Honore NEWBERG *v.* NEXT LEVEL EVENTS, INC.

CA 02-997 110 S.W.3d 332

Court of Appeals of Arkansas
Division III
Opinion delivered April 30, 2003

Howell, Trice, Hope & Files, P.A., by: *Jason D. Files*, for appellant.

Barber, McCaskill, Jones & Hale. P.A., by: *R. Kenny McCulloch*, for appellee.

JOHN F. STROUD, JR., Chief Judge. Appellant, Honore Newberg, slipped and fell while attending a wedding reception at appellee's facility on April 29, 2000, and she sustained injuries as a result of this fall. Newberg filed suit against appellee, Next Level Events, Inc., alleging that her injuries were a result of appellee's negligence. Appellee filed a motion for summary judgment, which was granted by the trial court. Appellant now appeals, arguing that the trial court erred in granting appellee's motion for summary judgment. We agree with appellant that summary judgment was inappropriate; therefore, we reverse the grant of summary judgment and remand the case for trial.

The standard of review utilized in determining whether a motion for summary judgment was properly granted was set forth by this court in *Little Rock Electrical Contractors, Inc. v. Entergy Corp.*, 79 Ark. App. 337, 341-42, 87 S.W.3d 842, 845 (2002):

> We no longer refer to summary judgment as a drastic remedy and now regard it as one of the tools in a trial court's efficiency arsenal. We will only approve the granting of summary judgment 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 its day in court because there are not any genuine issues of material facts remaining. All proof submitted must be viewed in the light most favorable to the nonmoving party, and any doubts must be resolved against the moving party. However, it is well settled that 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. If there is evidence from which an inconsistent hypothesis might be drawn and reasonable minds might differ, then summary judgment is not proper.

(Citations omitted.)

In its motion for summary judgment, appellee makes the following statements: "That plaintiff was deposed on August 7, 2001

at the office of her counsel where she was unable to state any facts sufficient to find liability on part of Defendant. That specifically, plaintiff stated that no foreign substance was observed on the floor where she fell. Also, she stated that she had no knowledge that Defendant was aware of any substance or had put any substance in that place." This motion was made prior to any discovery being made on appellant's behalf.

After discovery, appellant rebutted appellee's motion for summary judgment with the affidavit of another guest at the wedding reception, Charles Williamson, who stated that he had slipped on the same step; that the step was slick; and that he had commented to another guest that he believed that the situation was dangerous. Appellant also relied upon the deposition of Steve Shadid, the owner of appellee. In his deposition, Shadid stated that appellee used a standard Johnson & Johnson wax on the floor, that it was applied by mop, and that it did not require buffing. He said that the area where appellant fell was waxed that day and would have taken about twenty minutes to dry; that he did not slip on the step after the floor had been waxed that day; and that no one had reported any problem to him about the slipperiness of the step. Shadid said that in applying the wax, the floor is mopped and the wax is left on the floor. He said that the floor is stripped approximately every three and one-half months, but there is no set schedule; it is stripped on an as-needed basis and when the facility's schedule will allow it. Shadid did not know when the floor was last stripped, but speculated that it had probably been stripped in January or February. Appellant also presented the affidavit of her attorney, who had an opportunity to examine a label from the wax product at appellee's attorney's office. The label could not be reproduced because it was printed on clear plastic. In this affidavit, appellant's attorney stated that the product was marketed under the name "Floor Science Premium Universal Sealer/Finish," and that the label contained the following instructions: "Before recoating: dust mop or sweep, deep scrub floor using Floor Science cleaner, rinse floor before applying finish. Removal: remove using Floor Science stripper coded #1 red." Appellant argued that appellee failed to properly clean the floor prior to applying the wax.

At the hearing on the motion for summary judgment, appellee's attorney also argued that appellant admitted in her deposition that she had consumed an alcoholic beverage prior to her fall; appellant's attorney contended that there was no indication of intoxication. Appellant's attorney argued that appellee did not comply with the directions on the liquid-wax label. Appellee's attorney countered that the precautions on the label that could lead to product failure or slippery conditions, namely using the product on floors coated with paste wax that had not been removed, diluting the product, using the product on cold floors, or reusing previously used product, had all been met by appellee. Appellant's attorney stated that there was no direct proof that failure to follow the directions caused excess slipperiness, but there was evidence that appellee did not follow the directions and did not strip the floor on a regular basis.

In granting appellee's motion for summary judgment, the trial judge stated:

> I am going to grant your motion for summary judgement. . . . I don't see proximate cause. I don't think there is a nexus that's been established at this state, proof meeting proof, that the actual slippery floor, failure to follow those conditions caused the floor to be slippery. I think that there is some evidence that there was floor being slippery [sic] by the fact that [appellant] testified to that and also [appellant's] witness. . . . I think [appellant's attorney] has proved that the Plaintiff [sic] was negligent. But I think the problem that I have that there is no proximate cause between the negligence and the damages. There is nothing that I see that would suggest that the negligent actions of the Defendant actually caused the floor to be slippery. There is circumstantial evidence that she fell, but I think that the cases are pretty strict in saying that the fact that the floor is slippery is not enough, and the fact that she fell is not enough of a nexus between the two.

In *Capel v. Allstate Insurance Co.*, 78 Ark. App. 27, 42, 77 S.W.3d 533, 543 (2002), we held:

> To demonstrate a prima facie cause of action in tort, a plaintiff must establish that damages were sustained, that the defendant was negligent, and that the defendant's negligence was the proximate cause of the damages sustained. Proximate cause is "a cause which, in a natural and continued sequence, produces damage, and without

> which the damage would not have occurred." Proximate cause is typically a fact question; however, when the evidence opposing the motion for summary judgment is insufficient to raise a question of fact, summary judgment is appropriate. Proximate cause may be shown by direct or circumstantial evidence if the facts proved are of such a nature and are so connected and related to each other that the conclusion may be inferred.

(Citations omitted.)

Mere proof that a floor is slippery will not defeat summary judgment; there must be proof of a substance on the floor such as water, grease, or wax. *Kelley v. National Union Fire Ins. Co.*, 327 Ark. 329, 937 S.W.2d 660 (1997). In *National Credit Corp. v. Ritchey*, 252 Ark. 106, 110, 477 S.W.2d 488, 491 (1972), our supreme court quoted, with approval, the following language from *Nicola v. Pacific Gas & Electric Co.*, 50 Cal. App.2d 612, 123 P.2d 529 (1942):

> If wax, or as in the present case, both wax and soft soap, are applied to the floor, it must be in such manner as to afford reasonably safe conditions for the proprietor's invitees, and if such compounds cannot be used on a particular type of floor material without violation of the duty to exercise ordinary care for the safety of invitees, by reason of the dangerous conditions they create, they should not be used at all. Of course slipperiness is an elastic term. From the fact that a floor is slippery it does not necessarily result that it is dangerous to walk upon. It is the degree of slipperiness that determines whether the condition is reasonably safe. This is a question of fact.

Although the facts in *Richey* arose in the context of the denial of a directed-verdict motion at a jury trial, we find that the supreme court's analysis is pertinent to our decision as to whether or not summary judgment was properly granted in that it held that in determining whether a condition is reasonably safe, the degree of slipperiness is a question of fact. If that question is sufficient to withstand a motion for directed verdict, surely it presents a question of fact sufficient to allow appellant to have the opportunity to present her case in court.

The supreme court upheld the reasoning set forth in *Richey, supra*, in *Thompson v. American Drug Stores*, 326 Ark. 536, 539, 932 S.W.2d 333, 335 (1996):

> In slip-and-fall cases involving a foreign substance on the floor, the plaintiff must prove either that the presence of the 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's employees knew or reasonably should have known of its presence and failed to use ordinary care to remove it. *Wal-Mart Stores, Inc. v. Kelton*, 305 Ark. 173, 806 S.W.2d 373 (1991). A plaintiff may also allege that a defendant has been negligent in cleaning or waxing a floor. In *National Credit Corp. v. Ritchey*, 252 Ark. 106, 477 S.W.2d 488 (1972), we quoted, with approval, . . . language from *Nicola v. Pacific Gas & Electric Co.*, 50 Cal. App.2d 612, 123 P.2d 529 (1942):
>
> . . .

We also impliedly recognized such a theory of recovery in *J.M. Mulligan's Grille, Inc. v. Aultman*, 300 Ark. 544, 780 S.W.2d 554 (1989), but said that the plaintiff did not prove her case.

In the present case, appellee admitted that the floor had been waxed on the day of the event; therefore, there was no question that a substance, wax in this case, was present on the floor. Although appellee puts forth appellant's admission in her deposition that she had consumed some alcohol prior to her fall, appellant also places into question whether appellee's failure to follow the instructions for applying the wax caused the floor to become slippery, causing her to fall. We hold that summary judgment was inappropriate under the facts presented because there is a question of fact as to whether the wax or the manner in which it was applied was the proximate cause of appellant's fall.

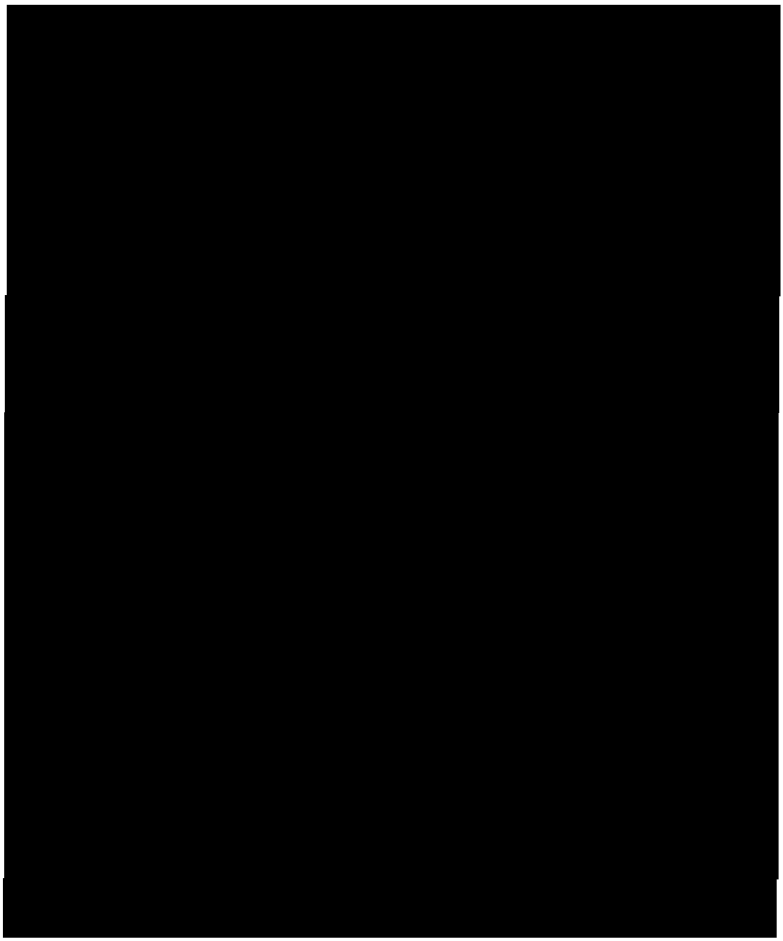
Reversed and remanded.

ROBBINS and CRABTREE, JJ., agree.

HOLT BONDING CO. *v.* FIRST FEDERAL BANK OF ARKANSAS

CA 02-735 110 S.W.3d 298

Court of Appeals of Arkansas
Division I
Opinion delivered April 30, 2003



Price Law Firm, by: *Robert J. Price*, for appellant.

Estes & Gramling, PLC, by: *Amy C. Estes*, for appellee.

JOHN MAUZY PITTMAN, Judge. This appeal is brought from two orders of summary judgment entered in favor of appellee First Federal Bank. As a result of the first order, appellant Holt Bonding Company was held liable for $24,000 as an endorser on a check; as the result of the second order, Holt's counterclaim against First Federal for conversion and negligence was dismissed.

On appeal, Holt argues that summary judgment was inappropriate because genuine issues of material fact remain on its liability as an endorser and on First Federal's liability for conversion and negligence. We affirm.

Holt writes appearance bonds in connection with judicial proceedings. It has agency relationships with a number of professional bail bondsmen in Baxter, Boone, Stone, and Washington counties. On December 9, 1998, Holt entered into an agency agreement with John Van Curen, a bail bondsman in Washington County. The agreement provided that Van Curen would write bonds for Holt, collect premiums, and send Holt weekly reports accompanied by fifty percent of the premiums collected. Under the terms of the agreement, all premiums were considered fiduciary funds held by Van Curen on behalf of Holt. It is undisputed that Van Curen had the authority to endorse Holt's name on checks made payable to Holt.

On October 6, 2000, Van Curen opened a checking account at First Federal Bank in the name of Van Curen's Rapid Recovery LLC. On October 13, 2000, he issued an appearance bond to Roberto Bravo, for which Zoila Ruano remitted a $24,000 check made payable to Holt Bonding. Van Curen endorsed the check

"Holt Bonding" and underneath that "John Van Curen." He then deposited the check into his LLC account at the Bank.

Between October 14 and 17, 2000, Van Curen made four cash withdrawals from the account at various First Federal branches until he had withdrawn the entire $24,000. On October 23, 2000, Ruano's check was returned to First Federal marked insufficient funds.

On October 31, 2000, the Bank sued Holt, Van Curen, and Rapid Recovery LLC, claiming that they were liable for the $24,000 by virtue of the endorsements on the check. Holt answered that, while Van Curen was its agent and was generally authorized to issue appearance bonds, endorse checks, and deposit checks into his account, he was not acting in the course and scope of his agency when he endorsed and deposited the Ruano check.

Following discovery, First Federal filed a motion for summary judgment, arguing that, as a matter of law, Van Curen was Holt's agent for the purpose of endorsing the $24,000 check and, when he endorsed Holt's name, Holt became liable as an endorser under the provision of the Uniform Commercial Code contained at Ark. Code Ann. § 4-3-415 (Repl. 2001), which reads:

> Subject to subsections (b), (c), and (d) and to 4-3-419(d) [not applicable here], if an instrument is dishonored, an indorser is obliged to pay the amount due on the instrument (i) according to the terms of the instrument at the time it was indorsed, or (ii) if the indorser indorsed an incomplete instrument, according to its terms when completed, to the extent stated in 4-3-115 and 4-3-407. The obligation of the indorser is owed to a person entitled to enforce the instrument or to a subsequent indorser who paid the instrument under this section.

Holt responded that a fact question remained as to whether Van Curen was acting in the course and scope of his agency when he endorsed and deposited the check. Holt also argued that First Federal should not have allowed Van Curen to deposit the check into the LLC account and then withdraw the entire proceeds, and that Van Curen had already repaid the $24,000 to First Federal. After a hearing, the trial court ruled that Van Curen was author-

ized to endorse premium checks and deposit them in his account and that, by reason of the endorsement of Holt's name, the Bank was entitled to judgment against Holt for $24,000 as a matter of law. Following this grant of summary judgment, the trial court granted summary judgment against Holt on a counterclaim that had been filed by Holt in which Holt alleged that First Federal was liable for conversion for allowing Van Curen to endorse and deposit the check into the LLC account without first contacting Holt to determine if he had the authority to do so. Holt now appeals from those two orders.

Before we address the propriety of the summary judgments, we direct our attention to two evidentiary arguments made by Holt. The first concerns requests for admission that First Federal propounded to Van Curen, which were not answered within the required thirty-day period. First Federal attached the requests to its motion for summary judgment, claiming that, by virtue of Van Curen's failure to answer, certain matters were deemed admitted, including that Van Curen endorsed the premium check for Holt, that he was authorized to deposit bond premiums in his checking account, and that he withdrew $24,000 for the benefit of Holt. Holt argues that the trial court erred when it treated Van Curen's unanswered requests as admissions by Holt.

In its brief, Holt admits that the trial court made no specific finding regarding the admissions when granting summary judgment. Our review of the court's order and comments from the bench likewise reveals no reliance by the trial court on Van Curen's unanswered requests. Therefore, even if consideration of the admissions would have been error, we decline to reverse on this point because it is clear that the trial court based its ruling on evidentiary attachments other than the requests for admissions. *See Barnett v. Arkansas Transp. Co.*, 303 Ark. 491, 798 S.W.2d 79 (1990) (holding that the trial court's mention of the collateral source rule in excluding evidence was not applicable to issues on appeal where it was clear that the court based its exclusion on ground of irrelevancy); *Freeman v. Freeman*, 20 Ark. App. 12, 722 S.W.2d 877 (1987) (holding that any possible error by trial court in taking judicial notice was harmless where is was clear that the court's ruling was based on other grounds).

The other evidentiary matter concerns certain attachments associated with Holt's claim that Van Curen had repaid the $24,000 to First Federal. Holt asserted this defense by way of an affidavit by its president, John Holt, stating that "Van Curen represented to me that all of the monies he had withdrawn from the bank had been repaid to the bank on December 21, 2000, and he provided me by facsimile with a copy of a receipt for $24,000 in cash on March 21, 2001." The faxed copy that purported to be a receipt indicated a deposit of $24,000 to the LLC account on December 21, 2000, and it bore a small round postmark-type stamp with the name "First Federal of Harrison."

At the hearing on the motion for summary judgment, the Bank objected that Holt's statement and the receipt were hearsay and that the receipt was forged and should not be considered by the court. Holt agreed that hearsay was not generally admissible for the purpose of a summary-judgment motion but argued that the evidence was either an admission of a party opponent or, in the case of the receipt, a record of a regularly conducted business activity. The trial judge ruled that no foundation had been laid to establish that the receipt fell within the business records exception and that the statement in the affidavit was not an admission but rather a denial of liability. Holt argues on appeal that the trial court erred when it so ruled.

Affidavits in support of or opposition to a motion for summary judgment must be made on personal knowledge and shall set forth such facts as would be admissible in evidence. Ark. R. Civ. P. 56(e). The supreme court has excluded hearsay statements from the summary-judgment analysis since such statements would be inadmissible at trial. *See, e.g., Swindle v. Lumbermens Mut. Cas. Co.*, 315 Ark. 415, 869 S.W.2d 681 (1993); *Brewington v. St. Paul Fire & Marine Ins. Co.*, 285 Ark. 389, 687 S.W.2d 838 (1985). However, this court has considered hearsay evidence in an affidavit where we determined that it could be subject to a hearsay exception. *See Baxley v. Colonial Ins. Co.*, 31 Ark. App. 235, 792 S.W.2d 355 (1990).

If Holt is to take advantage of the *Baxley* holding, it needs to convince us that the evidence could fall within a hearsay

exception. However, it has failed to do so. Holt offers no authority or convincing argument that the evidence constitutes either an admission of a party opponent, in which case it would not be hearsay under Ark. R. Evid. 801(d)(2) (2002), or a regularly kept business record, in which case it would be excepted from the hearsay rules under Ark. R. Evid. 803(6) (2002). We do not address points on appeal that are not supported by convincing argument or authority. *Parker v. Parker*, 75 Ark. App. 90, 55 S.W.3d 773 (2001).[1]

Having narrowed the issues by disposing of the above evidentiary questions, we turn now to whether the trial court erred in granting summary judgment on First Federal's claim against Holt. Our standard of review in summary judgment cases is well established. Summary judgment is to be granted by a trial court only when it is clear that there are no genuine issues of material fact to be litigated and the party is entitled to judgment as a matter of law. *Spears v. City of Fordyce*, 351 Ark. 305, 92 S.W.3d 38 (2002). Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* On appellate review, 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. *Id.* We view the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.*

Holt argues that summary judgment was inappropriate because the issue of whether Van Curen was acting within the scope of his authority when he endorsed and deposited the check

---

[1] In any event, Holt has not shown that a qualified person or custodian would offer the receipt into evidence, as required for application of the business-records exception, nor has it shown that the receipt or the statements in the affidavit constitute admissions by First Federal, being that they are the statements of another person (Van Curen) who is not an agent of First Federal and is in fact in a position adverse to First Federal's interest. *See Higgins v. General Motors Corp.*, 250 Ark. 551, 465 S.W.2d 898 (1971); *Cochran v. Arkansas Dep't of Human Servs.*, 43 Ark. App. 116, 860 S.W.2d 748 (1993).

is a question of fact for the jury to determine. *See generally Henry v. Gaines-Derden Enters., Inc.*, 314 Ark. 542, 863 S.W.2d 828 (1993); *Rowland v. Gastroenterology Assocs.*, 280 Ark. 278, 657 S.W.2d 536 (1983) (holding that whether an agent acts within the scope of his authority is a question of fact for the jury to determine). Holt relies on the generally established agency principles that 1) whether an employee is acting within the scope of employment depends on whether he is carrying out the object and purpose of the enterprise, as opposed to acting exclusively in his own interest; 2) if the servant steps aside from the master's business to do an independent act of his own and not connected with his master's business, then the relation of master and servant is for such time, however short, suspended; and 3) a master is ordinarily not liable for his servant's criminal acts.

While Holt correctly quotes the law as it relates to respondeat superior liability, the rules with regard to that type of liability do not completely answer the questions presented by this appeal. This is not a situation in which the Bank seeks to hold Holt vicariously liable for the tort of its employee; it seeks to hold Holt liable on its own endorsement contract, which arises by virtue of its signature being affixed to the check by its agent.

■ ■ The Uniform Commercial Code provides that, if a person acting, or purporting to act, as a representative signs an instrument by signing the name of the represented person, the represented person is bound by the signature to the same extent he would be bound if the signature were on a simple contract. Ark. Code Ann. § 4-3-402(a) (Repl. 2001). If the represented person is bound, the signature of the representative is the "authorized signature of the represented person" and the represented person is liable on the instrument. *Id.* There is no question in this case that Van Curen had the actual authority to endorse Holt's name on checks. Therefore, when Van Curen endorsed Holt's name, Holt's authorized signature was contained thereon, and Holt incurred the obligation of an endorser under the UCC provisions mentioned earlier in this opinion.

Because Van Curen was authorized to endorse Holt's name, Holt is liable as an endorser, regardless of any action that Van Curen took in misappropriating the funds after the endorsement was made. *See Citizen's Bank of Maryland v. Maryland Indus. Finishing Co.*, 338 Md. 448, 659 A.2d 313 (1995); *Rohrbacher v. Bancohio Nat'l Bank*, 171 A.D.2d 533, 567 N.Y.S.2d 431 (1991); *Jones v. Van Norman*, 513 Pa. 572, 522 A.2d 503 (1987) (recognizing that misappropriation by an agent after an authorized endorsement does not affect the validity of the endorsement, and the endorsement is either valid or invalid at the time it is made); *see also* 6 Ronald A. Anderson, *Uniform Commercial Code* § 3-403:57 at 346 (1998); 4 William Hawkland and Larry Lawrence, *Uniform Commercial Code Series* § 3-403:1 at 3-566 (West 1999).

Whether Van Curen, in making the endorsement, had a plan in mind to convert the funds is not relevant to Holt's liability on its signature. The fact is, Holt authorized Van Curen to endorse its name on the check and, having done so, became liable as an endorser under the UCC.

As for the summary judgment entered on Holt's counterclaim against First Federal, Holt argues that, even if it were liable to First Federal under the UCC, "it does not necessarily follow that the bank was not negligent or that it did not convert [Holt's] property." Holt cites no case nor makes any convincing argument to support its contention that a bank that pays on an authorized endorsement may nevertheless be liable for conversion or negligence. The question is not a simple one, requiring exploration and application of provisions of the UCC regarding conversion, the laws of banking, and possibly the commercial reasonableness of First Federal's conduct. It is not apparent without further research that Holt's point is well-taken. We therefore decline to address a legal issue that is not sufficiently developed on appeal. *See In re Adoption of D.L.J.*, 341 Ark. 327, 16 S.W.3d 263 (2000).

Affirmed.

NEAL and ROAF, JJ., agree.

Patricia POWELL *v.* John Charles POWELL

CA 02-133 110 S.W.3d 290

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered April 30, 2003

Davis & Watson, P.A., by: *Charles E. Davis*, for appellant.

Russell C. Atchley, P.A., for appellee.

JOHN MAUZY PITTMAN, Judge. The parties to this marital-property-division case married in 1993 and divorced in 2001. Appellee owned a farm subject to a mortgage before he

married appellant, and appellant had approximately $26,000 in premarital funds at the time of the marriage. The issues at trial focused on the respective rights of the parties to these items of property and on appellant's request for alimony.

Appellant contends that the trial court erred in awarding her only one-third of the reduction in indebtedness on the farm mortgage; in finding that the premarital funds she deposited into the joint account were marital property; and in denying her request for alimony. We find no error, and we affirm.

We first address appellant's contention that the trial court erred in failing to award her a full one-half of the reduction in indebtedness on the farm mortgage over the course of the marriage. The record shows that appellee owned a farm before he married appellant. The farm was subject to a mortgage in the amount of $141,508 when the parties married. By the time they divorced, the mortgage indebtedness had been reduced to $5,800. After trial, appellant was awarded one-third of the reduction of indebtedness. She argues on appeal that the trial judge erred in failing to award her one-half of that reduction. We do not agree.

With respect to the division of property in a divorce case, we review the chancellor's findings of fact and affirm them unless they are clearly erroneous. *Jablonski v. Jablonski*, 71 Ark. App. 33, 25 S.W.3d 433 (2000). It is true that there is a presumption that an increase in the value of nonmarital property resulting from the time, efforts, and skill of a spouse is regarded as a marital asset. *See Layman v. Layman*, 292 Ark. 539, 731 S.W.2d 771 (1987). However, a mere reduction in a single item of indebtedness is not the same thing as an increase in the overall value of the property, which would require evidence of the fair-market value of the farm both before and after the marriage. *See id.* There is evidence in the present case regarding the value of the farm at the time of the divorce, but we find nothing in the record that would allow the trial judge to determine the premarital value of the farm. Without evidence of the before-and-after value of the property to show the existence and extent of any increase in the value of the nonmarital property, any reduction in debt on nonmarital property is not considered to be marital property to be

divided equally; instead, the non-owning spouse is simply entitled to have the marital contribution considered in balancing the equities involved in the property division. *See Box v. Box*, 312 Ark. 550, 851 S.W.2d 437 (1993). The trial judge did so when he awarded appellant one-third of the reduction of indebtedness on the farm and, given the evidence presented at trial, we cannot say that he erred in failing to award her more.

We next address appellant's contention that the trial court erred in finding that appellant's premarital funds did not remain appellant's individual property after her marriage to appellee. Once property, whether personal or real, is placed in the names of persons who are husband and wife without specifying the manner in which they take, there is a presumption that they own the property as tenants by the entirety, and clear and convincing evidence is required to overcome that presumption. *McLain v. McLain*, 36 Ark. App. 197, 820 S.W.2d 295 (1991). Clear and convincing evidence is evidence by a credible witness whose memory of the facts about which he testifies is distinct, whose narration of the details is exact and in due order, and whose testimony is so direct, weighty, and convincing as to enable the fact-finder to come to a clear conviction, without hesitation, of the truth of the facts; on review, the issue is whether the trial judge's finding that the appellee overcame the presumption that the account was held by the entirety by clear and convincing evidence, is against a preponderance of the evidence. *Id.*

In the present case, the record shows that appellant had approximately $26,000 from the sale of her premarital home in a savings account at the time of her marriage to appellee. After she married appellee, appellant deposited these funds into a joint account she held with him. With regard to her intention regarding her separate property, appellant testified that "[w]e did discuss prenuptial things one day. And we planned on being married for the rest of our lives and we could just both put in everything we had and go from there." Given that appellant admitted that she deposited these funds in a joint account, that she discussed prenuptial arrangements with appellee, and that she regarded their property to be jointly held during the marriage, we cannot say that the trial judge erred in finding that she failed to rebut the

presumption of gift that arises when premarital funds are commingled with marital funds.

Finally, we address appellant's contention that the trial court erred in failing to award her alimony. The award of alimony is not mandatory, but is instead discretionary, and the trial court's decision regarding any such award will not be reversed absent an abuse of discretion. *McKay v. McKay*, 340 Ark. 171, 8 S.W.3d 525 (2000). The purpose of alimony is to rectify, insofar as is reasonably possible, the frequent economic imbalance in the earning power and standard of living of the divorced parties in light of the particular facts of each case. *Holaway v. Holaway*, 70 Ark. App. 240, 16 S.W.3d 302 (2000). The primary factors to be considered in awarding alimony are the need of one spouse and the other spouse's ability to pay; secondary factors that may also be considered in setting alimony include: (1) the financial circumstances of both parties, (2) the amount and nature of the income, and (3) the extent and nature of the resources and assets of each of the parties. *Id.*

The record in the present case shows that appellee was sixty-four years old at the time of the divorce and was in relatively poor health. He had quadruple bypass surgery for a heart condition, and had knee, intestinal, and hernia repair surgery as well since his marriage to appellant. He has a history of repeated hospitalizations for heart problems and is no longer able to do much farm work other than bookkeeping. Appellant was fifty-eight years old at the time of the divorce and was in good health. She had previous work experience as a union construction worker earning $18.00 per hour. She is currently employed managing an RV park in Branson, Missouri. Given this evidence, we cannot say that the trial judge abused his discretion in failing to award alimony to appellant.

Affirmed.

GLADWIN, BIRD, and GRIFFEN, JJ., agree.

ROBBINS and HART, JJ., concur.

Sharon Hays MARTINDALE *v.* The ESTATE of Sherman MARTINDALE, *Deceased*; Citizen's Bank and Trust Company; Cindy Ann Mizzell; Tammy Jo Flynn; and Robin Moore

CA 02-858 110 S.W.3d 319

Court of Appeals of Arkansas
Division III
Opinion delivered April 30, 2003

[redacted]

Jones, Jackson & Moll, PLC, by: *Mark Moll*, for appellant.

Gean, Gean & Gean, by: *Roy Gean III*, for appellees.

JOHN B. ROBBINS, Judge. Appellant Sharon Hays Martindale filed a petition to determine ownership of property following the death of her husband, Sherman Martindale, Jr. In her petition, Mrs. Martindale claimed entitlement to cattle and farm equipment acquired during their marriage. The appellees, Estate of Sherman Martindale, Jr., *et al.*, asserted that the assets at issue belonged to Mr. Martindale in his individual capacity at the time of his death and, consequently, are property of his estate. After a trial, the trial court ruled that Mr. Martindale was the sole owner of the cattle and equipment at the time of his death, and that it was the property of his estate. The trial court also ordered that Mrs. Martindale be reimbursed by the estate in the amount of $35,113.83 for expenses she incurred with respect to the cattle and equipment subsequent to Mr. Martindale's death.

For reversal of the trial court's order, Mrs. Martindale argues that the trial court erred in failing to find that the cattle and equipment were owned jointly instead of solely by Mr. Martindale. The appellees have cross-appealed, and argue that the trial court erred in ordering reimbursement of expenses incurred by Mrs. Martindale, and further request that a credit should be given against any amount of reimbursement for income received by Mrs. Martindale or for her use of the estate's farm equipment. We reverse on direct appeal, and we reverse on cross-appeal.

The evidence at trial established that Mrs. Martindale and Mr. Martindale were married in 1985, and that Mr. Martindale died on January 18, 2001. In 1990, the couple started a cattle business called S&S Limousin Farms, and a substantial amount of cattle and farm equipment remained at the time of Mr. Martindale's death. In his will, Mr. Martindale purported to give to his three daughters from a previous marriage, who are appellees herein, an interest in the cattle and farm equipment. Prior to the trial in this matter, Mrs. Martindale filed her election to take against the will.

Mrs. Martindale testified that she and Mr. Martindale farmed cattle and hay on real property that was owned by Mr. Martindale and also on property that they held jointly. She stated that throughout the farming operation the expenses were paid from a joint checking account. Initially, the account was styled, "Sherman or Sharon Martindale Limousin Farm Account," and it was subsequently styled, "Sherman or Sharon Martindale." Various checks were signed by either Mrs. Martindale or Mr. Martindale and were used for such things as purchasing cattle, buying or making payments for farm equipment, reparations, veterinarian bills, artificial insemination bills, feed, fuel, supplies, and membership dues to the North American Limousin Foundation.

Mrs. Martindale presented evidence that she and Mr. Martindale signed a promissory note in 1992 and borrowed $40,000.00 in order to acquire thirty-one head of Limousin cattle. The loan payments were made from their joint account. Loans were also taken for buying equipment such as a bailer, mower and rake that cost $19,000.00, a tractor that cost $27,000.00, and a soil aerator that cost $6750.00. Mrs. Martindale testified that all of the downpayments and monthly payments for these loans were made from their joint checking account.

Mrs. Martindale represented that she actively participated in the farming operation from its inception, and continued doing so after the death of her husband. She stated that she kept records and was involved in buying and selling cattle. Mrs. Martindale also maintained that she did everything from spreading chicken manure to bottle feeding calves to mowing hay, and that, "I did this every year, all the time." Mrs. Martindale testified that after Mr. Martindale died, she paid a total of more than $35,000.00 for

expenses such as equipment payments, reparations, supplies, farm labor, and insurance.

Mrs. Martindale introduced the insurance policy for the farm equipment, and the policy names both her and Mr. Martindale as the insureds. Also introduced into evidence was a financial statement bearing both of their names that listed as assets $35,000.00 in cattle and $35,000.00 in equipment.

Mrs. Martindale testified that the joint farm account was funded by a monthly payment of $7000.00 generated from a grocery store owned separately by Mr. Martindale. However, proceeds from the sale of cattle and hay were also deposited into the account. Mrs. Martindale stated that she never considered the money in the joint account to be only Mr. Martindale's, and that he never said anything to that effect. Mrs. Martindale stated, "I considered it our farm and not Sherman's farm," and that, "I never did consider the farm equipment to be Sherman's only."

Mr. Martindale's sister, Sue Shakingbush, was familiar with the farming operation and stated that the "S&S" in the name of the farm stands for "Sherman and Sharon." Mrs. Shakingbush further stated that both Sherman and Sharon Martindale owned the farm equipment.

Raymond Akins helped work on the farm, and he, too, stated that "S&S" stands for "Sherman and Sharon." Mr. Akins testified that both before and after Mr. Martindale's death, Mrs. Martindale has continuously worked on the farm performing such work as feeding cattle and driving a tractor or bulldozer. Mr. Akins thought that both of them owned the cattle and equipment.

Mrs. Martindale argues on appeal that the trial court clearly erred in finding that the cattle and farm equipment were owned solely by Mr. Martindale. She maintains that the farm was at all times operated jointly by her and Mr. Martindale, as evidenced by the fact that every expense was paid from their joint bank account. Mrs. Martindale also notes that she was authorized to conduct business on behalf of the farm, signed a promissory note to purchase cattle, was named on a financing statement that listed the cattle and equipment, and was named as an insured. Considering the indicia of ownership presented at the trial, Mrs. Martindale

contends that she proved she was a joint owner of the cattle and farm equipment.

In response to Mrs. Martindale's argument, the appellees raise several points that they contend demonstrate a lack of joint ownership. The appellees point out that registration certificates issued by the North America Limousin Foundation reflect that the cattle were registered in Mr. Martindale's name only. The appellees also note that the probate inventory prepared by the personal representative of the estate identifies the cattle and farm equipment as part of the estate, and that the personal representative met with Mrs. Martindale before preparing the inventory. Moreover, the appellees argue that Mr. Martindale's intention to keep the property in his individual capacity is evidenced by the fact that he treated it as such when preparing his will. The appellees further direct us to security agreements for farm equipment signed only by Mr. Martindale, and personal property tax assessments that include the equipment and are signed only by him. Finally, the appellees contend that the trial court was justified in relying on the fact that the joint account was being funded by Mr. Martindale's separate assets.

A party can destroy the nonmarital status of property by placing it in an account held jointly with a spouse. *McKay v. McKay*, 66 Ark. App. 268, 989 S.W.2d 560 (1999). A presumption arises that a spouse placing money in a joint account intended to make a gift of an interest in this money to the other spouse. *Id.* Once property, whether personal or real, is placed in the names of persons who are husband and wife, without specifying the manner in which they take, there is a presumption that they own the property as tenants by the entirety, and it takes clear and convincing evidence to overcome that presumption. *Lofton v. Lofton*, 23 Ark. App. 203, 745 S.W.2d 635 (1988). Furthermore, once property is owned by a husband and wife as tenants by the entirety, it retains its character of being entirety property even though the form of the asset may change. *See, e.g., Mathis v. Mathis*, 52 Ark. App. 155, 916 S.W.2d 131 (1996).

In bench trials, the standard of review on appeal is not whether there is any substantial evidence to support the finding of the trial court, but whether the trial court's findings were clearly erroneous. *Schueck v. Burris*, 330 Ark. 780, 957 S.W.2d 702

(1997). We hold that the trial court clearly erred in finding that Mrs. Martindale was not a joint owner, or more accurately, a co-owner as a tenant by the entirety, of the property at issue where there was no clear and convincing evidence to rebut the presumption that the joint bank accounts were held by the entirety, and all of the property was purchased from these accounts.

While the appellees correctly assert that the registration certificates for the cattle reflect Mr. Martindale's name, the membership application lists Mrs. Martindale as a person authorized to do business and bears her signature. Moreover, Mrs. Martindale signed a promissory note to purchase cattle, and bought and sold cattle throughout the farming operation. The fact that the certificates only reflect Mr. Martindale's name is not alone determinative of ownership. This fact was established by the testimony of the Martindale's veterinarian, who stated that he has been a partner in a cattle-farming operation where all the cattle were registered in his partner's name.

While it is true that Mr. Martindale's will treats the property as nonmarital and it is listed in the inventory of the estate, Mrs. Martindale correctly asserts that there was other, jointly-owned property that Mr. Martindale attempted to dispose of in his will. The property tax assessments referenced by the appellees are in Mr. Martindale's name, but also list Mrs. Martindale as his spouse. While the appellees correctly note that security agreements and bills of sale for farm equipment contain only Mr. Martindale's name, this alone does not end the inquiry in light of the other evidence. It is not disputed that the equipment was purchased with funds from the Martindales' joint bank account.

Mrs. Martindale testified that Mr. Martindale had a separate bank account from the time they were married until he closed it in 1993, and yet no contributions to the farm were made from this account. Instead, Mr. Martindale elected to open a joint account bearing both of their names and all farm expenses were paid from that account. The fact that the account was generated in part by Mr. Martindale's separate assets does not render the joint account, or purchases made from that account, his sole property in the absence of clear and convincing evidence of separate ownership. From our review of the record, we cannot find the clear and convincing evidence necessary to support the trial

court's ruling that the cattle and equipment were solely owned by Mr. Martindale, and now by his estate.

We now turn to the appellees' cross-appeal. The appellees argue that the trial court erred in ordering the estate to reimburse Mrs. Martindale for $35,113.83 that she allegedly spent in operating the farm after Mr. Martindale's death. Mrs. Martindale agrees that if we reverse on direct appeal, we should reverse on cross-appeal as no reimbursement will be necessary if she owns the cattle and farm equipment. Because we reverse on direct appeal, we also reverse on cross-appeal.

Reversed on direct appeal and on cross-appeal.

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

George HUTCHENS, Don Skeahan, and Robert Scott *v.* BELLA VISTA VILLAGE PROPERTY OWNERS' ASSOCIATION, INC.

CA 02-925 110 S.W.3d 325

Court of Appeals of Arkansas
Division IV
Opinion delivered April 30, 2003

Jerry B. Dossey, PLC, by: *Brian D. Burke* and *Jerry B. Dossey*, for appellants.

Connor & Winters, P.L.L.C., by: *John R. Elrod* and *Vicki Bronson*; and *Boyer, Schrantz, Rhoads & Teague*, by: *Douglas R. Schrantz*, for appellee.

OLLY NEAL, Judge. This is an appeal from an order of the Benton County Circuit Court, granting appellee's motion for summary judgment. Appellants challenge the trial court's finding that the protective covenants for Bella Vista Village permitted the implementation of a two-tiered assessment scheme based on whether a lot is improved or unimproved. They also argue that the trial court erred when it ignored the precedential treatment of *Kell v. Bella Vista Village Property Owners' Ass'n*, 258 Ark. 757, 528 S.W.2d 651 (1975), on the issue of equal application of assessments to all lots in a subdivision. We affirm.

Bella Vista Village is a planned residential and commercial community that was formed in 1965. In accordance with the terms of the Bella Vista Declaration, the appellee, Bella Vista Village Property Owners' Association (POA), was established to manage the affairs of Bella Vista Village. Every Bella Vista property owner is a member of the POA, and their property is subject to the declaration.

At issue in this appeal is article X of the declaration, which provides the framework whereby general annual assessments are levied against the property in Bella Vista. Article X provides, in part, as follows:

ARTICLE X

Covenant for Maintenance Assessments

> **Section 1. Creation of Lien.** The Developer of each Lot and Living Unit owned by it within The Properties hereby covenants and each Owner of any Lot or Living Unit by acceptance of a deed therefor, or by entering into a contract of purchase with the Developer, whether or not it shall be so expressed in any such

deed, contract of purchase, or other conveyance, shall be deemed to covenant and agree to pay to the Club: (1) annual assessments of charges; (2) special assessments for capital improvements, such assessments to be fixed, established and collected from time to time as hereinafter provided. The annual and special assessments, together with such interest thereon and costs of collection thereof as hereinafter provided, shall be a charge on the land and shall be a continuing lien upon the property against which each such assessment is made.

Section 2. Purpose of Assessments. The assessments levied hereunder by the Club shall be used exclusively for the purpose of promoting the recreation, health, safety, and welfare of the residents in The Properties and in particular for the improvement and maintenance of properties, services and facilities devoted to this purpose and related to the use and enjoyment of the Common Properties and the improvements situated on The Properties, including, but not limited to, the payment of taxes and insurance thereon, and repair, replacement, and additions thereto, and for the cost of labor, equipment, materials, management and supervision thereof. The limitation aforesaid shall not preclude the use of assessments levied hereunder for maintenance of roads and streets within The Properties, even though same have been dedicated to the public.

Section 3. Basis and Maximum of Annual Assessments. Until the year beginning January, 1970, the annual assessment shall be $60.00 per Lot or Living Unit. From and after January 1, 1970, the annual assessment may be increased by vote of the members, as hereinafter provided, for the next succeeding three years and at the end of each such period of three years for each succeeding period of three years. Unless the annual assessment shall be increased as aforesaid, it shall remain at $60.00 per Lot or Living Unit.

The Board of Directors of the Club may, after consideration of current maintenance costs and future needs of the Club, fix the actual assessment for any year at a lesser amount. Likewise, the Board of Directors of the Club may, after consideration of the lack of improvements as to lots in certain areas, fix the actual assessment for any year as to these particular lots at a lesser amount.

Section 4. Special Assessments for Capital Improvements. In addition to the annual assessments authorized by Section 3 hereof, the Club may levy in any assessment year a special assessment, applicable to that year only, for the purpose of defraying, in whole or in part, the cost of any construction or reconstruction, unexpected repair or replacement of the roads and streets within The Properties, even though same may have been dedicated to the public, and also a described capital improvement upon the Common Properties, including the necessary fixtures and personal property related thereto, provided that any such assessment shall have the assent of 51% of the votes of each class of members who are voting in person or by proxy at a meeting duly called for this purpose, written notice of which shall be sent to all Members at least 30 days in advance and shall set forth the purpose of the meeting. The Board of Directors of the Club may, after consideration of lack of improvements as to lots in a certain area, fix the actual assessment for any year as to these particular lots at a lesser amount.

Section 5. Change in Basis of Maximum of Annual Assessments. Subject to the limitations of Section 3 hereof, and for the purpose therein specified, the Club may change the maximum and basis of the assessments fixed by Section 3 hereof prospectively for any such period provided that any such change shall have the assent of 51% of the votes of each Class of Members who are voting in person or by proxy, at a meeting duly called for this purpose, written notice of which shall be sent to all Members at least 30 days in advance and shall set forth the purpose of the meeting.

Section 6. Quorum for Any Action Authorized Under Sections 4 and 5. The Quorum of any actions authorized by Section 4 and 5 hereof shall be as follows:

> At the first meeting called as provided in Sections 4 and 5 hereof, the presence at the meeting of Members, or of proxies, entitled to cast 50% of all votes of each class of membership shall constitute a quorum. If the required quorum is not forthcoming at any meeting, another meeting may be called, subject to the notice requirement set forth in Sections 4 and 5, and the required quorum at any such subsequent meeting shall be one-half of the required quorum at the preceding meeting, provided that no such subsequent

> meeting shall be held more than 90 days following the preceding meeting.

* * *

The declaration initially set the general annual assessment at sixty dollars per lot or living unit. However, in May of 2001, the POA board of directors submitted a ballot issue to the membership that would, if approved, have the effect of raising the assessment as to improved lots by ten dollars per month and the assessment as to unimproved lots by two dollars per month, effectively creating a two-tier assessment scheme based solely on the determination of whether a particular lot is improved or unimproved. Valid proxies were submitted by 52.4% of the membership. Of those received, 11,530 members voted in favor of the two-tiered assessment and 7,643 members voted against it.

On August 23, 2001, appellants filed their complaint for declaratory judgment, seeking a determination from the circuit court that the declaration provides no authority to the membership to establish a two-tiered assessment scheme. Thereafter, the parties each filed motions for summary judgment and a hearing was had on these motions on May 9, 2001. Following the hearing, the trial court granted appellee's motion for summary judgment and denied appellants' motion. From that decision comes this appeal.

Ordinarily, an order denying a motion for summary judgment is not an appealable order. *Karnes v. Trumbo*, 28 Ark. App. 34, 770 S.W.2d 199 (1989). However, when the order denying the motion is combined with a dismissal on the merits that effectively terminates the proceedings below, it is appealable. *Shelter Mut. Ins. Co. v. Williams*, 69 Ark. App. 35, 9 S.W.3d 545 (2001). The standard of review when an order denying a motion for summary judgment is appealed is whether the trial court abused its discretion in denying the motion. *Karnes v. Trumbo, supra.* Further, where the parties agree on the facts, we simply determine whether the appellee was entitled to judgment as a matter of law. *Tunnel v. Progressive Northern Ins. Co.*, 80 Ark. App. 215, 95 S.W.3d 1 (2003).

Appellants argue first that the trial court erred when it found that the protective covenants for Bella Vista Village permitted the implementation of a two-tiered assessment scheme where the amount of a lot's assessment is determined by whether the lot is improved or unimproved. Specifically, appellants state that:

> The sole issue in this case is whether the restrictive covenants provide any authority for the POA's creation of a general two-tiered scheme of assessments by less than a two-thirds affirmative vote of the members. . . . Appellants contend that there is no authority under the Declaration as written for such a general two-tiered assessment, and that the circuit court erred when it found otherwise.

A restrictive covenant is defined as a "private agreement, usually in a deed or lease, that restricts the use or occupancy of real property, especially by specifying lot sizes, building lines, architectural styles, and the uses to which the property may be put." *Black's Law Dictionary* 371 (7th ed. 1999). Restrictive covenants are not favored, and if there is any restriction on land, it must be clearly apparent. *See Holaday v. Fraker*, 323 Ark. 522, 915 S.W.2d 280 (1996). Restrictive covenants are to be strictly construed against limitations on the free use of property, and all doubts are resolved in favor of the unfettered use of land. *Forrest Constr. v. Milam*, 345 Ark. 1, 43 S.W.3d 140 (2001). The general rule governing the interpretation, application, and enforcement of restrictive covenants is that the intention of the parties as shown by the covenant governs. *Id.*

We hold that the covenant for maintenance assessment contained in Article X of the Bella Vista Village Declaration does not fall within the definition of a restrictive covenant; thus, strict construction is not required.

We have not previously addressed the review of actions of a property owners' association which adversely affect some its members. Courts in other jurisdictions have concluded that there are limits upon the majority's authority in these circumstances. In *Buckingham v. Weston Village Homeowners Ass'n*, 571 N.W.2d 842, 844 (N.D. 1997) (citing *Thanasoulis v. Winston Towers 200 Ass'n*, 110 N.J. 650, 542 A.2d 900, 903 (1988)), the

supreme court of North Dakota held that condominium associations have a fiduciary duty to their unit owners. "Courts have accordingly adopted a 'reasonableness' rule, holding that, although the condominium's governing body has broad authority to regulate the internal affairs of the development, this power is not unlimited, and any rule, regulation, or amendment to the declaration or bylaws must be reasonable." *Id.* at 844 (citing *O'Buck v. Cottonwood Village Condominium Ass'n*, 750 P.2d 813, 817 (Alaska 1988); *Johnson v. Hobson*, 505 A.2d 1313, 1317 (D.C. 1986); *Scudder v. Greenbrier C. Condominium Ass'n*, 663 So.2d 1362, 1369 (Fla. Dist. Ct. App. 1995); *Ridgely Condominium Ass'n v. Smyrnioudis*, 343 Md. 357, 681 A.2d 494, 498 (1996); *Bluffs of Wildwood Homeowners' Ass'n v. Dinkel*, 96 Ohio App. 3d 278, 644 N.E.2d 1100, 1102 (1994)). Under the reasonableness test, a rule which is unreasonable, arbitrary, or capricious is invalid. *Id.* at 844-45 (citing *Worthinglen Condominium Unit Owners' Ass'n v. Brown*, 57 Ohio App. 3d 73, 566 N.E.2d 1275, 1277 (1989)). In applying the reasonableness test, the reviewing court must determine:

> (1) whether the decision or rule is arbitrary,
>
> (2) whether the decision or rule is applied in an even-handed or discriminatory manner; and
>
> (3) whether the decision or rule was made in good faith for the common welfare of the owners and occupants of the condominium.

Blufffs of Wildwood, 644 N.E.2d at 1102. Courts will especially consider whether the majority's action has an unfair or disproportionate impact on only certain unit owners. *See Johnson*, 505 A.2d at 1318. The reasonableness test[:]

> protects against the imposition by a majority of a rule or decision reasonable on its face, in a way that is unreasonable and unfair to the minority because of its effect is to isolate and discriminate against the majority. It provides a safeguard against a tyranny by the majority.

Worthinglen, 566 N.E.2d at 1275.

Id. at 845.

[redacted] As in *Buckingham*, *supra*, the facts in this case demonstrate the need for limitations on the majority's authority to

change the method of assessments. We hereby adopt the "reasonableness" test and conclude that the power of the governing body of a property owners' association, homeowner's association, or condominium's association to make rules, regulations, or amendments to its declaration or bylaws is limited by a determination of whether the action is unreasonable, arbitrary, capricious, or discriminatory.

As appellee points out, the declaration does not state that the maximum and minimum must be the same for all lots. The only requirement contained in the declaration is that the assessment be approved by at least 51% of the voting members, which in this case, was done. Further, appellee points us to other jurisdictions where the two-tiered system has been upheld. In *Longanecker v. Diamondhead Country Club*, 760 So.2d 764 (Miss. 2000), the property owners' association was faced with an increase in the amount charged by the security company that provided security service to the residents. To help cover the additional cost, the board voted to charge five dollars per month in additional fees to owners of single-family dwellings, three dollars per month in additional fees to owners of condominiums, and no additional charge to owners of unimproved lots. Certain owners of single-family dwellings brought suit alleging that the two-tiered system of assessments was invalid under both a Mississippi statute, which provided that all members shall have the same rights and obligations, and the covenants governing the association. The Mississippi Supreme Court found the system permissible, citing *Ackerman v. Sudden Valley Community Ass'n*, 89 Wash. App. 156, 944 P.2d 1045 (1997), stating:

> Similarly in this case, the different assessments did not create different classes of members. The distinction was rationally based on the purpose of the fees, i.e. owners of improved lots are more likely to use and need the benefits of security than owners of unimproved parcels of land. The distinction did not affect the other rights or obligations of the members in any way.

Longanecker v. Diamondhead Country Club, 760 So.2d at 771.

Likewise in the instant matter, members are charged varying "usage" fees for use of various POA amenities, but even

more significant is the fact that the declaration does not specifically require equal assessment. Therefore, we hold that the creation of a two-tiered assessment scheme by the Bella Vista Village POA's members was not unreasonable, arbitrary, capricious or discriminatory. Accordingly, we affirm.

Appellants also argue that the trial court erred when it ignored the precedential treatment of *Kell v. Bella Vista Village Property Owners Ass'n*, 258 Ark. 757, 528 S.W.2d 651 (1975), on the issue of equal application of assessments to all lots in a subdivision. In *Kell*, the court indicated that "[t]he provisions of Sections 3 and 4 of Article X, *supra*, providing that appellee may, after consideration of the lack of improvements as to lots in a certain area, fix the actual assessment for any year as to these particular lots at a lesser amount appears to be invalid since the owners thereof have the same privilege of using the common facilities as do any of the residents of improved lots." There is no merit in appellants' argument.

The issues in *Kell* were whether (1) appellants' property constituted their homestead subject to the lien of the assessment; (2) appellants were bound to pay the annual assessments because the covenants did not run with the land; (3) appellants are bound by the lien created; (4) the covenant constitutes a perpetuity; (5) the developer was entitled to ten votes for each lot or living unit of which it was record owner; (6) the assessments arose out of contract and constitute a benefit to the property owner; and (7) the assessments were restraints on alienation. We have stated that dicta consists of statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to the determination of the case in hand, and they lack the force of an adjudication. *See Clemmons v. Office of Child Support Enforcement*, 345 Ark. 330, 47 S.W.3d 227 (2001). The issue in this case was not before the court in *Kell, supra*. Thus, what was said in dicta in *Kell* has no bearing on what we have decided here.

Affirmed.

PITTMAN and ROAF, JJ., agree.

Jim GREEN and J. Green Development Co. *v.*
CITY of JACKSONVILLE

CA 02-917 110 S.W.3d 323

Court of Appeals of Arkansas
Division III
Opinion delivered April 30, 2003

Eichenbaum, Liles & Heister, P.A., by: *Christopher O. Parker*, for appellants.

J. Denham and *Robert Bamburg*, for appellees.

TERRY CRABTREE, Judge. Appellant, Jim Green, is a developer whose final plat for a subdivision was accepted by the Jacksonville City Council on the condition that appellant comply with an ordinance requiring the installation of sidewalks. This is an appeal from an order granting appellee's motion for summary judgment and dismissing appellant's complaint, based on the conclusion that the trial court lacked jurisdiction to entertain appellant's cause of action challenging the council's decision. For reversal, appellant contends that the action of the city council was *ultra vires*, and thus the trial court had jurisdiction to enjoin the enforcement of the *ultra vires* act. We reverse and remand.

In 1999, appellant began the development of Phase II of the Collenwood Subdivision in Jacksonville, Arkansas. On November 8, 1999, the city's planning commission approved the preliminary plat that appellant submitted, which did not include sidewalks. Subsequently, on January 20, 2000, the city council passed Ordinance 1130, titled the "Master Sidewalk Plan," which required the construction of sidewalks. On December 11, 2000, the planning commission approved appellant's final plat. The minutes of the planning commission meeting reflect that the sidewalk ordinance was discussed but that it was agreed that appellant would not be required to comply with the ordinance since the process of developing the subdivision predated its enactment.

On February 1, 2001, the final plat was presented to the city council in accordance with Ordinance 17.12.100, which provides:

> Before the final plat is recorded in the Office of the Circuit Court and ex officio recorder, the subdivider shall submit the plat to the City Council . . . for [its] acceptance of public dedications. Until the public dedications and improvements have been accepted by the . . . City Council, any plat shall not be eligible to be recorded.

The city council voted to accept the subdivision's public dedications, but it conditioned its acceptance upon appellant's compliance with the sidewalk ordinance.

Appellant did not take an appeal to circuit court pursuant to Ark. Code Ann. § 14-56-425 (Repl. 1998). Instead, on May 22, 2001, he filed this action for declaratory and injunctive relief, contending that the city council's action was *ultra vires* because it had no authority to condition the acceptance of dedications by requiring compliance with the ordinance. In response, appellee denied that the city council exceeded its authority and took the position that the trial court lacked subject matter jurisdiction because appellant had not pursued a timely appeal of the city council's decision. Both parties moved for summary judgment, and the trial court granted appellee's motion and denied appellant's motion. In so ruling, the court did not determine whether the city council's action was *ultra vires* because it concluded that it lacked jurisdiction to make that determination since appellant had not appealed the council's decision. The trial court's ruling was in error.

Appellant's complaint was based on the theory that the city council's action was *ultra vires*, or in excess of its authority, and that an independent action does lie to collaterally attack such acts. This theory is well-grounded in our caselaw. In *Jensen v. Radio Broadcasting Co., Inc.*, 208 Ark. 517, 186 S.W.2d 931 (1945), our supreme court stated:

> The general rule of equity jurisdiction in suits to restrain acts of public officers is stated in 28 Am. Jur. 356, as follows: 'There is no doubt but that equity will exercise jurisdiction to restrain acts or threatened acts of public corporations or public officers, boards, or commissions which are *ultra vires* and beyond the scope of their authority, outside their jurisdiction, unlawful or without authority, or which constitute a violation of their official duty, whenever the execution of such acts would cause irreparable injury to, or destroy rights and privileges of, the complainant, which are cognizable in equity, and for the protection of which he would have no adequate remedy at law. An injunction to prevent an officer from doing that which he has no legal right to do is not an interference with his discretion.'

Id. at 520, 186 S.W.2d at 932. *See also Wilson v. Pulaski Ass'n of Classroom Teachers*, 330 Ark. 298, 954 S.W.2d 221 (1997); *Harkey, Comm'n v. Matthews*, 243 Ark. 775, 422 S.W.2d 410 (1967); *Shellnut v. Ark. State Game & Fish Comm.*, 222 Ark. 25, 258 S.W.2d 570 (1953). Under these authorities, the trial court

would have jurisdiction to grant appellant injunctive relief if the city council's action were found to be *ultra vires*. Thus, the question of whether the city council's action was or was not *ultra vires* is the pivotal jurisdictional issue in this case, yet the trial court declined to decide that issue on the belief that it had no jurisdiction to even make that determination. However, a court always has the power and a duty to examine the evidence and to determine whether, in fact, it does have jurisdiction over the matter. *Maxwell v. State*, 298 Ark. 329, 767 S.W.2d 303 (1989); *Arkansas Savings & Loan Ass'n v. Corning Savings & Loan Ass'n*, 252 Ark. 264, 478 S.W.2d 431 (1972). Consequently, we reverse and remand for the trial court to make that determination.

Reversed and Remanded.

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

Clarence L. ALLEN, Sr. *v.* Bertha ALLEN

CA 02-591 110 S.W.3d 772

Court of Appeals of Arkansas
Division I
Opinion delivered April 30, 2003

Ellen Lester Reif, for appellant.

Simmons S. Smith, for appellee.

LARRY D. VAUGHT, Judge. This is an appeal from a divorce decree ordering appellant to pay $25 a week in child support. Appellant contends that the trial court erred in ordering him to pay child support beginning November 2, 2001, due to his ongoing incarceration. He also argues reversal because there was no evidence that he had any income upon which to base the child-support order and because the order did not comply with Administrative Order No. 10. We affirm.

Appellant Clarence Allen, Sr., and appellee Bertha Allen were married on February 14, 1972. The parties separated on February 11, 1998. Three children were born during the marriage. Appellee filed a complaint for divorce on April 27, 2001, at which time appellant was incarcerated. After a hearing on October 31, 2001, the trial court granted appellee's complaint for divorce. A divorce decree was entered on December 7, 2001, which awarded custody of the parties' only minor child to appellee. The court ruled that appellee was entitled to the parties' mobile home, that appellant was entitled to visitation, and that appellant was to pay $25 per week in child support for the parties' minor child beginning on November 2, 2001. From that decision, comes this appeal.

