody cases, i.e., the welfare of the child involved. *Id.* Moreover, to ensure compliance with its orders, a trial judge has at his or her disposal the power of contempt. And, we have said that a court's contempt powers should be used prior to the more drastic measure of changing custody, *Carter v. Carter*, 19 Ark. App. 242, 719 S.W.2d 704 (1986), which is keeping with the principle that custody is not to be changed merely to punish or reward a parent. *Harvell v. Harvell*, 36 Ark.

App. 24, 820 S.W.2d 463 (1991). In addition, we have held that whether one parent is alienating a child from the other is also an important factor to be considered in change-of-custody cases because a caring relationship with both parents is essential to a healthy upbringing. *Turner v. Benson*, 59 Ark. App. 108, 953 S.W.2d 596 (1997).

In this case, appellant's actions alienated the children from their father by interfering with visitation to such a degree as to affect the well-being of the children. Not only did appellant repeatedly interfere with appellee's visitation, beginning less than one month after the divorce decree was filed, she instigated a sexual-abuse investigation when the children returned to Washington after their summer visitation with their father. The investigation was based on appellant's observations that the children had begun exhibiting behavioral changes when they returned from visiting appellee that summer. Testimony from Ken Hunt, an investigator with the Arkansas State Police Crimes Against Children Division, showed that the hotline received a tip in July 2001 that prompted the investigation. The two children were subjected to sexual-assault examinations at the Providence St. Peter Hospital; however, the medical examination report stated that the examinations were normal with respect to both children. Laila Thompson, a child and family therapist with the Cascade Mental Health Care, testified in her deposition that she saw H.M. on July 10, 2001, because appellant believed the child was experiencing a change behaviorally after returning from visitation with her father, such as not sleeping at night, nightmares, refusing to go to sleep alone, and talking about doing things to her sister that she had never done before. During observation, Ms. Thompson testified that H.M. told her that "daddy touched me and my sister," and that H.M. pointed to her genital area. In Rebecca Tetizel's deposition testimony, she stated that she was an educational assistant for the Centralia School District. While A.M. was at school one day after returning from seeing her father, she showed signs of a behavioral change, such as shaking and crying when her diaper was being changed. Nonetheless, based on the medical report and other factors including the interviews he conducted during the investigation, Mr. Hunt "closed [the] investigation as 'Unsubstantiated.'"

It was not until the following December, when appellee drove to Washington to begin Christmas visitation, that he was met with a protective order at appellant's home prohibiting him from having any contact with the children, premised on the behavioral changes exhibited in July. After waiting in a hotel for twelve days for the hearing, he was given four hours of supervised visitation in appellant's home. It is clear that appellant was intentionally thwarting any opportunity for appellee to visit his children and attempting to alienate them from their father. Former spouses are often hostile to one another, and it is unfortunate when their children are forced to bear the consequences. We agree with the trial judge that allowing appellant to retain custody of the children and returning with them to the state of Washington would be tantamount to terminating appellee's parental rights. Intentional alienation and interference with visitation to such a degree as to affect the well-being of the children cannot be tolerated.

In cases involving child custody, a heavier burden is cast upon the court to utilize to the fullest extent all its powers of perception in evaluating the witnesses, their testimony, and the child's best interests. *Arkansas Dep't of Human Serv. v. Couch*, 38 Ark. App. 165, 832 S.W.2d 265 (1992). The appellate court has no such opportunity, and it has often been said that we know of no case in which the superior position, ability, and opportunity of the trial court to observe the parties carry as great a weight as when the interests of minor children are involved. *Id.* Here, appellant intentionally interfered with visitation to an extreme, even though there was no evidence to support appellant's drug-abuse allegations, and the sexual-abuse allegations were unsubstantiated. Moreover, during the investigation, the children were subjected to medical sexual-assault examinations and were denied visitation with their father even after the investigation concluded the allegations were unsubstantiated. Such actions can hardly be said to be in the best interest of the child. Appellant's interference with visitation was so extreme that the best interest of the children required that they be removed from the situation. Under these circumstances, we hold that the trial court's findings were not clearly erroneous; thus, we affirm the chancellor's decision to modify custody in this case. *See Turner v. Benson, supra* (affirming chancellor's decision to change custody where evidence

showed that mother was alienating the thirteen-year-old child from his father by interfering with father's visitation schedule, and making derogatory statements about the father in the presence of their thirteen-year-old son, despite evidence that the son had a good relationship with the father and expressed a desire to live with mother).

Affirmed.

CRABTREE and ROAF, JJ., agree.

Debra L. BURNETT *v.* PHILADELPHIA LIFE INSURANCE COMPANY

CA 02-832 101 S.W.3d 843

Court of Appeals of Arkansas
Division IV
Opinion delivered April 2, 2003

[Petition for rehearing denied May 7, 2003.]

Eddy & Kelley, P.A., by: *David L. Eddy*, for appellant.

Gordon, Caruth & Virden, by: *Ben Caruth*; and *Huffer & Weathers, P.C.*, by: *Steve Huffer*, for appellee.

JOHN MAUZY PITTMAN, Judge. This is a second appeal from an order granting appellee summary judgment on a claim for proceeds of a life insurance policy. On April 24, 2002, this court dismissed the appeal for lack of a final order. *Burnett v. Philadelphia Life Ins. Co.*, CA01-991 (Ark. App. April 24, 2002). The trial court entered a final order on June 4, 2002. This appeal followed. We reverse and remand.

On November 1, 1997, Emmitt Bartch, the decedent, made an application for life insurance with appellee Philadelphia Life Insurance Company through its soliciting agent, Roy Touchet. The policy named appellant Debra Burnett, the decedent's fiancée, as beneficiary. Touchet filled out the application by asking Bartch the questions. Bartch signed the application form on November 1, 1997. One of the questions on the application asked for disclosure of any significant medical conditions or treatment. Bartch suffered from Marfan's Syndrome, a connective-tissue disorder. This condition was not noted on the application. Appellant presented evidence that Bartch told Touchet about this condition but that Touchet did not correctly complete the appli-

cation form. Appellee issued a policy effective February 27, 1998. Touchet delivered the policy to Bartch on March 9, 1998, together with a statement of good health to be signed by Bartch. This statement provided, among other things, that Bartch was in good health and had not consulted a physician within ninety days. In fact, Bartch had consulted Dr. Jack Lyon on February 12, 1998, for treatment of bronchitis, which was unrelated to the Marfan's Syndrome. Bartch died on August 29, 1998, of complications of Marfan's Syndrome. Appellee refused to pay the policy proceeds because the application did not disclose the Marfan's Syndrome and the March 9, 1998, statement of good health did not disclose Bartch's visit to Dr. Lyon for bronchitis.

Appellant filed this suit, seeking to recover the policy proceeds, statutory penalty, interest, and attorney's fees. The suit named appellee and Touchet as defendants.[1] Appellee filed an answer and counterclaim, seeking a declaratory judgment that appellee acted properly in voiding the policy *ab initio* and that appellee had no obligation to pay the proceeds under the policy. Appellee filed a motion for summary judgment, which the trial court granted, finding that the misrepresentations on the application were material as a matter of law.

In summary-judgment cases, this court need only decide if the granting of summary judgment was appropriate based upon whether the evidentiary items presented by the moving party in support of the motion left a material question of fact unanswered. *Inge v. Walker*, 70 Ark. App. 114, 15 S.W.3d 348 (2000). The burden of sustaining a motion for summary judgment is always the responsibility of the moving party. *Id.* All proof submitted must be viewed in a light most favorable to the party resisting the motion, and any doubts and inferences must be resolved against the moving party. *Id.* On a summary-judgment motion, once the moving party establishes a *prima facie* entitlement to summary judgment by affidavits or other supporting documents, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Welch Foods, Inc. v. Chicago Title Ins. Co.*, 341 Ark. 515, 17 S.W.3d 467 (2000). Summary judgment is not appropriate where evidence, although

[1] After this court dismissed the appeal, appellant filed a motion to dismiss Touchet from the case. The motion was granted, and a final order was entered on June 4, 2002.

in no material dispute as to actuality, reveals aspects from which inconsistent hypotheses might reasonably be drawn and reasonable minds might differ. *Lee v. Hot Springs Village Golf Sch.*, 58 Ark. App. 293, 951 S.W.2d 315 (1997).

Appellant's argument on appeal is that summary judgment is not appropriate because there are material issues of fact remaining to be decided. In *Wozniak v. Colonial Insurance Co.*, 46 Ark. App. 331, 885 S.W.2d 902 (1994), this court cited a line of cases that held that, where the facts were truthfully stated to the *soliciting* agent but, by fraud, negligence, or mistake, are misstated *in the application*, the company cannot use the misstatements to avoid liability on the policy if the agent was acting within the scope of his real or apparent authority and there was no fraud or collusion on the part of the insured. Other cases in this line include *Interstate Fire Insurance Co. v. Ingram*, 256 Ark. 986, 511 S.W.2d 471 (1974); *Reliable Life Insurance Co. v. Elby*, 247 Ark. 514, 446 S.W.2d 215 (1969); *Millers Mutual Fire Insurance Co. v. Russell*, 246 Ark. 1295, 443 S.W.2d 536 (1969); *Desoto Life Insurance Co. v. Johnson*, 208 Ark. 795, 187 S.W.2d 883 (1945); *Aetna Life Insurance Co. v. Routon*, 207 Ark. 132, 179 S.W.2d 862 (1944); *Southern National Insurance Co. v. Heggie*, 206 Ark. 196, 174 S.W.2d 931 (1943); *Union Life Insurance Co. v. Johnson*, 199 Ark. 241, 133 S.W.2d 841 (1939); *General Agents Insurance Co. v. St. Paul Insurance Co.*, 22 Ark. App. 46, 732 S.W.2d 868 (1987); *Time Insurance Co. v. Graves*. 21 Ark. App. 273, 734 S.W.2d 213 (1987); *Gilcreast v. Providential Life Insurance Co.*, 14 Ark. App. 11, 683 S.W.2d 942 (1985). This court recently applied this line of cases in *Neill v. Nationwide Mut. Fire Ins. Co.*, 81 Ark. App. 67, 98 S.W.3d 448, in reversing a grant of summary judgment because the court found unanswered questions about whether the insurance company asked and correctly recorded the insured's answers concerning previous losses. Appellant is relying on this line of cases to establish that there are material issues of fact to be determined at trial and therefore summary judgment is inappropriate.

In *Graves*, *supra*, an insurance agent, who knew the Graveses and knew that Mrs. Graves had undergone an operation for cancer, told the insureds that he could provide her with coverage for her preexisting condition. The Graveses testified that the agent filled out the application and that they truthfully answered each question asked by the agent but that they did not read the applica-

tion before they signed it. One question asked on the application — whether the insured had previously been treated for cancer — was left unanswered. Subsequently, an amendment to the application was received by the agent containing the unanswered question. The amendment already had the word "no" typed on it, and the agent testified that he got Mr. Graves to sign it. The amendment stated that Mr. Graves hereby amends "my application." Mr. Graves testified that the amendment bore his signature, but that he did not remember signing it. The court stated that the jury could have found that his signature did not constitute an untruthful statement as to Mrs. Graves's preexisting condition.

In *Ingram, supra,* the agent asked Ingram questions and filled out the application, which Ingram signed. Although there were several questions answered incorrectly, Ingram testified that he correctly answered each question that the agent asked and, therefore, the agent must have inaccurately recorded his answers. The court stated that the insurance company was not entitled to a directed verdict under the evidence in that case and that there was no error in instructing the jury that, where the facts were truthfully stated to an agent but, by fraud, negligence, or mistake, the agent misstated the information, the company cannot avoid liability if the agent had authority and there is no fraud or collusion on the part of the insured.

Appellee relies on *Dodds v. Hanover Insurance Co.*, 317 Ark. 563, 880 S.W.2d 311 (1994), for the general rule that the knowledge of a *soliciting* agent cannot be imputed to the company in order to avoid liability in this case. *Dodds* involved a backdated policy. The insureds in *Dodds* contacted an agent to obtain coverage on their business. The agent submitted an application to the company for a policy expected to become effective June 1, 1989. On that same date, the insureds suffered damage to their building. The damage was reported to the agent, but not to the insurance company, the next day. On June 5, 1989, the insureds mailed the premium to the company. The company issued a policy on June 29, 1989, effective June 1, 1989. In May 1990, the insureds finally notified the company of the damage suffered on June 1, 1989. When the company refused payment, the insureds filed suit and the trial court granted summary judgment to the company. The supreme court affirmed the grant of summary judgment, holding that, because the agent was a soliciting agent, his knowledge of the

loss prior to the issuance of the policy was not imputed to the company. Also, the court appeared to rely on the fact that this was a backdated policy. *Dodds, supra.* However, *Dodds* does not discuss the line of cases cited above.

Appellee also relies on *Carmichael v. Nationwide Life Insurance Co.*, 305 Ark. 549, 810 S.W.2d 39 (1991), where the court stated that a person is bound under the law to know the contents of the papers he signs and that he cannot excuse himself by saying that he did not know what the papers contained. In *Carmichael, supra,* the insured's beneficiary appealed from an order of summary judgment in favor of the insurer. The evidence showed that the agent asked questions and recorded Mr. Carmichael's answers on the application. Mr. Carmichael then signed the application. Based on misrepresentations in the policy that Mr. Carmichael did not suffer from diabetes, the insurer refused to pay the benefits under the policy. The appellant, Mrs. Carmichael, argued that the agent must have failed to ask her husband the question or that the agent must have inaccurately recorded his answer, because her husband had suffered from diabetes for many years and would not have responded negatively to the question. However, the court stated that there was no evidence to sustain Mrs. Carmichael's allegations and that the only person with personal knowledge of what transpired was the agent, because Mr. Carmichael had died. The agent, in his affidavit, averred that he had asked every question on the application and that he had correctly recorded Mr. Carmichael's answers. The court noted that Mr. Carmichael had signed a certification that the information in the application was true and stated that this was at least probative evidence of his misrepresentation. Because Mrs. Carmichael offered no evidence to rebut any of the assertions made by the insurer, the court found that summary judgment was appropriate.

As stated by Judge Mayfield of this court,

> The distinction . . . is that . . . the insurance agent, whether a general or soliciting agent, had been given authority by the company to obtain the information necessary to complete the application, and to accept the "knowledge" obtained in doing so. That is his "job," so anything he learns in relation thereto is imputed to the company.

Gilcreast, 14 Ark. App. at 16, 683 S.W.2d at 945 (MAYFIELD, J., concurring). Furthermore, we note that *Carmichael* was also relied

upon by the appellant in *Neill v. Nationwide Mutual Fire Insurance Co., supra.* We rejected the argument in that case, effectively limiting *Carmichael* to situations where the plaintiff offers no evidence of incorrect or fraudulent recordation of an applicant's answers to rebut the insurer's assertion to the contrary. In the present case, appellant did, in fact, offer such evidence in her testimony and, under such circumstances, *Carmichael* is inapplicable. *See Neill, supra.*

Appellee also makes the argument that Ark. Code Ann. § 23-79-107 (Supp. 2001) provides that an insurer may rescind a policy on proof of *any* misrepresentation with respect to a medical impairment. However, this argument sweeps too broadly and ignores the plain language of the statute. The statute states that misrepresentations and the like "shall not prevent a recovery" unless they are fraudulent or material. Such a statement merely provides a minimum prerequisite to the insurer's successful defense; that is, the misrepresentation must be proved to have been fraudulent or material. *See Old Republic Ins. Co. v. Alexander*, 245 Ark. 1029, 436 S.W.2d 829 (1969) (SMITH, J., concurring). That is by no means the equivalent of saying that every fraudulent or material misrepresentation shall *ipso facto* prevent a recovery. *Id.* The burden was on appellee to sustain its contention that the facts not disclosed were material to the risk assumed by it or that, in good faith, it would not have issued the policy had it known the true facts. *See Old Republic Ins. Co. v. Alexander, supra; Capital Life & Accident Ins. Co. v. Phelps*, 76 Ark. App. 428, 66 S.W.3d 678 (2002).

Although not cited by either party, *Old Republic Insurance Co. v. Alexander, supra*, held that the materiality to the risk of a fact misrepresented, omitted, or concealed is a question of fact so long as the matter is debatable. It is a question of law only when it is so obvious that a contrary inference is not permissible. *Id.* Here, appellee relies on two alleged misrepresentations: the nondisclosure of Bartch's Marfan's Syndrome on the November 1, 1997, application and the failure to disclose Bartch's February 12, 1998, visit to Dr. Lyon for treatment of bronchitis on the March 9, 1998, in the statement of good health. It is hard to see how Bartch's February 12 visit to the doctor for treatment of bronchitis could causally be related to Marfan's Syndrome and therefore be material to the risk assumed by appellee. We believe the Marfan's Syndrome would be a material fact. The issue is whether this was disclosed to the company via Touchet, the agent. Appellee's vice-

president, Ferry Bunting, testified by affidavit that, if appellee had known of Bartch's health problems, it would not have issued the policy. However, Bunting offered no proof of any underwriting practices either in Bunting's own company or within the industry generally with regard to applicants with the type of health conditions reflected in Bartch's records.

[redacted] As the supreme court recognized in *Old Republic Insurance Co. v. Alexander, supra*:

> It is significant, as pointed out by the chancellor, that appellant produced no record of its own underwriting standards, nor did it attempt to show general standards in the underwriting profession or insurance trade by disinterested witnesses. It relied solely on the retrospective and possibly self-serving declarations of conclusions by this witness . . . his testimony cannot be considered as that of a disinterested witness. In weighing testimony, courts must consider the interest of a witness in the matter in controversy. Facts established by the testimony of an interested witness, or one whose testimony might be biased, cannot be considered as undisputed or uncontradicted. While the testimony of such a witness may not be arbitrarily disregarded, a trier of facts is not required to accept any statement as true merely because so testified. It cannot be said that such testimony is arbitrarily disregarded when it is not consistent with other evidence in the case, or unreasonable in its nature or is contradicted. Nor is it arbitrarily disregarded where facts are shown which might bias the testimony or from which an inference may be drawn unfavorable to the witness' testimony or against the fact testified to by him.

Id. at 1039, 436 S.W.2d at 835-36 (citations omitted); *see also Capital Life & Accident Ins. Co., supra.* Appellant denied appellee's request for admission that Bartch did not disclose his Marfan's Syndrome. Even if one assumes that Marfan's Syndrome is material to the risk that appellee assumed, that does not end the inquiry. *See Phelps v. U.S. Credit Life Ins. Co.*, 336 Ark. 257, 984 S.W.2d 425 (1999). For appellee to prevail, it must prove that there was a nondisclosure of that information. Appellant and another witness both testified by affidavit that they were present when Touchet asked Bartch whether Bartch had any disease or physical disorder and Bartch replied that he had Marfan's Syndrome. This is where what Bartch told Touchet becomes critically important and why we believe there are material issues of fact

that would preclude summary judgment. *See Neill v. Nationwide Mut. Fire Ins. Co., supra.*

Reversed and remanded.

ROBBINS, J., agrees.

VAUGHT, J., concurs.

LARRY D. VAUGHT, Judge, concurring. I concur in the result based on the reasoning previously set forth in my concurring opinion in *McQuay v. Arkansas Blue Cross & Blue Shield*, 81 Ark. App. 77, 98 S.W.3d 454.

Gregory Ray GARNER *v.* STATE of Arkansas

CA CR 02-332 101 S.W.3d 857

Court of Appeals of Arkansas
Division I
Opinion delivered April 2, 2003

Louis L. Loyd, for appellant.

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

JOHN MAUZY PITTMAN, Judge. The appellant in this criminal case was a high school teacher. After reports that he had forced himself on some of his female students, he was charged with two counts of violation of a minor in the second degree and one count of violation of a minor in the first degree. After a jury trial, he was convicted of these offenses and sentenced to three years' imprisonment. This appeal followed.

Appellant does not challenge the sufficiency of the evidence on appeal, but instead limits his arguments to two evidentiary matters. First, he asserts that the trial judge erred in allowing another student, D.C., to testify that appellant made sexual overtures to her at school that were very similar in their expression and circumstance to those described by the victims. Second, he asserts

that the trial court erred in refusing to permit him to introduce a written, prior inconsistent statement by one of the victims. We find no error, and we affirm.

Three victims testified at trial. The first, M.M., testified that she was sixteen years old and had been in appellant's Health class. At the field house, appellant would always tell her that she was pretty and that she should model. Sometimes he would ask her to stay after class, but she would not. One day in late October or early November, she found herself in the field house with appellant after the boys in her class had left. The lights were dim. Appellant came up behind her, leaned over her shoulder, ran his hands from her breasts to her stomach, and kissed her on the side of her face. When she tried to leave, appellant grabbed her arm and told her not to tell anyone because it would get them both in trouble.

The next victim, H.M., referred to three separate incidents regarding appellant. She testified that she was fifteen years old and had been in appellant's Health class. Every time she looked up in class, she saw that appellant was staring at her. Appellant told her she was gorgeous as she was leaving the classroom or walking down the hall. The first incident occurred one day when appellant told H.M. that he needed to see her after class. She remained at her desk when her classmates left the room. Appellant turned out the lights and shut the door. H.M. was uncomfortable and walked behind appellant's desk. Appellant approached her from behind and put his hand on her lower back. He told her that she should leave or they would both get in trouble. The second incident occurred on November 18. The lights went out in the school building during a storm and everyone was told to go outside. H.M. sat near the front of the classroom and was the last to leave. As she neared the doorway, appellant moved in front of her. She grabbed the shirt of the student in front of her as she left the room to avoid being cornered by appellant. The third incident occurred in the field house in late November or December. Appellant asked the class to help him put away football equipment at the field house. H.M. went to the field house and found herself alone in the equipment room with appellant. As she bent over to pick up a football helmet, appellant approached her from behind, placed his chest against her back, rubbed her arms, and kissed her. H.M. was frightened and left the room.

The third victim, K.P., also referred to three incidents regarding appellant. She testified that she was sixteen years old and that appellant had been one of the coaches at her school. The first incident occurred during the storm on November 18. K.P. had been in another teacher's Biology class when the lights went out at school. The Biology class was dismissed. While K.P. was standing alone at the end of the hallway looking outside, appellant came up behind her, grabbed her waist, rubbed her side near her breast, and kissed her on the corner of the mouth. Appellant told her that she had better leave or they would both get in trouble, and that she should not tell anyone what happened. K.P. left, upset and crying. The second incident occurred in December when K.P. went to the field house to get a study guide from her biology teacher. After she left her teacher's office and was entering the gym, appellant approached her, grabbed her by the waist, backed her up against the wall, held both her hands over her head with his left hand, stuck his right hand down her pants, and penetrated her vagina with his finger. He again told her that she had better leave or they would both be in trouble, and that he could lose his job over the incident. The third incident occurred in January. K.P. had left a schoolbook in appellant's classroom. When she came to retrieve it, appellant grabbed her arm, rubbed her side and around her breasts, and told her that she had better leave.

K.P. felt frightened and ashamed, and did not tell anyone about the incidents until February 14, when two school officials, Mr. LaFargue and Ms. Adams, came to K.P.'s house and talked with her mother about rumored incidents at school. K.P. told her mother about the first and third incidents, but did not tell her about the second incident. It was arranged for the victims, their mothers, and school officials to meet at the police station. K.P. testified that she gave a written statement mentioning the first and third incidents, but omitting the second one. The statement specified that those were the only times appellant had molested her. K.P. further testified that she did not reveal the second incident in her statement because she did not feel that she could trust Mr. LaFargue and Ms. Adams. However, K.P. stated that, between February 15 and March 13, she talked frequently about the incidents involving appellant with another school official, Ms. Mitzi, and that on March 13 she told Ms. Mitzi about the second incident because she felt that she could trust her.

The State also introduced the testimony of another female student, D.C. She stated that she was eighteen years old and that she had been in appellant's Health class the previous year. She testified that, in the autumn, she noticed that appellant had begun to stare at her, and that appellant began telling her that she was attractive and had a nice body. She stated that appellant commented in Gym class about her breasts jumping out of her shirt, and that, while she was grading papers in appellant's class one day, he rubbed her leg "a little too high" and told her she was doing a good job. Appellant was not charged with any offenses relating to his conduct toward D.C.

Appellant first contends that the trial judge erred in allowing D.C. to testify about appellant's conduct toward her because it was not relevant to the offenses with which he was charged. We do not agree. Arkansas Rule of Evidence 404(b) prohibits evidence of other crimes, wrongs, or acts to prove the character of a person and to show that he operated in conformity therewith, but permits such evidence to be admitted for other purposes, including proof of motive, intent, preparation, or plan. The testimony of D.C. showed plan and modus operandi by demonstrating that appellant had gone through a similar sequence with all of the girls — involving compliments of a sexual nature, staring at them, attempting to get them alone — that preceded the actual assaults. This sort of antecedent conduct was held to be admissible in *Hyatt v. State*, 63 Ark. App. 114, 975 S.W.2d 433 (1998). Furthermore, it showed appellant's depraved sexual instinct and proclivity for sexual predation upon young girls under his care. This goes to the heart of the pedophile exception to Rule 404(b), which permits evidence of a defendant's sexual acts with other children when it is helpful in showing a proclivity toward a specific act with a person or class of persons with whom the accused has an intimate relationship, *see Greenlee v. State*, 318 Ark. 191, 884 S.W.2d 947 (1994), and the pedophile exception is not limited to cases where all the victims are children in the same household — it has recently been declared to be applicable in classroom situations. *Butler v. State*, 349 Ark. 252, 82 S.W.3d 152 (2002). The admission or rejection of evidence under Rule 404(b) is left to the sound discretion of the trial court and will not be disturbed absent a manifest abuse of discretion. *Pickens v. State*, 347 Ark. 904, 69 S.W.3d 10 (2002). There was no abuse of discretion in the present case.

Appellant next contends that the trial court erred in refusing to allow introduction of K.P.'s initial written statement, which did not mention the incident in which she was penetrated by appellant. We disagree. At trial, K.P. admitted that her testimony differed from her earlier written statement, and when a witness admits to having made a prior inconsistent statement, Ark. R. Evid. 613(b) does not allow introduction of extrinsic evidence of the prior statement to impeach the witness's credibility. *Kennedy v. State*, 344 Ark. 433, 42 S.W.3d 407 (2001).

Affirmed.

HART and GLADWIN, JJ., agree.

Sandra R. FRIGON *v.* Gary F. FRIGON

CA 02-298 101 S.W.3d 879

Court of Appeals of Arkansas
Division IV
Opinion delivered April 2, 2003

Brenda Austin, Ltd., for appellant.

Boyer, Schrantz, Rhoads & Teague, PLC, by: *Johnnie Emberton Rhoads*, for appellant.

JOHN B. ROBBINS, Judge. Appellant Sandra Frigon and appellee Gary Frigon were divorced by order of the Benton County Circuit Court filed on September 18, 2001. Appellant challenges the trial judge's finding that a Unum Provident Disability Income Protection Policy, covering appellee effective during the 2001 calendar year, had no cash value and thus was not divisible between the parties as marital property. We reverse and remand.

We review domestic-relations decisions de novo on the record.[1] *Nielsen v. Berger-Nielsen*, 347 Ark. 996, 69 S.W.3d 414 (2002). Although review is de novo, we will not reverse a finding of fact by the trial judge unless it is clearly erroneous. *Norman v. Norman*, 342 Ark. 493, 30 S.W.3d 83 (2000). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite

[1] Appellant's abstract and addendum are excessive as they encompass more testimony, pleadings, and exhibits than are necessary to an understanding of the question presented to us for resolution. *See* Ark. R. Sup. Ct. 4-2(a)(5) and (8). We decline in this instance to order appellant's counsel to file a proper abstract, brief, and addendum, *see* Ark. R. Sup. Ct. 4-2(b)(3), but we caution counsel to adhere to the briefing guidelines in the future.

and firm conviction that a mistake has been committed. *Nielsen, supra.* While the trial court's findings of fact shall not be set aside unless clearly erroneous, conclusions of law are not given the same deference. *Vowell v. Fairfield Bay Community Club, Inc.*, 346 Ark. 270, 58 S.W.3d 324 (2001). Accordingly, if the trial judge erroneously applies the law and an appellant suffers prejudice, the erroneous ruling should be reversed. *Id.*

During the marriage, the parties acquired a disability income protection policy covering appellee to protect against loss of his income if he became unable to perform the substantial or material duties of his occupation. The policy became effective on December 1, 1992, and was renewed annually; the premiums were paid semiannually. Therefore, the policy was effective year-to-year from December 1 through the following December 1. Appellee, a physician, made a claim in 1998 and was granted monthly benefits in the approximate sum of $12,000 per month during a four-month term of incapacity to work. At the time of the divorce hearing in July 2001, the policy was in effect for that year through December 1, 2001. The semiannual premiums had been paid with marital funds. However, there was no evidence that a disability claim was pending at the time of the final hearing in July 2001. Appellant argued to the circuit judge that she should be awarded property rights in the policy for 2001 should appellee become disabled during that year. Appellant also asked that the judge set child support and alimony on any disability income if appellee should become disabled under the policy.

In the order on appeal, filed of record on September 18, 2001, the trial judge ordered as follows:

> No cash value is found to exist in connection with the disability policy, so the Court finds nothing to divide. However, should the policy be activated, it may come into play for support purposes and not for a division of property, and at that time, a determination can be made as to the amount of income.

Appellant argues on appeal that even though monthly disability income benefits were a contingent and unliquidated asset, it was a marital asset nonetheless and subject to division. We agree.

Appellant cites to *Bunt v. Bunt*, 294 Ark. 507, 744 S.W.2d 718 (1988), as support for her position.[2] In that case, the supreme court held that a personal-injury claim, which had accrued to the husband but which had not been made the subject of a complaint or offer of settlement, was "marital property." To hold that a personal-injury claim is marital property only to the extent that it has become liquidated would place the claimant in the position of manipulating the claim so as to liquidate it after divorce and thus have the power to determine whether it is included in marital property. *See id. See also Liles v. Liles*, 289 Ark. 159, 711 S.W.2d 447 (1986) (holding that a personal-injury judgment based on a structured settlement, part of which had been received and part of which was to be received in the future, was marital property).

We agree that this asset, a contract right in the form of a disability income protection policy, was undoubtedly a marital asset. That being the case, appellant was entitled to one-half of the value of any claim arising under the policy during the remaining term of the policy, *i.e.*, through December 1, 2001. Alternatively, if the trial court awarded the policy wholly to appellee, the appellant was entitled to be reimbursed for one-half of the prepaid premium, *i.e.*, for the seventy-four-day period from the date the divorce was entered, September 18, 2001, through December 1, 2001. In our view, justice is better served by a remand so that the circuit judge can determine which method accomplishes equity in this case. *See Reaves v. Reaves*, 63 Ark. App. 187, 975 S.W.2d 882 (1998).

Reversed and remanded.

PITTMAN and HART, JJ., agree.

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[2] The *Bunt* case applied the law as it existed prior to the passage in 1987 of Act 676, which changed the definition of marital property to add certain exceptions for particular benefits. This Act was codified at Ark. Code Ann. § 9-12-315(b), and it excludes from the definition of marital property those benefits received or to be received from workers' compensation claims, personal injury claims, or social security claims as are given for any degree of permanent disability or future medical expenses. Clearly, the disability income benefits at issue in the present appeal do not fall within that exception.

David VALLAROUTTO d/b/a Albertson's Liquor *v.*
ALCOHOLIC BEVERAGE CONTROL BOARD

CA 02-556 101 S.W.3d 836

Court of Appeals of Arkansas
Division IV
Opinion delivered April 2, 2003

[Petition for rehearing denied May 7, 2003.]

[redacted]

Law Offices of Treeca J. Dyer, P.A., by: *Treeca J. Dyer* and *Steptoe & Johnson LLP*, by: *Peter Swann*, for appellants.

Donald R. Bennett and *Charles R. Singleton*, for appellee.

JOHN B. ROBBINS, Judge. Appellant David Vallaroutto d/b/a Albertson's Liquor appeals the denial of an application to transfer an existing liquor permit to a new location. The Alcoholic Beverage Control Board denied the application on the ground that the public convenience and advantage would not be served by the transfer. The Pulaski County Circuit Court affirmed the Board's decision, and this appeal followed. We affirm the Board, and our holding renders the Board's cross-appeal moot.

Albertson's operates a large retail grocery store in Texarkana. The store sits on a lot that is bound on the north by Arkansas Boulevard; on the east by Laurel Street; on the south by East 37th Street; and on the west by State Line Avenue, the street that serves as the border between Texarkana, Arkansas, and Texarkana, Texas. In December 1998, Albertson's purchased an existing retail liquor permit from Margaret Gleason with the goal of constructing and operating a liquor store on the northwest corner of its lot, near the intersection of Arkansas Boulevard and State Line Avenue. Gleason had held the permit since 1968, and thus it was not subject to the present-day prohibition against transferring liquor permits to the operators of grocery stores. *See* Ark. Code Ann. § 3-4-218(a) and (b) (Supp. 2001).

On September 15, 1999, Albertson's filed an application with the Alcoholic Beverage Control Director, seeking permission to transfer the location of the Gleason permit to the proposed construction site on its lot. The application was rejected on October 20, 1999, based on objections from local officials and area businesses and residents, primarily due to concerns over traffic congestion. Thereafter, Albertson's re-filed its application and proposed that the liquor store be located at the south end of the property, facing 37th Street. Albertson's hoped that, by moving the store away from the Arkansas/State Line intersection, its application would meet with greater favor.

On March 16, 2000, the Director again denied the application. Albertson's appealed the Director's decision to the Board, and a hearing was held on September 20, 2000, during which the Board heard the testimony of over a dozen witnesses and received petitions both for and against the transfer. Following the hearing, the Board denied Albertson's application, concluding that:

> Based on the existing number of retail liquor stores in this immediate market area, [and on] the probability that if the outlet transfer is approved that there will be additional traffic problems and additional vehicular accidents, the Board finds that the public convenience and advantage will not be served by granting the transfer. . . .

Albertson's appealed the Board's ruling to the Pulaski County Circuit Court. The court affirmed the Board's decision, and this appeal was brought by Albertson's.

Albertson's argues first that the Board failed to make sufficient findings of fact as required by the Administrative Procedure Act. *See* Ark. Code Ann. § 25-15-210(b)(2) (Repl. 2002). Whether sufficient findings of fact have been made is a threshold question in an appeal from an administrative board. *See Olsten Health Servs. Inc. v. Arkansas Health Servs. Comm'n*, 69 Ark. App. 313, 12 S.W.3d 656 (2000).