A trial court's ruling on child-support issues is reviewed *de novo* by this court, and the trial court's findings are not disturbed unless they are clearly erroneous. *Montgomery v. Bolton*, 349 Ark. 460, 79 S.W.3d 354 (2002). In reviewing a trial court's findings, we give due deference to the court's superior position to determine the credibility of the witnesses and the weight to be accorded to their testimony. *Id.* As a rule, when the amount of child support is at issue, we will not reverse absent an abuse of discretion. *Id.* However, a trial judge's conclusion of law is given no deference on appeal. *Id.*

Appellant first contends that the trial court erred in awarding child support because he was incarcerated at the time of the divorce hearing. We disagree. In *Reid v. Reid*, 57 Ark. App. 289, 944 S.W.2d 559 (1997), this court held that a child-support obligation need not be suspended due to the payor's incarceration. There, the appellant argued that the trial court abused its discretion in refusing to completely abate his child-support obligation due to his imprisonment, which was a result of his being con-

victed of raping his daughter. We upheld the trial court's decision on the ground of unclean hands because the appellant's misconduct that led to his incarceration was perpetrated against a child for whom he owed a duty of support. However, we also stated that "equity will not come to the aid of one who of his or her own volition engages in criminal behavior and suffers the consequences which affect the ability to pay child support." *Id.* at 294, 944 S.W.2d at 562. Although *Reid* involved a modification of support, the reasoning is applicable to this case.

Appellant cites two cases from other jurisdictions, which he contends hold that a child-support obligation should not be imposed when the parent was incarcerated *prior* to the imposition of a permanent child-support order. *See Lewis v. Lewis*, 637 A.2d 70 (Dist. Col. App. 1994) (holding that the rule that a voluntary reduction of income does not affect obligation to pay child support did not apply because there was no indication that the husband shot his wife with the intention to be imprisoned and thereby reduce his child-support obligation); *Pierce v. Pierce*, 162 Mich. App. 367, 412 N.W.2d 291 (1987) (holding that an inmate is not liable for an arrearage that accrued during incarceration unless he became incarcerated in order to avoid the obligation or had other assets while in prison). While this exact issue has never been determined in Arkansas, Administrative Order No. 10 provides that income may be imputed to an unemployed payor of child support, and *Reid* upheld the trial court's refusal to totally abate child support due to the appellant's incarceration.

We must therefore examine the court's award of child support in this case in light of the applicable version of Administrative Order No. 10. *See In Re: Administrative Order No. 10: Arkansas Child Support Guidelines*, 331 Ark. Appx. 581 (1998). Appellant contends that there was no evidence that appellant had any income upon which to base the initial support order. Appellee's testimony merely indicated that appellant was incarcerated in a federal prison. Section III of Administrative Order No. 10 provides in part:

> d. *Imputed income*: If a payor is unemployed or working below full earning capacity, the court may consider the reasons therefore. If earnings are reduced as a matter of choice and not for reasonable cause, the court may attribute income to a payor up to

> his or her earning capacity, including consideration of the payor's lifestyle. Income of at least minimum wage shall be attributed to a payor ordered to pay child support.

The supreme court in *Barnes v. Barnes*, 311 Ark. 287, 843 S.W.2d 835 (1992), upheld the chancellor's order directing the appellant to pay the minimum chart amount for retroactive child support where the trial judge recognized that there was no evidence of appellant's weekly take-home pay for the relevant time period. Finding no error or abuse of discretion, the supreme court stated that the "[c]hancellor simply set the support at the minimum level required of an unemployed person."

Similar to *Barnes*, here the trial court ordered appellant to pay the minimum chart amount of $25 per week where there was no evidence of appellant's income or even if he had any income. Following the reasoning of *Reid, supra*, appellant of his own volition engaged in criminal conduct and thus decreased his earnings by his own choice. We cannot say that the trial judge abused his discretion in ordering appellant to pay the minimum amount of support required of an unemployed person.

Appellant finally suggests that the trial court's order did not comply with Administrative Order No. 10 because there was no recitation of appellant's income, the amount of support required under the guidelines, and whether there was a deviation from the family-support chart. The applicable version of Admin. Order No. 10 does not require that the order recite appellant's income or the amount of support required under the guidelines. *See In Re: Administrative Order No. 10 — Arkansas Child Support Guidelines, supra.* In addition, this is not a deviation case. However, Arkansas Code Annotated section 9-12-312(a)(2) (Repl. 2002) provides:

> (2) In determining a reasonable amount of support, initially or upon review to be paid by the noncustodial parent, the court shall refer to the most recent revision of the family support chart. It shall be a rebuttable presumption for the award of child support that the amount contained in the family support chart is the correct amount of child support to be awarded. Only upon a written finding or specific finding on the record that the application of the support chart would be unjust or inappropriate, as determined under established criteria set forth in the family support chart, shall the presumption be rebutted.

It has been held that a reference to the family-support chart is mandatory. *Black v. Black*, 306 Ark. 209, 812 S.W.2d 480 (1991); *McJunkins v. Lemons*, 52 Ark. App. 1, 913 S.W.2d 306 (1997); *Jones v. Jones*, 43 Ark. App. 7, 858 S.W.2d 130 (1993).

While the order did not specifically reference the family-support chart, we hold that the trial judge in his bench ruling referenced the chart by ordering appellant to pay the minimum amount. The court stated: "The Court will order and direct that child support be set at the minimum amount of $25 per week commencing this Friday, November the . . . 2nd and will continue each Friday hereafter until further order of this court." Clearly, the court's reference to the "minimum amount" was a reference to the minimum chart amount.

Affirmed.

GLADWIN and BIRD, JJ., agree.

Cindy H. COLE *v.* Randall E. COLE

CA 02-232 110 S.W.3d 310

Court of Appeals of Arkansas
Division II
Opinion delivered April 30, 2003

Goodwin, Moore, Broadaway, Gray & Langley, LLP, by: *Harry Truman Moore* and *Angela Bowden Gray*; and *Kutak Rock LLP*, by: *Ken Shemin*, for appellant.

Barry E. Coplin, P.A., by: *Barry E. Coplin*, for appellee.

LARRY D. VAUGHT, Judge. This appeal involves the financial aspects of the dissolution of a twenty-five-year marriage. The trial court divided the marital estate, including the husband's interest in a medical practice and associated entities, and also awarded spousal and child support. Appellant Cindy Cole (wife) has appealed, taking issue principally with the division of the marital estate, the award of spousal support, and the award of child support. Appellee Randall Cole (husband) has cross-appealed on the issue of calculation of his income for child-sup-

port purposes. We have determined that the trial court's judgment should be reversed and remanded.

The parties were married in 1976, while husband was still in medical school. After the marriage, three children were born to the parties, with two having reached majority at the time of the divorce. Wife worked and supported the family while husband finished medical school and residency. After the parties returned from Florida in the mid-1980s, husband became associated with the Boozman-Hof Clinic ("Clinic"), the Boozman-Hof Surgery Center ("Surgery Center"), and the Genesis Partnership ("Genesis"). Husband filed a complaint for divorce, and wife answered and counterclaimed. Wife sought an unequal distribution of the marital property in her favor. The major issues at trial were the valuation of husband's interest in the surgery center and the distribution of the marital property.

On appeal, equity cases, such as divorces, are reviewed *de novo*. *Skokos v. Skokos*, 344 Ark. 420, 40 S.W.3d 738 (2001). With respect to the division of property in a divorce case, we review the trial judge's findings of fact and affirm them unless they are clearly erroneous. *Id.* A finding is clearly erroneous when the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Huffman v. Fisher*, 343 Ark. 737, 38 S.W.3d 327 (2001). In order to demonstrate that the trial court's ruling was erroneous, an appellant must show that the trial court abused its discretion by making a decision that was arbitrary or groundless. *Skokos v. Skokos, supra.*

Guidelines for the division of marital property are set forth in Ark. Code Ann. § 9-12-315(a)(1)(A) (Repl. 2002). Factors to be considered include the duration of the marriage, the estate of each party, and the "contribution of each party in acquisition, preservation, or appreciation of marital property . . . ." Ark. Code Ann. § 9-12-315(a)(1)(A)(viii).

I. Valuation of the Surgery Center

At the time of trial, husband had a 50% interest in the surgery center, a 22.7% interest in the clinic, and a 22.7% interest in Gene-

sis. The clinic employs the personnel used in both the clinic and the surgery center and leases the employees to the surgery center. The clinic also provides administrative services such as accounting and marketing. Genesis owns the real estate and the equipment used by the clinic and surgery center. The parties agreed that husband's interest in Genesis was valued at $689,700. The parties also agreed that husband's interest in the clinic was valued at $100,000. Husband has a buy-sell agreement with Dr. William Hof, the owner of the other 50% interest in the surgery center. The agreement, effective May 4, 1998, but signed on December 28, 1998, valued the entire surgery center at $750,000. Husband testified that the $750,000 figure was arrived at without a fair market valuation but was based on what he and Dr. Hof felt they could afford to pay each other and still operate the surgery center. There was also an option given to Dr. John Billingsley to purchase a 15% interest in the surgery center for $406,855.59, dated March 1, 1999.

Wife's expert, Cheryl Shuffield, a certified public accountant, gave an exhaustive valuation of husband's interest in the surgery center. In her original report, she valued the interest at $1,526,100. With updated information, she valued the interest at $1,274,200, in order to account for the goodwill personally attributable to husband's presence. Husband presented two experts, Daniel Bernick and Michael Brown, neither of whom were certified public accountants. Bernick did not do an independent evaluation; instead, he reviewed Shuffield's report and changed certain assumptions made by Shuffield for discounts for lack of marketability (50% versus Shuffield's 10%) and lack of a controlling interest (31.5% versus Shuffield's 10%) to arrive at a value of $497,303. Bernick testified that, if he had done an independent valuation, he would have used a different methodology than that used by Shuffield. Brown agreed with Bernick's basic approach and valued husband's interest at $297,500. Brown testified that he did not extensively review Shuffield's report. The trial court found husband's interest in the surgery center to be worth $375,000, the exact amount set forth in the buy-sell agreement.

This is a case in which we are left with the firm conviction that the trial court made a mistake in valuing husband's interest in the surgery center at $375,000. Husband argues that the

trial court found his experts more credible than Ms. Shuffield and made a rough average of their values and the buy-sell agreement value to reach $375,000. This is not supported in the abstract and addendum before us. The only indication in this record of the court's reasoning when establishing the value at $375,000 is found in the posttrial hearing of September 20, 2001. During a colloquy with counsel for both parties, the trial court indicated that it would take a long time for husband to retire the debt payment to wife if the surgery center were valued at $1.2 million, and rhetorically questioned the value of the surgery center if husband became disabled. In response to a request to divide the stock in the surgery center, the court stated that, if he used another method of distribution, such as stock division, husband would quickly be bought out by Dr. Hof pursuant to the terms of the buy-sell agreement. We believe that these comments indicate that the trial court did not attempt to establish a fair market value but instead determined that it was bound by the value set in the buy-sell agreement. Arkansas law requires the use of the "fair market value" standard for valuing businesses in a marital property context. Ark. Code Ann. § 9-12-315 (Repl. 2002); *Crismon v. Crismon*, 72 Ark. App. 116, 34 S.W.3d 763 (2000).

A small minority of courts hold that, in a divorce, the non-shareholder spouse is bound by a shareholder valuation agreement entered into by the shareholder spouse. *Hertz v. Hertz*, 99 N.M. 320, 657 P.2d 1169 (1983) (holding that, where agreement set value the shareholder spouse could receive for the firm's goodwill, non-shareholder spouse was bound by that valuation so as not to receive a greater interest upon divorce than the shareholder spouse). *See also McDiarmid v. McDiarmid*, 649 A.2d 810, 815 (D.C. 1994) (holding that, where partnership agreement provided husband could not recoup value of goodwill in law firm, wife was bound). Another court has held that a shareholder's agreement can establish a "presumptive value" for the divorcing spouse's shares. *Stern v. Stern*, 66 N.J. 340, 331 A.2d 257 (1975).

The clear majority of courts hold that the value established in the buy-sell agreement of a closely-held corporation, not signed by the non-shareholder spouse, is not binding on the non-shareholder spouse but is considered, along with other factors, in

valuing the interest of the shareholder spouse. This was discussed by the West Virginia Supreme Court of Appeals in a case in which the divorcing husband had executed a buy-sell agreement with his medical corporation. In *Bettinger v. Bettinger*, 183 W.Va. 528, 396 S.E.2d 709 (1990), the court observed:

> [A] majority of courts which have considered a buy-sell agreement in a closely held corporation setting the stock value for equitable distribution purposes has determined that such an agreement should not be considered as binding, but rather should be weighed along with other factors in making a determination as to the value of such stock. *E.g., In re Marriage of Melnick*, 127 Ill. App.3d 102, 82 Ill. Dec. 228, 468 N.E.2d 490 (1984); *In re Marriage of Moffatt*, 279 N.W.2d 15 (Iowa 1979); *Rogers v. Rogers*, 296 N.W.2d 849 (Minn. 1980); *Bowen v. Bowen*, 96 N.J. 36, 473 A.2d 73 (1984); *Amodio v. Amodio*, 70 N.Y.2d 5, 516 N.Y.S.2d 923, 509 N.E.2d 936 (1987); *In the Matter of the Marriage of Belt*, 65 Or. App. 606, 672 P.2d 1205 (1983); *Bosserman v. Bosserman*, 9 Va. App. 1, 384 S.E.2d 104 (1989); *Arneson v. Arneson*, 120 Wis.2d 236, 355 N.W.2d 16 (Wis. App.1984). It is apparent that buy-sell agreements in a closely held corporation can be manipulated by the shareholders to reflect an artificially low value. This is why caution should be exercised in accepting their value for equitable distribution purposes.

Id. at 533-34, 396 S.E.2d at 714-15.

In a similar divorce case, the Virginia Court of Appeals rejected the argument that a restrictive buy-sell agreement on stock controlled the value to be assigned to the shareholder spouse's interest in the corporation, stating:

> In a majority of jurisdictions, the price set by a buy-out provision does not control the determination of value when the other spouse did not consent or was not otherwise bound by its terms. This is so even though the agreement was executed after the marriage. The reason for rejecting the value set by buy-out provisions is that they do not necessarily represent the intrinsic worth of the stock to the parties. Some courts, however, consider buy-out provisions a factor to be considered. Other jurisdictions hold that the terms of the restriction presumptively control value, while a small minority regard the value specified in the agreement as controlling.

> . . . . The price established for buy-out purposes, however, is often artificial and does not always reflect true value. The very purpose of such provisions or agreements often is to discourage sales by restricting the price which could be realized to less than the actual value to the owner.

Bosserman v. Bosserman, 9 Va. App. 1, 6, 384 S.E.2d 104, 108 (1989) (citations omitted).

In explaining the rationale for the majority view, some courts have noted that the issue is not the value the shareholder spouse would receive if he sold his shares, but rather the current value to the shareholder of his interest in the corporation. In *Bowen v. Bowen, supra*, the shareholder spouse had a minority interest in a closely-held corporation, subject to a buy-sell agreement that set a value that excluded the corporation's goodwill and other intangible assets. The court held that the buy-sell agreement would be considered but was not dispositive. *Id.* The court explained:

> [T]he defendant argues that the court should not value his interest above its buy-sell value, since if he must sell his shares, the price he would receive would be limited by the buy-sell restriction. But there should be no reason to sell the shares since the court can fashion the distribution so that a sale need not occur. Furthermore, to give the buy-sell agreement conclusive effect would not recognize the realities of the present situation: The shareholder will not sell the stock and, one hopes, will not die. In other words, he will continue to experience the benefits of being a 22% shareholder and an employee.

Id. at 48, 473 A.2d at 79. *See also Money v. Money*, 852 P.2d 1158 (Alaska 1993); *In re Marriage of Keyser*, 820 P.2d 1194 (Colo. App. 1991); *Drake v. Drake*, 809 S.W.2d 710 (Ky. App. 1991); *Bosserman v. Bosserman, supra.* In *Wilson v. Wilson*, 294 Ark. 194, 741 S.W.2d 640 (1987), *appeal after remand*, 301 Ark. 80, 781 S.W.2d 487 (1989), our supreme court appeared to allow consideration of the value contained in a stock purchase agreement as *one* factor to be considered in valuation of a medical practice. Because the trial court in this case relied solely on the buy-sell agreement and did not establish a fair market value, we reverse on this point.

II. Other Marital Property Issues

As noted above, the trial court made an equal distribution of marital property. However, wife complains that this was improper. Part of wife's argument is based on the valuation of the surgery center. There are three other issues that wife raises in the total property distribution. We reverse on these issues so that the trial court can consider the valuation and distribution of marital property *in toto*. We briefly discuss these issues for guidance of the trial court on remand.

The parties had a membership at Pinnacle Country Club, valued at $30,000. This item was awarded to husband. There is no corresponding credit for one-half of this property interest in the decree and no explanation for this omission. While there is no requirement that each party receive a share of each item of marital property, section 9-12-315 requires an explanation for such unequal division. *See Harvey v. Harvey*, 295 Ark. 102, 747 S.W.2d 89 (1988).

Next, wife argues that the trial court erred in awarding her the marital residence and corresponding debt, rather than ordering the residence sold and the proceeds divided equally. The parties agreed that the marital residence was valued at $360,000, with a first mortgage of $59,906 and a second mortgage of $21,000. We do not believe the trial court could do anything other than order the property sold, give wife possession of the property until it would be sold at some future time, or leave the parties as tenants in common. Ark. Code Ann. § 9-12-317(a) (Repl. 2002). The trial court could not rely on section 9-12-317(c) in awarding wife the entire interest in the residence because that statute was not passed until 1997, after the parties acquired the property, and doing so would impair a vested interest. *See Hubbard v. Hubbard*, 251 Ark. 465, 472 S.W.2d 937 (1971).

Third, wife argues that husband exercised an option to purchase a condominium for $325,000 after the parties separated but before the divorce decree was entered. Husband testified that he had exercised his option but had not closed on the property. As defined in section 9-12-315, marital property is *all* property acquired subsequent to marriage except for those seven categories specifically listed. Generally, options acquired during the mar-

riage are marital property, even though the option is not exercised until after the divorce. *Richardson v. Richardson*, 280 Ark. 498, 659 S.W.2d 510 (1983); *Dunavant v. Dunavant*, 66 Ark. App. 1, 986 S.W.2d 880 (1999). Therefore, to the extent husband acquired an enforceable interest in the condominium, he acquired marital property subject to division.

III. Alimony

Wife appeals the trial court's decision to award her what the decree labels rehabilitation alimony of $3,000 per month for four years. She contends that her needs and husband's ability to pay justify a higher award. The trial judge indicated in the decree that he could have found that there was no "need" for alimony.

The decision whether to award alimony is a matter that lies within the trial judge's sound discretion, and on appeal this court will not reverse a trial judge's decision to award alimony absent an abuse of that discretion. *Ellis v. Ellis*, 75 Ark. App. 173, 57 S.W.3d 220 (2001). The purpose of alimony is to rectify economic imbalance in the earning power and the standard of living of the parties to a divorce in light of the particular facts of each case; the primary factors that a court should consider in determining whether to award alimony are the financial need of one spouse and the other spouse's ability to pay. *Id.* In fixing the amount of alimony, the courts consider many factors, including (1) the financial circumstances of both parties, (2) the couple's past standard of living, (3) the value of jointly owned property, (4) the amount and nature of the parties' income, both current and anticipated, (5) the extent and nature of the resources and assets of each of the parties, (6) the amount of income of each that is spendable, (7) the earning ability and capacity of each party, (8) the property awarded or given to one of the parties, either by the court or the other party, (9) the disposition made of the homestead or jointly owned property, (10) the condition of health and medical needs of both husband and wife, (11) the duration of the marriage, and (12) the amount of child support. *Boyles v. Boyles*, 268 Ark. 120, 594 S.W.2d 17 (1980). Neither this court nor the supreme court has ever attempted to reduce the amount of alimony to a mathematical formula. *Mitchell v. Mitchell*, 61 Ark. App. 88, 964 S.W.2d 411 (1998). Presumably, it has been thought that the need for flexibil-

ity outweighs the corresponding need for relative certainty. *Id.* The court should also consider the family support chart in determining the amount of spousal support to be paid. *Schumacher v. Schumacher*, 66 Ark. App. 9, 986 S.W.2d 883 (1999). Moreover, in the absence of a settlement agreement to the contrary, an award of alimony is always subject to modification, upon application of either party. *Bracken v. Bracken*, 302 Ark. 103, 787 S.W.2d 678 (1990); *Holaway v. Holaway*, 70 Ark. App. 240, 16 S.W.3d 302 (2000). *See also* Ark. Code Ann. § 9-12-314 (Repl. 2002).

Here, we have reversed the division of marital property, a major part of the *Boyles* factors to be considered listed above. Alimony and property divisions are complementary devices that a trial judge employs to make the dissolution of a marriage as equitable as possible. *Davis v. Davis*, 79 Ark. App. 178, 84 S.W.3d 447 (2002). Further, there is no indication that the trial judge considered the family support chart in setting the amount of alimony. In *Schumacher, supra*, this court reversed an award of alimony where the trial court referred to an award of separate maintenance made by another court and where the record did not show that the trial court made reference to the chart. Under these circumstances, we believe that it would be best to reverse and remand this issue to the trial court in order to consider all relevant factors when determining the amount of alimony that should be awarded, including the family-support chart. *Hoover v. Hoover*, 70 Ark. App. 215, 16 S.W.3d 560 (2000).

IV. Child Support

Both parties appeal the trial court's calculation of husband's income and the corresponding award of child support. The trial court found husband's annual net income to be $292,571, based on an average. The average was based on husband's projection of his 2001 income as $227,573 and wife's contention that his income was $357,569. The trial court then calculated husband's monthly income as $24,400 but then used a monthly income figure of $24,405[1]. The trial court then applied the Administrative Order 10 percentage for one child (15%) to arrive at the monthly child-support figure of $3,660.

[1] $292,571 divided by 12 equals $24,380.

The amount of child support lies within the sound discretion of the trial judge, and the judge's finding will not be reversed absent an abuse of discretion. *McWhorter v. McWhorter*, 346 Ark. 475, 58 S.W.3d 840 (2001); *Kelly v. Kelly*, 341 Ark. 596, 19 S.W.3d 1 (2000); *Smith v. Smith*, 337 Ark. 583, 990 S.W.2d 550 (1999). The trial judge is required to refer to the child-support chart, and the amount specified in the chart is presumed to be reasonable. *Smith v. Smith, supra.* However, the presumption that the chart is correct may be overcome if the trial judge provides written findings that the chart amount is unjust or inappropriate. *Id.*

It is the ultimate task of the trial judge to determine the expendable income of a child-support payor. *Stepp v. Gray*, 58 Ark. App. 229, 947 S.W.2d 798 (1997). This court has stated that the trial judge "may not simply utilize one of the definitions of income found in the tax code, particularly in the case of self-employed persons, to arrive at the true disposable income of the support obligor." *Id.* at 235, 947 S.W.2d at 801.

The version of the child-support chart applicable when this case was tried is found at *In Re: Administrative Order No. 10: Arkansas Child Support Guidelines*, 331 Ark. Appx. 581 (1998).[2] These guidelines provided that for self-employed payors, such as husband, the amount of support shall be calculated based on the last year's federal and state income tax returns and the quarterly estimates for the current year. *Id.* The trial judge should also "consider the amount the payor is capable of earning or a net-worth approach based on property, life-style, etc." *Id.*

We believe that we should reverse the award of child support as well. First, the award was based, in part, on an average of husband's income for 1999 and 2000. The revaluation and redistribution of the marital property may affect husband's income. Second, husband's 2001 income was, by his own testimony and that of Dr. Hof, going to be reduced because of several

[2] The most recent revision of the child-support guidelines, *In Re: Administrative Order No. 10: Arkansas Child Support Guidelines*, 347 Ark. Appx. 1064 (2002), became effective on February 11, 2002. This version now provides that for self-employed payors, the amount of support shall be calculated based on the last two years' federal and state income tax returns.

unusual circumstances. Further, husband's Affidavit of Financial Means lists expenses that should not be allowed under Administrative Order 10, such as college expenses for the two adult children, charitable contributions, country club/athletic club fees, and college bonds. While it is clearly permissible to consider financial obligations of the payor spouse, including support of other children, the trial court should make a written finding regarding why it took such expenses into account. *Guest v. San Pedro*, 70 Ark. App. 389, 19 S.W.3d 62 (2000); *Department of Human Servs. v. Forte*, 46 Ark. App. 115, 877 S.W.2d 949 (1994).

Reversed and remanded.

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

Billy Frank BROWN *v.* STATE of Arkansas

CA CR 02-846 110 S.W.3d 293

Court of Appeals of Arkansas
En Banc
Opinion delivered April 30, 2003

Steven R. Davis, for appellant.

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

KAREN R. BAKER, Judge. A Cleveland County jury convicted the appellant of manufacturing methamphetamine and possession of drug paraphernalia with intent to manufacture methamphetamine and sentenced him to prison terms of ten years and five years respectively. The trial court ordered him to serve the sentences consecutively and also suspended imposition of an additional five years for each conviction. The appellant challenges his convictions and sentences, arguing that the trial court erred by denying his motion for a directed verdict and by adding

five-year suspended sentences to the terms of imprisonment decided by the jury. We affirm the trial court's denial of a directed verdict; however, we affirm as modified on the second point because we agree that the trial court was without authority to increase the terms of imprisonment fixed by the jury, even though the additional imposition of sentence was suspended.

Appellant first argues that there is insufficient evidence to sustain a conviction because of the uncorroborated testimony of the admitted accomplices. The State responds that appellant bears the burden of proving that a witness is an accomplice whose testimony must be corroborated. The State urges that because appellant did not seek to have the trial court declare either of the witnesses, Ms. Harkins or Mr. Adams, an accomplice as a matter of law or submit the issue to the jury, he is precluded from raising the accomplice-corroboration rule on appeal. The State relies upon *Windsor v. State*, 338 Ark. 649, 1 S.W.3d 20 (1999).

In *Windsor*, the supreme court explained that when a trial court does not find a witness to be an accomplice, and the defendant fails to request that accomplice instructions be submitted to the jury for consideration, the issue is not preserved for appellate review. *Id.* at 656, 1 S.W.3d at 24. It is clear from the record in this case that the court, the defense counsel, and the prosecutor all accepted the fact that these witnesses were accomplices. Defense counsel based her directed-verdict motion on the fact that the State had failed to provide corroboration as a matter of law. The prosecutor responded to the motion by specifically referring to the witnesses' roles in the manufacturing of the methamphetamine. The court interrupted the prosecutor's recitation with the question, "Where is the corroboration of the accomplices? . . . Of the accomplices' statements. I mean, you can't convict on their statements alone." The colloquy continued, debating the sufficiency of the corroboration, and ending with the trial judge's denial of the motion finding that there was sufficient corroboration of the accomplices' testimony to move the case forward. The court unambiguously found these witnesses to be accomplices, regardless of the omission of the phrase, "the court finds these witnesses to be accomplices."

The State further insists that even if the judge's rulings are construed to mean that the court found the witnesses to be accomplices, that appellant's failure to have the jury instructed that the accomplices' testimony required corroboration independently precludes review. The State mistakenly imposes a two-part requirement on the *Windsor* clarification of accomplice corroboration. The supreme court in *Windsor* stated that "[a] defendant must *either* have the trial court declare a witness to be an accomplice as a matter of law *or* submit the issue to the jury for determination. *Windsor v. State*, 338 Ark. at 656, 1 S.W.3d at 24 (emphasis added). Accordingly, appellant's sufficiency-of-the-evidence argument is preserved for appeal.

Although the argument is preserved, it fails. In *Pickett v. State*, 55 Ark. App. 261, 935 S.W.2d 281 (1996), this court held:

> The corroborating evidence need not be sufficient standing alone to sustain the conviction, but it must, independent from that of the accomplice, tend to a substantial degree to connect the defendant with the commission of the crime. *Rhodes v. State*, 276 Ark. 203, 634 S.W.2d 107 (1982); *Gibson v. State*, 41 Ark.App. 154, 852 S.W.2d 326 (1993). The test is whether, if the testimony of the accomplice were completely eliminated from the case, the other evidence independently establishes the crime and tends to connect the accused with its commission. *Gordon v. State*, 326 Ark. 90, 931 S.W.2d 91 (1996); *Gibson v. State, supra.* The corroborating evidence may be circumstantial so long as it is substantial; evidence that merely raises a suspicion of guilt is insufficient to corroborate an accomplice's testimony. *Gordon v. State, supra; Gibson v. State, supra.*

Pickett v. State, 55 Ark. App. at 264, 935 S.W.2d at 282 (1996).

In this case, evidence other than the accomplice testimony tends to a substantial degree to connect the defendant with the commission of the crime. At trial, Investigator Gary Young of the Cleveland County Sheriff's Office testified that on May 15, 2001, his office received a call from Randy Hurt, a property owner who complained that there were unauthorized occupants in his house on Adams Road. Investigator Young and a deputy accompanied Mr. Hurt to the residence, where they encountered Alisha Louque and

Valerie Harkins. The two women agreed to allow Mr. Hurt and the police to inspect the inside of the house for damage. During this inspection, in one of the bedrooms, Investigator Young saw a "corner baggie," which is commonly used to package methamphetamine, and residue that he believed to be methamphetamine. He subsequently asked Ms. Louque and Ms. Harkins to step outside whereupon he obtained their consent to search the house. Because the search of the house and the surrounding area uncovered the components of a methamphetamine laboratory, Investigator Young placed Ms. Louque and Ms. Harkins, and a third occupant of the house, Keenan Camp, under arrest. A fourth person, Lester Adams, was later arrested. As a result of information obtained during interviews of those persons, Investigator Young discovered more components of a methamphetamine laboratory, consisting of an anhydrous ammonia tank and an Igloo cooler containing ammonia, at the site of a dilapidated house near the house owned by Mr. Hurt. Also, as a result of those interviews, he developed the appellant as a suspect and arrested him.

At trial, the defense stipulated that:

> the paraphernalia necessary to manufacture Crystal Methamphetamine was found on or about the location in question on Adams Road in Cleveland County, Arkansas — on or about May 15, 2001. The Defendant will further stipulate that traces of Crystal Methamphetamine were found on some of the drug paraphernalia items and that Crystal Methamphetamine was manufactured at that location on or about May 15, 2001.

Taken together, this evidence independently establishes the crimes of manufacturing methamphetamine and possession of drug paraphernalia.

Sufficient evidence also connects appellant with the commission of the crime. After his arrest, appellant gave a statement to the police in which he admitted to offering to drive to Little Rock to buy "pills" to manufacture methamphetamine and to giving Mr. Adams $80.00 in exchange for double the amount of methamphetamine that he would have been able to purchase on the street. He stated that, while in Little Rock, he, Mr. Adams, and Ms. Louque went to an Exxon Station and to Radio Shack

and Wal-Mart where they obtained batteries and starting fluid, respectively. They returned to the house, where he helped unload the supplies and left. According to appellant, he returned later that day to pick up his share of the finished product. At trial, appellant claimed that the $80.00 he gave Mr. Adams was intended to help him pay his rent and to buy drugs, rather than purchase ingredients to manufacture methamphetamine. He acknowledged the Little Rock shopping trip, but claimed that he only bought batteries for a flashlight and that he was unaware of the items purchased by the other two. Finally, he claimed that, despite his initials and signature verifying its accuracy, he did not supply the incriminating information in his statement.

The trier of fact may believe all or part of any witness's testimony and may resolve conflicts in testimony and inconsistencies in evidence. *Polk v. State*, 348 Ark. 446, 73 S.W.3d 609 (2002). Appellant's statement clearly tended to connect him with the crime and the jury was free to believe him. Therefore, there was sufficient corroboration of the accomplices' testimony and sufficient evidence to support the verdict.

For his second point, appellant claims that the court was without jurisdiction to suspend imposition of an additional sentence against him. The jury's verdict recommended a sentence of ten years and no fine on the one count of manufacturing methamphetamine. The jury verdict further recommended a sentence of five years and a fine of zero dollars on the count of possession of drug paraphernalia.

Sentencing in Arkansas is entirely a matter of statute. Arkansas Code Annotated section 5-4-103(a) (1987) provides that "[i]f a defendant is found guilty of an offense by a jury, the jury shall fix punishment as authorized by this chapter." Other parts of the statute permit a trial court to set the sentence, but only under enumerated circumstances, none of which apply to this case. *See Richards v. State*, 309 Ark. 133, 827 S.W.2d 155 (1992). Because the judge lacked statutory authority to increase the term of imprisonment, his action was unauthorized and illegal, and we modify the sentence by reducing it to the term fixed by the jury. *See id.*

The State argues that once the trial court sentences the defendant to a term of imprisonment according to the jury's recommendation, that the trial court then has the power to add an additional term of imprisonment and suspend the imposition of sentence as to that additional term. The State relies upon Arkansas Code Annotated § 5-4-104(e)(3) (Supp 2001), which provides that "a trial court may sentence the defendant to a term of imprisonment and suspend imposition of sentence as to an additional term of imprisonment." The State reasons that while Arkansas Code Annotated § 5-4-103(b) limits the trial court's authority to fix punishment under certain circumstances, the statutes are no limitation on the court's authority to suspend imposition of additional terms of imprisonment, as it is the "court, and not the jury, [that] has the power to suspend imposition of sentence." *See Rhoades & Emmerling v. State*, 270 Ark. 962, 968, 607 S.W. 2d 76, 80 (1980) *cert. denied*, 452 U.S. 915 (1981). It further argues that if we adopt appellant's argument, we will render section 5-4-104(e)(3) a nullity.

We reject that argument. The judge's suspension of the additional terms of imprisonment does not negate the fact that the judge increased the terms of imprisonment fixed by the jury. The trial court had no authority to increase the jury's fixed term of imprisonment. However, this does not render section 5-4-104(e)(3) a nullity. It is the court's function to impose a sentence, and it is the court's obligation to exercise its discretion in the imposition of that sentence. *See Rodgers v. State*, 348 Ark. 106, 71 S.W.3d 579 (2002); *Blagg v. State* 72 Ark. App. 32, 31 S.W.3d 872 (2000). A trial court may reduce the extent or duration of the punishment assessed by the jury if, in the judge's opinion, the conviction is proper but the punishment assessed is still greater than, under the circumstances of the case, ought to be inflicted, as long as the punishment is not reduced below the limit prescribed by the law. *Richards*, 309 Ark. at 134, 827 S.W.2d at 156; Ark. Code Ann. § 16-90-107(e) (1987). In such a case, the court could reduce the term of imprisonment, then suspend an additional term of imprisonment, with the sum of the two terms not exceeding the jury's original fixed term of imprisonment. Therefore, section 5-4-104(e)(3) is not rendered a nullity.

When an error has nothing to do with the issue of guilt or innocence and relates only to punishment, it may be cor-

rected by reducing the sentence in lieu of reversing and remanding for a new trial. *Richards, supra*; *Ellis v. State*, 270 Ark. 243, 603 S.W.2d 891 (1970); Ark. Code Ann. § 16-67-325(a) (1987).

The sentences are reduced by modifying each term of imprisonment to the term fixed by the jury. The conviction is affirmed as modified.

Affirmed as modified.

GLADWIN and NEAL, JJ., agree.

SEARCY INDUSTRIAL LAUNDRY, INC. *v.*
Sharon FERREN

CA 02-511 110 S.W.3d 306

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered April 30, 2003

Huckabay, Munson, Rowlett & Moore. P.A., by: *Carol Lockard Worley*, for appellant.

Davis & Mitchell, P.A., by: *Zan Davis*, for appellee.

KAREN R. BAKER, Judge. Appellant, Searcy Industrial Laundry, Inc., appeals a decision of the Workers' Compensation Commission finding that appellee, Sharon Ferren, proved by a preponderance of the evidence that she sustained a compensable neck injury, in addition to her admittedly compen-

sable low-back injury, arising from an incident that occurred on January 13, 2000. Appellant argues on appeal that there was no substantial evidence to support the Commission's decision that appellee's herniated disk in her neck was a compensable consequence of the lumbar-spine injury two-and-one-half months earlier. We disagree and affirm.

The parties stipulated to the fact that appellee sustained a compensable injury to her lower back on January 13, 2000. Appellee testified that on that particular date she was lifting a box when she experienced a sharp onset of pain "all over." She left work and sought medical assistance from Dr. Jim Citty. The next day, appellee returned to work to speak with the personnel manager, Karen Thomas. A Form 1A was filed, which reported a back injury. Appellee testified that she had never experienced pain in her back and neck before January 13 and that she told Dr. Citty from the beginning that she was experiencing pain "all over." Dr. Citty referred appellee to Dr. Williams at the Arkansas Neurosurgery Clinic. An initial MRI of the lumbar spine revealed a herniated disc at L4-5 with flattening of thecal sac and moderate impingement and a bulging disc at L5-S1 creating no significant compression. In a letter to Dr. Williams on July 3, 2000, Dr. Citty informed Dr. Williams of the date in which appellee complained of having chest-wall pain, and explained that his nurse had confirmed that appellee had previously complained of neck and upper thoracic pain on several occasions. Dr. Citty suggested a follow-up MRI on her cervical spine due to these complaints. The MRI revealed that there was indeed disc herniation at C6-7.

The Administrative Law Judge (ALJ) found that appellee had failed to prove by a preponderance of the evidence that she sustained a compensable injury to her cervical spine or neck. The ALJ specifically found that appellee failed to prove a cervical spine or neck injury arising out of and in the course of the employment, which was caused by a specific incident and was identified by time and place of occurrence. The Commission reversed the ALJ's decision. This appeal followed.

When reviewing a decision of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission, and we affirm that decision if it is

supported by substantial evidence. *Campbell v. Randal Tyler Ford Mercury Inc.*, 70 Ark. App. 35, 13 S.W.3d 916 (2000). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Mays v. Alumnitec, Inc.*, 76 Ark. App. 274, 64 S.W.3d 772 (2001). 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 conclusions arrived at by the Commission. *White v. Georgia-Pacific Corp.*, 339 Ark. 474, 6 S.W.3d 98 (1999). In making our review, we recognize that it is the function of the Commission to determine the credibility of witnesses and the weight to be given their testimony. *Wal-Mart Stores, Inc. v. Stotts*, 74 Ark. App. 428, 58 S.W.3d 853 (2001). Furthermore, the Commission has the duty of weighing medical evidence and, if the evidence is conflicting, its resolution is a question of fact for the Commission. *Green Bay Packaging v. Bartlett*, 67 Ark. App. 332, 999 S.W.2d 695 (1999).

■ ■ On appeal, appellant asserts that the Commission erred in finding that appellee had proven by a preponderance of the evidence that she sustained a neck injury on January 13, 2000. As the claimant, appellee had the burden of proving a compensable injury by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E)(i) (Repl. 2002). A "compensable injury" is one "arising out of and in the course of employment." Ark. Code Ann. § 11-9-102(4)(A)(i) (Repl. 2002). Arkansas Code Annotated section 11-9-102(4)(D) provides: "A compensable injury must be established by medical evidence supported by 'objective findings' as defined in subdivision (16) of this section." "Objective findings" are "those findings which cannot come under the voluntary control of the patient." Ark. Code Ann. § 11-9-102(16); *Carman v. Haworth, Inc.*, 74 Ark. App. 55, 45 S.W.3d 408 (2001). "In order to prove a compensable injury [the claimant] must prove, among other things, a causal relationship between his employment and the injury." *Wal-Mart Stores, Inc. v. Westbrook*, 77 Ark. App. 167, 171, 72 S.W.3d 889, 892 (2002) (citing *McMillan v. U.S. Motors*, 59 Ark. App. 85, 90, 953 S.W.2d 907, 909 (1997)). However, medical evidence is not required to prove the cause of an injury was work-related. *Wal-Mart Stores, Inc. v. VanWagner*, 337 Ark. 443, 990 S.W.2d 522 (1999).

Appellee testified that "when I first went and saw Dr. Citty on January 13, 2000, I told him how I was hurting. I did not really tell him I was having severe low back pain. I said that I was hurting all over. I was having low back pain, but I was hurting all over." She also testified that "[she] had never experienced any pain like [she] had in [her] back or [her] neck before January 13." In a letter to Dr. Williams on July 3, 2000, Dr. Citty explained that he felt it was necessary to proceed with an MRI of her thoracic and cervical spine as a result of her complaints of neck and thoracic pain. Specifically, in that letter, Dr. Citty wrote:

> In reviewing the records on Mrs. Sharon Ferren pertaining to her cervical and thoracic discomfort, we have one recorded episode in January on the 25th of her having check wall pain. My nurse confirms the fact that on several occasions there were complaints of neck and upper thoracic pain and this is alleged true by the patient. Primarily her symptoms have been referrable to the low back, however, I feel it is important to proceed with MRI studies of the thoracic and cervical spine referable to this injury.

The follow-up MRI of the cervical spine performed on July 11, 2000, showed a disc herniation at C6-7. Appellant argues that there was no evidence to support the Commission's decision, despite the foregoing facts. In its decision, the Commission relied on the following facts in support of its decision:

> In the present matter, the Full Commission reversed the Administrative Law Judge's finding that the claimant failed to prove by a preponderance of the evidence that she sustained a compensable injury to her cervical spine or neck on January 13, 2000. In this regard, Dr. Citty's contemporaneous medical reports might understandably have led the respondents to question the claimant's story that she was hurting over time in her neck, as well as her lower back after the incident. After all, Dr. Citty's several follow-up reports did not mention any ongoing neck complaints in the January through March period. Nevertheless, Dr. Citty's letter of July 3, 2000 to Dr. Williams should have cleared up any confusion on the respondent's part, since at that time, Dr. Citty corroborated that the claimant had been making neck complaints in his office.
>
> Furthermore, we note that Dr. Citty opined on July 3, 2000 that it was important to proceed with thoracic and cervical spine MRI studies referrable to the claimant's injury. Likewise, Dr. Williams rendered an opinion in a August 24, 2000 letter that the

> lifting incident on January 13, 2000 caused the claimant's need for medical care at issue, assuming that he had an accurate medical history. Certainly, the claimant's medical records and testimony both appear to be consistent with the history described by Dr. Williams. In addition, we agree with the claimant's attorney that the respondents have failed to present any expert medical opinion, or other credible medical evidence, to rebut the explanation and opinion in Dr. Citty's July 3, 2000 letter, or to rebut the opinion in Dr. Williams' August 24, 2000 letter. Furthermore, we note that the claimant's alleged neck injury is supported by objective medical findings of a disc herniation at the C6-7 level of the spine.

Based on the Commission's credibility determination concerning appellee's testimony, the letter indicating that, although not recorded, appellee had previously made complaints regarding neck pain, and the MRI proving that appellee had in fact sustained an injury to her cervical spine, the Commission found that appellee had met her burden of proving by a preponderance of the evidence that she sustained a compensable neck injury in addition to her low-back injury in an accident on January 13, 2000. Because we cannot say that fair-minded persons with the same facts before them could not have reached the conclusions arrived at by the Commission, we affirm.

GLADWIN, BIRD, and VAUGHT, JJ., agree.

NEAL and ROAF, JJ., dissent.

OLLY NEAL, Judge, dissenting. I write separately because I am not convinced that fair-minded persons with the same facts before them could have reached the same conclusions as the Commission. Appellee sustained a compensable injury to her back on January 13, 2000; subsequently, appellee sought additional medical treatment for a neck injury that she claims occurred at the same time as her back injury. Following her accident, appellee sought treatment from Dr. Jim Citty. Dr. Citty's medical notes indicate that on January 25, 2000, appellee's neck was normal. His notes also indicate that on February 16, 2000, appellee's neck was supple, *i.e.*, flexible, bendable, or pliable. The first documented record indicating appellee had complaints about neck pain is dated April 30, 2000, and in a letter dated July 3, 2000, Dr. Citty stated that his "nurse confirms the fact that on several occa-

sions there were complaints of neck and upper thoracic pain and this is alleged true by the patient." The letter does not provide any time frame for when these complaints might have occurred and does not state or even suggest that they occurred prior to April 30, 2000.

There is a conflict in the evidence and the Commission acknowledged this conflict when it stated the following:

> In this regard, Dr. Citty's contemporaneous medical reports might understandably have led the respondents to question the claimant's story that she was hurting over time in her neck, as well as her lower back after the incident. After all, Dr. Citty's several follow-up reports did not mention any ongoing neck complaints in the January through March period. Nevertheless, Dr. Citty's letter of July 3, 2000, to Dr. Williams should have cleared up any confusion on the respondents' part, since at that time, Dr. Citty corroborated that the claimant had been making neck complaints in his office.

I am mindful of the fact that the Commission has the duty of weighing medical evidence as it does any other evidence, and its resolution of the medical evidence has the force and effect of a jury verdict, *Wal-Mart Stores, Inc. v. Sands*, 80 Ark. App. 51, 91 S.W.3d 93 (2002), and that the Commission's findings are insulated to a certain degree from appellate review. *Tucker v. Roberts-McNutt, Inc.*, 69 Ark. App. 150, 12 S.W.3d 640 (2000); *Lloyd v. United Parcel Serv.*, 69 Ark. App. 92, 9 S.W.3d 564 (2000). However, its decisions are not, and should not be so insulated that it would make appellate review meaningless. *Tucker v. Roberts-McNutt, Inc.*, *supra*; *Lloyd v. United Parcel Serv.*, *supra*. Hence, I believe that this is one of those rare occasions where we should not defer to the Commission's resolution of conflicting evidence. I am convinced that fair-minded people with the same evidence before them as the Commission would not reach the same conclusions as the Commission and therefore I would reverse the Commission's award of benefits.

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

Tyrone SIMPSON *v.* STATE of Arkansas

CA CR 02-963 119 S.W.3d 83

Court of Appeals of Arkansas
Division IV
Opinion delivered April 30, 2003

[redacted]

S. Butler Bernard, Jr., for appellant.

J. Leon Johnson, Att'y Gen., by: *Kent G; Holt*, Ass't Att'y Gen., for appellee.

ANDREE LAYTON ROAF, Judge. Appellant Tyrone Simpson was convicted by a jury of second-degree murder and sentenced to twelve years' imprisonment. On appeal, Simpson argues that the trial court abused its discretion by refusing to allow lay-opinion testimony by an eyewitness that the shooting was accidental. We agree that the trial court erred, and we reverse and remand.

Simpson was charged with first-degree murder in connection with the shooting death of Rufus Lytle, which occurred on October 20, 2001. At trial, the State called as a witness James Lytle, a brother of the victim and an owner of Lytle's Grocery and Arcade, the

establishment where the shooting took place. Lytle testified that, on the evening of October 20, there was a fight taking place in the back room, known as the poolroom, of the store. Lytle stated that he went from the poolroom into the front room of the store and encountered Simpson, who was carrying a shotgun. Lytle testified that he told Simpson that he did not need to be in the store with a shotgun, but that Simpson remained there pointing his shotgun in the air and trying to see what was going on in the poolroom. While talking to Simpson, Lytle stated that his brother, Ralph Lytle, Sr., came into the store carrying a shotgun. According to Lytle, Ralph came up behind Simpson and struck him on the side of the head with the butt of the gun. As Simpson fell to the floor, Lytle testified that Simpson's gun discharged, striking another brother, Rufus Lytle, in the head and killing him. Lytle stated that both Simpson and Ralph immediately left the premises.

On cross-examination, Simpson asked Lytle, "What kind of shooting would you characterize this as?" The State objected, arguing that the question called for a conclusion and invaded the province of the jury to determine the circumstances of the shooting. Simpson replied that it was permissible for a witness to a shooting to testify as to whether in his opinion, the shooting was accidental or intentional. The trial court sustained the objection and disallowed the testimony, stating that it was not demonstrated that the testimony would be helpful to the jury and that it invaded the province of the jury for a layperson to testify as to the ultimate conclusion. Simpson was allowed to proffer the expected testimony of Lytle. In the proffered testimony, Lytle stated that he witnessed every moment of the events surrounding the shooting and that he would characterize the shooting as an accident. Lytle testified that in his opinion, Simpson was not intending to shoot the gun when he fell.

Simpson's sole argument on appeal is that the trial court erred in refusing to allow the opinion testimony of the eyewitness. The decision on whether to admit relevant opinion evidence rests in the sound discretion of the trial court, and the trial court's ruling will not be reversed absent an abuse of discretion. *Marts v. State*, 332 Ark. 628, 968 S.W.2d 41 (1998). Arkansas Rule of Evidence 701 (2002) permits lay witnesses to testify in the

form of opinions or inferences, as long as those opinions or inferences are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of his testimony or the determination of a fact in issue. Testimony in the form of an opinion or inference that is otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. Ark. R. Evid. 704 (2002); *Marts v. State*, *supra*. Although opinion testimony on the ultimate issue is admissible, if the opinion mandates a legal conclusion or "tells the jury what to do," the testimony should be excluded. *Marts v. State*, *supra* (citing *Salley v. State*, 303 Ark. 278, 796 S.W.2d 335 (1990)). For example, an opinion by an expert witness in a medical malpractice case that a doctor was not negligent was held to be inadmissible because it did not merely embrace the ultimate issue, but was tantamount to telling the jury what result to reach. *Gramling v. Jennings*, 274 Ark. 346, 625 S.W.2d 463 (1982).

Simpson contends that the proffered opinion in this case, which was that the shooting was accidental, was rationally based on James Lytle's perception, that it would have been helpful to a clear understanding of his testimony or a determination of a fact in issue, and that it does not mandate a legal conclusion. As support for his argument, Simpson cites *Mathis v. State*, 267 Ark. 904, 591 S.W.2d 679 (Ark. App. 1979). In *Mathis*, the defendant was convicted of second-degree murder for the shooting death of his girlfriend. According to the testimony of an eyewitness, the parties were arguing, and the defendant went to get his gun. The witness placed herself in between the defendant and his girlfriend, and she testified that the defendant then reached around and shot his girlfriend. The witness was allowed to testify that in her opinion, the shooting was not accidental. On appeal, the defendant argued that the trial court erred in allowing an opinion on the ultimate issue. He also argued that her opinion was not rationally based on her perception because it went to his state of mind and not to something that could be perceived by her senses. This court held that the opinion was properly admitted, finding that the opinion was rationally based on her observations of the struggle and that it was helpful to the trier of fact to know whether the eyewitness felt the shooting was accidental. *Id.* We stated that

opinion testimony is no longer viewed as "usurping the function of the trier-of-fact" and that the "trier of fact considers the opinion along with the other evidence and determines the weight to be attached to the testimony." *Id.* at 907, 591 S.W.2d at 681.

Also, in *Salley v. State, supra,* police officers were allowed to testify that the defendant appeared to be "shooting to kill," when he pointed the handgun at one of the officers. The court found that this type of testimony is quite different from an expert who utilizes established facts and from those facts makes a conclusory statement that the actor was "negligent" or "guilty of malpractice." *Id.* at 283, 796 S.W.2d at 338; *see also Long v. State,* 284 Ark. 21, 680 S.W.2d 686 (1984) (finding officer's testimony that the defendant was intoxicated was admissible although it embraced the ultimate issue, since it did not mandate a legal conclusion); *Tillman v. State,* 275 Ark. 275, 630 S.W.2d 5 (1982) (finding that the trial court properly admitted a witness's opinion that a car had backed out of a driveway just before he saw it, where the witness's observations as to the car's position relative to the driveway and as to its movement provided a rational basis for his opinion).

Here, Lytle testified that he observed every moment of the events leading up to the shooting by Simpson, and he observed Simpson's fall and the discharge of the gun. Lytle described the fall and the subsequent shooting as happening so quickly that he was not sure if Simpson had even hit the ground when the gun fired. Thus, the proffered opinion that the shooting was accidental is rationally based on Lytle's perception of the events. The State argues that this case can be distinguished from *Mathis, supra,* because Lytle did not know where the victim was before the shooting. However, Simpson's actions, not the victim's, were the ones relevant to the issue in this case. Thus, the State's argument that Lytle did not observe the entire transaction is without merit. In addition, this opinion would have been helpful to a clear understanding of his testimony describing the shooting, since he testified that "it happened so fast" that he could not say whether the shot went off before or after Simpson fell to the ground. Given Simpson's defense that the shooting was accidental, this opinion testimony would also have been helpful to a determination of a fact in issue, namely, whether Simpson committed first-degree murder or some other lesser-included offense. Therefore, this opinion testimony is proper under Ark. R. Evid. 701.

The trial court's ruling that it would have "invaded the province of the jury" for Lytle to testify as to the ultimate conclusion in this case is contrary to the holding in *Mathis v. State, supra.* As in *Mathis*, the opinion in this case would not have mandated that the jury reach a certain conclusion. Instead, the jury should have been able to consider this opinion along with all of the other evidence and determine the weight to be attached to the testimony. *Id.* Thus, the trial court abused its discretion in excluding this testimony.

Finally, we note that other jurisdictions have reached a different conclusion when considering whether lay opinion testimony is admissible under analogous circumstances. *United States v. Skeet*, 665 F.2d 983 (9th Cir. 1982) (holding witness should not be allowed to give opinion as to whether shooting was accidental where jury could be put into a position of equal vantage with the witness for drawing the opinion); *State v. Turner*, 136 Idaho 629, 38 P.3d 1285 (2001) (holding that opinion testimony that shooting was accidental was properly struck where witness testified to facts and circumstances surrounding the shooting, and jurors from their common experience and knowledge could draw their own conclusions about whether shooting was an accident); *State v. Parks*, 71 Or. App. 630, 693 P.2d 657 (1985) (holding witness's opinion that shooting was an accident not admissible where witness was not better able than jury to reach a conclusion on that issue); *Fairow v. State*, 943 S.W.2d 895 (Tex. Ct. App. 1997) (holding opinion from witness as to whether shooting was accidental not admissible because it would not be helpful from a witness able to articulate his perceptions in great detail, thus increasing the likelihood that the jury could form its own opinion). These authorities, while soundly reasoned, are not in line with the holdings in *Mathis v. State, supra*, and *Salley, supra*, where admission of opinion testimony about the accidental nature of a shooting was upheld even though the witness appeared to testify to sufficient facts and circumstances to allow the jury to form its own opinion. We therefore must reverse and remand.

Reversed and remanded.

PITTMAN and NEAL, JJ., agree.

Glenda MILLER *v.* HOMETOWN PROPANE GAS, INC.

CA 02-1044 110 S.W.3d 304

Court of Appeals of Arkansas
En Banc
Opinion delivered April 30, 2003

James R. Wallace & Associates, by: *Kimberly C. Bosshart*, for appellant.

Womack, Landis, Phelps, McNeill & McDaniel, by: *David Landis*, *Mark A. Mayfield*, and *Dustin H. Jones*, for appellee.

PER CURIAM. In this case, appellant alleged that an explosion, which destroyed her home on September 22, 1999, was caused by appellee's negligence. Appellee had been to appellant's home earlier that day to refill her propane tank. The explosion occurred just after appellant checked the lines in her appliances by running a Bic lighter over them. After a trial, the jury assigned eighty percent of the fault to appellant and twenty

percent to appellee. On appeal, appellant makes three evidentiary arguments: 1) that the trial court improperly excluded as hearsay her testimony regarding the contents of a message she left on appellee's answering machine on the day of the explosion; 2) that the trial court erred in allowing appellee's current owner, Doyle Durdin, to testify that he would have done nothing differently than the service man who went to appellant's house; and 3) that the trial court erred in allowing appellee's counsel to use a Bic lighter as a demonstrative aid during opening argument. A fourth argument concerns the propriety of the jury being instructed on the doctrine of "last clear chance." Finally, appellant makes a brief argument that the jury's verdict was inconsistent because, while it found her to be eighty percent at fault, which under Arkansas law would preclude her recovery, it found that she sustained $15,000 in damages.

In our review of this case, we have discovered that appellant's 444-page Addendum contains nearly 300 pages of material that bear no relation to the issues in this case or our understanding of them. For example, the Addendum includes 179 pages of medical records, but neither the amount of appellant's damages nor her medical condition are at issue on appeal. Further, the Addendum contains eighty-one pages regarding the deposition testimony of appellant's expert Rex White; however, there is no issue on appeal that involves White, who did not even testify at trial. Additionally, another thirty pages of the Addendum concern the value of lost property and lost wages or other matters that are not at issue on appeal. We also note that several pages of appellant's Abstract are devoted to these same subjects.

■ An appellant's Addendum shall include a copy of the order appealed from, "along with any other *relevant* pleadings, documents, or exhibits essential to an understanding of the case and the Court's jurisdiction on appeal." Ark. R. Sup. Ct. 4-2(a)(8) (2002) (emphasis added). The appellant's Abstract should consist of *"only such material parts of the* testimony of the witnesses and colloquies between the court and counsel and other parties *as are necessary to an understanding of all questions presented to the Court for decision."* Ark. R. Sup. Ct. 4-2(a)(5) (2002) (emphasis added). Appellant's Addendum and Abstract fail to comply with these rules. The emphasized portions of these rules reflect an obligation by an appellant, in preparing her Addendum, to not merely copy the record but give some

thought to whether the materials in the Addendum will be useful to the court in deciding the issues on appeal.

Although we are mindful that the decision of what to include in an Addendum or Abstract may be a difficult one and that counsel will often err on the side of inclusion, the Addendum and Abstract in this case contain an inordinate amount of material that cannot conceivably be said to bear any relevance to the issues on appeal or be helpful to our understanding of the case. Had appellant filed a proper brief, its current size would be reduced by nearly two-thirds.

For the reasons stated, and pursuant to Ark. R. Sup. Ct. 4-2(b)(3) (2002), we afford appellant the opportunity to file a substituted Abstract, Addendum, and Brief within fifteen days of the date of this per curiam.

Rebriefing ordered.

ROAF, J., dissents.

Carl Wade COUSINS *v.* STATE of Arkansas

CA CR 02-918 112 S.W.3d 373

Court of Appeals of Arkansas
Division IV
Opinion delivered May 7, 2003

Erwin L. Davis, for appellant.

Mike Beebe, Att'y Gen., by: *Vada Berger*, Ass't Att'y Gen., for appellee.

JOHN MAUZY PITTMAN, Judge. The appellant in this criminal case was charged with committing first-degree sexual abuse on September 13, 2001. After a trial, the jury found him guilty of that offense, fined him $1000.00, and sentenced him to seven years' imprisonment. The trial court delayed formal sentencing for several days. When the parties appeared for sentencing, appellant moved to vacate the jury verdict on the grounds that the statute he had been convicted of violating was not in force at the time he was alleged to have committed the acts constituting the offense, and that to convict him of violating the statute after it expired would be to apply it as an ex post facto law. The trial court denied the motion, stating that the newly-enacted offense of second-degree sexual assault criminalized the identical conduct, and that the appellant was not prejudiced by the name of the crime not being correctly listed in the felony information. The trial court then entered a judgment stating that appellant had been convicted of second-degree sexual assault. From that decision, comes this appeal.

For reversal, appellant contends that the trial court erred in denying his motion to vacate the jury verdict.[1] We agree, and we reverse and remand.