Albertson's relies on *Green House, Inc. v. Arkansas Alcoholic Beverage Control Div.*, 29 Ark. App. 229, 780 S.W.2d 347 (1989), to support its argument that this case should be remanded for additional findings of fact. In *Green House*, the Board's "findings" consisted of a narrative account of the proceedings and the witnesses' testimony, followed by the conclusion that the permit applied for was not in the public interest. In remanding the case for further proceedings, we said:

> Because the Board has merely recited the testimony rather than translating that testimony into findings of fact, we are unable to determine the Board's view of the facts, or the theory of law on which the denial of the permit was based. We addressed a similar situation in *Wright v. American Transportation*, 18 Ark. App. 18, 709 S.W.2d 107 (1986), where we quoted the following language from *Whispering Pines Home for Senior Citizens v. Nicalek*, 48 Ind. Dec. 568, 333 N.E.2d 324 (1975):
>
>> Once again, therefore, we attempt to tell the Board what a satisfactory specific finding of fact is.
>>
>> It is a simple, straightforward statement of what happened. A statement of what the Board finds has happened; not a statement that a witness, or witnesses, testified thus and so. It is stated in sufficient relevant detail to make it mentally graphic, i.e., it enables the reader to picture in his mind's eye what happened. And when the reader is a reviewing court the statement must contain all the specific facts relevant to the contested issue or issues so that the court may determine whether the Board has resolved those issues in conformity with the law.

Green House, 29 Ark. App. at 232-33, 780 S.W.2d at 349-50. We recently quoted this same passage in *Nesterenko v. Arkansas Bd. of Chiropractic Examiners*, 76 Ark. App. 561, 69 S.W.3d 459 (2002), in which we remanded for further findings from an administrative board.

The Board's decision in this case is a five-page document that, for fourteen paragraphs, merely recites the substance of witness testimony, the very type of evidentiary recapitulation that the *Green House* case cautioned against. However, that part of the document that follows the recitation of evidence reveals the pertinent facts found by the Board as the basis for its decision. The Board found that (1) based on the testimony of law enforcement officers, approval of the permit would likely increase traffic and traffic accidents in an area that already suffers a large number of accidents; and (2) based on witness testimony that there are six liquor stores within approximately a quarter of a mile of the proposed site, the area is already adequately served. The Board then concluded that the public convenience and advantage would not be served by transfer of the permit to the proposed location.

We believe that the Board's findings and conclusions go beyond a mere recitation of evidence and are thus adequate to permit us to undertake a proper review of the Board's ruling. We therefore proceed to the merits of the case.

Albertson's contends that the Board's denial of its transfer application is not supported by substantial evidence and is arbitrary and capricious. On appeal from circuit court, our review of administrative decisions is directed to the decision of the administrative agency, rather than the decision of the circuit court. *Arkansas Bd. of Registration for Professional Geologists v. Ackley*, 64 Ark. App. 325, 984 S.W.2d 67 (1998). We rely heavily upon the principle that administrative agencies are better equipped than courts, by specialization, insight through experience, and more flexible procedures, to determine and analyze underlying issues. *Fontana v. Alcoholic Beverage Control Bd.*, 11 Ark. App. 214, 669 S.W.2d 487 (1984). Judicial review is limited in scope, and the administrative agency decision will be upheld if supported by substantial evidence and not arbitrary, capricious or an abuse of discretion. *Arkansas Alcoholic Beverage Control Div. v. Person*, 309 Ark. 588, 832 S.W.2d 249 (1992).

When reviewing administrative decisions, we review the entire record to determine whether there is any substantial evidence to support the agency's decision. *Ackley, supra.* Substantial evidence is valid, legal, and persuasive evidence or such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* An absence of substantial evidence is

shown by demonstrating that the proof before the agency was so nearly undisputed that fair-minded persons could not reach its conclusions. *Id.* The credibility and the weight of the evidence is within the agency's discretion. *Id.*

We give the evidence its strongest probative force in favor of the Board's ruling. *See Chili's of Jonesboro, Inc. v. State of Ark. Alcohol Beverage Control Div.*, 75 Ark. App. 239, 57 S.W.3d 228 (2001). The question on review is not whether the evidence would have supported a contrary finding but whether it supports the finding that was made. *Id.* The reviewing court cannot displace the Board's choice between two fairly conflicting views even though the court might have made a different choice had the matter been before it de novo. *Id.*

With these standards in mind, we now set out the evidence before the Board. David Vallaroutto testified on behalf of Albertson's that he would be the permit holder and manager of the new liquor store; that the liquor store would have a separate entrance from the grocery store; that it would be equipped with a computerized register system, which would require presentation of an ID to verify the age of buyers; and that it would have no drive-thru window, thus discouraging underage sales. District Sales Manager Fred Bennett testified that sales from the liquor store would be credited to Albertson's Community Partners Card Program, in which the store contributes money to charities based on cards that are scanned at check-out. He also said that the new store would be comfortable and well-lit with wide aisles and, further, that Albertson's successfully operated several liquor stores in Louisiana. Albertson's employee Jackie Richardson testified that Albertson's had not been cited for selling to an underage buyer. Grocery Manager Spyres testified that he believed that it would be in the public's convenience to buy liquor from the same premises as the very secure Albertson's grocery lot.

Ernest Peters, a professional engineer, testified on Albertson's behalf that the proposed liquor store would have "an unperceivable impact" on either traffic or accidents in the vicinity. He based his opinion on vehicle-per-day usage data from 1985 to 1999 and an on-site traffic count conducted in January 2000, which showed usage of State Line Avenue by 20,000 vehicles per day, a figure below 1987-96 levels. Peters also relied on data from the Texarkana, Arkansas, city police department that, between

January 1998 and October 1999, twenty-three accidents occurred in the quarter-mile area surrounding the Arkansas/State Line intersection. However, he admitted on cross-examination that he had not obtained any accident figures from the Texarkana, Texas, police department. Peters's report also indicated that the liquor store would generate considerably fewer weekday visits than a fast-food restaurant.

Albertson's also placed into evidence (1) petitions and testimony from area residents in favor of the transfer; (2) the testimony of Stacy Pittman, an anti-drunk driving advocate who praised Albertson's for not having a drive-thru window and for its system that requires presentation of an ID before a sale is made; and (3) the testimony of Carol Conley, the city Director of Public Works, who testified that, pending a look at the actual store plans, he had no opposition to the transfer of the permit.

Those opposing the transfer presented the Board with letters of opposition from local officials and liquor store owners, along with a petition signed by area residents opposing the transfer. The following witnesses also testified in opposition: (1) Jim Nicholas, a Miller County deputy who was present to testify on behalf of the county sheriff. Nicholas said that he was familiar with traffic patterns in the area of the proposed liquor store and that he believed the store would increase traffic and safety problems in the area. He also stated that six liquor stores were already concentrated in the subject area along State Line Avenue and that he and the sheriff believed that the public was already adequately served by those stores; (2) Shawn Vaughn, a Texarkana, Arkansas, police officer, who testified on behalf of the city police chief. Vaughn stated that the chief opposed the new store because of his concern that traffic would be increased in an already congested area. He also said that his department had worked twenty-four accidents on the Arkansas side of the State Line/Arkansas Boulevard intersection in the past two years and that he believed there were a similar number on the Texas side; (3) Tom Wooten, a former liquor store owner, who testified as to the concentration of liquor stores along State Line Avenue and that, in the past ten to twelve years, seventeen liquor stores had closed in Miller County due to lack of business; and (4) Scott Womack, a current owner of a liquor store in the subject area, who testified regarding the large number of traffic accidents in the vicinity since September of 1999.

It is the public policy of the State of Arkansas that the number of permits to dispense vinous (except wines), spirituous, or malt liquor shall be restricted. Ark. Code Ann. § 3-4-201(a) (Repl. 1996). *See also Carder v. Hemstock*, 5 Ark. App. 115, 633 S.W.2d 384 (1982); *Stringfellow v. Alcoholic Beverage Control Bd.*, 3 Ark. App. 124, 623 S.W.2d 213 (1981). The Board is empowered to determine whether public convenience and advantage will be promoted by issuing the permits and by increasing or decreasing the number thereof. Ark. Code Ann. § 3-4-201(b) (Repl. 1996). Albertson's had the burden of proving that the public convenience and advantage would be promoted by transfer of the permit. *Marshall v. Alcoholic Beverage Control Bd.*, 15 Ark. App. 255, 692 S.W.2d 258 (1985).

The term "public convenience" is not defined in our statutes; however, the supreme court noted in *Fayetteville School Dist. No. 1 v. Alcoholic Beverage Control Bd.*, 279 Ark. 89, 648 S.W.2d 804 (1983), that reference to the public convenience and advantage means that the interest of the general public is to be considered, not merely that of the applicant. Also, this court has stated that public convenience and advantage should not be restricted to a colloquial sense as synonymous with "handy or easy of access" but construed in that sense which connotes suitable and fitting to supply the public needs to the public advantage. *See Carder v. Hemstock, supra. See also Arkansas Alcoholic Beverage Control Bd. v. Muncrief*, 308 Ark. 373, 825 S.W.2d 816 (1992). The factors to be considered by the Board in determining public convenience and advantage include the number and types of alcohol permits in the area, economic impact, traffic hazards, remoteness of the area, degree of law enforcement available, input from law enforcement and other public officials in the area, and comments in opposition or support from area residents. *Edwards v. Arkansas Alcoholic Beverage Control Div.*, 307 Ark. 245, 819 S.W.2d 271 (1991).

Upon viewing the entire record, we decline to reverse the Board's decision for lack of substantial evidence. As to the Board's finding that if the transfer were approved there would be additional traffic problems and vehicular accidents, we note that the potential for traffic problems has been approved of as a factor to consider in denying a liquor permit. *See, e.g., Carder v. Hemstock, supra; Stringfellow v. Alcoholic Beverage Control Bd., supra.* However, we agree with Albertson's that, although the opposition in this

case proved that the area in question suffered from traffic problems, none of the opposition witnesses offered anything other than mere speculation as to how the new liquor store would adversely affect these problems, especially in light of Ernest Peters's report regarding the lack of perceivable impact the store would have in this regard. *See Fouch v. State*, 10 Ark. App. 139, 662 S.W.2d 181 (1983) (where we found a lack of substantial evidence to support the Board's finding that a new retail liquor outlet would greatly increase the existing traffic problem where the testimony was that the new store would not cause any more of a traffic problem than a restaurant or other facility).

Nevertheless, we are persuaded that the Board's decision is supportable on its finding that the area is adequately served by the existing liquor stores nearby. This, too, is a proper consideration in determining whether the proposed outlet would serve the public convenience and advantage. *See Edwards v. Arkansas Alcoholic Beverage Control Div., supra.* We believe that the Board was entitled to rely on the opinion of area residents and public officials that the six existing liquor stores in the quarter-mile area already served the public convenience, thus obviating the need for another. As we stated earlier, administrative agencies are better equipped than courts by specialization, insight through experience, and more flexible procedures to determine and analyze underlying issues. We also reiterate that, as per our statutes, it is the public policy of the State of Arkansas that the number of liquor permits shall be restricted, Ark. Code Ann. § 3-4-201(a) (Repl. 1996), and that the Board is empowered to determine whether public convenience and advantage will be promoted by issuing the permits. Ark. Code Ann. § 3-4-201(b) (Repl. 1996). Here, various officials and citizens who were well-acquainted with the area stated their belief that the existing liquor stores were adequate to serve the public. Further, there was no clear proof that Albertson's could offer the public any convenience and advantage that was not already met by the existing stores. *See Carder v. Hemstock, supra. See also Fouch v. State, supra* (where the applicant submitted proof of the area's demand for its products and proof that other liquor stores did not carry particular products).

While we are mindful of Albertson's contention that the opposition evidence was adduced merely to squelch the entry of a powerful competitor such as Albertson's into the market, the

Board did not so find, and we defer to its superior ability to judge the credibility of the testimony before it.

In light of the foregoing, we conclude that, even though we disagree with the Board's finding regarding the proposed store's effect on traffic problems, when the record is viewed as a whole, the Board's decision was supported by substantial evidence. *See Stringfellow v. Alcoholic Beverage Control Bd., supra.* That being the case, it follows that the Board's decision was not arbitrary or capricious. *See Curen v. Arkansas Professional Bail Bondsman Lic. Bd.*, 79 Ark. App. 43, 84 S.W.3d 47 (2002).

Our holding renders moot the Board's cross-appeal on the ground that Albertson's application for the transfer permit was not timely filed.

Affirmed.

PITTMAN, J., agrees.

VAUGHT, J., concurs.

LARRY D. VAUGHT, Judge, concurring. Because of the great deference we give to decisions of administrative agencies, I concur in the affirmance of this case. I write separately to emphasize the necessity for boards and commissions, which are given quasi-judicial functions, to operate within the parameters of the Administrative Procedures Act. Arkansas Code Annotated § 25-15-210(b)(2) provides that a "final decision shall include findings of fact and conclusions of law, separately stated."

The majority holds, and I reluctantly agree, that the decision in this case complies with the statute. However, it is only by the thinnest thread that one paragraph out of fourteen, which is labeled neither finding of fact nor conclusion of law, meets the criteria. Surely after the direction given in *Green House, Inc. v. Arkansas Alcoholic Beverage Control Division*, 29 Ark. App. 229, 780 S.W.2d 347 (1989), which is quoted in the majority opinion, the board has no excuse for delivering decisions which require appellate courts to decipher what is supposed to be "separately stated." I assume that the board had legal counsel to assist in the drafting of the decision. If not, it should seek such assistance in the future.

FARMERS HOME MUTUAL FIRE INSURANCE COMPANY *v.* BANK OF POCAHONTAS

CA 01-712 101 S.W.3d 867

Court of Appeals of Arkansas
Division III
Opinion delivered April 2, 2003

Stidham Law Firm, P.A., by: *Daniel T. Stidham*, for appellant.

John C. Throesch, for appellee.

OLLY NEAL, Judge. In an unpublished opinion dated February 13, 2002, *Farmers Home Mutual Fire Insurance Co. v. Bank of Pocahontas*, CA01-712, appellant, Farmers Home Mutual Fire Insurance Company (Farmers) was afforded the opportunity to supplement its abstract in conformance with Arkansas Supreme Court Rule 4-2(a)(6). As the trial court's findings were not clearly erroneous, we now affirm.

The facts are as follows. Donna Hawkins borrowed money from appellee, Bank of Pocahontas (Bank), for the purchase of a home. The Bank approved the loan and issued a standard real estate mortgage that required an insurance policy naming itself as loss payee. Farmers issued the policy to Hawkins in 1996. The policy contained a standard mortgage clause naming the Bank as loss payee.

Upon renewal of the policy in 1998, Hawkins's premium check was returned marked "insufficient funds." On May 26, 1998, Farmers mailed Hawkins and the Bank a letter stating that the check would be redeposited on May 31, 1998. The check again failed to clear. On June 9, 1998, Farmers mailed Hawkins and the Bank another letter indicating that unless payment was received on or before June 18, 1998, the coverage would be terminated. Subsequently, Farmers canceled the policy when it did not receive payment. Farmers mailed a notice of the cancellation to Hawkins and the Bank on June 23, 1998.

On September 27, 1998, a fire destroyed Hawkins's home, and Farmers refused to pay the claim, contending that the policy had effectively been canceled. The Bank filed suit, alleging that it did not get notice of the cancellation, or if the notice was adequate, it was void under the terms of the policy. Alternatively, it argued that the policy had been reinstated by a document it received from the local insurance agent who had purchased the agency where the Hawkins policy originated.

The trial court awarded the Bank $23,500, plus 12% penalty and $4,000 in attorney's fees. The court determined that the Bank had been properly notified of the cancellation, but found that the terms of the policy required Farmers to make a "demand"on the Bank. The court reasoned that since no demand was made, the policy was still in effect at the time of the loss. The court further found that the policy was reinstated by the document Farmers sent to its new agent. It is from this judgment that appeal is taken.

On appeal, Farmers contends that (1) the trial court erred in holding that the mortgage clause of the insurance policy requires the insurance company to make demand upon the Bank to pay the insured's premiums before cancellation of the policy can be effected for nonpayment of premiums because (a) the ordinary and plain meaning of the policy does not require that the insurance company make demand upon the mortgagee to pay the premium on behalf of the insured and (b) the language of the policy regarding the issue of demand is not ambiguous, therefore requiring that the policy language be construed against the insurer; (2) if demand on the mortgagee is required under the terms of the policy, then the three letters mailed out to the mortgagee regarding nonpayment of the premium are sufficient to constitute demand that the premium be paid by the mortgagee; and (3) the trial court erred in finding that an internal memorandum issued to its agent reinstated the policy after it was canceled because (a) absent proof that all of the conditions necessary for reinstatement of the policy had either been met, or said conditions waived by the insurer, there could be no reinstatement of the policy and (b) the mortgagee, who never received the "internal memorandum" until after the loss, could not have reasonably relied upon the document as evidence that the policy had been reinstated, or somehow afforded it coverage for the loss.

In bench trials, the standard of review on appeal is whether the trial judge's findings were clearly erroneous or clearly against the preponderance of the evidence. *Ford Motor Credit Co. v. Ellison*, 334 Ark. 357, 974 S.W.2d 464 (1998). The appellate court views the evidence in a light most favorable to the appellee, resolving all inferences in favor of the appellee; disputed facts and determinations of the credibility of witnesses are within the province of the fact finder. *Id.*

I. Whether the policy language is ambiguous and required a demand

Farmers contends that the trial court erred because the ordinary and plain meaning of the policy language did not require it to make a demand upon the Bank to pay Hawkins's premium before the cancellation of the policy could be effected for nonpayment of the premiums. In determining that the policy required that Farmers make demand upon the Bank for payment of the premium, the trial court found that the language of the policy was "at the least" ambiguous, and thus must have been resolved in favor of the insured. In its order, the court stated that it could not "strictly apply the terms of the policy with respect to the mailing of the notice as being sufficient evidence of notice and ignore the requirement that the policy places on [Farmers] to make demand for payment of the premium from [the Bank] when [Donna Hawkins] fails to pay same." We agree with the trial court.

Nonrenewal, lapse, or failure by the insured to pay an insurance premium results in cancellation of the policy by the carrier. *Jabore v. Shelters Ins. Co.*, 307 Ark. 287, 819 S.W.2d 9 (1991). In reviewing an insurance policy, the appellate court submits to the principle that when the terms of the policy are clear, the language in the policy controls. *Columbia Mut. v. Home Mut. Fire*, 74 Ark. App. 166, 47 S.W.3d 909 (2001). The language in an insurance policy is to be construed in its plain, ordinary, popular sense. *Norris v. State Farm Fire & Cas. Co.*, 341 Ark. 360, 16 S.W.3d 242 (2000). If a policy provision is unambiguous, and only one reasonable interpretation is possible, the court will give effect to the plain language of the policy without resorting to rules of construction; if, however, the policy language is ambiguous, and thus susceptible to more than one reasonable interpretation, the policy will be construed liberally in favor of the insured and strictly against the insurer. *Id.* Whether the language of a policy is ambiguous is a question of law to be resolved by the court. *Id.*

There are two major categories of mortgagee clauses: (1) loss-payable and (2) standard clauses. *Nationwide Mut. Ins. Co. v. Hunt & First Citizens Bank*, 327 S.C. 89, 488 S.E.2d 339 (1997). In *Nationwide*, the South Carolina Supreme Court provided that:

> A loss payable, or open mortgage, clause typically declares that the loss, if any, is payable to a mortgagee as its interest might

appear. A standard mortgage clause, also known as a union or New York mortgage clause, uses language similar to the loss-payable, but further stipulates that, as to the interest of the mortgagee, the insurance shall not be invalidated by certain specified acts of the insured, which continue as grounds of forfeiture against him. The following is an example of a standard clause:

> [T]his insurance, as to the interest of the mortgagee only, shall not be invalidated by any act or neglect of the mortgagor or the owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership [of] the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy, provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee shall, on demand, pay the same.

Id. at 92, 488 S.E.2d at 341. (Citations omitted.)

It is generally held that standard mortgage clauses create independent contracts for the insurance of the mortgagee's interest. *See Foremost Ins. Co. v. Allstate Ins. Co.*, 439 Mich. 318, 486 N.W.2d 600 (1992); *Equality Savings & Loan Ass'n v. Missouri Property Ins. Placement Facility*, 537 S.W.2d 440 (Mo. Ct. App. 1976); *Prudential Ins. Co v. Franklin Fire Ins. Co.*, 180 S.C. 250, 185 S.E. 537 (1936). In Arkansas, we have likewise held that generally, a standard mortgage clause serves as a separate contract between the mortgagee and the insurer, as if the mortgagee had independently applied for insurance. *Columbia Mut. v. Home Mut. Fire, supra* (citing *Fireman's Fund Ins. Co. v. Rogers*, 18 Ark. App. 142, 712 S.W.2d 311 (1986)). Thus, the rights of a named mortgagee in an insurance policy are not affected by any act of the insured, including improper and negligent acts. *Columbia Mut. v. Home Mut. Fire, supra* (citing *Hatley v. Payne*, 25 Ark. App. 8, 751 S.W.2d 20 (1988)).

The policy language in question provides that:

> Loss, if any, under this policy, shall be payable to the mortgagee (or trustee), named on the Declarations page of this policy, as interests may appear, under all present or future mortgages upon said mortgages, and this insurance as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or any other proceedings or

> notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, *on demand*, pay the same [emphasis added]. Provided, also, that the mortgagee (or trustee) shall notify **us** [emphasis in original] of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee) and, unless permitted by this policy, it shall be noted thereon and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof, otherwise this policy shall be null and void.

This is a standard mortgage clause, which under Arkansas law, serves as a separate contract between the Bank and Farmers, as if the Bank had independently applied for insurance. We agree with the trial court's finding that the policy language, when construed in its plain, ordinary, popular sense, is at best ambiguous, thereby requiring that the policy be liberally construed in favor of the Bank and strictly against Farmers. Viewing the evidence in a light most favorable to the Bank and resolving all inferences in its favor, we cannot say that the trial court's findings were clearly erroneous or clearly against the preponderance of the evidence. Therefore, we affirm on this point.

II. Whether the three letters mailed to Hawkins and Bank constituted a "demand"

In the alternative, Farmers argues that if this court finds that demand on the mortgagee was required under the terms of the policy, then the three letters it mailed to the Bank regarding Hawkins's nonpayment of the premium were sufficient to constitute a demand that it pay the premium. Appellant's argument is unpersuasive.

A "demand" is "a requisition or request to do a particular thing specified under a claim of right on the part of the person requesting." *Babbit v. Chicago & Alston Ry. Co.*, 149 Mo. App. 439, 130 S.W. 364 (1910). The word "demand" need not be used in making such a legal request, but it is sufficient if any words are used which are understood by both parties to be a demand. *Id.* The proof of a demand may be shown by circumstantial evidence, or may be inferred from the actions and declarations of the parties as proven by direct evidence. *Id.*

This is not a case wherein there was no duty to inform because of a lack of contractual relationship. *See Columbia Mut. v. Home Mut. Fire, supra.* There existed a separate contract between Farmers and the Bank. An insurer's right to cancel a policy containing a standard mortgage clause on the mortgagee's failure, on demand, to pay premiums can be exercised only after strict compliance by the insurer with the terms of the agreement between the insurer and the mortgagee. *See American Mercury Ins. Co. v. Inland-Western Fin. Co.*, 6 Ariz. App. 409, 433 P.2d 60 (1967). In *American Mercury Insurance Co. v. Inland-Western Finance Co.*, the appellee, named as the mortgagee in a policy covering an aircraft, was granted summary judgment against the appellant. Appellant appealed, contending that the copy of the notice of possible future cancellation it sent to the appellee was a sufficient demand for payment and notice of cancellation under the terms of the breach of warranty endorsement. The Arizona Court of Appeals disagreed, holding that:

> A separate contract of insurance was created between the appellant and the appellee and the terms of the contract had to be strictly complied with. The notice of cancellation mailed out by appellant did not meet the requirement of strict compliance. The notice did not demand payment of the premium by the appellee. It was directed to Mr. Widmer [the insured] with a notation that a copy was being sent to appellee and it merely stated that the policy would be cancelled at a future date if the premium was not paid.

Id. at 411, 433 P.2d at 62.

Likewise in the instant case, the three letters Farmers mailed to Hawkins with a notation that a copy was being sent to the Bank did not meet the requirement of strict compliance. Although the cancellation language in the policy provided that proof of mailing alone would constitute sufficient proof of notice, we cannot, under *this* policy, construe this language to be the same as a demand by Farmers to the Bank. Therefore, we affirm.

Because we affirm for the foregoing reasons, we need not reach appellant's remaining argument.

Affirmed.

GLADWIN and BAKER, JJ., agree.

Haywood MILLER *v.* STATE of Arkansas

CA CR 02-715 101 S.W.3d 860

Court of Appeals of Arkansas
Division III
Opinion delivered April 2, 2003

William R. Simpson, Jr., Public Defender, by: *Erin Vinett*, Deputy Public Defender, for appellant.

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

OLLY NEAL, Judge. Appellant Haywood Miller appeals from a jury verdict that sentenced him as a habitual offender to thirty-five years' imprisonment for the offenses of aggravated robbery and theft of property. Appellant's sole point for reversal is that the trial court abused its discretion in declining to grant his request to peremptorily strike juror Judious Lewis based upon the fact that it was discovered mid-trial that Lewis knew the victim's family. Finding no abuse of discretion, we affirm.

Because appellant does not challenge the sufficiency of the evidence on appeal, a detailed recitation of the facts is unnecessary. At appellant's trial, victim Tyrone Davis testified that appellant stole his 2000 Honda Accord EX V-6. During the course of Davis's testimony, he revealed that his family owned Davis Petroleum. Sometime thereafter, the court called for a conference at the bench and told the parties that a juror, Mr. Judious Lewis, had given the trial court a note stating that he knew the victim's father because they were members of the same golf club. The court waited until both parties rested before calling Lewis before it. Lewis indicated that he was not aware that the owner of Davis Petroleum had a son, that he and the victim's father were both members of the Pro Duffers golf club, and that Davis Petroleum had underwritten several parties at which he and his wife had socialized with the father. Then the following colloquy took place:

COURT:	Would [the fact that you know the victim's father] have an impact upon your ability to sit as a juror today?
JUROR LEWIS:	No, sir.
COURT:	Do you think that you could fairly try this case and listen to the facts and the evidence and decide this based upon the facts in evidence and not upon your association with the [victim's] father?
JUROR LEWIS:	Sure.
COURT:	If you saw him later, the victim's father, do you think you would owe him an explanation as to why you decided this one way or another?
JUROR LEWIS:	No, sir.
COURT:	Do you know of any reason why you could not be fair and impartial?

JUROR LEWIS: There is no reason, Your Honor.

Lewis was thereafter excused for lunch. Defense counsel objected to Lewis sitting on the jury, stating that she believed that Lewis could not be impartial. The court then stated that:

> [t]he problem is, though, he says he can be impartial and fair. That's the standard. The question is whether or not the relationship is such that it would raise a question in the mind, but he said that he didn't know the victim. . . . The easy way out would be to seat the alternate and let him go. But is that the right thing to do, is a different question. I need to look at the law to see whether or not he is — from what he said, he has satisfied the Court that he could be fair and impartial.

After the lunch break, the court, outside the presence of the jury, asked Lewis the following:

COURT: Do you believe that you are able to consider the facts in this case impartially?

JUROR LEWIS: Yes, sir.

COURT: Do you believe that you could render your verdict according to the evidence?

JUROR LEWIS: Yes, sir.

COURT: Do you believe that you would also be able to abide by the instructions on the law given by the Court?

JUROR LEWIS: Yes, sir.

The court announced that after reviewing the relevant case law during the lunch break, it would allow Lewis to remain a juror, stating as follows:

> The relevant statute is 16-33-304 where challenge is made for cause. You can look at the bias that could be actually implied. There is no actual bias here. You can look at the bias that could be actually implied. The things listed under implied bias don't apply either. You can still look to other factors, like relationship and things of that nature. There are cases that deal with relationships, where jurors were allowed to sit on juries where they had knowledge of or knew different parties. In this case the juror has indicated several essential things. First of all, he's able to set aside his knowledge of the parties, decide the case on the facts, [and] abide by the law as given by the Court. For those reasons, I don't

> find that it's necessary to exclude him from service. I will note your objection for the record, Ms. Reynolds.

Following presentation of the evidence and jury instructions, the jury elected Mr. Lewis foreperson and unanimously found appellant guilty and sentenced him accordingly to thirty-five years' imprisonment. It is from this conviction that appeal is taken. On appeal, appellant argues that the trial court erred in declining to remove Lewis when he revealed that he had a relationship with Davis's family.

Jurors are presumed to be unbiased and the burden is on the appellant to show otherwise. *Kelly v. State*, 350 Ark. 238, 85 S.W.3d 893 (2002). Whether or not a peremptory challenge may be exercised after a juror has been selected by both sides is a matter that directs itself to the sound discretion of the trial court. *Rorex v. State*, 31 Ark. App. 127, 790 S.W.2d 180 (1990); *Daugherty v. State*, 3 Ark. App. 112, 623 S.W.2d 209 (1981). The appellate court reverses if there is a showing not only of abuse of that discretion but of prejudice likely to result. *See id.* The standard of review is the same regardless of whether the court permits the challenge or declines to permit it. *See Daugherty v. State, supra.*

Arkansas Code Annotated section 16-33-304 (Repl. 1999) provides that a challenge to an individual juror for cause may be made by either the State or the defendant and that there may be a general or particular cause that disqualifies a juror from serving in the case on trial. General challenge causes include a want of the qualifications prescribed by law; a conviction for a felony; or unsoundness of mind, or such defect in the faculties of the mind, or organs of the body, as renders him incapable of properly performing the duties of a juror. Ark. Code Ann. § 16-33-304(b)(1)(A)(B)(C) (Repl. 1999). Particular causes of challenge are actual and implied bias. Actual bias is the existence of such a state of mind on the part of the juror, in regard to the case or to either party, as satisfies the court, in the exercise of a sound discretion, that he cannot try the case impartially and without prejudice to the substantial rights of the party challenging. Ark. Code Ann. § 16-33-304(b)(2)(A) (Repl. 1999). A challenge for implied bias may be taken in the case of the juror:

> (i) Being related by consanguinity, or affinity, or stands in the relation of guardian and ward, attorney and client, master and servant, landlord and tenant, employer and employed on wages,

> or is a member of the family of the defendant or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted;
>
> (ii) Being adverse to the defendant in a civil suit, or having complained against or being accused by him in a criminal prosecution;
>
> (iii) Having served on the grand jury that found the indictment or, on the coroner's jury that inquired into the death of the party, whose death is the subject of the indictment;
>
> (iv) Having served on a trial jury which has tried another person for the offense charged in the indictment;
>
> (v) Having been one of the former jury sworn to try the same indictment and whose verdict was set aside, or who were discharged without a verdict;
>
> (vi) Having served as a juror in a civil action brought against the defendant for the act charged in the indictment;
>
> (vii) When the offense is punishable with death, the entertaining of such conscientious opinions as would preclude him from finding the defendant guilty.

Ark. Code Ann. § 16-33-304(2)(B)(i)-(vii) (Repl. 1999).

Here, once it was revealed that juror Lewis knew of Davis's family, the trial court appropriately inquired as to his ability to continue serving as a juror. The court questioned Lewis and also allowed defense counsel and the prosecuting attorney to ask Lewis questions. Lewis indicated that he could set aside his knowledge of the parties, decide the case on the facts, and abide by the law as given by the court. The court found the foregoing factors sufficient to allow Lewis to remain empaneled, determining that there was no for-cause basis under Ark. Code Ann. § 16-33-304 (Repl. 1999). *See Williams v. State*, 329 Ark. 8, 946 S.W.2d 678 (1997) (the trial court did not abuse its discretion in denying appellant's mistrial on the basis of juror bias where the judge questioned a juror who had hugged appellant's mother, and the juror responded that the relationship would not affect his objectivity); *Rorex v. State*, *supra* (where during voir dire, none of the jurors were asked if they knew or worked with any of the witnesses and no questions at all were addressed individually to the juror in question, where counsel never directly asked the court for permission to call the defendant's witness to testify that she worked with one of the jurors, and where the judge never told counsel he would not permit it, the trial court did not abuse his discretion in refusing to allow a peremptory challenge to be exercised after the juror had

been accepted by both sides); *Threlkeld v. Worsham*, 30 Ark. App. 251, 785 S.W.2d 249 (1990) (the fact that a juror has done business with one of the litigating parties does not *ipso facto* disqualify him as a prospective juror). Notably, appellant does not allege a for-cause challenge to Lewis's empanelment on appeal.

There is nothing in this record indicating that the trial court abused its discretion in allowing Lewis to remain on the jury panel, and in matters involving impartiality of jurors, we have consistently deferred to the trial court's opportunity to observe jurors and gauge their answers in determining whether their impartiality was affected. *See Echols v. State*, 326 Ark. 917, 936 S.W.2d 509 (1996). Furthermore, there was no showing of prejudice ever made or offered by appellant, as it is not enough that appellant merely shows that the trial court abused its discretion; there must also be prejudice. *See Daugherty v. State, supra.*

Affirmed.

GLADWIN and BAKER, JJ., agree.

Ronald SCHRADER *v.* Bruce SCHRADER, *et al.*

CA 02-677 101 S.W.3d 873

Court of Appeals of Arkansas
Division I
Opinion delivered April 2, 2003

Gibson & Gibson, P.A., by: *Sam Gibson*, for appellant.

Rebecca Brown, P.A., for appellees.

TERRY CRABTREE, Judge. This is a real-property case involving a dispute between two brothers. The Saline County Chancery Court found that the appellees, Bruce and Mary Schrader, had adversely possessed the disputed land, awarded them treble damages for destruction caused to their property by the appellant, and awarded them attorney's fees. On appeal, appellant claims that the trial court erred (1) in ruling that appellees acquired the land in question via adverse possession, (2) in awarding appellees treble damages, and (3) in awarding appellees attorney's fees. We affirm.

Although chancery cases are reviewed *de novo* on the record, the appellate court does not reverse unless it determines that the chancery court's findings of fact were clearly erroneous. *Fleece v. Kankey*, 77 Ark. App. 88, 72 S.W.3d 879 (2002). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite conviction that a mistake was committed. *Hedger Bros. Cement & Material v. Stump*, 69 Ark. App. 219, 10 S.W.3d 926 (2000). In reviewing a chancery court's findings of fact, the appellate court gives due deference to the court's superior position to determine the credibility of witnesses and the weight to be accorded to their testimony. *Jennings v. Burford*, 60 Ark. App. 27, 958 S.W.2d 12 (1997).

On May 29, 1998, the appellant, Ronald Schrader, filed a quiet-title action against property owners on four sides of his eighty-acre tract of land. Appellees own property that adjoins the west side of appellant's land. Ronald Schrader and Bruce Schrader lived on the property, which is now owned by appellees, as children. In 1976, appellees bought the property from Ronald Schrader and Bruce Schrader's grandfather, who had owned it since 1928. In the 1930's their grandfather installed a fence along the east side of his property. Ronald Schrader bought the land that borders the east side of his brother's property in 1993 from a non-relative. After Ronald Schrader filed his quiet-title action, he

presented to the trial court a recent survey to prove that the sixty-year-old fence was not on the actual property line between his property and his brother's property. Appellees counterclaimed that they adversely possessed the property in question. In support of their argument, they pointed to the fence erected over sixty years earlier, their maintenance of the disputed property, and the fact that they planted crops on the land.

On June 29, 2000, the trial court found that appellees had adversely possessed the disputed property and granted appellant an easement by necessity on a lane leading to his property. On August 6, 2001, appellees filed a petition against Ronald Schrader for damages to their fence and property and requested a permanent injunction restricting Ronald Schrader from entering their property. Appellees also complained that Ronald Schrader had violated the court's previous order with regard to the boundary line. Upon motion by appellant, the matter was merged into the quiet-title action as it was not fully adjudicated at that time. On December 3, 2001, the trial court entered an order, which permanently enjoined appellant from entering appellees' property.

On March 5, 2002, the trial court awarded appellees treble damages for appellant's deliberate destruction of their plants, crops, and fence materials. The trial court also awarded appellees attorney's fees and costs due to appellant's disregard of the court's previous determination as to the correct location of the boundary line between the two properties and the violation of the permanent injunction entered by the court on December 3, 2001.

At trial, appellant requested the trial court to state for the record the reason it denied admission of certain exhibits offered by appellant. The court stated:

> At the conclusion of the testimony approximately two years ago, I went out to the property with [the parties' attorneys]. I walked the property. I thought it was very, very clear regardless of where the actual survey lines may be, that where the actual lines, whether you call it title by acquiescence or adverse possession, were, considering the pond, considering how one part of the disputed property was mowed and well-kept and the other was basically undergrowth. There was a ridge around the pond. There was then a creek on the other side, as I remember. And that's why. And it's been two years, and I think it's clear as it can

> be where the property line should be, in fact, as opposed to perhaps wherever the survey line is.

After both parties rested, appellant moved for a directed verdict on the issues of adverse possession based on (1) the absence of proof of hostile intention and (2) the requirement of Ark. Code Ann. § 18-11-106 (Supp. 1997) that a party claiming adverse possession must prove payment of taxes on the property in issue or on contiguous property. The trial court took the motion under advisement.

For appellant's first point on appeal, he contends that the trial court erred in finding that appellees adversely possessed the land in dispute because appellees failed to present proof of payment of *ad valorem* taxes on the property. The Arkansas General Assembly amended the statutory requirements for proof of adverse possession in Act 776 of 1995, now codified at Ark. Code Ann. § 18-11-106. In order for a claimant to establish title by actual adverse possession under the new law, the claimant must prove color of title and payment of taxes in addition to all of the elements necessary under existing adverse possession law in the state of Arkansas. *Jones v. Barger*, 67 Ark. App. 337, 1 S.W.3d 31 (1999). Arkansas Code Annotated § 18-11-106 (Supp. 1999) states:

> (a) To establish adverse possession of real property, the person, and those under whom the person claims, must have actual or constructive possession of the property being claimed and have either:
>
> (1)(A) Held color of title to the property for a period of at least seven (7) years, and during that time have paid ad valorem taxes on the property.
>
> (B) For purposes of this subdivision (a)(1), color of title may be established by the person claiming adversely to the true owner by paying the ad valorem taxes for a period of at least seven (7) years for unimproved and unenclosed land or fifteen (15) years for wild and unimproved land, provided the true owner has not also paid the ad valorem taxes or made a bona fide good faith effort to pay the ad valorem taxes which were misapplied by the state and local taxing authority; or
>
> (2) Held color of title to real property contiguous to the property being claimed by adverse possession for a period of at least seven (7) years, and during that time have paid ad valorem taxes on the contiguous property to which the person has color of title.

(b) The requirements of this section are in addition to all other requirements for establishing adverse possession.

(c) This section shall not repeal any requirement under existing case law for establishing adverse possession, but shall be supplemental thereto, and, specifically, this section shall not diminish the presumption of possession of unimproved and unenclosed land created under § 18-11-102 by payment of taxes for seven (7) years under color of title, or the presumption of color of title on wild and unimproved land created under § 18-11-103 by payment of taxes for fifteen (15) consecutive years.

Ark. Code Ann. § 18-11-106 (Supp. 1999).

Appellees sought to establish adverse possession to the land in question when they filed their counterclaim on December 16, 1999. Appellees provided no proof to the trial court of payment of *ad valorem* taxes on the land in dispute or on contiguous land. Appellant advocates that this failure in proof is fatal for appellees as they did not comply with the legislature's supplemental requirements outlined in Ark. Code Ann. § 18-11-106. We, however, do not find appellant's argument persuasive. We hold that the law enacted in 1995 does not apply in this case.

There is no dispute that appellees bought their land in 1976. The testimony presented below established that appellees began adversely possessing the disputed property at that time. On the anniversary of the seventh year, appellees' rights to the property vested. These events occurred many years before the General Assembly contemplated a change in the law regarding adverse possession. As appellees' rights to the disputed property had vested well before 1995, appellee need not comply with the 1995 statutory change. *Cf. Patrick v. McSperitt*, 64 Ark. App. 310, 983 S.W.2d 455 (1998) (appellant did not raise the issue of whether Ark. Code Ann. § 18-11-106 should be given retroactive effect where the adverse possession evolved into ownership before the statute was changed).

For appellant's second point on appeal, he maintains that the trial court erred by awarding appellees treble damages. After appellant initiated his quiet-title action, appellees filed an action in circuit court seeking damages from appellant for trespass and damage to their property. They also sought a permanent injunction forbidding appellant "ever to have access to their property." By order entered December 3, 2001, that case was transferred to the

same division of circuit court in which the boundary-line case between the parties was pending. The order that made final disposition of the boundary-line case and also made final disposition of the damage-claim issues was entered on March 5, 2002.

Appellees proceeded under Ark. Code Ann. § 18-60-102 (Supp. 1997) in claiming treble damages. Subsection (a) of the statute provides:

> If any person shall cut down, injure, destroy, or carry away any tree placed or growing for use or shade or any timber, rails, or wood, standing, being, or growing on the land of another person; shall dig up, quarry, or carry away any stone, ground, clay, turf, mold, fruit, or plants; or shall cut down or carry away, any grass, grain, corn, cotton, tobacco, hemp, or flax, in which he has no interest or right, standing or being on any land not his own, or shall wilfully break the glass, or any part of it, in any building not his own, the person so trespassing shall pay the party injured treble the value of the thing so damaged, broken, destroyed, or carried away, with costs.

The trial court stated in its March 5, 2002, order, "The damages awarded are based upon the actual compensatory loss of $675.00 in fencing materials and plants, and were trebled due to the Court's determination that the actions by [appellant] in removing and destroying the plants and fence materials were deliberate, rather than by mistake or error."

Appellant admitted that he removed and destroyed appellees' fence posts, fence wire, and plants without appellees' permission. The fences that appellant destroyed were interior fences around appellees' gardens and not fences on the disputed boundary line. Appellees introduced into evidence a videotape, which showed appellant on different occasions destroying fences, tossing the materials in appellees' pond, and driving his truck over appellees' property. Appellant admitted driving his truck onto appellees' field and making tire ruts in the grass. In addition, he admitted that he drove through appellees' vegetable garden on more than one occasion and destroyed crops in the garden. Based upon the testimony and videotape surveillance presented at trial, the chancellor found that appellant had committed acts specifically prohibited by Ark. Code Ann. § 18-60-102(a). As a consequence,

the trial court awarded appellees treble damages for a total of $2025. We cannot say that the chancellor clearly erred in making his award.

For appellant's final point on appeal, he claims that the trial court erred by awarding appellees $1400 in attorney's fees and costs in the March 5, 2002, order. Appellant argues that appellees are not entitled to recover attorney's fees due to his violation of the injunctions because attorney's fees are not specifically set out by statute to be awarded in property-damage cases. He also contends that his destruction of appellees' property occurred in April of 2001, which was before the injunction was issued on December 3, 2001. Appellant ignores the fact that two previous court orders issued in 1999 and 2000 restrained him from trespassing onto appellees' property. We recognize, however, that the trial court wrongly referenced the December 3, 2001, order as being violated. This misstatement by the trial court is of no moment as appellant violated previous orders issued by the chancellor.

Essentially, the trial court awarded appellees attorney's fees to punish appellant for his wilful disregard of its previous orders. For a person to be held in contempt for violating a court order, that order must be clear and definite as to the duties imposed upon the party, and the directions must be expressed rather than implied. *Wakefield v. Wakefield*, 64 Ark. App. 147, 984 S.W.2d 32 (1998). In cases of civil contempt, the objective is the enforcement of the rights of the private parties to litigation. *Warren v. Robinson*, 288 Ark. 249, 704 S.W.2d 614 (1986). Punishment for civil contempt will be upheld by this court unless the trial court's order is arbitrary or against the weight of the evidence. *Dennison v. Mobley, Chancellor*, 257 Ark. 216, 515 S.W.2d 215 (1974). We hold that the trial court's award of attorney's fees in light of appellant's contemptuous actions was not arbitrary or against the weight of the evidence.

Affirmed.

BIRD and VAUGHT, JJ., agree.

Eugene FIELDS *v.* STATE of Arkansas

CA CR 02-319 101 S.W.3d 849

Court of Appeals of Arkansas
Division II
Opinion delivered April 2, 2003

[Petition for rehearing denied April 30, 2003.]

Fields, Tabor, Langston & Shue, P.L.L.C., by: *Daniel Shue*, for appellant.

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

ANDREE LAYTON ROAF, Judge. Appellant Eugene Fields was convicted by a jury of driving while intoxicated, fourth offense, for which he was sentenced to six years' imprisonment and fined $5000. On appeal, Fields argues that the trial court erred by permitting the State to: (1) use a prior unsworn statement without complying with the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510, *et. seq.*, by failing to prove prior consent by one party to an intercepted telephone conversation; (2) impeach a defense witness with a prior unsworn statement; (3) argue hypothetical court rulings during closing

argument; (4) argue that the burden of proof shifted to the appellant during closing argument; (5) provide the certified judgments to the jury in the punishment phase of the trial. Fields has failed to preserve his second, third, and fourth points for appellate review, and we conclude that his first and fifth points lack merit. Consequently, we affirm.

On November 15, 2000, Fields was arrested and charged with driving while intoxicated, fourth offense, after he was involved in an accident with his vehicle. Fields admitted that he was intoxicated, and the primary issue at the trial was whether Fields was the driver of the vehicle or a passenger.

Charles Taber, who worked for an industrial plant near the scene of the accident, testified as a witness for the State. On the evening of November 15, 2000, Taber saw a truck miss a curve in the road behind the plant and go off the road, hitting a park sign, a fence, and a tin shed. Taber called his supervisor and headed toward the truck. When he arrived at the truck, Taber testified that the truck was still running and that there was a man behind the steering wheel. Taber stated that the man got out of the truck and appeared to be disoriented. Taber testified that he did not see anyone else get out of the vehicle. When Taber asked the driver if he was hurt, the driver stated that he was not and began walking down the road, away from the accident. According to Taber, the driver was staggering and smelled of alcohol. Taber identified Fields as the driver of the vehicle.

Sonny Cameron, a security guard at the plant, testified that he was in the security office when he heard a loud crash. He went looking for the noise and discovered the truck on the other side of the back parking lot. Cameron testified that he talked to Fields and that Fields told him that he was not driving the truck, but that one of his friends that was visiting him had been driving. Cameron tried to convince Fields to go back to his truck, but Fields then took off running and a police officer caught him several blocks away.

Van Buren Police Officer Lance Dixon testified that he was called to investigate an accident possibly involving an intoxicated driver. When he arrived at the scene, Dixon encountered the plant security officer, who told him that the driver of the vehicle

had taken off. Dixon drove around the block and found Fields staggering down an alley. According to Dixon, Fields stated that he was not driving and that a friend named "Billy Billy" was driving, but Fields could not answer any questions about who or where Billy Billy was. Dixon testified that he gave Fields several field-sobriety tests, all of which he failed. Dixon then arrested Fields and took him to the detention center, where Fields refused a blood-alcohol test. Dixon testified that while he and another officer were fingerprinting Fields, he stated that he "was just taking Billy home." Deputy John McAllister, who was present when Fields was fingerprinted, also testified that Fields stated that he was just taking Billy home.

James Williams Cox testified as a witness for the defense. Cox stated that he was a longtime friend of Fields and that Fields called him Billy Cox. Cox testified that he lived in Texas, but that he was visiting in Arkansas on November 15, 2000, and that he went by Fields's house at approximately 8:00 p.m. and found Fields and another man by the name of Benny in the garage. Cox testified that they had been drinking all afternoon. Cox stated that Fields wanted him to drive Benny home because he had ridden his bike to the house. Cox testified that he drove Fields's truck, with Benny and Fields as passengers. According to Cox, they had dropped Benny off and were going back to Fields's house when he ran the truck off of the road because of problems with the steering column, hitting the sign, fence, and shed. When he was not able to back the truck off of the fence, Cox testified that he left to try and find Benny to help. Cox stated that he never found Benny and that when he returned to the scene, the truck was gone and no one was there. Assuming that Fields had the truck towed, Cox testified that he walked back to Fields's house and then drove back to Texas. Cox testified that he first heard that Fields was arrested a few days later, when Fields called him.

Fields testified that he and his friend, Benny Billy, had been drinking that day, so he asked Cox to drive Benny home. Fields stated that he had been having problems with his steering mechanism in the truck. After the accident, Fields testified that he walked off to try and find a phone to call a wrecker. When he was arrested by Officer Dixon, Fields testified that he continually told him that his friend, Billy, was driving, but that Dixon did not ask

any other questions about Billy. When he stated to the officers that he was just taking Billy home, Fields testified that he meant that he was taking Benny Billy home, but not that he was driving.

Fields first argues that the trial court erred by permitting the State to use a prior unsworn statement without complying with the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §2510, *et. seq.* During the direct examination of Cox, he testified that he had given a statement to the deputy prosecutor in the case over the telephone. Although Cox stated that he was fairly truthful during that conversation, he also testified that he was not "exactly candid" on every issue that was discussed. On cross-examination, the prosecutor questioned Cox, without objection, as to the accuracy of several of the statements made during the phone conversation. After Cox testified that he went to Lee Creek Park to look for Benny immediately after the accident, he was asked whether he remembered telling the prosecutor over the phone that he had left the scene after the accident and walked back to Fields's house. Cox testified that he did not remember making that statement and denied that the statement was made. The prosecutor, who was apparently reading from a transcript of the phone conversation, questioned Cox as to whether he had been asked on the phone where he went after the accident and as to what his response was at that time. Fields objected, and the following conversation occurred during a sidebar conference:

> DEFENSE COUNSEL: "I'm gonna ask that he quit waving this question and ask what he's got in front of the jury."
> STATE: "I'll play the tape for them."
> DEFENSE COUNSEL: "No you're not gonna play the tape, it's illegally made."
> STATE: "It's not illegal."
> DEFENSE COUNSEL: "Yes it is. Are you gonna testify that one consented and disqualify yourself as an attorney in this case?"
> STATE: "As long as one person can testify . . ."
> DEFENSE COUNSEL: ". . . but you're gonna have to testify you consented to it, you're not a witness in this case."
> TRIAL COURT: "Let's not wave it around. I'm gonna permit him to cross-examine."

The prosecutor proceeded to ask Cox if he remembered his response to the question of where he went after the accident, and

Cox testified that he did not specifically remember. The prosecutor then started to read Cox's response from the transcript, and Fields objected again, stating:

> DEFENSE COUNSEL: "Judge, he is standing there holding what is obviously a transcript reading from it, and I object to that."
> TRIAL COURT: "On the basis of what?"
> DEFENSE COUNSEL: "On the basis he's demonstrating to the jury that he has got a transcript of this conversation."
> TRIAL COURT: "Well if he has no problem with it . . ."
> DEFENSE COUNSEL: "I've got a problem with that."
> STATE: "It's impeachment testimony."
> DEFENSE COUNSEL: "You've got, you've got, he has . . ."
> TRIAL COURT: ". . .what is it about it that you're objecting to?"
> DEFENSE COUNSEL: "He's making the jury believe he's got a transcript of his conversation."
> STATE: "I do, I do have a copy and it's on the tape."
> DEFENSE COUNSEL: "Well it's not, it's an illegal tape."
> STATE: "No it's not, as long as one party knows it's recorded."
> DEFENSE COUNSEL: "Is he gonna get on the stand and testify he consented to it?"
> STATE: "As long as one party know it's recorded."
> TRIAL COURT: "Listen, lay that on the podium and ask him whatever you want."

Next, during the re-cross-examination of Cox, the prosecutor questioned him as to whether he knew that he was talking to a deputy prosecutor on the phone and whether he knew that the conversation was being recorded. Cox testified that he did not know the prosecutor was recording the conversation. Fields then moved for a mistrial, arguing that this was the first time that the recording was mentioned in front of the jury and that it was improper to state to the jury that there was a recording made of the phone conversation. The State replied that it was clearly proper impeachment testimony, and the trial court overruled Fields's motion.

[redacted] Fields now argues on appeal that the trial court erred in allowing the State to disclose the statements Cox made during the telephone conversation without showing that one party consented to the conversation being recorded, in violation of 18 U.S.C.A. § 2511 (West 2000). The State contends that this argument is not preserved for our review because Fields failed to object at the first opportunity or on the same basis that he now argues on appeal.

We find that this argument is properly preserved. Although the State initially questioned Cox as to his statements made during the phone conversation without objection, it was not until it was apparent that the State was referring to a transcript of the conversation that Fields objected on the basis that the recording was illegal. Fields continued to object, arguing that the State could not prove consent, and then moved for a mistrial, when the fact that the conversation was recorded was mentioned in front of the jury. Even though Fields did not mention the exact statute that he now argues was violated, his objections were sufficient to timely apprise the trial court of the particular error alleged, which is all that is required to preserve an argument for appeal. *Ayers v. State*, 334 Ark. 258, 975 S.W.2d 88 (1999).

Nevertheless, we find that there is no merit to Fields's argument that the recording was prohibited pursuant to 18 U.S.C.A. § 2511. The State argues that Fields does not have standing to challenge the recording of the phone conversation because he is not an aggrieved party. The State also argues that it was not unlawful to merely use the transcript for impeachment, where it was not admitted into evidence. However, it is not necessary to decide these issues, as the recording was not prohibited under the plain language of section . Section provides that it is unlawful to intentionally intercept, disclose, or use the contents of any wire, oral, or electronic communication in violation of this statute. However, section 2511(2)(c) states that "it shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." Similarly, section 2511(2)(d) states that it is not unlawful for a person who is not acting under color of law to intercept the communication where that person is a party to the conversation or has given his consent to the interception.

Cox testified that when the prosecutor, Marc McCune, called him, he was busy so he later returned McCune's phone call. According to Cox's testimony, McCune identified himself as a deputy prosecutor and Cox was aware that he was calling the prosecutor's office when he returned McCune's call. Cox further testified that he would assume that any conversation a person has with a police officer or other official investigating a case would be

recorded. McCune then asked Cox, "You just didn't know I was recording the phone call, did you?" Cox replied that he did not. Although Fields argues that it was not shown that McCune consented to the recording because he did not testify at the trial, McCune's consent can be inferred from Cox's testimony. Also, it can be inferred from this testimony that McCune was a party to the communication. Because it is not unlawful to intercept an oral communication where such person is either a party to the conversation or consents to the interception, Fields's argument on this point has no merit.

For his second point on appeal, Fields argues that the trial court erred in permitting the State to impeach a defense witness with a prior unsworn statement. Fields asserts that the State was allowed to improperly impeach Cox by reference to the prior telephone conversation on at least six occasions. However, as the State argues, Fields's argument is not preserved for our review because he at no time objected on this basis during the trial. While Fields did object to the use of the transcript based upon the lack of consent to the phone conversation being recorded, he did not argue that the State's impeachment was improper under Ark. R. Evid. 613, as he now argues on appeal. In order to preserve an evidentiary challenge for appellate review, a party must object at the first opportunity. *Brooks v. State*, 76 Ark. App. 164, 61 S.W.3d 916 (2001). In addition, a party may not change the basis for an objection on appeal, but is bound by the nature and scope of the objection made at trial. *Hutcherson v. State*, 74 Ark. App. 72, 47 S.W.3d 267 (2001). Because Fields did not raise this argument to the trial court, we need not address the merits of his claim.

Fields argues in his third point on appeal that the trial court erred by permitting the State to argue hypothetical court rulings during closing argument. During his closing argument, Fields argued that the State failed to call two witnesses who could have potentially resolved the dispute about whether he was driving the truck that night. The State then responded in its rebuttal argument that Fields would have objected on hearsay grounds if the State had called one of those witnesses. Fields objected, stating that that was not proper argument in this case. The trial court overruled the objection, and the State then repeated that it would be hearsay. Fields objected again and stated that "we're gonna have to make a better record on that." The trial court then

admonished the jury that the statements of the attorneys were not evidence and that they should base their decision on what they recall the evidence to be.

Fields contends that the argument by the State was improper because it was beyond the record and prejudicial. He asserts that the trial court's rulings denied him the opportunity to emphasize that the burden of proof was on the State. The State contends that this argument is not preserved because Fields failed to state these grounds for his objection to the trial court. In order to preserve for appeal an argument as to comments made during closing argument, the objection must be specific enough that the trial court is apprised of the particular error alleged, and the party may not change the grounds for his objection on appeal. *Cobbs v. State*, 292 Ark. 188, 728 S.W.2d 957 (1987); *Samples v. State*, 50 Ark. App. 163, 902 S.W.2d 257 (1995). Because Fields failed to specify the grounds for his objection to the trial court, his argument is not preserved for appellate review.

For his fourth point on appeal, Fields contends that the trial court erred by permitting the State to argue that the burden of proof shifted to the appellant during closing argument. During the State's rebuttal argument, the following statements were made by the prosecutor: "You heard the question of him. He talked to Ron Fields (Fields's prior defense counsel), Charles Taber did, he talked to myself, and he got on the stand today and testified. There wasn't any impeachment, there wasn't any, well, don't you remember saying this or now you're saying that." Fields objected, stating that the prosecutor was arguing that Ron Fields should have testified, when the prosecutor was aware that Mr. Fields now works for the federal government and could not be called as a witness. The trial court overruled Fields's objection, and the State continued its closing argument and stated that there were no prior inconsistent statements by Taber and that it was "pretty clear what happened here." Fields now contends that this argument shifted the burden of proof to him and was a comment on his failure to produce evidence. However, Fields did not make this argument below, and thus, this argument also is not preserved for our review. *See Samples v. State, supra* (where the defendant argued that the State's closing argument improperly shifted the burden of proof to the defendant, but the court held that it was not preserved for appeal because the defendant did not object on that basis at trial).

Fields argues for his fifth point on appeal that the trial court erred in permitting the State to provide the certified judgments to the jury in the punishment phase of the trial. During the sentencing phase, the State introduced evidence of three prior DWI convictions by Fields. The trial court then informed the jury that there were three different convictions and admitted the certified judgments into evidence. The trial court asked the attorneys if anyone had a problem with the convictions being provided to the jury. Although Fields initially stated that he did not have a problem with that, he then objected after a discussion with the trial court. Fields argued that the judgments should not go to the jury room, as the trial court had "read those convictions and anointed those convictions from the bench."

As the State asserts, Fields does not cite any authority for his argument that the jury should not have received certified copies of his prior DWI convictions. An argument that is unsupported by convincing argument or citation to relevant authority need not be addressed on appeal. *Sanders v. State*, 76 Ark. App. 104, 61 S.W.3d 871 (2001). Furthermore, the fact of prior DWI convictions is an element of the crime of DWI, fourth offense, and is to be determined by the jury. *Hodges v. State*, 27 Ark. App. 93, 766 S.W.2d 619 (1989). Although the trial court must determine the admissibility of evidence of the prior convictions, it is up to the jury to determine that the evidence establishes that element of the offense. *Id.* Thus, it was proper for the trial court to have provided copies of the prior convictions to the jury for their examination. Fields also argues that there was incorrect information contained in the judgments of the prior convictions; however, he did not object on this basis below, and thus, his argument is not preserved for appeal. *Hutcherson v. State*, *supra*. We also note that Fields attempts to argue in his reply brief that the trial court erred in informing the jury that he had three prior convictions and in reading from those convictions, because this had the effect of a binding instruction to the jury. This court does not address arguments raised for the first time in an appellant's reply brief. *Camp v. State*, 66 Ark. App. 134, 991 S.W.2d 611 (1999). As there is no merit to any of Fields's arguments on appeal, we affirm.

Affirmed.

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

James S. McCLELLAN *v.* STATE of Arkansas

CA CR 02-907 101 S.W.3d 864

Court of Appeals of Arkansas
Division II
Opinion delivered April 2, 2003

William R. Simpson, Jr., Public Defender; *David Sudduth*, Deputy Public Defender, by: *Erin Vinett*, Deputy Public Defender, for appellant.

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

ANDREE LAYTON ROAF, Judge. Following a bench trial, James S. McClellan was convicted of rape and was sentenced to fifteen years in the Arkansas Department of Correction. On appeal, McClellan's sole argument is that the trial court erred

by admitting the victim's medical records into evidence as business records because they were prepared in anticipation of criminal litigation. We affirm.

Appellant, James S. McClellan, was convicted of rape on April 22, 2002. The details of the rape are irrelevant for purposes of this appeal; however, the assault was especially violent and resulted in injuries to the victim, T.P. McClellan appeals only the admission of T.P.'s medical records into evidence as business records.

At trial, Candi Aston, the triage nurse who initially treated T.P. at Rebsamen Medical Center, testified that T.P. was upset when she arrived at the hospital. Aston helped lay the foundation for the admission of State's Exhibit 4, which is the evidence at issue in this appeal. The State's next witness was Tina Miles, who was the treating nurse at Rebsamen Medical Center. Miles testified about T.P's condition and injuries, and she also helped lay the foundation for admission of State's Exhibit 4. The defense counsel objected to the admission of State's Exhibit 4 as follows:

> MR. SUDDETH: The defense at this time would object to the admission as under the exception of business records. I believe that exception will apply unless there are some details about the exhibit that call into question its trustworthiness, and I believe we are, in the State's exhibits, there are a number of people who have not testified today and some of these pages aren't even signed. So I think it calls into question the trustworthiness of some of these pages that we would object to.

The State contended that the records qualified as business records under Arkansas Rule of Evidence 803(6), and the trial court agreed, admitting the evidence over appellant's objection.

McClellan argues on appeal that the trial court erred in allowing State's Exhibit 4 into evidence as business records under Ark. R. Evid. 803(6). The State contends that McClellan's point is not preserved for appellate review, and even if it is preserved for appellate review, McClellan failed to show that the trial court abused its discretion by admitting the records.

■ On appeal, we will not reverse a trial court's ruling on the admission of evidence absent an abuse of discretion nor will

we reverse absent a showing of prejudice. *Chapman v. State*, 343 Ark. 643, 38 S.W.3d 305 (2001); *Misskelley v. State*, 323 Ark. 449, 915 S.W.2d 702 (1996), *cert. denied*, 519 U.S. 898 (1996).

Generally, one who offers evidence has the burden of showing its admissibility. *Edwards v. Stills*, 335 Ark. 470, 984 S.W.2d 366 (1998); *Benson v. Shuler Drilling Co., Inc.*, 316 Ark. 101, 871 S.W.2d 552 (1994). Arkansas Rule of Evidence 803(6) provides an exception to the hearsay rule for the admission of business records. That exception has seven requirements: (1) a record or other compilation, (2) of acts or events, (3) made at or near the time the act or event occurred, (4) by a person with knowledge, or from information transmitted by a person with knowledge, (5) kept in the course of regularly conducted business, (6) which has a regular practice of recording such information, (7) all as known by the testimony of the custodian or other qualified witness. *Benson v. Shuler Drilling Co., Inc., supra.* (citing *Terry v. State*, 309 Ark. 64, 826 S.W.2d 817 (1992)). Rule 803(6) further provides that business records will not be admitted if the source of information or the method of circumstances of preparation indicate lack of trustworthiness. *Id.* Medical records may be admissible under the business-records exception. *See Terry v. State, supra.*

McClellan also argues that State's Exhibit 4 should not have been admitted because it was not trustworthy. However, the State contends that McClellan did not properly preserve this point for appellate review. The State is correct in asserting that arguments not raised in the circuit court will not be addressed for the first time on appeal. *E.g., Cook v. State*, 76 Ark. App. 447, 453, 68 S.W.3d 308, 313 (2002). Further, on appeal, a party is bound by the scope and nature of the arguments made in the circuit court. *E.g., Hutcherson v. State*, 74 Ark. App. 72, 76, 47 S.W.3d 267, 270 (2001). During the objection to the evidence at trial, defense counsel argued that there were a number of people who had not testified as well as several unsigned documents in State's Exhibit 4, and specifically called into question the trustworthiness of this portion of the records. We conclude that the objection to the trustworthiness of the evidence was sufficient to preserve the issue for appeal.

We must next consider whether the trial court abused its discretion in finding the evidence admissible. This court has stated that the trial judge has wide discretion in determining quali-

fication of a witness and trustworthiness of a document; we do not reverse absent a showing of the trial judge's abuse of discretion in making these initial determinations of fact concerning business records. *Wildwood Contractors v. Thompson-Holloway Real Estate*, 17 Ark. App. 169, 705 S.W.2d 897 (1986). McClellan argues that the medical records were "prepared in anticipation of a criminal proceeding," and to that end incorporated information given to the hospital personnel by the victim. McClellan further argues that the records were not prepared in the normal course of business, i.e., T.P.'s routine medical checkups.

Medical records may be admitted into evidence as business records. *E.g., Edwards v. Stills, supra.*; *Terry v. State, supra* at 69, 826 S.W.2d at 820 (1992) (appellant's medical records containing information about treatment for a sexual disease were not made in anticipation of litigation). McClellan conceded at trial that the records would be admissible if they were trustworthy. He now argues that the records were not trustworthy because the victim gave the information in the records and because they were made in anticipation of litigation. However, McClellan's argument that the records were untrustworthy is merely conclusory and goes to the weight of the evidence and not to its admissibility. *See Wildwood Contractors v. Thompson-Holloway Real Estate Agency, supra.* (personal knowledge of the sponsoring witness regarding preparation of business records goes to weight rather than admissibility of record).

The State asserts that medical decisions are made from such records, and these decisions are the business of hospitals. *Cf. Terry v. State, supra.* We agree, and this necessarily includes decisions regarding the treatment of victims of rape and other criminal events. It is the fact that regularly kept business records are relied upon for business decisions that makes them trustworthy enough to be admissible as an exception to the hearsay rule. *See Wildwood Contractors v. Thompson-Holloway Real Estate Agency, supra.*; E. Cleary, *McCormick On Evidence*, Section 306 (3d ed. 1984). Moreover, while McClellan questioned at trial the trustworthiness of "some of these pages" of the medical records, he did not specify the pages to which he objected or request that they be excised. To the extent his objection was directed at portions of the records containing information provided by the victim, we note that the victim's testimony at trial concerning the assault and rape was not in conflict

with information she provided to medical personnel during her examination and treatment, and was much more extensive, graphic, and detailed. Thus, the information contained in the medical records was merely cumulative of her trial testimony.

Affirmed.

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

The ESTATE of Daisy BYRD *v.* Lohnes Tommy TINER

CA 02-439 101 S.W.3d 887

Court of Appeals of Arkansas
Division II
Opinion delivered April 9, 2003

David A. Hodges, for appellant.

Tiner & Spruell, by: *Raymond L. Spruell, Jr.*, for appellee.

SAM BIRD, Judge. The Estate of Daisy Byrd appeals the dismissal of its wrongful-death claim against Tommy Tiner. Appellant raises two points of appeal: (1) that Tiner waived his defense that the suit was not brought in the name of the real-party-in-interest, and (2) that the trial court erred in prohibiting the Estate from amending its complaint by substituting the name of the personal representative in the place of the Estate of Daisy

Byrd. We find the second point dispositive and hold that the trial court did not err in prohibiting the amendment of the complaint. We affirm the dismissal of the case.

Daisy Byrd died after she was in an automobile accident on January 5, 1998. Her will was admitted to probate on March 20, 1998, and Nina Coffee was appointed as personal representative of her estate. On June 2, 1998, a wrongful-death action was filed in the name of "Estate of Daisy Byrd, Deceased," against Tommy Tiner, alleging that Byrd's death resulted from her car being struck when Tiner's negligence caused his car to cross the center line. The complaint contained no language to indicate that it was being brought by or in the name of the personal representative of Byrd's estate; it bore only the signature of counsel on behalf of "Estate of Daisy Byrd, Deceased, Plaintiff." On June 17, 1998, Tiner filed his answer, asserting among other things the defense that the plaintiff had failed to state facts upon which relief could be granted and had failed to join necessary parties in the action. On September 12, 2000, an order was entered setting the case for jury trial on February 12, 2001.

On February 9, 2001, Tiner filed a motion to dismiss, alleging that the Estate of Daisy Byrd was not the proper party to bring the wrongful-death action under Ark. Code Ann. § 16-62-102 (Supp. 2001); that the purported plaintiff was neither a personal representative nor an heir-at-law, and was a nonentity; and that suit by a new or substituted party was barred by limitations. At a hearing on the motion to dismiss, Tiner argued that the Estate was not the proper party to bring the wrongful-death suit and that substitution of parties was barred by limitations that had run on January 4, 2001. Arguing that Tiner had waived these contentions in his answer to the suit and that his motion to dismiss was not timely filed because he had been on notice of the trial since September 12, 2000, the Estate moved to amend, substitute, or add the name Nina Coffee, Executrix of the Estate. The court orally granted Tiner's motion to dismiss, agreeing that the suit was barred by limitations because the personal representative had not filed suit within the three-year period for filing wrongful-death actions. The Estate then filed both a motion to amend its complaint and a motion for reconsideration. The trial court denied these motions and entered an order of dismissal.