Despite the trial court's entry of a judgment of conviction for second-degree sexual assault, it is clear that appellant was tried for and found guilty of having committed first-degree sexual abuse after the statute proscribing that offense was repealed. This was error. A state cannot, consistently with the Due Process Clause of the Fourteenth Amendment, convict a defendant for conduct that its criminal statute, as properly interpreted, does not prohibit. *Fiore v. White*, 531 U.S. 225 (2001).

Nor do we agree that appellant was not prejudiced by the trial judge's denial of his motion to vacate the jury verdict. The jury expressly found that appellant committed the offense of first-degree sexual abuse in violation of Ark. Code Ann. § 5-14-108(a)(4) (Repl. 1997), which provided that "[a] person commits sexual abuse in the first degree if . . . [b]eing eighteen (18) years old or older, he engages in sexual contact with a person not his spouse who is less than fourteen (14) years old." "Sexual contact"

---

[1] The State contends that appellant is barred from arguing due process considerations on appeal because he based his objection at trial on ex post facto grounds. We do not agree. Although appellant's objection did not expressly identify his conviction for violating a statute that was no longer in force as a denial of due process, the supreme court has recognized that, in a case such as the present one, the concepts of due process and ex post facto are intertwined:

> "Ex post facto" literally means a law passed after the fact. That is, after the occurrence of the fact, or the crime. The constitutional prohibition on ex post facto laws is a limitation upon the powers of the legislature and does not of its own force apply to the judicial branch. However, the principle on which the clause is based, the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties, is fundamental to our concept of constitutional liberty, and as such, is protected against judicial action by the due process clause of the Fifth Amendment. *Marks v. United States*, 430 U.S. 188 (1977). Accordingly, the Supreme Court held that an unforeseen judicial enlargement of a criminal statute, applied retrospectively, operates precisely like an ex post facto law that is prohibited by Article I, § 10 of the Constitution of the United States, and it follows that such an interpretation is barred by the due process clause of the Fourteenth Amendment from achieving precisely the same result by judicial construction. The fundamental principle is that the *required criminal law must have existed when the crime occurred*. *Collins v. Youngblood*, [497 U.S. 37,]110 S. Ct. 2715 (1990).

Mauppin v. State, 309 Ark. 235, 251-52, 831 S.W.2d 104, 112 (1992) (emphasis in original).

means any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person or the breast of a female. Ark. Code Ann. § 5-14-101(8) (Repl. 1997). Section 5-14-108 was repealed by Act 1738 of 2001, which became effective August 13, 2001.

The trial judge entered a judgment convicting appellant of committing the newly-created offense of second-degree sexual assault in violation of Ark. Code Ann. § 5-14-125(a)(3) (Supp. 2001), which provides that "[a] person commits sexual assault in the second degree if the person . . . [b]eing eighteen (18) years of age or older, engages in sexual contact with the sex organs of another person, not the person's spouse, who is less than fourteen (14) years of age[.]" These statutes clearly differ in that sexual abuse in the first degree could have been committed by touching the buttocks or sex organs, while a conviction of sexual assault in the second degree requires touching of the sex organs. At trial, appellant admitted that he touched the buttocks of a person less than fourteen years of age, although he excused this as roughhousing. There was also testimony from the victim that appellant touched her sex organs. The jury made no express findings of fact regarding the manner in which the offense was committed, and it is therefore possible that appellant was convicted because the jury believed he touched the victim's buttocks for sexual gratification, while disbelieving that he touched the victim's sex organs. Consequently, we reverse and remand for the trial court to enter an order vacating the judgment and setting aside the jury verdict.[2]

Reversed and remanded with directions.

NEAL and ROAF, JJ., agree.

---

[2] The parties do not raise, and we do not address, the question of whether the State may bring new charges against appellant under the proper statute, or whether it would be barred from doing so by considerations of double jeopardy. In the absence of any indication in the record that new charges have been or will be filed against appellant, the question is not ripe for review. *See Bailey v. State*, 100 Nev. 562, 688 P.2d 320 (1984). We note, however, that if the State does bring such charges, appellant would be entitled to oppose them by filing a motion to dismiss in the trial court and, if necessary, an interlocutory appeal in the Arkansas Supreme Court. *See Sherman v. State,* 326 Ark. 153, 931 S.W.2d 417 (1996).

Sharon CRAIN *v.* Naomi Leomia Winston BURNS

CA 02-865 112 S.W.3d 371

Court of Appeals of Arkansas
Division IV
Opinion delivered May 7, 2003

The Mosby Law Firm, by: *Lori A. Mosby*, for appellant.

Graddy & Adkisson, P.A., by: *Larry E. Graddy*, for appellee.

JOHN MAUZY PITTMAN, Judge. On January 15, 2002, the appellee, Naomi Burns, filed a petition to quiet title asserting that she had obtained title by adverse possession to certain land in Faulkner County, Arkansas, and praying that an order be entered confirming her title to the described land. A large number of persons were specifically named as parties, together with all of the surviving and unknown heirs at law of those parties. Appellee filed her warning order the same day, and the warning order was published in a local newspaper on January 20 and January 27, 2002. Although appellant was not served, she moved to intervene on March 20, 2002, asserting that she had purchased the land in question from the Arkansas State Land Commissioner because of delinquent taxes in August 2001. After the trial court granted appellant's motion to intervene, appellee moved for summary judgment and for an injunction against appellant, asserting that appellant's deed was void because the land description contained therein was indefinite. The trial court agreed, and entered an order granting appellee's motion for summary judgment and injunction against appellant, enjoining appellant from maintaining any property or possessory rights in or to the land claimed by appellee, and ordering appellant to remove her person and property from the premises within thirty days. From that decision, comes this appeal.

For reversal, appellant contends that the trial court lacked subject-matter jurisdiction because the warning order did not comply with Ark. Code Ann. § 18-60-503. We agree, and we reverse.

■ We first address the question of whether the order appealed from is an appealable order. As appellee notes, the order in the present case did not conclude the rights of all the parties, and Ark. R. Civ. P. 54(b) requires that a final judgment may be entered as to fewer than all the claims or parties in a case only upon an express finding and certification that there is no just reason for delay. There was no such Rule 54(b) certification by the trial court in the present case. Nevertheless, the trial court's order is appealable. Appellee specifically requested, and obtained, injunctive relief against appellant in her "Amended Motion for Summary Judgment and Injunction," including an order directing appellant to remove her person and property from the land in

question. The Arkansas Rules of Appellate Procedure specifically permit an appeal from an interlocutory order by which an injunction is granted, Ark. R. App. P.—Civ. 2(a)(6), and a mandatory injunction is an appealable order under that Rule. *Tate v. Sharpe*, 300 Ark. 126, 777 S.W.2d 215 (1989). Because the specific provision authorizing an appeal under Ark. R. App. P.—Civ. 2(a)(6) controls over the general provisions in Ark. R. App. P.—Civ. 2(a)(1) and Ark. R. Civ. P. 54(b) without regard to the provisions of Rule 54(b), *East Poinsett County School District No. 14 v. Massey*, 317 Ark. 219, 876 S.W.2d 573 (1994), the present appeal is properly before us.

With regard to the merits, appellant contends that the trial court lacked subject-matter jurisdiction because the warning order did not comply with Ark. Code Ann. § 18-60-503 (1987). We agree. Section 18-60-503(a) (1987) establishes the procedure by which notification must be given to all persons who claim an interest in the disputed land, providing that:

> (a) Upon the filing of the petition [to quiet title], the clerk of the court shall publish a notice of the filing of the petition on the same day of each week, for four (4) weeks in some newspaper published in the county. . . . The petition shall describe the land and call upon all persons who claim any interest in the land or lien thereon to appear in the court and show cause why the title of the petitioner should not be confirmed.

Appellee concedes that the warning order in the present case, which was published only for two weeks instead of the four weeks required by § 18-60-503(a), did not comply with that statute. In the absence of compliance with the notice requirements of § 18-60-503(a), appellee cannot make a prima facie case to quiet title, *Eason v. Flannigan*, 349 Ark. 1, 75 S.W.3d 702 (2002), and the trial court lacked subject-matter jurisdiction to adjudicate the rights to the land. *Koonce v. Mitchell*, 341 Ark. 716, 19 S.W.3d 603 (2000).

Where the trial court lacks subject-matter jurisdiction, the appellate court also lacks subject-matter jurisdiction; accordingly, we reverse and dismiss. *Id.*

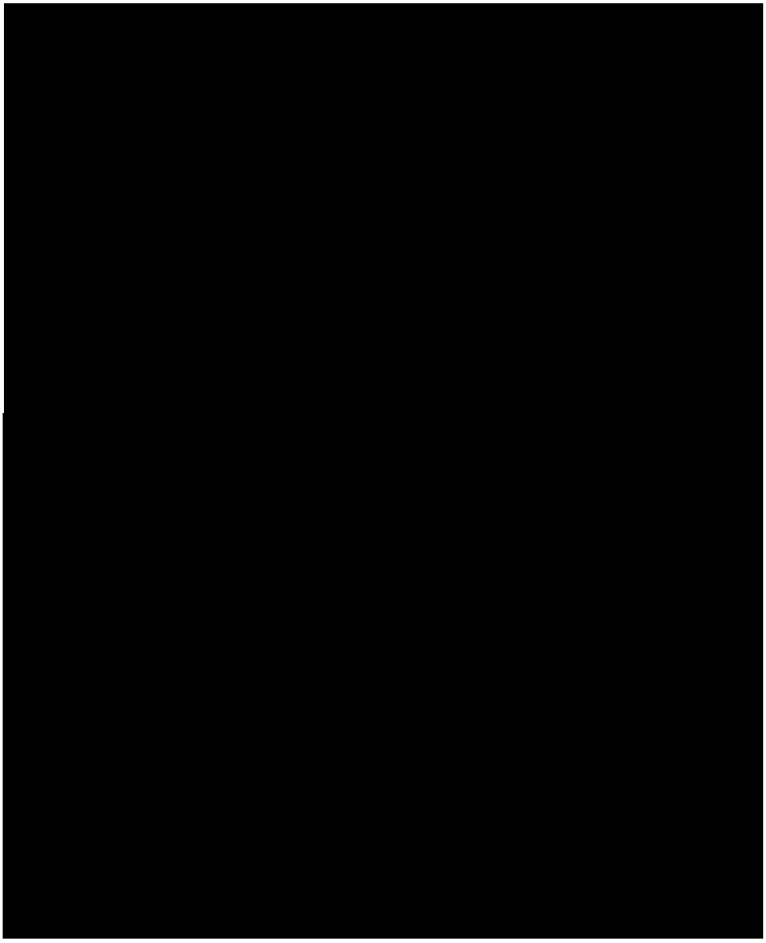
Reversed and dismissed.

NEAL and ROAF, JJ., agree.

NATIONSBANC MORTGAGE CORP. *v.* Al HOPKINS
and Patricia Hopkins, *et al.*

CA 02-427 114 S.W.3d 757

Court of Appeals of Arkansas
Division III
Opinion delivered May 7, 2003
[Petition for rehearing denied June 11, 2003.]



Wright, Lindsey & Jennings LLP, by: *Patrick J. Goss*; and *Dyke, Henry, Goldsholl & Winzerling, P.L.C.*, by: *Scot P. Goldsholl*, for appellant.

William F. Smith, for appellee Alfred J. Hopkins

Phillips, Douthit & Lamoureux. by: *Heidi M. Massey*, for appellee Patricia Hopkins.

Streett Law Firm, P.A., by: *Alex G. Streett*, for appellee River Valley Bank of Russellville, Arkansas.

JOHN B. ROBBINS, Judge. This appeal is brought from a circuit court order that canceled a $150,000 promissory note and mortgage executed by appellees Al and Patricia Hopkins in favor of appellant NationsBanc, and further awarded damages, prejudgment interest, and attorney fees to Al and Patricia Hopkins resulting from NationsBanc's failure to satisfy several of the couple's prior mortgages. We affirm the damage awards to Al and Patricia Hopkins in the amounts of $300,000 and $76,423.61, respectively, but we reverse the cancellation of the $150,000 mortgage and the award of prejudgment interest and attorney fees.

Al and Patricia Hopkins were divorced in 1998. However, during the course of their marriage, they executed numerous

promissory notes for both business and personal reasons, which were secured by mortgages on their home property, referred to in the briefs as Lots 6 and 7, and the surrounding acreage, Tract 1. Between 1979 and 1995, the Hopkinses executed eight mortgages totaling nearly $600,000. These mortgages were executed in favor of Peoples Bank, Worthen Bank, and Boatmen's Bank, all of which were predecessors of appellant NationsBanc. On February 9, 1996, the Hopkinses executed yet another mortgage on Lots 6 and 7, this one securing a note in the amount of $150,000. This note had not yet been paid in full when the Hopkinses separated in February of 1997.

After Mrs. Hopkins filed a complaint for divorce, the two began working out arrangements for a property settlement agreement. It was agreed that Mr. Hopkins would receive Lots 6 and 7 and Tract 1. However, Mrs. Hopkins insisted that he refinance the property so that she would no longer be liable on the $150,000 mortgage note to NationsBanc. In March or April of 1998, Mr. Hopkins spoke with Ward Ramsay, a friend who was a former banker, and asked Ramsay if he would loan him the money to pay off the NationsBanc note. Ramsay said he would loan Hopkins up to $150,000 if he could get a clear first mortgage on the property. During this same time, Mr. Hopkins also spoke with James Biggers of River Valley Bank (RVB) about obtaining financing. Biggers testified that he was willing to loan Hopkins $150,000 if RVB could get a clear first mortgage on the property.

Upon receiving these offers, Mr. Hopkins began contacting NationsBanc to determine the amount of the payoff on the loan. He also contacted Alfred Vance of Vance Title Company to obtain a title policy. During the course of checking the title, Vance discovered that the prior mortgages in favor of NationsBanc's predecessors had not been released, even though they had been paid in full. Vance made several attempts, as did Hopkins and Ramsay, to call NationsBanc and determine whether NationsBanc would release the prior mortgages and provide the payoff on the current mortgage. However, they received no information from NationsBanc.

Meanwhile, on July 7, 1998, the Hopkinses signed a property settlement agreement. It provided that Mr. Hopkins would have

sole ownership of Lots 6 and 7 and Tract 1, which, according to later expert testimony, were valued at $300,000. Mr. Hopkins promised that within ninety days he would refinance the debt on the property and retire the current debt in full. The agreement further provided that, if Mr. Hopkins was in arrears more than 120 days in paying any installment due on the mortgage note secured by the property, whether before or after refinancing, the property would immediately revert to Mrs. Hopkins. The agreement was formally executed on August 13, 1998, the same day the divorce decree was entered.

Following entry of the decree, Hopkins, Ramsay, and Vance continued their efforts to obtain a release of the prior mortgages. On September 15, 1998, Vance wrote to NationsBanc specifically requesting that the prior mortgages be released. A similar letter followed on October 6, 1998. Mr. Hopkins also sent NationsBanc correspondence on October 7, 1998, regarding obtaining a release of the mortgages. However, NationsBanc made no effort to release the mortgages or explain why it would not do so.

During this time period, from July to October 1998, no payments were being made to NationsBanc on the $150,000 note. As a result, on November 4, 1998, NationsBanc filed a foreclosure action, alleging that payments were in arrears and seeking $146,264.51 due on the note. Both Mr. and Mrs. Hopkins filed a counterclaim against NationsBanc, asserting that they had been damaged by the bank's refusal to release the prior mortgages. Their claim was based primarily on Ark. Code Ann. § 18-40-104 (Supp. 2001), which imposes a penalty on a mortgagee who refuses to record the satisfaction of a mortgage. The statute reads, in pertinent part:

> (a) If any mortgagee, or his executor, administrator, or assignee, shall receive full satisfaction for the amount due on any mortgage, then, at the request of the person making satisfaction, the mortgagee shall acknowledge satisfaction thereof on the margin of the record in which the mortgage is recorded.
>
> (b) Acknowledgment of satisfaction, made as stated in subsection (a) of this section, shall have the effect to release the mortgage, bar all actions brought thereon, and revest in the mortgagor or his legal representatives all title to the mortgaged property.

> (c) If any person receiving satisfaction does not, within sixty (60) days after being requested, acknowledge satisfaction as stated in subsection (a) of this section, he shall forfeit to the party aggrieved any sum not exceeding the amount of the mortgage money, to be recovered by a civil action in any court of competent jurisdiction.

Mr. Hopkins alleged that NationsBanc's wrongful refusal to release the prior mortgages created a cloud on the title of Lots 6 and 7 and Tract 1, rendering him unable to obtain the financing that had been promised by Ramsay and Biggers. As a result, he claimed, he was unable to comply with the property settlement agreement and lost his used-car business, Dealers X-Change. Mrs. Hopkins alleged that Mr. Hopkins's inability to comply with the property settlement agreement in various respects caused her to expend money that she would not have spent if he had complied.

Following a trial, the circuit judge found that NationsBanc had not complied with the statute, which caused the Hopkinses to suffer damages. The court canceled the current $150,000 note and mortgage, along with the interest, attorney fees, and penalties owing thereon, and found that Mr. Hopkins had suffered "additional damages to his business and to the real estate," for which he was awarded $300,000, together with prejudgment interest and an attorney fee of one-third of that amount. The court further found that Mrs. Hopkins had suffered damages of $76,423.21, an amount she would have received if Mr. Hopkins had been able to perform the property settlement agreement. She too was awarded prejudgment interest and an attorney fee of one-third of that amount. NationsBanc appeals from that judgment and argues that the trial court erred in the cancellation of the mortgage, the award of damages, and the award of prejudgment interest and attorney fees. It also argues that the court erred in considering the testimony of Mr. Hopkins's expert witness, CPA Owen Johnson.

■ ■ We first address the court's cancellation of the $150,000 mortgage. Our reading of section 18-40-104 does not reveal any basis for the cancellation of a mortgage on which amounts are still due and owing. The statute requires that, if a mortgagee "shall receive full satisfaction for the amount due on any mortgage," he must, at the request of the person making satisfac-

tion, acknowledge satisfaction of the mortgage in the margin of the record in which the mortgage was recorded. If satisfaction is not acknowledged within sixty days after it is requested, the mortgagee "shall forfeit to the party aggrieved any sum not exceeding the amount of the mortgage money." Ark. Code Ann. § 18-40-104(c). This statute is penal in nature and must be strictly construed. *Reed v. Frauenthal*, 133 Ark. 544, 202 S.W. 700 (1918). It is apparent that it is intended to serve as a penalty against a mortgagee who fails to acknowledge satisfaction of a mortgage once it has in fact been satisfied. The $150,000 mortgage had not been satisfied but still secured approximately $146,000 in principal debt. Therefore, the court had no authority under the statute to cancel the mortgage.

Mr. Hopkins argues that the cancellation of the mortgage in fact amounted to an award of damages as evidenced by the court's language in the decree that the note and mortgage were "canceled, forfeited, and set off." As a general rule, judgments are construed like any other instrument; the determinative factor is the intention of the court, as gathered from the judgment itself and the record. *Fox v. Fox*, 68 Ark. App. 281, 7 S.W.3d 339 (1999). The language used by the court does not necessarily indicate the court's intention to cancel the mortgage in lieu of an equivalent damage award. In fact, the use of the word "forfeit" indicates that the court was attempting to apply the penalty provision of section 18-40-104. We therefore decline to adopt Mr. Hopkins's interpretation, and we hold that the trial court erred in canceling the mortgage.

Next, we consider the award of $300,000 in damages to Mr. Hopkins. In doing so, we set out the following facts concerning the demise of Mr. Hopkins's business, Dealers X-Change, Inc. The business began to suffer sometime in 1997. It had a $450,000 line of credit at Simmons First Bank, and in November of 1997, Gene Simmons, the bank's president, revamped the floor-plan agreement based on his concern that the car lot's inventory was not being turned over quickly enough. Simmons froze the floor plan, which meant that Dealers could acquire no additional inventory, and he instituted a plan by which Dealers would reduce the current balance of approximately $400,000 to $150,000 through the sale of autos or other assets, with minimum payments of

$25,000 per month. By March 31, 1998, the debt had been reduced to $267,000. However, Mr. Hopkins testified that, as a result of NationsBanc's failure to release the prior mortgages, he was unable to obtain new financing to reinvigorate the business, which was ultimately lost to creditors in December of 1999. Expert testimony showed that, as of March 1998, the business had been worth $300,000, but it was worth nothing by December of 1999. James Biggers of River Valley Bank testified that he would have provided financing to Mr. Hopkins and that new financing would have helped Mr. Hopkins stay in business.

NationsBanc argues that its failure to release the mortgages did not cause Mr. Hopkins's damages. In reviewing a bench trial, this court will not set aside the findings of fact by a circuit judge unless they are clearly erroneous. Ark. R. Civ. P. 52(a); *Lee v. Daniel*, 350 Ark. 466, 91 S.W.3d 464 (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 and firm conviction that a mistake has been committed. *Lee v. Daniel, supra.* This court gives due deference to the superior position of the trial judge to determine the credibility of the witnesses and the weight to be accorded their testimony. *Id.* Further, it is within the province of the trier of fact to resolve conflicting testimony. *Id.*

NationsBanc offers various reasons in support of its argument that the failure to release the mortgages did not cause damage to Mr. Hopkins, including that Mr. Hopkins's business was already in such bad condition that refinancing could not have saved it and that Hopkins was a stockholder in Dealers X-Change and cannot claim its damages as his own. We do not see in the record that this last argument was made below; if it was made, it was not ruled upon. Therefore, we will not address it. *See Webb v. Brown*, 350 Ark. 254, 85 S.W.3d 885 (2002); *Britton v. Floyd*, 293 Ark. 397, 738 S.W.2d 408 (1987).

As for the other arguments, we begin by observing that Ark. Code Ann. § 18-40-104 permitted the trial court to impose damages of approximately $600,000, which represented the amount of the mortgages that had been paid but not released by

NationsBanc. As we pointed out earlier, the statute is penal in nature, and it contains no express requirement that the amount awarded under it bear a relation to damages actually caused to the aggrieved party. However, one case has held that in order for the penalty to be imposed, an actual loss must be suffered. *See Price v. Center*, 200 Ark. 19, 138 S.W.2d 391 (1940). There is no question that Mr. Hopkins suffered an actual loss in this case in the form of a lost opportunity to obtain financing that would have allowed him to comply with the property settlement agreement and breathe new life into his business. Therefore, the court's award was proper under the statute.

However, even if we were to read a causation requirement into the statute, we cannot say that the trial court's finding that NationsBanc caused Mr. Hopkins to suffer $300,000 in damages is clearly erroneous. The loss of the business alone — a loss that Mr. Hopkins's expert calculated to be $300,000 — would justify the award. The fact that the business had been experiencing trouble or that the financing might not have generated a large amount of cash does not render the court's finding erroneous. As of March 1998, the business had made considerable progress in debt reduction. Further, the refinancing that Mr. Hopkins hoped to obtain from James Biggers would have helped the business, according to Biggers. In light of these considerations, we uphold the $300,000 award to Mr. Hopkins.

Next, we review the award of $76,423.21 to Mrs. Hopkins. The award was based on her testimony that she incurred the following expenses when Mr. Hopkins was unable to comply with the property settlement agreement: (1) $7,854 in interest on other real property; (2) the $5,500 value of her son Michael's four-wheeler and trailer, which she had not received; (3) $25,000 in cash, which Mr. Hopkins was supposed to pay in lieu of his being relieved of certain debts; (4) the loss of a sale of other real property, which was later sold for $57,900 less (making her one-half interest in the loss $28,950); (5) $4,458 in Michael's college expenses; and (6) $7,659 in life insurance premiums. NationsBanc argues that the award of $76,423.21 to Mrs. Hopkins is inconsistent with the trial court's finding that Mr. Hopkins suffered $300,000 in damages because her damages represent an

amount that he owed her under the property settlement agreement; therefore, to entitle Mrs. Hopkins to an award, Mr. Hopkins would had to have suffered more than $300,000 in damages. While we understand NationsBanc's argument that the court has in effect paid Mrs. Hopkins a debt that was owed to her by Mr. Hopkins, we disagree that the award is incompatible with the trial court's damage award to Mr. Hopkins. As we pointed out earlier, under section 18-40-104, approximately $600,000 could have been awarded against NationsBanc for its failure to release the prior mortgages. It is therefore possible to award a total amount of damages to both parties greater than $300,000. Consequently, we affirm the damage award to Mrs. Hopkins.

Before leaving the damages issues, we address NationsBanc's argument that it was not required to release the prior mortgages because all the mortgages contained "future advance" or "other debt" clauses. NationsBanc claims that, as a result of these clauses, the prior mortgages secured not only the particular debt to which they applied but all future debt owed by the Hopkinses to NationsBanc; therefore, as long as the Hopkinses were indebted to the bank in any amount, the mortgages were not satisfied.

NationsBanc does not cite a single case in support of its argument. Where an argument is not properly developed on appeal and not supported by convincing argument or authority, we will not address it. *See Spears v. Spears*, 339 Ark. 162, 3 S.W.3d 691 (1999). In any event, each of the prior mortgages was a separate, free-standing transaction and not an extension of a prior mortgage or an advance. There is nothing to clearly indicate that these mortgages would cover future, unrelated indebtedness. Further, we conclude that NationsBanc has waived this argument. Waiver is the voluntary abandonment or surrender by a capable person of a right known by him to exist, with the intent that he shall forever be deprived of its benefits. *Continental Ins. Co. v. Stanley*, 263 Ark. 638, 569 S.W.2d 653 (1978). It may occur when one, with full knowledge of material facts, does something which is inconsistent with the right or his intention to rely upon the right. *Id.* The relinquishment of the right must be intentional. *Id.* During the time that Mr. Hopkins and his agents were attempting to get the prior mortgages released, NationsBanc never

explained that its failure to release the mortgages was based on these clauses. In fact, it offered no explanation at all. Further, in the October 6, 1998, letter written to NationsBanc by Alfred Vance, Vance asked the bank to send a statement that, when Hopkins paid off the current note, NationsBanc would release the mortgages — a solution that would have been consistent with the application of the clauses. NationsBanc never responded. Finally, NationsBanc actually released the mortgages in February 1999, an action inconsistent with the argument it now makes.

We turn now to the evidentiary issue concerning Mr. Hopkins's expert witness, CPA Owen T. Johnson. The controversy surrounds Johnson's valuation of Mr. Hopkins's business, at $300,000. Johnson reached this figure by viewing Mr. Hopkins's handwritten statement of his assets and liabilities, which showed a net worth of $234,989. He then logged onto a web site that contained sale prices of used car dealerships. He used those sales prices to calculate a shareholder equity ratio of 3.4:1, multiplied that factor times the business's net worth of $234,989, deducted the business's liabilities, and arrived at approximately $300,000. At trial, NationsBanc argues that the methods Johnson used to arrive at his valuation were questionable and moved to strike his testimony. The judge denied the motion but said he would consider NationsBanc arguments in weighing the credibility of Johnson's opinion.

On appeal, NationsBanc argues that Johnson used only Hopkins's unsupported handwritten statement as a starting point for his analysis, did not have enough information to use the approaches he normally employed in valuing a business, and based his valuation on sales of auto dealerships that were not at all comparable to Hopkins's dealership. A trial court's decision on the admissibility of expert testimony will not be reversed absent an abuse of discretion. *Lee v. Daniel, supra.* Further, the strength or weakness of an expert's testimony goes toward the weight and credibility to give the testimony and not toward its admissibility. *See generally Wood v. State*, 75 Ark. App. 22, 53 S.W.3d 56 (2001). The trial judge said he would consider NationsBanc's arguments in assessing Johnson's credibility. In light of that fact, and in light of the fact that no other expert testimony was presented on this matter, and that Johnson's valuation was reasonable in light of the

$234,989 net worth of the business (which the trial court could have found credible), we cannot say that the court abused its discretion in failing to strike the testimony.

NationsBanc argues next that the trial court erred in awarding prejudgment interest. To support an award of prejudgment interest, damages should be reasonably ascertainable both as to time and amount. *Dugal Logging, Inc. v. Arkansas Pulpwood, Inc.*, 66 Ark. App. 22, 988 S.W.2d 25 (1999). If a method exists for fixing the exact value of a cause of action at the time of the occurrence of the event that gives rise to the cause of action, prejudgment interest should be awarded. *Id.* Put another way, where the amount of damages is definitely ascertainable by mathematical computation or if the evidence furnishes data that make it possible to compute the amount without reliance on opinion or discretion, prejudgment interest should be awarded. *Id.*

NationsBanc argues that the damages awarded in this case were not capable of being fixed at the time of the occurrence of the event that gave rise to the cause of action. We agree. The damages arose from Mr. Hopkins's inability to comply with the property settlement agreement, which consequently caused damage to his realty and business interests. The value of those interests only became clear after presentation of expert valuation testimony at trial. Therefore, it cannot be said that, prior to that point, they were reasonably ascertainable as to time and amount. *See generally Woodline Motor Freight v. Troutman Oil Co.*, 327 Ark. 448, 938 S.W.2d 565 (1997). The prejudgment interest award is therefore reversed.

As for the attorney fee award, the court entered the award based on Ark. Code Ann. § 16-22-308 (Repl. 1999), which reads:

> In any civil action to recover on an open account, statement of account, account stated, promissory note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, or for labor or services, or 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.

In its decree, the trial court stated that NationsBanc had negligently failed to perform its statutory and contractual duties, apparently finding that the Hopkins's claims sounded, at least in part, in contract. However, an award of attorney's fees under section 16-22-308 is proper only when the action is based primarily in contract. *Reed v. Smith Steel*, 77 Ark. App. 110, 78 S.W.3d 118 (2002). We do not view this case as one that is primarily based in contract; its true nature is an action for violation of a statute and possibly negligence. Neither of these causes of action support an attorney fee award under section 16-22-308. We therefore reverse on this point.

Affirmed in part; reversed in part.

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

Carl Gene McGHEE *v.* STATE of Arkansas

CA CR 02-353 112 S.W.3d 367

Court of Appeals of Arkansas
Division II
Opinion delivered May 7, 2003

Jeff Rosenzweig, for appellant.

J. Leon Johnson, Att'y Gen., by: *Jeffrey A. Weber*, Ass't Att'y Gen., for appellee.

WENDELL L. GRIFFEN, Judge. Appellant appeals the application of the seventy-percent parole-eligibility rule to his sentence for manufacture of a controlled substance, methamphetamine. Appellant argues that application of the rule to his sentence violated both the federal and state constitutional prohibition against *ex post facto* laws because his crime was committed before methamphetamine offenses became subject to the seventy-percent rule. We affirm because appellant failed to preserve his argument for appellate review.

In 1998, appellant was arrested and charged with a number of offenses committed on May 8, 1998. On April 30, 1999, a jury convicted appellant of manufacture of a controlled substance, possession of drug paraphernalia, and possession with intent to manufacture. During the sentencing phase, the trial court instructed the jury as follows:

> For manufacture of a controlled substance methamphetamine, it is punishable by a term of years up to life. Persons under the sentence for life are not eligible for parole, but if you sentence him to a terms of years, he'll be eligible for parole after he served seventy percent of the term you impose and this percentage of imprisonment will not be reduced by earning a meritorious good time. In your deliberations on the sentence to be imposed for the other charges . . . [t]he term of imprisonment may be

> reduced further to one-sixth of any period you may impose if he earns the maximum amount of meritorious good time during his imprisonment.

Appellant did not raise an objection to this instruction. After deliberating, the jury recommended a sentence of fifteen years for the crime of manufacture of a controlled substance and three years each for the crimes of possession of drug paraphernalia and possession with intent to manufacture. The trial court sentenced appellant as recommended by the jury and ordered the sentences to run concurrent, again commenting that appellant would have to serve seventy percent of his sentence for manufacture of methamphetamine.

On May 25, 1999, appellant filed a notice of appeal; however, the record was not tendered until October 4, 1999, at which time the Supreme Court Clerk refused to file it because it was late. On April 11, 2002, appellant retained new counsel and filed a motion for "belated appeal" or motion for "rule on clerk" and tendered a record for his appeal for a second time. The supreme court granted appellant's motion. *McGhee v. State*, 348 Ark. 573, 74 S.W.3d 627 (2002); *McGhee v. State*, 350 Ark. 49, 84 S.W.3d 423 (2002). This appeal followed.

Appellant argues that the application of the seventy-percent parole-eligibility rule under Ark. Code Ann. § 16-93-611 (Supp. 2001) to his sentence for manufacture of a controlled substance, methamphetamine, violates federal and state constitutional prohibitions on *ex post facto* legislation. Both the United States and Arkansas Constitutions prohibit the enactment of any law which imposes punishment on a person for an act done that was not punishable at the time it was committed or which increases or imposes additional punishment than what was prescribed for that act when it was committed. U.S. Const. Art. I, §§ 9 and 10; Ark. Const. Art. 2, § 17. To fall within the *ex post facto* prohibition, the law must be retroactive, that is, it must apply to events occurring before its enactment and it must disadvantage the offender affected by it. *Bowen v. State*, 322 Ark. 483, 911 S.W.2d 555 (1995). Furthermore, the change in the law must have altered substantial personal rights, not merely modes of procedure that do not affect matters of substance. *Id.* The Arkansas Supreme Court has applied the *ex post facto* prohibition to parole-eligibility cases and

has held that it is unconstitutional to apply the current parole-eligibility act retrospectively to a defendant's conviction, instead of considering him for parole under the parole-eligibility statute that was in effect at the time of the commission of the crime. *Bosnick v. Lockhart*, 283 Ark. 206, 672 S.W.2d 52 (1984).

Appellant's felony information recited that the offenses for which appellant was convicted occurred on May 8, 1998. At that time, Ark. Code Ann. § 16-93-611 (Supp. 2001) provided that a person convicted of certain serious crimes would not be eligible for parole until he served seventy percent of his sentence, but the statute did not include the offense of manufacture of methamphetamine. This statute was amended in 1999 by Act 1268 to add methamphetamine offenses, thus, making the manufacture of methamphetamine subject to the seventy-percent parole-eligibility rule. This new amendment became effective on April 9, 1999. However, when appellant was sentenced, the seventy-percent parole-eligibility rule was applied to his sentence for manufacture of a controlled substance, methamphetamine. Therefore, appellant correctly asserts that the application of the seventy-percent parole-eligibility rule to his sentence for manufacture of methamphetamine would be an *ex post facto* law in violation of the federal and state constitutions. Nonetheless, the record reflects, as appellant has admitted, that his counsel never raised an objection to the jury instruction or the application of the seventy-percent parole-eligibility rule to his sentence at trial; thus, this error was not brought to the attention of the trial court. It is well settled that the appellate courts will not hear arguments or errors, even constitutional ones, which were not raised at the trial court level by means of a timely, specific objection. *Nooner v. State*, 339 Ark. 253, 4 S.W.3d 497 (1999); *Ussery v. State*, 308 Ark. 67, 822 S.W.2d 848 (1992).

Appellant argues that he did not need to object to the application of the seventy-percent parole-eligibility rule to his sentence at trial, citing *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980) in support of his position. In *Wicks v. State*, the supreme court enumerated four exceptions to the contemporaneous-objection rule: (1) death-penalty cases; (2) cases where an error is made by the trial judge and defense counsel has no knowledge of the error and hence no opportunity to object; (3) cases in which an error is so egregious that the trial court had a duty to

correct, absent an objection; and (4) cases which might fall under Ark. R. Evid. 103(d) providing, "[n]othing in this rule precludes taking notice of errors affecting substantial rights although they were not brought to the attention of the court." 270 Ark. at 785-87, 606 S.W.2d at 369-70. The supreme court further held that the application of Ark. R. Evid. 103(d) was limited to a ruling which admits or excludes evidence. *Id.* at 787. Appellant makes the argument that an *ex post facto* violation is one that would fall under Ark. R. Evid. 103(d) or that the exceptions should be expanded to include such errors when they undisputedly appear on the face of the record. We are not persuaded by appellant's argument.

First, it is quite obvious that appellant's case does not come within the scope of any of the recognized exceptions to the contemporaneous-objection rule listed in *Wicks v. State*, and we decline to extend the exceptions. Second, Arkansas does not adhere to the "plain error" rule under which plain errors affecting substantial rights may be noticed although they were not brought to the attention of the trial court. *Lovelady v. State*, 326 Ark. 196, 931 S.W.2d 430 (1996); *Smith v. State*, 268 Ark. 282, 595 S.W.2d 671 (1980); *Wicks v. State*, *supra*. To the contrary, our law is well settled that issues raised for the first time on appeal, even constitutional ones, will not be considered because the trial court never had an opportunity to rule on them. *J.C.S. v. State*, 336 Ark. 364, 985 S.W.2d 312 (1999); *Ussery v. State*, *supra*. As such, appellant's argument is not preserved for our review.

Alternatively, appellant argues that in the interest of judicial economy we should address the merits of the case because he would be entitled to relief under Rule 37 or state *habeas corpus* grounds. In response to this assertion, we quote from *Wicks v. State* in which the supreme court stated:

> In closing, we mention a position sometimes taken in appellate briefs in criminal cases, that a possible error should be argued by counsel even in the absence of an objection below, because the matter might be raised in a petition for postconviction relief. The short answer to that suggestion is that if the supposed error calls for postconviction relief, the defect is not cured by the presentation of an argument that is certain to be rejected by this court for want of an objection at the trial.

270 Ark. at 787, 606 S.W.2d at 370. Moreover, the determination of parole eligibility is the province of the Arkansas Department of Correction. *Morris v. State*, 333 Ark. 466, 970 S.W.2d 210 (1998). We point out that appellant has failed to show in the record that, in addition to the trial court' s error, the Department has miscalculated his parole-eligibility date in a manner inconsistent with the law in effect at the time he committed his crimes.

Affirmed.

HART and BAKER, JJ., agree.

Vivian SANDERSON, *et al.* Beneficiaries of the Estate of Barron C. Sanderson, *Deceased v.* Sid McCOLLUM, Executor of the Estate of Robert H. McCollum, M.D.,. *Deceased*

CA 02-815 112 S.W.3d 363

Court of Appeals of Arkansas
Division II
Opinion delivered May 7, 2003

Law Offices of Charles Karr, P.A., by: *Charles Karr* and *Shane Roughley*, for appellants.

Bassett Law Firm, by: *Walker Dale Garrett* and *Shannon L. Fant*, for appellee.

WENDELL L. GRIFFEN, Judge. Appellants are the beneficiaries of the Estate of Barron C. Sanderson. They appeal from a trial court order dismissing their case with prejudice upon finding that their action was barred by the statute of limitations. Appellants argue that the trial court erred. We disagree and affirm.

From June 12, 1995, until August 19, 1997, Barron Sanderson (appellants' decedent) was under a continuous course of treatment with appellee, Dr. Robert McCollum. On November 23, 1997, Barron Sanderson died after suffering a heart attack. The decedent was survived by his wife, Vivian Sanderson; his son, Devin Sanderson; his daughters, Peri Trudell and Danielle Hudson; his mother, Pansy Sanderson; and his sister, Sandra Jackson. No personal representative was appointed on behalf of the decedent's estate.

On August 16, 1999, Vivian Sanderson filed a *pro se* wrongful-death action against appellee alleging that he was negligent in failing to properly treat and diagnose the decedent's cardiac problems. This complaint was styled "Vivian Sanderson, Surviving Spouse of Barron C. Sanderson, Deceased v. Robert H. McCollum, M.D." Three days later, on August 19, 1999, the law office of Charles Karr, P.A. entered an appearance as the attorneys of record for Vivian Sanderson and filed an amended complaint. The amended complaint was styled "Vivian Sanderson, Surviving Spouse of Barron C. Sanderson, Deceased, on Behalf of Herself,

the Heirs and Statutory Beneficiaries, and the Estate v. Robert H. McCollum, M.D."

On February 15, 2001, Vivian Sanderson took a voluntary nonsuit of this action. On the same day, a wrongful-death complaint was filed against appellee in the name of the appellants, Vivian Sanderson, Devin Sanderson, Peri Trudell, Danielle Hudson, Pansy Sanderson, and Sandra Jackson, who represented all of decedent's heirs. Appellee moved to dismiss the complaint, alleging that the action was barred by the statute of limitations. Appellants argued that they had ratified the first suit brought by Vivian Sanderson and that the ratification should relate back to save their claim. The trial court treated appellee's motion to dismiss as a motion for summary judgment, found that the first complaint filed by Vivian Sanderson was not in compliance with Ark. Code Ann. § 16-62-102 (Supp. 2001), and that the second complaint filed by appellants, as the heirs of the decedent, was barred by the applicable statute of limitations. Therefore, the trial court dismissed appellants' complaint. This appeal followed.

■ ■ When reviewing a trial court's decision on a motion to dismiss, the facts alleged in the complaint are treated as true and are viewed in the light most favorable to the plaintiff. *Goff v. Harold Ives Trucking Co., Inc.*, 342 Ark. 143, 27 S.W.3d 387 (2000). All reasonable inferences must be resolved in favor of the complaint, and the pleadings are to be liberally construed. *Martin v. Equitable Life Assur. Soc'y of the United States*, 344 Ark. 177, 40 S.W.3d 733 (2001). A party, who relies upon a statute of limitations as defense to a claim, has the burden of proving that the full statutory period has run on the claim before the action was commenced. *Davenport v. Pack*, 35 Ark. App. 40, 812 S.W.2d 487 (1991). In order to prevail on a motion to dismiss on the basis of limitations, the complaint must be barred on its face. *Id.*

Appellants first argue that in *Murrell v. Springdale Memorial Hospital*, 330 Ark. 121, 952 S.W.2d 153 (1997), *Ramirez v. White County Circuit Court*, 343 Ark. 372, 38 S.W.3d 298 (2001), *St. Paul Mercury Insurance Co. v. Circuit Court of Craighead County*, 348 Ark. 197, 73 S.W.3d 584 (2002), and *Davenport v. Lee*, 348 Ark. 148, 72 S.W.3d 85 (2002), the Arkansas Supreme Court con-

strued the wrongful-death statute too strictly. Appellant contends that the supreme court's rulings in these cases should be limited to hold that a wrongful-death action brought by fewer than all the heirs may not go to judgment but does toll the statute of limitations. This argument is without merit.

In Arkansas, a wrongful-death action must be brought by and in the name of the personal representative of the deceased person. Ark. Code Ann. § 16-62-102(b) (Supp. 2001). If there is no personal representative, then the action shall be brought by the heirs at law of the deceased person. *Id.* A wrongful-death action is a creation of statute and only exists in the manner and form prescribed by the statute; thus the wrongful-death statute must be strictly construed and nothing may be taken as intended that is not clearly expressed. *Ramirez v. White County, supra.* In applying all the standard rules of statutory construction, the supreme court held that the language of Ark. Code Ann. § 16-62-102(b) (Supp. 2001) was clear and unambiguous. *Id.* If there is no personal representative of the deceased person, then a wrongful-death action must be brought by all the heirs at law. *Id.* An action brought by less than all the heirs of the deceased is a nullity. *St. Paul Mercury Ins. Co. v. Circuit Court of Craighead County, supra.* As this is the precedent established by our supreme court, we are bound to follow it. *Smith v. ALCOA*, 78 Ark. App. 15, 76 S.W.3d 909 (2002); *Scott v. State*, 69 Ark. App. 121, 10 S.W.3d 476 (2000).

In the instant case, an estate was never opened for Barron Sanderson and no personal representative was ever appointed as administrator of the estate. Consequently, any wrongful-death action stemming from the death of Barron Sanderson had to be brought by all his heirs at law to be valid. Ark. Code Ann. § 16-62-102(b) (Supp. 2001); *Ramirez v. White County, supra*; *St. Paul Mercury Ins. Co. v. Circuit Court of Craighead County, supra.* The original *pro se* complaint brought by Vivian, in her individual capacity, was not in compliance with Ark. Code Ann. § 16-62-102 (Supp. 2001) because it was not brought in the name of all the decedent's heirs at law and was a nullity. The amended complaint, which was brought by Vivian Sanderson on behalf of herself, the heirs, and the estate, was not in compliance

with Ark. Code Ann. § 16-62-102 (Supp. 2001); Vivian could not bring a suit in this representative capacity because she had not been appointed as the personal representative of the estate. Thus, the amended complaint was also a nullity. Therefore, when appellants, who were Barron Sanderson's heirs at law and the necessary parties in this action, filed their complaint on February 15, 2001, the two-year statute of limitations for filing a medical malpractice claim had run, barring their cause of action. Accordingly, the trial court did not err in dismissing their case. *See* Ark. Code Ann. § 16-114-203 (Supp. 2001).

Appellants, however, argue that they ratified the first suit brought by Vivian Sanderson and that we should interpret Ark. Code Ann. § 16-56-126 (Repl. 1987), the savings statute, in a liberal and equitable manner to save their cause of action. Under Ark. Code Ann. § 16-56-126 (Repl. 1987), a plaintiff, who has suffered a nonsuit, may refile the suit within one year regardless of whether the statute of limitations would otherwise prevent institution of such suit. *Tatus v. Hayes*, 79 Ark. App. 371, 88 S.W.3d 864 (2002). However, the savings statute cannot save a wrongful-death action when the current plaintiffs are not the same plaintiffs who were parties to first suit, which had been nonsuited. *See Murrell v. Springdale Mem. Hosp.*, *supra* (the supreme court barred the wrongful-death claims of Murrell's children because the children were not parties to the first action that had been nonsuited).

In this case, the cause of action for the wrongful-death claim accrued on November 23, 1997, the date of Barron Sanderson's death. The plaintiff in the first wrongful-death suit was the decedent's spouse, Vivian Sanderson. She brought the action in her individual capacity and within the time allowed by two-year statute of limitations. However, Vivian Sanderson's suit was a nullity because it was not in compliance with Ark. Code Ann. § 16-62-102 (Supp. 2001) and was nonsuited on February 15, 2001. The second suit was filed on February 15, 2001, which was within this one-year grace period of the savings statute, but it was filed by appellants, the decedent's heirs at law. Because appellants were not plaintiffs to the first wrongful-death complaint, they could not benefit from the application of the savings statute. Therefore, at the time appellants filed their wrongful-death suit, the two-year

statute of limitations had already run, barring their claim. Appellants could not ratify the first suit filed by Vivian so as to come within the savings statute because there was no valid cause of action for them to ratify. *Tatus v. Hayes*, *supra*.

Alternatively, Vivian Sanderson argues that she has standing to bring a loss-of-consortium claim independent of a wrongful-death suit citing, *Lopez v. Waldrum Estate*, 249 Ark. 558, 460 S.W.2d 61 (1970), for support of her argument. In *Lopez*, a mother and daughter were injured in an automobile accident in 1967 caused by the driver in the other vehicle who was killed. The administrator of the driver's estate published a notice to creditors to which anyone having a claim against the estate was to assert that claim within six months of the notice. Neither the mother nor daughter asserted a claim against the estate. At the time of the accident, the husband was overseas with the military. Upon returning home in 1969, the husband filed a complaint on his behalf, for loss of consortium and on behalf of his wife and daughter. The supreme court in *Lopez* dismissed the claims filed on behalf of the wife and daughter as barred by the statute of limitations, but found that the statute of limitations as to the husband's claim had been tolled by the Soldiers' and Sailors' Civil Relief Act. The supreme court stated that although it has held that a loss-of-consortium claim is a derivative cause of action and that a judgment adverse to the wife would bar the husband's action, the fact that the husband's cause of action was derivative did not mean that it could not be independently prosecuted.

Vivian Sanderson's reliance on *Lopez* is misplaced. Unlike in other personal-injury cases, in wrongful-death actions, loss of consortium cannot be alleged as a separate cause of action. *See Machado v. Kunkel*, 2002 Pa. Super. 232, 804 A.2d 1238 (2002); *Wiard v. State Farm Mut. Auto. Ins. Co.*, 132 N.M. 470, 50 P.3d 565 (2002). In a wrongful-death action, the loss-of-consortium claim is only an element of damages and is dependant on the legal existence of the predicate action. *See Musorofiti v. Vlcek*, 65 Conn. App. 365, 783 A.2d 36 (2001); *Kramer v. Lewisville Mem'l Hosp.*, 858 S.W.2d 397 (Tex. 1993). Consequently, a defense that would constrict or exclude the defendant's liability to the injured

party would have the same effect on a loss-of-consortium action. *See Sisemore v. Neal*, 236 Ark. 574, 367 S.W.2d 417 (1963).

Therefore, because the statute of limitations has run, barring appellants from commencing a wrongful-death action against appellee, Vivian Sanderson is also barred from pursuing a separate claim for loss of consortium, which was derivative to the wrongful-death action.

Affirmed.

HART and BAKER, JJ., agree.

CITY of LITTLE ROCK *v.* Richard Alan HUBBARD, Jr.

CA 02-1084 112 S.W.3d 375

Court of Appeals of Arkansas
Division III
Opinion delivered May 7, 2003

Office of the City Attorney, by: *Bradley S. Chafin*, Deputy City Att'y, for appellant.

Robert A. Newcomb, for appellee.

TERRY CRABTREE, Judge. This is an employment-termination case. Chief Phil Johnston of the Little Rock Fire Department wrote the appellee, Richard Hubbard, a letter terminating him from his position as a driver for the fire department effective April 20, 2001. Appellee appealed his termination to the Little Rock Civil Service Commission. After a hearing, the Commission signed an order on August 9, 2001, which altered the form of discipline imposed on appellee. Rather than terminating appellee, the Commission imposed an unpaid thirty-day suspension on him, ending at the conclusion of his family-medical leave, and thereafter allowed him a one-year unpaid leave of absence to complete drug rehabilitation. The appellant, City of Little Rock, appealed the Commission's decision to the Pulaski County Circuit Court, and the circuit court upheld the Commission's ruling. First on appeal, appellant claims that the circuit court's decision

was not supported by substantial evidence and that the trial court did not engage in a *de novo* review of the case. For appellant's second point on review, it contemplates a possible conflict-of-interest argument from appellee. We reverse and remand.

Appellee became a firefighter for the City of Little Rock on July 4, 1988, where he worked as a hoseman. In 1996, appellee was promoted and began driving fire trucks. He served as a driver until he was terminated. Appellee began having problems with drug addiction in 1993. Since July 2000, appellee has been in at least three different drug-treatment programs.

In July of 2000, appellee entered a drug-treatment program at Bridgeway in Little Rock; however, he suffered a relapse shortly thereafter. On October 2, 2000, appellee suffered a knee injury and took leave until November 7, 2000. In the meantime, on October 28, 2000, appellee entered COPAC, a drug-rehabilitation facility. Several days later, appellee's wife met with Chief Johnston to discuss appellee's rehabilitation and request a family-medical leave for him. That day, Chief Johnston sent a letter to appellee explaining family-medical leave procedures. On November 10, 2000, appellee's family-medical leave began and continued for twelve weeks.

While at COPAC, appellee left the facility for a short time with two other patients and smoked marijuana and drank alcohol. Ultimately, on December 27, 2000, after sixty days of treatment, appellee left COPAC against medical advice. Appellee testified that he left the facility because it cost $6,000 per month for treatment and that this financial burden was too great for his family. On January 16, 2001, appellee called Chief Wilson and represented that he was ready to return to work. On January 18, 2001, appellee presented to Dr. Harley Haber in Little Rock, and the doctor released appellee to work effective January 22, 2001. On January 25, 2001, Chief Johnston sent appellee a pre-termination letter. On February 9, 2001, an administrative hearing was held regarding appellee. Finally, appellee received a letter dated April 20, 2001, which stated that he was terminated effective that day.

On July 17, 2001, the Civil Service Commission held a hearing concerning appellee's termination. The Commission over-

turned Chief Johnston's decision to terminate appellee and instead imposed an unpaid thirty-day suspension, to end at the conclusion of his family-medical leave, and thereafter granted appellee a one-year unpaid leave of absence. Appellant appealed to the circuit court, and it upheld the Commission's decision to modify appellee's punishment.

Appellant contends that substantial evidence does not support the circuit court's order and that the trial court did not engage in a *de novo* review of the case. The circuit court reviews decisions of the Civil Service Commission *de novo* and has jurisdiction to modify the punishment fixed by the Commission even if the court agrees that the officer violated department rules and regulations. *City of Van Buren v. Smith*, 345 Ark. 313, 46 S.W.3d 527 (2001); *City of Little Rock v. Hall*, 249 Ark. 337, 459 S.W.2d 119 (1970). The circuit court does not merely review the decision of the Civil Service Commission for error, but instead conducts a *de novo* hearing on the record before the Civil Service Commission and any additional competent testimony that either party might desire to introduce. *Daley v. City of Little Rock*, 36 Ark. App. 80, 818 S.W.2d 259 (1991); Ark. Code Ann. § 14-51-308(e)(1)(C) (2000). The effect of this statutory provision for a *de novo* appeal to circuit court is to reopen the entire matter for consideration by the circuit court, as if a proceeding had been originally brought in that forum. *Civil Service Commission of Van Buren v. Matlock*, 206 Ark. 1145, 178 S.W.2d 662 (1944). Although the transfer from a civil service commission is called an appeal in Ark. Code Ann. § 14-51-308(e)(1), the circuit court proceeding is in the nature of an original action. *Daley, supra.*

In *Petty v. City of Pine Bluff*, 239 Ark. 49, 386 S.W.2d 935 (1965), our supreme court stated that the test on appeal to the supreme court from circuit court was whether the judgment was supported by substantial evidence. However, that holding was changed effective July 1, 1979, by Arkansas Rule of Civil Procedure 52, which now prevents us from reversing the trial court unless its findings are clearly against the preponderance of the evidence. *See City of Van Buren v. Smith, supra.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a

mistake has been made. *Foundation Telecommunications v. Moe Studio*, 341 Ark. 231, 16 S.W.3d 531 (2000).

In its order filed on July 13, 2002, the circuit court wrote:

> The Court, after hearing arguments of counsel and having reviewed the record finds that while there is substantial evidence to support Little Rock Fire Chief Johnston's decision to terminate [Hubbard's] employment with the Little Rock Fire Department, there is also substantial evidence to support the decision of the Little Rock Civil Service Commission to overturn the Chief's decision and hereby affirms the Civil Service Commission's decision for the reasons stated from the bench, which are hereby incorporated herein.

The trial judge stated from the bench:

> The Court is going to rule to affirm the decision of the Civil Service Commission. I do that in disagreeing with the City's position at this point. The City being the Chief. There is substantial evidence for the Commission's decision. I am not saying that there is a preponderance or that there is more evidence, but there is substantial. The Court believes that the Commission is charged with having the final say on employee matters. Both the Commission and the Chief disciplined Mr. Hubbard and it is just a question of degree of discipline. The Court affirms the ruling of the Civil Service Commission.

The foregoing demonstrates that the circuit court was clearly confused as to the type of review it should conduct. In its order, the court stated that substantial evidence supported the Commission's decision. From the bench, the trial judge referred to the substantial-evidence standard of review in addition to "a preponderance [of the evidence]."

Undoubtedly, the trial court should have engaged in a *de novo* review of the matter. *See City of Van Buren v. Smith, supra.* The substance and intent of the circuit court proceeding is to provide a judicial forum for relitigation of the case. *Matlock, supra.* In *Matlock*, the court described an appeal to circuit court from a civil service commission and quoted *United States v. Ritchie*, 58 U.S. 525 (1854), for the proposition that, although the transfer is called an appeal:

> [W]e must not, however, be misled by a name, but look to the substance and intent of the proceeding. The district court is not confined to a mere re-examination of the case as heard and decided by the Board of Commissioners, but hears the case *de novo*[.]

Matlock at 1150, 178 S.W.2d at 665. We are convinced that the trial court made its decision in this case according to a substantial-evidence test. Because the trial court did not conduct a *de novo* review of this matter, we reverse and remand to the circuit court for a new trial consistent with this opinion. We need not address appellant's second point on appeal as we reverse and remand on the first.

Reversed and remanded.

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

Michael MORRIS, *et al. v.* ARKANSAS DEPARTMENT of FINANCE and ADMINISTRATION

CA 02-890 112 S.W.3d 378

Court of Appeals of Arkansas
Division II
Opinion delivered May 7, 2003

David J. Potter, for appellants.

Michael J. Wehrle, for appellee.

KAREN R. BAKER, Judge. This appeal is from an order of the Sevier County Circuit Court finding that two logging-related businesses owned by appellant Michael Morris and three similar businesses owned by appellant Jim Morris owe appellee, the Arkansas Department of Finance and Administration, withholding taxes for their employees for the time period beginning in January 1989 and ending in December 1994. Appellants Michael Morris, d/b/a M & M and 3-M Transportation, Inc., and Jim Morris, d/b/a Morris Logging, Jim Morris Trucking, and Jim Morris Logging, Inc., assert error in the admission of evidence against them, the computation of the amounts owed appellee, and the dismissal of their claims for subrogation against their employees. We affirm the trial judge's decision in all respects.

Appellants employed over 100 people in Lockesburg, Arkansas, between 1989 and 1994. Although appellants withheld federal income taxes from their employees' wages and prepared W-2 forms, they did not withhold or remit state income taxes. After conducting five audits, appellee assessed appellants for unpaid withholding taxes, interest, and penalties. Although appellants did not establish a reasonable cause for their failure to withhold the taxes, appellee conducted reaudits to give them credit for the income taxes that the employees had paid on those wages. According to appellee, if an employee had reported gross income

in an amount at least equal to the amount of wages reported in the W-2 records, it gave appellants credit for the state income taxes that should have been withheld on those wages. Appellants challenged the reaudits and requested an administrative hearing, adopting the position that the state income taxes were the employees' responsibility. Appellee upheld the assessments. Appellants filed this action for judicial relief from appellee's determination under Ark. Code Ann. § 26-18-406 (Supp. 2001). In their complaint, appellants also sought subrogation from the employees, naming them as defendants.

Appellee's auditor, Donald Gunter, testified at trial that he had reviewed appellants' W-2 and W-4 payroll records between 1989 and 1994 and had prepared audit summaries from those records. Mr. Gunter testified that he had calculated the amounts of income taxes that should have been withheld by taking each employee's W-2 income for each year, finding the correct amount of taxes due according to the state standard deduction tax table, and subtracting any allowable personal tax credits. He said that he did not compute withholding tax for any employee with $3,000 or less yearly income. He testified that each employee who had reported gross income in an amount at least equal to the amount of wages reported in the W-2 records was not included in the audits; therefore, appellants were given credit for the taxes that should have been withheld for those wages. Neither appellant Jim Morris nor Michael Morris testified, nor did any other officer of their companies.

In his order, the trial judge found that appellant Jim Morris was "well aware" of his obligation to withhold state income taxes from his employees' wages but refused to do so. The judge noted that, since 1965, Arkansas employers have been required to withhold state income taxes from the wages paid to their employees and that any employer who fails to do so is personally and individually liable to the state for those taxes. Further, the judge refused to grant appellants subrogation against the employees, stating that appellants had cited no Arkansas statutory or case law to support their claim. The judge found that appellants were liable for such taxes, the statutorily permitted interest, and penalties as follows:

Michael Morris d/b/a M & M — $5,502 taxes; $1,925.70 penalty; interest at 10% from the due dates of the delinquent withholding taxes until paid;

3-M Transportation, Inc. — $4,690 taxes; $1,641.50 penalty; and interest at 10%;

Jim Morris d/b/a Morris Logging — $1,838 taxes; $643.30 penalty; and interest at 10%;

Jim Morris d/b/a/ Jim Morris Trucking — $6,871 taxes; $2,404.85 penalty; and interest at 10%; and

Jim Morris Logging, Inc. — $22,157 taxes; $7,754.95 penalty; and interest at 10%.