A wrongful-death action must be brought by and in the name of the personal representative of the deceased person; if

there is no personal representative, the action shall be brought by the heirs at law of the deceased person. Ark. Code Ann. § 16-62-102(b) (Supp. 2001). Every action authorized by the statute must be commenced within three years after the death of the person alleged to have been wrongfully killed. Ark. Code Ann. § 16-62-102(c) (Supp. 2001). Because the wrongful-death action is a creation of statute, it exists only in the manner and form prescribed by the statute; it is in derogation of the common law and must be strictly construed, and nothing may be taken as intended that is not clearly expressed. *St. Paul Mercury Ins. Co. v. Circuit Court of Craighead County*, 348 Ark. 197, 73 S.W.3d 584 (2002).

The Estate argues that the amended complaint should have been allowed under Ark. R. Civ. P. 15 and 17. Rule 15(a), with the exception of certain defenses, allows a party to amend its pleadings unless, upon motion of an opposing party, the court determines that prejudice would result or the disposition of the cause would be unduly delayed because of the filing of an amendment. Under Rule 15(c), amendment of a pleading in certain instances relates back to the date of the original pleading. Rule 17 prohibits dismissal of an action on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for joinder or substitution of the real party in interest. These rules, however, are not applicable in the case we now decide.

Where an action is brought in the name of a nonexistent plaintiff, any amendment of the complaint by substituting the proper party to the action as plaintiff institutes a new action as regards the statute of limitations. *Ark-Homa Foods v. Claude C. Ward, Jr.* 251 Ark. 473 S.W.2d 910 (1971); *see Davenport v Lee*, 348 Ark. 148, 72 S.W.3d, 85 (2002). Before Rule 15 can apply, there must be valid pleadings to amend. Rule 17(a) requires all actions to be prosecuted in the name of the real party in interest, and further provides that no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed to correct the defect by joinder or substitution of the real party in interest. However, Rule 17 is simply not implicated in the case at bar. Although the heirs at law of the estate of Daisy Byrd could have been the real parties in interest in a wrongful death action against Tommy Tiner, Ark. Code Ann. § 16-62-102 mandates that wrongful-death actions be brought by and in the name of the appointed personal representative of the decedent's

estate. *See St. Paul Ins. Co. v. Circuit Court of Craighead County, supra.* Only if there is no personal representative of the estate, shall the wrongful death action be brought by the decedent's heirs at law. In the case at bar it is undisputed that Nina Coffee had been appointed as personal representative of the estate of Daisy Byrd at the time this wrongful death action was commenced. Therefore, under Ark. Code Ann. § 16-62-102, a wrongful-death action arising out of the death of Daisy Byrd was required to have been brought by and in the name of Nina Coffee as personal representative of the estate of Daisy Byrd.

Unquestionably, the "Estate of Daisy Byrd, Deceased" was not the personal representative of Daisy Byrd's estate and was not authorized to pursue the wrongful-death action. *See Davenport v. Lee,* 348 Ark. 148, 72 S.W.3d 85 (2002). In February 2001, when the Estate moved to amend its complaint by substituting or adding the name of Nina Coffee, personal representative, as plaintiff, there was no complaint to amend because the original complaint was a nullity. *See McKibben v. Mullis,* 79 Ark. App. 382, 90 S.W.2d 442 (2002). Furthermore, had the amendment been allowed, it would have constituted the commencement of a new action for which the period of limitations had expired. For these reasons, we hold that the Estate was statutorily barred from bringing this wrongful-death suit and that the trial court did not err in denying the motion to amend the complaint by naming the personal representative of the Estate as plaintiff.

We need not reach the Estate's point of appeal that Tiner waived his real-party-in-interest defense. As already discussed, Rule 17 has no application in this case. The right to recover under the wrongful-death statute is dependent upon the complaining party's bringing itself within the terms of the statute. *See St. Paul Mercury Ins. Co. v. Circuit Court of Craighead County, supra.* Even if we were to reach that point, we would be compelled to affirm it because appellant obtained no express ruling by the trial court as to its waiver argument. A moving party bears the burden of obtaining a ruling on any objection, and in the absence of such a ruling the issue is not preserved for appellate review. *White v. Davis,* 352 Ark. 183, 99 S.W.3d 409.

Affirmed.

ROBBINS and GRIFFEN, JJ. agree.

Michael Patrick SUNDEEN *v.* KROGER and Jerry Hart

CA 02-575 101 S.W.3d 891

Court of Appeals of Arkansas
Division III
Opinion delivered April 9, 2003

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

Barber, McCaskill, Jones & Hale, P.A., by: *Michael J. Emerson* and *Cynthia J. Worthing*, for appellees.

OLLY NEAL, Judge. Michael Sundeen appeals the Pulaski County Circuit Court's grant of summary judgment in favor of the Kroger and Jerry Hart, a Kroger employee (Kroger).[1] Sundeen sued Kroger for malicious prosecution and abuse of process following the State's nolle prosse of criminal charges alleging that Sundeen had obstructed governmental operations and attempted to influence a governmental official, arising from an incident at a Kroger Store. On appeal, Sundeen alleges that the court erred in granting summary judgment on both causes of action and that genuine issues of material fact exist with respect to each cause. We conclude that there was no error and therefore affirm.

The incident leading to the charges against Sundeen occurred on December 21, 1999. While shopping in a Kroger store, Sundeen asked Angela Bryant, a Kroger employee, where he could find the marshmallows. It is disputed as to whether Sundeen was rude to Baker or whether Baker was rude to Sundeen. Sundeen was not pleased with Baker's reply, so he went to lodge a complaint at the customer-service desk. Meanwhile, Baker informed Jerry Hart that she was having a problem with Sundeen. Hart then approached Sundeen while he was standing in line at the customer-service desk, and Sundeen initially ignored him. Hart identified himself as a police officer. Hart asked Sundeen if he could talk to him. When Sundeen became argumentative, Hart grabbed Sundeen by the arm and escorted him to the security office. In the office, Hart informed Sundeen that he had received a complaint about him from Baker. Hart subsequently placed Sundeen under arrest for obstructing governmental operations and attempting to influence a governmental official.

[1] Hart was an off-duty Little Rock police officer subcontracted to provide security for Kroger. He received compensation from Kroger.

A trial before a special judge was held on March 29, 2000, in municipal court. At the trial, Jerry Hart testified that at the time of the incident he was working as a plainclothes security officer but that he also worked as a patrolman for the Little Rock Police Department. He also testified that despite being paid by Kroger, he was obliged to follow the rules and regulations of the police department. He stated that when he approached Sundeen, he was investigating Sundeen on allegations of criminal harassment. He testified that in the security office he told Sundeen "that because of his actions out on the floor that he was also under arrest for obstructing governmental operations and I was charging him with that because he was hindering my investigation on a problem that was presented to me that was [of] a criminal nature." Hart stated that upon being told he was under arrest for obstruction, Sundeen threatened to call his lawyer and Hart's supervisor and have Hart's "job taken." Hart testified that "me, fearing economic reappraisal [*sic*], then arrested Mr. Sundeen for attempting to influence governmental operations." The municipal court found Sundeen guilty on both charges. However, upon appeal to circuit court, the State nolle prossed the charges.

Subsequently, on January 19, 2001, Sundeen filed suit, alleging malicious prosecution and abuse of process. Kroger filed a motion for summary judgment on October 19, 2001. In the motion, Kroger asserted that Sundeen (1) could not prove all the elements necessary to prevail in a claim of malicious prosecution, and (2) could not prevail on his claim of abuse of process because he could not prove judicial process was used to extort or coerce. In addition, both parties submitted a transcript of Sundeen's trial in municipal court. On February 25, 2002, the court entered an order granting Kroger's motion for summary judgment. In the order, the court stated that it found probable cause for Sundeen's arrest and prosecution for obstructing governmental operations and attempting to influence a public official; therefore, his malicious-prosecution claim failed. The court also found that Sundeen's abuse-of-process claim failed because he had not submitted any evidence that Kroger was guilty of malice or committed any improper act after his arrest and the initiation of criminal proceedings. From that order comes this appeal.

[redacted] Summary judgment is to be granted by a trial court only when it is clear that there are no genuine issues of material fact to be litigated, and the moving party is entitled to judgment as a matter of law. *Brown v. Fountain Hill School Dist.*, 67 Ark. App.

358, 1 S.W.3d 27 (1999). The burden of sustaining a motion for summary judgment is always the responsibility of the moving party. *Palmer v. Council on Economic Educ.*, 344 Ark. 461, 40 S.W.3d 784 (2001). Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Brown v. Fountain Hill School Dist.*, *supra.* On review, the appellate court determines if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *Id.* This court views the evidence in the light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.*

To succeed on his claim of malicious prosecution, appellant had to establish the following: (1) an earlier proceeding instituted or continued by the appellee against the appellant; (2) termination of the proceeding in favor of the appellant; (3) absence of probable cause for the proceeding; (4) malice on the part of the appellee; and (5) damages. *Wal-Mart Stores, Inc. v. Thomas*, 76 Ark. App. 33, 61 S.W.3d 844 (2001).

In the context of malicious prosecution, the term "probable cause" is defined as a state of facts or credible information which would induce an ordinarily cautious person to believe that the accused is guilty of the crimes charged. *Id.* Ordinary caution is a standard of reasonableness that presents an issue for the jury when the proof is in dispute or is subject to different interpretations. *Wal-Mart Stores, Inc. v. Williams*, 71 Ark. App. 211, 29 S.W.3d 754 (2000). The existence of probable cause is determined by an examination of the information known to the defendant at the time the proceedings were instituted. *Id.* Where a defendant relied on an eyewitness statement, but was also in possession of contradictory facts, the jury should be allowed to consider all the evidence available to the defendant to determine if ordinary caution was exercised in bringing the charges. *Id.*

Sundeen argues that the trial court erred in ruling that probable cause existed for his arrest. He specifically asserts that the trial court erred in considering the criminal conviction in municipal court in ruling that there was probable cause. We disagree. In *Kansas & Texas Coal Co. v. Galloway*, 71 Ark. 351, 74 S.W. 521 (1903), our supreme court held:

> The inquiry is not as to the facts which constitute the defendant in the former proceeding guilty or innocent, but, rather, what was said by witnesses in the former proceeding, which, it is to be presumed, determined whether or not there was probable cause for the prosecution, not that the defendants were guilty or innocent, for the rule is that, while the defendant in the former proceeding may have been found innocent and acquitted, yet that does not show a want of probable cause in the prosecution; it being not conclusive of anything as against the prosecutor, but a mere circumstance which, taken along with others, may induce the jury to find that there was a want of probable cause, and also that there was malice. The rule is quite different if the defendant in the prosecution is found guilty, for that is conclusive of the fact that there was probable and reasonable cause for the prosecution.

Id. at 358, 74 S.W. at 524; *see also McNeal v. Millar*, 143 Ark. 253, 220 S.W. 62 (1920). In *Casey v. Dorr*, 94 Ark. 433, 127 S.W. 708 (1910), the court went on to say that:

> The rule seems to be established by the weight of authority that a judgment of conviction by a court of competent jurisdiction is conclusive evidence of the existence of probable cause, even though the judgment [is] subsequently reversed and set aside, unless it be shown that the judgment was procured by fraud or undue means.

Id. at 436, 127 S.W. at 709; *see also Alexander v. Laman*, 225 Ark. 498, 283 S.W.2d 345 (1955); *Freeman v. Allen*, 193 Ark. 432, 100 S.W.2d 679 (1937).

[redacted] Here, the municipal court found Sundeen guilty of obstructing governmental operations and attempting to influence a public official. However, upon appeal to the circuit court, the State nolle prossed the charges. While it is true that the entry of a nolle prosse is a sufficiently favorable termination, *see Crockett Motor Sales, Inc. v. London*, 283 Ark. 106, 671 S.W.2d 187 (1984), the entry of a nolle prosse does not preclude a finding of probable cause to arrest. Based on the municipal court's determination of guilt, we hold that there was probable cause to arrest Sundeen for obstructing governmental operations and attempting to influence a public official. Therefore, the grant of summary judgment as to Sundeen's malicious-prosecution claim was proper.

[redacted] In order to prevail on his abuse-of-process claim, Sundeen had to show the following: (1) a legal procedure set in motion in proper form, even with probable cause and ultimate success; (2) the procedure is perverted to accomplish an ulterior pur-

pose for which it was not designed; and (3) a willful act is perpetrated in the use of process which is not proper in the regular conduct of the proceeding. *South Arkansas Petroleum v. Schiesser*, 343 Ark. 492, 36 S.W.3d 317 (2001). The test is whether a judicial process is used to extort or coerce. *See id.* The key to the tort is the improper use of process after its issuance in order to accomplish a purpose for which the process was not designed. *Id.* Thus, it is the purpose for which the process is used, once issued, that is important in reaching a conclusion. *Id.* Examples of misuse of process that have been found to constitute the tort of abuse of process are the service of an arrest warrant; delivery of an order to a sheriff for execution; personal service procured by fraud; or attachment or garnishment for a greatly excessive amount. *Carmical v. McAfee*, 68 Ark. App. 313, 7 S.W.3d 350 (1999). Sundeen failed to establish that Kroger instituted judicial process as a means of coercion or extortion. Therefore, we conclude that the court's grant of summary judgment as to Sundeen's abuse-of-process claim was proper.

Affirmed.

GLADWIN, J., agrees.

BAKER, J., concurs.

KAREN R. BAKER, Judge, concurring. I concur with this decision because we are bound by precedent to conclude that the district court's conviction of Mr. Sundeen required that the trial court also find that probable cause existed for the institution of the proceedings. I write separately to emphasize that the cases which are directly on point, and which we are bound to follow, contradict the purpose of *de novo* review by the circuit court and result in the anomaly of one circuit court being bound by a lower court's ruling. It is a situation which the supreme court should review and resolve.

De novo review provides due process and other procedural safeguards to an accused. "Trial *de novo*" means "as though there had been no trial in the lower court." *Harrell v. City of Conway*, 296 Ark. 247, 753 S.W.2d 542 (1988). The applicable statute provides for an appeal to circuit court, where the accused is entitled to an entirely new trial, "as if no judgment had been rendered" in municipal court. *Griffin v. State*, 297 Ark. 208, 209, 760 S.W.2d 852, 853 (1988); Ark. Code Ann. § 16-96-507 (Repl. 1999).

Appellate jurisdiction of circuit courts with respect to appeals from municipal courts is governed by Ark. Code Ann. § 16-19-1105 (1987). *Johnson v. State*, 312 Ark. 38, 846 S.W.2d 662 (1993). Although § 16-19-1105 addresses appeals from the decisions of justices of the peace, the statute applies to municipal court misdemeanor convictions. *Johnson, supra*; *Casoli v. State*, 297 Ark. 491, 763 S.W.2d 650 (1989). The statute provides in part:

> (a) Upon the return of the justice of the peace being filed in the clerk's office, the court shall be in possession of the cause and shall proceed to hear, try, and determine the cause anew on its merits, without any regard to any error, defect, or other imperfection in the proceedings of the justice of the peace.
>
> (b) The same cause of action, and no other, that was tried before the justice of the peace shall be tried in the circuit court upon the appeal. . . .

Ark. Code Ann. § 16-19-1105 (Repl. 1999).

The trial in the circuit court is not to be influenced or affected by what occurred in the municipal court. *Bussey v. State*, 315 Ark. 292, 867 S.W.2d 433 (1993). Even a defendant who has pled guilty or otherwise agreed to judgment in a lower court may subsequently appeal and retry the issue of liability in circuit court:

> We are convinced that it is indeed illogical to provide for a complete retrial of municipal court judgments entered pursuant to pleas of guilty, by consent or confession or by default, if the issue of liability cannot also be retried. The constitutional guarantee of a jury trial would be meaningless in those appeals involving a sum certain if the defaulting defendant is not allowed to deny liability on de novo review.

Murdock v. Slater, 326 Ark. 1067, 1073, 935 S.W.2d 540, 543 (1996).

The presumption we must follow when analyzing whether probable cause existed to institute proceedings against Mr. Sundeen deviates from the express purpose of *de novo* review: to conduct a trial as though there had been no trial in the lower court. *See Bussey, supra.* Our application of the presumption directly contradicts the principle that a trial in the circuit court is not to be influenced or affected by what occurred in the municipal court. *See Bussey, supra.* The application of the presumption denies Mr. Sundeen's due process rights by denying him judicial review. Despite these contradictions, we have precedent we our bound to follow.

Accordingly, I concur.

Gary VAN DEVEER *v.* RTJ, INC., *d/b/a* George's Flowers

CA 02-693 101 S.W.3d 881

Court of Appeals of Arkansas
Division II
Opinion delivered April 9, 2003

[Petition for rehearing denied May 7, 2003.]

Taylor Law Firm, by: *Timothy J. Myers* and *Chris D. Mitchell*, for appellant.

Davis, Wright, Clark, Butt & Carithers, PLC, by: *Laura J. Andress* and *Courtney P. Glibert*, for appellee.

ANDREE LAYTON ROAF, Judge. Appellant Gary Van DeVeer filed suit against appellee RTJ, Inc., d/b/a George's Flowers ("RTJ"), for injuries he sustained when he fell down a flight of stairs while working on RTJ's greenhouse.[1] Van DeVeer alleged in his complaint that his injuries were proximately caused by the negligence of RTJ in failing to warn of a dangerous condition, to maintain the premises in a safe and prudent manner, to have a handrail on the stairway, and to construct the stairs in compliance with local and state codes. The trial court granted summary judgment to RTJ, finding that the stairs were an obvious danger. On appeal, Van DeVeer argues that: (1) the trial court erred in granting summary judgment for RTJ when either genuine issues of material fact exist, or the undisputed facts are suscep-

[1] An earlier appeal in this case was dismissed for lack of finality in *Van DeVeer v. George's Flowers, Inc.*, 76 Ark. App. 408, 65 S.W.3d 488 (2002).

tible to differing interpretations as to whether the dangerous condition was "open and obvious" and whether he had notice of the dangerous condition; (2) assuming the dangerous condition was "open and obvious," the trial court erred as a matter of law in finding that the landowner's duty of care was completely abrogated solely because the dangerous condition that caused injury was "open and obvious." We agree that summary judgment is inappropriate and reverse and remand on both points.

According to Van DeVeer's deposition, he was employed by Precision Glass and Mirror, Inc., and was doing work for his employer at George's Flowers in May 1996, replacing broken windows in the greenhouses. After working for three or four days in the east greenhouse, Van DeVeer began to work on the west greenhouse. Van DeVeer testified that, while working in the west greenhouse, he noticed a set of stairs leading up from the greenhouse into the showroom of George's Flowers. Van DeVeer stated that he saw that there was no handrail and that the stairs appeared to be unsafe; therefore, he avoided them. After spending several hours in the west greenhouse that afternoon, Van DeVeer stated that he worked at another site for two or three days.

Van DeVeer returned to George's Flowers on the afternoon of May 2, 1996, to finish replacing the windows. Van DeVeer had previously gained entrance to the greenhouses by an outside door, which one of the employees would unlock for him. However, when he drove up that afternoon, Van DeVeer testified that the door appeared to be "all closed up," although he did not try to open it. Van DeVeer stated that he assumed everyone was still at lunch, so he went inside the store to enter the greenhouse through an interior door. Van DeVeer stated that he approached the interior door, which opened outward into the greenhouse, turned the door knob, opened the door partway and took a step, opened the door the rest of the way, attempted to take a second step, and fell down the stairs, hitting his head. Van DeVeer testified that he fell because there was no landing area behind the door into the greenhouse, as there usually is at the top of a staircase. The pictures of the staircase indicate that not only is there no landing beyond the door, but the edge of the floor does not quite reach to the door, and there is a gap or drop-off between the edge and the bottom of the closed door. Van DeVeer stated that he did not see any sort of sign on the door warning people to watch their step.

When questioned as to whether he already felt the stairs were a dangerous condition on the day that he fell, Van DeVeer stated that he guessed that he did, but that he did not think about that as he was walking toward the stairs that day. Van DeVeer testified that he was "just concerned about getting in there and finishing up the job." When asked if he would have been able to walk safely down the stairs if he had just opened up the door and looked down before taking a step, Van DeVeer replied that he supposed he could have. Van DeVeer stated that it was not dark in the greenhouse and that there was nothing blocking his view of the steps.

An employee of George's Flowers, Barbara Spears, testified that she witnessed Van DeVeer open the door and fall down the stairs. Spears stated that no customers had fallen down the stairs to her knowledge, but that she had almost stumbled a couple of times. According to Spears, the stairs were too narrow, and it was easy for a person to lose their footing if they were not careful. She stated that the employees also had to watch their step when using the stairs. Spears testified that there were no signs to warn of the immediate drop-off. Spears could not remember if she or other employees had talked directly with the owner of George's Flowers, Randall Jones, about the condition of the stairs, but she did testify that he was aware that the stairs were bad. However, during his deposition, Jones denied that any employee had ever told him of any problems with the stairs.

Van DeVeer first argues that the trial court erred in granting summary judgment for RTJ when genuine issues of material fact exist as to whether the dangerous condition was "open and obvious" and whether he had notice of the dangerous condition. Summary judgment should only be granted 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. *Smith v. Rogers Group, Inc.*, 348 Ark. 241, 72 S.W.3d 450 (2002). All proof must be viewed in the light most favorable to the nonmoving party, and any doubts must be resolved against the moving party. *Id.* If, after reviewing undisputed facts, reasonable men might reach different conclusions from those facts, then summary judgment should be denied. *Plant v. Wilbur*, 345 Ark. 487, 47 S.W.3d 889 (2000).

The duty of care that RTJ owes to its invitees, such as Van DeVeer, is stated as follows in *Restatement (Second) of Torts*, § 343 (1965):

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

The basis for a premises owner's liability under this rule is the superior knowledge of an unreasonable risk of harm of which the invitee, in the exercise of ordinary care, does not or should not know. *Jenkins v. Hestand's Grocery, Inc.*, 320 Ark. 485, 898 S.W.2d 30 (1995). There is an exception to this general rule, which states that a "possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." *Restatement (Second) of Torts*, § 343A(1) (1965).

Arkansas cases have also recognized the general duty that a premises owner owes to an invitee and the exception to this duty where the dangerous condition is either known or obvious to the invitee. *See, e.g., Jenkins v. Hestand's Grocery, supra*; *Jenkins v. Int'l Paper Co.*, 318 Ark. 663, 887 S.W.2d 300 (1994); *Young v. Paxton*, 316 Ark. 655, 873 S.W.2d 546 (1994); *Carton v. Missouri Pac. R.R. Co.*, 303 Ark. 568, 798 S.W.2d 674 (1990); *Kuykendall v. Newgent*, 255 Ark. 945, 504 S.W.2d 344 (1974); *Ramsey v. American Auto. Ins. Co.*, 234 Ark. 1031, 356 S.W.2d 236 (1962). These rules are the basis of AMI Civ. 3d 1104, which states that the premises owner owes a duty to an invitee to use ordinary care to maintain the premises in a reasonably safe condition. No such duty exists, however, if the condition of the premises that creates the danger was known by or obvious to the invitee, unless the premises owner should reasonably anticipate that the invitee would be exposed to the danger despite his knowledge of it or its obvious nature. *Id.*

The question of whether a duty is owed is always a question of law and never one of fact for the jury. *Bryant v. Putnam*, 322 Ark. 284, 908 S.W.2d 338 (1995); *Jordan v. Jerry D. Sweetser, Inc.*, 64 Ark. App. 58, 977 S.W.2d 244 (1998). Here, Van DeVeer contends that summary judgment is inappropriate because there are material questions of fact susceptible to differing interpretations regarding his knowledge of the dangerous condition of the stairs and

their obvious nature. Section 343A of the Restatement, which discusses known or obvious dangers, defines "known" as "not only knowledge of the existence of the condition or activity itself, but also appreciation of the danger it involves." "Thus the condition or activity must not only be known to exist, but it must also be recognized that it is dangerous, and the probability and gravity of the threatened harm must be appreciated." *Id.*

According to Van DeVeer's deposition, he noticed the stairs on the first afternoon that he went to work in the west greenhouse. Van DeVeer testified that the stairs looked unsafe because there was no handrail and that he avoided using them. He stated that he did not want to climb the stairs while carrying any materials or ladders because "there is no place to grab." As Van DeVeer argues, although he was aware that the stairs had no handrail, there is no evidence that he had knowledge of the particular condition that caused his fall, which was the immediate drop-off at the door to the greenhouse. Van DeVeer had never gone up or down the stairs prior to his accident, and he stated that he did not expect there to be no landing at the top of these stairs. Because Van DeVeer did not have knowledge of the particular dangerous condition that caused him to fall, he could not have appreciated the risk he was taking by using these stairs to enter the greenhouse. Thus, it cannot be said on the facts before us, as a matter of law, that Van DeVeer had "knowledge" of the dangerous condition associated with the stairs. *See Lively v. Libbey Mem'l Physical Med. Ctr.*, 311 Ark. 41, 841 S.W.2d 609 (1992) (although there were signs warning to stay a certain distance away from whirlpool jets, the appellant was injured by underwater suction pipes, and the court stated that a jury could conclude that the dangers associated with the underwater suction were hidden or not easily recognized; thus, the court held that it could not be stated as a matter of law that the appellant was aware of the risk presented).

Van DeVeer also contends that the trial court erred in finding that the stairs were an "open and obvious danger." According to section 343A of the Restatement, a dangerous condition is "obvious" where "both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment." RTJ argues that the stairs were an obvious condition because Van DeVeer stated during his deposition that if he had pushed the door

open and looked down before proceeding forward, he thought that he could have seen the stairs and walked down them safely.

Although no Arkansas cases have involved stairs such as the ones at issue in this case, two cases from other jurisdictions are helpful in determining whether these particular stairs present a danger that is "open and obvious." In *Bertrand v. Alan Ford, Inc.*, 449 Mich. 606, 617, 537 N.W.2d 185, 190 (1995), the court stated that under ordinary circumstances, the danger of tripping and falling on a step is open and obvious, and the public policy of encouraging people to take reasonable care for their own safety precludes imposing a duty on the possessor of land to make ordinary steps "foolproof." However, where there are special aspects of the particular steps that make the risk of harm unreasonable, whether by their character, location, or surrounding conditions, then the duty of the possessor of land to exercise reasonable care remains. *Id.* In *Allgauer v. Le Bastille, Inc.*, 101 Ill. App.3d 978, 428 N.E.2d 1146 (1981), as in the present case, the appellant fell down a set of stairs that had no landing and were concealed by a door that opened out onto the stairs. The trial court granted summary judgment to the premises owner, finding that the appellant knew of the dangerous condition because she had climbed the same stairs to enter the business. *Id.* The appellate court reversed, holding that the dangerous condition was hidden by the door until it was opened and that the fact that the stair could have been seen for a split second by the appellant before she fell "does not necessarily remove it from the realm of hidden dangers." *Id.* at 981-82, 428 N.E.2d at 1148. The premises owner argued that the appellant should have stopped and looked at the stairs before she walked through the door and that she should have known that the stairs were dangerous to descend because she had ascended them two hours before. *Id.* However, the court stated that these contentions do not go to the issue of whether the owner was required to give warning of the danger, but rather, they concern whether the appellant was guilty of contributory negligence. *Id.*

In this case, the dangerous condition that caused Van DeVeer's fall, the fact that the stairs had no landing, was at least partially hidden by the door when it was closed. Although Van DeVeer admitted that he could possibly have safely descended the steps if he had pushed the door open, stopped, and looked, he contends that a reasonable person in his position would have expected a

landing behind the door and would not have recognized and appreciated the danger in time to prevent himself from falling. Because the door opened away from the person entering the greenhouse, a reasonable person might well have taken a couple of steps forward while pushing the door open and fallen before noticing the drop-off. In *Flentje v. First National Bank of Wynne*, 340 Ark. 563, 11 S.W.3d 531 (2000), the supreme court said:

> Summary judgment is not proper, however, "where evidence, although in no material dispute as to actuality, reveals aspects from which inconsistent hypothesis might reasonably be drawn and reasonable minds might differ." *Thomas v. Sessions*, 307 Ark. 203, 818 S.W.2d 940 (1991).
>
> As we further explained in *Wallace v. Broyles*, 332 Ark. 189, 961 S.W.2d 712 (1998), we will not engage in a "sufficiency of the evidence" determination. We have ceased referring to summary judgment as a drastic remedy. We now regard it simply as one of the tools in a trial court's efficiency arsenal; however, we only approve the granting of the motion when the state of the evidence as portrayed by the pleadings, affidavits, discovery responses, and admission on file is such that the nonmoving party is not entitled to a day in court, i.e., when there is not any genuine remaining issue of fact and the moving party is entitled to judgment as a matter of law. *Id.* However, when there is no material dispute as to the facts, the court will determine whether "reasonable minds" could draw "reasonable" inconsistent hypotheses to render summary judgment inappropriate. In other words, when the facts are not at issue but possible inferences therefrom are, the court will consider whether those inferences can be reasonably drawn from the undisputed facts and whether reasonable minds might differ on those hypotheses.

340 Ark. at 569-70, 11 S.W.3d at 536.

There are no factual disputes in this case about the physical condition of the stairs, such as the fact that the stairs contained no landing and were hidden by a door. Regarding Van DeVeer's knowledge of the dangerous condition, it is also undisputed that Van DeVeer had never used the stairs in question, and although while working on the lower level, he had noticed that the stairs did not have a handrail, he stated that he did not know that there was no landing at the top of the stairs. However, even if there are no disputed questions of fact regarding whether Van DeVeer had knowledge of the dangerous condition or whether the stairs were an obvious danger, we conclude that reasonable men could reach dif-

ferent conclusions from these facts regarding the duty owed by RTJ, and summary judgment was inappropriate in this instance.

Van DeVeer also contends that, even assuming that the dangerous condition was "open and obvious," the trial court erred as a matter of law in finding the landowner's duty of care was completely abrogated. As stated in AMI 1104, a finding that the dangerous condition is known by or obvious to the invitee does not necessarily eliminate a duty on the part of the premises owner to maintain the premises in a reasonably safe condition. If the landowner should reasonably anticipate that the invitee will be exposed to the danger despite his knowledge of it, or its obvious nature, then the duty owed by the owner is not abrogated. AMI 1104; *Restatement (Second) of Torts* § 343A. Section 343A lists examples of situations where the landowner should reasonably anticipate that harm to an invitee may arise, notwithstanding the known or obvious danger of the condition:

> Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the owner has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk. In such cases the fact that the danger is known, or is obvious, is important in determining whether the invitee is to be charged with contributory negligence, or assumption of risk. (citations omitted). However, it is not conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances.

See also Jenkins v. International Paper Co., supra. However, this exception to the "open and obvious danger" rule has been applied in Arkansas in only one situation, where the invitee is forced, as a practical matter, to encounter the danger in order to perform his job. *Jenkins v. International Paper Co., supra; Carton v. Missouri Pac. R.R. Co., supra; Kuykendall v. Newgent, supra.*

Van DeVeer does not argue that he was forced to encounter the stairs in order to perform his job. Unlike in the above cited cases, Van DeVeer had an alternative to using the stairs because he could have asked one of the employees to open the

outside door for him, as he stated that he had done on every other occasion. Instead, Van DeVeer asserts that whether RTJ should have reasonably anticipated the harm, despite the known or obvious nature of the dangerous condition, is a question of fact for the jury that cannot be decided on summary judgment. As support for this proposition, Van DeVeer cites to the language set out above in section 343A of the Restatement, which states that where the risk of harm from a known or obvious danger is unreasonable, the fact that the danger is known or obvious is not conclusive in determining the duty of the possessor. We agree and conclude that reasonable men could reach different conclusions as to whether RTJ should have anticipated that harm to its invitee might arise under the circumstances presented in this case; thus, we hold that summary judgment was also inappropriate on this issue.

Reversed and remanded.

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

Winfred Javaar LAWRENCE *v.* STATE of Arkansas

CA CR 02-397 104 S.W.3d 393

Court of Appeals of Arkansas
Division I
Opinion delivered April 16, 2003

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

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

JOHN MAUZY PITTMAN, Judge. The appellant in this criminal case was convicted of aggravated robbery and theft, and was sentenced to terms of fifteen years and five years of imprisonment, to be served concurrently. From that decision, comes this appeal.

For reversal, appellant contends that the trial court erred in allowing into evidence an out-of-court statement given by Antonio Jordan to law enforcement officers. In the alternative, appellant contends that the trial court erred in allowing into evidence those parts of Antonio Jordan's statement that repeated out-of-court statements made by a third party, Jesse James Smith. We think that appellant's second argument has merit, and we reverse and remand on that point.

There was evidence at trial to show that a masked person generally fitting appellant's description robbed a bank, threatening bystanders with a sawed-off shotgun. The only evidence identifying appellant as the robber was a statement made to police by Antonio Jordan. Jordan made an out-of-court statement to police that he was at a party with appellant and Jesse James Smith shortly after the robbery. Jordan stated that appellant told him that he had just

robbed a bank. Jordan also stated that Smith told him that appellant participated in the robbery and wore a mask, and was worried because a water company employee saw him come out of the bank wearing the mask. Jordan further stated that Smith told him that Smith drove the getaway car after the robbery and later disposed of the shotgun.

Jordan did not testify at trial, apparently because he refused to do so. The State sought to introduce Jordan's out-of-court statement in his absence. The appellant objected and filed a motion in limine. Jordan appeared at a pretrial hearing on the motion and testified that he remembered making a statement to police officers, but that he did not remember what he said to them. He further stated that he was threatened into giving a statement and that he did not know if what he told the police was the truth or not. Finally, Jordan claimed to be schizophrenic.

The trial court ruled that Jordan was mentally competent to testify. The State then proposed to introduce Jordan's out-of-court statement at trial, asserting that it was admissible under the exception to the hearsay rule set out in Rule 803(5). The court ruled that Jordan's statement was admissible under 803(5) because, in the statement, Jordan told the police that everything he said in his statement was true. The statement was admitted, appellant was convicted, and this appeal followed.

On appeal, appellant contends that the trial court erred in admitting Jordan's out-of-court statement, asserting that Rule 803(5) is inapplicable because Jordan did not testify at trial that the statement was truthful and that the recordation was accurate. We do not agree.

Arkansas Rule of Evidence 803(5) provides that hearsay is admissible, regardless of the declarant's availability, if it is in the form of a:

> *Recorded Recollection.* A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

Two elements must be established to provide a foundation for such a recorded recollection to be read into evidence at trial: first, there must be evidence that the recordation was *adopted* by the declarant; second, there must be evidence that the recordation was *accurately recorded*.

[redacted] Here, Jordan affirms in the statement itself that it is true, therefore satisfying the requirement that the recordation must be adopted by the declarant. With regard to the second requirement, there was no evidence that Jordan himself ever affirmed that his statement was accurately recorded. There was, however, testimony by a police officer who was present at the time the statement was made stating that Jordan's statement was accurately recorded.

[redacted] The central question in this case, therefore, is whether a record prepared by a party other than the declarant is admissible under 803(5) in the absence of testimony by *both* the declarant and the recorder that the information is true and that the recordation was accurate? The State argues that both parties to the record must testify as to both aspects of the foundation, *i.e.*, truth and accuracy. We do not agree. To the contrary, it has been said that:

> Both participants must ordinarily testify, the *reporter vouching for the accuracy of the oral report* and *the recorder for the accuracy of the transcription.*

WEINSTEIN'S EVIDENCE ¶ 803.10(5) (2d ed. 2002) (emphasis supplied). That is precisely what occurred in the present case: appellant affirmed in his statement itself that he was telling the truth, and the police officer who was present testified as to the accuracy of the transcription.

[redacted] We acknowledge the argument that the police officer's testimony concerning the accuracy of recordation should be disregarded because Jordan failed to unequivocally adopt the statement as truthful when he testified at the pretrial hearing. However, Jordan's testimony at the hearing was inconsistent and self-contradicting. Although he at times stated that he was under duress and that he could not remember what he said to the police, he also acknowledged that he did give a statement, and he did not disagree that it reflected what he said at the time. We think that the contradictions in Jordan's testimony regarding the statement were properly resolved by the trial court, and that he did not err in holding that the statement was admissible as a recorded recollection.

Jordan's out-of-court statement is *itself* hearsay, and we have held that it was properly allowed into evidence under Rule 803(5) as a recorded recollection. Appellant's second point on appeal raises an entirely different question, *i.e.*, whether there is a basis for admitting into evidence the *contents* of that written statement which are *themselves* hearsay.

The statements made by appellant to Jordan were properly admitted as admissions against penal interest by the appellant, a party-opponent in this case. *See Mock v. State*, 20 Ark. App. 72, 723 S.W.2d 844 (1987). However, we find no such independent grounds for admitting the portions of Jordan's out-of-court statement recounting the statements made by Smith, who was not involved in this case. The trial judge based the admission of Smith's statements on Ark. R. Evid. 801(d)(2)(v), which exempts from the definition of hearsay a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. However, it is clear that Smith's statement to Jordan, made at a party after the robbery had been committed, was simply after-the-fact boasting that was neither in the course of nor in furtherance of the robbery. Furthermore, Smith's statements as repeated by Jordan implicated both Smith and the appellant, and therefore do not fall within the statement-against-interest exception to the hearsay rule set out in Ark. R. Evid. 804(b)(3). Consequently, we hold that the trial court erred in admitting those portions of Jordan's out-of-court statement recounting the statements made to Jordan by Smith.

Finally, we do not agree with the State's argument that the admission of these statements was harmless. Smith's statement directly implicated the appellant and, as the State itself argued to the jury, the amount of detail contained in Smith's statements as reported by Jordan regarding the particulars of the crime, such as the use of the mask and the robbers' apprehension concerning the presence of a witness near the getaway car, tended to make Jordan's out-of-court statement considerably more credible.

Reversed and remanded.

GLADWIN, J., agrees.

HART, J., concurs.

APOLLO COATING RCS, INC. and Apollo, Inc. *v.*
BROOKRIDGE FUNDING CORP.

CA 01-1415 103 S.W.3d 682

Court of Appeals of Arkansas
Divisions IV and I
Opinion delivered April 16, 2003

Clark & Spence, by: *George R. Spence*, for appellant.

No response.

WENDELL L. GRIFFEN, Judge. Apollo Coating RCS, Inc., appeals from an order granting judgment in the amount of $35,964 to Brookridge Funding Corporation in an action to collect on an account. Appellant argues that the trial court erred in not rendering written findings of fact and conclusions of law as it requested and in awarding judgment to the appellee. We agree and reverse and remand for compliance with Arkansas Rule of Civil Procedure 52.

On August 3, 1998, appellant placed an order for 170,000 pig ears at a cost of $45,900 from Rudy Gutierrez d/b/a Diversified Marketing International (DMI), which was to be shipped in several installments to another corporation, Hartz. On August 12, 1998, DMI entered into an agreement to sell some of its accounts receivables to appellee. Among the accounts sold and assigned to appellee was the account of appellant. Appellant was informed of the assignment and was aware that all future payments were to be made to appellee. On November 19, 1998, appellant paid appellee $9,936 for the first shipment of pig ears sent by DMI to Hartz. However, appellant would not pay appellee for the subsequent shipments of pig ears DMI delivered to Hartz on August 19, 1998, and on August 28, 1998. Therefore, appellee filed an action against appellant alleging that appellant was indebted to it in the amount of $35,964.

At the hearing on the matter, appellant denied any indebtedness, claiming that the two shipments of pig ears had been rejected by Hartz. On September 4, 2000, the trial court entered an order awarding judgment to appellee. However, the order did not set forth findings of fact and conclusions of law. Thus, on September 7, 2000, appellant filed a motion requesting that the trial court make specific findings of fact and conclusions of law pursuant to Ark. R. Civ. P. 52. The trial court declined to rule on this motion.

Appellant appeals raising two arguments for reversal: (1) The trial court erred in not rendering written findings of fact and conclusions of law as it requested; and (2) The trial court erred in awarding judgment to the appellee as the goods were rejected. We agree with appellant's first point on appeal.

Rule 52 of the Arkansas Rules of Civil Procedure provides in part:

> (a) *Effect.* If requested by a party, in all contested actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58 . . .
>
> (b) *Amendment.*
>
> (1) Upon motion of a party made not later than 10 days after entry of judgment, the court may amend its findings of fact or make additional findings and may amend the judgment accordingly.

Under this rule, there is a clear distinction between motions or requests made pursuant to Rule 52(a) and Rule 52(b)(1). As appellant correctly notes, under Rule 52(a), a trial court is required to make specific findings of fact and state separately its conclusions of law if a timely request is made. *McWhorter v. McWhorter*, 70 Ark. App. 41, 14 S.W.3d 528 (2000). In comparison, Rule 52(b) is reserved for motions or requests that ask the trial court to amend previously made findings of fact or to make additional findings. Rule 52(b) does not mandate that the trial court take action even when a timely motion or request is made. *McClain v. Giles*, 271 Ark. 176, 607 S.W.2d 416 (1980).

In the instant case, the trial court did not set forth its findings of fact and conclusions of law in its order. Appellant, therefore, filed a motion requesting that the trial court make specific findings of fact and conclusions of law. As appellant's motion was for the trial court to make findings and conclusions, not to amend them, it was governed by Rule 52(a). The motion was timely made, filed only three days after the judgment was entered. Thus, the trial court was required to provide written findings and conclusions as appellant had requested. Accordingly, we must reverse and remand for compliance with the provisions of Rule 52(a).

We recognize that our opinion in *Price v. Garrett*, 79 Ark. App. 84, 84 S.W.3d 63 (2002), contains language that is contradictory to our holding in this case. Therefore, we specifically limit *Price v. Garrett* to the holding that a postjudgment motion for findings of fact and conclusions of law made under Rule 52(a) does not extend the time for filing a notice of appeal under Rule 4 of the Rules of Appellate Procedure. To the extent that any language in *Price v. Garrett* is in conflict with our holding in this opinion, *Price v. Garrett* is overruled.

Reversed and remanded.

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

BIRD and VAUGHT, JJ., dissent.

SAM BIRD, Judge, dissenting. I disagree with the majority judges' interpretation of Ark. R. Civ. P. 52(a), and, therefore, respectfully dissent. Specifically, I do not agree that Rule 52(a) can be interpreted to enable a party to compel a trial judge, sitting as the trier of fact, to make findings of fact and separate conclusions of law *after* the court's judgment has been entered. The very language of the rule belies such an interpretation. Simply stated, Rule 52(a) provides, in pertinent part, that a trial judge sitting as the trier of fact in a contested action is required to make findings of fact and state separately its conclusions of law if requested by a party, and that judgment shall be entered pursuant to Rule 58. The logical sequence suggested by Rule 52(a) is that the judge sits as the trier of fact, a party requests the judge to make findings of fact and separate conclusions of law, the court announces or publishes its findings and conclusions,[1] a form for the judgment is prepared, and the judgment is entered.

While the majority opinion notes that "there is a clear distinction between motions or requests made pursuant to Rule 52(a) and Rule 52(b)(1)," it then proceeds to obliterate the distinction by holding that, under Rule 52(a) a party can require the court to make findings of fact and separate conclusions of law *after* judgment has been entered, or, under Rule 52(b)(1) a party may request the court to amend its findings of fact or make additional findings within ten days *after* the entry of judgment. Although the majority cites *McWhorter v. McWhorter*, 70 Ark. App. 41, 14 S.W.2d 528 (2000), to support its position that Rule 52(a) can be invoked after judgment has been entered, it fails to note that in *McWhorter* we reversed the trial court because it declined to consider a party's request for specific findings of fact where the request was made *before* the entry of judgment. Only a few months ago this court decided *Price v. Garrett*, 79 Ark. App. 84, 84 S.W.3d 63 (2002), in which we held that "[a] Rule 52(a) motion or request must be filed at least prior to

[1] The rule does not require that the court's findings and conclusions be in writing, and it is not uncommon for them to be announced on the record from the bench.

the date of entry of judgment." For no apparent reason, the majority now overrules that holding.

I agree that there is a clear distinction between the purposes of Rule 52(a) and 52(b)(1). Rule 52(a) empowers a party to *compel* the trial judge sitting as the trier of fact in a contested action to make findings of fact and separate conclusions of law, following which judgment shall be entered. By clear implication, a party's request under 52(a) comes too late if it is not made until after judgment has been entered. On the other hand, Rule 52(b)(1) permits a party to *request* the trial judge to amend its findings of fact or make additional findings, and to amend its judgment accordingly, which request the court *may* either grant, deny, or ignore. By clear implication, a party's request, under Rule 52(b)(1), for the court to amend its findings or its judgment must come after the court has made findings of fact or after judgment has been entered.

The distinction between Ark. R. Civ. P. 52(a) and 52(b)(1) is made even clearer when it is considered that under Ark. R. App. P.—Civ. 4(b), which relates to extensions of time for filing a notice of appeal, it is provided that the time for filing a notice of appeal is extended upon the filing of a motion to amend or make additional findings of fact under Rule 52(b) and a motion to amend the judgment made no later than ten days after the entry of judgment. Significantly, there is no allowance for an extension of time to file a notice of appeal upon the filing of a request pursuant to Rule 52(a), for the obvious reason that Rule 52(a) contemplates that the party's request will precede the entry of judgment. If a request for findings of fact and separate conclusions of law under Rule 52(a) can be made, as the majority holds, after judgment has been entered, and since a request under Rule 52(a) does not extend the time for filing a notice of appeal, I cannot help but wonder what effect the court's postjudgment findings of fact and conclusions of law would have upon the judgment previously entered, if the judgment is appealed. There is no requirement under Rule 52(a) that the trial court enter another judgment after making postjudgment findings and conclusions; nor is it provided that the postjudgment findings and conclusions are made a part of the judgment previously entered. Furthermore, it is significant to ask, I believe, that since the making of a Rule 52(a) request does not extend the time for filing a notice of appeal, and since Rule 52(a) sets no time within which the trial court must comply with the party's request for findings of fact and

separate conclusions of law, what would become of an appellant's appeal if the trial court simply waits thirty-one days after the entry of judgment before it renders the requested findings and conclusions.

These questions arise because of the strained attempt of the majority to interpret Rule 52(a) to mean something that it does not say. I cannot interpret that rule to require the trial court to justify its decision to a party after the judgment has been entered. I believe that Rule 52(a) is nothing more than the adoption of a common-sense rule that if a litigant wishes to know the facts upon which the trial court will rely and the legal conclusions the court will draw from those facts, the litigant, acting pursuant to Rule 52(a), can request that information, and the court shall be obligated to provide it before judgment is entered. On the other hand, if the trial court has made findings of fact with which the litigant does not agree, the litigant, acting pursuant to Rule 52(b)(1), can request the trial court to amend its findings and to amend the judgment that resulted from them, which request the court may grant or deny, in its discretion.

I would affirm the decision of the trial court, and I am authorized to state that Judge VAUGHT joins with me in this dissent.

William Patrick MILLER, and Loretta Anita Jackson *v.* STATE of Arkansas

CA CR 02-698 102 S.W.3d 896

Court of Appeals of Arkansas
Division III
Opinion delivered April 16, 2003

J. Martin Honeycutt, for appellant.

Mark Pryor, Att'y Gen., by: *David R. Raupp*, Ass't Att'y Gen. *KaTina Hodge*, Law Student, and *Darnisa Evans Johnson*, Deputy Att'y Gen, for appellee.

OLLY NEAL, Judge. This is an appeal from the denial of a motion to suppress in the Crawford County Circuit Court, after which appellants entered conditional pleas of nolo contendere for possession of marijuana with the intent to deliver and reserved their right to appeal the suppression denial. Each appellant was fined $3,500 plus costs and sentenced to ten years' imprisonment in the Regional Punishment Facility with nine years suspended. On appeal, appellants argue that the trial court erred in denying their motions to suppress. We affirm.

On October 15, 2001, Trooper Raymond Triplett stopped appellants' vehicle on Interstate 40 for following too closely. Triplett advised the driver, appellant Loretta Jackson, and her passenger, appellant William Miller, of the reason for the stop and requested identification; both complied with the officer's request. The officer issued Jackson a citation for driving on a suspended license and gave her a written warning.

During the course of events, Trooper Triplett learned that Miller had rented the car and that he and Jackson were traveling from California to Georgia for a couple of days to see some friends. Triplett looked inside the vehicle, noticing "not too many clothes or any kind of luggage in the back seat," just "a jacket, perhaps small food items." Triplett then asked Jackson and

Miller about their clothing and luggage, and they both informed Triplett that everything they had was in the back seat of the vehicle. Both Jackson and Miller advised Triplett that they did not have any knowledge as to what was in the trunk.

Finding this suspicious, Trooper Triplett asked Jackson if she would object to a search of the vehicle, to which she responded that she could not give consent because she had not rented the vehicle. Triplett advised Jackson that "because she was driving the vehicle that she was in control, and had authority to grant consent." Triplett also noticed that "Mr. Miller lost all eye contact with me. He sunk down in his seat and looked straight ahead. He appeared to be highly nervous at that point." The officer stated that Jackson did not give him consent; therefore, he advised her that he was going to "run [his] K-9 around the vehicle for a quick K-9 scan." Trooper Triplett went to his car and retrieved his canine.

When Trooper Triplett walked the canine around the car, the dog gave an alert or indication by stopping and jumping up at the trunk and scratching several times with its paws. The trooper then informed Jackson and Miller that he was going to search the trunk. When he opened the trunk, Trooper Triplett found three black suitcases filled with wrapped packages of marijuana. Trooper Triplett placed appellants under arrest. Both were charged with possession of a controlled substance with intent to deliver.

Appellants moved to suppress the evidence seized during the traffic stop, arguing that the evidence was obtained in violation of the Fourth and Fourteenth Amendments to the United States Constitution, and Article II, Sections 8 and 10, of the Arkansas Constitution. The motions were denied. Thereafter, appellants entered conditional pleas of nolo contendere, and the trial court sentenced them accordingly. This appeal followed.

Appellants do not challenge the legality of the initial stop or their arrest. On appeal, appellants argue, pursuant to Ark. R. Crim. P. 24.3, that the trial court erred in denying their motion to suppress evidence. In response, the State first argues that appellants have not demonstrated that they are entitled to a conditional-plea appeal and that we are without jurisdiction to hear the case. We will address this issue first.

Conditional Plea

Rule 24.3 of the Arkansas Rules of Criminal Procedure states in pertinent part that:

> (b) With the approval of the court and the consent of the prosecuting attorney, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of an adverse determination of a pretrial motion to suppress evidence. If the defendant prevails on appeal, he shall be allowed to withdraw his plea.
>
> * * *
>
> (d) No plea of guilty or nolo contendere shall be accepted by any court unless the prosecuting attorney of the governmental unit in which the offense occurred is given opportunity to be heard at the time the plea is tendered. In any criminal cause in which trial by jury is a right, a court shall not accept a plea of guilty or nolo contendere unless the prosecuting attorney has assented to the waiver of trial by jury.

Ark. R. Crim. P. 24.3 (2002). The rule requires both the consent of the prosecuting attorney and the approval of the trial court; additionally, the intent to reserve the right to appeal must be entered contemporaneously with the plea. *See Barnett v. State*, 336 Ark. 165, 984 S.W.2d 444 (1999). The supreme court has interpreted Ark. R. Crim. P. 24.3(b) to require strict compliance with the writing requirement in order for the appellate court to obtain jurisdiction; this includes a requirement that the conditional plea be reserved in writing by the defendants. *McMullen v. State*, 79 Ark. App. 15, 84 S.W.3d 44 (2002). Absent compliance with the express terms of Rule 24.3(b), the appellate court acquires no jurisdiction to hear an appeal, even when there has been an attempt at trial to enter a conditional plea. *Id.*

In its argument, the State argues:

> Concerning their apparent attempted conditional guilty pleas, appellants' addendum contains only their amended judgment and commitment orders entered on May 8, 2002, and documents entitled "Additional Terms/Conditions of Disposition." Appellants' abstract fails to provide any other basis upon which to determine if Rule 24.3 was complied with, although it recited that they entered conditional pleas. While the judge signed the judgment and commitment orders, neither the judge, the prose-

> cuting attorney, nor Appellants also signed the attached Additional Terms/Conditions of Disposition, although they recite that theirs [sic] pleas are conditional. Thus, appellants have not demonstrated strict compliance with Rule 24.3(b) and this Court's jurisdiction to hear the merits of their appeal.

In *McCormick v. State*, 74 Ark. App. 349, 354-55, 48 S.W.3d 549, 552 (2001), we stated that

> Rule 24.3 does not specify the manner in which the State is to manifest its consent to the conditional guilty plea, so being present, contesting the objectionable aspects of the disposition of the case, and allowing the plea to be entered as a "negotiated plea of guilty" should be sufficient to preserve the suppression issue for appeal. Obviously, for a "negotiated" plea to exist it requires negotiation, and the only other interested party is the State. In contract law, manifestation of assent may be made by spoken words or by conduct.

There, we held that the prosecutor manifested assent by showing up in court and acquiescing to the entry of the negotiated plea agreement. We stated that "[t]o hold otherwise would be to give the State the benefit of the bargain while simultaneously relieving it of its obligation to consent." *Id.* at 355, 48 S.W.3d at 552.

In the instant case, the record reflects that a suppression hearing was held on April 22, 2002, and the trial court denied appellants' motions. The record indicates that prosecuting attorneys Marc McCune and Will Jones; Miller's defense attorneys, Marvin Honeycutt and Charles Waldman; and Jackson's defense attorney, Ernie Witt, were present at the hearing. Following the court's ruling, Jackson's defense attorney, Witt, informed the trial court that "[w]e're going to do a conditional plea, Judge, so hopefully we may do that this morning." Thereafter, the record reflects that appellants entered conditional pleas.

Immediately following appellants entrance of conditional pleas, a "Conditional Plea Proceeding," was had, and the following colloquy took place:

COURT:	Are we going to have some conditional pleas or not? All right, the State alleges here that on or about the 16th day of October of 2001, that you unlawfully and feloniously possessed marijuana with intent to deliver, a schedule VI

	controlled substance, weight being greater than 100 pounds. Do each of you understand the nature of the charge?
DEFENDANT JACKSON:	Yes.
DEFENDANT MILLER:	Yes.
COURT:	Do you understand that you have a right if you believe you're innocent to a trial by jury, do each of you understand that?
DEFENDANT JACKSON:	Yes.
DEFENDANT MILLER:	Yes.
COURT:	The fact that you're here this morning, indicates to the Court that you're about to enter pleas in the case, give up your right to a trial by jury, give up your right to confrontation and simply plead to the charge, am I correct about that?
MR. WITT:	Yes sir, it's a conditional plea, Judge.
MR. HONEYCUTT:	That's correct, that's on both of them, a conditional.
COURT:	Are you entering your pleas here based on the belief that you are in fact in violation, subject to the decisions by any appellant [*sic*] court on the legal issues involved.
DEFENDANT JACKSON:	Yes.
DEFENDANT MILLER:	Yes.
COURT:	All right, tell me about it.
MR. JONES:	Your Honor, on the date alleged in the information officers stopped the 2001 Nissan Maxima that these defendants were traveling in for following too closely; officers then ran a K-9 around the vehicle, and the K-9 alerted to the trunk area of the vehicle. Officers then searched the trunk area and found three black suitcases which contained bundles of marijuana, which weighed approximately 100 pounds, and the marijuana

	did test positive at the State Crime Lab, Your Honor.
COURT:	Is that true as it relates to you, Loretta?
DEFENDANT JACKSON:	Yes.
COURT:	Is that true as it relates to you, William?
DEFENDANT MILLER:	Yes.
COURT:	Each of you entering your plea voluntarily?
DEFENDANT JACKSON:	Yes.
DEFENDANT MILLER:	Yes.
COURT:	Each of you understand that the range of punishment here is 5 to 30 years in the Arkansas Department of Corrections [sic] — or is it 6 to 30, I guess isn't it, and/or a fine of $15,000?
DEFENDANT JACKSON:	Yes.
DEFENDANT MILLER:	Yes.
COURT:	Are either of you under the influence of any drug or anything to keep you from understanding what's happening?
DEFENDANT JACKSON:	No.
DEFENDANT MILLER:	No.
COURT:	Do you fully understand what's going on here, each of you?
DEFENDANT JACKSON:	Yes.
DEFENDANT MILLER:	Yes.

* * *

COURT:	Loretta, how do you plead on possession of marijuana with intent to deliver?
DEFENDANT JACKSON:	No contest.
COURT:	How do you plead, William?
DEFENDANT MILLER:	No contest.

The Court then sentenced the appellants.

The State correctly points out that the only thing we have in the abstract is appellants' judgment and commitment orders with

an attached sheet entitled "Additional Terms/Conditions of Disposition." These sheets indicate that the pleas entered were conditional, but do not indicate that they were with the approval of the court and consent of the prosecuting attorney. Found in the record were documents entitled "PLEA STATEMENT." However, neither of these documents indicate that they were approved by the court and consented to by the prosecuting attorney nor do they include the word "conditional" on them anywhere. *See Green v. State*, 334 Ark. 484, 978 S.W.2d 300 (1998) (where the record reflected that the handwritten word "conditional" appeared above the typed heading "PLEA STATEMENT" at the top of the form signed by appellant, and where that portion of the plea statement acknowledging waiver of the right to appeal was crossed out and initialed by appellant, appellant met the Ark. R. Crim. P. 24.3(b) requirement of "reserving in writing" his right to appellate review).

Nevertheless, what we have before us are appellants' judgment and commitment orders with an attached sheet entitled "Additional Terms/Conditions of Disposition." These sheets indicate that the pleas entered were conditional. Additionally, we have the conditional plea proceeding immediately following the suppression hearing where the trial court asked defense counsels, "[a]re we going to have some conditional pleas or not?" Finally, we have the presence of prosecuting attorney Will Jones who, during the conditional plea proceeding, informed the court of the facts of the case. Therefore, in accordance with our holding in *McCormick v. State, supra*, the prosecutor manifested assent by showing up in court and acquiescing to the entry of the negotiated plea agreement. To hold otherwise would be to give the State the benefit of the bargain while simultaneously relieving it of its obligation to consent. *See McCormick v. State*, 74 Ark. App. at 355, 48 S.W.3d at 552.

Motions to Suppress

In reviewing denial of a motion to suppress evidence, the appellate court makes an independent examination based upon the totality of the circumstances and reverses only if the decision is clearly against the preponderance of the evidence. *Hilton v. State*, 80 Ark. App. 401, 96 S.W.3d 757 (2003). A determination of the preponderance of the evidence depends heavily on questions of

credibility and weight to be given testimony, and the appellate court defers to the superior position of the trial court on those questions. *Id.*

Appellants contend that the trial court erred in denying their motions to suppress, according to the case of *Knowles v. Iowa*, 525 U.S. 113 (1998), because (1) probable cause did not exist as Trooper Triplett's only observation in attempting to reach the threshold of probable cause was that Mr. Miller broke eye contact when Ms. Jackson asserted her constitutional right to refuse consent to a search; and (2) Trooper Triplett did not have the authority to continue questioning them after he issued the traffic citations because (a) he did not fear for his safety and (b) he had gathered all necessary information for issuing a citation. We find appellants' arguments unpersuasive.

In order for a police officer to make a traffic stop, he must have probable cause to believe that the vehicle has violated a traffic law. *Laime v. State*, 347 Ark. 142, 60 S.W.3d 464 (2001). Probable cause is defined as facts or circumstances within a police officer's knowledge that are sufficient to permit a person of reasonable caution to believe that an offense has been committed by the person suspected. *Id.* "During this process, the officer may ask the motorist routine questions such as his destination, the purpose of the trip, or whether the officer may search the vehicle, and he may act on whatever information is volunteered." *Id.* at 158, 60 S.W.3d at 474. In assessing the existence of probable cause, appellate review is liberal rather than strict; whether a police officer has probable cause to make a traffic stop does not depend on whether the driver was actually guilty of the violation which the officer believed to have occurred. *Id.*

An officer who has reasonable cause to believe that a moving or readily movable vehicle contains things subject to seizure may, without a search warrant, stop, detain, and search the vehicle and may seize things subject to seizure discovered in the course of the search where the vehicle is on a public way or other area open to the public. *Vega v. State*, 56 Ark. App. 145, 939 S.W.2d 322 (1997). Furthermore, a canine sniff of the exterior of a vehicle does not amount to a Fourth Amendment search. *Willoughby v. State*, 76 Ark. App. 329, 65 S.W.3d 453 (2002). Moreover, when an officer has a police dog at his immediate disposal, a motorist's detention may be briefly extended for a canine sniff of

the vehicle in the absence of reasonable suspicion without violating the Fourth Amendment. *Id.* Once a canine dog alerts, an officer has probable cause to suspect the presence of illegal contraband. *See id.*

In the instant case, Trooper Triplett made a traffic stop because he had probable cause to believe that appellants' vehicle had violated a traffic law, namely following too closely. During the course of this stop, Trooper Triplett learned that appellants were traveling from California to Georgia to visit some friends, that they did not have any luggage, and that they did not know what was in the trunk of the vehicle. When Trooper Triplett asked appellant Jackson whether he could search the vehicle, appellant Miller became nervous. When consent was denied, Trooper Triplett walked his canine around the vehicle, and the dog alerted near the trunk of the vehicle. Although mere nervousness, standing alone, will not constitute reasonable suspicion of criminal activity and grounds for detention, *see Laime v. State, supra,* no further justification was needed here because neither appellant was under arrest and both were free to leave. However, upon learning the information that he did while conducting the traffic stop, Trooper Triplett was entitled to search the vehicle on Interstate 40 because the car was readily movable. *See Vega v. State, supra.* Furthermore, we cannot conclude that the trial court clearly erred in denying appellant's motion to suppress because even in the absence of reasonable suspicion and without violating the Fourth Amendment, Trooper Triplett, with his police dog at his immediate disposal, could perform a permissible canine sniff. The additional time it took for the dog to walk around the car was a minimal intrusion on appellants' personal liberty. Once the dog alerted, this constituted probable cause for Triplett to search appellants' vehicle.

Affirmed.

GLADWIN and BAKER, JJ., agree.

Judy BEAVER and Jimmy Beaver *v.* JOHN Q. HAMMONS HOTELS, INC., and John Q. Hammons Hotels, L.P.

CA 02-1106 102 S.W.3d 903

Court of Appeals of Arkansas
Division IV
Opinion delivered April 16, 2003

Daily & Woods, P.L.L.C., by: *Jerry Canfield*, for appellants.

Jones & Harper, by: *Niki T. Cung* and *Charles R. Garner, Jr.*, for appellees.

LARRY D. VAUGHT, Judge. This is a slip-and-fall case that has previously been before this court. The central issue presented is whether the circuit judge erred in granting summary judgment to the appellees John Q. Hammons Hotels, Inc., and John Q. Hammons Hotels, L.P., after holding that an earlier Arkansas Workers' Compensation Commission determination as to causation had a preclusive effect in this negligence action. As explained below, we hold that the judge did err, and we reverse and remand.

Procedural History

In April 1997, appellant Judy Beaver attended a seminar related to her work at the Holiday Inn Civic Center in Fort Smith. During a lunch break, Mrs. Beaver and some of her coworkers decided to eat lunch at the hotel's restaurant. While approaching the buffet, she slipped on an allegedly wet floor. She grabbed a coworker as she fell and hit the floor with her right

knee. Mrs. Beaver sought medical treatment in June 1997 and was diagnosed with a herniated disc. She then sought workers' compensation benefits for a compensable back injury. Although she was initially awarded such benefits, the Commission reversed on two grounds: (1) she was not performing employment services at the time of the injury; (2) she failed to prove that her disc herniation resulted from the April 1997 fall.

Mrs. Beaver appealed both findings to this court. In *Beaver v. Benton County Child Support Unit*, 66 Ark. App. 153, 991 S.W.2d 618 (1999), we affirmed the Commission's decision on the sole ground that there was substantial evidence to support the Commission's finding that she was not engaged in employment services at the time she fell. We did not address the issue of causation.

In 2000, Judy and Jimmy Beaver sued appellees John Q. Hammons Hotels, L.P., the owner of the hotel; John Q. Hammons Hotels, Inc., the manager of the hotel; and several John Does, alleging that their negligence caused Mrs. Beaver's injuries. Appellees moved for summary judgment, arguing that, because the Commission had determined that Mrs. Beaver had failed to prove physical harm resulting from the fall, she was collaterally estopped from litigating that issue in this action. The trial judge agreed and dismissed the claims against the hotel and its manager. We dismissed an appeal from that decision because the claims against the John Does had not been dismissed and, therefore, a final order was lacking. Appellants subsequently took a nonsuit of their claims against the John Does, and the circuit judge issued a final order of dismissal on the basis of collateral estoppel. This appeal followed.

Argument

Appellants argue that the trial judge erred in granting summary judgment to appellees because the Commission's determination as to causation is not entitled to preclusive effect. They base their argument on the facts that the causation issue was not the sole basis for the Commission's decision and that we did not address it in the appeal from the Commission.

Standard of Review

In reviewing summary-judgment cases, we determine whether the trial court's grant of summary judgment was appropriate based on whether the evidence presented by the moving party left a material question of fact unanswered. *Alberson v. Automobile Club Interins. Exch.*, 71 Ark. App. 162, 27 S.W.3d 447 (2000). The moving party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is not a genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Id.*

Collateral Estoppel

The doctrine of collateral estoppel or issue preclusion bars the relitigation of issues of law or fact actually litigated in the first suit. *Coleman's Serv. Ctr., Inc. v. Federal Deposit Ins. Corp.*, 55 Ark. App. 275, 935 S.W.2d 289 (1996). When an issue of fact or law is actually litigated and determined by a valid and final judgment and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. *Id.; Restatement (Second) of Judgments* § 27 (1982). Collateral estoppel may be asserted by a stranger to the first judgment or decree but is applicable only when the party against whom the earlier decision is being asserted had a full and fair opportunity to litigate the issue in question in the earlier proceeding. *Office of Child Support Enforcement v. Willis*, 347 Ark. 6, 59 S.W.3d 438 (2001); *Coleman's Serv. Ctr., Inc. v. Federal Deposit Ins. Corp., supra.* For collateral estoppel to apply, the following elements must be met: (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. *Van Curen v. Arkansas Prof. Bail Bondsman Licensing Bd.*, 79 Ark. App. 43, 84 S.W.3d 47 (2002). Decisions of an administrative board may be entitled to collateral estoppel effect. *Id.*

Additional considerations come into play, however, when the administrative board's decision is based on two different grounds;

this situation relates to the "essential to the judgment" requirement of collateral estoppel. Here, the circuit judge's decision is not in keeping with either the first or the second *Restatement of Judgments* because we did not address the causation issue in the appeal from the Commission's decision. Comment *n* to section 27 of the first *Restatement of Judgments* (1942), provided in part: "Where the trial court bases the judgment upon two alternative grounds, and an appellate court affirms the judgment solely on one of the grounds, the judgment is not conclusive in a subsequent action in which the other ground is in issue."

Comment *o* to section 27 of the second *Restatement* provides that, if the appellate court upholds one of the determinations as sufficient and refuses to consider the other, the judgment is conclusive only as to the first determination:

> If the judgment of the court of first instance was based on a determination of two issues, either of which standing independently would be sufficient to support the result, and the appellate court upholds both of these determinations as sufficient, and accordingly affirms the judgment, the judgment is conclusive as to both determinations. In contrast to the case discussed in Comment *i*, the losing party has here obtained appellate decision on the issue, and thus the balance weighs in favor of preclusion.
>
> If the appellate court upholds one of these determinations as sufficient but not the other, and accordingly affirms the judgment, the judgment is conclusive as to the first determination.
>
> If the appellate court upholds one of these determinations as sufficient and refuses to consider whether or not the other is sufficient and accordingly affirms the judgment, the judgment is conclusive as to the first determination.

It is true that the position adopted by the *Restatement (Second) of Judgments* § 27, Comment *o* (1982) has not been uniformly adopted. *See* 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 132.03[4][b] (3d ed. 2002); 46 AM. JUR. 2D *Judgments* § 591 (1994). However, it has been adopted by the Eighth Circuit Court of Appeals. *See Baker Elec. Coop., Inc. v. Chaske*, 28 F.3d 1466 (8th Cir. 1994) (applying North Dakota law).

In 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE: RES JUDICATA § 4421, at 568-70 (2d ed. 2002), the authors state:

> The Restatement Second of Judgments has sought to create a new intermediate ground of its own. As a first proposition, it would . . . deny preclusion as to any of the independently sufficient findings of a trial court. This view has found support in state law. Two paths are then offered to justify preclusion in other circumstances.
>
> On the first path, if an appeal is taken preclusion should attach to every ground that is in fact reviewed and affirmed by an appellate court. This result is justified on the ground that the fear of artificially forcing cautionary appeals is dispelled by the fact that an appeal was taken and review had. At the same time, it must be noted that this rule may have the converse effect of artificially discouraging appeals by parties who would choose to accept defeat in one case to avoid the risk of issue preclusion in another case. As to matters passed over by the appellate court, however, preclusion is not available on the basis of the trial-court decision. This result is supported by the fact that the appellate choice of grounds for decision has made unavailable appellate review of the alternative grounds.
>
> The federal decisions agree with the Restatement view that once an appellate court has affirmed on one ground and passed over another, preclusion does not attach to the ground omitted from its decision.