Arguments

Appellants make the following arguments: (1) the trial judge erred in admitting the audit summaries into evidence; (2) the judge erred in failing to deduct withholding for the employees who had paid their state income taxes; (3) the judge erred in denying appellants subrogation against the employees.

Admission of Evidence

Appellants assert that the judge committed reversible error by admitting appellee's audit summaries into evidence without requiring appellee to first give notice of its intention to use such summaries and to produce at trial the documents from which they were compiled. In his order, the judge stated that, given the large number of employees, the amount of time, and the fact that five employers were involved, the audit summaries introduced by appellee were acceptable to establish appellants' tax liability in lieu of all of the source documents. He stated: "Mr. Gunter's testimony regarding audit procedures, techniques and calculations provided an adequate foundation for the admission of the Audit Summaries." The judge also found that there was no evidence to suggest that appellants were denied access to any of appellee's evidence and supporting documents prior to trial or that appellants had made proper discovery requests pursuant to the Arkansas Rules of Civil Procedure. He added: "The supporting W-2 and W-4 records were obtained from the [appellants or the appel-

lants'] accountant and therefore should have been readily available to [appellants] throughout the pendency of this case." The judge also found that appellants had failed to prove that the reaudits were flawed in any respect.

The admission of evidence is at the discretion of the trial judge, and we will not reverse absent an abuse of that discretion and a showing of prejudice. *Dodson v. Allstate Ins. Co.*, 345 Ark. 430, 47 S.W.3d 866 (2001). Rule 1006 of the Arkansas Rules of Evidence controls the admissibility of summaries. It states:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

This rule gives the trial judge discretion whether to accept or reject a summary or whether to order that the source documents be produced in court. *See Dodson v. Allstate Ins., supra.* Rule 1006 does not require that a party notify an opposing party that he intends to introduce a summary. *Ward v. Gerald E. Prince Constr., Inc.*, 293 Ark. 59, 732 S.W.2d 163 (1987).

The five audit summaries introduced at trial as State's Exhibits 1 through 5 set forth many details about the process by which they were prepared. Each sets forth the audit period, the company, the date completed, the identity of the auditor, the credits given during the reaudit, the auditor's report, samples of the W-2 forms from which the audits were prepared, and computations of the taxes, penalties, and interest due. Mr. Gunter, the lead auditor who prepared these summaries, testified that he used appellants' W-2 and W-4 records to prepare the summaries and explained the process in great detail. He also thoroughly described the care with which he had conducted the reaudits to ensure that appellants were given credit for the taxes that had been paid by the employees. Mr. Gunter stated that the W-2 forms were the "key documents" that he used to determine the employees' wages. Appellants do not deny that these documents were

obtained from them or their accountant. Given appellants' possession of the source documents, and their failure to demonstrate prejudice, we cannot say that the judge abused his discretion in admitting these summaries.

Credit for Taxes Paid

Appellants argue that the judge erred in failing to give them credit for taxes paid by two employees who testified at trial that they had paid their taxes and by others who had indicated that they had done so in answers to interrogatories and requests for production of documents. Whether appellee gave appellants credit for all of the taxes actually paid by employees is a question of fact that is not reversible unless it is clearly against the preponderance of the evidence. The standard that we apply when reviewing a judgment entered by a circuit judge after a bench trial is well established. We do not reverse unless we determine that the circuit judge erred as a matter of law or we decide that his findings are clearly against the preponderance of the evidence. *Riffle v. United Gen. Title Ins. Co.*, 64 Ark. App. 185, 984 S.W.2d 47 (1998). We view the evidence in the light most favorable to the appellee, resolving all inferences in the appellee's favor. *Ford Motor Credit Co. v. Ellison*, 334 Ark. 357, 974 S.W.2d 464 (1998). The determination of the credibility of witnesses is within the province of the circuit judge, sitting as the trier of fact. *Id.*

In his decision, the judge stated that, although an employer who fails to withhold and remit such taxes due to "reasonable cause" is entitled to credit against its withholding liability to the extent that the employees have reported the wages paid by the employer and have paid state income tax on those wages, appellants had failed to do so "without reasonable cause." He found that appellee had given appellants credit for any taxes reported and paid by the employees, even though appellants had failed to establish a reasonable cause for their failure to withhold and remit such taxes.

Arkansas Code Annotated section 26-51-905 (Repl. 1997), which is part of the Arkansas Income Tax Withholding Act of 1965, provides that employers paying wages to employees "shall deduct and withhold" income taxes from their wages and that

such amounts shall be credited against the employees' tax liabilities for that year. Arkansas Code Annotated section 26-51-908(a) (Supp. 2001) requires these employers to pay appellee the full amount that must be deducted and withheld. Section 26-51-908(e) states: "Every employer who fails to withhold or pay to the director any sums required by this subchapter to be withheld and paid shall be personally and individually liable therefor except as provided in § 26-51-916." The exception set forth in § 26-51-916 (Repl. 1997) provides:

> Every employer shall be liable for amounts required to be deducted and withheld by this subchapter regardless of whether or not the amounts were in fact deducted and withheld. However, if the employer fails to deduct and withhold the required amounts and if the tax against which the required amounts would have been credited is paid, the employer shall not be liable for those amounts not deducted and withheld if the failure was due to reasonable cause.

Appellants introduced the testimony of a former employee, James McIntyre, who stated that he had paid his state income taxes for 1991-94. Janet Denson testified that she and her husband, Gerald, had paid state income taxes for 1991-94. Appellants also introduced into evidence documents pertaining to Paul and Sonia Yancey and William Jegstrup that purportedly showed that they had paid state income taxes, even though appellee had not given credit for these payments.

On the other hand, appellee's records indicated that Mr. McIntyre and Mrs. Denson had not paid such taxes. Mr. Gunter testified that appellee had given appellants credit for all taxes paid by employees who had reported income at least equal to the amounts shown on the W-2 records maintained by appellants. The judge's finding that appellee had done so is not clearly against the preponderance of the evidence.

In any event, appellee was under no obligation to give appellants credit for any of these taxes, because appellants failed to establish any reasonable cause for their failure to do so. We note that appellants have not appealed the judge's finding that they did not establish reasonable cause for their failure to withhold and remit these taxes. Additionally, the evidence introduced at trial

clearly demonstrated that appellant Jim Morris knowingly and willfully failed to withhold and remit the taxes. Mr. McIntyre testified that, when he had asked Morris why he was not withholding state income taxes, he said that "too much paperwork" and "too much hassle" were involved.

Accordingly, we affirm on this point.

Subrogation

Relying on general principles of subrogation, appellants contend that the judge erred in denying their claim for subrogation against the employees. They assert that the employee is the primary obligor for the state income tax withheld by an employer and, therefore, the employer that is required to pay that tax should be entitled to subrogation. To support their argument, appellants rely on *St. Paul Fire & Marine Insurance Co. v. Murray Guard, Inc.*, 343 Ark. 351, 37 S.W.3d 180 (2001), which sets forth the general rules of subrogation. Subrogation is an equitable remedy that rests upon principles of unjust enrichment and attempts to accomplish complete and perfect justice among the parties. *Id.* The elements of subrogation are: (1) a party pays in full a debt or an obligation of another or removes an encumbrance of another; (2) for which the other is primarily liable; (3) although the party is not technically bound to do so; (4) in order to protect his own secondary rights, to fulfill a contractual obligation, or to comply with the request of the original debtor; (5) without acting as a volunteer or an intermeddler. *Id.* Subrogation is a doctrine of equity governed by equitable principles. *Id.*

Appellants misunderstand the nature of the obligation imposed upon employers by Arkansas's withholding tax statutes: the only entities obligated by these statutes are employers. Arkansas Code Annotated section 26-51-908(e) expressly makes employers who fail to withhold and remit these taxes "personally and individually liable" for them. The basic rule of statutory construction is to give effect to the intent of the legislature. *Central & S. Cos. v. Weiss*, 339 Ark. 76, 3 S.W.3d 294 (1999). In considering the meaning of a statute, we consider it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Stephens v.*

Arkansas Sch. for the Blind, 341 Ark. 939, 20 S.W.3d 397 (2000). If the language of a statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to rules of statutory interpretation. *Id.* All statutes on the same subject are in *pari materia* and must be construed together. *Boothe v. Boothe*, 341 Ark. 381, 17 S.W.3d 464 (2000).

Arkansas's withholding statutes unambiguously impose liability only on employers, not employees. Thus, it is the employer's debt and not the debt of the employee pursuant to the statutes, and the elements of subrogation cannot be established. We note that appellants do not challenge the statutes or present any argument that the statutes wrongly place this liability on them.

Affirmed.

HART and GRIFFEN, JJ., agree.

James M. MASON *v.* America A. MASON

CA 02-746 111 S.W.3d 855

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered May 7, 2003

Boyd & Buie, by: *Rufus T. Buie, III*, for appellant.

John H. Bell, for appellee.

ANDREE LAYTON ROAF, Judge. James M. Mason appeals the White County Circuit Court's order changing custody of the parties' two minor children to his ex-wife, America Ann Mason Hood. Mason argues that because his circumstances as custodial parent had not materially changed, the trial court erred in changing custody to Mrs. Hood even though her circumstances had radically improved. We affirm.

Mason and Hood were divorced by decree dated April 6, 2001. After a hearing, the trial court awarded custody of the parties' two minor children, a boy born in 1997 and a girl born in 2000, to Mason. At the time, Hood had no job, had moved into a trailer with two other people, had no transportation, and had not completed high school. The trial court found that, because of the situation Hood was in, she was not in a position to take care of the children and awarded custody to Mason, who continued to reside with his parents and brother. Hood was not required to pay child support, and Mason was required to transport the children to Hood for visitation.

On August 20, 2001, Hood filed a petition for change of custody; the petition was heard on March 6, 2002, a year after the final divorce hearing. At the hearing, Hood, her new husband, Ricky Wayne Hood, and her mother, Carolyn Murrah, testified about the changes in Hood's circumstances. The Hoods married

on March 22, 2001, and have a daughter who was born in December 2001. Ricky Hood has a two-year degree and is working toward a bachelor's degree in engineering. He is employed as an electronics technician at an average annual salary of $50,000. The Hoods have a three bedroom, two bathroom home. Since the divorce, America Hood has obtained a GED, taken classes in computer skills, and was taking an ACT preparatory class. She stopped working in November 2001 to stay at home with her new baby and attended school at night, with plans to return to work when this child reaches kindergarten age. Ricky Hood cares for the Hood's baby and the Mason children when they are there for visitation on the two evenings per week that Hood attends classes. Hood's mother testified that Hood was depressed at the time of the divorce, but had turned her life around "one hundred percent" since then.

Hood further testified that since the divorce, Mason's car had been repossessed and his home telephone disconnected. She stated that the children do not get the attention they need from him because they stay primarily with the grandparents. Hood also testified that she did not allow Mason to send clothes or other items with the children on their visitations with her because he was transporting roaches to her home in the bags, and her children had been bitten by roaches at the Mason home. However, Hood admitted that Mason had the same job, residence, and educational level that he had at the time of the divorce a year earlier and cited only repossession of his car and disconnection of his home telephone as changes in his circumstances.

Mason and his mother, Shirley Mason, testified on his behalf. Mason testified that his circumstances were unchanged since the custody hearing one year ago. He testified that he and the children reside with his parents and brother in a house with three bedrooms and one bath. This was also the parties' living arrangements and residence during their marriage. His grandfather resides in a trailer behind his parents' home. Mason's son sleeps with him in the home while his parents and his daughter spend nights in the grandfather's home because of the grandfather's health problems.

In response to Hood's assertion that his circumstances had worsened, Mason testified that his car had been repossessed because of the amount of work he had to miss in order to transport the children five hundred twenty miles round trip from Colt to Judsonia for Hood's weekend visitations, that he had replaced it with a pick-up truck and that other than being late one time when the brakes went out on his car, he had not failed to comply with the court's visitation transportation order. Mason testified that his family uses the telephone in his grandfather's nearby trailer and that the phone in the house was turned off because they were getting prank calls at all hours of the night. Mason admitted that he still had roaches in his home but denied that roaches had bitten his children, and he stated that they had not been able to rid the house of them despite spraying every two weeks.

Mason's mother testified that she takes care of the children while Mason is at work and that he spends a lot of time with them. She testified that the primary reason she quit her job was to care for her father, who had bypass surgery and has other health problems, and that she needs to stay at his trailer at night in case he needs assistance in going to the bathroom.

At the conclusion of the hearing, the trial court announced the decision to change custody to Hood. The trial court's following statements from the bench are pertinent to our review of this case:

> At the conclusion of the case last time I made the remark that I was reluctant to place these minor children with them, but, because of the situation with the mother, I felt I had no choice. I did so because they didn't have any other place to go. I thought it would probably be best if they would be with their mother, but she simply wasn't in the shape to take care of them, in my judgment, and I mentioned if she got over this situation and demonstrated a change in circumstances and got her feet on the ground, knew where she was going, what would be in their best interest, that it might be different.
>
> The thing that disturbed me then was the dismal existence that these people had as a couple, living where they did, and I think it was inevitable that they split up because of that. The father had some problems at that time, he was in depression too, but I nor-

mally don't take chances with kids if I feel like that they're not going to be looked after, but she has made a remarkable change. I'm really a little surprised. I guess I'm quite cynical because I hear these things every day and I see people every day, but there is not any doubt she has made a radical change in her life. She has married well in my opinion. I think he's a fine man. They have a stable home. She's improved her educational situation. She has a way to go, but she's remarkably changed in that regard and her attitude and physical well-being are much better, so I think she has done exactly what I said she ought to do.

It's been quoted to me that if there is not a change in the custodial parent, then you can't do it. That may be true in some situations. I'm not sure it would apply to this case. I commend the father for hanging on, but there are some problems there. I don't think they have prospects there in terms of their full potential, in terms of education. I mean the girl has rarely been mentioned during this entire hearing, and I think the father is very attached to his son, he's sleeping with him, which I don't think is a particularly good thing, and his mother is pretty much raising the girl. These kids are approaching school age, and they're going to have to be prepared for it, and I don't believe that they have been prepared for it, and I think that is something that has to be done.

I don't know but what they're not going to have is the same prospects that they had over there, and that doesn't mean he doesn't love his children, but there is more to them than just loving them, we have to build their personalities, we have to build their hopes. These people, in my opinion, are still into paybacks to each other for the anger and wrongs that they committed to each other, and I think the kids are in the middle, and I don't have any doubt they'll be better off with her, so I'm going to find there is a change of circumstances, both positive in her behalf and the fact that things are not going as well as they should have in the other home, and so I'm going to change the custody.

The trial court's written order changing custody further states in pertinent part:

The Court finds that there has been a material change in circumstances, namely the Plaintiff, America A. Mason Hood, has exhibited exemplary changes in her lifestyle which include securing her high school diploma through G.E.D. and securing a stable home. Her new husband seems to be a good man. He is a

> hard-working, decent man and able to fulfill the role of a husband and a father. He is sensitive to the needs of the children. The Plaintiff and her husband will provide an atmosphere for a better education for the children.
>
> On the other hand, while the Defendant is a man doing his best, there are not good prospects for the welfare of the children if he keeps them. The girl is rarely mentioned by him. The Defendant's circumstances have deteriorated; he has recently lost his telephone and transportation. His mother is the primary caregiver for the children and also cares regularly for the Defendant's grandfather who lives next door.

The trial court awarded custody to Hood, with Mason to have alternate weekends and other customary visitation. Mason appeals from this order.

On appeal, Mason contends that his circumstances have not materially changed and that under Arkansas case law, the changes made solely by Hood are not sufficient to justify change of custody. Mason argues that while Hood has made positive improvements in her lifestyle since the divorce, these changes were insufficient to make a wholesale change of custody. Arkansas law is well settled that a judicial award of custody will not be modified unless it is shown that there are changed conditions that demonstrate that a modification of the decree will be in the best interests of the children. *Campbell v. Campbell*, 336 Ark. 379, 384, 985 S.W.2d 724, 727 (1999); *Feight v. Feight*, 253 Ark. 950, 490 S.W.2d 140 (1973).

In order to avoid relitigation of factual issues already decided, courts will usually restrict evidence in a modification proceeding to facts arising since the prior order. *Id.* The only other time a change is permissible is when there is a showing of facts affecting the best interests of the children that were either not presented to the chancellor or were not known by the chancellor at the time the original custody order was entered. *Id.; Jones v. Jones* , 326 Ark. at 491, 931 S.W.2d at 772 (1996); *Henkell v. Henkell*, 224 Ark. 366, 273 S.W.2d 402 (1954) (stating that it is well settled that a decree fixing the custody of a child is final on conditions then existing and should not later be changed unless there are altered conditions since the decree was rendered or there

were material facts existing at the time of the decree but unknown to the court, and then only for the welfare of the child). The party seeking modification of the custody order has the burden of showing a material change in circumstances. *Jones*, 326 Ark. at 491, 931 S.W.2d at 772.

In child custody cases, we review the evidence *de novo*, but we will 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) (holding that the noncustodial parent's remarriage, the custodial parent's move, and the passage of time, when examined in the aggregate, supported a change in custody).

Mason relies heavily on *Jones v. Jones, supra*, to support his argument that the non-custodial parent's remarriage and financial improvements are insufficient to establish the requisite changed circumstances. In *Jones*, the father remarried and filed for a change of custody of the parties' children, citing, in part, his subsequent remarriage. *Id.* at 143, 78 Ark. App. at 394. The *Jones* court held that remarriage alone was not a sufficient reason to change custody. The court also stated that because the father was aware of the alleged change in circumstances at the time of the custody agreement, he could not use those changes as grounds to modify custody. *Id.*; *see also Vo v. Vo*, 78 Ark. App. 134, 79 S.W.3d 388 (2002). In *Hamilton v. Barrett*, 337 Ark. 460, 989 S.W.2d 520 (1999), the supreme court narrowed its holding in *Jones*, noting that its decision merely underscored the rule that changes in circumstances of the non-custodial parent, including a

claim of improved life because of remarriage, are not alone sufficient to modify an order of custody. Morever, this court has refused to modify custody merely because one parent has more resources or income. *Malone v. Malone*, 4 Ark. App. 366, 631 S.W.2d 318 (1982). However, Mason's argument is unpersuasive.

We find the facts of this case to be distinguishable from those of the authorities relied upon by Mason. Here, the same judge who presided over the initial custody proceeding also heard the petition for change of custody a year later. In the first proceeding, the trial court clearly had serious reservations about placing the parties' young children in Mason's custody, based on the "dismal existence" and other circumstances in Mason's home, and did so only because he concluded that Hood was in no position to have custody at that time. However, at the subsequent hearing, Hood demonstrated that she had significantly improved her circumstances in regard to her stability, employment, remarriage, pursuit of educational goals, and the ability to be a stay-at-home mother to her young children. The trial court found that the radical improvement in Hood's circumstances, along with the fact that Mason's already dismal circumstances had further deteriorated, justified the change in custody to Hood. The trial court stated that he did not have "any doubt" that the children would be better off with Hood. The trial court's opinion was clearly based on more than simply economic factors. We cannot say that, under the particular circumstances of this cases, and given our deference to the superior position of the trial court on child custody cases, the trial court's decision to change custody based upon a radical and positive change in Hood's circumstances, coupled with evidence of a further decline in Mason's already dismal circumstances, was clearly erroneous.

Affirmed.

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

GRIFFEN and GLADWIN, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. I must respectfully disagree with the majority decision in this child custody appeal where the trial court granted a change in

custody based on a petition filed by the noncustodial parent only four months after the parties were divorced. No matter how one may couch it, today's decision will trivialize the effect of child custody determinations when parents divorce, and will produce unnecessary and harmful instability. Because I believe that our longstanding case law in this area should not be disturbed, particularly on these facts, I would reverse and remand.

The parties were married on January 30, 1995, and are parents of two children: a son (Shawn Michael Mason) born on April 2, 1997, and a daughter (Brittany Ann Mason) born on August 29, 2000. The parties separated on or about November 23, 2000. The trial court entered the divorce decree on April 6, 2001, following a hearing on March 19, 2001. When the trial judge entered the divorce decree on April 6, 2001, he expressed a preference for granting custody to the appellee (mother), but found she was in no position to care for the two minor children. Four months later, on August 20, 2001, appellee filed a petition to modify custody based on her remarriage, the fact that she had obtained a G.E.D. certificate, her employment, and her ability to provide a stable environment. At the hearing on her petition to modify custody, appellee testified that she obtained her G.E.D. certificate and was taking an ACT prep course twice a week in hope of attending college. She now lives in a house with three bedrooms and two bathrooms so that Shawn would have his own room while Brittany would share a room with appellee's daughter by her current husband. Appellant married Ricky Hood on March 22, 2001, and their daughter (Carissa Brianne Hood) was born on December 29, 2001. Ricky Hood testified that he worked as a manufacturing technician and earns on the average of $50,000 a year. According to Hood, appellee will stay home until Carissa enters kindergarten.

Appellee testified that she was concerned about the living conditions her children experienced with appellant. She mentioned that Brittanny appeared to have roach bites on her arms, that appellant's phone has been disconnected, that appellant's mother appears to be the primary caretaker of the children in addition to taking care of her ailing father, that appellant and his mother have not prepared Shawn to enter kindergarten, and that

appellant's car had been repossessed. Yet, appellee also testified "Matt is still living in the same home and location as he was at the last hearing we had and even before that when we all lived there for quite a while during my marriage. I have said that there's nothing that has changed with regard to Matt Mason to my knowledge."

Unlike my colleagues who make up the majority, I see nothing in this case that warrants departing from the long-settled law regarding modification of child-custody decisions. The primary consideration when modifying custodial orders is the best interest and welfare of the child; all other considerations are secondary. *Fitzpatrick v. Fitzpatrick*, 29 Ark. App. 38, 776 S.W.2d 836 (1989). However, an order changing custody cannot be made without proof showing a change in circumstances from those existing at the time the original custody order was made. *Riley v. Riley*, 45 Ark. App. 165, 873 S.W.2d 564 (1994). Custody awards are not made or changed to gratify the desires of either parent, or to award or punish either of them. *Hollinger v. Hollinger*, 65 Ark. App. 110, 986 S.W.2d 105 (1999). If there is no showing of a material change of facts, there must be a showing of facts affecting the child's best interest that were not presented to or known by the court at the time the original custody order was entered. *Riley v. Riley, supra.* This is because the original custody order constitutes a final adjudication that one parent or the other was a proper person to have care and custody of the child and before an order can be made changing the status, there must be proof justifying a change in custody. *Fitzgerald v. Fitzgerald*, 63 Ark. App. 254, 976 S.W.2d 956 (1998). Appellee, as the moving party, has the burden of proving a material change in circumstances and that the change was in the best interests of the children. *Jones v. Jones*, 326 Ark. 481, 931 S.W.2d 767 (1996). Furthermore, the supreme court has stated that courts generally impose more stringent standards for modifications than for initial determinations of custody, *Jones v. Jones, supra*, and that more stringent standards for modification of custody determinations are required "to promote stability and continuity in the life of the child." *Lloyd v. Butts*, 343 Ark. 620, 625, 37 S.W.3d 603, 606 (2001). We should be especially cautious about departing from this line of authority where the

supreme court has not suggested the need to change the standard for deciding petitions to modify child custody orders and where the record shows the trial court was fully aware of the facts surrounding appellant's residence when the initial custody decision was made. Contrary to the view advanced by the majority opinion, the facts in this case prove the wisdom of the existing standard, rather than present an excuse for disobeying it.

Furthermore, the facts of this case should give us even greater reason to hesitate before departing from well-established precedent. Appellee apparently complained about appellant's residence and living conditions to social services; however, her complaint was unfounded, and was lodged despite her admission that she had not been to appellant's residence since the March 19, 2001, hearing at which the original custody award was made. For all her complaints about appellant's living situation, it is the same situation the trial court knew about when the original custody determination was made only months before appellee petitioned to have it modified. I refuse to ignore the rather telling fact that appellee remarried and had a child by her new husband within a year of the time she was divorced from appellant. Indeed, it seems she may have been expecting the child born of her current husband when she filed the petition to change custody four months after the divorce.

The supreme court has stated that remarriage and improved financial circumstances on the part of the noncustodial parent do not, standing alone, constitute a material change of circumstances. We should reverse the trial court's decision in obedience to that principle. By refusing to do so, the majority sends a dangerous signal that a noncustodial parent can upset even a recent custody determination and destabilize the life that children are trying to build with the custodial parent following the trauma of divorce by merely choosing a new mate whose financial condition can be leveraged to foster an image of economic superiority to the custodial parent. Child custody decisions deserve more respect than that from judges, if from no one else.

I respectfully dissent and am authorized to state that Judge GLADWIN joins this opinion.

Jeff BRISTOW and Dana Bradford *v.* STATE of Arkansas

CA CR 02-1109 119 S.W.3d 527

Court of Appeals of Arkansas
Division III
Opinion delivered May 14, 2003

Wayne Emmons; and *Bart Ziegenhorn*, for appellants.

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

JOHN F. STROUD, JR., Chief Judge. After the trial court's denial of their motions to suppress, appellants, Jeff Bristow and Dana Bradford, purportedly entered conditional pleas of guilty pursuant to Rule 24.3(b) of the Arkansas Rules of Criminal Procedure. Bristow pleaded guilty to manufacture of a controlled substance, methamphetamine; he was sentenced to eight years in the Arkansas Department of Correction, to be followed by a ten-year suspended imposition of sentence. Bradford pleaded guilty to possession of a controlled substance, methamphetamine, and she was sentenced to five years' probation. Appellants' sole point on appeal is that the trial court erred in denying their motions to suppress. We hold that the appeal must be dismissed because the appellants failed to properly preserve their right to appeal pursuant to a conditional plea under Rule 24.3(b), and this court therefore does not have jurisdiction to hear the appeal.

Rule 24.3(b) of the Arkansas Rules of Criminal procedure provides:

> 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.

In *McCormick v. State*, 74 Ark. App. 349, 354, 48 S.W.3d 549, 552 (2001) (substituted opinion on grant of reh'g), this court held:

> When Rule 24.3(b) is not strictly complied with, this court lacks jurisdiction to hear an appeal, even when the record reveals that the trial court attempted to enter a conditional plea. It has previously been held that Rule 24.3(b) requires a contemporaneous writing by the defendant, as well as proof that the conditional plea was approved by the trial court with the consent of the prosecuting attorney.

(Citations omitted.)

The addendum contains documents signed by both appellants entitled "Guilty Plea Statement" with the word "Conditional" handwritten above those words. Their attorney also signed these documents; however, the prosecuting attorney's office did not sign these documents. Both of the judgment and commitment orders also indicate a conditional plea of guilty, but there is no indication in those documents that the prosecutor approved of the conditional-plea agreements.

In *McCormick, supra*, this court originally dismissed the appellant's appeal for lack of jurisdiction on the basis that there was no consent from the prosecutor when her only involvement in the proceeding appeared to be her recommendation of a sentence and her opinion on an appeal bond. On grant of rehearing, this court held that assent was manifested by the prosecutor by appearing in court and acquiescing to the entry of the negotiated-plea agreement, and to 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.

The present case is distinguishable from *McCormick*. Here, the only hearing contained in the record is the one on the motions to suppress the evidence found pursuant to the search warrant. There is no transcript in the record of a sentencing hearing; therefore, unlike in *McCormick*, this court cannot know if the prosecutor was present at sentencing or not. Inasmuch as the conditional-guilty pleas are not signed by the prosecutor, and we have no record before us that indicates acquiescence by the prosecutor to a conditional plea, we must dismiss appellants' appeal for lack of jurisdiction due to the precedent mandating that we strictly construe the requirements of Rule 24.3(b).

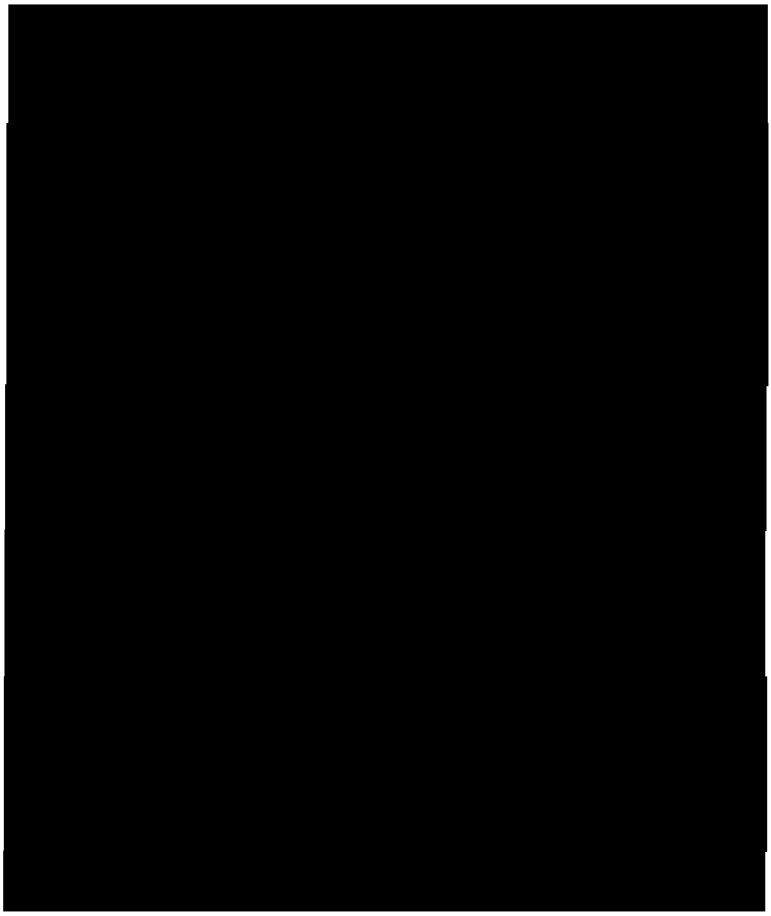
Appeal dismissed.

ROBBINS and CRABTREE, JJ., agree.

Gordon COSTNER *v.* Beatrice ADAMS, Individually and as Administratrix of the Estate of James Adams, Sr., *Deceased*, and Tommy Adams, Individually

CA 02-721 121 S.W.3d 164

Court of Appeals of Arkansas
Division III
Opinion delivered May 14, 2003



Carol Gillespie, for appellant.

R. Bryan Tilley; and *Paul Petty*, for appellees.

JOHN F. STROUD, JR., Chief Judge. This appeal is from a Cleburne County jury verdict awarding appellees Tommy Adams and Beatrice Adams, individually and as administratrix of the estate of James L. Adams, deceased, $100,000 against appellant Gordon Costner. The case arises from a long-running and violent land dispute that resulted in the death of James and the shooting of his son, Tommy. We hold that the jury's verdict is supported by substantial evidence and affirm.

Procedural History

In the mid-1990s, James and appellant went to court over appellant's dozing of Stoney Point Drive, which runs between two parcels of land owned by James. The judge found that appellant had the right to maintain the road and entered a mutual restraining order prohibiting the parties from harassing each other, noting that they had behaved immaturely and had used poor judgment. James and another son, Carl, were later held in contempt for violating this order by threatening appellant's children with a gun.

On January 29, 1998, appellant encountered James and Tommy along their fence line by the side of the road. After the parties exchanged words, appellant went back to his house, where he called the sheriff and told him that there was going to be trouble, picked up a gun, and permitted Brent Grissom, who worked for appellant's business, to accompany him back to the scene of the dispute. At the same time, Tommy returned to his house, told his mother to call 911, and picked up a shotgun before returning to the scene. Within a few minutes after appellant, Brent, and Tommy returned, Brent, using appellant's gun, shot

James and Tommy. James died at the scene, and Tommy was treated for a shoulder wound.

Appellees filed this suit against appellant and Brent, alleging assault, battery, negligence, and civil liability for violation of a criminal statute. Many of Beatrice's claims against appellant asserted vicarious liability, under the doctrine of *respondeat superior*, for Brent's actions. At trial, appellant presented evidence that Brent was not an employee of appellant but of appellant's corporation, Costner Equipment Sales & Rental, Inc. He also introduced undisputed evidence that, at the time of the shooting, Brent's work day had ended, and he was working on his own truck when appellant returned to call the sheriff. According to Brent, he chose to accompany appellant to the scene of the dispute because he knew that appellant was a hothead, and he hoped to have a calming influence on him. Brent testified that he used appellant's gun to shoot James and Tommy after James aimed a rifle at appellant. On the other hand, Tommy testified that shots rang out after appellant raised a long piece of wood over his head and acted as if he was going to hit Tommy with it. Brent verified that appellant picked up the piece of wood before James aimed the rifle at appellant.

The trial judge denied appellant's motions for directed verdict, and the jury awarded appellees $100,000 against appellant and Brent. The verdict was entered against appellant and Brent jointly and severally. Brent has not appealed from the judgment entered on the verdict. Appellant argues on appeal that the trial judge erred in denying his motions for summary judgment and for directed verdict.

Summary Judgment

We cannot address the summary judgment issue. The denial of a motion for summary judgment is not an appealable order; even after there has been a trial on the merits, the denial order is not subject to review on appeal. *Bharodia v. Pledger*, 340 Ark. 547, 11 S.W.3d 540 (2000); *Elliott v. Hurst*, 307 Ark. 134, 817 S.W.2d 877 (1991).

Directed Verdict

Our standard of review for the denial of a motion for directed verdict is whether the jury's verdict is supported by substantial evidence, which is evidence that goes beyond suspicion or conjecture and is sufficient to compel a conclusion one way or the other. *D'Arbonne Constr. Co. v. Foster*, 80 Ark. App. 87, 91 S.W.3d 540 (2002). In determining whether there is substantial evidence, we view the evidence in the light most favorable to the party against whom the verdict is sought and give the evidence its strongest probative force. *Id.*

The jury rendered a general verdict that stated: "We, the jury, find for the Plaintiffs on their Complaint against the Defendants, Gordon Costner and Brent Grissom, and assess their damages in the amount of One Hundred Thousand ($100,000.00) Dollars." When the jury's verdict is rendered on a general verdict form, it is an indivisible entity or, in other words, a finding upon the whole case. *JAG Consulting v. Eubanks*, 77 Ark. App. 232, 72 S.W.3d 549 (2002). We will not speculate on the basis of a jury's general verdict. *Esry v. Carden*, 328 Ark. 153, 942 S.W.2d 846 (1997). When special interrogatories are not requested, we are left in the position of not knowing the basis for the jury's verdict and will neither question nor theorize about the jury's findings. *Id.* Therefore, we have no way of knowing the basis upon which the jury awarded damages[1]; even if appellees established only one claim, the verdict must be affirmed.

Respondeat Superior

We agree with appellant that he cannot be liable for Brent's actions under the doctrine of *respondeat superior* because appellees did not establish that Brent worked for appellant. Although Brent testified that he had occasionally helped with appellant's cattle, his payroll records clearly demonstrate that his employer was appellant's corporation.

---

[1] Appellant has not challenged the amount of the damages awarded. We also note that the time to object to any irregularity in the verdict form is prior to the discharge of the jury. *Smith v. Hansen*, 323 Ark. 188, 914 S.W.2d 285 (1996). Appellant failed to make such an objection.

Even if appellees had proved that Brent was appellant's employee, the doctrine of *respondeat superior* has no application in this case. Brent testified that his work hours were from 7:00 - 7:30 a.m. to 3:30 - 4:00 p.m. and that his duties included repairing heavy equipment, sandblasting, painting, and "whatever [appellant] needed around the shop." Brent stated that when appellant came back to call the sheriff around 4:20 p.m., his work day had ended and that he was working on his personal vehicle.

The doctrine of *respondeat superior* assigns liability to an employee's expected acts that are incidental to the employee's duties or that benefit the employer; liability attaches when an employee commits a foreseeable act within the scope of his employment at the time of the incident. *Porter v. Harshfield*, 329 Ark. 130, 948 S.W.2d 83 (1997). The scope of employment includes acts done with the object and purpose of the enterprise and not acts that are strictly personal. *Id.* In *Regions Bank & Trust v. Stone County Skilled Nursing Facility, Inc.*, 345 Ark. 555, 49 S.W.3d 107 (2001), the supreme court held that a nursing home was not liable under the theory of *respondeat superior* for a nursing assistant's sexual assault of a patient. Following *Porter v. Harshfield, supra*, the court held that the nursing assistant was not, "by any stretch of the imagination, acting within the scope of his duties" when he assaulted the patient, even though his job duties included bathing her. 345 Ark. at 567, 49 S.W.3d at 115. Describing the nursing assistant's actions as "purely personal," the court held that they were not expectable in view of his duties as a nursing assistant. *Id.*

In light of these decisions, there is no evidence to support holding appellant vicariously liable for Brent's actions. However, as explained below, there is substantial evidence to support the verdict based on appellant's own conduct.

Facts

Lewis Short, the 911 dispatcher who took appellant's call, testified that, after appellant related the problem, he (Short) advised appellant not to return to the scene until a deputy arrived. He said that appellant responded, "I know there's going to be problems." Robbie Cooper, a marshal, testified that when he arrived at the scene, James pointed at appellant and Brent and stated, "he shot us," and "he ordered him to." Brent testified that

he had known appellant to be hot-headed and that when appellant came back to call the sheriff to prevent James and Tommy from blocking the road, he offered to go back to the scene to be a "calming influence" on him. He stated that appellant told him to stay in the car because he was afraid for his safety.

Brent testified that he noticed a .357 Ruger Black Hawk gun lying between the car seats on the way to the scene. Brent said that when they arrived at the scene, he stayed in the car as appellant got out; that James was on the side of the road tying a fence wire and would not stop doing so when appellant told him to stop; that appellant then got "excited and upset" and told Tommy to make his father stop because a dozer was coming in; that Tommy kept looking down at a "one-by-four" on the ground; that appellant grabbed the one-by-four and pulled it back behind his back; and that James then climbed over the fence. Brent testified that, at that point, he could "feel something was wrong"and he pulled the gun out of its holster; that as James slowly walked about twenty feet toward a tree, Brent left the car and walked parallel to James; and that appellant was still holding the piece of wood. Brent said that a few seconds after appellant threw the wood away, James picked up a shotgun; that Brent yelled at appellant to get down because James had a gun; that Brent pulled the pistol up and told James to drop the gun; and that James dropped to one knee, pulled the shotgun up to his shoulder, "drew down on" appellant, took the safety off, and "pulled down on a bead." Brent stated that as he again told James to drop the shotgun, appellant ran for the car, and James touched the trigger. At that point, Brent said, he shot James just below the ribs on his left side because he did not want to kill James, just put him on the ground.

Brent testified that he then told Tommy to get on the ground, and that Tommy did not do so, but came toward Brent. Brent said that he then saw James get back up on one knee and that he saw Tommy reaching behind his back, inside his shirt. He said that he again told Tommy to get down, and that Tommy lunged at him. Brent said that he then shot Tommy in the shoulder because he did not want to kill him, just put him on the ground. He said that James then aimed the shotgun at him again, and that he shot James in the chest.

Appellant admitted that he returned to the scene with his gun, even though he knew the confrontation could involve gunplay, in order to prevent James and Tommy from putting the fence up. He also admitted that he picked up and raised the board as he told Tommy to make his dad stop violating the previous court order.

Tommy testified that when appellant returned to the scene, he jumped out of the car, cursed at him and his father, and picked up a board, raising it over his head as if to swing it at Tommy. Tommy said that, after he and James had been shot, appellant said: "Did you get 'em?" and Brent replied, "I got 'em both."

Assault and Battery

Assault has been defined as an intentional attempt by a person, by force or violence, to do an injury to the person of another, or as any attempt to commit a battery, or any threatening gesture showing in itself or by words accompanying it an immediate intention, coupled with a present ability, to commit a battery. 6 AM. JUR. 2D *Assault and Battery* § 1 (1999). Battery is a wrongful or offensive physical contact with another through the intentional contact by the tortfeasor and without the consent of the victim, the unpermitted application of trauma by one person upon the body of another person. 6 AM. JUR. 2D *Assault and Battery* § 3 (1999). Liability for an assault or assault and battery is not necessarily restricted to the actual participants; any person who is present, encouraging, or inciting an assault and battery by words, gestures, looks, or signs, or who by any means approves the same, is in law deemed to be an aider and abettor and liable as a principal, and such person assumes the consequences of the act to its full extent as much as the party who does the deed. *Hargis v. Horrine*, 230 Ark. 502, 323 S.W.2d 917 (1959).

Clearly, appellees proved that appellant is liable for assault in picking up the piece of wood, raising it, and preparing to swing it at Tommy. Additionally, Brent obviously committed battery against Tommy and James. The evidence, therefore, supports a finding that appellant aided and abetted the battery. The verdict can be affirmed on this basis.

Civil Liability for Violation of a Criminal Statute

Arkansas Code Annotated section 16-118-107 (Supp. 2001), which was enacted in 1997, provides:

> (a)(1) Any person injured or damaged by reason of conduct of another person that would constitute a felony under Arkansas law may file a civil action to recover damages based on the conduct.
>
> (2) The burden of proof for showing conduct that constituted a felony shall be a preponderance of the evidence.
>
> (3) If the person who is injured or damaged prevails, he or she shall be entitled to recover costs and attorney's fees.
>
> (b) The action may be maintained by the person who was injured or damaged or, after the person's death, the executor, administrator, or representative of his or her estate.
>
> (c) The remedy provided in this section shall be in addition to any other remedies in law or equity.

Beatrice asserted in her complaint that this statute provided civil liability for the defendants' violations of "Ark. Code Ann. § 5-10-101 *et seq.*" and "§ 5-2-403." Arkansas Code Annotated section 5-10-101 (Repl. 1997), which deals with capital murder, and section 5-10-102, which addresses murder in the first degree, do not apply here. Although murder in the second degree, addressed in section 5-10-103, might apply, manslaughter, which is covered by section 5-10-104, clearly applies to Brent's actions. It provides in part:

> (a) A person commits manslaughter if:
>
> (1) He causes the death of another person under circumstances that would be murder, except that he causes the death under the influence of extreme emotional disturbance for which there is reasonable excuse. The reasonableness of the excuse shall be determined from the viewpoint of a person in the defendant's situation under the circumstances as he believes them to be;
>
> . . . .
>
> (3) He recklessly causes the death of another person . . . .

Arkansas Code Annotated section 5-2-402 (Repl. 1997) provides that a person is criminally liable for the conduct of another

person when he is an accomplice of another person in the commission of an offense. Section 5-2-403 states in relevant part:

> (a) A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of an offense, he:
>
> (1) Solicits, advises, encourages, or coerces the other person to commit it; or
>
> (2) Aids, agrees to aid, or attempts to aide the other person in planning or committing it; or
>
> (3) Having a legal duty to prevent the commission of the offense, fails to make proper effort to do so.

The evidence supports findings that Brent committed manslaughter and that appellant was his accomplice. Therefore, the verdict can also be affirmed on this ground.

Negligence

To establish a prima facie case in tort, a plaintiff must show that damages were sustained, that the defendant was negligent, and that such negligence was a proximate cause of the damages. *J.E. Merit Constructors, Inc. v. Cooper*, 345 Ark. 136, 44 S.W.3d 336 (2001); *Ouachita Wilderness Inst. v. Mergen*, 329 Ark. 405, 947 S.W.2d 780 (1997). Negligence is the failure to do something that a reasonably careful person would do, and a negligent act arises from a situation where an ordinarily prudent person in the same situation would foresee such an appreciable risk of harm to others that he would not act or at least would act in a more careful manner. *Tedder v. Simmons First Bank of NWA* (unpublished opinion, February 19, 2003). In order to prove negligence, there must be a failure to exercise proper care in the performance of a legal duty that the defendant owed the plaintiff under the circumstances surrounding them. *Shannon v. Wilson*, 329 Ark. 143, 947 S.W.2d 349 (1997). The question of what duty, if any, is owed by one person to another is always a question of law. *Heigle v. Miller*, 332 Ark. 315, 965 S.W.2d 116 (1998). Proximate cause is that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. *Chambers v. Stern*, 347 Ark. 395, 64 S.W.3d 737 (2002), *cert. denied*, 536 U.S. 940 (2002). When there is evidence to establish a

causal connection between the negligence of the defendant and the damage, it is proper for the case to go to the jury. *Id.* Proof of the violation of a criminal statute is evidence tending to show negligence. *Wilson v. Coston*, 239 Ark. 515, 390 S.W.2d 445 (1965).

The mutual restraining order established appellant's duty not to engage in confrontations with James and Tommy; appellant knowingly breached this duty. As the gun that killed James and wounded Tommy was the one that appellant brought back to the scene, appellees established a causal connection between appellant's negligence and the damage. Thus, the verdict can also be affirmed on the negligence claim.

Affirmed.

ROBBINS and CRABTREE, JJ., agree.

Marvin TULL *v.* STATE of Arkansas

CA CR 02-509 119 S.W.3d 523

Court of Appeals of Arkansas
Division IV
Opinion delivered May 14, 2003

Joe Kelly Hardin, for appellant.

Mike Bebee, Att'y Gen., by: *Katherine Adams*, Ass't Att'y Gen., for appellee.

JOHN MAUZY PITTMAN, Judge. The appellant in this criminal case, age sixty-five, was charged with four counts of violation of a minor in the first degree, committed by engaging in sexual intercourse or deviate sexual activity with his step-granddaughter, T.M. Prior to trial, appellant moved to exclude the testimony of his forty-five-year-old daughter, Marla T., who testified that appellant also sexually violated her while she was a child living in appellant's home thirty years ago. The trial court denied the motion, finding that the testimony came within the pedophile exception to Ark. R. Evid. 404(b), and that the probative value of the testimony outweighed the potential for unfair prejudice under Ark. R. Evid. 403. After a jury trial, appellant was found guilty and was sentenced to six years' imprisonment. From that decision, comes this appeal.

For reversal, appellant contends that the trial court erred in admitting the testimony of Marla. We do not agree, and we affirm.

Rule 404(b) provides that, although evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith, it may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Evidence of other sexual offenses is allowed under the "pedophile exception" to Rule 404(b) to show motive where the other sexual offenses involve a similar act of sexual abuse of children, and where the evidence shows a proclivity toward a specific act with a person or class of persons with whom the accused has had an "intimate relationship," such as where the victim lives with the criminal defendant in the same home or where the offenses were committed in the

criminal defendant's home. *Pickens v. State*, 347 Ark. 904, 69 S.W.3d 10 (2002).

We think that the evidence in the case at bar was probative of both plan and motive. Marla testified that appellant began to sexually fondle her when she was in the fourth or fifth grade, while her siblings were asleep in their beds and her mother was working the night shift. By the time she was twelve or thirteen years old, appellant began having intercourse with her several times per week until she was fifteen. The first act of intercourse occurred when appellant suggested it would be good for her to know what it would be like when she was married. This, too, occurred at night after her mother had gone to work. Afterwards, appellant gave Marla special treatment and privileges, such as staying up late and allowing her to go places with him, in order to create opportunities for him to spend time with her alone. During these times he would have sexual intercourse with her in various places, including their home, the car, at motels, in the laundromat, and outdoors. Appellant took photographs of her naked in many of these locations. Marla refused to continue having intercourse with appellant when she was fifteen years old and told her mother about the abuse, but her mother did not believe her.

Marla also testified that, although she has never again been close to appellant, she did live across the road from him and her mother. She learned that T.M.'s mother and stepfather had made arrangements for her mother and appellant to care for T.M. while they were out of town working, and noticed that appellant was increasingly involved with T.M.'s care to the exclusion of her mother, that appellant always wanted T.M. to accompany him to various places, and that T.M. was getting special privileges that her mother would not have allowed. Based on these observations and her own experiences with appellant, Marla called the Department of Human Services and reported her suspicions of abuse.

The testimony of T.M. described an experience remarkably similar to Marla's. T.M. testified that she was now seventeen years old, and that appellant had volunteered to care for her and her siblings so they would not have to change schools while their parents worked out of town. Appellant would come to their home

before they arrived home from school and stay all night, leaving when they left for school in the morning. Appellant was in charge of where the children went. On arriving home from school, her brother generally went to a friend's house while T.M. stayed home with appellant. Sometimes appellant would allow her to do things or go places that her mother would not want her to do or go. Appellant first molested T.M. by rubbing her chest with suntan lotion during a camping trip at the river. Appellant then began giving her "back rubs" in her bed after her brother was asleep, first stroking the side of her chest but progressing to removing her bra and rubbing her breasts. Ultimately, appellant progressed to penetrating T.M. digitally and with his penis, telling her that she needed to have at least one sex partner before she got married so she would know what it was like. When appellant allowed T.M. permission to do something special, he told her that it was going to "cost her," which she took to mean that he was going to do something sexual to her. Appellant also told her that he would enjoy taking pictures of her outdoors. Finally, she stated that the first time she told an adult about appellant's behavior was after her Aunt Marla called the Department of Human Services and an officer of the State Police came to school to talk to her. At that time, T.M. was barely acquainted with Marla and did not know her last name.

In light of the evidence that appellant volunteered to care for T.M., we think that the similarity of the methods by which appellant gradually broke down the girls' inhibitions (fondling escalating to intercourse for the stated "educational" purpose of preparing them for marriage), the offering of special privileges as an inducement, and the efforts he made to create situations where he could be alone with them, tend to show both that appellant had the proclivity to sexually violate young girls entrusted to his care and that, with respect to T.M., he systematically planned to do so. We hold that the testimony of Marla was admissible both to show motive and plan under Rule 404(b).

Nor do we agree that the trial court erred in concluding that the probative value of the evidence outweighed the possibility of unfair prejudice. Appellant argues that the passage of thirty years between Marla's abuse and that of the victim makes

Marla's testimony too remote to be used as evidence. This argument is similar to that advanced in *Hernandez v. State*, 331 Ark. 301, 962 S.W.2d 756 (1998), where the appellant urged the supreme court to establish parameters for the admission of evidence pursuant to the pedophile exception. The supreme court rejected this argument, stating that:

> Arkansas R. Evid. 403 provides the necessary "parameters." In response to an objection that evidence is unfairly prejudicial, the probative value of the evidence must be weighed against the danger of unfair prejudice. *George v. State*, 306 Ark. 360, 813 S.W.2d 792 (1991). The standard of review is whether the trial court abused its discretion. *Greene v. State*, 317 Ark. 350, 878 S.W.2d 350 (1994).

Hernandez, 331 Ark. at 311, 962 S.W.2d at 761-62.

The *Hernandez* court held that the trial court did not err in concluding that the probative value of the evidence outweighed the danger of unfair prejudice because the evidence involved a similar crime against a child of an age similar to that of the victim, both of whom were in Hernandez's care or household at the time that the incidents occurred. *Id.* Here, the testimony regarding the abuse of the witness was strikingly similar to that describing the abuse of the victim, *see Taylor v. State*, 334 Ark. 339, 974 S.W.2d 454 (1998), the victim and witness were of similar age at the time of the abuse, and both were in the care of the appellant when the abuse took place. We recognize that the passage of thirty years between the events recounted in the testimony of Marla and those for which appellant was convicted in the present case is a significant factor to be considered in determining whether the probative value of the testimony outweighs the danger of unfair prejudice. Nevertheless, in light of the evidence that her own experience thirty years earlier made it possible for Marla to correctly conclude, based on her observation of otherwise innocent behavior, that appellant was sexually abusing T.M., we cannot say that the trial court erred in holding that the probative value of Marla's testimony outweighed the danger of unfair prejudice.

Affirmed.

NEAL and ROAF, JJ., agree.

Ronald Joe WEST *v.* STATE of Arkansas

CA CR 02-927 120 S.W.3d 100

Court of Appeals of Arkansas
Division II
Opinion delivered May 14, 2003

Sherwood & Merritt PLLC, by: *Sara F. Merritt*, for appellant.

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

JOSEPHINE LINKER HART, Judge. Appellant, Ronald Joe West, was convicted at a bench trial of possession of methamphetamine with the intent to deliver, possession of drug paraphernalia, and misdemeanor possession of marijuana, for which he was sentenced to a total of seven years' imprisonment in the Arkansas Department of Correction. On appeal, he argues that the trial court erred in refusing to suppress items seized from his car. Further, he argues that the trial court erred by permitting the State to elicit hearsay from its witnesses and by accepting inadmissible evidence to establish appellant's habitual-offender status. We affirm.

The suppression hearing and the bench trial were held simultaneously. Officer Jason Hopkins of the Sherwood Police Department testified that on May 23, 2001, while he was parked on a parking lot, appellant's wife, Brenda West, stopped and reported that appellant was following her and that she had a protection order against him. She showed Hopkins the protection order, and Hopkins determined that it was valid. Appellant drove by, and Hopkins stopped appellant's vehicle. Appellant told Hopkins that he was not following his wife and that it was just a coincidence that they were in the same area. Hopkins told appellant that there was a protection order. Appellant, who was aware of the protection order, told him that he was not trying to harass her and that it would not happen again.

Hopkins also testified that other officers had told him that on May 18, 2001, appellant had contacted Stephanie Giunta, who worked with and was a friend of Brenda West. Appellant had called her home at all hours of the night wanting to know Brenda West's location. Giunta told the officer that he had called at 3:00 a.m., and she was worried that something was going to happen. The officers were taking Giunta's statement outside her place of employment when appellant drove by. Once they stopped him, the officers saw next to appellant a pair of binoculars, a notepad, and a pen. The officers told him that if he returned to Giunta's

place of employment or near her residence on Brierly in Sherwood, he would be placed under arrest.

Hopkins further testified that around 11:45 p.m. on June 12, 2001, he received a call about a suspicious vehicle that had backed into the driveway of a vacant duplex on Stafford in Sherwood. The callers, who resided next door, stated that the car had been there off-and-on for two or three weeks, leading them to worry that the car might be involved in illegal activity. Lieutenant Norman Golden later testified that he spoke to the neighbors, who told him that they had seen the car in the neighborhood several times and had decided that if it was seen again and was parked, then they would call the police. Hopkins testified that Stafford intersected with Brierly, and upon arriving, he saw that the car was parked in a driveway directly across from Brierly on Stafford where there was a clear view of Giunta's residence, which was one-half a block away. Hopkins turned on his spotlight, surprising appellant, who was in the vehicle. Hopkins noticed that next to appellant was a large, open briefcase and some binoculars.

While Hopkins did not recognize appellant initially, he remembered him when appellant told him his name. Appellant told Hopkins that he was looking for his wife. He said that he had been by her place of employment, and she was not there. He thought that she might be coming to Giunta's residence because he believed that his wife had been staying at and visiting the residence and that he had backed into the driveway to wait for his wife. Appellant also stated that he wanted to talk to his wife because two days earlier he had an argument with her and had accidentally kicked a dent in her new car, and he wanted to fix it. Appellant told Hopkins that there was an order of protection that had been updated.

Hopkins then placed appellant under arrest for harassment and criminal trespass. Hopkins testified that he arrested appellant for harassment because appellant was aware of the protection order and had previously been warned not to go near Giunta's residence. Hopkins further testified that he thought Brenda West was the victim of harassment even though he did not know whether she was at the residence. He did not, however, contact Brenda

West or Giunta. Hopkins also testified that he did not arrest appellant for violating the order of protection because appellant could not show him a current copy of the order and because the dispatcher could not find it. At the conclusion of Hopkins's testimony, the State submitted as evidence on the issue of probable cause the final order of protection. The order, filed May 31, 2001, provided that appellant was prohibited from contacting Brenda West. Further, the order provided that appellant was "enjoined and restrained from doing, attempting to do, or threatening to do, any act injuring, mistreating, molesting or harassing" Brenda West.

Appellant was transported to the police department, and Lieutenant Golden inventoried the vehicle. He found what was later determined to be approximately eleven grams of methamphetamine hydrochloride and one and six-tenths of a gram of marijuana. Also found was a sum of cash between nine and ten thousand dollars and a straw with methamphetamine residue.

Brenda West testified for appellant. She stated that after the protection order was entered, she never spent the night at Giunta's residence. She also testified that she did not know on June 12 that appellant was outside Giunta's residence and consequently she was not harassed that particular night. She further testified that Giunta was not home that night and likewise did not know of appellant's presence. She admitted, however, that Giunta was a friend, that she would visit with Giunta at the residence, and that appellant was aware that she went over to the house. She also testified that the order of protection did not exclude appellant from Giunta's residence.

Appellant first contends that the trial court erred in refusing to grant his motion to suppress the items seized from his vehicle. He argues that the police did not have probable cause to arrest him on either the charge of criminal trespass or harassment.

Arkansas Rule of Criminal Procedure 4.1(a)(iii) (2003) provides that "[a] law enforcement officer may arrest a person without a warrant if . . . the officer has reasonable cause to believe that such person has committed any violation of the law in the officer's presence[.]" "Reasonable or probable cause exists where there is a reasonable ground of suspicion supported by cir-

cumstances sufficiently strong in themselves to warrant a cautious person to believe that a crime has been committed by the person suspected." *Jones v. State*, 348 Ark. 619, 631, 74 S.W.3d 663, 671 (2002). Further, "[i]n assessing the existence of reasonable or probable cause, our review is liberal and is guided by the rule that probable cause to arrest without a warrant does not require the degree of proof sufficient to sustain a conviction." *Id.* The burden of demonstrating error rests on the appellant. *Id.* Also, "[a]n arrest shall not be deemed to have been made on insufficient cause . . . solely on the ground that the officer . . . is unable to determine the particular offense which may have been committed." Ark. R. Crim. P. 4.1(c); *Yocum v. State*, 325 Ark. 180, 188-89, 925 S.W.2d 385, 389 (1996); *Crail v. State*, 309 Ark. 120, 123-24, 827 S.W.2d 157, 158-59 (1992).

Even though Hopkins testified that he did not arrest appellant for violating the protective order, we conclude that there was probable cause to arrest appellant for the offense of violation of an order of protection. In pertinent part, "[a] person commits the offense of violation of an order of protection if" after such an order has been issued and the person has received notice of it, "[h]e knowingly violates a condition of an order of protection. . . ." Ark. Code Ann. § 5-53-134(a) (Repl. 1997). Here, the order provided that appellant was "enjoined and restrained from doing, attempting to do, or threatening to do, any act injuring, mistreating, molesting or harassing" Brenda West. Appellant's statement regarding his attempt to contact Brenda West, coupled with his statement that there was an updated order of protection, provided Hopkins with probable cause to believe that appellant was committing the offense of violation of an order of protection by attempting to harass Brenda West. As Rule 4.1(c) indicates, Hopkins's inability to determine at the time of the arrest the particular offense that appellant had committed did not make the arrest illegal. Consequently, we conclude that because the arrest was valid, the trial court did not err in refusing to suppress the evidence seized from appellant.

Appellant next argues that the trial court erred in permitting the State to introduce hearsay testimony in three separate instances. First, we note that appellant acknowledges that the

court did not rule on one of his hearsay objections. It is appellant's burden to obtain a ruling, and we do not address an argument when there was no ruling made at trial. *See, e.g.*, *Alexander v. State*, 335 Ark. 131, 133-34, 983 S.W.2d 110, 111 (1998). In the first of the other two instances, Hopkins testified, as described earlier, that the callers who lived next door had stated that a suspicious vehicle was backed into a driveway, that the car had been there off-and-on for two or three weeks, and that they were worried that the car might be involved in illegal activity. Appellant objected to the testimony, contending it was hearsay. The State replied that it went to "probable cause." The court permitted the testimony, concluding that it was not offered for the truth of the matter asserted. In the second instance, Lieutenant Golden testified that he spoke to the neighbors and was told that the car had been seen in the neighborhood. Appellant made a hearsay objection, and the court overruled the objection.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ark. R. Evid. 801(c) (2003). An out-of-court statement is not hearsay if it is offered to show a course of conduct or basis of action. *Nottingham v. State*, 29 Ark. App. 95, 98, 778 S.W.2d 629, 630 (1989). Here, the testimony was offered to explain why the officers were investigating the parked car and not for the truth of the matter asserted. Because it was introduced for the purpose of showing the basis for their actions and was relevant to the issue of probable cause, which was challenged by the appellant, this testimony was not hearsay. Therefore, the trial court did not err in allowing its introduction. *See Nottingham, supra* (holding that testimony was not hearsay because it was introduced for the purpose of showing the basis for an officer's actions and was relevant to the issue of reasonable cause).