In their brief, appellees rely on cases from other jurisdictions that do not follow the modern rule as set forth in the comments to section 27 of the second *Restatement*. Although the appellate courts of this state have not addressed the precise question presented in this appeal, the supreme court has relied upon section 27 of the second *Restatement* in other situations. *See In re Estate of Goston v. Ford Motor Co.*, 320 Ark. 699, 898 S.W.2d 471 (1995); *John Cheeseman Trucking, Inc. v. Pinson*, 313 Ark. 632, 855 S.W.2d 941 (1993); *Smith v. Roane*, 284 Ark. 568, 683 S.W.2d 935 (1985).

In the circumstances presented by this case, we believe it is appropriate to follow Comment *o* to section 27 of the *Restatement (Second) of Judgments*. Accordingly, we hold that the circuit judge erred in giving preclusive effect to the Commission's causation determination.

Reversed and remanded.

PITTMAN and ROBBINS, JJ., agree.

Gary SAULSBERRY *v.* STATE of Arkansas

CA CR 02-725 102 S.W.3d 907

Court of Appeals of Arkansas
Division IV
Opinion delivered April 16, 2003

Gregory E. Bryant, for appellant.

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

LARRY D. VAUGHT, Judge. Appellant was convicted of simultaneous possession of drugs (marijuana) and a firearm, and possession of a controlled substance (marijuana) with intent to deliver, which was merged with the simultaneous possession conviction for sentencing. He was sentenced to ten years in prison. He raises two points of appeal: (1) whether Officer Green had a particular and articulable suspicion that a search of his truck was necessary for officer protection; (2) whether the State proved beyond a reasonable doubt that his firearm met the statutory definition of a firearm. We affirm.

On April 9, 2001, the State filed a three-count felony information charging appellant with simultaneous possession of drugs and a firearm, possession of a controlled substance with intent to deliver, and possession of a firearm by certain persons. Appellant filed a motion to suppress evidence seized during a warrantless search of his vehicle, arguing that no probable cause existed to believe that con-

traband was located in his vehicle. Prior to the December 11, 2001 bench trial, the parties agreed that the motion to suppress would be heard simultaneously with the trial on the charges.

At trial, the evidence revealed that at 8:46 p.m. on February 22, 2001, the Little Rock Police Department sent out a report regarding gunshots fired in the area of Seventeenth and Abigail Streets. Officer David Green was in the area and began looking for a red Chevrolet S-10 pickup truck, which was described in the report. Approximately five minutes later Officer Green passed a parked red Chevrolet S-10 at Twenty-third and Maple Streets. After he passed the truck, Officer Green turned around and stopped it at Asher and Maple Streets. Appellant exited the vehicle and the officer advised him of what was going on and asked appellant if he had any weapons. Appellant replied that he did not have any weapons. Officer Green testified that Officer McNair pulled up, took appellant to the side, and conducted a pat-down search, during which time Officer Green searched the vehicle for weapons. The vehicle had dark, tinted windows. When he opened the side door and looked in, he observed a .22 Derringer pistol in plain view on the driver's seat. Officer Green testified that the pistol was loaded with two rounds. Appellant was then arrested, and his vehicle was searched incident to arrest. Officer Green stated that he and Officer Gilbert found approximately five pounds of marijuana in the cab of the truck.

On cross-examination, Officer Green explained that he decided to look inside the vehicle because of the report of a suspected vehicle that was involved in the shots-fired call, but he did not have reason to believe that appellant had done anything himself or that there was a gun in the vehicle. He added that appellant did not present a danger to him because he was in the custody of another officer and did not have access to the weapon. In order to access the weapon, Officer Green stated that appellant would have had to open the door and grab it while Officer Green stood between him and the door to the car. Officer Green testified that he did not believe appellant when he said he did not have a gun. He stated that he searched the vehicle for police and public safety and thought he had reasonable cause to do so because of the police broadcast, although the issue of officer safety had disappeared when the other officer took appellant aside and patted him down.

At the conclusion of trial, the trial court denied the motion to suppress and found appellant guilty of simultaneous possession of drugs and a firearm and possession of a controlled substance with intent to deliver, and sentenced him to ten years in prison. An order denying the motion to suppress was entered December 17, 2001, and the judgment and conviction order was entered on December 27, 2001. Of his two points of appeal, we first consider appellant's argument that there was insufficient evidence to convict him of simultaneous possession of drugs and a firearm because double jeopardy considerations require that we consider a challenge to the sufficiency of the evidence prior to other issues on appeal. *Atkinson v. State*, 347 Ark. 336, 64 S.W.3d 259 (2002).

Appellant argues the evidence is insufficient to support the simultaneous possession of drugs and a firearm conviction because the State failed to prove that appellant's firearm met the statutory definition of a firearm. We cannot reach the merits of appellant's argument because it is not preserved for our review.

Rule 33.1 of the Arkansas Rules of Criminal Procedure provides that if a motion for dismissal is made, it shall be made at the close of all the evidence. It has been repeatedly held that a directed-verdict motion requires a movant to apprise the court of the specific basis on which the motion is made. *Spencer v. State*, 348 Ark. 230, 72 S.W.3d 461 (2002); Ark. R. Crim. P. 33.1.

Appellant's motion for directed verdict as to the simultaneous possession charge was insufficient. Although appellant failed to abstract the motion, the record demonstrates that after the State rested and after the trial court's finding of guilt, defense counsel merely stated,

> Your honor, you made a finding of guilty before I could move to dismiss the count regarding simultaneous drugs and firearms. When you asked if there was anything else, I assumed you were referring to the motion to suppress. But on the issue of simultaneous possession, I move to dismiss for lack of sufficient proof.

Even if the motion had been timely, it did not specify the respect in which the evidence was insufficient. Thus, the issue was not preserved for review.

If the issue had been preserved, there is substantial evidence to support the conviction. Directed-verdict motions are treated as challenges to the sufficiency of the evidence. *Vergara-Soto v. State*, 77 Ark. App. 280, 74 S.W.3d 683 (2002). When we review a challenge to the sufficiency of the evidence, we will affirm the conviction if there is substantial evidence to support it, when viewed in the light most favorable to the State. *Id.*

Appellant only argues that the State failed to prove that appellant's firearm meets the statutory definition set out in Ark. Code Ann. § 5-1-102(6) (Supp. 2001). Officer David Green testified that when he opened the side door of appellant's car and looked in the driver's seat he observed a .22 Derringer pistol in plain view, which was loaded with two rounds. This constitutes substantial evidence that the .22 pistol was a firearm within the meaning of the statute.

Appellant also argues that the trial court erred in denying his motion to suppress because Officer Green did not have a particular and articulable suspicion that a search of appellant's truck was necessary for officer protection. The supreme court in *Davis v. State*, 351 Ark. 406, 94 S.W.3d 892 (2003), recently clarified the standard of review of a suppression challenge. The standard is that we conduct a *de novo* review based on the totality of the circumstances, reviewing findings of historical facts for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the trial court. *Id.*

The circuit court in the present case found Officer Green to be credible and that he had a reasonable suspicion that appellant was armed and that the weapon was likely inside the vehicle. The court acknowledged that appellant was being detained by other officers at the time of the search and relied on Officer Green's testimony that he searched the vehicle based on the police dispatch call and on the concern for safety. The court, in denying appellant's motion to suppress, specifically found "that the radio dispatch call in conjunction with area and time in which the stop occurred, and Green's concern for officer safety, gave the officer just cause for searching the vehicle."

Appellant does not argue that Officer Green did not have the authority to stop and interrogate him. Rather, he only contends that Officer Green's initial search of his vehicle violated the Arkansas Constitution and Ark. R. Crim. P. 3.4. Rule 3.4 provides:

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

Reasonable suspicion is defined by Ark. R. Crim. P. 2.1 as follows:

> "Reasonable suspicion" means a suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion.

Appellant cites the cases of *Reeves v. State*, 20 Ark. App. 17, 722 S.W.2d 880 (1987), and *Michigan v. Long*, 463 U.S. 1032 (1983), in support of his argument. Both *Reeves* and *Long* involved situations where the defendants were stopped based on reports of suspected DWI. During both of the stops, officers saw weapons in plain view within the vehicle.

In upholding the search of Reeves's vehicle, this court relied heavily on *Long,* stating:

> The facts in *Long* led the Supreme Court to conclude that "the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief . . . that the suspect is dangerous and . . . may gain immediate control of weapons." *Long* at 1049, 103 S. Ct. at 3480. The Court then noted that if while conducting a legitimate protective search of the interior of the vehicle the officer should discover contraband other than weapons, he cannot be required to ignore the contraband, and "the Fourth Amendment does not require its suppression in such circumstances." *Long* at 1050, 103 S. Ct. at 3481.
>
> The appellant argues that the officer in the present case neither felt threatened nor had a reasonable suspicion that the

> appellant was dangerous. In *Long,* the lower court had determined that it was not reasonable for the officers to fear the driver because he was effectively under their control during the investigative stop and could not get access to any weapons that might have been located in the car. Also, the driver of the vehicle had not manifested a violent disposition. In reversing the state court's decision, the Supreme Court stated that such suspects not only have the opportunity to break away from police control and retrieve a weapon from the vehicle, but also, if not placed under arrest, they would ultimately be able to reenter the vehicle and have access to any weapons inside. *Long* at 1052, 103 S. Ct. at 3482. Our reading of the record in this case reveals ample evidence that Officer Redding felt that the presence of the weapon constituted a threat and that, for his own safety and that of others nearby, it was necessary to secure the weapon while the appellant was being detained by the second officer.

Reeves v. State, 20 Ark. App. at 25-26, 722 S.W.2d at 884-85.

The same reasoning that the Supreme Court used in *Long* and that we relied on in *Reeves* supports the circuit court's decision in this case. The court in *Long* held that the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief that the suspect is dangerous and may gain immediate control of weapons.

Although Officer Green testified that appellant did not present a danger to him because he was in the custody of a fellow officer, it was still possible that appellant could have broken away from police and had access to any weapons in the truck. Moreover, unlike *Long* and *Reeves*, appellant was stopped because his vehicle met the description of the police broadcast regarding a crime involving a weapon. Because appellant's vehicle met the description and he was found within minutes of the police broadcast and within blocks of the scene of the shots-fired incident, it was reasonable for Officer Green to believe that appellant could be dangerous and could gain control of a weapon. While the facts of *Reeves* and *Long* indicate that the officers saw the weapons in plain view without having to first enter the vehicle, Officer Green did not observe the weapon until he opened the door to search for weapons. Once Officer Green opened the door of the car, which had dark-tinted windows, the weapon was in plain view on the driver's seat. He testified that he had a reason to believe that a

weapon was in appellant's car because of the police broadcast. Because appellant was stopped as a result of the shots-fired report that identified the suspect as driving a vehicle that met the description of appellant's truck, it was reasonable for Officer Green to search the passenger compartment of the automobile for the safety of the officers and the safety of others. If the officers had released appellant without conducting the search, he could have returned to the truck and had access to the weapon.

Another case cited by the State also supports the trial court's decision. In *Hill v. State*, 275 Ark. 71, 628 S.W.2d 284 (1982), police received reports of incidents involving robbery, kidnapping, and murder that had occurred earlier in the afternoon. The broadcast contained a description of the suspect, as well as the vehicle and license number. The suspect was described as armed and extremely dangerous. The police observed a vehicle matching the description and initiated a stop. While one officer frisked the appellant, another officer searched the immediate area of the car where the appellant had been sitting, and found a weapon. The appellant filed a motion to suppress, which was denied. On appeal, he argued that both the stop and the search were unreasonable. The supreme court relied on *Terry v. Ohio*, 392 U.S. 1 (1967), in affirming the trial court's decision denying the motion to suppress. With respect to the search, the court reasoned:

> The search here was completely reasonable when considered under the totality of the existing circumstances. The officers would have taken an unnecessary risk if they had attempted to talk with the appellant before searching him and the accessible areas of his car; removing appellant from his car was a prerequisite to the safety of the officers in making such a search. Although appellant was standing behind the car with his hands on the trunk at the time of the search, the mere fact of appellant's removal from the car did not remove the possible danger to the officers and thereby obviate the necessity for the search. It was certainly reasonable to believe that a suspect believed to have kidnapped, robbed, and executed a Game and Fish Officer, and, simultaneously, attempted to do the same thing to another person was capable of breaking for a weapon inside his car, and probably would have been highly motivated to do so. Here, the limited search of the car was both "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry v. Ohio, supra.*

Hill v. State, 275 Ark. at 82, 628 S.W.2d at 289. Although the facts in *Hill* were more compelling given the more serious nature of the crimes, the reasoning supports the trial court's decision in this case. Unlike *Reeves* and *Long*, the gun in *Hill* was not found in plain view. Rather, the officers entered Hill's vehicle to conduct the search for weapons and found the weapon under the driver's seat.

Based on the totality of the circumstances, we cannot say that the trial court's decision denying the motion to suppress was clearly erroneous.

Affirmed.

PITTMAN and ROBBINS, JJ., agree.

Diana LANCASTER and Michael Kehn *v.* STATE of Arkansas

CA CR 02-849 105 S.W.3d 365

Court of Appeals of Arkansas
Division III
Opinion delivered April 23, 2003

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

J. Leon Johnson, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.

JOHN F. STROUD, JR., Chief Judge. Upon the trial court's denial of their prehearing motions to suppress, Diana Lancaster and Michael Kehn entered conditional pleas of guilty, pursuant to Rule 24.3 of the Arkansas Rules of Criminal Procedure, to the offenses of manufacture of a controlled substance (marijuana), possession of marijuana with intent to deliver, and possession of drug paraphernalia with intent to deliver. They were each sentenced to five years' probation; Lancaster was assessed a $2500 fine and Kehn was ordered to pay a $5000 fine. The cases were consolidated for purposes of appeal. Appellants argue that the trial court erred in denying their motions to suppress because the police officers had no probable cause to be on their property and therefore had no legitimate basis for the issuance of a search warrant; they further argue that the search warrant was invalid because it was issued by an "improper magistrate." We affirm.

When reviewing the trial court's denial of a motion to suppress, this court makes an independent determination based on the totality of the circumstances. *Embry v. State*, 70 Ark. App. 122, 15 S.W.3d 367 (2000). The appellate court will reverse a denial of a motion to suppress only if the trial court's ruling was clearly against the preponderance of the evidence. *Id.*

At the hearing on the motion to suppress, Investigator Afton Fletcher of the drug task force testified that in May 2001 he was assisting probation officer Curt Decker in attempting to locate one of Decker's probationers, Terry Copeland. The officers were unsure where Copeland was living, so they were going from house to house asking residents if they knew Copeland or where he

lived. When the officers came to appellants' driveway about 12:15 p.m., they pulled in; Fletcher stated that the house could not be seen from the road.

Appellant Lancaster came outside when the officers pulled up, and they asked her if she knew where Copeland lived. Fletcher said that the officers did not suspect any criminal activity on Lancaster's part at that time. However, Lancaster began telling the officers about people who were shooting guns in the woods behind her house. When asked where, Lancaster pointed to the rear of her house. When she pointed, Fletcher said that he saw a garden with a rail fence around it behind her house toward an outbuilding; Fletcher said that he could see marijuana plants between the fence rails. The marijuana was in boxes approximately four-feet wide and eight-feet long, and the plants looked to have been freshly watered. When asked about the plants, Lancaster said "where"; when Lancaster and the officers walked over to the garden, Lancaster asked "where" again, and Fletcher told her, "right there." Lancaster then became upset, said that marijuana should be legal, and started toward the house. The officers followed Lancaster to the front porch, where Fletcher advised her of her Miranda rights. Fletcher asked if they could search the house, which Lancaster refused. As Lancaster attempted to open the door and go inside, Fletcher heard dogs inside the house; he then pulled her back out onto the porch, shut the door, and told Lancaster that she was under arrest. Lancaster was transported to jail while the officers secured the scene and Fletcher obtained a search warrant. Fletcher testified that appellant Kehn arrived at the house during the execution of the search warrant; he was told what the officers were doing and was advised of his Miranda rights. Kehn denied knowledge of how the plants got onto his property.

Probation officer Curt Decker testified that in May 2001 Investigator Fletcher and Deputy Burnett were assisting him in searching for Terry Copeland, one of his probationers. He said that he had not heard from Copeland in over a month, and there was some question as to whether he was living in that area or if he had moved to Batesville. Decker said that he did not know where Copeland was, and on that day they were simply going from house to house attempting to locate him. He said that they had stopped at a number of residences to ask if anyone knew where Copeland

lived or had any idea where to find him, but they had no leads. He said that when they turned into the appellants' property, they had "no idea" who lived there, but that they were just trying to locate Copeland or some information on him. Decker recognized Lancaster when she came outside, and she began telling the officers about gunshots and pointing toward the back of her house. Decker said that was when Fletcher noticed something and began asking Lancaster questions and walking toward the garden. He said that once the marijuana plants were pointed out to him, he could see the tops of them from where he had been standing.

Appellants contend on appeal that the officers had no reason to be on their property and therefore their motions to suppress should have been granted. Appellants cite no authority in their brief for this argument, and this alone is grounds to affirm the trial court's ruling. This court will not consider an argument when the appellant presents no citation of authority or convincing argument in its support and it is not apparent without further research that the argument is well taken. *Hollis v. State*, 346 Ark. 175, 55 S.W.3d 756 (2001).

Nevertheless, the trial court did not err in denying appellants' motions to suppress. Appellants complain that the officers had no reason to come onto their property because they did not have any information that the probationer for whom they were searching was on appellants' property. There is nothing in the Constitution that prevents the police from addressing questions to any individual. *Jefferson v. State*, 349 Ark. 236, 76 S.W.3d 850 (2002). The Fourth Amendment does not protect the merely subjective expectation of privacy, but only those expectations that society is prepared to recognize as reasonable. *Burdyshaw v. State*, 69 Ark. App. 243, 10 S.W.3d 918 (2000). Police officers in *Burdyshaw*, acting upon an anonymous tip that a methamphetamine lab was on the premises, drove up the appellant's driveway to ask him if they could search the residence, and appellant's father gave written consent. In upholding the trial court's denial of appellant's motion to suppress the evidence obtained in the search, this court held that the expectation of privacy in driveways and walkways that are commonly used by visitors to approach dwellings is generally not considered reasonable; however, the question of whether a driveway is protected from entry by police officers is

dependent upon the circumstances, with reference to factors such as accessibility and visibility from a public highway. In that case, this court was persuaded by the rationale set forth in *United States v. Ventling,* 678 F.2d 63, 66 (8th Cir. 1982):

> The absence of a closed or blocked gate in this country creates an invitation to the public that a person can lawfully enter along the driveway during daylight hours to contact the occupants for a lawful request and if the request is refused to leave by the same way. The presence of "no trespassing" signs in this country without a locked or closed gate makes the entry along the driveway for the purposes above described not a trespass and therefore does not constitute an intrusion prohibited by the Fourth Amendment.

This court further stated, "If one has a reasonable expectation that various members of society may enter the property in their personal or business pursuits, he should find it equally likely that the police will do so." *Burdyshaw,* 69 Ark. App. at 248, 10 S.W.3d at 921 (citing *Oregon v. Corbett,* 516 P.2d 487, 490 (1973)).

The facts of the present case are less intrusive than the facts found in *Burdyshaw.* Here, the officers were not requesting permission to search appellants' premises; they were lawfully seeking assistance in locating a missing probationer when they came to appellants' unblocked driveway and proceeded to their house to inquire if appellants knew the whereabouts of Copeland. We hold that there was no violation of appellants' Fourth Amendment rights when the officers drove up their driveway to their house, and the trial court did not err in denying the motions to suppress.

Appellants also contend that the search warrant was invalid because it was issued by an "improper magistrate." The search warrant was presented to and signed by Izard County District Judge Dewayne Lawrence, although the officers were from Stone County and appellants' property was located in Stone County. Investigator Fletcher testified that the warrant was presented to Judge Lawrence because he was the only judge available at the time, and he understood that Judge Lawrence and Adam Harkey, the Stone County District Judge, had an exchange agreement with each other.

Appellants now argue that this jurisdiction-exchange agreement was invalid pursuant to Arkansas Code Annotated section

16-17-102 (Repl. 1999). However, Arkansas Code Annotated section 16-17-102 has no application to this case: that statute concerns the exchange of jurisdiction of district court judges, formerly municipal court judges, to enter into agreements that authorize such judges to sit as judge in each other's districts.

The statute applicable to the present case is Arkansas Code Annotated section 16-82-201(a) (Supp. 2001), which provides, "A search warrant may be issued by any judicial officer of this state only upon affidavit sworn to before a judicial officer which establishes the grounds for its issuance." This precise issue was addressed by our supreme court in *Brenk v. State*, 311 Ark. 579, 847 S.W.2d 1 (1993). In that case, the appellant argued that a search warrant was invalid because a Marion County municipal judge had signed the warrant for Baxter County without a written agreement pursuant to Ark. Code Ann. § 16-17-206. In rejecting this argument, the supreme court held:

> Appellant's construction would have us limit the ability of a judge to issue a warrant to affect only property in the county in which the judge has jurisdiction. Section 16-17-206 is not applicable. The statute which controls a judicial officer's ability to issue a search warrant is Ark. Code Ann. 16-82-201 (1987). It provides in pertinent part: "A search warrant may be issued by any judicial officer of this state only upon affidavit sworn to before a judicial officer which establishes the grounds for its issuance." Ark. Code Ann. 16-82-201(a). The applicable statute does not give any indication that the jurisdiction of a judicial officer in issuing search warrants is limited to the county in which the judicial officer was elected or appointed. In fact, it expressly provides that a search warrant may be issued by any judicial officer. We refuse to find that judicial officers are limited to issuing search warrants only in the counties in which they were elected or appointed and, therefore, find that the search warrant issued by Judge Bearden was valid.

311 Ark. at 590-91, 847 S.W.2d at 7. In light of the *Brenk* holding, appellants' argument that the warrant was invalid must fail.

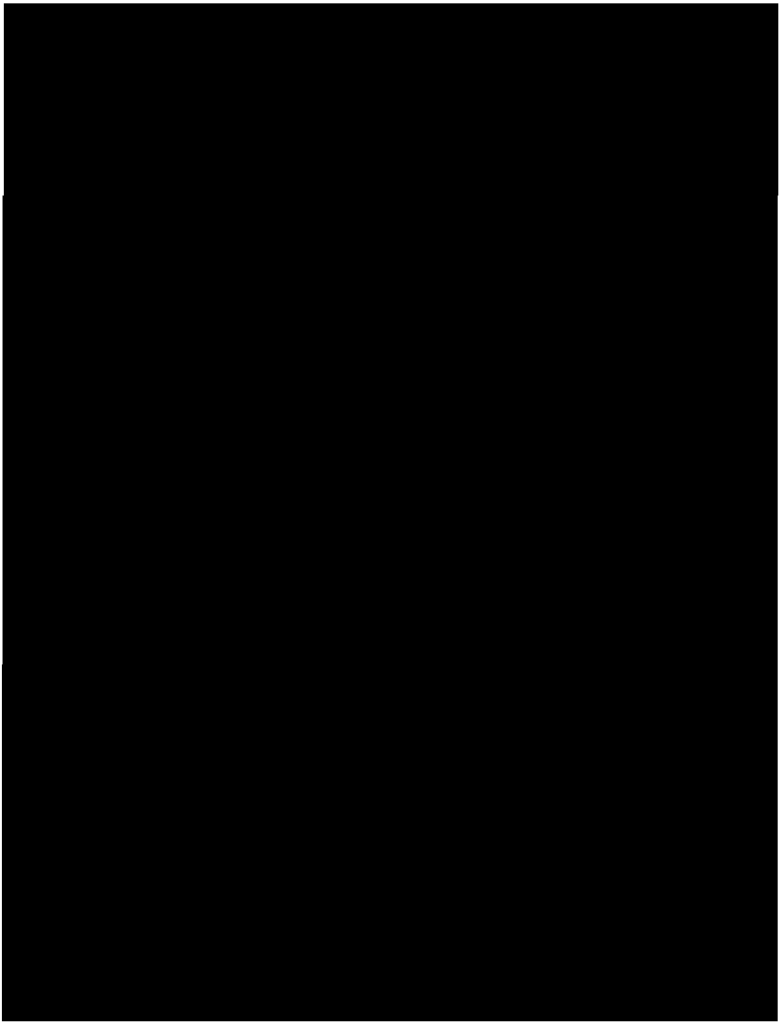
Affirmed.

ROBBINS and CRABTREE, JJ., agree.

Allen LAMPKIN *v.* STATE of Arkansas

CA CR 02-940 105 S.W.3d 363

Court of Appeals of Arkansas
Division IV
Opinion delivered April 23, 2003



Angela Felecia Epps, UALR School of Law Legal Clinic, for appellant.

Mark Pryor, Att'y Gen., by: *David J. Davies*, Ass't Att'y Gen., for appellee.

JOHN MAUZY PITTMAN, Judge. This is an appeal from a DWI conviction after a bench trial. Appellant contends that the trial court erred in denying his motion to strike evidence of a breathalyzer test because the police failed to provide him with reasonable assistance in obtaining an additional test. We find no error, and we affirm.

Arkansas Code Annotated § 5-65-204(e) (Supp. 2001) establishes the right of a person tested for alcohol content at the direction of a law enforcement officer to have an additional test performed as follows:

> (e)(1) The person tested may have a physician or a qualified technician, registered nurse, or other qualified person of his own choice administer a complete chemical test in addition to any test administered at the direction of a law enforcement officer.
>
> (2) The law enforcement officer shall advise the person in writing of this right and that if the person chooses to have an additional test and the person is found not guilty, the arresting law enforcement agency will reimburse the person for the cost of the additional test.
>
> (3) The refusal or failure of a law enforcement officer to advise a person of this right and to permit and assist the person to obtain a test shall preclude the admission of evidence relating to the test taken at the direction of a law enforcement officer.

When a defendant moves to exclude admission of a test pursuant to § 5-65-204(e)(3), the State bears the burden of

proving by a preponderance of the evidence that the defendant was advised of his right to have an additional test performed and that he was assisted in obtaining a test. *See Kay v. State*, 46 Ark. App. 82, 877 S.W.2d 957 (1994). Substantial compliance with the statutory provision about the advice that must be given is all that is required, *Hegler v. State*, 286 Ark. 215, 691 S.W.2d 129 (1985), and the officer must provide only such assistance in obtaining an additional test as is reasonable under the circumstances presented. *Williford v. State*, 284 Ark. 449, 683 S.W.2d 228 (1985); *Fiegel v. City of Cabot*, 27 Ark. App. 146, 767 S.W.2d 539 (1989). Whether the assistance provided was reasonable under the circumstances is ordinarily a fact question for the trial court to decide. *Fiegel v. City of Cabot, supra.* On appeal, the question to be decided is whether the trial court's finding of reasonable assistance to obtain another test is clearly against the preponderance of the evidence. *Kay v. State, supra.*

The record in the present case reflects that appellant was driving his automobile on Interstate 630 when Trooper Bain observed appellant weaving and speeding. Trooper Bain stopped appellant and noticed that appellant's face was flushed, his eyes were bloodshot, and he smelled of alcohol. After conducting and observing the results of three field-sobriety tests, Trooper Bain arrested appellant and transported him to the Pulaski County Jail for a BAC Datamaster test. Prior to the test, appellant was advised of his right under Ark. Code Ann. § 5-65-204(e) to have an independent chemical test performed at his own expense.

Trooper Robinson testified that he made contact with appellant at the Pulaski County Jail when Trooper Bain asked him to administer a BAC Datamaster test to appellant. Trooper Robinson further testified that, although appellant agreed to submit to the test, he did not take the test at first. After appellant had been observed for the requisite twenty-minute period and Trooper Robinson was preparing the machine to administer the test, appellant put a quarter in his mouth, requiring another twenty-minute period of observation before a valid test could be performed. After the second period of observation, Trooper Robinson again attempted to administer the test, but appellant would not blow into the machine as directed, and the test results were incomplete. After the second attempt, Trooper Robinson again explained the procedure to appellant and reloaded the machine.

On the third attempt, appellant did comply with instructions and a valid result of .106 was obtained at 1:19 a.m.

Appellant requested an additional test. In response, Trooper Bain gave appellant a telephone book and told him that local hospitals could provide the test. Appellant was released, and he telephoned his sister at 2:00 a.m. Appellant's sister picked him up at a nearby McDonald's at 2:15 a.m. There is no evidence that appellant requested any additional assistance in obtaining an independent test, or that he had such a test performed on his release.

We think that the trial court could properly find, on this record, that appellant was at least passively uncooperative with regard to the BAC Datamaster test. He delayed the test substantially by putting a quarter in his mouth on the first try, requiring another twenty-minute waiting period, and then made inadequate efforts on the second test. A valid result was not obtained until the third attempt. In our view, this evidence of appellant's uncooperative passivity is pertinent to the question of whether the police provided him with reasonable assistance in obtaining an additional test. Although appellant was informed that local hospitals could perform an additional test and was provided with a telephone book, there is no evidence that appellant requested any other assistance. Appellant makes much of the fact that he was not offered transportation to obtain an additional test, but we think this fact is of no significance in the absence of any evidence that appellant had selected a testing facility and requested to be transported there. Appellant's behavior is in contrast to that of the appellant in *Kay v. State, supra,* who asked where he could obtain an additional test and was involved in attempting to arrange for an acceptable form of payment at that facility. Here, appellant did nothing except state that he wanted an additional test, asking no questions, making no effort to take advantage of the resources with which he had been provided, and requesting no additional resources. Given the evidence of appellant's other passively uncooperative behavior and his failure to utilize the resources with which he was provided or request any additional help, we think that the trial judge's finding that the assistance offered was reasonable was not clearly against the preponderance of the evidence.

Affirmed.

ROBBINS and VAUGHT, JJ., agree.

Wayne McCARLEY *v.* Rachael SMITH

CA 02-537 105 S.W.3d 387

Court of Appeals of Arkansas
Division IV
Opinion delivered April 23, 2003

Herby Branscum, Jr. and *James Henderson*, for appellants.

Alvin Schay, for appellee.

JOHN MAUZY PITTMAN, Judge. The appellee, Rachael Smith, is the mother of appellant, Wayne McCarley. Appellee filed suit against appellant, alleging that he convinced her to deed her 108-acre farm to him so that he could obtain a loan to pay off mortgage debts on the property and make improvements, with the agreement that he would re-deed the property back to her. She further alleged that he failed to return the property to her, and prayed that the court would order him to do so. Appellant denied making any such agreement and filed a counterclaim, alleging that he had incurred damages in the form of a lost chicken contract because of his mother's lawsuit. The circuit judge entered an order that contained no findings of fact, but simply dismissed appellant's counterclaim and granted appellee a life estate in the disputed property. The son appeals, asserting that the circuit judge's order is not supported by the evidence and is otherwise erroneous, and the mother cross-appeals, asserting that the grant of a life estate was inadequate relief. We reverse and remand.

Our supreme court has recently stated:

> To impose a constructive trust, there must be full, clear, and convincing evidence leaving no doubt with respect to the necessary facts, and the burden is especially great when a title to real estate is sought to be overturned by parol evidence. The test on review is not whether the court is convinced that there is clear and convincing evidence to support the chancellor's finding but whether it can say the chancellor's finding that the disputed fact was proved by clear and convincing evidence is clearly erroneous, and we defer to the superior position of the chancellor to evalu-

> ate the evidence. 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 has been committed.

Nichols v. Wray, 325 Ark. 326, 333, 925 S.W.2d 785, 789 (1996) (internal citations omitted).

We are convinced that a mistake has been committed in the present case because the trial court's order is not supported by the facts in evidence. It would be permissible, in a land-transfer case, for the court to impose a constructive trust and grant relief in the form of a life estate if there was clear and convincing evidence that the land was deeded with the intention that the conveyor would be allowed to live on the land for the rest of her life. This was done in *Brasel v. Brasel*, 313 Ark. 337, 854 S.W.2d 346 (1993). However, there was no such evidence in the present case. The only evidence of an agreement came from the appellee, who stated that she deeded the property to her son in order to get a loan with the understanding that he would later return the property to her. This evidence, if believed, would support the imposition of a constructive trust, but the relief would not be a life estate because there was no agreement to that effect. Instead, the proper relief in these circumstances would be to require the mother to reimburse the son for his expenses, at which time the mother would be entitled to have legal title vested in her. *See, e.g., Kerby v. Feild,* 183 Ark. 714, 38 S.W.2d 308 (1931).

Because the imposition of a constructive trust is potentially consistent with the facts in evidence, but the relief granted by the circuit judge is not, we are unable to determine the basis for the chancellor's decision on appellate review sufficiently to permit us to fully address the issues presented on appeal and cross-appeal. Therefore, further proceedings are needed to allow the chancellor to fashion relief consistent with the facts in evidence. Consequently, we reverse and remand for further proceedings consistent with this opinion. *See Wrightsell v. Johnson,* 77 Ark. App. 79, 72 S.W.3d 114 (2002).

Reversed and remanded.

ROBBINS and VAUGHT, JJ., agree.

Gene ADDINGTON *v.* WAL-MART STORES, INC.

CA 02-626 105 S.W.3d 369

Court of Appeals of Arkansas
Division II
Opinion delivered April 23, 2003

Odom & Elliott, by: *Bobby Lee Odom* and *Conrad T. Odom*; and *Ray Bunch* for appellant.

Matthews, Campbell, Rhoads, McClure, Thompson & Fryauf, P.A., by: *David R. Matthews* and *George R. Rhoads*, for appellee.

JOSEPHINE LINKER HART, Judge. In this case from Benton County, the trial court granted summary judgment to Wal-Mart on five causes of action brought against it by appellant Gene Addington, a former employee: 1) the tort of outrage; 2) false-light invasion of privacy; 3) intrusion invasion of privacy; 4) defamation; and 5) negligence. Addington argues that summary judgment was inappropriate because genuine issues of material fact remain on each count. We affirm the grant of summary judgment on the outrage, false-light invasion of privacy, defamation, and

negligence claims. However, we reverse and remand on the intrusion invasion-of-privacy claim.