Appellant also raises three issues regarding sentencing. During appellant's testimony on his own behalf, he admitted in response to the State's questioning that he had previously been convicted in federal court of possession of five hundred grams of cocaine with the intent to distribute. Appellant also admitted that he had been convicted of theft by receiving. Appellant then objected to the State's questioning of appellant about the theft-by-

receiving conviction, arguing that the conviction was more than ten years old and could not be used for impeachment. In response, the State remarked that it was "going for habitual purposes." The court replied, "Yeah, I think it's fair game."

Upon the court finding appellant guilty, the State asked that the court consider his status as a habitual offender, noting that appellant had stated under oath that he had been convicted of two prior offenses. Appellant objected, arguing that it was improper to establish appellant's habitual-offender status through his own testimony. The court concluded that appellant was a habitual offender with two or more prior felonies. At a subsequent hearing on sentencing, the State introduced into evidence the records relating to appellant's prior convictions. Appellant stated that while he did not object to the federal conviction, he objected to the use of the 1978 theft-by-receiving conviction because he was sentenced under Act 378 and the conviction had been expunged. The court waived sentencing and asked the parties to submit briefs. At a later hearing, the court concluded that expunged convictions could be used to establish habitual-offender status. The court sentenced appellant to seven years' imprisonment and noted that this was the "presumptive sentence range" and that the misdemeanor conviction would merge.

Appellant first argues that it was improper for the State to use his testimony at the bench trial to establish his habitual-offender status. When the State questioned appellant, however, appellant did not argue that the testimony could not be used to prove habitual-offender status, even after the State informed the court that the testimony was being elicited for that purpose and the court concluded that the testimony was "fair game." Appellant's failure to make a contemporaneous objection to this testimony precludes him from arguing on appeal that the trial court erred in admitting the evidence. *Evans v. State*, 310 Ark. 397, 398, 836 S.W.2d 384, 385 (1992).

Second, citing Rule 609 of the Arkansas Rules of Evidence, appellant argues that the trial court erred by allowing the State to impeach appellant with a conviction that was more than ten years old. Appellant's argument is without merit. It is appar-

ent from the above-described colloquy that the State's purpose in eliciting this testimony was not for impeachment but for establishing appellant's habitual-offender status and that the court considered the testimony for that purpose. We affirm on this point.

Third, appellant argues that because the theft-by-receiving conviction was expunged pursuant to Act 378 of 1975, the conviction cannot be used for enhancement purposes. However, in *Gosnell v. State*, 284 Ark. 299, 681 S.W.2d 385 (1984), the Arkansas Supreme Court concluded that a conviction expunged under that act may be used to enhance a defendant's sentence as an habitual offender. We affirm on this point as well.

Affirmed.

GRIFFEN and BAKER, JJ., agree.

Christy Tucker DUMAS *v.* Marc TUCKER

CA 02-1020 119 S.W.3d 516

Court of Appeals of Arkansas
Division I
Opinion delivered May 14, 2003

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

ROBERT J. GLADWIN, Judge. Christy Tucker Dumas appeals from an order of the Pope County Circuit Court that increased the amount of child support made to her by appellee but denied her request that she be allowed to claim tax exemptions for both children. For reversal, appellant argues that the trial court erred in awarding to a noncustodial parent the right to claim a child for tax-exemption purposes without providing the requisite written or specific findings to support this decision. Appellee did not file an appellate brief. For the reasons that follow, we reverse and remand for proceedings consistent with this opinion.

Appellant and appellee were divorced on August 20, 1997. Appellant was awarded custody of the parties' two minor children. Appellee was ordered to pay child support and was awarded the right to claim one of the children for tax-exemption purposes. The court made no specific findings of fact to support this decision, and neither party objected to the order entered at that time.

On July 24, 2000, appellant filed a petition seeking an increase in child support and requesting that she be allowed to claim both children for tax-exemption purposes. In an order filed August 6, 2002, the court found a change in circumstances sufficient to warrant an increase in child support, and appellant agrees that the court correctly determined appellee's income and set the child support in accordance with the chart. However, the court denied appellant's request that she be allowed to claim both children for tax purposes, leaving the situation as it was in the 1997 order.

Appellant's argument on appeal is that the August 2002 order allowing appellee, the noncustodial parent, to claim one of the children for tax purposes was tantamount to an award of child support. Appellant further argues that by making such an award, the judge deviated from the child-support chart and failed to make the requisite findings to support this deviation. We agree.

Administrative Order Number 10 provides in section III(f) that allocation of dependents for tax purposes belongs to the custodial parent pursuant to the Internal Revenue Code. However, the order notes, the court shall have the discretion to grant dependency allocation, or any part of it, to the noncustodial parent if the benefit of the allocation to the noncustodial parent substantially outweighs the benefit to the custodial parent.

Arkansas Code Annotated section 9-12-312(a)(2) (Repl. 2002) provides for the determination of child support as follows:

> In determining a reasonable amount of support, initially or upon review, to be paid by the noncustodial parent, the court shall refer to the most recent revision of the family support chart. It shall be a rebuttable presumption for the award of child support that the amount contained in the family support chart is the correct amount of child support to be awarded. Only upon a writ-

> ten finding or specific finding on the record that the application of the support chart would be unjust or inappropriate, as determined under established criteria set forth in the family support chart, shall the presumption be rebutted.

These statutory requirements are applicable in a modification setting. *Freeman v. Freeman*, 29 Ark. App. 137, 778 S.W.2d 222 (1989).

In *Freeman*, the parties had entered into a separation agreement, part of which governed the right to claim tax exemptions for the parties' children. When the trial court subsequently modified the tax-exemption provision of the decree, appellant argued that the right to claim the children as dependents was bargained for and was more in the nature of a property right. In holding that the trial court had the authority to modify the tax-exemption provision contained in the parties' agreement and incorporated into the original decree of divorce, we stated that such a provision is "more closely related in nature to an award of child support than it is to a settlement of property rights. . . . " *Freeman*, 29 Ark. App. at 140, 778 S.W.2d at 224.

In *Fontenot v. Fontenot*, 49 Ark. App. 106, 898 S.W.2d 55 (1995), we noted that the right to claim the parties' children as dependents for tax purposes is accurately characterized as a matter of child support. The parties in *Fontenot* were divorced, and appellant was awarded custody of the parties' children and child support. In a subsequent order, the court increased the child support to be paid to appellant and awarded appellee the right to claim as dependents for income-tax purposes the parties' three minor children. We held that because the trial court awarded the tax exemptions to the noncustodial parent, the court essentially deviated from the child-support chart without providing the required findings, and the case was remanded.

In setting the amount of child support, reference to the chart is mandatory, and the chart itself establishes a rebuttable presumption of the appropriate amount, which may only be deviated from if supported by written findings or specific findings on the record stating why the chart amount is unjust or inappropriate. *See Roland v. Roland*, 43 Ark. App. 60, 859 S.W.2d 654 (1993).

The trial court is not entirely precluded from adjusting the amount as deemed warranted under the facts of a particular case; the presumption in favor of the chart amount may be overcome if the trial court determines, upon consideration of all relevant factors as set out in Administrative Order Number 10, Section III(f), that the chart amount is unjust or inappropriate. *See Waldon v. Waldon*, 34 Ark. App. 118, 806 S.W.2d 387 (1991). Additionally, when considering whether to award to a noncustodial parent the right to claim a child for tax purposes, the trial court is required by Administrative Order Number 10, Section III(f) to determine whether the benefit of the allocation to the noncustodial parent substantially outweighs the benefit to the custodial parent.

■ ■ We agree with the holding of the Missouri Court of Appeals in *Niederkorn v. Niederkorn*, 616 S.W.2d 529, 533 (Mo. Ct. App. 1981), as cited in *Freeman*, 29 Ark. App. at 141, 778 S.W.2d at 224, that "an award of a tax exemption to one party is nearly identical in nature to an order that the other party pay as child support a sum equal to the value of the exemption." An award of a tax exemption to a noncustodial parent results in a deviation from the child-support chart. The trial court in the case before us erred in making such an award without providing the findings required by Ark. Code Ann. § 9-12-312(a)(2) and without weighing the benefits to the parties as required by Administrative Order Number 10.

■ ■ This court has the power to decide cases involving child support *de novo* on the record before it, but in appropriate cases, the court also has the authority to remand such cases for further action. *Fontenot, supra.* We think it appropriate to remand this case to the trial court for further consideration of the tax-exemption issue. We leave it to the discretion of the trial judge to decide whether a more detailed and explanatory opinion will suffice to meet the requirements of Administrative Order Number 10 and Ark. Code Ann. § 9-12-312(a)(2) or whether further proof from the parties is necessary regarding the applicable factors and other relevant matters.

Reversed and remanded.

BIRD and VAUGHT, JJ., agree.

Sammy Lynn DENTON *v.* Clifton PENNINGTON
& Linda Pennington d/b/a Pennington Companies

CA 02-1033 119 S.W.3d 519

Court of Appeals of Arkansas
Division IV
Opinion delivered May 14, 2003

McHenry& McHenry Law Firm, by: *Donna McHenry* and *Robert McHenry*, and *Greg Taylor*, for appellant.

Matthews, Sanders & Sayes, by: *Doralee I. Chandler* and *Roy Gene Sanders*, for appellees.

OLLY NEAL, Judge. Appellant, Sammy Denton, brings this appeal from the trial court's order granting summary judgment in favor of the appellees, Clifton and Linda Pennington d/b/a Pennington Companies. On appeal, he asserts that the trial court erred when it found there were no genuine issues of material fact. We reverse and remand.

The appellees own Wingate Plaza, a commercial property located in Faulkner County, Arkansas. Wingate Plaza is composed of five buildings, buildings A, B, C, D, and E. Building A was unique from the other buildings in that along the back of the building a continuous wooden deck, that was built by the appellees, ran the length of the building. The appellees employed someone who routinely patrolled and visually inspected the common areas of the property. The employee would occasionally hammer nails that were sticking up in the deck back into place.

Appellant leased office space in Wingate Plaza. His office was located in suite 3 of building A. On January 16, 1999, while walking along the deck from suite 2 to suite 3, appellant injured his back when his foot went through a board in the deck. The injury left appellant unable to work. On March 27, 2000, appellant sued the appellees for breach of contract and negligence. Following discovery, the appellees filed a motion for summary judgment, asserting that they did not have a duty to repair the deck. Appellant filed a response in which he asserted that the appellees had created and undertaken a duty to repair the deck. The trial court found that the appellees had no duty to maintain or repair the deck and granted their motion for summary judgment. Appellant now appeals.

Summary judgment is a remedy that should be granted only when there are no genuine issues of fact to litigate and when the case can be decided as a matter of law. *Carver v. Allstate Ins. Co.*, 77 Ark. App. 296, 76 S.W.3d 901 (2002). The moving party bears the burden of showing that there is no issue of material fact. *See*

Wheeler v. Phillips Dev. Corp., 329 Ark. 354, 947 S.W.2d 380 (1997). 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. *Spears v. City of Fordyce*, 351 Ark. 305, 92 S.W.3d 38 (2002). On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *Id.* We view the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.*

On appeal, appellant contends that the appellees agreed in the lease contract to maintain and repair the deck. Arkansas follows the common-law rule that a landlord owes no duty to his tenant to repair the premises. *Stewart v. McDonald*, 330 Ark. 837, 958 S.W.2d 297 (1997); *Majewski v. Cantrell*, 293 Ark. 360, 737 S.W.2d 649 (1987); *Hurst v. Feild*, 281 Ark. 106, 661 S.W.2d 393 (1983). However, we have recognized that a duty can arise in certain circumstances under the terms of the lease. *See Stewart v. McDonald*, *supra*. The pertinent parts of appellant's lease provide:

> 7. Repairs
>
> A. Lessor's Repairs
>
> Lessor shall maintain the exterior walls, doors, and roof, *exterior*, interior, plumbing, wiring, heating, ventilation and air conditioning systems of the structure upon the leased premises in reasonable state of repair as may be required to keep and maintain the same in good and tenable condition, to include changing furnace filters periodically so as to maintain heating and air conditioning units.
>
> * * *
>
> 17. Common Areas
>
> Any parking area or other areas which lessor may provide shall be for the joint use of lessor, lessee, other tenants or lessor and the customers, invitees, and employees of lessor, lessee, and other tenants of lessor; and lessor hereby grants to

> lessee the right, during the term of this lease, to use any parking area and other common areas which may be provided in common with others entitled to the use thereof. The use thereof shall be subject to such reasonable regulations or limitations as lessor shall make or require from time to time.

The question of duty owed by one person to another is ordinarily one of law. *Elkins v. ARKLA, Inc.*, 312 Ark. 280, 849 S.W.2d 489 (1993). However, when the matter of legal duty is the subject of a contract which is ambiguous as to the parties' intent, a question of fact is presented. *Id.*; *Easterling v. Weedman*, 54 Ark. App. 22, 922 S.W.2d 357 (1996). Language in a contract is ambiguous when there is doubt or uncertainty as to its meaning or it is fairly susceptible of two interpretations. *American Investors Life Ins. Co. v. Butler*, 76 Ark. App. 355, 65 S.W.3d 472 (2002). On motion for summary judgment, the court viewing the evidence in the light most favorable to the nonmoving party, ascertains the plain and ordinary meaning of the language in the written instrument, and if there is any doubt about the meaning, there is an issue of fact to be litigated. *Carver v. Allstate Ins. Co., supra.*

Here, the lease agreement provides that the appellees would maintain the exterior in a reasonable state of repair. The word "exterior" makes paragraph 7 in the lease ambiguous. "Exterior" is susceptible to more than one interpretation in that it may or may not encompass the deck. A material question of fact remained; therefore, the trial court erred when it granted the appellees' motion for summary judgment.

Appellant also contends that the appellees assumed the duty to maintain and repair the deck. An assumption of duty by conduct can remove the landlord from the protection of the general rule of nonliability. *Eoff v. Warden*, 330 Ark. 244, 953 S.W.2d 880 (1997).

The evidence established that the appellees had an employee patrol and visually inspect the common areas of the property, including the deck. The employee's duties included picking up the trash, trimming the hedges, mowing the lawn

around the deck, and making sure the premises were clean. In addition, the employee would often drive in nails that she found protruding from the deck. Therefore, the question becomes whether the appellees removed themselves from the general rule and assumed a duty to repair the deck.

In *Wheeler v. Phillips Development Corp.*, *supra*, the appellant injured herself when she stepped on a rock that was on the sidewalk at her apartment complex. At the time of her accident, the apartment manager was operating a weedeater in the vicinity. Appellant filed suit alleging that her landlord breached its duty of care by failing to keep the sidewalk clear. In response to the landlord's motion for summary judgment, the appellant argued that the apartment manager's duties, which included mowing, weedeating, and cleaning off the sidewalk, created a genuine issue of material fact as to whether the landlord had assumed a duty to keep the area safe. In affirming the trial court's grant of summary judgment, our supreme court held that maintaining the grounds of an apartment complex did not create an assumption of a duty to keep the common areas safe. *Id.*

The case at bar is distinguishable from *Wheeler*. Here, the appellees' maintenance person drove nails back into the surface of the deck, swept the deck, and cut the grass in and around the deck. Viewing the evidence in a light most favorable to appellant, we conclude that there was a question as to whether the maintenance person's conduct created an assumption of maintenance by the appellees.

Based on the foregoing, we hold that the trial court erred when it granted the appellees' motion for summary judgment. There were material questions of fact as to whether the appellees agreed to maintain and repair the deck in the lease and as to whether the appellees' conduct created an assumption of a duty to maintain and repair the deck. Therefore, we reverse and remand.

Reversed and remanded

PITTMAN and ROAF, JJ., agree.

Howard LARRY *v.* GRADY SCHOOL DISTRICT

CA 02-719 119 S.W.3d 528

Court of Appeals of Arkansas
Division III
Opinion delivered May 14, 2003
[Petition for rehearing denied June 18, 2003.]

Cross, Kearney & McKissic, by: *Jesse L. Kearney*, for appellant.

Gibson Law Office, by: *Chuck Gibson*, for appellee.

OLLY NEAL, Judge. Appellant, Howard Larry, appeals from a decision of the Lincoln County Circuit Court that found he was not entitled to reinstatement to his position as

principal and not entitled to damages. For reversal, Larry contends that the lower court's finding that he was terminated for cause was contrary to the evidence before it and that the court's decision denying his claims for damages and reinstatement was contrary to the law. We affirm.

Larry was employed under a two-year contract as a principal for the appellee, the Grady School District. The duration of the contract was for a two-year period beginning July 1, 1997, and ending on June 30, 1999. Pursuant to the contract, Larry's salary was $48,075.50 per year. On December 17, 1997, Larry was notified in writing by the superintendent that he was being placed on suspension with pay due to allegations of theft of school funds and that the superintendent was recommending his immediate termination. In a letter dated December 19, 1997, Larry requested a hearing before the school board. He was subsequently notified in writing that a hearing would be held on January 15, 1998; however, on the day of the hearing, Larry was notified that the hearing was canceled. On January 21, 1998, Larry was informed in writing by the superintendent that his suspension had ended and the recommendation of termination was being withdrawn.

However, on January 28, 1998, Larry received written notification from the superintendent that he was being placed on suspension and that the superintendent was going to recommend that Larry's employment contract be terminated. The superintendent listed the following reasons for the suggested termination: (1) theft of school funds; (2) sexual harassment of an employee under Larry's supervision; and (3) use of profanity toward that same employee. In response, Larry requested a hearing before the school board. Following a February 23, 1998 hearing, the school board found that the allegations of sexual harassment and use of profanity were untrue but that the allegation of theft of school funds was true. As a result, Larry was terminated.

Larry appealed the school board's decision to the Lincoln County Circuit Court. He asserted that the school board had failed to comply with the Arkansas Teacher Fair Dismissal Act. He requested reinstatement to his position and back pay. On November 5, 1999, Larry filed a motion for summary judgment, in which he stated that the only triable issue was the amount of damages. The court granted the motion for summary judgment

on the issue of the Grady School District's liability but reserved judgment on the issue of damages. The Grady School District does not appeal the grant of summary judgment.

Following a September 4, 2001, hearing on the issue of damages, the court requested briefs on the issues of reinstatement and back pay. On March 29, 2002, the court entered an order in which it found that Larry was terminated for cause and denied Larry's request for reinstatement and monetary relief. This appeal followed.

On appeal, Larry argues that the lower court erred when it denied his request for damages. As a general rule, in employment contract cases, the aggrieved party must use reasonable care, effort, and expenditure to mitigate damages. *Marshall Sch. Dist. v. Hill*, 56 Ark. App. 134, 939 S.W.2d 319 (1997). The measure of damages in such cases is the wages that were to be paid, less any sum earned in mitigation. *Western Grove Sch. Dist. v. Strain*, 288 Ark. 507, 707 S.W.2d 306 (1986). Thus, a teacher has an obligation to obtain other employment in mitigation of damages following the termination of his contract. *See Moore v. Pulaski County Special Sch. Dist.*, 73 Ark. App. 366, 43 S.W.3d 204 (2001); *Western Grove Sch. Dist. v. Strain, supra.* Our supreme court has recognized that a teacher is entitled to damages equivalent to the amount of actual loss sustained as measured by the wages that would have been paid if not for the wrongful discharge. *See Western Grove Sch. Dist. v. Strain, supra.*

At the time of his termination, Larry had one year remaining on his employment contract. During that one-year period, Larry would have earned $48,075.50. It was established that upon his termination with the Grady School District, Larry obtained employment in the Marvell School District, where he earned $49,724.25. This resulted in Larry having surplus income in the sum of $1,648.75. Thus, by mitigating his damages Larry did not suffer any loss.

As part of his damages, Larry requested reinstatement to his former principal position. Before we can determine if Larry was entitled to reinstatement, we must first determine if he was terminated for cause. This necessitates a review of the school board hearing. It is apparent that the lower court had a transcript of the

school board hearing before it and used this transcript to determine if there was cause for Larry's termination. Larry's counsel neither included a copy of the hearing transcript in the record nor did he abstract the hearing transcript. This document is essential to any determination as to whether Larry was entitled to reinstatement.

In *Simmons v. State*, 80 Ark. App. 426, 97 S.W.3d 421 (2003), appellant failed to include a video that was essential to our review of his challenge to the sufficiency of the evidence. There, we ordered appellant to rebrief and supplement the record based upon our interpretation of Rule 6(e) of the Arkansas Rules of Appellate Procedure — Civil, which states that:

> If any difference arises as to whether the record truly discloses what occurred in the circuit court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by *error or accident or is misstated* therein, the parties by stipulation, or the circuit court, either before or after the record is transmitted to the appellate court, or the appellate court on proper suggestion, or on its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary, that a supplemental record be certified and transmitted. All other questions as to form and content of the record shall be presented to the appellate court.

(Emphasis added.) Rule 6(e) allows this court to order supplementation of the record when it is clear that something is missing as a result of error or accident by the court reporter or circuit clerk. In *Simmons*, the failure to include the video was not the result of error or accident by the court reporter or circuit clerk, and we now conclude that *Simmons* should have been summarily affirmed.

■ ■ We have repeatedly emphasized that the appellant bears the burden of bringing forth an adequate record on appeal. *See Cannon Remodeling v. The Marketing Co.*, 79 Ark. App. 432, 90 S.W.3d 5 (2002); *see also Rothbaum v. Arkansas Local Police*, 346 Ark. 171, 55 S.W.3d 760 (2001). In the absence of a complete record on appeal, we are compelled to summarily affirm. *See Hankins v. Department of Fin. & Admin.*, 330 Ark. 492, 954 S.W.2d 259 (1997). As in *Simmons*, the omission of the school board hearing was not the result of error or accident by the court

reporter or circuit clerk; therefore, due to the absence of a complete record, we are compelled to affirm.

Affirmed.

GLADWIN and BAKER, JJ., agree.

David M. DYE *v.* STATE of Arkansas

CA CR 02-921 119 S.W.3d 513

Court of Appeals of Arkansas
Division IV
Opinion delivered May 14, 2003

Gary W. Potts, for appellant.

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

ANDREE LAYTON ROAF, Judge. Appellant, David M. Dye, was tried and convicted by a jury of twenty-three counts of possession of child pornography and three counts of rape. He was sentenced to consecutive terms of imprisonment totaling 250 years in the Arkansas Department of Correction. Dye argues on appeal that the trial court abused its discretion in denying his motion to dismiss based on the running of the statute of limitations.

Dye sold a used computer to Ms. Tia Smith, who later discovered that its hard drive contained hundreds of pictures of child pornography. A search warrant was issued for Dye's home. Officers uncovered more depictions of child pornography in a locked footlocker. Some of the photos were of Dye engaging in sexual acts with young boys from his local area. The mothers of the boys identified them. One victim, B.A., identified himself in some of the photographs and established that they were taken around 1983 or 1984, when he was five or six years of age.

Prior to trial, Dye moved to dismiss the rape charges, arguing that the six-year statute of limitations in effect at the time of the rapes had expired. *See* Ark. Stat. Ann. § 41-104 (Repl. 1987). In response, the State contended that Acts 484 and 586 of 1987, which were passed before the offenses involving B.A. were barred by § 41-104, extended the statute of limitations for offenses involving minors, and applied retroactively to allow prosecution of Dye for the offenses involving B.A. The trial court agreed with the State and denied Dye's motion to dismiss.

On appeal, Dye relies heavily on *Morton v. Tullgren*, 263 Ark. 69, 563 S.W.2d 422 (1978), which holds that a strong presumption exists that statutes are not to be retroactively applied unless there is a clear legislative intention that they be so applied. *Id.* at 73, 563 S.W.2d at 425. *See also City of Cave Springs v. City of Rogers*, 343 Ark. 652, 37 S.W.3d 607 (2001). Specifically, statutes of limitation ought to be construed as prospective in operation "unless otherwise expressed or that they cannot have the intended operation by any other than a retrospective construction." *Morton v. Tullgren* at 74, 563 S.W.2d at 425 (quoting *Baldwin v. Cross*, 5 Ark. 510 (1844)). In the present case, we find that the General Assembly intended to retroactively apply Ark. Code Ann. § 5-1-109(h) (Supp. 2003), and, thereby, extend the six-year statute of limitations for rapes involving minor victims.

Acts 484 and 586 of 1987, now codified at Ark. Code Ann. § 5-1-109(h), provide that if the six-year statute of limitations for rape has expired, "a prosecution may nevertheless be commenced . . . if, when the alleged violation occurred, the offense was committed against a minor, the violation has not previously been reported to a law enforcement agency or prosecuting attorney, and the [six-year statute of limitations] has not expired

since the victim has reached the age of eighteen (18)." The General Assembly expressly stated that the purpose of the statute was to "extend" the statute of limitations. Further, the General Assembly stated in the preambles of Acts 484 and 586 that "in many instances, child victims are threatened or intimidated to prevent the prompt reporting of abuse or sexual offenses," and that "it is in the best interest of the State to extend the statute of limitations for certain offenses involving child victims." It appears that the express purpose for the enactment of Ark. Code Ann. § 5-1-109(h) was to extend the statute of limitations for offenses that might have already occurred, but, because of the tender age of the victims, had not yet been reported. Therefore, the trial court did not err in denying Dye's motion to dismiss because the General Assembly intended that the amendment apply retroactively.

Arkansas case law also provides that no one has any vested right in a statute of limitations until the bar of the statute has become effective. *Morton v. Tullgren, supra*; *Horn v. Horn*, 226 Ark. 27, 287 S.W.2d 586 (1956); *Pinkert v. Lamb*, 215 Ark. 879, 224 S.W.2d 15 (1949). The General Assembly may also validly enlarge the period of limitations and make the new statute, rather than the old, apply to any cause of action which has not been barred at the time the new statute becomes effective. *Morton v. Tullgren*; *also Hill v. Gregory*, 64 Ark. 317, 42 S.W. 408 (1897). The critical question is one of legislative intent. *Id.*

Having already determined that the General Assembly expressly intended the amendment to apply retroactively in order to protect minors, we hold that the present case was not barred by the six-year statute of limitations. The victim was born on March 25, 1978, and was abused during either 1983 or 1984, which would have resulted in the previous statute of limitations running during 1989-90. However, the 1987 amendment to the statute tolled the running of the statute of limitations until six years after the victim reached majority. Therefore, Dye had no vested right in the statute, and the charges were timely filed.

Affirmed

PITTMAN and NEAL, JJ., agree.

EMERALD DEVELOPMENT COMPANY *v.*
James McNEILL and Theodore Beitel

CA 02-1159 120 S.W.3d 605

Court of Appeals of Arkansas
Division IV
Opinion delivered May 14, 2003

Law Office of David W. Cahoon, PLC, by *David W. Cahoon*, for appellant.

Gill Elrod Ragon Owen & Sherman, P.A., by: *John P. Gill* and *Roger H. Fitzgibbon, Jr.*, for appellee.

ANDREE LAYTON ROAF, Judge. Emerald Development Company (Emerald) appeals from a circuit court order enjoining it from operating an airport at its current location in Cleburne County. Emerald argues that the trial court's jurisdiction was preempted by the Federal Aviation Act and that there was no proof of a nuisance or irreparable harm that would justify the issuance of an injunction. We affirm.

Emerald owns a real estate development on the eastern side of a portion of Greers Ferry Lake known as The Narrows. In April of 2001, it began construction of a small private airport for the use of its residents. The airport was slated for construction in an east-to-west manner, with east being away from The Narrows and west heading toward The Narrows. Construction of the airport ceased when, on June 4, 2001, appellees James McNeill and

Theodore Beitel sued Emerald, seeking an injunction to prohibit operation of the airport. McNeill and Beitel (collectively "McNeill") own property in the Bondair lakefront development, directly across the lake on the western side of The Narrows. Bondair has a small airport for the use of its residents and guests, which has been in existence for approximately thirty years. It is laid out in an approximate north-to-south direction, parallel with The Narrows' shoreline. McNeill alleged that the proximity of the Emerald airport to the Bondair airport created an overlap in air traffic patterns, presenting a safety hazard.

The case went to trial on the theory that Emerald's airport constituted a nuisance. The evidence established that the two airports are four-tenths of a mile apart at their closest point and eight-tenths of a mile apart from center to center and that neither airport has a tower or ground control of any kind. As a result of the airports' proximity, their traffic patterns would overlap significantly, a fact that caused the Federal Aviation Administration (FAA) to object to Emerald's proposed construction (although the objection was advisory only and had no force of law). McNeill's two expert witnesses, R.V. Stewart and Jim Burnett, the former Chairman of the National Transportation Safety Board, testified that the closeness of the two airports and the ensuing traffic pattern overlap created an unreasonably dangerous situation that would ultimately result in a midair collision. Stewart testified that the situation was a "disaster waiting to happen," and Burnett stated that the "stacking" of risk factors, *i.e.*, usage of the airports by non-business pilots, the fact that most midair collisions happen in the traffic pattern or on landing or takeoff, the proximity of these two airports, and the conflicting traffic patterns, created a situation in which "there's no way to make these two airports operate safely together aligned as they are."

Emerald's expert, Dr. Jerry Robinson, testified that, with some modification of the traffic patterns, the two airports could operate safely. He recommended that Bondair's traffic pattern be oriented strictly to the west of the airport, which would require pilots in the pattern to use right-hand turns. The evidence showed that, typically, a traffic pattern is laid out so that, once the plane enters the pattern, it makes only left-hand turns.

After the hearing, the trial judge ruled that Emerald's airport created a dangerous situation and could be operated safely only if Bondair airport users employed onerous procedures to avoid the danger. He then issued the requested injunction, and this appeal followed.

Emerald's first argument is that the trial court's authority to enjoin the operation of the airport was preempted by the Federal Aviation Act. In any preemption analysis, the overriding principle that must guide our review is whether Congress intended to preempt state law. *25 Residents of Sevier County v. Arkansas Highway & Transp. Comm'n*, 330 Ark. 396, 954 S.W.2d 242 (1997). However, the historic police powers of the states are not to be superseded by a federal act unless that is the clear and manifest purpose of Congress. *NEF v. Ag Servs.*, 79 Ark. App. 100, 86 S.W.3d 4 (2002). The burden is on the moving party to prove that Congress intended to preempt state law. *Id.*

The doctrine of federal preemption is based upon the United States Constitution's Supremacy Clause. U.S. Const. art. 6, cl. 2. There are three types of preemption: 1) express preemption, where Congress defines explicitly the extent to which its enactments preempt state law; 2) field preemption, where Congress's regulation of a field is so pervasive or the federal interest so dominant that an intent to occupy the entire field can be inferred; and 3) conflict preemption, where state law stands as an obstacle to the accomplishment of the full purposes and objectives of a federal statute or where compliance with both laws is impossible. *Hale v. State*, 336 Ark. 345, 985 S.W.2d 303 (1999). Emerald concentrates its argument on appeal on the field preemption aspect, arguing that the trial court's injunction was an attempt to regulate airspace, a field that belongs to the federal government. This argument is based on the Federal Aviation Act's grant to the federal government of exclusive sovereignty of United States airspace. *See* 49 U.S.C.S. § 40103(a) (1998).

Field preemption occurs when 1) the scope of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the state to act, or 2) when federal law touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *See English v. General Elec. Co.*, 496

U.S. 72 (1990). Although the Federal Aviation Act gives the federal government exclusive sovereignty over U.S. airspace, the area of land-use regulation is still within the purview of state government. *See Gustafson v. City of Lake Angelus*, 76 F.3d 778 (6th Cir. 1996), *cert. denied*, 519 U.S. 823 (1996) (holding that a city's prohibition of the operation of seaplanes on a lake was not preempted and stating that the federal government's regulation of aircraft in flight is distinguishable from the regulation of the designation of plane landing sites, which involves local control of land use); *Condor Corp. v. City of St. Paul*, 912 F.2d 215 (8th Cir. 1990) (holding that a city's denial of permit to construct a heliport was not preempted and stating that there was no conflict between a city's regulatory power over land use and the federal regulation of airspace); *see also* 49 U.S.C.S. § 40120(c) (1998), which provides that a remedy under the Act "is in addition to any other remedies provided by law," and 14 C.F.R. § 157.7(a) (2003), which recognizes local authorities' jurisdiction over land use.

The circuit court in this case was not engaged in the regulation of airspace but in the regulation of land use. The court prohibited the operation of Emerald's airport because its location on nearby land interfered with Bondair's use of its airport. Although it is obvious that any regulation of an airport's location will in some manner touch on the field of aviation, for state regulation to fall within the zone of preemption, it must have some direct and substantial effect on the decisions made by those who regulate airspace. *See English v. General Elec. Co., supra.* Not every state law that in some remote way may affect a federally regulated area is preempted. *See id; see also American Aviation, Inc. v. Aviation Ins. Mgrs., Inc.*, 244 Ark. 829, 427 S.W.2d 544 (1968) (holding that, although federal law governed the recording of title instruments to airplanes, it had not preempted the entire field related to conveyances of aircraft). The circuit court in this case did not define or restrict what portions of the airspace could be used by either party. Instead, it issued a ruling that Emerald could not construct the airport at its present location. We therefore conclude that the trial court's action was not preempted by federal law.

Emerald argues next that its airport did not constitute a nuisance. Its primary contention is that the finding of a nuisance in this case is based on nothing more than speculation that a midair collision may occur in the future. A nuisance is

defined as conduct by one landowner that unreasonably or unlawfully interferes with the use and enjoyment of the lands of another and includes conduct on property that disturbs the peaceful, quiet, and undisturbed use and enjoyment of nearby property. *Miller v. Jasinski*, 17 Ark. App. 131, 705 S.W.2d 442 (1986). Equity will enjoin conduct that culminates in a private or public nuisance where the resulting injury to the nearby property and residents, or to the public, is certain, substantial, and beyond speculation and conjecture. *Id.* The general rule is that, in order to constitute a nuisance, the intrusion must result in physical harm[1], as distinguished from unfounded fear of harm, which must be proven to be certain, substantial, and beyond speculation and conjecture. *Goforth v. Smith*, 338 Ark. 65, 991 S.W.2d 579 (1999). The findings of a trial judge as to the existence of a nuisance will not be overturned unless they are found to be clearly against a preponderance of the evidence. *See Miller v. Jasinski, supra.*

Emerald relies on *Milligan v. General Oil Co.*, 293 Ark. 401, 738 S.W.2d 404 (1987), for its holding that a mere fear or apprehension of danger, without more, is not sufficient to warrant injunctive relief for abatement of a nuisance. However, *Milligan* recognized that an activity could constitute a nuisance if it created a substantial likelihood of danger in the future or if it could be shown to a reasonable certainty that danger was actually threatened rather than merely anticipated. Both of McNeill's experts in this case testified that the location of the Emerald airport presented a disaster waiting to happen. We can hardly disagree that, if two uncontrolled airports are aligned in a perpendicular manner such that the ends of each runway are less than a half-mile apart, danger is substantially likely and actually threatened to a reasonable certainty. Further, we note that the trial court's finding of a nuisance was based not only on the dangerous aspect of the airport configurations but on the fact that, if the Emerald airport were constructed, the Bondair airport could be safely operated only by employing atypical right-hand turns in the traffic patterns. The evidence showed that the use of a left-hand pattern was more common and that, while regular users of Bondair could be informed about the change, the airport was some-

---

[1] Physical harm does not necessarily mean direct physical damage to the premises. *Osborne v. Power*, 318 Ark. 858, 890 S.W.2d 570 (1994), *cert. denied*, 515 U.S. 1143 (1995).

times used by non-regular users who, if they failed to be diligent in seeking out the information, could be unaware of the change.

Emerald relies on a survey of aviation activity compiled by the Aircraft Owners and Pilots Association, which recites the small number of midair collisions that occurred during the thirty million flight hours flown in the United States in the year 2000. Those statistics mean very little here. They cannot take into account the increased risk of a midair collision engendered by the layout of these two airports. Additionally, the report itself notes that forty-nine percent of the midair collisions occurred in traffic patterns and that midair collisions occur mainly on good VFR (visual flight rule) days, at low altitude, close to airports.

Emerald's final argument is that McNeill had an adequate remedy at law, making issuance of an injunction improper. Emerald contends that the trial court's injunction was based on the possibility that personal injury and property damage could occur if a midair collision took place and that these types of injuries can be redressed in a court of law.

The grant of an injunction is reviewed *de novo* on appeal and rests within the sound discretion of the trial judge. *See Brown v. SEECO, Inc.*, 316 Ark. 336, 871 S.W.2d 580 (1994). The prospect of irreparable harm or lack of an otherwise adequate remedy at law is at the foundation of the power to issue injunctive relief. *Compute-A-Call, Inc. v. Tolleson*, 285 Ark. 355, 687 S.W.2d 129 (1985).

In issuing the injunction, the trial court's purpose was not to prevent McNeill from suffering personal injury or property damage as the result a midair crash; its purpose was to allow McNeill to continue reasonable usage of the Bondair airport. Thus, Emerald's argument is not well-taken. In any event, if a trial court perceives that a dangerous incident is substantially likely to occur as the result of a certain activity, we are loath to say that the court may not enjoin that activity simply because the people injured or killed might be monetarily compensated.

We likewise reject Emerald's argument that the trial court failed to consider the fact that Emerald had already spent $100,000 in construction costs. There is no evidence that the trial court failed

to consider this fact and weigh it in the balance against the danger presented by the completion and use of the Emerald airport.

Affirmed.

PITTMAN and NEAL, JJ., agree.

David M. DYE *v.* STATE of Arkansas

CA CR 02-921 119 S.W.3d 526

Court of Appeals of Arkansas
Division IV
Opinion delivered May 14, 2003

Gary W. Potts, for appellant.

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

PER CURIAM. This case involves prosecution for child pornography and rape. Given the nature of this case, the fact that Volume 7 of the record displays identifiable child victims engaged in explicit sexual conduct, and that possession of such images is in violation of Ark. Code Ann § 5-27-304 (1991), Volume 7 of the record is hereby closed and put under seal by the clerk of this court. If such images have been retained by the Ashley County Circuit Clerk, they are likewise closed and placed under seal in the Ashley County records. *See Juvenile H. v. Crabtree*, 310 Ark. 212, 833 S.W.2d 766 (1992).

BAAN, U.S.A. *v.* USA TRUCK, INC.

CA 02-1137 105 S.W.3d 784

Court of Appeals of Arkansas
Division III
Opinion delivered May 21, 2003

Ledbetter, Cogbill, Arnold & Harrison, LLP, by: *Jeffrey D. Rickard, Rebecca D. Hattabaugh*, and *Ronald D. Harrison*, for appellant.

Smith, Maurras, Cohen, Redd & Horan, PLC, by: *Matthew Horan* and *Lee M. Kirner*, for appellee.

JOHN F. STROUD, JR., Chief Justice. The sole issue in this case is whether the trial court erred in denying appellant's motion to dismiss the case filed against it by appellee. The basis of the motion to dismiss was a forum-selection clause in the parties' contract requiring them to litigate disputes in California. This is a question of law; therefore, on appellate review of such a case, we simply determine whether appellant was entitled to judgment as a matter of law. *Haase v. Starnes,* 323 Ark. 263, 915 S.W.2d 675 (1996). We hold that the trial judge erred as a matter of law in not dismissing the case based upon the forum-selection clause; therefore, we reverse and dismiss.

In June 2000, appellee, USA Truck, Inc., entered into an agreement ("Agreement") for the purchase of transportation software licensed by appellant, BAAN, U.S.A., Inc. After using appellant's software and customer support service for approximately seven months, appellee, who had not paid appellant any license or support fees, repudiated the Agreement and returned one disk of software to appellant. On July 20, 2001, appellee filed a complaint for declaratory judgment in the Circuit Court of Crawford County, Arkansas, alleging that it was unable to use appellant's software for the purposes intended, and that it had rescinded the Agreement by returning the software to appellant. Appellee also alleged that the statements and inducements made to appellee by appellant to induce it to enter into the Agreement were erroneous and constructively fraudulent, including the choice-of-law and choice-of forum provisions.

Appellant filed a counterclaim for breach of contract[1], as well as a motion to dismiss appellee's complaint, alleging that the Crawford County Circuit Court lacked jurisdiction based upon the forum-selection clause in the Agreement that provided for exclusive jurisdiction to be vested in the courts of California. This motion was denied by the trial court. Appellant renewed its jurisdictional objection prior to trial on May 28, 2002, at the close of appellee's case, and again at the close of all the evidence; all of these motions were denied. The case was submitted to the jury, which found in appellant's favor on its counterclaim and awarded appellant $45,000.[2] After trial, appellant moved for a judgment notwithstanding the verdict on the basis that the jury found the Agreement to be valid and enforceable and therefore the forum-selection clause should be enforced and the case should be dismissed; the trial court denied the motion. Appellant now brings this appeal.

The Agreement contained the following provision:

> 13.9 Applicable Law. This Agreement shall be interpreted and construed in accordance with the laws of the State of California and the United States of America, without regard to conflict of law principles. All disputes arising out of this Agreement shall be subject to the exclusive jurisdiction of any federal or state court or courts sitting in San Jose, California, which courts are empowered to try the dispute, and the parties hereby agree to submit to the personal and exclusive jurisdiction and venue of these courts. The U.N. Convention on Contracts for the International Sale of Goods shall not apply to this agreement.

In *Nelms v. Morgan Portable Bldg. Corp.*, 305 Ark. 284, 289, 808 S.W.2d 314, 316-17 (1991), the supreme court held:

---

[1] In *Arkansas Game & Fish Com'm v. Lindsey*, 292 Ark. 314, 730 S.W.2d 474 (1987), the Arkansas Supreme Court held that the assertion of a compulsory counterclaim does not constitute a waiver of objection to venue because of the non-voluntary character of the compulsory counterclaim. Appellant's counterclaim here was a compulsory counterclaim.

[2] We are cognizant of the fact that appellant did prevail on its counterclaim after the trial court denied its motion to dismiss for lack of jurisdiction. A party that prevails on a certain issue at trial cannot later raise the issue on appeal. *See, e.g., Garrigus v. State*, 321 Ark. 222, 901 S.W.2d 12 (1995). However, in this case, the issue appellant raises on appeal, that the trial court erred in not enforcing the forum-selection clause in the parties' contract, was decided adversely to it by the trial court.

> [C]hoice of forum clauses in contracts have generally been held binding, unless it can be shown that the enforcement of the forum selection clause would be unreasonable and unfair. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). The modern trend among Courts is to respect the enforceability of contracts containing clauses limiting judicial jurisdiction, if there is nothing unfair or unreasonable about them. . . .
>
> Traditionally, we have adhered to the view that an individual . . . who subjects himself to the personal jurisdiction of a Court by express agreement shall be bound by that contract, if the agreement can be determined to be fair and reasonable. *SD Leasing, Inc. v. Al Spain & Assoc., Inc.*, 277 Ark. 178, 640 S.W.2d 451 (1982).
>
> . . . .
>
> Any decision whether or not to exercise judicial jurisdiction over a transaction must also address the due process requirements embodied in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Under *International Shoe, supra*, and its progeny the well recognized test is whether such "minimum contacts" exist between the parties, the contract and the [forum selected] so that maintenance of a suit in [the forum selected] will not offend "traditional notions of fair play and substantial justice." It has been firmly established that a single contract . . . can provide the basis for the exercise of jurisdiction over a non-resident defendant . . . if there is a substantial connection between the contract and the forum state. *See McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

A forum clause should control absent a strong showing that it should be set aside. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)).

In the present case, both appellant and appellee are Delaware corporations, and this Agreement was a commercial transaction. Prior to signing the Agreement, both appellee's treasurer and Dwain Key, appellee's Vice-President of Logistics, reviewed the contract, and appellee negotiated with appellant the provisions of the Agreement regarding the price of the software and when support services were to be provided. There was no objection to the choice of California court jurisdiction prior to the execution of the Agreement, which was signed by Key directly under the forum-selection clause. *See National School Reporting Servs., Inc. v. National Schools of CA., L.P.*, 924 F. Supp. 21 (S.D.N.Y. 1996).

In *SD Leasing, Inc. v. Al Spain & Assoc., Inc., supra*, our supreme court held a forum-selection clause electing Arkansas jurisdiction to be valid. In that case, the appellee, a Florida corporation, defaulted on a lease agreement between it and the appellant, an Arkansas corporation. The negotiations for the lease took place in Florida, appellee signed the lease in Florida and mailed it to the appellant in Arkansas. The appellant accepted the lease, and the appellee mailed payments and memos to appellant in Arkansas. The lease also specifically provided that the lease was to be governed by and construed under Arkansas law. The supreme court stated that while that fact did not in and of itself confer personal jurisdiction on Arkansas courts, it did "provide another contact with this state which goes to satisfy the 'minimum contacts' requirement of *International Shoe, supra.*" *SD Leasing*, 277 Ark. at 181, 640 S.W.2d at 452. The supreme court further held that in addition to the above-mentioned substantial contacts with the State of Arkansas, the appellee had subjected himself to the personal jurisdiction of the Arkansas courts by expressly agreeing that in the event of a default he would consent to and be subject to the jurisdiction of the Arkansas courts.

■ ■ Relevant factors for finding minimum contacts include prior negotiations, contemplated future consequences, and a contract's choice-of-law provisions. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). In the present case, the initial contact regarding the software was made in California at a trade show, where Dwain Key first received literature about the transportation software. Negotiations, including the price of the software and the support to be provided, were entered into prior to the execution of the Agreement, and there was no objection on the part of the appellee to the forum-selection clause. After the Agreement was signed, one of appellant's consultants, Daniel Araujo, who was a resident of California, traveled to Arkansas and consulted with appellee regarding the transportation software. Furthermore, it is clear that appellee believed that appellant's principal place of business was in California, as evidenced by its Complaint for Declaratory Judgment, until such statement was denied by appellant. Nevertheless, appellant has a registered agent for service in California, which was where appellee served process on appellant in its declaratory judgment action. And most importantly, appellee freely and willingly agreed to submit itself to the jurisdiction of the California courts in the

Agreement. Appellee argues that there were no contacts with the State of California. Admittedly, there were more contacts with the State of Georgia, where appellant's principal place of business was located, but that is not determinative of the issue here. The issue in this case is whether there were sufficient contacts and connections with California to permit enforcement of a freely negotiated forum-selection clause. We find that the above-enumerated contacts and connections are sufficient for such enforcement under *Nelms, supra.*

Appellee claims that enforcing the forum-selection clause would oust Arkansas courts of jurisdiction. However, this argument was discussed in *M/S Bremen*, 407 U.S. at 12, and the Supreme Court held that such an argument was

> hardly more than a vestigial legal fiction. It appears to rest at core on historical judicial resistance to any attempt to reduce the power and business of a particular court and has little place in an era when all courts are overloaded and when businesses once essentially local now operate in world markets. It reflects something of a provincial attitude regarding the fairness of other tribunals. . . . The threshold question is whether that court should have exercised its jurisdiction to do more than give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum clause.

Appellee also argues that it had rescinded the contract with appellant as a matter of law, and therefore the declaratory action filed by it in the Crawford County Circuit Court did not violate the forum-selection clause because the action did not arise out of the Agreement. In *Douglass v. Nationwide Mutual Insurance Co.*, 323 Ark. 105, 114, 913 S.W.2d 277, 282 (1996) (citations omitted), our supreme court discussed the theory of rescission:

> In Arkansas, rescission of a contract at law is accomplished by the rescinding party's tendering the benefits received to the contracting party, and the courts have nothing to do with the repudiated transaction. But one who desires to rescind a contract on grounds of fraud or deceit must do so as soon as that person discovers the truth. We stated in *Herrick* that the rescinding party must announce his purpose at once and act with reasonable diligence so that the parties may be restored to their original position as nearly as possible.
>
> Hence, rescission of a contract at law occasioned by fraud may be accomplished without court action but by a prompt restoration of

> benefits to the contracting party and by a clear statement that rescission of the agreement is what is intended. The contracting party then had the option of suing for breach of contract.

Appellee asserts that it had rescinded the contract as a matter of law and that the declaratory judgment action did not pertain to the Agreement because the Agreement no longer existed. However, appellee had not rescinded the contract as a matter of law and without court action because it did not return all of the benefits it received under the contract as required by *Douglass*; specifically, it did not pay for the appellant's hours of consulting prior to appellee unilaterally rescinding the contract, and it did not return all of the computer disks, as admitted by Dwain Key in his testimony.

Furthermore, the forum-selection clause provided, "All disputes arising out of this Agreement" were to be litigated in California. Although appellee contends that its action for declaratory judgment is not subject to this clause, the clear fact is that if not for the Agreement between the parties, such an action would not have been filed. We cannot say that the declaratory judgment action was not a result of a dispute arising out of the Agreement.

Appellee further contends that appellant was inconsistent in arguing that exclusive jurisdiction was in California while requesting and receiving attorney's fees after it prevailed on its counterclaim in Arkansas when attorney's fees would not be allowed in a California court. We find no such inconsistency. The allowance of attorney's fees is penal in nature, and is a procedural matter governed by the laws of the State of Arkansas. *USAA Life Ins. Co. v. Boyce*, 294 Ark. 575, 745 S.W.2d 136 (1988). Appellant was forced to litigate in Arkansas and prevailed on its counterclaim for breach of contract against appellee; therefore, it was entitled by Arkansas law to attorney's fees. Ark. Code Ann. § 16-22-308 (Repl. 1999).

We hold that the trial judge erred as a matter of law in denying appellant's request to enforce the forum-selection clause.

Reversed and dismissed.

ROBBINS and CRABTREE, JJ., agree.

Raymond POLK *v.* STATE of Arkansas

CA CR 02-1264 105 S.W.3d 797

Court of Appeals of Arkansas
Division IV
Opinion delivered May 21, 2003

[redacted]

Mark S. Fraiser, Chief Public Defender, by: *Wallace & Associates*, by: *Kimberly Bosshart*, for appellant.

Mike Beebe, Att'y Gen., by: *Katherine Adams*, Ass't Att'y Gen., for appellee.

JOHN F. STROUD, JR., Chief Judge. Appellant, Raymond Polk, was charged with theft of property over $2500, a Class B felony. He was tried by a jury and found guilty of the offense of theft of property over $500, a Class C felony. He was sentenced to serve twelve years in the Arkansas Department of Correction. On appeal, he contends (1) that the trial court erred when it allowed the State to go forward with an accomplice theory when the information failed to allege such, and (2) that the trial court erred when it refused to reduce the charge to a Class A misdemeanor due to the value of the merchandise taken. Finding no error, we affirm.

Terry Woodfork, a security officer for J.C. Penney, testified that he was employed in that capacity on December 2, 2001. He said that, on that date, he was observing the store from "the towers," looking for shoplifters, and that he observed appellant "walking around and just observing," not shopping. He stated that appellant purchased a pillow in the domestic area and got a large sack, and that he then returned to the menswear area, where he began putting several shirts and other menswear items into the sack. Woodfork said that he left the tower to get closer and that he observed appellant from ten to twenty feet away, concealing merchandise. Woodfork stated that he followed appellant out of the store to his car; that appellant got in the car; and that two other people, a male and a female, then got out of the car with Penney's bags and headed toward the store. He said that he contacted mall security before the two entered the store and asked for assistance, reporting his belief that a "circle" was going on. He said that he told mall security that he needed assistance because there were three persons involved; that he wanted security "to be there" when the two came out of the store; and that he gave them a description of the automobile. He said that he observed the male and female go into the store, and that he returned to the towers for a better view. He said that the male was concealing shirts and pants and that the female was taking costume jewelry and ladies' outfits. Woodfork testified that when the two left the store, he came down from the towers, walked out behind them, identified himself, and asked them to step back into the store. He said that the security officers, Dukes and House, were already there and that they "converged on the car all at once." He said that the officers took over from that point.

Woodfork testified that the merchandise that was taken was present in the car; that most of it was in the back seat; and that a few items were in the trunk. He said that a J.C. Penney's employee, Tracy Farr, joined him and that they took possession of the merchandise. He said that he and Tracy calculated how much the merchandise was worth and then placed it in a storage area that had limited access. He said that he then went to the security substation in the mall, and that he and the security officers took photos of the shoplifters.

He testified that he thought the suspects were acting in a "circle" because of the manner they entered the store; that when appellant got in the car, the other two got out; that the other two then entered the store and split up; and that they then exited the store together, as if they knew what time to leave. He said that appellant was never in the store at the same time as the other two; that he assumed appellant and the other two were working together; and that his assumption was based on the fact that they were in one car.

Officer Jessie Dukes testified that he worked off-duty security at Hot Springs Mall on December 2, 2001. He said that he worked with Deputy Bill House and that Terry Woodfork contacted them, advising them that he had two shoplifters in the store and one outside by a white Ford Taurus. He said that he and House drove around and observed the car; that they ran the tags just as normal procedure; and that the car was reported stolen from Little Rock. He said that a black male, later identified as appellant, was sitting on the hood, looking at a paper. He said that they "backed off a little ways away from the car"; that Woodfork subsequently notified them that he was following two people out of the store; and that he and House subsequently advised the three that they were under arrest.

Tracy Farr, a member of management at the Penney's store, testified that her job gives her familiarity with prices and pricing merchandise at the store. She said that she was working on December 2, 2001, and that she was called to help recover some merchandise, photograph it, inventory it, and "add it up." She said that she, Woodfork, and Mr. Jones, the store manager, compiled a list of the pieces and their prices. She then identified and reviewed the list that they compiled, explaining how they did it. She said that the grand retail-value total for all of the merchandise was $4,006.43, and that the actual cost to J.C. Penney was $1,602.57.

We address appellant's second point of appeal first because it essentially challenges the sufficiency of the evidence supporting his conviction. Double-jeopardy considerations require us to consider a challenge to the sufficiency of the evidence prior to examining other issues on appeal. *Clem v. State*, 351 Ark. 112, 90 S.W.3d 428 (2002). A motion for a directed

verdict is a challenge to the sufficiency of the evidence. *Id.* In reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State and consider only the evidence that supports the verdict. *Fields v. State*, 349 Ark. 122, 76 S.W.3d 868 (2002). We do not reweigh the evidence but determine instead whether the evidence supporting the verdict is substantial. *Clem v. State, supra.* We affirm a conviction if substantial evidence exists to support it. *Id.* Evidence, whether direct or circumstantial, is sufficient to support a conviction if it is forceful enough to compel reasonable minds to reach a conclusion without having to resort to speculation or conjecture. *Id.* We do not, however, weigh the evidence presented at trial, as that is a matter for a factfinder. *Id.* Nor will we weigh the credibility of the witnesses. *Id.*

Here, appellant contends that witness Farr had no independent actual knowledge of the value of the articles and that the knowledge she did have came solely from the retail price tags. He cites the case of *Brooks v. State*, 303 Ark. 188, 792 S.W.2d 617 (1990), to support his contention that her testimony was thus inadmissible. We are not persuaded. In *Brooks*, the value testimony came from a security guard, who based his value testimony solely on the price tags, which was found to be inadmissible hearsay. Here, Ms. Farr testified that she was a manager-level employee, that she handled the store when the manager was absent, and that as such she was familiar with store merchandise pricing. Clearly, unlike the security guard in *Brooks*, Ms. Farr had sufficient knowledge to support her value testimony.

Moreover, appellant contends that Farr failed to testify concerning the wholesale value of the articles and that the State failed to elicit such testimony, concluding that the merchandise value was not sufficiently shown to be an amount in excess of the statutorily required amount. However, contrary to appellant's contention, Farr testified not only about the retail value of the merchandise, $4,006.43, she also testified about the actual cost to the store of the stolen merchandise, stating that it amounted to $1,602.57. The value evidence submitted by the State was more than sufficient to support the verdict for theft of property over $500. *See Christian v. State*, 54 Ark. App. 191, 925 S.W.2d 428 (1996).

In his remaining point of appeal, appellant contends that the trial court erred when it allowed the State to go forward with an accomplice theory when the information failed to allege such. Again, we disagree.

The original information filed in this matter charged appellant and two other persons with the offense of theft of property over $2500, a Class B felony. The first amended information only named appellant, charged him with the offense of theft of property over $2500, and added the allegation that appellant's punishment should be enhanced because he had previously been convicted of more than four felonies, which were named. Both the original and the amended information alleged that the theft involved merchandise taken from the J.C. Penney's store at the Hot Springs Mall.

In *Dunlap v. State*, 303 Ark. 222, 228, 795 S.W.2d 920, 923-24 (1990), our supreme court explained:

> We have held that it is only necessary that an indictment name the offense and the party to be charged. Defendants may be charged by either indictments or informations. The state is not required to include a statement of the act or acts constituting the offense, unless the offense cannot be charged without doing so. The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet.

(Citations omitted.) Moreover, there is no distinction between the criminal responsibility of an accomplice and a principal. *Lee v. State*, 297 Ark. 421, 762 S.W.2d 790 (1989).

Here, the information named the offense and the party to be charged, and it was sufficient because it contained the elements of the offense intended to be charged and it apprised appellant of what he had to be prepared to meet.

Affirmed.

PITTMAN and BAKER, JJ., agree.

Ricky GAMBLE and Shawn Mosley *v.* STATE of Arkansas

CA CR 02-965 105 S.W.3d 801

Court of Appeals of Arkansas
Division III
Opinion delivered May 21, 2003

[redacted]

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

Mike Beebe, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.

JOSEPHINE LINKER HART, Judge. After a bench trial, each of the appellants, Ricky Gamble and Shawn Mosley, was convicted of being a felon in possession of a firearm, a Class B felony. Gamble was sentenced to six years' imprisonment as a

habitual offender with four or more felony convictions, and Mosley was sentenced to five years' imprisonment. For reversal, appellants argue that the there was insufficient evidence that either appellant constructively possessed a firearm.

Appellants were passengers in an automobile driven by Kendal Wheeler when Little Rock police officers stopped the car for displaying a fictitious license plate. On two earlier attempts to perform the traffic stop, the police turned on their blue lights only to have the car pull over and then drive away. After appellants were handcuffed, the officers inventoried the contents of the car in compliance with a police departmental policy requiring impoundment of vehicles displaying fictitious license plates.

The only testimony introduced at trial on April 1, 2002, was the testimony of four police officers. Officer Sean Berryman testified that Gamble was located in the front passenger seat and Mosley was located in the back seat on the passenger side of the vehicle. Further, he stated that when he and Officer Self first attempted to initiate a traffic stop, he saw Mosley bend over a couple of times. Officer Greg Self also testified that Gamble was in the front passenger seat and Mosley was in the back passenger seat when the officers stopped the vehicle.

Roger Wallis, an officer who arrived after the stop, testified that during his search of the car, he retrieved a .357 magnum handgun from underneath the front passenger seat of the car. He further stated that the handgun was not in plain view but was located "kind of over to the driver's side somewhat." Officer Christian Sterka testified that after the stop, Mosley was taken to the police vehicle and placed in the back seat. Officer Sterka stated that Mosley gave several different dates for his birth and identified himself repeatedly as Anthony Rogers. Accordingly, Sterka was unable to identify Mosley until his sister called on his cellular telephone and asked to speak to her brother, Shawn Mosley. Furthermore, Sterka stated that the back seat of the car was not securely fastened and when he lifted the seat he found a Lorcin .380 semi-automatic handgun.

At the close of the State's case-in-chief, appellants made a motion to dismiss, asserting that the State failed to prove that either appellant had constructively possessed a firearm. Appellants rested without presenting evidence and renewed their motion to

dismiss, which was again denied, and the trial court found both guilty as charged.

For their sole point on appeal, appellants argue that the State failed to produce substantial evidence that each appellant constructively possessed a firearm. Appellants argue that as joint occupants of the vehicle, their close proximity to the location of the handguns found under the front and rear passenger seats does not provide substantial evidence that either appellant possessed a handgun. They further note that the handguns were not located in their personal possessions or in plain view. Appellants argue that the evidence did not establish that either of them had a right to control the vehicle or that any relationship existed between either of them and the driver of the vehicle. Thus, appellants assert there was no evidence from which it could be inferred that they had knowledge of the handguns. Additionally, Mosley, the passenger in the backseat, argues that the State's evidence that he had bent over on at least two occasions while the police were attempting to stop the vehicle was not suspicious behavior.

A motion to dismiss in a non-jury trial is a challenge to the sufficiency of the evidence. *Green v. State*, 79 Ark. App. 297, 87 S.W.3d 814 (2002). Our standard of review is well settled: "The test for such motions is whether the verdict is supported by substantial evidence, direct or circumstantial. Substantial evidence is evidence of sufficient certainty and precision to compel a conclusion one way or another and pass beyond mere suspicion or conjecture." *Goodman v. State*, 74 Ark. App. 1, 7, 45 S.W.3d 399, 402-03 (2001). When reviewing a denial of a challenge to the sufficiency of the evidence, the appellate court considers only the evidence that supports the judgment and affirms if that evidence is substantial. *Polk v. State*, 348 Ark. 446, 73 S.W.3d 609 (2002).

Constructive possession requires the State to prove beyond a reasonable doubt that (1) the defendant exercised care, control, and management over the contraband, and (2) the accused knew the matter possessed was contraband. *Boston v. State*, 69 Ark. App. 155, 12 S.W.3d 245 (2000). Although constructive possession can be implied when the contraband is in the joint control of the accused and another, joint occupancy alone is not sufficient to establish possession. *Littlepage v. State*, 314 Ark. 361, 863 S.W.2d 276 (1993). Other factors that sufficiently link an accused to contraband found in a vehicle jointly occupied by more than one per-

son include: (1) whether the contraband was found in plain view; (2) whether the contraband was found on the defendant's person or with his personal effects; (3) whether the contraband was found on the same side of the car seat as the defendant or in immediate proximity to him; (4) whether the accused owned the vehicle in question or exercised dominion and control over it; (5) whether the accused acted suspiciously before or during the arrest. *Plotts v. State*, 297 Ark. 66, 759 S.W.2d 793 (1988).

Here, the evidence established that Gamble was seated in the front passenger seat with Mosley seated in the rear of the car. The testimony of Officer Wallis established that a .357 magnum handgun was found under the passenger seat; however, the handgun was more accessible to the driver than to appellant Gamble. It is undisputed that Gamble neither owned the vehicle in question nor exercised control over it. Further, there was no evidence that Gamble acted suspiciously before or during the arrest. Even though the handgun was found on the same side of the car as Gamble, it was more accessible to the driver; therefore, this factor does not establish that appellant had knowledge of the presence of the handgun. This court has previously held that a defendant's mere proximity to an item not in plain view is not proof that the defendant constructively possessed the item. *Walker v. State*, 77 Ark. App. 122, 72 S.W.3d 517 (2002). We reach the same conclusion here. Therefore, we hold that there was not substantial evidence that Gamble constructively possessed the handgun under the front passenger seat. Thus, we reverse and dismiss with regard to Gamble.

We now address the evidence presented to support Mosley's conviction. The evidence established that he was sitting in the back seat on the passenger side of the car. Officer Sterka testified that after noticing the back seat was not securely fastened, he lifted the seat and found a Lorcin .380 semi-automatic handgun. Officer Sterka also noted that when the officers attempted to determine Mosley's identity, he gave several different dates of birth and repeatedly identified himself as Anthony Rogers. Mosley was not identified until his sister called his cellular phone and asked to speak to her brother, Shawn Mosley. Officer Berryman testified that Mosley bent over a couple of times from the time the officers first attempted to pull the vehicle over and the time of the traffic stop.

As stated above, the close proximity of Mosley to the handgun found by the officer when he lifted the back seat is insuf-

ficient in a joint occupancy situation to find that Mosley constructively possessed the handgun. *See Littlepage, supra.* However, whether Mosley acted suspiciously during or after the arrest can be an additional factor linking him to the handgun. *See Plotts, supra.* Mosley's act of giving a fictitious name and several different dates of birth and his act of bending over in his seat repeatedly during the driver's attempt to evade the officers constitute, at a minimum, suspicious behavior. Mosley's close proximity to the handgun, coupled with his suspicious behavior on two occasions, is clearly indicative of constructive possession. *Polk, supra.* Commensurate with the holdings in *Polk* and *Plotts*, we cannot say that the trial court erred in determining that there was substantial evidence to support appellant Mosley's conviction for being a felon in possession of a firearm.

Reversed and dismissed as to appellant Gamble and affirmed as to appellant Mosley.

BIRD and ROAF, JJ., agree.

Norma RUTLEDGE *v.*
CHRIST IS THE ANSWER FELLOWSHIP, INC.

CA 02-1249 105 S.W.3d 816

Court of Appeals of Arkansas
Division I
Opinion delivered May 21, 2003

Melvin E. Petty, for appellant.

J. Slocum Pickell, for appellee.

ROBERT J. GLADWIN, Judge. This is an appeal from the August 19, 2002, order of the Jefferson County Circuit Court that found appellee owed to appellant $45,645.64 on its note and mortgage. We must dismiss this appeal because not all of the claims against all of the parties have been resolved, and there has been no proper certification pursuant to Ark. R. Civ. P. 54(b) (2003) that would render the order herein final and appealable.

When multiple parties are involved, Ark. R. Civ. P. 54(b) provides that a trial court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination, supported by specific factual findings, that there is no just reason for delay and upon its express direction for the entry of judgment. If the court makes such a determination, it must execute a certificate in compliance with the requirements of Rule 54(b). *See Stouffer v. Kralicek Realty Co.*, 81 Ark. App. 89, 98 S.W.3d 475.

In *Fisher v. Citizens Bank of Lavaca*, 307 Ark. 258, 819 S.W.2d 8 (1991), our supreme court noted that Rule 54(b) is intended to permit review before the entire case is concluded, but only in those *exceptional* situations where a compelling, discernible hardship will be alleviated by an appeal at an intermediate stage. In *Davis v. Wausau Ins. Co.*, 315 Ark. 330, 867 S.W.2d 444 (1993), the supreme court emphasized that the trial court must make an express determination that there is no reason to delay an appeal, stating that the court must *factually* set forth reasons in the final judgment, order, or the record, which can then be abstracted, explaining why a hardship or injustice would result if an appeal is not permitted. The *Davis* court specifically gave notice that under the terms of Rule 54(b), the final judgment, order, or record must contain specific facts supporting the trial court's determination that there is some danger of hardship or injustice that would be alleviated by an immediate appeal.

In the case before us, the judgment does not include specific findings of any likely danger of hardship or injustice that could be alleviated by an immediate appeal. The Rule 54(b) certificate attached to the order of the trial court makes one factual statement: "That Norma Rutledge is owed a total of $45,645.64

on the note executed by the Plaintiff in 1993." The court then recites the language of Rule 54(b) that "there is no just reason for delay of the entry of a final judgment . . . ." In *Fisher, supra,* the court stated that merely tracking the language of Rule 54(b) will not suffice. In order to determine that there is no just reason for delay, the trial court must find that a likelihood of hardship or injustice will occur unless there is an immediate appeal and must set forth facts to support its conclusion. *Davis, supra.* That factual underpinnings supporting a Rule 54(b) certification may exist in the record is not enough; they must be set out in the trial court's order. *Id.*

The failure to comply with Rule 54(b) presents a jurisdictional issue that we will raise on our own. *Barr v. Richardson,* 314 Ark. 294, 862 S.W.2d 253 (1993). Because the Rule 54(b) certificate executed in this case does not conform to the requirements of the rule and the relevant case law, it is ineffective to certify the appeal. Accordingly, we dismiss the appeal without prejudice to refile upon entry of an order that complies with Rule 54(b).

Dismissed.

ROBBINS and NEAL, JJ., agree.

Ivan ATKINSON and J. Gene Atkinson *v.* Bonnie KNOWLES

CA 02-1257 105 S.W.3d 818

Court of Appeals of Arkansas
Division I
Opinion delivered May 21, 2003

Johnny L. Nichols, for appellants.

Donnie Rutledge, for appellee.

JOHN B. ROBBINS, Judge. This appeal concerns the ownership of the contents of a bank safe-deposit box owned by the deceased, Francis Nickerson. The bank, First Federal of Arkansas, F.A., filed an interpleader action in December 2001 when it opened safe-deposit box number 132, discovering cash, coins, and

two certificate of deposit books under the name of Mr. Francis E. Nickerson who had died in September 1990. The ownership card could not be found. The interpleader action requested that the bank be allowed to turn over the items into the registry of the court and allow the trial court to determine ownership. The suit named appellants Ivan and Gene J. Atkinson, nephews of the deceased, as defendants, and appellee Bonnie Knowles, niece of the deceased, as a defendant. Appellants and appellee are siblings.

Appellants answered by asserting that no will was ever probated for Nickerson and that his property should pass through the laws of intestate succession and be divided equally among the three defendants. Appellee answered by attaching an unprobated will of Nickerson executed in 1988 naming her as sole beneficiary as evidence that the contents of the safe-deposit box should be vested in her, citing to Ark. Code Ann. § 28-40-104 (1987). Appellee also cross-complained against the bank for negligence in not having informed her of the safe deposit box within five years of Nickerson's death, should she not be awarded the entirety of the box's contents. Appellants moved for judgment on the pleadings, and appellee moved for summary judgment. After a hearing, appellee's motion was granted on the basis that she met the requirements of section 28-40-104. Appellants appeal. We affirm.

Summary judgment is to be granted by a trial court only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. *Bond v. Lavaca Sch. Dist.*, 347 Ark. 300, 64 S.W.3d 249 (2001). Normally, in an appeal from a summary judgment, the evidence is viewed most favorably for the party resisting the motion and any doubts and inferences are resolved against the moving party, but when the parties agree on the facts, we need only determine whether the appellee was entitled to judgment as a matter of law. *See Aloha Pools & Spas, Inc. v. Employer's Ins. of Wausau*, 342 Ark. 398, 39 S.W.3d 440 (2000). When both sides agree that there are no material facts remaining, summary judgment is an entirely appropriate means for resolution of the case. *McCutchen v. Patton*, 340 Ark. 371, 10 S.W.3d 439 (2000). The question in the case at bar is one of law. A trial judge's conclusion on a question of law is given no deference on appeal. *See Kelly v. Kelly*, 341 Ark. 596, 19 S.W.3d 1 (2000); *City of Lowell v. M & N Mobile Home Park*, 323 Ark. 332, 916 S.W.2d 95 (1996).

The basic rule of statutory construction is to give effect to the intent of the General Assembly. *Turnbough v. Mammoth Spring Sch. Dist.*, 349 Ark. 341, 78 S.W.3d 89 (2002). In determining the meaning of a statute, the first rule is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Id.* Statutes relating to the same subject are said to be *in pari materia* and should be read in a harmonious manner, if possible. *R.N. v. J.M.*, 347 Ark. 203, 61 S.W.3d 149 (2001).

The relevant statutory law is found at Ark. Code Ann. § 28-40-104 (1987), which reads:

> (a) No will shall be effectual for purposes of proving title to or the right to the possession of any real or personal property disposed of by the will until it has been admitted to probate.
>
> (b) Except as provided in § 28-40-101, to be effective to prove the transfer of any property or to nominate an executor, a will must be declared to be valid by an order of probate by the probate court, except that a duly executed and unrevoked will which has not been probated may be admitted as evidence if:
>
> > (1) No proceeding in probate court concerning the succession or administration of the estate has occurred, and;
> >
> > (2) Either the devisee or his successors and assigns possessed the property devised in accordance with the provisions of the will, or the property devised was not possessed or claimed by anyone by virtue of the decedent's title during the time period for testacy proceedings.
>
> (c) The provisions of subsections (b) and (c) of this section shall be supplemental to existing laws relating to the time limit for probate of wills, and the effect of unprobated wills, and shall not be construed to repeal § 28-40-103 and subsection (a) of this section or any other law not in direct conflict herewith.

The 1949 Probate Code provided: "No will shall be effectual for the purpose of proving title to or the right to the possession of any real or personal property disposed of by the will until it has been admitted to probate." Ark. Stat. Ann. § 62-2126 (Repl. 1971). The current recitation is found in section 28-40-104(a) (1987). In 1981, however, the legislature adopted Act 347, which creates an exception to the Code's sweeping rejection of unprobated wills by adopting the language found in section 28-40-104(b) and (c). The statute manifestly gives effect to a testator's

unrevoked will, though never probated, if the two specified conditions are satisfied. *Smith v. Ward*, 278 Ark. 62, 643 S.W.2d 549 (1982). All parties agree that there have never been probate proceedings regarding the will, thus meeting the first requirement.

Appellants argue, as they did to the trial judge, that appellee failed to show "possession" of the contents of the safe-deposit box and thus failed as a matter of law under subsection (b)(2). Appellants cite to *Songer v. Wiggins*, 71 Ark. App. 152, 27 S.W.3d 755 (2000) (deciding what constitutes "possession" of the farm property devised) and *Johnson v. Johnson*, 292 Ark. 536, 539, 732 S.W.2d 121, 123 (1987) (holding that certificate of deposit in bank, though interest was paid to widow, remained in actual possession of the bank; thus widow's claim to have possession of the certificate failed where she did not have actual possession). Appellee agrees that she did not possess the contents of the safe-deposit box. Appellee asserts that "the property devised was not possessed or claimed by anyone by virtue of the decedent's title during the time period for testacy proceedings." Ark. Code Ann. § 28-40-104(b)(2). That being the case, appellee contends that this situation fits within the parameters of subsection (b)(2), which thus allows evidence of the testator's intention and provides the evidence that supports the trial court's conclusion that appellee is the owner of the box contents. The trial judge concluded that appellee was correct.

We distinguish the present situation from that found in *Johnson v. Johnson, supra*. In the *Johnson* case, Mr. Clarence Johnson died in 1978 survived by his widow of many years, appellant Opal Johnson, and three children of a former marriage, the appellees. His will, which was never probated, divided his estate into two trusts. Opal was to receive the net income from both trusts until her death, but if she remarried, the income from the family trust would terminate and the corpus would be distributed to the appellees. When Clarence Johnson died, his estate consisted of a farm and several certificate of deposit. The certificates of deposit were consolidated into one certificate for $49,000 issued to "The Estate of Clarence Johnson." The certificate remained with the bank, and interest generated by the certificate was paid to Opal with the approval of the appellees. After more than five years passed from their father's death, appellees requested the chancery court to declare their father intestate and distribute his property accordingly. Opal responded by presenting the unprobated will.

Opal also asserted that she was in "possession" of the certificate of deposit inasmuch as she received the interest on the certificate. She cited to what is now Ark. Code Ann. § 28-40-104. The chancellor decided that the statute did not apply, and the supreme court agreed. The supreme court construed the statute to mean that if a claimant asserts possession, it must be actual and not constructive, which was not met when the actual certificate remained with the bank. Because Opal contended that she was in possession of the property, the supreme court had no reason to address the applicability of the alternative statutory condition, *i.e.*, a situation in which no one claimed or possessed property of a decedent during the five-year term in which to conduct testacy proceedings.

This is the first case construing this alternate language in subsection (b)(2), and we hold that the trial judge's application of the law to the undisputed facts was correct. A plain reading of the statute, giving the words their ordinary and plain meaning, leaves us with no other reasonable conclusion. This unique situation appears to be just the type of scenario that the statute was designed to remedy.

Affirmed.

GLADWIN and NEAL, JJ., agree.

Mitchell JONES *v.* STATE of Arkansas

CA CR 02-1123 105 S.W.3d 835

Court of Appeals of Arkansas
Division II
Opinion delivered May 21, 2003

The Cannon Law Firm, P.L.C., by: *David R. Cannon*, for appellant.

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

WENDELL L. GRIFFEN, Judge. This appeal arose from a criminal conviction in Pulaski County for possession of a controlled substance (marijuana) with intent to deliver, resulting in a twenty-five-year sentence. Mitchell Jones argues on appeal that the trial court abused its discretion by admitting into evidence the State's exhibits concerning the marijuana over his chain-of-custody objection, based solely on a discrepancy between the weight of the marijuana as stated in the police report and the crime lab report. We affirm.

On or about September 12, 2000, members of the Little Rock and North Little Rock Police Departments' drug interdiction units received information that appellant might have picked up a suspicious bag, which allegedly smelled of marijuana, from the North Little Rock bus terminal to travel by taxi cab toward the Little Rock National Airport. Once there, appellant removed his automobile from a parking lot at the airport. Ultimately, Detectives Kyle King, Todd Spafford, and Grant Humphries acted on the information and stopped appellant's vehicle. A police dog alerted the officers to the trunk of the vehicle, from which the officers seized two duffel bags containing eight bundles of marijuana, four rolled marijuana joints, and personal items.

At trial, appellant objected to the introduction of the seized items because he contended that the chain of custody was not established to the necessary extent. He based his challenge on the discrepancy between the weight of the marijuana according to the officer who seized it and the weight of the marijuana according to the state crime laboratory chemist. The trial court overruled the objection because it found that there was testimony that explained the weight difference.

Specifically, there was testimony that Detective Humphries placed the two duffel bags in a cardboard box and weighed the entire contents of the box. Thus, Humphries arrived at a weight of approximately fifty-nine pounds. That weight included the duffel bags, the various bundles and joints of marijuana in their original packaging, as well as toiletry items, towels used to wrap the marijuana bundles, and a pair of underwear, shorts, and a shirt. Furthermore, Humphries testified that he maintained custody of the bags

and all of their contents. After taking inventory of the contents of the bags, he returned the bags and their contents to the cardboard box, sealed the box, initialed the seal, and stored it in the property locker until it was taken to the state crime laboratory.

Another witness for the State, state crime laboratory forensic drug chemist Chris Larsen, testified that he checked the box out from a secured location where evidence is stored once it is received from the police. The chemist testified that the box was sealed when he received it. He then removed the marijuana bundles from the bags, removed their original packaging, and weighed only the marijuana substance. Thus, he arrived at a total weight of the marijuana of approximately 42.7 pounds.

Upon cross-examination of Larsen, the following colloquy took place:

Q Would it be common in roughly 38 days for [the marijuana] to lose almost a third of its weight by evaporation?

A I don't really know the rate that marijuana dries out. I couldn't testify about that, but I would think it probably wouldn't lose that much.

Q Would you say maybe a couple of ounces here, a couple of ounces there?

A This is a lot of marijuana. I don't know how many ounces or grams it would lose in that amount of time. I really don't know.

Q Okay. Would it surprise you to know that somehow this lost 17 pounds of marijuana somewhere down the road?

A Would it surprise me?

Q Yeah.

A If it was lost?

Q Well, they weighed in at 59 pounds.

A Who's they?

Q The police department. They weighed it in at 59 pounds, and you came up with 42. There'd be 17 pounds missing somewhere, correct?

A Uh huh.

Q Okay. In a bag with some towels and stuff I don't expect that weighs more than five pounds or so. So, we're look-

> ing at probably a loss of maybe 12 pounds. Would that be possible through evaporation as Detective Humphries suggested to this jury in a matter of 38 days?
>
> A Not through evaporation. Probably not.

Larsen did not make any statements regarding the weight of the bags and other personal items contained in the evidence box, as distinct from the weight of the marijuana.

All three officers involved in the seizure of the contraband in question testified at trial that State's Exhibits 1 and 2 were photographs of the two duffel bags containing four bundles of marijuana, discovered in the trunk of appellant's car. Detective King testified that he recognized the State's Exhibits 3-10, photographs of the bundles of marijuana. However, he also explained that the bundles appeared different in the exhibits than when they were stored because when

> you send dope to the Crime Lab, we don't separate the bundles. We leave the bundles intact inside the bag. The Crime Lab cuts the bundles open, takes the dope out, weighs the dope, and then puts 'em back in different bags.

Detective Humphries testified, with respect to Exhibits 3-10, that he recognized them as showing the marijuana bundles seized in appellant's trunk. He also stated that

> [a]s you can see where the packaging has been cut. When it's sent to the Crime Lab to be analyzed, these bundles were in this shape, but the packaging was sealed around them of this interior packaging. This outside plastic bag was not a part of it. That's how it was resealed, I believe, by the Crime Lab.

Humphries recognized the State's Exhibit 12 as the loose marijuana and four hand-rolled marijuana cigarettes he had found in one of the bags' pockets.

The trial court stated, when ruling on appellant's objection, that

> the whereabouts of [the evidence] at all times or every person who handled it is not necessary for introduction. Second of all, the testimony is in this case that it is less than what they said it was weighed at, but there is some explanations in the record as to the difference in it. In addition, there's no evidence of any actual

> tampering of the matter, other than the difference of this weight which has been, testimony has been given an explanation of it.

From the resulting conviction appellant now brings as the sole point on appeal his challenge to the chain of custody, based on the weight discrepancy[1].

Chain-of-Custody Challenge Based on Weight Discrepancy

Appellant challenges the sufficiency of the chain of custody solely on the basis of a weight discrepancy between the police report and the state crime laboratory report. We do not reverse a trial court's ruling on the admissibility of evidence absent a showing that it clearly abused its discretion. *Rankin v. State*, 57 Ark. App. 125, 942 S.W.2d 867 (1997). The purpose of establishing a chain of custody is to prevent the introduction of physical evidence that has been tampered with or is not authentic. *Newman v. State*, 327 Ark. 339, 939 S.W.2d 811 (1997). The trial court must be satisfied within a reasonable probability that the evidence has not been tampered with. *Id.* It is not necessary for the State to eliminate every possibility of tampering. *Id.* Minor uncertainties in the chain of custody are matters to be argued by counsel, but they do not render the evidence inadmissible as a matter of law. *Crisco v. State*, 328 Ark. 388, 943 S.W.2d 582 (1997).

In *Guydon v. State*, 344 Ark. 251, 257, 39 S.W.3d 767, 771 (2001), a case involving a very minor discrepancy, the supreme court stated that the "difference in testimony regarding the weight of State's Exhibit 1 was .1172 of a gram, and the difference regarding State's Exhibit 2 was .0817 of a gram." The *Guydon* court pointed out that the slight variation in the weight of the substance could have resulted from the differing sensitivity in the scales used by the officer and the chemist. *Id.*

In *Crisco v. State*, *supra*, relied upon by appellant, the supreme court reversed and remanded Crisco's conviction because of the

---

[1] Appellant did not include a copy of his notice of appeal in his addendum or abstract, as required under Ark. R. Sup. Ct. 4-2(a)(8) (2002). Only a review of the record reveals that appellant filed a notice of appeal on July 22, 2002. The judgment and commitment order was dated July 18, 2002, and filed July 25, 2002. Pursuant to Ark. R. App. P.—Crim. 2(b)(1) (2002), the appeal is thus timely, albeit not properly documented on appeal.

discrepancies in the officer's and the chemist's descriptions of the controlled substance involved. The officer described the substance as an "off-white powder," while the chemist described the drug as a "tan, rock-like substance." 328 Ark. at 389, 943 S.W.2d at 583. The State, in that case, argued that the officer's identification of the envelope containing the drug was sufficient. *Id.* The supreme court disagreed and held that the State had to do more to establish the authenticity of the drug tested than merely trace the route of the envelope containing the substance. *Id.*

In this case, we hold that the trial court did not abuse its discretion when it admitted the relevant exhibits concerning the marijuana seized in appellant's trunk. The existing discrepancy between the weights given by the police officers and the chemist admittedly is considerable, but the trial court also had before it testimony explaining the difference. The police weighed not only the marijuana, but the bags with all its contents, including some clothes, towels, and a cardboard box. While we would appreciate concrete information before us concerning how much the other items, such as the bags and towels, weighed, apart from the marijuana, we remain mindful of the fact that the State did not need to eliminate every possibility of tampering. *Newman v. State, supra.* The trial court merely had to be satisfied within a reasonable probability that no one had tampered with the evidence. *Id.*

Moreover, we point out that neither *Guydon v. State, supra,* nor *Crisco v. State, supra,* involve comparable facts. In *Guydon,* the police weighed the contraband itself, just as the crime laboratory did later, and the question on appeal essentially became whether the existing weight discrepancy could be explained satisfactorily by the use of different scales in the field and in the laboratory. In the present case, the police weighed everything together with the contraband, while the crime laboratory weighed only the contraband. Furthermore, in *Crisco,* the discrepancy was one of description, not weight. Here, we do not have any such discrepancy. Finally, the particular holding of *Crisco,* namely that the State had to do more to establish the authenticity of the drug tested than merely trace the route of the envelope containing the substance, upon which appellant seems to rely, does not avail him of any relief because the State did do more.

Specifically, the trial court had available the testimony of Detective Humphries who inventoried the bags, sealed the cardboard box containing all the items seized, and locked the evidence up until it was moved to the state crime lab. The chemist testified that the cardboard box was sealed when he picked it up from the laboratory's evidence locker. The trial court also heard testimony to the effect that the police, when inventorying bags containing marijuana bundles, customarily do not open marijuana bundles. Based on the record before us, we are unable to hold that the trial court abused its discretion. Thus, we affirm.

Affirmed.

VAUGHT and CRABTREE, JJ., agree.

Billie TRIPP *v.* C.L. MILLER, Administrator of the Estate of Cathy Ann Miller, *Deceased*, and C.L. Miller, *Individually*

CA 01-365 105 S.W.3d 804

Court of Appeals of Arkansas
Division II
Opinion delivered May 21, 2003

Tom Allen, for appellant.

Leroy Blankenship, for appellee.

WENDELL L. GRIFFEN, Judge. This appeal is from the trial court's refusing to impose a constructive trust on certain real property in favor of appellant Billie Tripp and the trial court's reforming a deed to another piece of real property owned by appellant and another person. We affirm in part and reverse and remand in part.

Appellant and Cathy Miller acquired real property in Independence County, Arkansas, from Charles and Trula Wilson in 1994. Cathy Miller was the daughter of appellee C.L. Miller. The real estate contract did not specify the nature of the tenancy created. The deed conveyed the property to appellant and Cathy Miller as joint tenants with the right of survivorship. The transaction was an escrow agreement whereby the Wilsons deposited a warranty deed with the escrow agent (Citizens Bank) until the purchase price of $23,887.50 was paid.

Appellee and Cathy Miller owned approximately 220 acres of real property located in Stone County, Arkansas, as joint tenants with right of survivorship. Appellee conveyed his interest in the Stone County property to Cathy Miller on July 27, 1995. On August 18, 1995, appellant and Cathy Miller executed a promissory note in favor of Citizens Bank in order to obtain funds with which to build a home on the Independence County property. As security for the note, Cathy Miller mortgaged the Stone County property to Citizens Bank.

Cathy Miller committed suicide on July 5, 1997, and appellee was named administrator of his daughter's estate. On January 20, 1998, Citizens Bank filed a complaint to foreclose the mortgage on the Stone County property. Appellant answered the foreclosure complaint, agreeing that the property should be sold and the indebtedness paid. Appellee filed an answer and cross-complaint, alleging that the deed to the Independence County property should be reformed to provide that Cathy Miller's estate owned an undivided one-half interest. The cross-complaint also

alleged that appellee's home was located on the Stone County property, that he conveyed the Stone County property to his daughter as an estate-planning device, that the mortgage was executed without appellee's knowledge or consent, and that appellant would be unjustly enriched by having the Stone County property foreclosed in order to pay the debt for construction of a residence on the Independence County property. Appellant answered the cross-complaint, alleging that she and Cathy Miller owned the property as joint tenants with right of survivorship and that Cathy Miller promised to convey the Stone County property to appellant as joint tenants with right of survivorship, and denying that appellee was entitled to any relief. Appellant filed a counterclaim against appellee alleging that appellant and Cathy Miller had an agreement to own all of their property jointly and seeking a constructive trust on the Stone County property and on personal property owned by Cathy Miller.

A foreclosure decree was entered. The property was sold to appellee for $41,000. The issues raised by the cross-complaint and counterclaim between appellant and appellee proceeded separately from the foreclosure issues.

Appellant testified that she and Cathy Miller acquired the Independence County property and built a house. She stated that Cathy Miller told the person drafting the contract that title was to be a joint tenancy with right of survivorship. She also said that the first time she saw the deed was when it was delivered to her by the escrow agent. She stated that, although she was the beneficiary of three life insurance policies on Cathy Miller's life, one of the policies would not pay because the death was ruled a suicide and the other two policies paid a total of $43,000. She testified that she used the insurance proceeds to pay a debt to Citizens Bank but not the mortgage on the Stone County property.

Appellant testified that she was asking the court to impose a constructive trust on the Stone County property. She stated that it was unfair for appellee to own the property because that was not what Cathy Miller wanted or what appellee had agreed to. Appellant admitted that there was no contract between appellee and herself or between Cathy Miller and herself. She also admitted that neither appellee nor Cathy Miller made a gift of the property to her. She stated that appellee benefitted from his conveying the

property to Cathy Miller by having the mortgage, taxes, and insurance paid by appellant and Cathy Miller and by having a place to live at no expense to him. Appellant testified that Cathy Miller had told her on two occasions that she (appellant) was her (Cathy Miller's) only heir. She testified that the Stone County property was to be Cathy Miller's and her retirement but that appellee could live on the property until his death. She also testified that the Stone County property was not placed jointly in her name because of problems with her former husband. Appellant testified that, at the funeral home, appellee told her that she was Cathy Miller's only heir and not to worry.

Appellee testified that he voluntarily conveyed the Stone County property to Cathy Miller but that he did not know she had mortgaged it until after her death. He admitted that there were no restrictions on Cathy Miller's ownership. He stated that he knew Cathy Miller and appellant were building the house in Independence County when he conveyed the property to his daughter. He stated that he conveyed the property because his health was bad and he did not want Cathy Miller to have legal problems after his death. He testified that he purchased the property at the foreclosure sale. He also testified that it was possible that he had told appellant that she was Cathy Miller's only heir. He also admitted that Cathy Miller paid off the mortgage, insurance, and taxes on the property. Appellee stated that he did not believe that he should have any interest in the Independence County property but that he should be compensated for the money he expended.

Judy Swaim, a friend of appellant and a co-worker with Cathy Miller, testified that Cathy Miller told her that she (Miller) was going to use the Stone County property to finance construction of the home in Independence County. She also stated that Cathy Miller told her that the place was to be her retirement with appellant. Swaim also confirmed appellant's testimony concerning Cathy Miller's fear of appellant's former husband obtaining an interest in the Stone County property and of the conversation between appellant and appellee at the funeral home after Cathy Miller's death.

The trial court issued a letter opinion on May 1, 2000, and judgment was entered on October 10, 2000. Some of the findings

contained in the letter opinion do not correspond to findings in the judgment, but there is no explanation in the record for the discrepancies. The trial court reformed the deed to the Independence County property to reflect that appellant and Cathy Miller owned the property as tenants in common and not as joint tenants with right of survivorship, as provided in the deed. The judgment found that the contract for purchase joined appellant's and Cathy Miller's name with "and," indicating a tenancy in common. The trial court noted that there is a statutory presumption that a tenancy in common is created unless the contrary is shown. The trial court also relied on the fact that appellant did not know that title to the property was as joint tenants with right of survivorship. The trial court's letter opinion does not discuss the reformation issue. In its letter opinion, the trial court found that appellant should not have to pay appellee for the foreclosure judgment paid by appellee.

However, in the October 10, 2000, judgment, the trial court found that appellant was unjustly enriched by appellee's having paid the foreclosure judgment and appellee was entitled to equitable subrogation. The trial court also found that appellee made a gift of his interest in the Stone County property to Cathy Miller. Further, the trial court found that, although there was life insurance on Cathy Miller's life with appellant as beneficiary, none of those proceeds were used to pay off the mortgage, which was the joint debt of appellant and Cathy Miller. The trial court also found that appellee's purchase of the property at the foreclosure sale in order to save his home resulted in the unjust enrichment of appellant. The court awarded appellee judgment against appellant in the sum of $40,465. The court's letter opinion originally found that appellee voluntarily paid the mortgage and therefore appellant should not have to pay appellee. The trial court also found that appellant did not meet her burden of proving a constructive trust. This appeal followed.

Appellant raises three points on appeal: (1) that the trial court erred in reforming the deed; (2) that the trial court erred in not imposing a constructive trust in favor of appellant; and (3) that the trial court erred in granting appellee a money judgment against appellant.

[redacted] Equity cases are reviewed *de novo* on appeal. *McKay Props., Inc. v. Alexander & Assocs.*, 63 Ark. App. 24, 971 S.W.2d

284 (1998). This court does not reverse a trial court's findings of fact unless they are clearly erroneous. *Id.* Although the imposition of a constructive trust requires clear and convincing evidence of the necessary facts, the test on review is not whether we are convinced that there is clear and convincing evidence to support the trial court's findings but whether we can say that the trial court's finding that the disputed fact was proved by clear and convincing evidence is clearly erroneous. *Betts v. Betts*, 326 Ark. 544, 932 S.W.2d 336 (1996).

For her first point, appellant argues that the trial court erred in reforming the deed to the Independence County property. Appellant and Cathy Miller received a deed to the property in Independence County as "joint tenants with the right of survivorship." The trial court reformed the deed to hold that appellant and Cathy Miller held the property as tenants in common and that the estate of Cathy Miller held an undivided one-half interest in the property. The trial court reasoned that, because the contract for sale provided that appellant's and Cathy Miller's names were joined by "and," it indicated that a tenancy in common was created. The trial court also noted that there is a statutory presumption in favor of a tenancy in common.

■ ■ We hold that the trial court erred in relying on the contract for sale when the deed unambiguously created a joint tenancy with right of survivorship. The general rule is that, in the absence of fraud or mistake, the contract for sale is merged into the deed executed under the contract. *Duncan v. McAdams*, 222 Ark. 143, 257 S.W. 2d 568 (1953). The trial court should not have considered the presumption found in Ark. Code Ann. § 18-12-603 (1987) because that presumption arises only where a deed is ambiguous as to the estate created and the trial court did not find that the deed was ambiguous.

■ ■ Section 18-12-603 is a statute like many throughout the country. At common law, joint tenancy was favored and, where possible, that estate was held to exist. *Ferrell v. Holland*, 205 Ark. 523, 169 S.W.2d 643 (1943). However, in Arkansas, and in many other states, statutes have been adopted that presumptively construe an instrument to create a tenancy in common rather than a joint tenancy. *Id.* These statutes do not prohibit joint tenancies, but merely provide for a construction against a joint tenancy if the

intention to create it is not clear. *Mitchell v. Mitchell*, 263 Ark. 365, 565 S.W.2d 29 (1978); *Metropolitan Life Ins. Co. v. Gardner*, 245 Ark. 742, 434 S.W.2d 266 (1968). A statute such as section 18-12-603 is not an expression of a public policy against joint tenancies but is merely a choice by the legislature of a rule of construction that selects one of two possible interpretations of a provision otherwise ambiguous. *James v. Taylor*, 62 Ark. App. 130, 969 S.W.2d 672 (1998). In the present case, the deed at issue is clear and unambiguous in creating a joint tenancy with right of survivorship. *See Brissett v. Sykes*, 313 Ark. 515, 855 S.W.2d 330 (1995) (holding that whether a survivorship interest was created is to be determined from the four corners of the deed); *James v. Taylor, supra.* Therefore, reliance upon section 18-12-603 is unnecessary. We reverse on this point.

For her second point, appellant argues that the trial court erred in failing to impose a constructive trust in her favor on the Stone County property. A constructive trust is an implied trust that arises by operation of law when equity demands. *Malone v. Hines*, 36 Ark. App. 254, 822 S.W.2d 394 (1992). It is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. *Edwards v. Edwards*, 311 Ark. 339, 843 S.W.2d 846 (1992). The duty to convey the property may arise because it was conveyed through fraud, duress, undue influence or mistake, breach of fiduciary duty, or wrongful disposition of another's property. *Id.* The basis of a constructive trust is the unjust enrichment that would result if the person having the property were permitted to retain it. *Id.* To impose a constructive trust, there must be full, clear, and convincing evidence leaving no doubt with respect to the necessary facts. *Nichols v. Wray*, 325 Ark. 326, 925 S.W.2d 785 (1996). The burden is especially great when title to real estate is sought to be overturned by parol evidence. *Id.*

The argued basis for imposition of a constructive trust in this case is an alleged agreement between appellant and Cathy Miller that they would hold the property acquired during their relationship as joint tenants with right of survivorship. Appellant also alleged that appellee told her after Cathy Miller's death that she was Cathy Miller's only heir and implied that he would convey the property to her. We do not consider this sufficient for

imposition of a constructive trust. Appellee had no obligation, legal, moral, or otherwise, to convey the property to appellant. Further, appellant testified that Cathy Miller had not made a gift of the property to her and that she did not have a contract with Cathy Miller.

We also do not believe that appellant established the existence of a confidential relationship between herself *and appellee*, which is one of the elements of a constructive trust. *See Lucas v. Grant*, 61 Ark. App. 29, 962 S.W.2d 388 (1998). The fact that appellant and Cathy Miller had a confidential relationship is irrelevant to the constructive-trust issue. We affirm on this issue.

In her third issue, appellant argues that the trial court erred in awarding appellee a money judgment against her. In its letter opinion, the trial court originally found that appellant should not have to pay appellee because he would have received any money from the sale of the property in excess of the amount of the mortgage debt. In the judgment, the trial court found that appellant was unjustly enriched by appellee's having paid the mortgage, a joint debt of appellant and Cathy Miller. Appellee took the property by intestate succession as an heir at law of Cathy Miller, subject to the mortgage debt. *See Yeates v. Yeates*, 179 Ark. 543, 16 S.W.2d 996 (1929). If appellee wanted to retain the property, he would have to satisfy the mortgage. A real estate mortgage is extinguished after both the foreclosure of the mortgage and the sale of the mortgaged property. *See* Ark. Code Ann. §§ 18-49-103(c) (Supp. 2001), 18-49-105 (1987); *Pulaski Fed. Sav. & Loan Ass'n v. Woolsey*, 242 Ark. 612, 414 S.W.2d 633, 635 (1967). *See also In re Gordon*, 161 B.R. 459 (Bankr. E.D. Ark. 1993). Because of the foreclosure and sale of the property, the contractual relationship between appellant and Citizens Bank terminated and the debt was extinguished. There was nothing for which appellant could be unjustly enriched. We reverse on this point.

Affirmed in part, reversed and remanded in part.

VAUGHT and CRABTREE, JJ., agree.

Charles R. HUDSON, Jr.; Deborah Tidwell Hudson; and Routh Wrecker Service, Inc. *v.* Keith COOK

CA 02-263 105 S.W.3d 821

Court of Appeals of Arkansas
Division II
Opinion delivered May 21, 2003

[redacted]

[redacted]

Henry Law Firm, P.A., by: *David P. Henry*, for appellants.

Perroni & James, P.A., by: *Patrick R. James*, for appellee.

LARRY D. VAUGHT, Judge. This is an appeal from a Pulaski County Circuit Court jury verdict awarding actual and punitive damages to appellee, Keith Cook, on claims of replevin, conversion, and interference with business and business expectancy.[1] Appellant Charles R. Hudson, Jr. (Hudson Jr.), raises seven points on appeal. The first three assert that the trial court erred in failing to direct a verdict because appellee failed to prove: (1) ownership of the property alleged to have been converted; (2) market value of the property at the time of the alleged taking; (3) lost profits or loss of business expectancy. The next four points deal with the award of punitive damages, alleging that the trial court erred: (4) in instructing the jury on punitive damages under the facts of this case; (5) in failing to direct a verdict with regard to the punitive-damages award; (6) in failing to direct a verdict with regard to the amount of punitive damages awarded as being excessive; (7) in failing to direct a verdict with regard to punitive damages because the amount awarded violates the Fourteenth Amendment's Due Process Clause, which imposes on state courts the Eighth Amendment prohibition against excessive fines and cruel and unusual punishment. An eighth

[1] The original judgment also included an award for damages against Routh Wrecker Service, Inc.; however, no appeal was filed as to that portion of the judgment.

point on appeal has been raised by appellant Deborah Tidwell Hudson asserting that the trial court erred in finding that funds in her possession, as a garnishee in the case, obtained by her to pay Hudson Jr.'s attorney's fees are subject to garnishment by appellee. Finally, appellee cross-appeals the reduction in punitive damages awarded by the trial judge.

While there has been a long-running dispute regarding rights to certain property that has been farmed by Hudson Jr.'s family for many years, the instant case deals with a specific incident that occurred on February 17, 1996. Hudson Jr. owns and operates a marina on the Little Maumelle River in Pulaski County, Arkansas. Part of the marina business is conducted on a segment of a fifty-six-acre tract of real property leased by Hudson Jr. from his stepmother, Glenna Hudson. The balance of the fifty-six-acre tract has for many years been farmed by the Hudson family. In January 1986, Glenna Hudson purchased the property at a commissioner's sale.

Appellee had a close relationship with Hudson Jr.'s father, Hudson Sr., and began helping him farm the fifty-six-acre tract of land in 1992. Appellee alleges that in 1995, he entered into an oral lease to farm that part of the Glenna Hudson property not under lease to Hudson Jr.'s marina. Appellee also states that he purchased a Case 1570 tractor and an International Harvester disc from Hudson Sr. for $30,000 in June 1995 in order to farm the land. He made a down payment of $5000 and agreed to pay Hudson Sr. the balance of the purchase price out of his portion of the crop sales.

A dispute arose over the location of the boundaries between the lease to the marina and that property subject to appellee's farm lease. On February 17, 1996, while discing the farm land, appellee came upon seven stakes located approximately 100-200 feet out in the area that was included in the area that had been farmed since at least 1986. Appellee did not know who had put the stakes there,[2] but he considered them to be on the property he had leased from Hudson Sr., and started discing up the stakes.

Upon noticing appellee's actions, Hudson Jr. drove his truck into the field and blocked appellee's tractor, and a confrontation

[2] The stakes had actually been placed by Ken Clark, a landscape architectural engineer hired by Hudson Jr. to conduct a survey of the fifty-six acres that was needed to begin an expansion of the marina proposed by Hudson Jr.

ensued between the two. Hudson Jr. allegedly jumped on the tractor and verbally and physically attacked appellee, at which point appellee supposedly grabbed a pistol to scare Hudson Jr. off the tractor. Hudson Jr. then reportedly grabbed a rifle, the two exchanged more words, and Hudson Jr. called the sheriff's office. The sheriff responded to the call and eventually arrested appellee. The charges were later dismissed. Hudson Jr. then called Routh Wrecker Service, Inc., and without permission from appellee, had appellee's tractor and disc removed from the property. Appellee subsequently attempted to recover the tractor and disc, but Routh Wrecker Service, Inc., would not release them without payment of towing and storage fees.

The boundary issues were joined in Pulaski County Chancery Court, Case No. 97-3056, and on June 5, 2000, an order was entered. Paragraph five of that order construed the lease agreement to permit farming up to the base of the levee road. On November 26, 1996, appellee filed the original action in this matter, seeking replevin of the tractor and damages against Routh Wrecker Service, Inc. On April 21, 1997, appellee amended his complaint and named Hudson Jr. as an additional defendant. On January 12, 2001, appellee filed a second amended and substituted complaint seeking replevin, damages for conversion, and for interference with business and business expectancy. The matter was tried before a jury on June 20, 2001. Appellee orally dismissed his claim for replevin during the trial. At the close of appellee's case, Hudson Jr. moved for a directed verdict on the basis that appellee failed to establish ownership of the tractor and disc, and that appellee had failed to prove damages. The motions were denied. At the close of the evidentiary part of the trial, Hudson Jr. once again moved for directed verdict on the same bases; again, the motions were denied. The jury returned a verdict against Hudson Jr. for $20,000 on the conversion claim, $15,000 on the claim for interference with business and business expectancy, and $250,000 in punitive damages.[3] Judgment was entered on July 25, 2001.

[3] The jury also returned a verdict in favor of appellee against Routh Wrecker Service, Inc., on the conversion claim and awarded damages in the amount of $10,000 and punitive damages in the amount of $35,000. Routh Wrecker Service, Inc., received a remittitur of punitive damages to $10,000. The remainder of this judgment was not appealed by Routh Wrecker Service, Inc.

On July 31, 2001, Hudson Jr. filed his motion for judgment notwithstanding the verdict, pursuant to Rule 50(b) of the Arkansas Rules of Civil Procedure. On August 22, 2001, the trial court heard and denied the motion, but granted a remittitur as to the punitive damages, reducing them to $200,000. The trial court's written order was signed on August 30, 2001, and entered on September 7, 2001. Hudson Jr. filed his notice of appeal on September 24, 2001. Appellee filed his notice of cross-appeal on September 27, 2001.

Appellee subsequently attempted to enforce the judgement. On September 7, 2001, appellant Deborah Tidwell Hudson was served with a writ of garnishment as a result of Hudson Jr.'s deposition, in which he described his sale to her of his one-half interest in a boat and other personal property, indicating that she had not yet paid him and owed him $12,500. In her responses to the writ of garnishment, Mrs. Hudson denied owing Hudson Jr. any money. At a hearing on October 31, 2001, Mrs. Hudson explained that the money was not owed to Hudson Jr., but rather to his attorney. She testified that $6000 had been paid to Hudson Jr.'s attorney after being served with the writ of garnishment. She added that the purpose of her purchase was to obtain a loan to pay Hudson Jr.'s attorney's fees. The trial court found the funds to be subject to garnishment and entered an order on November 5, 2001, granting appellee judgment against Deborah Tidwell Hudson for $6000. The trial judge also ordered her to produce any checks that she contended were written and deposited related to the remaining balance. She failed to do so, and on November 30, 2001, the trial judge granted appellee judgment against her for the remaining $6500. Deborah Tidwell Hudson filed her notice of appeal on December 5, 2001.

Before reaching the merits of the parties' arguments, we note that appellants abstracted their appeal under the previous abstracting rules and failed to include a number of important documents, including the respective notices of appeal in the addendum. It includes only the July 5, 2001 order, July 25, 2001 order, and the September 7, 2001 order. Accordingly, appellants are not in compliance with Rule 4-2(a)(8) (2002) of the Arkansas Supreme Court and Court of Appeals. We could order rebriefing pursuant to Rule 4-2(b)(3) (2002); however, appellants did abstract the notices and various other documents in their abstract, and the

record reveals that all the notices of appeal are timely for purposes of reviewing the judgments involved in this case.

Direct Appeal

1. Whether the trial court erred in failing to direct a verdict because appellee failed to prove ownership of the property alleged to have been converted

Our standard of review of the denial of a motion for directed verdict is whether the jury's verdict is supported by substantial evidence. *Wal-Mart Stores, Inc. v. Lee*, 348 Ark. 707, 74 S.W.3d 634 (2002). Substantial evidence is that which goes beyond suspicion or conjecture and is sufficient to compel a conclusion one way or the other. *Id.* It is not the appellate court's place to try issues of fact, rather this court simply reviews the record for substantial evidence to support the jury's verdict. *Id.* In reviewing the sufficiency of the evidence as being substantial on appellate review, we need only consider the testimony of the appellee and the evidence that is most favorable to appellee. *Id.* Circumstantial evidence may meet the substantial evidence test. *Id.*

Hudson Jr. argues that because appellee's cause of action was one of trover and conversion, based in tort rather than contract, appellee must first prove by a preponderance of the evidence that he has an ownership interest in the property. *See Dugal Logging, Inc. v. Arkansas Pulpwood Co.*, 66 Ark. App. 22, 988 S.W.2d 25 (1999). Hudson Jr. maintains that appellee produced no written record or other documentation of his ownership of the property in question, but only offered testimony of a "gentlemen's agreement" as to the June 1995 purchase of the tractor and disc from Hudson Sr. However, appellee alleged the existence of a bill of sale and promissory note, but stated that he had left both documents at home.

Hudson Jr.'s stepmother, Glenna Hudson, testified that as far as she knew, the subject property belonged to her husband, Hudson Sr. Additionally, Hudson Jr. asserts that because there was no written proof of appellee's ownership, merely appellee's word against Glenna Hudson's, appellee failed to establish his ownership in the property, which is a critical element of his case. Failure to produce written evidence or documents entirely within

the control of the party with the burden of proof gives rise to an adverse inference that the missing evidence will not support the position advanced. *See McLendon v. Johnson*, 243 Ark. 218, 419 S.W.2d 309 (1967). *See also Smith v. United States*, 128 F. Supp.2d 1227 (E.D. Ark. 2000).

Hudson Jr. also argues that, at most, appellee was entitled to the amount of equity he had in the equipment, or the value of the tractor and disc less the balance of the purchase price left to pay. *See Barham v. Strandridge*, 201 Ark. 1143, 148 S.W.2d 648 (1941). He states that appellee failed to establish the balance due, interest rate, or other terms of the agreement, and accordingly did not establish by a preponderance of the evidence that he had an interest in the equipment in question upon which he could obtain relief.

Appellee argues in response that Hudson Jr. is invading the province of the jury and arguing the weight of the evidence. *See Union Pac. R.R. v. Sharp*, 330 Ark. 174, 952 S.W.2d 658 (1997). He claims that Hudson Jr. even conceded at the hearing that this was an issue of fact that the jury decided against him. Appellee claims that he more than met the substantial evidence test with regard to proving that he is the owner of the equipment. He purchased the same from Hudson Sr. in 1995. It was the equipment that had previously been used to farm the land. He made a $5000 down payment on the $30,000 purchase price. He testified that he saw the bill of sale before purchasing the tractor, and that he actually has the bill of sale for the tractor. Appellee claims that while he was testifying as to the value of the equipment, the trial court *and* Hudson Jr. made it clear that he was testifying as the owner, although now Hudson Jr. maintains appellee did not provide substantial evidence of ownership.

This is a factual issue, and under our standard of review there was sufficient evidence for the question of ownership, and the extent thereof, to go to the jury. Hudson Jr.'s arguments merely go to the weight of the evidence before the jury on this issue. Accordingly, we affirm on this point.

2. Whether the trial court erred in failing to direct a verdict because appellee failed to prove market value of the property at the time of the alleged taking

Hudson Jr. claims that in addition to ownership, appellee was required to prove damages to succeed in his claim of conversion. The measure of damages for the conversion of property in Arkansas is the market value of the property at the time and place of the taking. *JAG Consulting a/k/a Glad Indus., Inc. v. Eubanks*, 77 Ark. App. 232, 72 S.W.3d 549 (2002). Fair market value is defined as the price the personalty would bring between a willing seller and a willing buyer in the open market after negotiations. *Id.* Hudson Jr. asserts that at no time was any evidence given as to the market value of the equipment. Appellee did testify as to the purchase price of the equipment; however, the purchase took place in June 1995, seven to eight months prior to the occurrence in February 1996. Hudson Jr. also claims that because of the "loose, insider-financing" extended to appellee from his friend and mentor, Hudson Sr., the purchase price should not be considered as representative as the true market value. He asserts that while the jury awarded appellee the full purchase price against the two original defendants ($10,000 against Routh Wrecker Service, Inc. and $20,000 against Hudson Jr.), the purchase price was not the proper measure of damages and cites *Dawson v. Temp Plus, Inc.*, 337 Ark. 247, 987 S.W.2d 722 (1999), for the proposition that juries are not allowed to speculate as to market value. Appellee had the burden of proving the fair market value of the equipment in the lower court. Hudson Jr. argues that there was no documentation or other evidence produced as to the value immediately before the alleged taking. He claims that the jury could not have complied with the trial court's instruction to determine the fair market value immediately before the occurrence without engaging in pure speculation.

Appellee asserts that a loss may be determined in any manner which is reasonable under the circumstances. *See Quality Truck Equip. Co. v. Layman*, 51 Ark. App. 195, 912 S.W.2d 18 (1995). Appellee testified that he purchased the equipment from Hudson Sr., for $30,000 in June 1995, that it was converted only eight months later, and that the equipment was in substantially the same condition on the day it was converted as it was on the day he

purchased it. He further testified that Hudson Sr. bought the equipment in 1978 for $49,000, and that in seventeen years it had only lost $19,000 in value. Accordingly, he maintains that it would not have significantly diminished in value over the eight months between his purchase and the conversion. Hudson Jr. did not offer any contradictory evidence as to the value of the equipment at the time of the conversion.

Appellee claims that the measure of damages was not left to speculation or conjecture, but rather his testimony adequately established the amount of damages in relation to the equipment wrongfully converted by Hudson Jr. That testimony, in the absence of contradictory testimony, was sufficient to establish the value of the equipment at the time and place of the conversion. The jury was instructed as to the determination of the market value of the property. Based on our review, there was sufficient evidence for the jury to have reached a decision on this issue, and accordingly we affirm.

3. Whether the trial court erred in failing to direct a verdict because appellee failed to prove lost profits or loss of business expectancy

When a party seeks to recover anticipated profits under contract, he must present a reasonably complete set of figures to the jury and not leave the jury to speculate as to whether there could have been any profits. *See Grand State Mktg. v. Eastern Poultry Dist., Inc.*, 63 Ark. App. 123, 975 S.W.2d 439 (1998). Hudson Jr. maintains that in this case, appellee offered no proof of lost profits other than his undocumented testimony that he made somewhere between $2500 and $3000 the previous year. Appellee admitted that he kept no records, that the previous year's crop was sold in Hudson Sr.'s name, and that he did not report the income on his income taxes or even tell his wife about the alleged income. Hudson Jr. asserts that appellee pulled the numbers "from thin air," and without documentary evidence and a complete set of figures, there was no basis from which he could refute the claim for damages. He claims that appellee did not sustain his burden of proof with respect to lost profits and business expectancy and requests that the award to these elements of damage be set aside on the grounds that it was based on pure speculation.

Appellee testified, without objection, as to the lost profits and business. The disputed land consists of fifty-six acres of farm land. Based upon his experience, appellee maintains that the land in question would ordinarily yield 2000 bushels of soybeans per acre. In February 1996 and thereafter, the price of soybeans was approximately six dollars per bushel. Appellee testified that in farming the land in question, costs would typically run between $4000 and $5000 per year, including fuel, herbicides, oil filters, tires, bearings, grease, maintenance, etc.

The farming agreement between appellee and Hudson Sr. provided that twenty-five percent of the profits from the crop would go to Hudson Sr. Multiplying six dollars by 2000 bushels would result in $12,000 in proceeds from the sale of the crop. Hudson Sr.'s twenty-five percent ($3000) was taken out of the proceeds prior to accounting for the $4000 or $5000 in expenses. After paying Hudson Sr., and paying other expenses, appellee estimated that he made between $2500 to $3000 per year and that he made approximately that amount in 1995. Appellee asserts that he in fact has provided adequate evidence of damages under the holding in *Grand State Mktg, supra.* Where it is reasonably certain that profits would have resulted, then the complaining party is entitled to recover lost profits. *Id.* Hudson Jr. failed to present evidence that the land would not have yielded the amount of soybeans estimated by appellee or for a different price. The loss may be determined in any manner which is reasonable under the circumstances. *Id.* We hold that appellee's testimony was sufficient evidence to support the jury's finding and affirm.

4. Whether the trial court erred in instructing the jury on punitive damages under the facts of this case

Hudson Jr. contends that the mere assertion of the conversion of personal property does not automatically permit a punitive-damages instruction. Appellee was required to show an intentional exercise of control or dominion over the converted property for the purpose of violating the owner's right to the property, or for the purpose of causing damages. *See City Nat'l Bank of Ft. Smith v. Goodwin*, 301 Ark. 182, 783 S.W.2d 335 (1990).

However Hudson, Jr. failed to object to the punitive-damages instructions being given during the jury-instruction con-

ference. It is well-settled that no party may assign as error the giving or failing to give an instruction unless he objects thereto before or at the time the instruction is given, stating distinctly the matter to which he objects and the grounds of the objection. *Union Pac. R.R. Co. v. Sharp*, 330 Ark. 175, 952 S.W.2d 658 (1997). Accordingly, the alleged error was not preserved and will not be considered on appeal.

5. Whether the trial court erred in failing to direct a verdict with regard to the punitive-damages award

Under Arkansas law, an award of compensatory damages must exist before punitive damages can be awarded. *See Hale v. Ladd*, 308 Ark. 567, 826 S.W.2d 244 (1992). Additionally, it has been held that in the absence of an award for compensatory damages, punitive damages are barred, even where compensatory damages were suffered. *Bell v. McManus*, 294 Ark. 275, 742 S.W.2d 599, *opinion supplemented on denial of reh'g*, 294 Ark. 278-A, 745 S.W.2d 140 (1998). Hudson Jr. contends that appellee failed to offer sufficient proof to sustain the award of compensatory damages as discussed under points (2) and (3) herein; and accordingly, if we reverse on those points, an award of punitive damages would be barred, and the jury's award should be overturned. Conversely, appellee contends that the punitive-damages award is supported by both the damage award for conversion and the damage award for interference with business and business expectancy. He maintains that he did establish a basis for the award of punitive damages. Because we affirm on points (2) and (3), we hold that the punitive-damages award is supported by the award for compensatory damages.

6. Whether the trial court erred in failing to direct a verdict with regard to the amount of punitive damages awarded as being excessive

In applying the test for excessiveness, this court makes a case-by-case determination, and the award of punitive damages may be reduced if the verdict shocks the conscience of the court or demonstrates that the jurors were motivated by passion or prejudice. *Harold McLaughlin Reliable Truck Brokers, Inc. v. Cox*, 324 Ark. 361, 922 S.W.2d 327 (1996). Hudson Jr. maintains that the award in this case is grossly disproportionate to the gravity of

the dispute, as well as to the conduct of the parties at the time of the occurrence. He claims that, at worst, he was mistaken as to the boundary of his leasehold, but any such mistake was made in good faith. Appellee asserts that Hudson Jr. could not have been mistaken about the boundary lines because the same fifty-six acres had been farmed by appellee and Hudson Sr., for years. He claims that Hudson Jr.'s argument that he made a mistake in good faith is clearly contrary to the evidence.