Gene Addington is the former maintenance supervisor of Wal-Mart's home office maintenance facility in Bentonville. In August of 1998, he was terminated when it was discovered that he was in possession of property that belonged to Wal-Mart. He later filed suit against Wal-Mart, alleging that, in conducting the investigation that led to his termination, Wal-Mart committed the above mentioned tortious conduct. To place his allegations in context, it is necessary to recite a history of the investigation and surrounding events.

On August 13, 1998, two Wal-Mart loss prevention officers, Jim Elder and Keith Womack, began surveillance of Bob Kitterman, an employee of Wal-Mart's home office maintenance department. The surveillance led to the discovery that Kitterman and his son-in-law were in possession of tools and other property allegedly stolen from Wal-Mart. On August 17, another maintenance facility employee, David Clark, was interviewed with regard to stolen property. A subsequent search of Clark's home resulted in the seizure of approximately 400 items that Wal-Mart contended were stolen from its facility. Thereafter, on August 20, 1998, Elder and Womack, along with personnel officer Melinda Hass, interviewed the other employees of the maintenance department. During the interviews, employee Hays Buenning admitted to being in possession of Wal-Mart property that he did not own. A search of Buenning's home by Elder and Womack revealed several items allegedly belonging to Wal-Mart. Buenning was suspended, and he spoke with Addington on the phone that night, telling Addington that his (Buenning's) house had been "ransacked."

The next day, August 21, 1998, Womack conducted an interview with Addington. He asked Addington if he had any property that belonged to Wal-Mart. Addington admitted that he had some light poles in his yard that had been given to him by his supervisor Bob Murphy and a VCR and monitor that he had gotten from David Clark, though he was not sure if they belonged to Wal-Mart. According to Addington, Womack asked if they might go to Addington's home to view the light poles. Addington

agreed, and Elder and Womack followed him in a separate car. While they were en route, Elder called for a Benton County deputy to meet the men at Addington's house, telling the dispatcher that stolen property from Wal-Mart was located there.

When the deputy arrived, Elder asked Addington to sign a consent form to allow a search of his home. Addington refused until he could speak with his wife, who was inside the home. After speaking with Mrs. Addington, who became very upset, Addington again communicated his refusal to sign the consent form, and he went back inside the house. The men stayed on the premises, however, and Addington observed Elder walking toward his shop building. Addington returned to the front porch and reiterated that he would not sign the consent. According to Addington, Womack said, "Well, we'll just call the IRS and let them do the math." During this same time frame, Elder said to Addington, "Gene, I can get a search warrant. I've already talked to someone." Also, according to Mrs. Addington, Womack stated at some point that "we don't need the media involved in this" or "we don't need to get the media up here." Addington went back inside, called attorney Paul Davidson, and told him that he was afraid that, if he did not consent to the search, his job would be in jeopardy. Davidson told him that, while he did not have to consent to the search, Wal-Mart could probably obtain a warrant and that, if he was convinced that refusal to consent would result in his termination, he should allow the search. At that point, Addington went back outside and signed the consent form. The time span between the parties' arrival at the Addington property and the signing of the consent form was approximately thirty minutes. During this time, the deputy never spoke with Addington; he sat in his car in the driveway.

After Addington signed the consent form, Elder conducted a search of Addington's shop with the deputy alongside him. Elder questioned Addington about where he had obtained various items. Addington explained where he had purchased the items and, once a satisfactory explanation was given, Elder mentioned it no further. However, Addington admitted that, in addition to the light poles, monitor, and VCR, he had some toilets and water heaters that he had removed from a Wal-Mart facility. Addition-

ally, he had a security camera, which he had purchased from a Wal-Mart vendor for $5.00, in violation of company policy. Elder confiscated the monitor and VCR and asked Addington to disconnect the camera and bring it with him to the office on Monday. Addington was suspended on the spot and later terminated. In all, five employees were fired as the result of this investigation. Wal-Mart's handling of the investigation has led to several lawsuits being filed by the men accused.

After Addington filed the instant action in Benton County Circuit Court, seeking redress for outrage, false-light invasion of privacy, intrusion invasion of privacy, defamation, and negligence, discovery was undertaken. Thereafter, Wal-Mart filed a motion for summary judgment on each count in the complaint. The trial court granted the motion, and this appeal followed.

Our standard of review of summary-judgment cases is well established. We have ceased referring to summary judgment as a drastic remedy. *Cumming v. Putman Realty, Inc.*, 80 Ark. App. 153, 92 S.W.3d 698 (2002). We now regard it simply as one of the tools in a trial court's efficiency arsenal; however, we approve the granting of the motion only when the state of the evidence as portrayed by the pleadings, affidavits, discovery responses, and admissions on file is such that the nonmoving party is not entitled to a day in court, *i.e.*, when there is no genuine remaining issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* The burden of proving that there is no genuine issue of material fact is upon the movant, and all proof submitted must be viewed favorably to the party resisting the motion. *Id.* Where the evidence, although in no material dispute as to actuality, reveals aspects from which inconsistent hypotheses might reasonably be drawn and reasonable minds might differ, summary judgment is not proper. *Lee v. Hot Springs Village Golf Sch.*, 58 Ark. App. 293, 951 S.W.2d 315 (1997).

Our supreme court recently affirmed a jury verdict of $651,000 in compensatory damages and $1,000,000 in punitive damages on behalf of David Clark for invasion of privacy and defamation. *See Wal-Mart Stores, Inc. v. Lee*, 348 Ark. 707, 74 S.W.3d 634 (2002). Although the circumstances in that case differ

in many respects from the circumstances in this case, there are sufficient similarities to warrant our reliance on it in some respects, as will be explained later in this opinion.

We begin by addressing Addington's argument that the trial court erred in granting summary judgment on his outrage claim. Addington argues that a fact question remains on his outrage cause of action because: 1) Jim Elder told him that he had been "under surveillance with people watching him from up in the trees"; 2) he was told that his co-worker Buenning was "a thief and a liar"; 3) Wal-Mart used the police to coerce him into signing the consent form; 4) Womack threatened him with the IRS; 5) Elder "made comments about stolen property" on Addington's land; 6) Wal-Mart failed to investigate whether Addington had been given permission to take the light poles home; 7) Elder and Womack refused to leave when Addington declined to consent to the search; and 8) there were "threats of search warrants."

The supreme court has formulated four factors necessary to establish the tort of outrage: (1) the actor intended to inflict emotional distress or knew or should have known that emotional distress was the likely result of his conduct; (2) the conduct was extreme and outrageous, was beyond all possible bounds of decency, and was utterly intolerable in a civilized community; (3) the actions of the defendant were the cause of the plaintiff's distress; and (4) the emotional distress sustained by the plaintiff was so severe that no reasonable person could be expected to endure it. *Faulkner v. Arkansas Children's Hosp.*, 347 Ark. 941, 69 S.W.3d 393 (2002). Despite judicial recognition of this tort, the courts have addressed it in a cautious manner and have stated that recognition of it is not intended to open the doors of the courts to every slight insult or indignity one must endure in life. *See, e.g., Dillard Dep't Stores, Inc. v. Adams*, 315 Ark. 303, 867 S.W.2d 442 (1993). In particular, the courts have taken a narrow view of claims that arise out of the discharge of an employee. The reason is that an employer must be given considerable latitude in dealing with employees, and at the same time, an employee will frequently feel considerable insult when discharged. *City of Green Forest v. Morse*, 316 Ark. 540, 873 S.W.2d 154 (1994).

The type of conduct that meets the standard for outrage must be determined on a case-by-case basis. *Crockett v. Essex Home, Inc.*, 341 Ark. 558, 19 S.W.3d 585 (2000). .We require clear-cut proof to establish the elements in outrage cases. *Id.* Merely describing the conduct as outrageous does not make it so. *Id.* Clear-cut proof, however, does not mean proof greater than a preponderance of the evidence. *Id.*

The trial court ruled that the facts presented by Addington were not so outrageous or extreme as to go beyond all possible bounds of decency and further, that Addington's symptoms did not constitute emotional distress so severe that no reasonable person should be expected to endure it. We agree with the trial court.

On the first of the eight factors alleged by Addington to support his claim, Addington has misrepresented his own deposition testimony. He testified that, when Elder, Womack, and Hass met with the maintenance employees on August 20, Elder "went through some of these techniques as how they do it and what they do, and a reference was made to people sitting in trees observing other people to watch them and all that." Addington acknowledged that Elder did not say anyone was sitting in trees watching Addington. Further, Addington said that nothing at the August 20 meeting made him mad or was considered by him to be inappropriate. On the second factor, Addington attempts to base his outrage claim on the fact that Wal-Mart labeled a co-worker a liar and a thief. Addington cites no authority, and we have found none for the proposition that insulting a third person may give rise to outrage. On factor number three, Wal-Mart's use of the police for intimidation purposes is not well borne out here. Although a deputy was present when the consent to search was being offered to Addington, the deputy sat in Addington's driveway while the controversy over the consent was going on. Addington stated that the only conversation he had with the deputy was when he eventually signed the consent form "to get rid of them." Addington also stated that the deputy "never stepped foot on my grass or on my sidewalk." Further, when the search took place, the deputy did not go into Addington's home, although he did go into his shop.

On the fourth factor — the mention of the IRS — there is no question that a threat to notify the Internal Revenue Service is an intimidating technique, but we do not think it constitutes outrage. The reference to the IRS was vague in nature, and there was no evidence that Addington was particularly susceptible to a mention of the IRS. The "comments about stolen property" that Addington mentions in factor number five references Elder's description of the security camera as stolen and Elder's question to Addington, during the search of the shop, "where is the pallet of tools?" Accusations of theft, however, do not constitute outrage. *See Dillard Dep't Stores v. Adams, supra*; *Unicare Homes Inc. v. Gribble*, 63 Ark. App. 241, 977 S.W.2d 490 (1998). As for Wal-Mart's failure to investigate whether Addington had permission to take the light poles home, as alleged in factor number six, Wal-Mart did conduct an investigation, although it may have been incomplete. Wal-Mart asked Addington's supervisor if he had given Addington permission to take the poles, and the supervisor said "absolutely not." It later developed that an employee said that she had overheard the supervisor giving Addington permission to take the poles. While this might constitute a lack of thoroughness by Wal-Mart, it is not the type of conduct that goes beyond all bounds of decency.

Regarding Elder and Womack's failure to leave when Addington declined to sign the consent form, undeniably they were putting pressure on him by their continued presence. However, they never tried to enter his home or use physical violence. Finally, on factor number eight, we fail to see how the threat of obtaining a search warrant is outrageous conduct when Addington had already acknowledged that he had property belonging to Wal-Mart in his home and his attorney had likewise told him that Wal-Mart could probably get a warrant.

Whether each of the above factors is taken individually or they are considered as a whole, we do not believe Wal-Mart's conduct rose to the level of that required for outrage. Although Wal-Mart's conduct was aggressive and intimidating, it did not go beyond all bounds of decency, especially when we consider some of the conduct that employers in other cases have committed and not been held liable. *See, e.g., Faulkner v. Arkansas Children's Hosp., supra* (strained working relationships, a deliberate attempt to under-

mine the employee's authority, and false accusations of shoddy work and mental illness); *Stockton v. Sentry Ins.*, 337 Ark. 507, 989 S.W.2d 914 (1999) (cutting off dental benefits in mid-procedure and telling employee's wife that employee was a "lazy s.o.b." who wasn't good enough for her); *City of Green Forest v. Morse, supra* (cursing and speaking angrily and inquiring into employee's personal life); *Webb v. HCA Health Servs.*, 300 Ark. 613, 780 S.W.2d 571 (1989) (being verbally abusive, making derogatory remarks about employee to others, asking employee to falsify records, and misrepresenting cause for termination); *Sterling v. Upjohn Healthcare Servs.*, 299 Ark. 278, 772 S.W.2d 329 (1989) (undermining employee's authority, making false accusations of drunkenness and of falsifying job application, cursing employee, and asking others to report on employee). In light of our holding that Wal-Mart's conduct did not transcend the bounds of decency, we need not address whether Addington sustained emotional distress so severe that no reasonable person could be expected to endure it.

Addington argues next that his invasion of false-light invasion-of-privacy claim should not have been dismissed by way of summary judgment. The right to recover for a false-light invasion-of-privacy claim is conditioned upon the complaining party's demonstrating that (1) the false light in which he was placed by the publicity would be highly offensive to a reasonable person, and (2) that the defendant had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed. *Dodrill v. Arkansas Democrat Co.*, 265 Ark. 628, 590 S.W.2d 840 (1979), *cert. denied*, 444 U.S. 1076 (1980). The evidence must support the conclusion that the publisher had serious doubts about the truth of his publication. Howard W. Brill, *Arkansas Law of Damages* § 33-11 at 671 (4th ed. 2002). In false-light actions, the plaintiff's burden of proof is governed by the clear-and-convincing-evidence standard. *Dodrill, supra.*

Where the plaintiff is not a public figure and the publication is of matters of general or public concern, the plaintiff must prove actual malice by clear and convincing evidence. *Dodson v. Dicker*, 306 Ark. 108, 812 S.W.2d 97 (1991). Statements made with actual malice are those made with knowledge that the statements

were false or with reckless disregard of whether they were false or not. *Id.*

Addington's claim on this count is based on certain written and oral statements made by Jim Elder during the course of the investigation. During the drive from Wal-Mart to Addington's home on August 21, Elder telephoned the police while en route and asked for help in retrieving "stolen property." In Elder's initial investigation synopsis, he stated that Addington "voluntarily admitted having possession of Wal-Mart merchandise at his house for which he had not reimbursed the company." He also stated:

> Addington admitted having light fixtures and poles on his property belonging to Wal-Mart. In addition, he stated that he still had a monitor and computer given to him by David Clark which he had not been paid for. He also admitted to being in possession of a VCR brought over by Clark. Addington stated that he had some toilets and (2) water heaters that he had removed from one of the Wal-Mart facilities during a remodel.

Elder furnished a copy of this report to the county prosecutor and to several persons within the company, all of whom it appears were either part of the loss prevention or the corporate fraud department. Finally, in a letter to personnel officer Melinda Hass, Elder stated that, during the August 21 interview, Addington admitted to having some items in his residence that were not paid for, and that, while at the residence, Addington gave Elder a recorder and monitor that belonged to Wal-Mart and had not been paid for, and a camera that he had purchased from a Wal-Mart vendor for five dollars.

Addington argues that these statements placed him in a false light by insinuating that he was part of a theft ring and that he possessed stolen property. We disagree. First of all, the statements are not false, even when viewed in a light most favorable to Addington. Addington admitted to having, on his property, toilets and water heaters that he had taken from Wal-Mart. He also said that the VCR "very well could have been Wal-Mart's." Finally, he admitted in his deposition that the statements in Elder's case synopsis regarding the property he had was accurate. We also conclude that, even if Elder's statements were subject to a more favorable interpretation to Addington, the statements were protected by a

qualified privilege. A communication is qualifiedly privileged when it is made in good faith upon any subject matter in which the communicator has an interest or in reference to which he has a duty, and to a person having a corresponding interest or duty. *Wal-Mart Stores, Inc. v. Lee, supra.* The privilege is lost if abused by excessive publication, where a statement is made with malice, or where a statement is made with a lack of grounds for belief in its truthfulness. *Id.* Whether a particular statement falls within the scope of a qualified privilege is a question of fact for the jury. *Id.*

Wal-Mart v. Lee is the case that involved Addington's fellow employee David Clark. There, the supreme court held that similar communications by Elder fell outside the privilege because he had grounds to believe that Clark did not possess stolen goods.[1] Such was not the case here. Addington's supervisor had stated that he absolutely had not given Addington permission to take the light poles. Further, Addington admitted during the search to having the toilets and the water heaters, and he made the other statements attributed to him in the previous paragraph. Thus, unlike in *Lee*, the undisputed evidence in this case shows that Elder had every reason to believe that Addington possessed property that rightfully belonged to Wal-Mart. Additionally, Elder's communications were made only to law enforcement officers and appropriate personnel within his own company. Addington simply has not shown that the qualified privilege was lost through excessive publication or malice. We therefore uphold the trial court's grant of summary judgment on the false-light claim.

We likewise hold that the same qualified privilege applies to a portion of Addington's defamation claim. The claim is partially based on the same statements made by Elder to law enforcement officers and Wal-Mart employees as set out earlier; it is also based on Wal-Mart's statement in a letter to the Employment Security Division that Addington removed several items of company property without authorization. On this point, we note that it is an

[1] There was evidence that Clark operated his own electronics repair business and had been asked by a supervisor to repair items for the Associates Store, which sold damaged merchandise to employees at a discount. There was also evidence that Clark had been told he could keep some items that were beyond repair. Clark informed Elder of this on the day of the seizure.

employer's duty to make an accurate report to the Employment Security Department and, if made in good faith, the communication is privileged. *See Dillard Dep't Store v. Felton*, 276 Ark. 304, 634 S.W.2d 135 (1982). Given our discussion of qualified privilege on the previous issue, we conclude that the same reasoning applies to these aspects of Addington's defamation claim.

The remaining parts of Addington's defamation claim concern Elder's comment that the security camera at Addington's home was "stolen" and his question to Addington during the search of the shed, "where is the pallet of tools?" A viable action for defamation turns on whether the communication or publication tends or is reasonably calculated to cause harm to another's reputation. *Faulkner v. Arkansas Children's Hosp., supra.* The following elements must be proved to support a claim of defamation, whether it be by the spoken word (slander) or the written word (libel): (1) the defamatory nature of the statement of fact; (2) that statement's identification of or reference to the plaintiff; (3) publication of the statement by the defendant; (4) the defendant's fault in the publication; (5) the statement's falsity; and (6) damages. *Id.*

As for the stolen camera, there is no showing by Addington that anyone heard or could have heard this comment. In light of that, there is no evidence of publication or damage to reputation. Further, Addington can hardly say that he was damaged by such a comment when, in fact, he possessed items that were taken from Wal-Mart without authorization. As for the inquiry about the pallet, we fail to see how this question is defamatory. An actionable statement is one that tends or is reasonably calculated to cause harm to another's reputation. *Dodson v. Allstate Ins. Co.*, 345 Ark. 430, 47 S.W.3d 866 (2001). Also, a defamatory statement must imply an assertion of an objective, verifiable fact; it should, for example, be capable of being proved true or false. *See Faulkner v. Arkansas Children's Hosp., supra.* The question does not meet these criteria. Additionally, Addington could point to no damage to reputation other than his assertion that it had been harmed among the contractors with whom he did business, none of whom were present when this inquiry was made. We therefore affirm the trial court's grant of summary judgment on the defamation count.

We turn now to Addington's cause of action for intrusion invasion of privacy. Intrusion is the invasion by a defendant upon the plaintiff's solitude or seclusion. *Wal-Mart Stores, Inc. v. Lee, supra.* Arkansas courts have seldom adjudicated intrusion claims. *Id.* The tort consists of three parts: (1) an intrusion; (2) that is highly offensive; (3) into some matter in which a person has a legitimate expectation of privacy. *Id.* A legitimate expectation of privacy is the touchstone of the tort of intrusion. *Id.*

Wal-Mart argues here, as it did in *Lee, supra*, that there was not an intrusion because there was a consent to the search. Addington argues that a fact question remains as to whether his consent was freely and voluntarily given. We agree.

Though the validity of consent in a civil case does not involve a defendant's motion to suppress evidence seized in a criminal case, the standard for determining valid consent in the criminal context is helpful. *Lee, supra.* Consent must be given freely and voluntarily to be valid. *Id.* It must be shown that there was no duress or coercion, actual or implied. *Id.* The voluntariness of consent must be judged in light of the totality of the circumstances. *Id.* In a civil case, the issue of whether consent was valid is a question of fact that must be decided by the trier of fact. *Id.*

In *Lee*, the supreme court upheld the jury's verdict for David Clark on this count in a situation involving similar circumstances. As in that case, there are several particulars here that create a fact question on the issue of whether Addington's consent was voluntarily given: the threat of the IRS (a factor in *Lee*); the fact that Addington declined to consent three times, yet Elder and the officer remained on the premises (which is more indicative of coercion than in *Lee*, where there was one request to consent made at the premises); Addington's fear that he would lose his job if he did not consent (a factor in *Lee)*; mention of the media, as testified to by Mrs. Addington (when she was aware that in Clark's case, media coverage had been substantial); and the fact that Addington agreed to go to his home in the first place only to allow Womack to look at the light poles (similar to the situation in *Lee*). One factor that distinguishes this case from *Lee* is that, before signing the consent, Addington took the opportunity to consult with counsel. However, while Addington's consultation with an attorney before signing the consent form is certainly a factor to be

considered in determining the voluntariness of his actions, we do not deem it conclusive. By that point, Addington had already refused to consent three times and had been subjected to the other coercive actions. The totality of the circumstances, in particular the fact that Addington declined to consent three times before succumbing, leads us to conclude that a fact question remains as to whether his consent was voluntarily given.

The only remaining question on this issue concerns the effect of a federal court ruling in Addington's previously filed 42 U.S.C. § 1983 action. The federal court ruled that, as a matter of law, Addington's consent was voluntary. Wal-Mart, in a one-paragraph argument without citation to authority, argues that the federal court's finding on this point is binding under the doctrine of collateral estoppel. Wal-Mart was likewise unable to provide supporting authority during oral argument.

This point is barely developed enough for our consideration, but we believe it is governed by our holding in *Guidry v. Harp's Food Stores*, 66 Ark. App. 93, 987 S.W.2d 755 (1999). Guidry, who had been arrested for shoplifting, sued a police officer who worked for Harp's in federal court for a section 1983 violation and for various state law tort claims. The federal court granted summary judgment to the officer on the basis that his arrest of Guidry was reasonable and thus he was entitled to qualified immunity. The court then declined to exercise jurisdiction over the state law tort claims. When Guidry filed those claims in state court against Harp's, the federal court's ruling was set forth by Harp's as conclusive of the officer's reasonableness. The trial judge agreed, ruling that the federal court determination had "knocked out the underpinning" of Guidry's state law claims. We reversed on the basis that the type of analysis used by a court to determine the question of qualified immunity would be different from that used to determine tort liability. That reasoning does not apply here because the same analysis would be used to determine voluntariness of consent in this case as was used in the federal court case. However, *Guidry* went on to say that, where a federal court decides not to retain jurisdiction of state law claims, the plaintiff's right to litigate those claims in the future is reserved. That is the situation here. The federal court declined to exercise jurisdiction over the state law claims and thus implicitly preserved Addington's right to litigate his state tort claims to their full extent.

Finally, we address Addington's argument that summary judgment was inappropriate on his negligence claim. Addington's complaint alleged that Wal-Mart negligently failed to investigate whether Addington possessed stolen property and negligently supervised its employee, Jim Elder. The trial court ruled that there was no basis for the negligent investigation claim and that Addington failed to submit evidence that Wal-Mart knew or should have known of some prior conduct by Elder that would have put it on notice that Elder was a danger to other persons.

In his brief, Addington relies on Elder coming out to Addington's property under the guise of looking only at the light poles as evidence of a negligent investigation. While this fact may be relevant to Addington's other claims, we fail to see how it constitutes negligence. In any event, we cannot conceive how Wal-Mart could be liable for negligently determining that Addington possessed stolen property when it is undisputed that he did possess Wal-Mart property without authorization. Addington simply makes no convincing argument on this point.

On the negligent-supervision claim, liability for this cause of action is based upon the unique relationship between employer and employee. *Madden v. Aldrich*, 346 Ark. 405, 58 S.W.3d 342 (2001). Under this theory, employers are subject to direct liability for the negligent supervision of employees when third parties are injured as a result of the tortious acts of employees. *Id.* The employer's liability rests upon proof that the employer knew or, through the exercise of ordinary care, should have known that the employee's conduct would subject third parties to an unreasonable risk of harm. As with any other negligence claim, to prove negligent supervision, a plaintiff must show that the employer's conduct was a proximate cause of the injury and that the harm to third parties was foreseeable. *Id.* It is not necessary that the employer foresee the particular injury that occurred, only that he or she reasonably foresee an appreciable risk of harm to others. *Id.*

The *Aldrich* case is consistent with the general line of cases on negligent supervision in that, before the supervisor is held liable, it must be put on notice that the person supervised poses a danger to third parties. *See Regions Bank & Trust v. Stone County Skilled Nursing Facility*, 345 Ark. 555, 49 S.W.3d 107 (2001); *Maneth*

v. Tucker, 72 Ark. App. 141, 34 S.W.3d 755 (2000); *Sparks Reg'l Med. Ctr. v. Smith*, 63 Ark. App. 131, 976 S.W.2d 396 (1998). As Wal-Mart points out in its brief, there is no evidence that it had knowledge of any propensity by Elder to be overly zealous or aggressive in an investigation. Thus, there is no evidence that Wal-Mart could have foreseen that Elder might conduct himself in such a manner. We therefore affirm on this point.

The trial court's grant of summary judgment is reversed and remanded on the intrusion invasion-of-privacy count and affirmed on all other counts.

Affirmed in part; reversed and remanded in part.

GRIFFEN and BAKER, JJ., agree.

Neil D. WILLIAMS *v.* BROWN'S SHEET METAL/ CNA INSURANCE COMPANY

CA 02-428 105 S.W.3d 382

Court of Appeals of Arkansas
Divisions I and II
En Banc
Opinion delivered April 23, 2003

Dale Grady, for appellant.

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

ROBERT J. GLADWIN, Judge. Appellant, Neil Williams, appeals from a decision by the Workers' Compensation Commission denying his claim for benefits. For reversal, appellant argues that the Commission's decision was not supported by substantial evidence. We affirm.

On December 25, 1998, appellant was working at Virco Manufacturing Company as an employee of Brown's Sheet Metal, lifting heavy exhaust fans that weighed approximately 700 pounds each. He worked for about four hours at this task. Appellant went to the doctor on December 31, 1998, and was diagnosed as having a kidney infection. When the pain in appellant's back persisted past the healing of the infection, he saw his regular doctor and several other doctors over the next two to three years for treatment of his back pain. Appellant sought workers' compensation benefits, contending that he had injured his back when lifting the fans at Virco. The administrative law judge denied appellant's claim. The Commission remanded the case to settle the record as to the deposition of appellant's witness, Dr. Thomas Hart. Thereafter, the law judge filed a supplemental opinion that modified his findings of fact and denied appellant's claim. The Commission affirmed and adopted the law judge's opinion and findings.

The Commission concluded that there was nothing in the record to indicate that a specific-incident injury had occurred and that appellant had thus failed to meet his burden of proving the existence of a compensable injury. Although appellant claimed he injured his back while lifting the fans, he could not identify a specific incident or moment in time when he might have sustained this injury. According to appellant's testimony, he suspected he had a kidney infection but could not tell if the pain he was experiencing was related to the kidney infection or if he had injured his back. Appellant stated that he assumed that because the fans were so heavy, lifting them must have been what caused his back to hurt. Appellant also acknowledged prior back injuries, occasions when he experienced low back pain severe enough to cause him to walk "in a crooked position," and involvement in an automobile accident in 1993.

One of appellant's co-workers testified that following the day's work, appellant stated that he thought he might have pulled something in his lower back. Several physicians treated appellant, and their collective testimony established that appellant had degenerative disc disease of the lumbar spine and that he suffered multilevel annular disc disruption or annular tears.

In determining the sufficiency of the evidence to support the findings of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings, and we will affirm if those findings are supported by substantial evidence. *Winslow v. D & B Mech. Contr.s*, 69 Ark. App. 285, 13 S.W.3d 180 (2000). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* The determination of the credibility and weight to be given a witness's testimony is within the sole province of the Commission. *Farmers Coop. v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002). The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Id.* We will not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have reached the con-

clusions arrived at by the Commission. *Wal-Mart Stores, Inc. v. Sands*, 80 Ark. App. 51, 91 S.W.3d 93 (2002).

Viewing the evidence in the light most favorable to the Commission's findings, the record shows that although appellant had suffered physical injury to his back, there is nothing to indicate that a specific-incident injury occurred other than appellant's own testimony that he "thinks" an injury must have occurred while he was lifting the heavy fans at Virco. Appellant's medical records clearly demonstrate the presence of degenerative disc disease. There were no eyewitness accounts of the alleged injury, and appellant's own testimony is less than determinative; in fact, his testimony establishes that there was no specific incident of injury and that his claim of injury while lifting the fans is based solely upon his deduction that the injury must have occurred then because the fans were heavy.

Appellant's witness, Dr. Thomas Hart, opined that regardless of appellant's preexisting degenerative disc disease, the on-the-job lifting incident was the major cause of appellant's current disability. The Commission noted that while Dr. Hart had objectively proven the existence of annular tears that were causing appellant's back pain, he could only speculate as to the origin of the annular tears by relying on assumptions that had been furnished to him by appellant. The Commission found, in assessing the weight to accord Dr. Hart's opinion, an over-reliance by the doctor on the appellant's related history and accounts of an alleged job-related injury. The Commission further found that when subjected to cross-examination, the doctor's responses were speculative as to the issue of causal relationship.

It is well settled that the Commission has the authority to accept or reject medical opinion and the authority to determine its medical soundness and probative force. *Oak Grove Lumber Co. v. Highfill*, 62 Ark. App. 42, 968 S.W.2d 637 (1998). The Commission has a duty to use its experience and expertise in translating the testimony of medical experts into findings of fact. *Id.* It is the responsibility of the Commission to draw inferences when the testimony is open to more than a single interpretation, whether controverted or uncontroverted; and when it does so, its

findings have the force and effect of a jury verdict. *Marrable v. Southern LP Gas, Inc.*, 25 Ark. App. 1, 751 S.W.2d 15 (1988). The Commission is not bound by a doctor's opinion that is based largely on facts related by a claimant where the claimant's own testimony is less than determinative. *See Roberts v. Leo Levi Hospital*, 8 Ark. App. 184, 649 S.W.2d 402 (1983).

In reviewing the Commission's decision, the question is not whether the evidence would have supported findings contrary to the ones made by the Commission or even whether we would have reached a different conclusion upon the same facts; the question is whether reasonable minds could reach the conclusion made by the Commission. *See Wal-Mart Stores, Inc. v. VanWagner*, 337 Ark. 443, 990 S.W.2d 522 (1999); *Winslow v. D & B Mech. Contrs.*, 69 Ark. App. 285, 13 S.W.3d 180 (2000). When a claim is denied because the claimant has failed to show an entitlement to compensation by a preponderance of the evidence, the substantial-evidence standard of review requires us to affirm if the Commission's opinion displays a substantial basis for the denial of relief. *Daniels v. Arkansas Dep't of Human Servs.* 77 Ark. App. 99, 72 S.W.3d 128 (2002). Here the Commission's decision displays a substantial basis for the denial of relief, and we affirm.

Interspersed throughout appellant's argument are references to his contention that the administrative law judge intentionally excluded a deposition transcript from the evidence in his case and his suggestion that the Commission aided the law judge in "covering up" his action by remanding the case for the law judge to settle the record and issue a supplemental opinion. We agree with the Commission that the unintentional error in excluding from the record the deposition of Dr. Hart was corrected by the remand and the supplemental order that made the deposition transcript a part of the record. As noted by the Commission, the law judge reviewed the evidence, including the testimony of Dr. Hart, and amended his findings accordingly. Any unfairness that might have existed was cured by the law judge's consideration of Dr. Hart's deposition upon remand. Appellant's claims are without merit as he offers no facts or evidence to support his claims of prejudice, bias, or a cover-up.

Affirmed.

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

HART, J., dissents.

JOSEPHINE LINKER HART, Judge, dissenting. I disagree with the majority's conclusion that the Commission's opinion displays a substantial basis for the denial of relief. Rather, I agree with the opinion of the dissenting commissioner who, after thoroughly analyzing the medical evidence, concluded that even though appellant was a poor historian, he did prove that he sustained a compensable injury.

Appellant testified that in late December of 1998 his back began hurting after helping co-workers lift fans weighing 700 pounds. After work that day, he told his wife about his back. Although appellant did not recall speaking to his co-worker, Richard Alonzo, about his back, Alonzo remembered that he had been working with appellant lifting the fans when a supervisor reassigned appellant to other work. Further, Alonzo stated that he saw appellant hold his back and heard appellant say to him, "I think I pulled something."

The issue was complicated when appellant was first examined by Dr. Christi Williams on December 31, 1998, and she determined that he suffered from a kidney infection. However, appellant's back pain persisted after the kidney infection had been treated. Thereafter, numerous tests were performed on appellant's lumbar spine to determine the cause of his pain.

Dr. Hart reported on August 18, 2000, that although appellant "had preexisting degenerative disc disease, the history of specific back injury in December of 1998 . . . was the onset or precipitating and major cause of his continued back, buttock, and lower extremity pain . . . and disability, based on subjective and objective findings." Further, Dr. Hart stated with reasonable medical certainty that the "discography demonstrated multiple levels of disc disruption, well documented, secondary to his on-the-job injury."

Although Dr. Hart acknowledged that appellant had degenerative changes, he opined that appellant did not have annular tears prior to the injury because "annular tears are extremely painful, and they can make you dysfunctional." When discussing the annular tears in the four different discs, Dr. Hart stated that he was sure that the L3-4 area had "dealt him a big blow in his back problems because there's a large bulging disc." Moreover, Dr. Hart opined that tears in the annular disc do not always result in immediate pain and that it was common for patients to describe a pop in their backs and the pain to continually get worse with time. Dr. Hart ultimately opined in his testimony that regardless of appellant's preexisting degenerative disc condition, the on-the-job lifting incident was the major cause of his current disability condition and treatment.

The findings of the ALJ, as adopted by the Commission, stated:

> While Dr. Hart has objectively proven to the satisfaction of this examiner that the Claimant has 4 annular tears which are the cause of Claimant's back pain, he can only speculate as to the origin of the annular tears by relying on "assumptions" that have been furnished to him by the Claimant himself. The Claimant's age, work experience in hard manual labor, diabetes, arthritis, and degenerative disc disease have all been dismissed in relying solely upon Claimant's relation of facts and, as such, Dr. Hart has utilized "assumptions" and speculation to express his opinion as to a causal connection between the annular tears and an on the job injury.

There is nothing in the evidence to establish that appellant has been diagnosed with diabetes. In fact, the medical evidence specifically provides that appellant does not have diabetes. Furthermore, the findings of the Commission are based on Dr. Hart's reliance on appellant's recitation of the fact that he was lifting heavy equipment at the time of the injury. In adopting the findings of the ALJ, the Commission disregarded Dr. Hart's testimony because he was not able to opine as to when appellant's condition originated and because he relied on appellant's own statements in order to relate the condition to his employment. This disregard of Dr. Hart's testimony, however, was arbitrary because Dr. Hart based his testimony on the common-sense observation that appel-

lant's complaints of back pain began following a day of very heavy work and that he was pain free before that day and thereafter, he was in pain with multiple problems.