When reviewing an award of punitive damages, the court considers the extent and enormity of the wrong, the intent of the party committing the wrong, all the circumstances, and the financial and social condition and standing of the erring party. *United Ins. Co. of America v. Murphy*, 331 Ark. 364, 961 S.W.2d 752 (1998). Punitive damages are a proper assessment for conduct that is malicious or done with the deliberate intent to injure another. Appellee claims that Hudson Jr.'s "worst" conduct was not a mistake regarding property lines, but rather the physical and verbal attacks he waged against him, and maliciously converting appellee's tractor and disc. Hudson Jr. counters that there is no claim for damage for any of the conduct described herein by appellee, except for the conversion of the equipment. He maintains, that assuming *arguendo*, his actions in having the tractor and disc moved were in bad faith, the punitive-damages award must be limited to those acts, and not any other conduct allegedly directed toward appellee. He claims that appellee sought no damage award for any of the conduct set forth in appellee's argument supporting the punitive-damages award.

Our supreme court has followed a two-step analysis in determining punitive-damages issues: (1) determine whether the award of punitive damages is excessive under state law; and (2) consider the award in light of the due process analysis in *Gore*. *Routh Wrecker Serv., Inc. v. Washington*, 335 Ark. 232, 980 S.W.2d 240 (1998) (discussing *BMW of North America v. Gore*, 517 U.S.559 (1996)). We have held that when there is an issue of excessiveness, we will review the proof and all reasonable inferences in the light most favorable to the appellee. *Id.* There is no evidence demonstrating that the punitive-damages award "shocked the conscience" of the court or that the jury was motivated by passion or prejudice; accordingly, we affirm on this point.

7. Whether the trial court erred in failing to direct a verdict with regard to punitive damages because the amount of punitive damages awarded violates the Fourteenth Amendment's due process clause, which imposes on state courts the Eighth Amendment prohibition against excessive fines and cruel and unusual punishment

Hudson Jr. asserts that this issue is one of first impression in Arkansas, and that it is founded in the recent U.S. Supreme Court decision, *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 524 U.S. 424 (2001). That case held that a jury award of punitive damages is not a finding of fact, but rather an expression of moral condemnation. The Court further stated that requiring a de novo review of the jury award to protect due process concerns is proper.

In *Cooper Indus., supra*, the Court construed the Eighth Amendment to the U.S. Constitution, and set forth three factors to be considered in determining whether a punitive-damages award violates the prohibition against excessive fines and cruel and unusual punishment. They are:

> (1) the degree of the defendant's reprehensibility or culpability;
> (2) the relationship between the penalty and the harm; and
> (3) the sanctions imposed in other cases for comparable misconduct.

Cooper Indus., 524 U.S. at 440. Hudson Jr. asserts that the worst that could have been expected to happen by his actions was that appellee would have to pay the wrecker and storage bill, the initial cost of which was approximately $1100. He maintains that appellee's decision to "stand on principle" and allow those storage fees to accumulate cannot be attributed to any malicious or wrongful intent on his part. Hudson Jr. asserts that appellee chose not to mitigate his damages by claiming the equipment he alleges he owns, but rather to purposely allow his damages to increase, and that these facts cannot justify an award of punitive damages in the amount of $250,000 under the guidelines in *Cooper Indus., supra.*

Appellee addresses each of the factors set forth in *Cooper Indus., supra*, the first being the degree of the defendant's reprehensibility or culpability. He argues that Hudson Jr.'s actions were intentional and premeditated, and that the degree of reprehensibility was great, therefore justifying the amount of punitive damages.

Appellee also asserts that the second factor, the relationship between the penalty and the harm caused to appellee by Hudson Jr.'s actions, also weighs in his favor. He maintains that the $250,000 punitive-damages award compared to the harassment and torment inflicted upon him, his loss of business and business expectancy, and the conversion of the equipment is not excessive. In *BMW of North America v. Gore, supra*, the U.S. Supreme Court looked at the ratio between the punitive and compensatory damages awards and reversed where that ratio was 500:1, respectively. In the instant case, however, the ratio between the punitive-damages award of $250,000 and the compensatory damages award of $35,000 was approximately 7:1. Appellee cites several Arkansas cases allowing punitive-damages awards to stand where the ratio in question was higher than in the instant case. *See Routh Wrecker Serv., Inc. v. Washington, supra* (finding a 75:1 ratio not to be excessive); *Carter v. Carter*, 311 Ark. 627, 846 S.W.2d 173 (1993) (upholding an award of 17.5:1); *Wortman v. Shipman*, 293 Ark. 253, 737 S.W.2d 438 (1987) (validating a jury award with a ratio of 40:1); *First Nat'l Bank of Brinkley v. Frey*, 282 Ark. 339, 668 S.W.2d 553 (1984) (affirming an award where the ratio was 70:1); and *Ray Dodge, Inc. v. Moore*, 251 Ark. 1036, 479 S.W.2d 518 (1972) (affirming an award where the ratio was 14:1). The approximate 7:1 ratio in this case is well within the acceptable range when reviewing this particular factor under *Cooper Indus., supra*, and also falls within the range most recently set forth by the United States Supreme Court in *State Farm v. Campbell*, 538 U.S. 408 (2003) (holding that in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process).

Appellee maintains that Hudson Jr. failed to offer any authority that this award was excessive as compared to sanctions imposed in other cases for comparable misconduct, the third factor in *Cooper Indus., supra*. He claims the facts in this case are different from most conversion cases. He cites *Ford Motor Credit Co. v. Herring*, 267 Ark. 201, 589 S.W.2d 584 (1979), where the supreme court held that a punitive-damages award of $17,000, with a ratio of 8.5:1, was not excessive. The court stated that the act of not returning property was a fact question on punitive damages that was properly submitted to the jury. Appellee further contends that the *Ford Motor Credit Co.* case involved neither the

long history of confrontation between the parties nor the severity of conduct on the part of the appellant, as was present in this case. He further supports his argument for the punitive-damages award by reminding the court of Hudson Jr.'s disturbing and culpable actions over the years, which culminated in his actions in this particular case. Under the factors set forth in *Cooper Indus., supra*, we hold that the punitive-damages award does not violate the prohibition against excessive fines and cruel and unusual punishment.

8. Whether the trial court erred in finding that funds in the hands of a garnishee obtained to pay a judgment debtor's attorney's fees are subject to garnishment by the judgment creditor

For the final point on direct appeal, appellant Deborah Tidwell Hudson addresses the finding of the trial court that $12,500 in loan proceeds obtained by her were subject to garnishment. Subsequent to the entry of the judgment in the case, Hudson Jr. transferred certain personal property to his wife, in order that she would be able to obtain a loan to pay his attorney's fees. The money was to be paid directly to his attorney. Appellee argued that the loan proceeds were subject to garnishment because they were still in the hands of Deborah Tidwell Hudson at the time the writ of garnishment was served upon her. The trial court agreed and directed her to pay the proceeds to appellee.

Deborah Tidwell Hudson asserts that the law on garnishments is well founded in Arkansas. She states that where a tenant of a building sublets a portion of the premises and assigns the rent due from the sub-tenant to retire a debt, the rent in the hands of the sub-tenant is not subject to garnishment by another creditor or the tenant to whom the funds have been assigned. *See Samstag v. Orr*, 101 Ark. 582, 142 S.W.1127 (1912). Similarly, she states that where there was an agreement by which a defendant sold oil leases to a garnishee under circumstances in which the garnishee was to make payment to the defendant's creditors, but the proceeds were not to be paid to the defendant, it was held that the garnishment did not capture the proceeds of the sale in the hands of the garnishee. *Gibson v. Arkansas So. Prod. Co.*, 230 Ark. 115, 320 S.W.2d 932 (1959) (holding that a garnishment does not reach a debt a garnishee owes to a defendant when the proceeds have been assigned to another).

Deborah Tidwell Hudson maintains that none of the loan proceeds obtained by her were to be paid to Hudson Jr. Therefore, she argues they were obtained in constructive trust, and it was her obligation to pay the attorney's fees, either as trustee or by virtue of Hudson Jr.'s assignment of his rights in the property to her, in consideration of her assumption of the debt to his attorney. She claims that the garnishment of the court does not reach such previous assignments, *see Saunders v. Adcock*, 249 Ark. 856, 462 S.W.2d 219 (1971), and that that portion of the judgment should be set aside.

Appellee argues that appellants have failed to cite any jurisdictional basis through which to include this argument as part of the appeal. He submits that we should not consider this issue at the present time because Deborah Tidwell Hudson, garnishee, is not a party to this action, and because appellants failed to abstract the order and judgment regarding the garnishment as well as the entire garnishment hearing. By virtue of the garnishment proceedings filed in this case under the same case number, along with Deborah Tidwell Hudson's appearance and participation in those garnishment proceedings, she is in fact a party to this action. Furthermore, all relevant pleadings are contained in the record, and we may go to the record to affirm. *Smith v. Aluminum Co. of America*, 78 Ark. App. 15, 76 S.W.3d 909 (2002).

In the alternative, appellee states that Hudson Jr.'s argument must fail as a matter of law. Arkansas Code Annotated section 16-110-101 states in pertinent part:

> [t]he plaintiff in a civil action . . . . may have an attachment against the property of the defendant . . . . as a security for the satisfaction of such judgment as may be recovered . . . . (1)(A) [i]n an action for the recovery of money, where the action is against a defendant who . . . . (vii) [h]as sold, conveyed, or otherwise disposed of his property, or suffered or permitted it to be sold, with the fraudulent intent to cheat, hinder, or delay his creditors.

Ark. Code Ann. § 16-110-101 (2002). Additionally, Ark. Code Ann. § 16-110-102(a)(1) (2002) provides in pertinent part that, "whenever, in a civil action, the plaintiff shall have reason to believe that any other person is indebted to the defendant or has in his hands or possession goods or chattels, moneys, credits, and

effects belonging to the defendant, the plaintiff may sue out a writ of garnishment."

An appellate court will not reverse a trial court's finding of fact unless it is clearly erroneous. *Troutman Oil Co. v. Lone*, 75 Ark. App. 346, 57 S.W.3d 240 (2001). A finding of fact is clearly erroneous when, although there is evidence to support it, the appellate court is left, on reviewing the entire evidence, with the firm conviction that a mistake has been made. *Burmeister v. Richman*, 78 Ark. App. 1, 76 S.W.3d 912 (2002).

Appellee maintains that whether the funds were assigned to Hudson Jr.'s counsel before the writ of garnishment was served on Deborah Tidwell Hudson is a question of fact that will only be reversed if the trial court clearly erred. Hudson Jr. testified in his deposition in aid of execution of the judgment that he had not been paid for the transfer of property to his wife and that she owed him $12,500. Appellee's counsel had a writ of garnishment served on his wife while the deposition was still proceeding. There was no contradictory evidence that any of the funds were paid before the writ of garnishment was served. Deborah Tidwell Hudson testified at the hearing that one of the checks to Hudson Jr.'s counsel was "probably after September 7th when I was served with the writ of garnishment . . . . [t]hat one would be for $6,000."

Appellee maintains that it is clear that the trial court did not err in directing the garnishee to pay these funds to him. Without adequate proof that the money was assigned to Hudson Jr.'s counsel for payment of his debt prior to the writ of garnishment being served, we must affirm the trial court's decision. That is where the facts of the instant case differ from those cited by Hudson Jr. In *Samstag* and *Gibson, supra*, there were formal assignments to the other creditor before the garnishment of the funds in question. Here, Hudson Jr. offered no proof that the funds were formally assigned to his counsel. We affirm.

Cross-Appeal

Whether the trial court erred in issuing the remittitur on punitive damages

This court has held that generally, when a plaintiff elects to accept a reduction in his verdict after the trial court has

found the verdict to be excessive, he is bound by that decision and may not appeal. *See Farmers & Merchants Bank v. Deason*, 25 Ark. App. 152, 752 S.W.2d 777 (1988). However, a plaintiff's election to accept the trial court's conditional order by consenting to the remittitur does not bar the plaintiff from cross-appealing when the defendant appeals. *Id.* A remittitur is within the inherent power of the court if an award is grossly excessive or appears to be a result of passion or prejudice. *McNair v. McNair*, 316 Ark. 299, 870 S.W.2d 756 (1994). The reviewing court will reverse a remittitur if the punitive-damages award is supported by evidence and does not shock the conscience of the court. *Id.*

When considering the issue of remittitur of punitive damages, the appellate court reviews the issue de novo. *Routh Wrecker Serv., Inc. v. Washington, supra.* The reviewing court considers the extent and enormity of the wrong, the intent of the party committing the wrong, all of the circumstances, and the financial and social condition and standing of the erring party. *Id.* Where, in light of the evidence, the jury could have concluded that an appellant displayed a conscious indifference for appellee and that his acts were done with the deliberate intent to injure, the amount of punitive damages will not shock the conscience of the court. *Ellis v. Price*, 337 Ark. 542, 990 S.W.2d 543 (1999). The reviewing court can restore the jury's verdict or reduce it. *Morrison v. Lowe*, 274 Ark. 358, 625 S.W.2d 452 (1981).

Appellee submits that the $250,000 punitive-damages award against Hudson Jr. was not grossly excessive and was not the result of passion or prejudice. In *O'Neal Ford, Inc. v. Davie*, 299 Ark. 45, 770 S.W.2d 656 (1989), the supreme court reversed a trial court's order of remittitur because the trial judge had stated that he was only "mildly surprised by the amount." In the instant case, the trial judge stated that he considered the punitive-damages award "a little excessive." Appellee maintains that this neither meets the "grossly excessive" standard nor "shocks the conscience of the court." We hold that this is much more like the "mildly surprised" comment made by the judge in *O'Neal Ford, supra*, and in light of the applicable standard, it justifies a reversal of the remittitur. We therefore reverse on cross-appeal, and remand for the trial court to reinstate the original punitive-damages award of $250,000.

Additionally, on August 6, 2002, appellee filed a motion for $585 in costs associated with his submission of a supplemental abstract and addendum. We hereby grant the motion in the amount of $100.

Affirmed on direct appeal; reversed and remanded on cross-appeal.

GRIFFEN and CRABTREE, JJ., agree.

WALDRON NURSING CENTER, INC. *v.*
ARKANSAS DEPARTMENT OF HUMAN SERVICES,
Office of Long Term Care

CA 02-946 105 S.W.3d 781

Court of Appeals of Arkansas
Division II
Opinion delivered May 21, 2003

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., by: *Debby Thetford Nye, Marsha Talley Ballard*, and *Amy Jackson Dunn*, for appellant.

David S. Long, for appellee.

TERRY CRABTREE, Judge. The appellant in this case brings this appeal from the circuit court's order finding substantial evidence to support a hearing officer's recommended findings of fact and conclusions of law. Because the record contains no final agency decision for us to review, we dismiss the appeal.

Appellant, Waldron Nursing Center, Inc., is located in Waldron, Arkansas, and is a Medicaid-certified, long-term care facility that is licensed by appellee, the Arkansas Department of Human Services. On October 6, 2000, a surveyor from the department's Office of Long Term Care conducted an inspection of appellant's facility after receiving complaints following the death of a resident. As a result of the inspection, a Statement of Deficiencies was issued in which it was found that appellant had violated a number of regulations. The department then sanctioned appellant by

imposing a civil money penalty in the amount of $4,000, by denying Medicaid payments for new admissions to the facility from October 18, 2000, through October 20, 2000, and by terminating the facility's nurse-aid training program. Appellant contested these sanctions by sending a request for a hearing to the Director of the Department of Human Services. The Director then appointed a hearing officer to conduct a hearing.

On March 12, 2001, the hearing officer issued a "Recommended Decision," which contained findings of fact and conclusions of law that upheld both the determination that appellant was not in compliance with certain regulations, and the civil money penalty of $4,000. The hearing officer forwarded her recommendation to the Director of the Department of Human Services.

On May 11, 2001, appellant filed a petition for judicial review in the Pulaski County Circuit Court. The circuit court, after hearing the parties' arguments and receiving briefs, entered an order finding that there was substantial evidence to support the hearing officer's recommended decision. This appeal followed.

It is well settled that 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. *Cave City Nursing Home, Inc. v. Ark. Dep't of Human Servs.*, 351 Ark. 13, 89 S.W.3d 884 (2002). Conspicuously absent from the record, however, is any final decision made by the agency for us to review.

In its petition for judicial review filed in circuit court, appellant referenced Ark. Code Ann. § 20-10-303 (Supp. 2001) as setting out the governing procedure. That statute provides in pertinent part that:

> (a) The Long-Term Care Facility Advisory Board created in § 20-10-301 shall have the power to hear all appeals by licensed long-term care facilities, long-term care administrators, or other parties regulated by the Office of Long-Term Care with regard to *licensure and certification.*
>
> (b)(1) Any long-term care facility or party regulated by the Office seeking a hearing before the board shall submit a request in writing to the *chairman of the board.* The written request, until denied by the chairman, shall stay the action of the appeal pending the hearing and final decision.

> (2) Upon receiving a written request for a hearing from any party regulated by the office, the chairman shall place the request on the agenda to be considered in a hearing at the next or called meeting of the board and may assign the appeal to an impartial hearing officer who shall not be a full-time employee of the Department of Human Services.
>
> (3)(d) The hearing officer may preside over the appeal, which shall be conducted in accordance with the Arkansas Administrative Procedure Act, § 25-15-201 et seq., and make specific findings of fact and conclusions of law in the form of recommendations to the board.
>
> (f)(1) All decisions rendered by the Board shall be submitted to the *Deputy Director of the Division of Medical Services of the Department of Human Services*, subject to his review and final determination. The deputy director may, for good cause, approve, reject, or remand the decision to the board for further proceedings.
>
> (g) The deputy director must act on a decision of the board within thirty (30) days of its decision or else the decision of the board shall be final.

In its petition for judicial review, appellant stated that it was "unclear" when the time for filing an appeal to circuit court had run because the hearing officer had transmitted her recommended decision directly to the Director of the Department of Human Services rather than to the board, thereby bypassing the step in which the board makes and submits its decision to the deputy director. Appellant then stated that "[i]n the event that the time for filing an appeal to this Court began to run when the thirty (30) days expired for the Deputy Director to act on the Board's decision, the Petitioner is timely filing this appeal within thirty (30) days from the date that the recommended decision may have become final by virtue of Ark. Code Ann. § 20-10-303."

In its response to the petition for judicial review, appellee stated that appellant's reliance on the procedures outlined in Ark. Code Ann. § 20-10-303 was misplaced because appellant had appealed the civil monetary penalty, but not the deficiency findings, as reflected by appellant's initial request for a hearing made to the Director of the Department of Human Services, as opposed to sending the request to the Chairman of the Long-Term Care Facility Advisory Board. Appellee, nevertheless, agreed that appellant's appeal to circuit court was timely.

Although appellee did not cite the statute governing appeals of civil monetary penalties, undoubtedly it was referring to Arkansas Code Annotated section 20-10-208(a)(1) (Repl. 2000), which provides as follows:

> A licensee may contest an *assessment of a civil penalty* by sending a written request for hearing to the *Director of the Department of Human Services*. The director shall designate a hearing examiner who shall preside over the case and make findings of fact and conclusions of law in the form of a recommendation *to the director*, who shall then review the case and make the final determination or remand the case to the hearing examiner for further findings of law or fact.

We need not decide whether the provisions of either § 20-10-303 or § 20-10-208 apply in this case because neither procedure was fully utilized. With regard to § 20-10-303, the hearing officer's recommended findings were never forwarded to the board. Consequently, the board was not called upon to render any decision with regard to the hearing officer's recommendation. Obviously, since the board did not render a decision, there was no decision to be submitted to the deputy director; therefore, the deputy director's failure to act could not possibly result in a final decision pursuant to § 20-10-303(g). As for § 20-10-208, the hearing officer's recommendation was submitted to the Director; however, there is nothing in the record to indicate that the Director made any final determination with respect to the hearing officer's recommendation. Unlike § 20-10-303, § 20-10-208 contains no provision for a decision to become final due to inaction. As a consequence of non-compliance with either statute, no final agency decision has been made in this case, or the record does not reflect that one has been made.

The rule is well-established that a litigant must exhaust his administrative remedies before instituting litigation to challenge the action of the administrative agency. *Ark. Motor Vehicle Comm'n v. Cantrell Marine*, 305 Ark. 449, 808 S.W.2d 765 (1991). It has repeatedly been held that the failure to exhaust administrative remedies is grounds for dismissal. *Romine v. Dep't of Environmental Quality*, 342 Ark. 380, 40 S.W.3d 731 (2000). Subject-matter jurisdiction is a defense that cannot be waived by the parties at any time, nor can it be conferred by the parties' consent. *Douglas v. City of Cabot*, 347 Ark. 1, 59 Ark. App. 430 (2001). In this case, appellant sought judicial review before a final agency decision was made.

Accordingly, the circuit court never acquired jurisdiction. *Milligan v. Burrow*, 52 Ark. App. 20, 914 S.W.2d 763 (1996). We dismiss the appeal. *See Douglas v. City of Cabot, supra.*

Dismissed.

GRIFFEN and VAUGHT, JJ., agree.

AVAYA (Lucent Technologies) & Reliance National Insurance *v.* Cleaster BRYANT

CA 02-1122 105 S.W.3d 811

Court of Appeals of Arkansas
Division III
Opinion delivered May 21, 2003

Roberts, Roberts & Russell, P.A., by: *Bud Roberts*, *Bruce D. Anible*, and *John D. Webster*, for appellant.

Kenneth A. Olsen, for appellee.

ANDREE LAYTON ROAF, Judge. This is an appeal from the Workers' Compensation Commission's order affirming and adopting the Administrative Law Judge's decision, which found that appellee Cleaster Bryant was entitled to a 15% whole body physical impairment rating for his compensable shoulder injury. On appeal, appellant Avaya (Lucent Technologies) challenges the manner in which Bryant's physician used the AMA *Guides* in calculating his impairment rating and argues that the Commission's decision in respect to these calculations is not supported by substantial evidence. We affirm.

On June 29, 1999, while employed by Avaya as a repairman, Bryant injured his shoulder when loading a control box onto a truck. In his deposition, Bryant stated that the control box started to fall, and as he was trying to catch it, he felt something pop in his right shoulder. Bryant was diagnosed with a rotator cuff tear and underwent arthroscopic surgery by Dr. Jimmy Tucker on July 26, 1999, to repair the tear. Bryant was released to full duty approximately six months later. After he continued to experience pain in his shoulder, Bryant was referred to Dr. David Collins in August 2000. In his office note of August 28, 2000, Dr. Collins stated that Bryant had a failed rotator cuff repair and that he was also symptomatic with acromioclavicular arthrosis. Bryant underwent a second surgery on his right shoulder in October 2000 to repair the failed rotator cuff. In addition, Dr. Collins performed an arthrotomy of the acromioclavicular joint ("AC joint") and a distal clavicle excision. Avaya accepted Bryant's injury as compensable and paid for all of his medical treatment related to the injury, as well as temporary total disability benefits. On February 28, 2001, Dr. Collins stated in an office note:

> There is no change in the physical appearance of the shoulder. There is very mild crepitation, although his range of motion with

> assist is nearly full. He has 4+}/5 external rotation power, 5/5 deltoid and subscapularis.
>
> Mr. Bryant has reached maximum medical improvement following a work-related injury to the right shoulder. He has sustained permanent partial impairment on the basis of injury to the rotator cuff, acromioclavicular joint, and surgical treatment of the shoulder environment. This would include alteration of the deltoid process, acromion process, coracoacromial ligament, rotator cuff, greater tuberosity, and acromioclavicular joint. Impairment is equal to 25% to the upper extremity, equal to 15% to the body as a whole.
>
> Mr. Bryant is released to activities without restriction. He will be seen as needed.

Bryant made a claim for permanent partial disability benefits in the amount of 15% to the body as a whole, and Avaya controverted the rating, contending that it was excessive. The matter was submitted to the ALJ without a hearing on stipulated facts, briefs, medical exhibits, and Bryant's deposition. The parties stipulated that Bryant sustained a compensable shoulder injury on June 29, 1999, and that he earned an average weekly wage sufficient to entitle him to $303 for temporary total disability benefits and $227 for permanent partial disability benefits. In his deposition, Bryant stated that he had returned to work after being released without restrictions on February 28, 2001, and that he was performing the same type of job. Bryant further stated that he had not had any subsequent problems with his shoulder, that he was not currently taking any medications, and that he could perform his job without any problems.

In its brief, Avaya argued that the 15% impairment rating was invalid and excessive because Dr. Collins failed to properly calculate the extent of Bryant's disability in accordance with the AMA's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) ("AMA *Guides*"). Avaya contended that a 15% impairment rating to the body as a whole is only appropriate for a 100% loss of function of the AC joint of the shoulder, according to the AMA *Guides*, and that the evidence showed that Bryant has had no residual problems with his shoulder since his release by Dr. Collins. Using the AMA *Guides*, Avaya calculated its own impairment rating based on the objective medical findings and alleged that Bryant was entitled to a maximum impairment rating of 6.6% for his shoulder injury.

In its decision of December 19, 2002, the ALJ disagreed with Avaya's argument and found that the 15% impairment rating assessed by Dr. Collins was not excessive. The ALJ noted that Bryant had to undergo two different surgeries to repair his shoulder injuries and that Dr. Collins was an orthopedist, whose specialty is the treatment of shoulder injuries and who has an excellent reputation in the orthopedic community. Avaya then appealed to the Commission, who affirmed and adopted the ALJ's findings of fact. The Commission also discussed Avaya's calculation of its impairment rating pursuant to the AMA *Guides* and disagreed with its method. The Commission calculated its own impairment rating and concluded that the objective medical findings warranted an impairment rating of 19%, according the AMA *Guides*. Because this rating was in excess of that assessed by Dr. Collins and requested by Bryant, the Commission found that the 15% impairment rating awarded by the ALJ was not excessive. Avaya now appeals from this ruling.

On appeal, Avaya argues that the decision of the Commission that Bryant was entitled to a 15% impairment rating to the body as a whole is not supported by substantial evidence. When reviewing a decision of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission. *Rice v. Georgia Pacific Corp.*, 72 Ark. App. 148, 35 S.W.3d 328 (2000). This court must affirm the decision of the Commission if it is supported by substantial evidence. *Id.* Substantial evidence is that evidence which a reasonable mind might accept as adequate to support a conclusion of the Commission. *Id.* The issue on appeal is not whether the appellate court might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, the appellate court must affirm its decision. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999).

Any determination of the existence or extent of physical impairment must be supported by objective and measurable physical findings. Ark. Code Ann. § 11-9-704(c)(1)(B) (Repl. 2002). Pursuant to Ark. Code Ann. § 11-9-522(g)(1) (Repl. 2002), the Commission must adopt an impairment rating guide to be used in the assessment of anatomical impairment, and the

Commission has adopted the AMA *Guides* to be used in this assessment. Arkansas Workers' Compensation Commission Rule 34. The Commission is authorized to decide which portions of the medical evidence to credit and to translate this medical evidence into a finding of permanent impairment using the AMA *Guides*. *Polk County v. Jones*, 74 Ark. App. 159, 47 S.W.3d 904 (2001). Thus, the Commission may assess its own impairment rating rather than rely solely on its determination of the validity of ratings assigned by physicians. *Id.*

Avaya argues on appeal, as it did before the Commission, that the 15% impairment rating assigned by Dr. Collins is excessive based on the objective medical evidence, and it has again calculated its own rating by applying the AMA *Guides* to the medical findings. A discussion of Avaya's method of calculating its impairment rating is necessary for a resolution of its argument on appeal.

The AMA *Guides* provide the following summary of steps for evaluating impairment to the shoulder: "Determine upper extremity impairments due to *loss of motion* (Section 3.1j, p. 41) and *other disorders* (Section 3.1m, p. 58) and *combine* the values to determine the upper extremity impairment involving the shoulder region." AMA *Guides*, p. 66. Finding that there is no basis for an assessment of permanent impairment due to loss of motion, Avaya calculates all of Bryant's impairment to his shoulder under Section 3.1m of the AMA *Guides*, which discusses other disorders involving the upper extremity. The impairments under Section 3.1m are evaluated separately, and "appropriate impairment percents from Tables 19 through 30 are multiplied by percents from Table 18" representing the impaired parts. *Id.* at 58. "Appropriate impairment percents are combined with other impairment percents using the Combined Values Chart (p. 322)." *Id.* Table 18 provides a 25% upper extremity impairment and a 15% whole person impairment for 100% loss of function of the AC joint of the shoulder.

Using Table 27 of Section 3.1m, which provides for impairment of the upper extremity after arthroplasty of specific bones and joints, Avaya asserts that Bryant is entitled to an impairment rating of 24% to the joint for a total shoulder resection arthroplasty and 10% for a distal clavicle resection arthroplasty. Avaya then refers to the Combined Values Chart and finds that these ratings combine to produce a 32% impairment rating to the joint. Avaya then multi-

plies this 32% rating by the 15% whole person rating provided in Table 18 for total loss of function of the AC joint and concludes that Bryant should be assessed a permanent impairment rating of 4.8% to the body as whole as a result of the arthroscopy and distal clavicle excision. Due to Dr. Collins's finding that Bryant also suffers from "very mild crepitation," Avaya also refers to Table 19, which provides for impairment from joint crepitation. However, because the lowest rating in Table 19, which is 10% impairment, only applies to "mild crepitation," Avaya contends that Bryant is not entitled to any degree of permanent impairment for this condition. In the alternative, if Bryant is entitled to permanent impairment for his very mild crepitation, Avaya argues that this 10% impairment combined with the other impairments results in a 39% impairment rating to the joint. When multiplied by the 15% rating in Table 18, this 39% impairment to the joint results in a rating of 5.9% to the body as a whole. Therefore, Avaya contends that Bryant is not entitled to an impairment rating of more than 5.9% to the body as a whole, based on the objective medical findings.

In its opinion, the Commission analyzed Avaya's calculation of Bryant's impairment rating and stated that it disagreed with Avaya's method. The Commission did not disagree with Avaya's finding that, using Table 27, Bryant was entitled to a 24% impairment rating for a total shoulder arthroplasty and a 10% impairment rating for a distal clavicle arthroplasty, or that these ratings combined to produce an impairment rating of 32%. However, the Commission acknowledged that there was confusion as to what part of the body the 32% rating relates. The Commission asserted that Avaya had misinterpreted Table 27 as assigning impairment values only to the *shoulder joint*, when Table 27 instead assigns impairment values from arthroplasty of specific bones and joints to the entire *upper extremity*. Thus, the Commission found that Avaya had incorrectly lowered the rating by too great a factor when it multiplied the 32% impairment rating by using the 15% whole-person factor from Table 18. Although it recognized that the AMA *Guides*, on page 58, state that the impairment percents from Tables 19 through 30 are to be multiplied by percents from Table 18 representing the impaired part, the Commission noted that the text on page 61 also states that "simple resection arthroplasty is given 40% impairment of the joint value," which is more than the combined rating that results from all of the procedures performed on Bryant, and that the ratings in Table 27 clearly are already calculated for the upper extremity, instead of just

the shoulder joint. The Commission also noted that the example calculations provided in Section 3.1m were consistent with its interpretation.

The Commission instead used Table 3 on page 20, which provides a conversion from upper extremity impairment to whole body impairment, to find that the 32% upper extremity impairment rating converts to a 19% impairment rating to the body as a whole, exclusive of any additional impairment rating for Bryant's crepitation. Thus, the Commission found that a 19% impairment rating was appropriate based on the objective medical evidence and because this rating exceeded the rating that Dr. Collins had assigned, the Commission found that a preponderance of the evidence supported the ALJ's decision to award Bryant a 15% impairment rating.

We find that the Commission's decision is supported by substantial evidence. The Commission was correct in finding that Avaya's calculation of a 32% impairment rating applies to the entire upper extremity and that this rating should then be converted to an impairment rating to the body as a whole using Table 3. Avaya's method of multiplying the 32% rating by the 15% whole person factor in Table 18 is not appropriate, as Table 27 has already directly converted ratings resulting from particular procedures to an impairment of the upper extremity as a whole. Indeed, Table 27 is captioned "Impairment of the Upper Extremity After Arthroplasty of Specific Bones or Joints." As the Commission found, Table 3, rather than Table 18, should thus be used to convert the 32% impairment rating of the upper extremity to an impairment of the whole person, which in this case is 19%. AMA *Guides*, p. 20.

Although Avaya argues that the text of Section 3.1m states that the impairment percentages from Tables 19 through 30 should all be multiplied by percents from Table 18 representing the impaired parts, the Commission found that the textual language notwithstanding, this directive could not apply to Table 27. The majority of the tables in Section 3.1m list the percentage of impairment to the joint itself, and not to the entire upper extremity as in Table 27. However, the tables that list percentage impairment to the joint also note within the tables themselves that these impairment values should be multiplied by the relative value of the joint found in Table 18. No such instruction appears in Table 27

or in Table 26, which is the only other table in this section to list impairment values to the upper extremity instead of to the joint. Also, in Section 3.1o, there is a summary of steps for evaluating impairments of the upper extremity, including the shoulder region. AMA *Guides*, p. 66. Step X provides that once the percentage of upper extremity impairment is calculated, this percentage should be converted to a whole-person impairment using Table 3. *Id.* Accordingly, we find that the Commission correctly found that the objective medical evidence warranted a 19% impairment rating pursuant to the AMA *Guides*, and that there is therefore substantial evidence to support its decision affirming the ALJ and finding that the award of a 15% permanent impairment rating to Bryant for his shoulder injury was not excessive.

Affirmed.

HART and BIRD, JJ., agree.

Marqueta MILLER *v.* The KROGER CO. and Lisa Baker

CA 02-480 105 S.W.3d 789

Court of Appeals of Arkansas
Divisions II, III, and IV

Substituted Opinion upon Denial of Petition for Rehearing
delivered May 21, 2003

Dover Dixon Horne PLLC, by: *Joel F. Hoover*, for appellant.

Barber, McCaskill, Jones & Hale, P.A., for appellee.

ANDREE LAYTON ROAF, Judge. Marqueta Miller appeals the trial court's grant of summary judgment in favor of the Kroger Company and Lisa Baker, a Kroger employee (Kroger). Miller had sued Kroger for malicious prosecution, outrage, and false imprisonment after she was acquitted in municipal court of a shoplifting charge arising from an incident at a Kroger store. On appeal, Miller argues that the trial court erred in granting summary judgment on all three causes of action, and that genuine issues of material fact exist with respect to each cause. We agree that the trial court erred in granting summary judgment with respect to the claim of malicious prosecution, and reverse and remand as to that count.

The evidence in this case was primarily in the form of deposition testimony and a transcript of Miller's municipal court trial. The incident arose on September 25, 1999, when Miller was shopping at the Kroger store on Salem Road in Conway, Arkansas. After shopping and checking out, Miller admittedly left the store with three paperback books and a large magazine that she had not purchased. Miller claimed to have placed the items in her basket while shopping. Whether Miller placed the merchandise in or under her purse is in dispute. Miller testified that the items were under her purse in the child-seat portion of the shopping cart. She testified that the checker also placed bagged groceries in the seat, further obscuring the books, and that she in essence forgot about the items or did not realize that they had not been checked. Miller further claimed and provided a demonstration that the four books would not have fit inside her purse. Lisa Baker, the assistant manager at Kroger, testified that she observed Miller place the items inside her purse. Baker asked another employee to phone the police while she followed Miller and Jeremy Crabb, a clerk who assisted with Miller's cart, outside. Baker further testified that she could see a portion of the magazine "sticking out" when Miller was at the checkout stand.

After Miller and Crabb left the store, Baker stopped Miller and asked about the books. Baker and Crabb testified that Miller removed the items from inside her purse and gave them to Baker. However, Miller testified that she retrieved the items from beneath the purse. The conversation that took place between the two women is also in dispute. Miller eventually voluntarily reentered the store with the understanding that she was to fill out some paperwork. When Baker asked Miller to climb some steps to an office in order to fill out the paperwork, Miller stated that she was unable to climb stairs due to a medical condition. Both Crabb and Miller testified that Baker offered to call an ambulance to assist Miller in climbing the stairs; however, Baker denied ever making this statement.

Officer Jon Cole soon arrived at the store and took Miller into custody. She was handcuffed in the upstairs office and made to walk down the stairs and out past the checkout area with her hands cuffed behind her back. Officer Cole testified in the municipal court proceedings that Miller's purse was pretty full and that he "personally [didn't] see how the items could fit inside the purse," and advised Miller to take a picture of the purse. After being released from police custody several hours later, Miller returned home. She suffered a heart attack the following morning.

Miller was charged with shoplifting, or theft of property. At her trial in Conway Municipal Court, in which Officer Cole testified favorably in her defense, she was found not guilty. Miller then filed suit against Kroger for malicious prosecution, false imprisonment, and outrage. After discovery, the trial court granted summary judgment in favor of Kroger on the theory that probable cause existed as a matter of law because it was undisputed that Miller left the store with at least "partially concealed" merchandise and without permission, Miller voluntarily returned to the store to resolve the matter, and Kroger's conduct did not rise to the level required to sustain a claim for outrage. This appeal followed.

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, 11 S.W.3d 531 (2000). Summary judgment is not proper "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." *Thomas v. Sessions*, 307 Ark. 203, 818 S.W.2d 940 (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).

Miller first argues that the trial court erred in granting summary judgment on the count of malicious prosecution. In order to prevail in a claim of malicious prosecution, a plaintiff must prove the following elements: (1) a proceeding instituted by the defendants against plaintiff; (2) termination of the proceeding in favor of plaintiff; (3) absence of probable cause on the part of the defendants; (4) malice; and (5) damages. *See South Ark. Petrol. Co. v. Shiesser*, 343 Ark. 492, 36 S.W.3d 317 (2001).

The trial court found that Miller failed to establish the absence of probable cause. At the hearing and in its brief in support of summary judgment, Kroger contended that Miller's malicious prosecution claim should fail because probable cause existed as a matter of law, based upon the shopkeeper presumption found in Ark. Code Ann. § 5-36-102(b) (Repl. 1993), which provides as follows:

> The knowing concealment, upon his person or the person of another, of unpurchased goods or merchandise offered for sale by any store or other business establishment shall give rise to a presumption that the actor took the goods with the purpose of depriving the owner, or another person having interest therein.

Kroger further relied upon *Kroger Co. v. Standard*, 283 Ark. 44, 670 S.W.2d 803 (1984). In *Standard*, the supreme court reversed the plaintiff's judgment where Standard had knowingly concealed a ham in a sack, stapled it shut with a credit slip, and attempted to leave the store without paying for it. However, in *Wal-Mart Stores, Inc. v. Yarbrough*, 284 Ark. 345, 681 S.W.2d 359

(1984), the supreme court, in affirming the trial court's submission of the appellee's claim for malicious prosecution to the jury, distinguished the case from *Standard*, stating:

> The question the court is initially presented with is the issue of probable cause for the arrest and prosecution of the appellee. "The test for determining probable cause is an objective one based not upon the accused's actual guilt, but upon the existence of facts or credible information that would induce a person of ordinary caution to believe the accused to be guilty." Unless both the facts and the reasonable inferences to be deduced from those facts are undisputed, this issue is to be submitted to the jury.
>
> The appellant, relying upon *Kroger Co. v. Standard, supra*, contends that the trial court erred as a matter of law in submitting the issues of malicious prosecution and false imprisonment to the jury. This reliance is not well founded. The *Kroger Co.* court found the appellant had the benefit of the shoplifting presumption, which arises with the knowing concealment of unpurchased items. Applying, in conjunction, this presumption, and the testimony of the appellee, the court held that there was not substantial evidence that Kroger failed to exercise the ordinary caution exhibited by the reasonably prudent merchant.
>
> Assistant manager Caudle testified he was able to see the pen at all times during the period he was observing the appellee. The shoplifting presumption did not arise here and thus, the appellee did not have to overcome the burden imposed by Rule 301. The appellant did have probable cause for the initial stop of the appellee to question her with respect to the pen. However, it can not be held, as a matter of law, that the appellant thereafter exercised ordinary caution in these circumstances. Once the decision to stop was made, the prosecution of appellee was automatic, according to appellant. There was no effort made to listen to, or believe, the explanation proffered by appellee because there was nothing she could have said that could have changed the appellant's decision to prosecute. And additionally, the appellant continued with the prosecution after the recommendation was made by the city attorney that the action be dismissed.
>
> While those facts, as were all others, were undisputed, they were susceptible to different inferences. The submission of the issues of false imprisonment and malicious prosecution to the jury was entirely appropriate in these circumstances. [Citations omitted.]

We agree with Miller that the evidence in this case is in dispute as to whether there was a "knowing concealment, upon [her] person . . . of unpurchased goods. . . ." Crabb testified that he heard Miller state that "she had done nothing wrong" and say that the items had been under, rather than inside, her purse when she was initially stopped by Baker. Baker herself testified that the magazine was partially visible to her at the checkout counter. The trial court, in granting summary judgment, found only that Miller left the store with "at least partially concealed merchandise." Miller contends that the merchandise was inadvertently left under her purse while Kroger employees assert that it was inside the purse. The facts in dispute in this case thus render it distinguishable from the facts in *Standard*, *supra*, in which a ham had been knowingly concealed by being stapled inside a bag. These disputed facts are material to the issue of whether Miller knowingly concealed the four books with the purpose of taking the items from the store without paying for them. Moreover, as in *Yarbrough*, Baker testified that after stopping Miller, she had no choice or discretion not to pursue Miller's prosecution, and stated:

> The Kroger policy with regard to shoplifting is to make 100% sure that the person has taken merchandise. If I have any doubt, I am not supposed to stop them. . . . It is Kroger's policy to always call the police and ask them to arrest the suspect if the suspect is guilty. It is the corporate policy that whenever a shoplifter is detained, the police are to be called to arrest the suspect. I am not given a choice. If I apprehend a shoplifter, I call the police, always.

Thus, as in *Yarbrough*, once Baker made the decision to stop Miller, arrest and prosecution was automatic. The arresting officer's testifying favorably to Miller in her municipal court proceedings can also be likened to the prosecuting attorney's recommendation to dismiss the case in *Yarbrough*. Accordingly, we hold that the trial court erred in granting summary judgment to Kroger on the claim of malicious prosecution.

Miller next argues that the trial court erred in granting summary judgment on the claim of false imprisonment. Miller contends that Kroger employees induced her to return to the store under false pretenses and that she was held against her will for close to an hour before the police arrived, an excessive period of time. It

is not in dispute that Miller left the store with unpurchased goods, voluntarily returned to the store, and was aware when she did so that Baker had declined to simply allow her to pay for the items. In *The Limited Store, Inc. v. Wilson-Robinson*, 317 Ark. 80, 876 S.W.2d 248 (1994), the supreme court in reversing a jury verdict in favor of the plaintiff for false imprisonment, stated:

> It is well established that the restraint constituting a false imprisonment may be by threats of force which intimidate the plaintiff into compliance with orders. Although the plaintiff is not required to incur the risk of personal violence by resisting until force is actually used, it is essential that the restraint be against the plaintiff's will. Submission to the mere verbal direction of another, unaccompanied by force or threats of any character, does not constitute false imprisonment. If one agrees of one's own free choice to surrender freedom of motion, as by accompanying another voluntarily to clear oneself of suspicion, rather than yielding to the constraint of a threat, then there is no imprisonment. [Citations omitted.]

Id. at 84, 876 S.W.2d at 250-51.

In granting summary judgment, the trial court found that Miller voluntarily returned to the store in order to resolve the matter. Miller testified in her deposition, "I voluntarily went back inside," and that Baker was "adamant" that she was not going to simply let her pay for the books. Miller further testified that by the time the paperwork was completed, the officer who arrested her had arrived. In sum, Miller did not present any evidence of threats of force or that she was restrained against her will, and the trial court properly granted summary judgment on this count.

Miller's final argument is that the trial court erred in granting summary judgment on the claim of outrage. In support of her argument, Miller asserts that Baker testified falsely when she stated that she placed the books in her purse and cites to Kroger's actions in forcing her to walk up a flight of steps to the office, refusal to allow her to call her son so she could get a needed insulin shot, and forcing her to walk down the stairs and exit the store in handcuffs. Miller contends that she suffered physical and emotional injury as a consequence of Kroger's actions. As Kroger points out, Miller testified that after selecting the books and magazine and placing them in the child seat, she removed two paperback books of her own and

other items from her purse to retrieve her checkbook and grocery list, and that Baker must have viewed her replacing these items in her purse and believed them to be the Kroger items. Miller testified that she told Baker she felt ill, but declined Baker's offer to call an ambulance. Kroger argues that, to the extent Miller's assertion of false testimony presenting a claim for defamation, any statements given to police were related to Miller's prosecution and privileged pursuant to *Routh Wrecker Service Inc. v. Washington*, 335 Ark. 232, 980 S.W.2d 240 (1998), and that at most, Baker may have been mistaken about what she observed.

In *Faulkner v. Arkansas Children's Hospital*, 347 Ark. 941, 69 S.W.3d 393 (2002), the supreme court recently restated the standard for the tort of outrage:

> There are four elements that are necessary to establish liability for 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. In sum, this court has taken a very narrow view of claims of outrage. [Citations omitted.]

Dillard's Department Stores, Inc. v. Adams, 315 Ark. 303, 867 S.W.2d 442 (1993), is similar to the instant case because the outrage claim arose out of accusations of theft. In the *Dillard* case, a sales manager believed he had observed Ms. Adams, a customer, switch the price tags on two bathing suits and then purchase the one with the lower price tag. As Adams was leaving the store, the manager and a security guard stopped her, identified themselves as "Dillard's security," and asked her to accompany them to the rear of the store. In a manager's office, Adams was confronted about switching the price tags, but denied any wrongdoing. The store manager and the police were called. The store manager questioned Adams, took her picture, and told her she was banned from the store. The police issued her a citation and escorted her from the store. The entire incident lasted twenty minutes to an hour. The supreme court stated:

> [W]e have addressed outrage in a cautious manner. Our recognition of this tort is not intended to "open the doors of the courts to every slight insult or indignity one must endure in life."
>
> . . .
>
> We cannot say Ms. Adams presented sufficient evidence for a jury instruction on the tort of outrage. Ms. Adams testified the entire incident lasted less than an hour. During that time she was not physically touched, and while Dillard's employees may have questioned her in a confrontational manner, there is no evidence that their tone was abusive or harassing. Ms. Adams testified that Ms. Hallmark initially confronted her in a professional manner and in such a way as not to draw the attention of any other customers.
>
> We do not mean to say that Dillard's employees' actions were merely a "slight insult." We recognize Ms. Adams may well have suffered mental distress as a result of them. She was accused of a crime of which she was not convicted. We cannot, however, find in the facts alleged or shown the kind of extreme degree of outrageous conduct "as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in civilized society." Whatever the merits of the claim of Dillard's and Ms. Hallmark as to Ms. Adams's conduct (and we assume no merit in them for purposes of this appeal) nothing that was done constituted conduct fitting our definition of "outrage."

Id. at 305-06, 867 S.W.2d at 443-44.

Applying this standard for the tort of outrage, we cannot say that Miller's evidence is sufficient to sustain her claim. Miller acknowledged that Baker could have seen her replacing several of her own books and other items in her purse after she had removed the books at issue from the Kroger shelves and believed them to be the property of Kroger. The stairs to the office were described as several steps, a landing, and several additional steps. The incident, as in *Dillard's Department Store, Inc. v. Adams*, *supra*, lasted from twenty minutes to an hour, and there is no evidence that Kroger, rather than the Conway policeman, made the determination to arrest Miller instead of issuing a citation. In sum, we cannot say that Kroger's conduct as described by Miller displays the kind of "extreme degree" of outrageous conduct required to survive the motion for summary judgment brought by Kroger. Consequently we affirm the trial court's ruling as to this count.

Affirmed in part, reversed and remanded in part.

NEAL, GLADWIN, GRIFFEN, and HART, JJ, agree.

STROUD, C.J., PITTMAN, ROBBINS, and CRABTREE, JJ., would grant rehearing and affirm.

JOHN B. ROBBINS, Judge, dissenting. I respectfully dissent from today's decision holding that the trial court erred in granting summary judgment to Kroger on the claim of malicious prosecution. In my view, there is no genuine issue of material fact as to whether the appellees had probable cause to prosecute Ms. Miller, and I would affirm this case on all points.

The test for determining probable cause is an objective one based not upon the accused's actual guilt, but upon the existence of facts or credible information that would induce a person of ordinary caution to believe the accused to be guilty. *Kroger Co. v. Standard*, 283 Ark. 44, 670 S.W.2d 803 (1984). Even if the merchandise taken from the store in this case was not completely concealed, it is undisputed that Ms. Miller left the store without paying for it. In *Kroger v. Standard, supra*, the supreme court stated:

> Today, modern supermarkets are tens of thousands of square feet in size and display nearly all of their goods on open shelves within easy reach of the customer. The customer picks up the goods and can continue shopping over the entire store area before taking his selections to a check-out stand. This great size and easy accessibility make it very difficult for a merchant to know when someone is shoplifting from the shelves.

283 Ark. at 51-52, 670 S.W.2d at 807. While it was difficult, if not impossible, for Ms. Baker to know Ms. Miller's subjective intent, the circumstances of this case would have induced a person of ordinary caution to believe Ms. Miller was shoplifting.

The majority relies on *Wal-Mart Stores, Inc. v. Yarbrough*, 284 Ark. 345, 681 S.W.2d 359 (1985), in reversing on this point. However, I believe that case is distinguishable.

In *Wal-Mart Stores, Inc. v. Yarbrough, supra*, there was evidence that, after being confronted, the accused shoplifter explained that she simply forgot she had the item she removed from the store, but

that the store employee would under no circumstances accept any explanation inconsistent with theft. In the instant case, Ms. Baker testified that when she confronted Ms. Miller, Ms. Miller said she was sorry and that she was low on money. Ms. Miller testified that she told Ms. Baker she was sorry and would pay for the items. While she further testified that she did not intend to steal the items, there was no evidence that she communicated this explanation to Ms. Baker.[1] Moreover, the decision to prosecute was not automatic, as in the previously cited case. Ms. Baker testified that her job is to make 100% sure that a person has taken merchandise, and that if she has any doubt she is not supposed to stop the person. She further stated that if she apprehends a shoplifter, and the suspect is guilty, she always calls the police. This indicates that Ms. Baker attempts to determine whether a detained person is guilty of shoplifting. Ms. Baker did not testify that she made no effort to believe any explanation offered by Ms. Miller, or that nothing could have changed her decision to prosecute after the stop was made.

While the majority compares the arresting officer's favorable testimony in this case to the prosecuting attorney's recommendation to dismiss the charges in *Wal-Mart Stores Inc. v. Yarbrough, supra*, I do not think these are comparable circumstances. While the arresting officer thought that the items taken from the store could not have fit in Ms. Miller's purse, there was no evidence that the officer, the prosecutor, or anyone else made any recommendation to drop the charges.

I cannot agree that there was a genuine issue of material fact on the malicious-prosecution claim, and I would affirm the trial court's ruling that Kroger was entitled to judgment as a matter of law. Therefore, I dissent.

STROUD, C.J., PITTMAN and CRABTREE, JJ., join in this opinion.

---

[1] The majority notes that Mr. Crabb testified that he heard Ms. Miller state that "she had done nothing wrong." However, he also testified that Ms. Miller stated she was ashamed, had never done anything like that before, and would never come back to the store. He stated that Ms. Miller was contradicting herself in this respect. Taken in context, Mr. Crabb's testimony does not indicate that Ms. Miller communicated to Ms. Baker an innocent explanation for leaving the store without paying for the items.

Alonzo D. WILLIAMS *v.* Henrietta E. WILLIAMS

CA 02-453 108 S.W.3d 629

Court of Appeals of Arkansas
Division IV
Opinion delivered May 28, 2003

Wilson, Engstrom, Corum & Coulter, by: *Stephen Engstrom*, for appellant.

Janice W. Vaughn, for appellee.

JOHN MAUZY PITTMAN, Judge. This is a divorce case that involves the division of property, child support, mortgage payments, marital debts, and valuation of the husband's medical clinic and surgery center. For reversal, appellant contends that the trial court erred in setting child support at the level established by the family support chart and permitting the appellee to remain in the marital home and in requiring appellant to make the mortgage payments on the marital home in addition to child support and alimony. Appellant also contends that the trial court erred by failing to make an equal and equitable division of the marital assets. On cross-appeal, appellee asserts that the trial court erred in the valuation assigned to appellant's professional practices. We find no error, and we affirm in all respects.

Appellant Alonzo Williams is a gastroenterologist who owns a clinic, Arkansas Diagnostic Center, P.A. (ADC), and a surgery center, Gastroenterology Center of Arkansas, P.A. (Gastro), in Little Rock. He and appellee/cross-appellant Henrietta Williams were married in 1972 and had three children, two of whom were minors at the time of trial. Appellee, who has a Ph.D. in special education, began work in appellant's practices in 1984. By appellant's admission, appellee played a significant role in developing his practices, which are phenomenally successful. As hostilities between the parties escalated, appellant fired her; she was not working at the time of trial. The parties separated in 1997. During the marriage, appellant had extramarital affairs with other women and had two children born out of wedlock with two different women. Appellant's girlfriend is the mother of one of those children. For several years, appellant has provided substantial support to his girlfriend and their daughter. He managed to keep the amount of this support secret from appellee with the assistance of his accountant. Appellant also supports his other daughter born out of wedlock.

At trial, appellee requested child support in the amount set by the family support chart, possession of the marital home (11,200 square feet), an equal division of the property, and alimony. She also asked that appellant be required to make the mortgage payments on the house. Appellant asked the judge to award less than the amount of child support set by the chart; to force appellee and the children to vacate the marital home and move into a less expensive house; and to make an unequal division of the marital property in his favor. The parties disputed the proper valuation of appellant's clinic and surgery center; appellee argued that both practices had a substantial goodwill value, and appellant asserted that they did not. Both parties presented exhaustive evidence about their valuation.

The judge awarded appellant a divorce on the basis of eighteen months' separation. He found that appellant's net income for 1999 was $778,495, or $64,875 monthly, and set appellant's child-support obligation at $13,624 per month, in keeping with the support guidelines. He also awarded appellee monthly alimony of $4,000. The judge awarded possession of the house to appellee

and the children until the youngest child graduates from high school, when it will be sold and the net proceeds divided equally between the parties. He ordered appellant to make all repairs on the house exceeding $500.

The judge awarded appellee a one-half interest in the clinic and surgery center, which he valued at $695,500, which is substantially less than appellee argued they were worth. He found the value of the parties' other real property as follows: 8907 Kanis Road $4,850,000; 8908 Kanis Road $1,500,000; and 305 Freeway Medical Tower $170,000. He gave appellee a one-half interest in these pieces of property, along with several other parcels for which no value was given, directing the parties to reach an agreement as to their disposition within forty-five days. The judge equally divided their cash, retirement funds, stocks, bonds, investments, life insurance policies, accounts receivables, and interests in several closely held businesses. The judge permitted appellee to keep her jewelry, a mink coat, some paintings, and a 1994 Mercedes.

The judge found that, during the marriage, after the parties' separation, and after the entry of the temporary order, appellant spent marital funds totaling at least $801,457.59 on his girlfriend and on his sisters, and awarded appellee one-half of that amount. To compensate appellee, the judge awarded her the entire contents of the marital residence, the title to a lot in Hickory Hills (valued at $110,000), and twelve acres in West Helena, Arkansas (valued at $25,000).

The judge held appellant responsible for the following debts: $279,104 for furniture and decorative items purchased for the marital home; $143,530 for repayment of life insurance policy loans and $105,565 for premium loans incurred after entry of the temporary order; $900,000 in personal loans from Metropolitan Bank; $292,010 for a stockholder loan from ADC; and $47,000 for his girlfriend's Mercedes.

Standard of Review

■ ■ We review traditional equity cases *de novo* on the record and will not reverse a finding of fact by the trial judge unless it is clearly against the preponderance of the evidence.

Hunt v. Hunt, 341 Ark. 173, 15 S.W.3d 334 (2000). In reviewing the trial judge's findings, we give due deference to the judge's superior position to determine the credibility of the witnesses and the weight to be accorded to their testimony. *Id.*

The Direct Appeal

Appellant makes two arguments in his first point on appeal: first, that the trial judge abused his discretion in *not* deviating from the child-support chart; and second, that the trial judge abused his discretion in failing to require appellee to move into a less expensive house. Appellant has not challenged the judge's determination of his income or his finding that appellant attempted to hide his income with the assistance of his accountant. Appellant argues that the "staggering" child-support award, in addition to the requirement that he pay the mortgage on the marital home for the next seven years, amounts to an abuse of discretion and argues that the parties' historical spending level for the children was substantially lower than the child-support award. According to appellant, the chart amount exceeds the children's actual needs. He states that, exclusive of housing, the historical monthly spending on the children was $3,671.71. Appellant also contends that the marital home is more luxurious than necessary to give the children a comfortable lifestyle and that appellee and the children should be required to move into a less expensive house. Appellant cites out-of-state cases, including a Kansas case, *In re Marriage of Patterson*, 22 Kan. App. 522, 528, 920 P.2d 450, 456 (1996), where the court stated: "[N]o child, no matter how wealthy the parents, needs to be provided more than three ponies." Appellant recognizes that no Arkansas case has considered the "Three Pony Rule" but points out that the family support guidelines provide that the court can grant more or less support if the evidence shows that the needs of the dependents require a level of support different from the amount set by the chart. In oral argument, appellant acknowledged that the support guidelines do not set a "cap" on the level of support to be provided by high-income payors but urged this court to impose such a cap in this case.

It is true that the trial judge may deviate from the chart amount if it exceeds or fails to meet the needs of the child.

See Scroggins v. Scroggins, 302 Ark. 362, 790 S.W.2d 157 (1990); *Guest v. San Pedro*, 70 Ark. App. 389, 19 S.W.3d 62 (2000). The amount of child support a trial judge awards, however, lies within his sound discretion and will not be disturbed on appeal absent an abuse of that discretion. *Office of Child Support Enforcement v. Pittman*, 70 Ark. App. 487, 20 S.W.3d 426 (2000). Arkansas Code Annotated section 9-12-312(a)(2) (Repl. 2002) provides that, in determining a reasonable amount of support, the judge shall refer to the most recent revision of the family support chart, and that it shall be a rebuttable presumption that the amount contained in the chart is the correct amount of child support to be awarded. The statute states that only upon a written finding or specific finding on the record that the application of the support chart would be unjust or inappropriate, as determined under established criteria set forth in the family support chart, shall the presumption be rebutted. Because the child-support guidelines are remedial in nature, they must be broadly construed so as to effectuate the purpose sought to be accomplished by their drafters. *Pannell v. Pannell*, 64 Ark. App. 262, 981 S.W.2d 531 (1998).

The version of the family support chart in effect when the decree was entered was found at *In Re: Administrative Order No. 10: Arkansas Child Support Guidelines*, 331 Ark. 581 (1998). In Section IIIb, it provides that when the payor's income exceeds that shown on the chart, support for two children should be set at twenty-one percent. In Section I, it states in part:

> It is a rebuttable presumption that the amount of child support calculated pursuant to the most recent revision of the Family Support Chart is the amount of child support to be awarded in any judicial proceeding for divorce, separation, paternity, or child support. The court may grant less or more support if the evidence shows that the needs of the dependents require a different level of support.
>
> It shall be sufficient in a particular case to rebut the presumption that the amount of child support calculated pursuant to the Family Support Chart is correct, if the court enters in the case a specific written finding within the Order that the amount so calculated, after consideration of all relevant factors, including the best interest of the child, is unjust or inappropriate. Findings that rebut the guidelines shall state the payor's income, recite the

> amount of support required under the guidelines, recite whether or not the Court deviated from the Family Support Chart and include a justification of why the order varies from the guidelines as may be permitted under SECTION V. hereinafter.