In *Edens v. Superior Marble & Glass*, 346 Ark. 487, 492, 58 S.W.3d 369, 373 (2001), our supreme court addressed Arkansas Code Annotated section 11-9-102(4)(A)(i), which defines "compensable injury," and stated:

> A strict construction of the statute does not require, as a prerequisite to compensability, that the claimant identify the precise time and numerical date upon which an accidental injury occurred. Instead, the statute only requires that the claimant prove that the occurrence of the injury is capable of being identified. The inability of the claimant to specify the date might be considered by the Commission in weighing the credibility of the evidence, but the statute does not require that the exact date be identified. Therefore, we reverse the Commission's decision to the extent that it was based on Mr. Eden's inability to provide an exact date of the injury, and remand for the Commission to consider the compensability of Mr. Eden's claim in a manner consistent with our interpretation of section 11-9-102(4)(A)(i).

Furthermore, in *Edens*, the supreme court stated that the "Commission may not arbitrarily disregard the testimony of any witness, nor may the Commission arbitrarily disregard other evidence submitted in support of a claim." *Id.* at 492-93, 58 S.W.3d at 373.

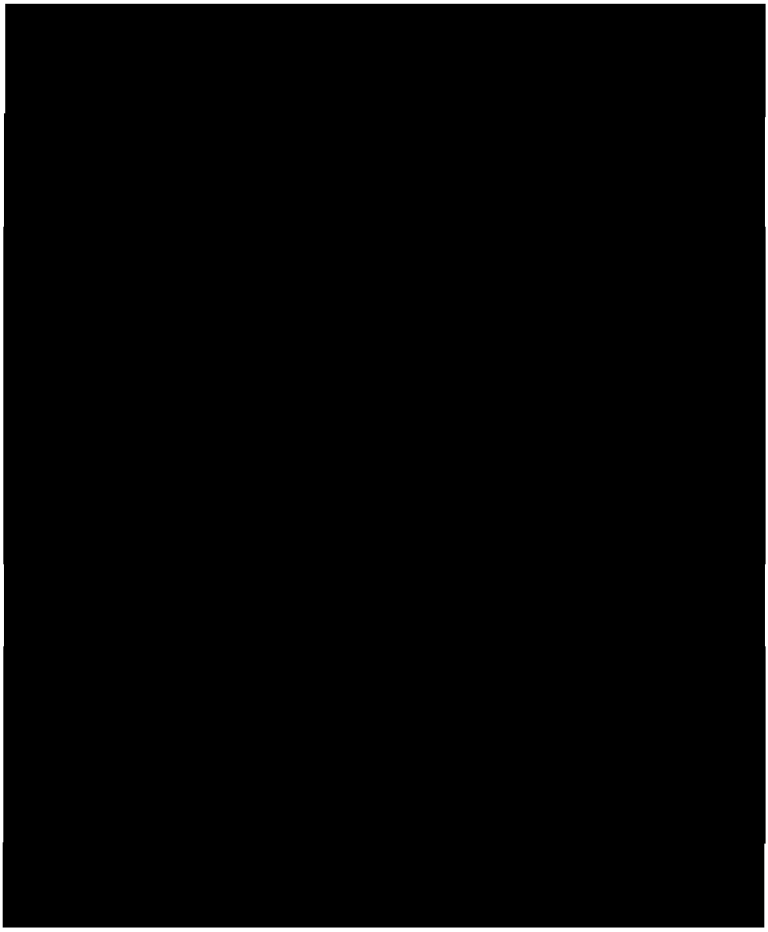
Here, the evidence established that appellant did suffer from degenerative disc disease; however, the main source of his complaints occurred after the December 1998 on-the-job injury. Although the Commission has discretion to accept or reject medical testimony, it must be noted that Dr. Hart's analysis and diagnosis were not refuted by any of the other treating physicians. Because the Commission was presented with no other evidence to refute Dr. Hart's testimony, it must be concluded that the Commission arbitrarily disregarded his medical testimony as to the cause of appellant's injury. Here, the medical evidence presented established that the Commission's opinion did not display a substantial basis for the denial of relief. Therefore, I respectfully dissent.

William WESLEY, Mary Wesley, and Tommy Jones *v.* ESTATE OF Joseph "Joe" BOSLEY, *Deceased, et al.*

CA 02-901 105 S.W.3d 389

Court of Appeals of Arkansas
Division III
Opinion delivered April 23, 2003

[Petition for rehearing denied May 28, 2003.]



Howell, Trice, Hope & Files, P.A., by: *Kevin O'Dwyer*, for appellants.

Simmons S. Smith, for appellees.

TERRY CRABTREE, Judge. This appeal involves a family dispute over the funds in two savings accounts owned by Joseph Bosley, who died on February 3, 2001, at the age of ninety-two. Mr. Bosley, who was widowed, lived alone in his house in Little Rock and was relatively independent, although he relied on others to help him run errands. He drew social security benefits, and had savings accounts with Regions Bank and Bank of America. Mr. Bosley had several siblings, including appellants Mary Bosley and Willien Wesley, who lived in California. Mr.

Bosley's nephew, appellant Tommy Jones, who also lived in California, had Mary Bosley's power of attorney. Appellee James Williams is the nephew of Mr. Bosley's deceased wife and lives in Little Rock. Mr. Williams provided substantial assistance to Mr. and Mrs. Bosley before Mrs. Bosley died and a lesser amount of help to Mr. Bosley thereafter. Appellee Mary Modica is Mr. Bosley's granddaughter, who lives in Texas. Mr. Williams and Ms. Modica are the beneficiaries of Mr. Bosley's will, and Mr. Williams is executor of the estate.

In May 2000, Mr. Jones came to Arkansas and accompanied Mr. Bosley to Regions Bank and Bank of America, where Mr. Bosley placed Mary Bosley's name as a joint tenant with right of survivorship on his savings accounts. Mrs. Wesley came to Arkansas in June 2000, and Mr. Bosley added her name as a joint tenant to those accounts while she was here. In November 2000, Mr. Bosley broke his arm and was hospitalized. He also had cancer and became too ill to live alone. While Mr. Bosley was in the hospital, Mrs. Wesley and Mr. Jones came back to Arkansas and removed some of the furniture from his house, changed the house's locks, had Mr. Bosley's mail forwarded to Mr. Jones's residence in California, and terminated the utilities to Mr. Bosley's house. They also had Mr. Bosley admitted to the Quapaw Quarter Nursing Home and Rehabilitation Center, where Mr. Bosley died the next February. Although the nursing home received some payments on his account, apparently from his social security benefits, a substantial sum remained unpaid. The nursing home was unaware that Mr. Bosley had approximately $100,000 in savings. Immediately after Mr. Bosley's death, appellants transferred the funds in the Bank of America account ($42,000) in equal amounts to Mary Bosley's and Mrs. Wesley's bank accounts in California.

Immediately after the funeral, appellees filed suit in the Pulaski County Circuit Court against appellants for injunctive relief prohibiting any further transfer of the funds and ordering the Bank of America funds to be returned. Mr. Williams also initiated the probate of Mr. Bosley's estate, and Mr. Jones filed a claim for the money he had spent on Mr. Bosley's funeral services. The cases were consolidated.

In his decision, the judge found that Mrs. Wesley and Mr. Jones were untruthful, "less than credible," and deceptive. He found the testimony of Mr. Williams, Will Bosley (Mr. Bosley's brother), Catherine Harper (Mr. Bosley's niece), and Shirley Lewis (his neighbor for thirty years) to be credible. The judge found that appellants had exercised unauthorized and wrongful control of Mr. Bosley's home and its contents. He also found that, when appellants communicated with the nursing home regarding Mr. Bosley's assets in order to obtain Medicaid benefits, they deceived the nursing home by failing to disclose that Mr. Bosley had approximately $100,000 in savings. He further found that Mrs. Wesley and Mr. Jones had failed to pay the nursing home for Mr. Bosley's care.

The judge also made the following findings, which are at the heart of the issues on appeal:

> 11. That Joseph "Joe" Bosley's acts of adding Willien Wesley and Mary Bosley's names to his savings accounts were gifts.
>
> 12. That Willien Wesley, Mary Bosley and Tommy Jones induced Joseph "Joe" Bosley to add the names of Willien Wesley and Mary Bosley to his savings accounts by promising Joseph "Joe" Bosley they would care for Joseph "Joe" Bosley at his home versus being placed in a nursing home.
>
> 13. That the relationship between Willien Wesley, Mary Bosley, Tommy Jones, and Joseph "Joe" Bosley was the sort of relationship that raises a legal or evidentiary presumption of invalidity of gifts.
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> 14. That there is substantial evidence Willien Wesley, Mary Bosley, and Tommy Jones defrauded, coerced and/or took undue advantage of Joseph "Joe" Bosley to secure the gifts regarding the Regions Bank and Bank of America savings account funds.
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> . . . .
>
> 19. That the Court finds that Joseph "Joe" Bosley, shortly before his death, realized he had been deceived into transferring his Savings Account to a joint account with a right of survivorship to Willien Wesley and Mary Bosley with the promise of maintaining Joseph "Joe" Bosley in home during his old age and/or ill health, but Joseph "Joe" Bosley was too ill or frail to take the necessary actions to rectify the situation with his Savings Accounts by removing Willien Wesley and Mary Bosley's names from the Regions Bank and Bank of America savings accounts.

The judge found that appellees had sustained their burden of proof by clear and convincing evidence that the gift or transfer of the funds was obtained by the defendants as a result of undue influence, fraud, or overreaching or by a means condemned by law. He also found that appellees had sustained their burden of proving that the relationship between Mr. Bosley and appellants was

> of such a nature as to raise a presumption that the gift in favor of [appellants] was obtained by an abuse of that relationship; that the [appellees'] proof shifted the burden of proof to the [appellants] to prove the legitimacy of the gift; and, the [appellants] failed to meet their burden of establishing the legitimacy of the gift.

The judge entered judgment in the amount of $42,000 against appellants, ordered them to transfer all sums held in Regions Bank to Mr. Bosley's personal representative, and enjoined them from removing the funds held in Regions Bank. The judge stated that Mr. Jones's claim against the estate for the funeral expenses would be offset and satisfied by the furniture and property appellants had removed from Mr. Bosley's home without authority.

Arguments

Appellants make the following arguments on appeal: (1) the judge erred in denying their claim to the funds on the ground that they failed to establish a gift; (2) the judge erred in finding that a confidential relationship existed between Mr. Bosley and appellants; (3) the judge erred in shifting the burden of proving the validity of the gift to appellants; (4) there was insufficient evidence to prove undue influence, fraud, or overreaching on the part of appellants; (5) the judge erred in entering a judgment for the nursing home bill against Mrs. Wesley and Mr. Jones; (6) the judge erred in offsetting Mr. Jones's claim against the estate for the funeral services with the furniture and property appellants had taken from Mr. Bosley's house. Although we agree that the judge erred in applying the law of gifts, finding that Mr. Bosley had a confidential relationship with appellants, and shifting the burden of proof to appellants, reversal is not warranted for the reasons expressed below.

Whether a Gift Was Made

Appellants contend that, because their claim to the bank accounts is based on their rights as surviving joint tenants, the judge erred in applying the rules of law relating to gifts. We agree. The law governing the validity of gifts *inter vivos* is well settled. The donor must be of sound mind, must actually deliver the gift with intention to vest immediate title, and the gift must be accepted by the donee. *Burns v. Lucich*, 6 Ark. App. 37, 638 S.W.2d 263 (1982). Ordinarily, in cases involving claims of undue influence or lack of capacity to make a gift, the burden of proof is upon one who attacks such a gift to prove that the donor lacked the capacity to give the gift or was unduly influenced. *Id.* However, a different burden of proof arises when it is shown that a confidential relationship existed between the donee and the donor. *Id.* Where special trust or confidence has been shown, a gift to the dominant party is presumed to be void, and the burden then rests upon the dominant recipient to show that he has not overreached the giver. *Id.*

We believe that, because Mr. Bosley did not release all future dominion and control over the bank accounts in question, an *inter vivos* gift was not proven, *see Wright v. Union National Bank of Arkansas*, 307 Ark. 301, 819 S.W.2d 698 (1991), and the judge erred in applying the law of gifts. We also note that appellants' claim to the funds in these accounts is based on their rights as surviving joint tenants, not on their rights as recipients of a gift. It is settled law that claims based on survivorship rights are distinguishable from gifts. *Coleman v. Coleman*, 59 Ark. App. 196, 955 S.W.2d 713 (1997).

Whether There Was a Confidential Relationship

Appellants contend that the judge erred in finding that a confidential relationship existed because appellees failed to plead it. If evidence showing such a relationship had been introduced, it would be proper to consider the pleadings as amended to conform to the proof.[1] However, such evidence is absent.

[1] Although pleadings are required so that each party will know the issues to be tried and be prepared to offer his proof, Rule 15(b) of the Arkansas Rules of Civil Procedure

The evidence does not support the judge's finding that appellants had a confidential relationship with Mr. Bosley. Relationships deemed to be confidential arise whenever there is a relation of dependence or confidence, especially confidence which springs from affection on one side and a trust in reciprocal affection on the other. *Jones v. Balentine*, 44 Ark. App. 62, 866 S.W.2d 829 (1993). A confidential relationship, however, is not established simply because parties are related. *Wright v. Union Nat'l Bank of Ark., supra.* It is apparent that Mr. Bosley's relationship with appellants was no closer than it was with his other relatives. In fact, the overwhelming evidence showed that Mr. Bosley had little contact with appellants. There is no evidence showing any special trust or dependence on Mr. Bosley's part or any position of dominance on the part of appellants. Accordingly, we hold that the judge's finding that a confidential relationship existed is clearly erroneous and, therefore, the judge erred in shifting the burden of proof to appellants. As explained below, however, these errors do not require reversal.

Fraudulent Inducement

Appellants assert that the judge's finding of undue influence, fraud, and coercion on the part of appellants is clearly erroneous. Although we agree that no coercion or undue influence was shown, the judge's decision can be affirmed on the basis of fraudulent inducement. If the trial judge reached the right result in a traditional equity case, we will affirm even if we disagree with the judge's reasoning. *Wedin v. Wedin*, 57 Ark. App. 203, 944 S.W.2d 847 (1997). As discussed above, only part of the judge's decision is clearly erroneous.

In order to establish fraud, the party asserting it must prove by a preponderance of the evidence: (1) a false representation of a material fact; (2) knowledge that the representation is false or that there is insufficient evidence upon which to make the

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permits the amendment of the pleadings to conform to the evidence introduced at trial. *Hope v. Hope*, 333 Ark. 324, 969 S.W.2d 633 (1998). Issues not raised in the pleadings but tried with the express or implied consent of the parties are treated as though they had been pled. *Schueck v. Burris*, 330 Ark. 780, 957 S.W.2d 701 (1997). The failure of a party to move to have the pleadings conform to the proof does not affect the trial on the issue in question. *Id.*

representation; (3) justifiable reliance on the representation; and (4) damage suffered as a result of the reliance. *Golden Tee, Inc. v. Venture Golf Schools, Inc.*, 333 Ark. 253, 969 S.W.2d 625 (1998). The question of fraud is ordinarily one of fact. *Godwin v. Hampton*, 11 Ark. App. 205, 669 S.W.2d 12 (1984).

Appellants denied having promised to care for Mr. Bosley in his home in consideration for the addition of Mrs. Wesley's and Mary Bosley's names on the accounts. As mentioned above, however, the judge had no faith in Mrs. Wesley's and Mr. Jones's veracity. As the fact-finder, it was within the trial judge's province to believe or disbelieve the testimony of any witness. *See Schueck v. Burris*, 330 Ark. 780, 957 S.W.2d 702 (1997). Deference is generally accorded to the superior position of the judge to assess the credibility of the witnesses and the weight to be given their testimony. *Hunt v. Hunt*, 341 Ark. 173, 15 S.W.3d 334 (2000).

By all accounts, Mr. Bosley was very "tight" with his money. It is reasonable to conclude that he would not have added his sisters' names to his savings accounts if they had not promised to take care of him in return. There is ample evidence to support the judge's finding that appellants did make this promise. Will Bosley testified that when Mr. Bosley was in the nursing home, he told him that his sister had promised to stay in his house and take care of him if he signed over the money. Catherine Harper stated that, near the end of her uncle's life, she visited him in the hospital and he told her that Mrs. Wesley was coming to Little Rock to take care of him. Mary Modica also testified that Mr. Bosley had told her that his sister was going to take care of him. Mrs. Wesley admitted that the nursing home's log book indicated that Mr. Bosley had told the administrator that Mrs. Wesley was staying at his house in Little Rock. Mr. Williams testified that, when he saw Mr. Bosley in the hospital, he said that he was going home to live with his sisters when he was discharged. He testified that after Mr. Bosley was in the nursing home, he asked Mr. Williams not to "throw him away" like his family had and that, although they were supposed to be in his house, they had gone back to California, and he "had been a fool."

Additionally, evidence demonstrating that appellants never intended to follow through with their promise to care for Mr.

Bosley in his home was presented. After Mr. Bosley's sisters secured their names on his accounts in May and June 2000, they returned to California. Mrs. Wesley and Mr. Jones did not return to Little Rock until Mr. Bosley was in the hospital in the fall of 2000. Also, Mrs. Wesley and Mr. Jones changed the locks on Mr. Bosley's house and disposed of a substantial amount of Mr. Bosley's furniture when he was in the hospital. Obviously, they did not intend to take care of him in his home after that time. Indeed, appellants made no attempt to follow through on their promise to care for Mr. Bosley in his home.

As for justifiable reliance, there is no question that Mr. Bosley added his sisters' names to his savings account. Further, there is no dispute that, as a result of Mr. Bosley's reliance on his sisters' promise, his estate had to file suit to recover his money. Also, Mr. Bosley did not receive the promised in-home care, and incurred substantial nursing home costs as a result.

Based on this evidence, the judge's finding that appellants fraudulently induced Mr. Bosley to add his sisters' names to the accounts is not clearly erroneous.

The Nursing Home Bill

Appellants' fifth point on appeal is stated as follows: "The trial court abused its discretion by entering a judgment assigning the outstanding nursing home bill for Quapaw Quarter Nursing Home and Rehabilitation Center to Willien Wesley and Tommy Jones." However, no such judgment is in the record on appeal. In his order, the trial judge simply noted that Mrs. Wesley and Mr. Jones had failed to pay the nursing home for Mr. Bosley's care; he did not enter a judgment against them for this bill. At the trial, the judge stated that, regardless of whether the estate recovered the money, it would be responsible for the nursing home bill. This argument is, therefore, without merit.

Mr. Jones's Claim Against the Estate

Appellants also contend that the judge erred in offsetting Mr. Jones's claim for the funeral services, for which he paid, against the property that appellants had wrongfully removed

from Mr. Bosley's home. According to appellants, this is so because no evidence was taken as to the value of that property. Although we agree that no valuation evidence was admitted, the judge's decision on this issue can be affirmed. The clean-hands maxim, which was obviously applied by the judge, bars relief to those guilty of improper conduct in the matter as to which they seek relief. *Lucas v. Grant*, 61 Ark. App. 29, 962 S.W.2d 388 (1998). Equity will not intervene on behalf of a party whose conduct in connection with the same matter has been unconscientious or unjust. *Cardinal Freight Carriers, Inc. v. J.B. Hunt Transp. Servs., Inc.*, 336 Ark. 143, 987 S.W.2d 642 (1999). In determining whether the clean-hands doctrine should be applied, the equities must be weighed. *Estate of Houston v. Houston*, 31 Ark. App. 218, 792 S.W.2d 342 (1990). It is within the judge's discretion as to whether the interests of equity and justice require application of the doctrine. *Grable v. Grable,* 307 Ark. 410, 821 S.W.2d 16 (1991); *Lucas v. Grant, supra.* Further, a court of equity may fashion any reasonable remedy justified by the proof. *Jones v. Ray*, 54 Ark. App. 336, 925 S.W.2d 805 (1996).

Although Mrs. Wesley testified that the property she and Mr. Jones removed from the house was run down and broken, Mr. Williams stated that Mr. Bosley's furniture was nice and that the missing items included two lawn chairs, a freezer, all of the furniture in the guest room (a bed, a dresser, a mirror, a chest of drawers, a mattress set, and the lamps), the living room couch, lamps, and rugs, the kitchen table and chairs, and the hall cabinet. Given appellants' fraudulent inducement of Mr. Bosley's placement of his sisters' names on his savings accounts and their wrongful control and disposition of Mr. Bosley's personal property during his last illness, we hold that the judge did not abuse his discretion in treating Mr. Jones's claim as he did.

Affirmed.

STROUD, C.J., and ROBBINS, J., agree.

Jerry HAWKINS *v.* STATE of Arkansas

CA CR 02-169 105 S.W.3d 397

Court of Appeals of Arkansas
Divisions I, II, and IV
Opinion delivered April 23, 2003

David Mark Gunter, Public Defender, for appellant.

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

KAREN R. BAKER, Judge. A jury in Hempstead County Circuit Court convicted appellant, Jerry Hawkins, of delivery of a controlled substance, cocaine. He was sentenced to ten years' imprisonment in the Arkansas Department of Correction and fined $10,000. On appeal, he asserts that the trial court erred when it overruled his objection to the admission of State's exhibit two, crack cocaine, in that the State failed to establish a chain of custody by not showing with reasonable probability that the evidence had not been altered. We affirm.

Officer David Jones testified that on September 26, 2000, he was working undercover when he approached appellant. He stated to appellant that he was "trying to score [him] a rock." Appellant replied, "Well, I can help you out." The officer handed appellant thirty dollars, and appellant soon returned with two rocks of crack cocaine. The officer placed the substance into a brown envelope, initialed it, and sealed it. At that time, he carried the evidence to lock-up at the South Central Drug Task Force office. It was then delivered to the State Crime Lab by Chief Investigator Linda Card.

Chemist Roy Adams testified that the evidence seemed to be in the same condition as when the lab received it. He described the evidence as "one plastic bag (which I'm talking about the plastic bag inside it) containing one white-off-white, rock-like substance." Both the chemist and the officer identified the brown envelope as State's exhibit one, and the crack cocaine as State's exhibit two. Upon the prosecution's attempt to offer State's exhibit one and two into evidence, defense counsel objected. The objection was based on chain of custody. The trial judge overruled the objection to the introduction of the exhibit. The evidence was admitted as a result. Ultimately, appellant was found guilty, sentenced, and fined. This appeal followed.

The purpose of establishing a chain of custody is to prevent the introduction of evidence that has been tampered with or is not authentic. *Guydon v. State*, 344 Ark. 251, 39 S.W.3d 767 (2001). The trial court must be satisfied within a reasonable probability that the evidence has not been tampered with, but it is not necessary for the State to eliminate every possibility of tampering. *Crisco v. State*, 328 Ark. 388, 943 S.W.2d 582 (1997). Minor uncertainties in the proof of chain of custody are matters to be argued by counsel and weighed by the jury, but they do not render the evidence inadmissible as a matter of law. *Id.*; *Guydon, supra.* Proof of the chain of custody for interchangeable items like blood or drugs needs to be more conclusive than for other evidence. *Crisco, supra.* On review, the appellate court will not reverse a ruling regarding the admission of evidence absent an abuse of discretion because such matters are left to the sound discretion of the trial court. *Guydon, supra.*

Appellant asserts that the trial court erred when it overruled his objection to the admission of the crack cocaine in that the State failed to establish a chain of custody by not showing with reasonable probability that the evidence had not been altered. The State, on the other hand, asserts that any minor uncertainties with the chain of custody went only to the weight of the evidence.

In *Crisco, supra*, our supreme court held that the trial court abused its discretion by receiving a substance into evidence that was not properly authenticated. *Crisco* is distinguishable from the facts presented in this case. In *Crisco*, the police officer described it as an "off-white powder substance" and the forensic chemist's description varied significantly, describing it as "one triangular piece of plastic containing a tan rock-like substance." 328 Ark. at 392, 943 S.W.2d at 584. The court in *Crisco* stated that:

> In the case before us, Crisco hinges his contention of lack of authenticity on the fact that Officer Hanes's description of the drugs differed significantly from that of the chemist, Michael Stage, in color and consistency. In fact, the chemist admitted that he would not have described the substance as off-white powder. Crisco's point has merit. True, there was no obvious break in the chain of custody of the envelope containing the plastic bag or conclusive proof that any tampering transpired. Yet, the

> marked difference in the description of the substance by Officer Hanes and the chemist leads us to the conclusion that there is a significant possibility that the evidence tested was not the same as that purchased by Officer Hanes. This is especially so when we consider that the drug involved is a readily interchangeable substance. Under these circumstances, where the substance at issue has been described differently by the undercover officer and the chemist, we believe the State was required to do more to establish the authenticity of the drug tested than merely trace the route of the envelope containing the substance.

Id. at 393, 943 S.W.2d at 585 (citations omitted).

However, in *McChristian v. State*, 70 Ark. App. 514, 20 S.W.3d 461 (2000), this court distinguished *Crisco* and affirmed the trial court's admission of the evidence. In *McChristian*, we stated:

> Here, the substance in question was identified by the officer who retrieved it as "six rocks" of what appeared to be crack cocaine, while the chemist's report described it as "a hard off-white rock-like substance." While in the *Crisco* case there was a difference in descriptions of the color and texture of the substance (white powder substance versus tan rock-like substance), here the difference is only in a specific number of rocks versus a reference to "a hard off white rock-like substance." We view differences in these descriptions, at most, as conflicts in evidence properly weighed by the finder of fact rather than as a failure to prove the authenticity of the cocaine. Furthermore, there were no allegations of tampering. Thus, the State sufficiently established the chain of custody. It is not necessary that the State eliminate every possibility of tampering; instead, the trial court must be satisfied that in all reasonable probability the evidence has not been tampered with.

70 Ark. App. at 518-19, 20 S.W.3d at 464-65 (citations omitted).

■ In the present case, Officer Jones testified that when he approached appellant and told him that he was "trying to score [him] a rock," appellant gave him two rocks. The chemist testified that "it was one plastic bag (which I'm talking about the plastic bag inside it) containing one white-off-white, rock-like substance." As in *McChristian*, we view any difference in these descriptions as, at most, conflicts in evidence properly weighed by

the finder of fact rather than as a failure to prove the authenticity of the cocaine.

Moreover, there was no obvious break in the chain of custody or other conclusive proof that any tampering transpired. Officer Jones testified that he packaged the items that he received from appellant, initialed the package, and sealed it. He stated that he carried the envelope to the South Central Drug Task Force office where it was locked and secured. The evidence was taken to the State Crime Lab by Chief Investigator Linda Card. Roy Adams of the crime lab identified exhibit one and two and testified that the evidence appeared to be in the same condition as it was when the lab received it. This testimony sufficiently establishes the chain of custody for the items. It is not necessary that the State eliminate every possibility of tampering; instead, the trial court must be satisfied that in all reasonable probability the evidence has not been tampered with. *See Pryor v. State*, 314 Ark. 212, 861 S.W.2d 544 (1993). Therefore, we hold the trial court did not err in admitting the crack cocaine into evidence. Accordingly, we affirm.

Affirmed.

PITTMAN, GLADWIN, ROBBINS, and BIRD, JJ., agree.

HART, GRIFFEN, CRABTREE, and ROAF, JJ., dissent.

ANDREE LAYTON ROAF, Judge, dissenting. The purpose of establishing a chain of custody is not to present an accounting of every hand that touched an item of contraband as it made its way from the alleged perpetrator to the arresting officer to the State Crime Lab and back into Drug Task Force custody. Instead, its purpose is to prevent the introduction of evidence that is not authentic. The majority has lost sight of this purpose, or simply ignored it, by refusing to recognize that the testimony and evidence in this case present a significant possibility that the contraband tested was not the same as that allegedly purchased by the officer and that the State in no way attempted to rebut or explain the discrepancy in the two descriptions of the crack cocaine allegedly purchased from appellant Jerry Hawkins.

At Hawkins's trial for delivery of a controlled substance, David Jones of the South Central Arkansas Drug Task Force testified that on September 26, 2000, he purchased two rocks of crack

cocaine from Hawkins. Jones's affidavit of facts supported his testimony. Although Jones denied that he or anyone else at the Task Force weighed the drug, the felony information filed against Hawkins reflected that it had "an aggregate weight of .382 grams." However, chemist Roy Adams of the State Crime Lab testified that he received only one rock of crack cocaine weighing .118 grams. The State offered the cocaine as State's Exhibit 2. Hawkins timely objected to the admission of State's Exhibit 2, asserting that the evidence offered could not be the same as testified to by Officer Jones. The trial judge overruled Hawkins's objection and admitted the evidence.

Hawkins was found guilty and sentenced to ten years in the Arkansas Department of Correction and was given a $10,000 fine. In his only point on appeal, Hawkins argues that the trial court erred when it overruled his objection to the admission of State's Exhibit 2, namely crack cocaine. Specifically, Hawkins contends that there was a discrepancy in the weight and number of rocks of the exhibit and that the State failed to establish a chain of custody by not showing with reasonable probability that the evidence had not been altered.

Again, the purpose of establishing the chain of custody is to prevent the introduction of evidence that is not authentic. *Gomez v. State,* 305 Ark. 496, 809 S.W.2d 809 (1991). To prove its authenticity, the State must demonstrate with reasonable probability that the evidence has not been altered in any significant manner. *Id.* It is not necessary that every possibility of tampering be eliminated; it is only necessary that the trial judge in his discretion be satisfied that the evidence presented is genuine, and in reasonable probability, has not been altered. *Dixon v. State,* 310 Ark. 460, 839 S.W.2d 173 (1992). Any minor discrepancies are for the trial court to weigh, and absent some evidence of tampering, the trial court is accorded discretion and its rulings in this regard will not be reversed on appeal absent an abuse of discretion. *Holbird v. State,* 301 Ark. 382, 784 S.W.2d 171 (1990); *Irvin v. State,* 28 Ark. App. 6, 771 S.W.2d 26 (1989). However, proof of the chain of custody for interchangeable items like drugs or blood needs to be more conclusive. *Crisco v. State,* 328 Ark. 388, 943 S.W.2d 582 (1997); *Lee v. State,* 326 Ark. 229, 931 S.W.2d 433 (1996); *Gardner v. State,* 296 Ark. 41, 754 S.W.2d 518 (1988).

There are three recent cases from our supreme court that have a particular bearing on this case; all three are cited by the majority opinion. In *Crisco v. State*, the supreme court held that the trial court had abused its discretion by receiving into evidence contraband that was not properly authenticated due to a marked difference in the description provided by an undercover officer and a crime lab chemist. The supreme court held that because there was a significant possibility that the evidence tested was not the same as that purchased by the officer, the State was required to do more to establish the authenticity than to simply trace the route of the envelope containing the substance. Although the discrepancy in *Crisco* involved color and texture, and this case involves weight and quantity, the underlying rationale expressed in *Crisco* holds true in this case. Here, there was a marked difference in both the number of rocks and in the weights as testified to by the officer and chemist, and as reflected in the felony information. There also was no attempt made by the State to clear up the discrepancies or establish the authenticity of the drug tested other than by tracing the route of the envelope.

While the facts of *Crisco* taken alone would seem to decide this case, it is necessary to also look at two other cases decided since *Crisco* that likewise have bearing upon the facts of Hawkins's case. In *Guydon v. State,* 344 Ark. 251, 39 S.W.3d 767 (2001), the admission of crack cocaine evidence turned on discrepancies between the testimony of the officer who weighed and submitted the crack cocaine for evidence and the forensic chemist who analyzed the crack cocaine. The officer in *Guydon* testified that before he put the two pieces of cocaine in sealed packets, initialed the tape, and delivered them to the Arkansas State Crime Laboratory, the two plastic bags of cocaine weighed .3 grams and .2 grams. The crime lab chemist testified that when she weighed the two bags of cocaine they weighed .1828 and .1183 respectively. The court found that, "although there was conflicting testimony concerning the weight of the evidence . . . this variation was insignificant, and note that minor uncertainties in the proof of chain of custody are matters to be argued by counsel and weighed by the jury, but they do not render the evidence inadmissible as a matter of law." Id., 344 Ark. at 257, 39 S.W.3d at 771; *see Harris v. State,* 322 Ark. 167, 907 S.W.2d 729 (1995); *see also Gardner v. State*, 296 Ark. 41, 754 S.W.2d 518 (1988). The *Guydon* court also distinguished its facts from those of *Crisco* by stating that the

minor discrepancy in weights was insufficient to raise a reasonable probability that a break in the chain of custody occurred.

Finally, in *McChristian v. State*, 70 Ark. App. 514, 20 S.W.3d 461 (2000), this court held that conflicting testimony between the arresting officer, who testified that he placed six rocks of cocaine in the evidence bag, and the crime lab chemist, who testified that the evidence bag only contained "a hard off white rock-like substance," were minor uncertainties. The court further stated that "[w]e view differences in these descriptions, at most, as conflicts in evidence properly weighed by the finder of fact rather than as a failure to prove the authenticity of the cocaine." *Id.* at 518, 20 S.W.3d at 465.

Hawkins argues that there is uncertainty in the chain of custody because Officer Jones testified that he placed two rocks of cocaine in the evidence envelope and Adams testified he opened the envelope and found one rock. The State argues that pursuant to the holdings of *McChristian* and *Guydon,* this conflict in testimony merely presents a "minor uncertainty" that does not bar the admission of the evidence, but allows the finder of fact to assign whatever weight to the evidence it chooses. The majority apparently agrees with the State, but it does so without any analysis other than to quote directly from *Crisco* and *McChristian*, repeat excerpts from the testimony in Hawkins's case, and conclude, "[A]s in *McChristian*, we view any difference in these descriptions as, at most, conflicts in evidence properly weighed by the finder of fact rather than as a failure to prove the authenticity of the cocaine." The fact remains that two rocks somehow became one between the alleged sale of the contraband and its arrival at the crime lab. This is not a "minor uncertainty" involving minuscule weights as was present in *Guydon,* nor is it analogous to the difference in *McChristian* between an officer who specified a number of rocks and a chemist who did not. The majority does not directly assert that it is, because undoubtedly it would be a misrepresentation of the facts of this case to do so. The facts contained in both the abstract and, unfortunately for Mr. Hawkins, with even more clarity in an unabstracted portion of the record, place this case squarely within the holding and authority of *Crisco*. By refusing to follow *Crisco*, this court has done a disservice to both Mr. Hawkins and our notion of justice. I would reverse and remand.

HART, GRIFFEN, and CRABTREE, JJ., join.

[redacted]

[redacted]