In Section V, Administrative Order No. 10 sets forth the following factors to be considered when deviating from the amount set by the chart:

> 1. Food;
> 2. Shelter and utilities;
> 3. Clothing;
> 4. Medical expenses;
> 5. Educational expenses;
> 6. Dental expenses;
> 7. Child care;
> 8. Accustomed standard of living;
> 9. Recreation;
> 10. Insurance;
> 11. Transportation expenses; and
> 12. Other income or assets available to support the child from whatever source.
>
> Additional factors include:
>
> 1. The procurement and/or maintenance of life insurance, health insurance, dental insurance for the children's benefit;
>
> 2. The provision or payment of necessary medical, dental, optical, psychological or counseling expenses of the children (e.g. orthopedic shoes, glasses, braces, etc.);
>
> 3. The creation or maintenance of a trust fund for the children;
>
> 4. The provision or payment of special education needs or expenses of the child;
>
> 5. The provision or payment of day care for a child;
>
> 6. The extraordinary time spent with the noncustodial parent, or shared or joint custody arrangements; and
>
> 7. The support required and given by a payor for dependent children, even in the absence of a court order.

In *Anderson v. Anderson*, 60 Ark. App. 221, 963 S.W.2d 604 (1998), we affirmed the chancellor's straightforward application of the percentage set by the support chart to the husband's monthly net income of $9,696.

In this case, the trial judge made the following findings regarding child support:

> Ark. Code Annot., Section 9-12-312(a)(2) requires the court to set child support based upon the most recent child support chart. It is a rebuttable presumption that the chart amount is the correct amount of child support, and this court must enter specific findings regarding its reasons for deviating from the chart. The court must first ascertain the net income of Dr. Alonzo Williams on an annual basis. The court heard testimony from Mr. Richard Schwartz and Ms. Cheryl Shuffield as to the income, expenses and ability to pay of Dr. Alonzo Williams. Previous to the filing of this divorce action, Dr. Williams has earned over $2,000,000.00 per year. Dr. Williams' income has dropped during this divorce proceeding. It was proven at trial that Dr. Williams incorrectly reported monies spent on [his girlfriend] and that other expenses were improperly deducted as business expenses. The tax returns of Arkansas Diagnostic Clinic and Gastroenterology Center of Arkansas were amended to exclude these expenses as allowable business deductions. However, no change was made to Dr. Williams' personal tax returns. Dr. Williams included personal American Express charges as deductions which should have been reflected as part of his income. The court is of the opinion that Dr. Williams' salary was, for purposes of trial, made to appear less than what his actual net monthly or yearly income is. The court relies on Plaintiff's Exhibit 40, which is the child support calculations for Dr. Alonzo D. Williams for the year 1999. The court finds that Dr. Williams' annual income for child support purposes is $778,495.00, with a net monthly income of $64,875.00.
>
> The court finds, by a preponderance of the evidence, that the Defendant has failed to establish a reason for this court to deviate from the current family support chart. The court determines that child support should be set at the rate of $13,624.00 per month for two children. The court determines 21% of the monthly net of $64,875.00 to be $13,624.00. The Court finds that the child support calculations made by Plaintiff's expert, Mr. Richard Schwartz, are correct as they represent Defendant's disposable income more accurately than the Defendant or Defendant's expert. Dr. Williams can afford to maintain his children in the style and manner to which they have become accustomed to living during the marriage of the parties.

The amount of "historical expenses" offered by appellant was demonstrated at trial to be inaccurate. The record shows that these figures were based on only a portion of the total amount spent during the parties' separation; they did not include the substantial amount that appellant directly spent on the children. Also, during the separation, appellant was able to buy his girlfriend an expensive house, a very expensive ring, a Mercedes, and furnishings for her new house. He also bought her older daughter a car. He purchased a Mercedes for one of his sisters and a Lexus for another. He bought and furnished an expensive house for himself. Appellee also presented evidence that, during this proceeding, appellant and his girlfriend traveled extensively. Given the evidence of appellant's affluence, exceptional generosity, and extravagant lifestyle, we cannot say that the trial judge abused his discretion in setting child support in accordance with the presumptive amount derived from the family support chart.

In his second point, appellant asserts that the judge abused his discretion in ordering him to pay the mortgage on the marital residence until the youngest child graduates from high school. According to appellant, the monthly child-support payments of $13,624, the mortgage payments of $13,977.94, and the payments of $2,000 in insurance and real estate taxes amount to over $29,000 in monthly support for the children. Appellant contends that an order directing a noncustodial parent to make house payments must be deemed a form of child support, especially when the duration of the obligation is tied to a child's graduation from school or attainment of a certain age. He states that adding the mortgage payment to the child-support payment required by the chart produces a windfall to appellee, because the children's need for shelter is already covered by the child-support amount set by the chart. In the alternative, appellant argues that the judge should have deviated from the chart amount on the basis that a substantial element of support for the children (housing) was provided through the mortgage payments. Appellant also argues that the judge's decision regarding the mortgage payments amounts to an improper deviation from the support chart without the required findings from the judge. Appellant further contends that the judge's decision in this regard is especially inequitable because

he did not permit appellant to receive credit for the post-divorce reduction in the principal debt.

Citing *Bramlett v. Bramlett*, 5 Ark. App. 217, 636 S.W.2d 294 (1982), appellant argues that this sort of obligation should not be imposed unless there are special circumstances showing that support payments are ineffective or inefficient in satisfying a party's obligations to children or a former spouse. We do not agree with appellant's reliance on *Bramlett v. Bramlett*. Although we did affirm the husband's obligation to make the mortgage payments in that case and noted that the chancellor had considered this obligation in setting child support, the amount of child support was not an issue on appeal.

Additionally, the child-support guidelines do not support appellant's position. Although a trial judge has the authority to include mortgage payments made for the benefit of the child in an award of child support, especially when the term of the obligation is tied to the child's reaching the age of majority or finishing high school, *see Keesee v. Keesee*, 48 Ark. App. 113, 891 S.W.2d 70 (1995), there is no requirement that a mortgage payment *must* take the place of a portion of the amount of child support set by the chart; such a decision is clearly within the trial judge's broad discretion. The trial judge has wide discretion in awarding either party the possession of the home, and the award of possession of the home is subject to such terms as the judge deems to be equitable and just. *Schumacher v. Schumacher*, 66 Ark. App. 9, 986 S.W.2d 883 (1999); *Hodges v. Hodges*, 27 Ark. App. 250, 770 S.W.2d 164 (1989). Additionally, it is acceptable to permit the parties to equally share the proceeds of sale after only one party has made the mortgage payments for a period of time. *Schumacher v. Schumacher, supra*. Given this authority, we cannot say that the chancellor abused his discretion in requiring appellant to make the mortgage payments on the family home until his youngest child finishes high school.

Appellant's third and fourth points involve related facts and will therefore be considered together. Appellant asserts in his third point that the net effect of the judge's attempt to equally divide the property and to assign over $2 million in debt to appellant was

to award appellee $2.4 million more of the marital estate than he awarded appellant. He contends that, even though the judge stated that he was dividing the marital property equally between the parties, he actually made an unequal division, which appellee did not request and for which the judge failed to give an explanation. Appellant argues in his fourth point that the judge erred in failing to equally divide the debts. He asserts that, because the judge failed to reduce the value of the assets by the liabilities specifically tied to them, the net effect was to award appellee an inflated value for her one-half portion of the marital estate. According to appellant, with the exception of the house payments and appellee's jewelry, virtually all of the $2.4 million disparity between the assets awarded to the parties is a consequence of the marital debt assigned only to appellant. Appellant contends that, even though the judge stated that he would not divide the property unequally, he did so surreptitiously by allocating the debt in this fashion.

Appellant offers the following chart[1] in support of his argument that appellee received sixty-seven percent, and not fifty percent, of the marital estate:

	Total	**Appellant**	**Appellee**
Cash	211,129	105,565	105,565
Retirement Funds	383,100	191,550	191,500
Marketable Securities	940,068	470,034	470,034
Closely Held business Interest	695,516	347,758	347,758
Insurance Cash Value	3,013,216	1,506,608	1,506,608
Real Estate	8,363,250	4,181,625	4,181,625
Future Equity in Hickory Hills		200,890	200,890
Receivables	131,706	65,853	65,853
Total Assets	14,374,290	6,940,338	7,433,953
Liabilities	7,092,563	(4,511,741)	(2,433,953)
Net Marital Estate	7,281,727	2,428,597	4,853,130

The following items are the debts that appellant contends should have reduced the value of the assets that secured them:

[1] We note that some of the figures in appellant's chart have been miscalculated.

A. The $292,010 shareholder debt due ADC and included as a receivable in the practices' valuation. Appellant argues that this loan was taken out prior to the parties' separation and that appellee's expert witness, Richard Schwartz, recognized this fact and included it as a receivable in his ADC valuations. Appellant's expert, Cheryl Shuffield, did the same.

B. A $600,000 loan from Metropolitan Bank, secured by an office building at 8901 Kanis Road property, that was utilized to pay taxes and to improve the 8907 Kanis Road property, which were marital debts. He argues that loans taken out to benefit both of the parties are marital debts regardless of which party takes out the loan or whether both parties are aware of the loan. *See Hunt v. Hunt, supra.*

C. A $300,000 loan from Metropolitan Bank secured by certificates of deposit owned by ADC. Appellant states that this loan, which was incurred to pay the parties' joint tax obligations, is secured by certificates of deposit owned by ADC that are included in its valuation.

D. $528,199 in loans secured by life insurance policies. Appellant points out that the judge did not give a reason for the allocation of this debt and asserts that he must have done so because appellant failed to pay the premiums after the entry of the temporary order. He argues that it was unfair for the judge to penalize him in this fashion while letting appellee get away with failing to place appellant's name on the policies as the judge had previously ordered. He further argues that some of these loans were taken out before the temporary hearing and all of them were for the benefit of the parties and the marital estate.

Citing Missouri and Tennessee cases, appellant asserts that when a debt is secured, its value must ordinarily be offset against the value of the underlying asset. In essence, appellant argues that, because Ark. Code Ann. § 9-12-315 (Repl. 2002) mandates that marital *property* be divided equally unless the court finds that such a division is inequitable, it also requires that the division of *debts* be treated the same way. We do not agree. Section 9-12-315 does not apply to the division of marital debts; hence, in Arkansas, there is no presumption that an equal division of debts must occur. *Ellis v. Ellis*, 75 Ark. App. 173, 57 S.W.3d 220 (2001). In *Ellis v. Ellis*, the trial judge divided the marital property equally and ordered the husband to pay seventy percent of the marital debts. We affirmed the judge's unequal division of

the marital debts due to the disparity between the parties' incomes and their relative abilities to pay the debts.

Although the division of marital debt is not addressed in Ark. Code Ann. § 9-12-315 (Repl. 2002), the chancellor has authority to consider the allocation of debt in a divorce case. *Box v. Box*, 312 Ark. 550, 851 S.W.2d 437 (1993); *Anderson v. Anderson, supra.* In fact, we have stated that an allocation of the parties' debt is an essential item to be resolved in a divorce dispute, *Ellis v. Ellis, supra*, and that it must be considered in the context of the distribution of all of the parties' property. *Boxley v. Boxley*, 77 Ark. App. 136, 73 S.W.3d 19 (2002). A judge's decision to allocate debt to a particular party or in a particular manner is a question of fact and will not be reversed on appeal unless clearly erroneous. *Ellis v. Ellis, supra*; *Anderson v. Anderson, supra.* It is not error to determine that debts should be allocated between the parties in a divorce case on the basis of their relative ability to pay. *Ellis v. Ellis, supra*; *Anderson v. Anderson, supra.* Furthermore, the effect of an allocation of debt on a spouse's lifestyle is a valid consideration; the supreme court has affirmed unequal debt allocations where a husband was able to pay the debts from income without materially changing his style of life but the wife could not pay the debts from her income without disposing of assets to pay part of the debt. *Richardson v. Richardson*, 280 Ark. 498, 503, 659 S.W.2d 510, 513 (1983). When considering the allocation of debts, it is also appropriate that the judge consider who should equitably be required to pay them. *Keathley v. Keathley*, 76 Ark. App. 150, 61 S.W.3d 219 (2001).

Appellant argues that this case is controlled by *Hoover v. Hoover*, 70 Ark. App. 215, 16 S.W.3d 560 (2000), wherein this court held that the chancellor had erred in failing to consider a large debt as part of his mathematical calculations while dividing the marital property. This court subtracted the amount of debt assigned to the husband from the value of the assets awarded to him in determining the total value of the property awarded to him in the divorce, stating:

> In his letter ruling, the chancellor set out an item-by-item recitation of the marital assets and debts assigned to each party.

> Appellee was awarded, free of debt, the couple's marital home, two vehicles, and other items with a total value of $917,406. Appellant was awarded the assets of Hoover Oil & Gas, valued at $421,642, an additional $210,821 enhancement to the company's value, the remainder of the couple's real property, and various other items with a total value of $1,319,514. Appellant was also assigned over $700,000 in debt, which included the $371,093 remaining mortgage on the marital home. His net award was therefor $618,998, or approximately forty percent of the marital property.
>
> . . . . However, one significant item that was mentioned in the decree was not mentioned in the letter ruling — the $156,106 debt owed by Hoover Oil & Gas to First National Bank. In the decree, the debt is assigned to appellant. However, it is not included in the mathematical calculations in the letter ruling.
>
> Appellant argues that the chancellor, in his letter ruling, obviously intended to divide the property 60/40 between the parties, but, due to several errors, the actual division was much more unequal. In particular, he contends that the assets assigned to him are much less valuable than they appear because the chancellor failed to reduce the worth of Hoover Oil & Gas by the $156,106 debt owed to First National Bank and because the chancellor arbitrarily added a 50% enhancement ($210,821) to the value of Hoover Oil & Gas. We agree that the chancellor erred on both counts.

70 Ark. App. at 218-19, 16 S.W.3d at 562.

We do not agree that *Hoover* is controlling. A close reading of *Hoover* shows that we based our reversal not on the percentage distributed to each party but instead on the erroneous calculation of the value of an asset assigned to the appellant. Therefore, *Hoover* does not stand for the proposition that the marital debt must be subtracted from the marital assets to determine the "net" value of the total award made to each party in all divorce cases. Although the chancellor in *Hoover* used this method, and we followed his methodology, the methodology itself was not in issue. Accordingly, we hold that the assignment of these *debts* to appellant did not constitute an unequal distribution of the marital *property*.

The trial judge explained his decision to assign these debts to appellant as follows:

During the course of the marriage, after the separation of the parties, and after entry of the restraining order in this matter, Dr. Williams spent considerable monies on the mother of one of his illegitimate children, . . . and in purchasing new automobiles for his sisters. The evidence reveals that Dr. Williams spent in excess of $801,000.00 on [his girlfriend] and his sisters. The funds expended were marital funds.

. . . .

Prior to the separation of the parties, certain loans on insurance policies were made by Mrs. Williams to pay for furniture and decorative items for the parties' home. The total for these loans is $279,104.00. Dr. Williams will be responsible for the repayment of these loans. Further Dr. Williams was required, pursuant to the parties' Agreed Temporary Order, to pay insurance premiums on the policies. Dr. Williams will be solely responsible for reimbursing the marital estate for all premium loans incurred after the date of the temporary order of February 27, 1998. This amount totals $105,565.00. Dr. Williams will be solely responsible for the insurance policy loan in the amount of $143,530.00 taken on policy No. 10-031-697 after the date of the separation and temporary order. Dr. Williams will also be solely responsible for the loan on [his girlfriend's] automobile in the amount of $47,000.00, for the personal loans from Metropolitan Bank in the amount of $900,000.00, for the stockholder loan from ADC in the amount of $292,010.00.

The court will award as Mrs. Williams' separate property, the entire contents of the parties' marital residence as partial reimbursement and compensation by Dr. Williams for the monies expended for [his girlfriend] and Dr. Williams' sisters after separation and after the restraining order was entered in this matter. The court finds that the award to Mrs. Williams of these items of personal property, as well as the title to Lot 29, Hickory Hills and the twelve acres in West Helena, Arkansas, as her separate property, will compensate her for the funds expended by Dr. Williams.

All other retirement accounts, cash and cash equivalent accounts, marketable securities, insurance policies and accounts receivable of the parties shall be divided in kind. All real property owned by the parties upon the entry of a decree of divorce shall be converted to ownership as tenants in common.

Dr. Williams has requested that the Court make an unequal division of marital property pursuant to Ark. Code Annot., Sec-

> tion 9-12-315(a)(1)(A)(v) and (vii). The court finds absolutely no merit to Dr. Williams' contention that the marital estate should be divided unequally in his favor. In fact, had the Plaintiff requested an unequal division of marital assets, the court would have been much more inclined to make an unequal division in favor of Mrs. Williams than Dr. Williams. Dr. Williams expenditures for illegitimate children and paramours, his attempts to hide assets through accounts with Mr. Kramer, and other activities which the court views as an attempt to minimize income and place assets beyond the reach of Mrs. Williams, further justify the court refusing to divide the marital property unequally in Dr. Williams' favor.

The parties to a divorce often must use marital funds to meet necessary expenses incurred during the pendency of an action, and the chancellor has discretion to determine whether it was necessary to use those funds, whether the amount used was reasonable, whether fraud or overreaching occurred, and whether an offset is appropriate. *Burns v. Burns*, 312 Ark. 61, 847 S.W.2d 23 (1993). The trial judge's findings as to the circumstances warranting a property division will not be reversed unless they are clearly erroneous. *Dennis v. Dennis*, 70 Ark. App. 13, 13 S.W.3d 909 (2000); *Smith v. Smith*, 32 Ark. App. 175, 798 S.W.2d 442 (1990).

Arkansas Code Annotated section 9-12-315(a)(1) (Repl. 2002) provides that all marital property shall be distributed one-half to each party unless the court finds such a division to be inequitable; in that event, the court shall make some other division that the court deems equitable, taking into consideration the following factors: (1) length of the marriage; (2) age, health, and station in life of the parties; (3) occupation of the parties; (4) amount and sources of income; (5) vocational skills; (6) employability; (7) estate, liabilities, and needs of each party and opportunity of each for further acquisition of capital assets and income; (8) contribution of each party in acquisition, preservation, or appreciation of marital property, including services as a homemaker; and (9) the federal income tax consequences of the court's division of property. The statute further states that, when property is divided pursuant to these considerations, the court must state in the order its reasons for not dividing the marital property equally.

Arkansas Code Annotated section 9-12-315, however, does not compel mathematical precision in the distribution of property; it simply requires that marital property be distributed equitably. *Creson v. Creson*, 53 Ark. App. 41, 917 S.W.2d 553 (1996). The statute vests the chancellor with a measure of flexibility and broad powers in apportioning property, nonmarital as well as marital, in order to achieve an equitable distribution; the critical inquiry is how the total assets are divided. *Id. Accord Box v. Box, supra; Boxley v. Boxley, supra.* This court will not substitute its judgment on appeal as to the exact interest each party should have but will only decide whether the order is clearly wrong. *Boxley v. Boxley, supra.* On our review of the extensive record in this case, we cannot say that the trial court's order is clearly wrong.

Cross-Appeal

Appellee has filed a cross-appeal from the judge's valuation of appellant's clinic and surgery center. She contends that the judge failed to follow Ark. Code Ann. § 9-12-315(4) (Repl. 2002), which provides that, when stocks or other securities issued by a corporation make up part of the marital property, the court shall, if awarding the securities to only one party, determine the fair market value of the stock and then award the other spouse an amount in money or other marital property equal to the fair market value of the securities.

The judge made these findings of fact regarding the valuation of appellant's practices:

> Plaintiff contends that the combined value of the professional practices is $2,388,200.00 based upon the business appraisal of Mr. Richard Schwartz. Defendant contends that the value of the professional practices is $465,500.00 based upon the appraisal of Ms. Cheryl Shuffield. The differences in the value per the appraisal of the two competing expert witnesses is $1,922,700.00.
>
> Mr. Schwartz testified that the fair market value of the two corporations included the fair market value of the intangible assets of the corporation, including the business or practice goodwill as well as fair market value of the tangible assets belonging to the practices. Mr. Schwartz contended that the goodwill to which he was referring was "practice" or "business" goodwill rather than "personal" goodwill and that this practice goodwill

was of the type that could be transferred and sold along with the corporate assets. He further testified that this goodwill was not dependent upon Dr. Williams' continued presence. Mr. Schwartz distinguished this practice goodwill for the personal goodwill that Dr. Williams has by virtue of Dr. Williams' compensation received in the form of salary.

Part of the differences in the valuation of the practices is attributable to the expert real estate appraisers upon whom Mr. Schwarz and Ms. Shuffield relied in formulating their values for the practices. Mr. Schwartz relied upon a valuation of $1,550.00.00 by Mr. Tom Ferstl for the office building located at 8901 Kanis Road, Little Rock. Ms. Shuffield relied upon the appraisal of Mr. R.M.S. Pearce valuing the property at 8901 Kanis Road at $1,320,000.00, a difference of some $230,000.00. The bulk of the difference in value as between Mr. Schwartz and Ms. Shuffield was that which was attributable to the goodwill of the business. Ms. Shuffield testified that any goodwill of the corporations would be "personal" goodwill and thus she rejected the market approach to valuation as well as the income approach. She instead valued the business purely from an adjusted asset approach. Mr. Schwartz' net asset method and his income method relied heavily on calculations of considerable goodwill. Mr. Schwartz' valuations failed to distinguish between personal and professional goodwill associated with the two professional corporations.

Under prevailing case law, for goodwill to be marital property, it must be a business asset with value independent of the presence or reputation of a particular individual. *Tortorich v. Tortorich*, 50 Ark. App.114, 902 S.W.2d 247, 250 (1955) [sic] (citing *Wilson v. Wilson*, 294 Ark. 194, 205-06, 741 S.W.2d 640, 647 (1987)). To establish goodwill as marital property and thus be divisible, the party must produce evidence establishing the salability or marketability of that goodwill as a business asset of a professional practice. The *Tortorich* and *Wilson* cases confirm that the burden is on the party who seeks to establish goodwill as a marital asset to produce convincing proof delineating between professional goodwill on the one hand and personal goodwill on the other. *Wilson*, 294 Ark. App. 121, 741 S.W.2d. 640. Mr. Schwartz admitted in his testimony that he did not attribute any value to Dr. Alonzo Williams' personal reputation. He stated that he ". . .didn't distinguish between the goodwill that developed between any personal and any professional."

At trial, Defendant testified that he was raised in West Helena and how he gained recognition for his personal, professional and civic achievements. Defendant serves [sic] on the Arkansas State Medical Board for the past twelve years and has held the position of secretary for approximately six years. Dr. Williams also has served on the board of the Boy Scouts in this area counsel for many years.

Dr. Williams attributes his draw of patients to various factors. Specifically, he testified that he has a group of twenty to thirty physicians with whom he maintains regular contact and from whom he receives referrals. Dr. Williams contends that he receives much of his business based upon referrals. He testified that these referrals keep coming because the referring doctors are his personal friends and know that he will treat the patient well regardless of financial circumstances. Dr. Alonzo Williams testified that the racial makeup of his patient base is over 80% African-American. Dr. Williams is one of the only two African-American board certified gastroenterologists in Arkansas. The burden of proof is with the Plaintiff, not the Defendant, to delineate the facets of goodwill. The court finds that the Plaintiff has failed to do so.

The court finds that Mr. Schwartz' market valuation method was unconvincing due to lack of comparable features in the transaction upon which he relied. For example, in his valuation of Gastro, Mr. Schwartz could reference only two transactions or sales; neither of these two transactions were in Arkansas. One transaction was in Kansas City and one was in Naples, Florida. One transaction or sale was in 1997. Mr. Schwartz did not know the number of physicians involved in the practices which were the subject of the transactions; he did not know whether there were non-compete agreements signed; he did not know whether the motivation for these particular transactions were strategic; he did not know whether the transaction was in stock or for cash; he did not know how the liabilities were handled in the transaction; he did not know whether the acquiring entity bought 100% or only a portion of the Kansas City business; and he acknowledged that the Florida transaction was for only 60% of the business.

The transactions relied upon by Mr. Schwartz regarding ADC were more numerous but lacking in comparable detail, most notably they were quite remote. Almost all of the transactions dated back to 1996. The court notes that there has been

considerable volatility and change in the health care industry in the last few years. Acquisitions have diminished and motivations have changed.

The court adopts the valuation placed on Gastro and ADC by Ms. Shuffield, with the exception of her reliance upon the appraisal of Mr. Pearce. The court places the greater credibility and weight on the testimony of Mr. Tom Ferstl, the appraiser upon which Mr. Schwartz relied in valuing the practices. Therefore, the valuation placed upon the practices by Ms. Shuffield totaling $465,500.00 will be increased by the sum of $230,00.00, the difference between the appraisal of Mr. Ferstl and Mr. Pearce, resulting in a valuation of $695,500.00 for ADC and Gastro.

Ms. Shuffield's values were based upon the adjusted book value, or net asset value method, which is a cost approach. The underlying theory of the cost approach is that a buyer will not pay more for an asset than the cost to reproduce such asset (whether tangible or intangible). The standard of value applied was fair market value, going concern basis. In arriving at value, it was necessary to distinguish the value of any personal goodwill, which pursuant to Arkansas case law, is not a marital asset. An individuals' probable future earnings capacity is non-marital property. For goodwill to be marital property, it must be a business asset with value independent of the presence or reputation of a particular individual. Ms. Shuffield's analysis focused on transferable value, absent Dr. Alonzo Williams' continued physical presence in the business.

Dr. Alonzo Williams' continued presence is of particular significance in the valuation of Gastro where Dr. Williams personally performed procedures accounting for 84% of the revenues in 1998, and 89% in 1999. The court notes that a buyer of 100% interest in Gastro could not legally protect himself against the eventuality that Dr. Alonzo Williams might choose to perform those procedures elsewhere, or that Dr. Alonzo Williams might retire, or be disabled. The proof reflected that without Dr. Alonzo Williams' continued use of and presence at Gastro, Gastro would operate at a loss. The only way for Dr. Williams to realize full value of the income generated by Gastro would be for him to remain in place as its owner. For this reason, the market approach was rejected by Ms. Shuffield in the Gastro valuation and Court views this as reasonable. This same reasoning lead Ms. Shuffield to reject the income approach. If a buyer can not protect himself against loss of the income stream, then the income approach is inapplicable.

Ms. Shuffield rejected the market approach in the valuation of ADC for the following reasons:

(a). Market data does not provide sufficient data to distinguish between personal and enterprise, or professional, goodwill.

(b). Market data does not provide sufficient information for comparability of consideration.

(c). Market data does not provide sufficient information for comparability of the subject with reported transactions due to geographical differences, differences in patient population and characteristics, differences in managed care environments, number of physicians, and distribution of patient base among physicians.

(d). Market comparables were unavailable for any transactions occurring after 1997.

Ms. Shuffield properly rejected the income approach in valuing ADC because:

(a). Any income model based on historical results of operations would necessarily include an employment contract with Dr. Alonzo Williams to attain comparable results on a perspective [sic] basis.

(b). An income model constructed without the assumed continued presence of Dr. Alonzo Williams must take into account not only the continued patronage of the patient population absent his presence, but also the cost to reproduce his services.

(c). Absent even these considerations, if one takes into account the expected decreases in revenues from HCFA (for which Ms. Shuffield introduced supporting information) and other third party payors, there are no excess earnings to capitalize; thus the adjusted book value approach utilizing a cost to reproduce the enterprise value yields the higher value than one which utilizes earnings capacity.

Ms. Shuffield testified that the value of Arkansas Diagnostic Center, P.A., prior to application of a marketability discount was comprised of net tangible operating assets of $570,418.00, enterprise goodwill value of $75,000.00, and a deficit value per net non-operating assets of ($202,083.00), for a total asset value, net of liabilities, of $443,335.00. A marketability discount of

> $36,570.00 was deducted to arrive at a total concluded value of $407,000.00 for the 100% ownership interest in ADC. The marketability discount was calculated at 10% and excluded the values of non-operating assets and also the face amount of stock holder receivables. Had the conclusion of value been reached through a market or income approach, a considerably higher marketability discount percentage would have been applied.
>
> As previously stated $230,000.00 of the difference between Ms. Shuffield's and Mr. Schwartz' concluded value of ADC is attributable to the differing real estate values for the property at 8901 Kanis. The court finds that the value placed on the property at 8901 Kanis by Mr. Tom Ferstl is the more reliable and creditable value and therefore will increase the value of the ADC practice by the $230,000 difference between Mr. Ferstl and Mr. Pearce's appraisals. . . .

As mentioned above, Ark. Code Ann. § 9-12-315 (Repl. 2002) requires the use of the "fair market value" standard for valuing businesses in a marital property context. *See Cole v. Cole*, 82 Ark. App. 47, 110 S.W.3d 310 (2003). We will reverse the trial court's finding of the valuation of a business only if it is clearly erroneous. *Miller v. Miller*, 70 Ark. App. 64, 14 S.W.3d 903 (2000); *Vestal v. Vestal*, 28 Ark. App. 206, 771 S.W.2d 800 (1989). Difficulty arises in valuing a professional practice when goodwill is likely to depend on the professional reputation and continuing presence of a particular individual in that practice. For goodwill to be marital property, it must be a business asset with value independent of the presence or reputation of a particular individual — an asset that may be sold, transferred, conveyed or pledged. *Wilson v. Wilson*, 294 Ark. 194, 741 S.W.2d 640 (1987). Thus, whether goodwill is marital property is a fact question, and a party, to establish goodwill as marital property and divisible as such, must produce evidence establishing the salability or marketability of that goodwill as a business asset of a professional practice. *Id.*

In *Tortorich v. Tortorich*, 50 Ark. App. 114, 902 S.W.2d 247 (1995), we held that the husband's business goodwill in a solo oral surgery practice was not marital property:

> While we agree with the chancellor's finding that Mr. Schwartz's testimony was persuasive to an extent, we fail to find any evidence that Dr. Tortorich's professional association had "value independent of the presence or reputation of [this] partic-

> ular individual — an asset which may be sold, transferred, conveyed, or pledged."
>
> Dr. Tortorich is a sole practitioner whose personal skills developed his reputation with other dentists. Dr. Tortorich's practice, as the evidence clearly showed, was almost wholly dependent on referrals from other dentists who referred patients to him based on his reputation alone. Without the presence or reputation of this particular individual the oral surgery practice had no value independent of its tangible assets. The chancellor adopted Mr. Schwartz's opinion of the goodwill value of Anthony L. Tortorich, D.D.S., P.A., and held that this goodwill had a value of approximately $180,000 and was a marital asset. It appears that Mr. Schwartz arrived at his opinion by capitalizing the above average net income Dr. Tortorich has been able to generate in his practice. This does not, however, purport to distinguish the superior personal earnings capacity of Dr. Tortorich from any goodwill of the professional association independent of his continued presence and reputation. Upon our de novo review we conclude that the value of Dr. Tortorich's P.A. is $61,086 and that it has no goodwill value independent of Dr. Tortorich's presence and reputation. We do not hold, as suggested in the dissenting opinion, that a solo professional practice can never have business goodwill independent of the personal goodwill of the practitioner. We simply hold that pursuant to *Wilson*, Mrs. Tortorich had the burden of proving that Dr. Tortorich's professional association had business goodwill independent of Dr. Tortorich's personal goodwill if it was to be considered a marital asset. This she failed to do. The chancellor's finding to the contrary was clearly erroneous and is reversed.

50 Ark. App. at 120-21, 902 S.W.2d at 251.

Appellee's expert, Richard Schwartz, testified that the fair market value of ADC is $911,200 and that the fair market value of Gastro is $1,477,000. Mr. Schwartz testified that appellant was compensated for his personal goodwill in the form of his salary. Appellant's expert, Ms. Shuffield, valued ADC at $407,000 and Gastro at $58,000; she assigned "some" enterprise value but stated that any goodwill of the corporations would be personal goodwill.

Appellee argues that Ms. Shuffield's valuation of the practices was unreliable. She contends that most of the business at ADC and Gastro consists of repeat visits from patients, which comprise a continuing patient base, and not new referrals. She also directs

this court's attention to the testimony of Bill Kremer, appellant's accountant, who had valued the practices significantly higher in 1994 when the parties contemplated selling them to appellant's nephew. Appellee also points out that appellant testified that he had hired other doctors to take over his hospital work so that he could concentrate on doing procedures at Gastro; that both practices are not named after appellant; and that, even though appellant owns the practices, two other doctors also work there.

We think that the trial judge's extensive findings concerning the unreliability of Mr. Schwartz's valuation are supported by the evidence and that the judge's adoption of the valuation offered by appellant's expert, Ms. Shuffield, is not clearly erroneous. The goodwill factor was the major point on which the experts disagreed. The evidence at trial, however, preponderates in favor of a finding that most of the goodwill attributable to appellant's practices depends on his professional reputation and his continuing presence and that appellee failed to satisfy her burden of proving otherwise. Appellant presented evidence that most of his practice is dependent upon referrals from other physicians and not repeat business; that his efforts to provide attentive service to his patients have been successful; that he works hard and efficiently; that his reputation in the Little Rock area and in eastern Arkansas, where he grew up, is excellent; that he is very involved in community affairs; and that he was, at the time of trial, the secretary of the Arkansas Medical Board. Although two other physicians are employed by appellant's practices, appellant brought in eighty-four percent of Gastro's revenues in 1998 and performed three times as many procedures as the other physicians. Appellant saw over fifty percent of ADC's patients. Furthermore, appellee's expert failed to adequately account for the reduction in patient revenues that would be associated with appellant's departure from the practices. For these reasons, and because appellant's expert, Ms. Shuffield, did in fact include enterprise value in her valuation of the practices, we cannot say that the trial judge erred in crediting her valuation over that of Mr. Schwartz.

Affirmed on appeal; affirmed on cross-appeal.

STROUD, C.J., and BAKER, J., agree.

Tom HARRIS *v.* Donna HARRIS

CA 02-1170 107 S.W.3d 897

Court of Appeals of Arkansas
Division II
Opinion delivered May 28, 2003

Brockman, Norton & Taylor, by: *C. Mac Norton*, for appellant.

Bridges, Young, Matthews & Drake, PLC, by: *Terry F. Wynne*, for appellee.

WENDELL L. GRIFFEN, Judge. Tom Harris appeals from an order of the trial court requiring him to continue paying child support for his oldest child who had reached the age of eighteen, graduated from high school, and was enrolled in college. Appellant argues that when his oldest child turned eighteen years old, a change of circumstance occurred by operation of law pursuant to Ark. Code Ann. § 9-14-237 (Repl. 2002) sufficient to warrant a modification of his child-support obligation. We agree; thus, we reverse and remand.

Appellant and appellee, Donna Harris, were divorced on January 20, 1998. Appellee was awarded custody of the parties' two children, and appellant was ordered to pay child support in the amount of $1,200 per month. The parties' separation and property settlement agreement was incorporated by reference into the 1998 divorce decree and provided, in part, that the $1,200 per month child support payment would "remain at this amount until such time as the children reach the age of 18," and that the parties "shall each be responsible for one-half (1/2) the reasonable expenses and costs of the college education of the children."

On June 13, 2002, appellant filed a petition to terminate his child support for the parties' oldest child, Lauren, because Lauren had graduated from high school and was about to turn eighteen on June 21, 2002. He also requested that child support for the parties' other child be set in accordance with Arkansas law. In response to appellant's petition, appellee argued that the parties negotiated the amount of child support at the time of the divorce and had agreed that child support was to remain at $1,200 per month until both children reached the age of eighteen. Appellee

filed a counterclaim against appellant contending that Lauren was attending college and that appellant had refused to pay for one-half of Lauren's college expenses.

A hearing was conducted on July 8, 2002. At the hearing, appellant testified that when the parties divorced he was making $41,000 per year. He negotiated the amount of alimony and child support that he was to pay and did not use the child-support chart. Appellant stated that he lived with his parents, rent free, for two years after the divorce, so that he could do what he could financially for his children. He acknowledged that the language used in the child-support provision of the agreement did not specify that his child-support obligation was to change upon Lauren reaching the age of eighteen. However, appellant stated that this is what he understood would happen and was part of his consideration for agreeing to pay for half of Lauren's college expenses. Appellant also mentioned that he maintained health insurance on the parties' two children at a cost of $125 per month, which was taken directly out of his paycheck. According to appellant, his current yearly income was approximately $58,000, and he was planning to remarry in August 2002.

Appellee testified that although at the time of the divorce she was planning to enter the insurance business, she was not working, which was a factor she considered when negotiating the child-support amounts with appellant. Appellee stated, "I had no doubt in my mind he would pay me $1200 per month until both children were eighteen, even though [when] Lauren turned eighteen Mr. Harris would be responsible for part of her college expenses." Appellee asserted that she needed the entire $1,200 per month child support to pay for the youngest child's tuition of $250 per month, uniforms in the amount of $400 per year, and registration fees. However, appellee testified that after the divorce, with the $1,200 per month child support, she had both the parties' children in private school. At the time of the hearing, appellee was no longer working, but was receiving $24,000 per year in disability, as compared to her prior salary of $25,000 plus commissions. Appellee further mentioned that Lauren no longer lived with her, but that the cost of taking care of Lauren had increased because

Lauren now had additional college expenses. Following the hearing, the trial court found that there had not been a change in circumstances sufficient to warrant a termination or reduction in appellant's child-support obligation. This appeal followed.

It is well settled that on appeal our review of a trial court's order of child support is *de novo*, and we will affirm the trial court unless its findings of fact are clearly erroneous. *Alfano v. Alfano*, 77 Ark. App. 62, 72 S.W.3d 104 (2002). A finding is clearly erroneous, even though there is evidence to support it, if the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Deluca v. Stapleton*, 79 Ark. App. 138, 84 S.W.3d 892 (2002). In resolving the question of whether the trial court's findings are clearly erroneous, we must give due regard to the opportunity of the trial court to judge the credibility of witnesses. *Johnson v. Ark. Dep't of Human Servs.*, 78 Ark. App. 112, 82 S.W.3d 183 (2002).

Appellant argues that the trial court erred in refusing to reduce the amount of his child support when his legal obligation to support his oldest child terminated by operation of law. Arkansas Code Annotated section 9-14-237 (Repl. 2002) provides that the "duty to pay child support for a child shall automatically terminate by operation of law when the child reaches eighteen (18) years of age or should have graduated from high school, whichever is later . . . unless the court order for child support specifically extends child support after such circumstances." Accordingly, a noncustodial parent who petitions the court to terminate child support alleging that his child has reached the age of eighteen and has graduated from high school has made a *prima facie* case for discontinuance of child-support payments. The burden then shifts to the custodial parent to go forward with proof that the child support should be continued. *Hogue v. Hogue*, 262 Ark. 767, 561 S.W.2d 299 (1978).

Appellee, however, argues that appellant was bound by the parties' agreement incorporated into the divorce decree to pay $1,200 per month in child support until both of their children reached eighteen years of age. In *Scroggins v. Scroggins*, 302 Ark.

362, 790 S.W.2d 157 (1990), the supreme court recognized that a parent who agrees, at the time of divorce, to continue support until the minor children are beyond the age of eighteen commits himself to uphold such an obligation. A parent can contract and bind himself to support a child past the age of majority, and such a contract is just as binding and enforceable as any other contract. *Worthington v. Worthington*, 207 Ark. 185, 179 S.W.2d 648 (1944). However, such independent contracts dealing with child support are not binding on the trial court. *Alfano v. Alfano, supra*; *Warren v. Kordsmeier*, 56 Ark. App. 52, 938 S.W.2d 237 (1997). Accordingly, the trial court always retains jurisdiction over child-support issues as a matter of public policy, and no matter what the parties' independent contract provides, either party has a right to request a modification of a child-support award. *Id.*

A party seeking to modify child support has the burden of showing a change in circumstances sufficient to warrant the modification. *Weir v. Phillips*, 75 Ark. App. 208, 55 S.W.3d 804 (2001). Factors which the trial court may consider in determining whether there has been a change in circumstances include remarriage of the parties, a minor reaching majority, change in the income and financial conditions of the parties, relocation, change in custody, debts of the parties, financial conditions of the parties and families, ability to meet current and future obligations, and the child-support chart. *Woodson v. Johnson*, 63 Ark. App. 192, 975 S.W.2d 880 (1998).

The first issue that we must address is whether appellant agreed to continue making child-support payments for his children past the age of eighteen. The relevant provisions of the property-settlement agreement provide (1) that the $1,200 per month child-support payment would "remain at this amount until such time as the children reach the age of 18," and (2) that the parties "shall each be responsible for one-half (1/2) the reasonable expenses and costs of the college education of the children." Appellant contends that although the language used in the agreement did not specifically state that upon Lauren turning eighteen years of age his child-support obligation would be modified, it was his understanding that:

> when I agreed to the amount of child support, that I would pay this amount of child support until one turned age 18, and support for that child would end. This was part of my consideration to pay half of Lauren's college expenses. I thought the child support for her would end, and I would use that money to pay her college expenses.

Appellee, however, argues that the divorce decree specifically extends child support beyond the eighteenth birthday of Lauren and directs that the child support continued at $1,200 per month until both children reached eighteen. The trial court noted that the parties had contemplated a change regarding support. However, the trial court reasoned that:

> If the parties wanted it changed, it could very well have been placed in the property settlement agreement once Lauren turned 18 or graduated from high school, whichever came — I guess in this situation, last. Also, I must note that the custodial parent also has an obligation to pay one-half of the oldest child's expenses. And the parties very well could have contemplated that what was going for child support would now go toward Lauren's college expenses.

The trial court found that under the parties' agreement, appellant was obligated to pay both child support and one-half of the college expenses for the children who attended college.

■ However, based on our *de novo* review of the facts of this case, we conclude that the child-support provision stating that support would "remain at this amount until such time as the children reach the age of 18," is ambiguous; it does not clearly designate whether appellant's child-support obligation of $1,200 per month was to continue at this amount until both children reached eighteen years of age, or change once one reached the age of majority. If an ambiguity exists, we are permitted to look outside of the agreement to determine the actual intent and conduct of the parties. *Rockefeller v. Rockefeller*, 335 Ark. 145, 980 S.W.2d 255 (1998). Further, in determining the true intentions of the parties, different clauses of a contract must be read together and construed so that all of its parts harmonize if that is possible. *Dodson v. Dodson*, 37 Ark. App. 86, 825 S.W.2d 608 (1992).

In this case, the record reveals that appellant was only making $41,000 per year at the time of divorce, but agreed to pay alimony and child support in the amount of $1,200 per month, which was above the amount required under the child-support chart. As a result, appellant lived with his parents to be able to provide financially for his children. Part of the $1,200 per month child support was used by appellee to pay tuition for both children to attend private school, as the parties had agreed. Based on these facts, when we read the "child support" provision and the "college expenses" provision together, we must conclude that the intent of the parties was that appellant's child-support obligation would cease upon each child reaching the age of majority; however, if a child chose to attend college, the parties then agreed to share the expense of supporting the child while in college. If the parties had intended otherwise, the decree could have simply provided so by including the word "both." However, it did not. Based on these facts, we are not inclined to read such an intent into the decree, especially when doing so would impose an obligation to pay child support not clearly evidenced by the parties' agreement and in the face of Ark. Code Ann. § 9-14-237 (Repl. 2002).

The second issue we must address is whether there was a change of circumstances sufficient to modify child support. In the instant case, the record reveals that the parties' oldest child had graduated from high school, had reached the age of majority, and was no longer living under the same roof as appellee. On these facts, appellant made a *prima facie* showing of a change of circumstances sufficient to warrant modification of child support. The burden then should have shifted to appellee to prove the need for this support. *Hogue v. Hogue, supra.*

Accordingly, we hold that the trial court erred in finding that the parties had agreed that appellant was to continue paying child support for the children past the age of eighteen years old and that there was not a change of circumstances sufficient to warrant modification of appellant's child-support obligation.

Reversed and remanded.

HART and BAKER, JJ., agree.

Susan L. REBSAMEN *v.* Richard L. REBSAMEN

CA 02-1384 107 S.W.3d 871

Court of Appeals of Arkansas
Division II
Opinion delivered May 28, 2003

Skokos, Bequette & Billingsley, P.A., by: *Keith I. Billingsley*, for appellant.

Hilburn, Calhoon, Harper, Pruniski & Calhoon, Ltd., by: *Sam Hilburn* and *Susan M. Coleman*, for appellee.

WENDELL L. GRIFFEN, Judge. This appeal arose from an order modifying visitation after granting relocation to appellant, Susan L. Rebsamen Stockton. The sole issue is whether the trial court was clearly erroneous in structuring the visitation schedule concerning the parties' eight-year-old son, Dalton, after

appellee, Richard L. Rebsamen, consented to, or at least waived any objection regarding appellant's relocation out of state. We affirm.

The parties obtained a divorce from each other on October 6, 1999. Appellant received custody of Dalton, subject to certain visitation privileges of appellee. Appellee exercised visitation regularly every other weekend, alternate holidays, and six weeks during the summer break. Appellant remarried in the spring of 2002 and relocated, within Arkansas, to Fayetteville. However, appellant's husband recently obtained new employment in the state of Virginia. Because of the new job, appellant, her husband, and Dalton moved to Winchester, in the very northern tip of Virginia. Due to her husband's change in employment, appellant's yearly family income increased from approximately $48,000 to about $82,000 per year. Appellant's husband does not have any children of his own. In contrast, appellee, residing in Nashville, Arkansas, made $35,000 per year. Appellee also remarried, and his wife has three children of her own. There is no evidence in the record pertaining to appellee's wife's income, if any. Appellant's and appellee's parents continue to reside in Arkansas as well.

Appellee initially opposed appellant's motion to relocate, but later withdrew his objection. At the hearing, however, appellee asserted that he would like to see Dalton as often as possible. In return, appellant expressed concerns about the flight schedule, frequent air travel, possible complications due to connecting flights, and other travel-related concerns. Appellant's new home is located about two hours' drive-time from the Baltimore airport, from where Dalton could board a nonstop flight to Little Rock on Southwest Airlines. The flight departs at 7:30 a.m. In order to arrive in time, appellant would have to depart from home, in order to bring Dalton to the airport in time, before 4:30 a.m.

Based on these facts, and appellee's withdrawal of his objection to the relocation, the trial court granted the relocation and issued a new visitation order, emphasizing one particular factor under *Staab v. Hurst*, 44 Ark. App. 128, 868 S.W.2d 517 (1994), namely whether there will be a realistic opportunity for visitation in lieu of the weekly pattern that can provide an adequate basis for

preserving and fostering the parent relationship with the noncustodial parent. In relevant parts, the trial court stated specifically:

> [Appellee] shall have summer visitation from July 1 until the Friday before the fall school semester reconvenes. This schedule will continue as long as Dalton is playing baseball. If the child does not participate in baseball, then summer visitation will commence three days after the school recesses for the summer break and will continue until the Friday before the fall semester reconvenes. Child support shall abate by fifty-percent during summer visitation;
>
> [Appellee] shall have every Spring Break from the Friday that school lets out for the break until the Sunday before school starts;
>
> . . .
>
> Every year [after 2002], [appellee] shall have Dalton from the time school lets out for the Christmas holiday until the evening before school reconvenes for the spring semester. When [appellant] is in Arkansas, she will have Dalton Christmas Eve from 6:00 p.m., December 23 until 7:00 p.m. on December 24.
>
> [Appellee] shall have the minor child from noon on the Tuesday before Thanksgiving until Monday after Thanksgiving. If [appellant] is in the state of Arkansas, she will have Thanksgiving from Wednesday evening until Thanksgiving at 7:00 p.m. in even-numbered years. If [appellant] is in the state, she shall be entitled to one day of the weekend of Thanksgiving break in odd-numbered years;
>
> [Appellee] shall have the child from the Friday before Memorial Day until Memorial Day;
>
> Per the 2002-2003 school calendar, [appellee] will have the minor child as follows:
>
> (i) Friday, October 18, 2002, until Sunday, October 20.
>
> (ii) Friday, November 1, 2002, until Tuesday, November 5.
>
> (iii) Friday, January 17, 2003, until Tuesday, January 21.
>
> (iv) Friday, February 14, 2003, until Monday, February 17.
>
> The visitation referenced hereinabove shall be revised each year in accordance with the child's school calendar and visitation shall coincide with all extended school breaks, to the extent they exist . . . .

> In addition to the visitation set out above, [appellant] shall make the minor child available to [appellee] at any times that she has the child in Arkansas. In the event [appellee] travels to the state of Virginia, upon proper notice, he shall be entitled to visit with Dalton during any trip, holiday or vacation travel; and
>
> In the event that [appellee] has a family event, wedding or funeral, which he would like the child to attend, the parties shall work to arrange for the child to be present. The transportation expense and arrangements for any additional visitation of this nature shall be the responsibility of [appellee].
>
> . . .
>
> [T]he Court orders [appellant] to be responsible for the transportation expense, other than those areas or times that [appellee] has a special need or event referenced [above].

From this order arises the present appeal.

Visitation After Uncontested Relocation Out of State

On appeal, appellant solely asserts that the trial court acted clearly erroneously when it devised and ordered the above visitation schedule. We review cases such as this *de novo* and reverse only when the trial court's findings are clearly erroneous. *Hollandsworth v. Knyzewski*, 78 Ark. App. 190, 79 S.W.3d 856 (2002). A finding is clearly erroneous when, despite the existence of evidence supporting it, we have the definite and firm conviction, based on the entire evidence, that a mistake was committed. *Id.*

While there is little case law before us that distinctly applies to the current situation — notably not one involving a disputed relocation, but solely a disputed visitation schedule within the context of an out-of-state relocation — our court in *Staab v. Hurst*, 44 Ark. App. 128, 133, 868 S.W.2d 517, 519 (1994), made some relevant observations. After a divorce and an initial custody determination, the determination of a child's best interest cannot be made in a vacuum, but requires that the interests of the custodial parent also be taken into account. *Id.* Our court quoted, as a decisive case, *D'Onofrio v. D'Onofrio*, 144 N.J. Super. 200, 365 A.2d 27, *aff'd* 144 N.J. Super. 352, 365 A.2d 716 (App. Div. 1976):

> The children, after the parents' divorce or separation, belong to a different family unit than they did when the parents lived together.

> The new family unit consists only of the children and the custodial parent, and what is advantageous to that unit as a whole, to each of its members individually, and to the way they relate to each other and function together is obviously in the best interest of the children. It is in the context of what is best for that family unit that the precise nature and terms of visitation and changes in visitation by the noncustodial parent must be considered.

Id. Consequently, our court arrived at five factors to be considered in order to accommodate the compelling interests of all the family members:

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

Id. at 134, 868 S.W.2d at 520; *see also Hollandsworth v. Knyzewski*, *supra* (Griffen, J., concurring) (emphasizing the necessity to apply the *Staab* factors in deciding relocation cases).

Our supreme court found the *Staab* factors to be irrelevant in a case where visitation between Fayetteville and Russellville was neither impossible nor impractical, where neither side objected to the time of travel necessary to implement visitation as being unduly burdensome, and where joint custody was at issue. *Lewellyn v. Lewellyn*, 351 Ark. 346, 93 S.W.3d 681 (2002). The supreme court concluded that the *Lewellyn* case is "simply not a relocation case where the *Staab* factors should be applied." *Id.* at 357, 93 S.W.3d at 688. Indeed, in the case now before us the question also arises whether the *Staab* analysis actually applies. Appellee withdrew his objection to appellant's relocation. Thus, we do not have before us an actual relocation case. As such, we do not have to decide whether relocation ought to be granted. Upon reading the *Staab* factors, and their subsequent applications

throughout Arkansas case law, it appears, however, that they apply to the issue whether relocation should be granted or not — and do not apply to disputes solely focusing on visitation.

Of the five *Staab* factors, only the fifth factor addresses visitation, and even then, only as one factor to be considered in deciding relocation itself. However, it appears feasible to accept the fifth factor of *Staab* as a general statement of policy, namely in that visitation in a relocation context should attempt to provide for a "realistic opportunity for visitation" for "an adequate basis for preserving and fostering the parent relationship with the non-custodial parent." Thus, we recognize that it has been part of Arkansas's jurisprudence and policy to consider the preservation and maintenance of a parent-child relationship between the child and the noncustodial parent.

In a recent case, we decided that the trial court did not clearly err in scheduling visitation between two parties located in Fayetteville and El Dorado, Arkansas. *Haas v. Haas*, 80 Ark. App. 408, 97 S.W.3d 424 (2003). In that case, the trial court ordered summer visitation with the noncustodial parent beginning one week after school was dismissed and ending ten days prior to school starting for the fall semester. The custodial parent, however, retained visitation during the first weekend of July. The trial court also allowed the noncustodial parent every spring break and alternate weekends. In conclusion, we stated that "while we might well have restructured visitation differently, particularly to prevent such long periods in the summer when [the minor] is away from his mother, we are not convinced that the trial court erred in this regard." *Id.* at 412, 97 S.W.3d at 427.

In the case at bar Dalton presently plays baseball and thus, under the existing visitation order now on appeal, remains at appellant's home until the beginning of July, whereas the minor in *Haas* was to spend even more time at the noncustodial parent's household during the summer. Yet, in *Haas* we did not find ourselves in a position to disagree with the trial court's decision. Furthermore, while it is true that the present visitation order provides for Dalton to spend virtually every holiday with appellee, each spring break, and one weekend each month in which there is no holiday or other school vacation, the order also provides that Dalton spends all remaining time at appellant's household in Virginia.

Even though appellee is to receive his son on all holidays and school breaks, except those summer weeks during which Dalton still plays baseball, appellee unarguably gets to spend significantly less time with Dalton than appellant—whose choice it was to move to Virginia. Thus, there is no clear error.

In so holding, we are not unmindful of our stated policy, adopted from the New Jersey case of *D'Onofrio*, that the child now belongs to a new family unit and that we must determine visitation and changes of visitation in the context of what is best for the new family unit. *Staab v. Hurst, supra.* But we also must balance the needs of the noncustodial parent with that of the new family unit, especially if we, by analogy to a proper relocation case, consider the fifth *Staab* factor, according to which we always must consider the feasibility of maintaining visitation with the noncustodial, nonmoving parent so as to preserve the bond between noncustodial parent and child before relocation can be allowed. Even though the present case does not raise the issue of relocation per se, we find the reasoning behind the fifth *Staab* factor persuasive in the instant case as well. The need to preserve the relationship between the noncustodial parent and the child is not somehow less because the relocation itself occurred uncontested and is not now on appeal before us.

Furthermore, we also acknowledge that a visitation dispute never should disregard the best interest of the child. *Haas v. Haas, supra.* Appellant is correct when she worries about a young child frequently flying between Baltimore and Little Rock, but we are not convinced that such concerns outweigh the importance of fostering a good and working relationship between Dalton and appellee, his father.

Finally, we recognize that different versions of visitation could have been created, but the issue before us is whether the trial court clearly erred in establishing the specific visitation schedule now before us, not whether we could have, or would have, arrived at a different visitation schedule. *See Haas v. Haas, supra.* The issue before us is not whether we like the visitation schedule. We also remind the parties that the trial court's order provides for an alternative visitation schedule in the event that appellant chooses to celebrate certain holidays, such as Thanksgiving and Christmas, in Arkansas — where Dalton's grandparents, appellant's parents, reside

as well. According to that alternative visitation schedule, appellant can spend parts of those holidays with Dalton.

In light of the existing economic differences between the parties, we also find no clear error in the trial court's determination that, on the whole, appellant should be responsible for the transportation cost of visitation, except in such cases where appellee's specific family needs might require additional visitation not specifically ordered. After all, it was appellant who requested the relocation in the first place, and she does not appear to challenge the financial aspects of the order.

Affirmed.

VAUGHT and CRABTREE, JJ., agree.

DEATH & PERMANENT TOTAL DISABILITY TRUST FUND *v.* Eugene BRANUM, Employee Service America Corporation, and Wausau Insurance Company, Carrier

CA 02-1294 107 S.W.3d 876

Court of Appeals of Arkansas
Division I
Opinion delivered May 28, 2003

Terry Pence and *David L. Pake*, for appellant.

Friday, Eldredge & Clark, by: *Guy Alton Wade*, for appellees.

OLLY NEAL, Judge. On March 1, 1995, Eugene Branum was killed while in the course and scope of his employment with his employer, Service America Corporation. A hearing was held on February 25, 1997, to determine the appropriate beneficiaries of death benefits and their benefit amounts. The adminis-

trative law judge determined that Beverly Branum, Eugene Branum's widow, her two children, Kevin Bunn and Shawn Bunn, and the deceased's children from a previous marriage, Jeffrey Allen Branum, Jeannie Marie Branum, and Terry Lynn Branum (now McClain), were wholly and actually dependent upon the deceased at the time of his death. Although she was married and no longer a full-time student under the age of twenty-five, Terri Lynn McClain was determined to be wholly and actually dependent upon the deceased due to mental incapacity.

It is undisputed that appellant, Death & Permanent Total Disability Fund (Fund), was not in attendance at this hearing. It argues that it received no notice of any proceedings until it was served with a copy of the ALJ's opinion that ordered benefits to be paid to all named beneficiaries. Upon receipt of the opinion, the Fund advised the attorney who represented the insurance carrier, Wausau Insurance Company, that it did not agree with the finding of dependency made on behalf of Terri Lynn Branum McClain, Jeffrey Branum, Kevin Bunn, or Sean Bunn. The Fund's letter, dated October 17, 1997, stated as follows:

> The Death and Permanent Total Disability Trust Fund has examined the information on this case and from that have taken the position that Terry Lynn (Branum) McClain was not an eligible dependent at the time of Mr. Branum's death. We have also determined that both Kevin and Sean Bunn were not wholly and actually dependent upon decedent.

However, the Fund took no further action. The Fund acknowledged receipt of a copy of the ALJ's opinion in a letter dated October 23, 2000, in which it stated:

> The Trust Fund received a courtesy copy of the March [7], 1997 opinion on this case prior to the official AR-D notification received on June 25, 1997 from Wausau. The deceased[,] by prior marriage, had either adopted children or natural children. In an "Agreed Order" dated August 30, 1991, for child custody, the deceased was given custody of two children and the ex-wife['s] two children. The order also relieved the deceased of obligation of child support as previously ordered. It is the Trust Fund's opinion that this Order eliminated the expectations of support for Terri Lynn Branum and Jeffrey Branum.

* * *

> The Trust Fund has taken a position that the step-children were not wholly and actually dependent on the deceased. Several factors from our investigation support this. The claimant only earned 40% of the household income as [ ] Beverly Branum earned the majority of the income. Ms. Branum also carried claimant and her two children on her medical coverage.

* * *

A subsequent hearing was held on June 12, 2001, wherein all parties were represented by counsel. In a pre-hearing order entered on March 22, 2001, the parties stipulated that the issues to be determined were (1) whether the Fund was bound by the March 7, 1997 opinion; (2) whether Terri Lynn Branum McClain was entitled to any dependent's benefits; and (3) whether Kevin Bunn and Sean Bunn were entitled to full benefits as children of the deceased. At the hearing, the following colloquy took place:

FUND'S COUNSEL:	Your Honor, our position on that is that at the — as we were not a party, we treat this as if the first hearing had never taken place, Your Honor, and under the Code, as well as the established case law, those seeking compensation benefits have the burden of proving they're entitled to them.
ALJ:	Well, you forget one aspect of the hearing and, that is, whether or not you all are bound by this. That's one aspect. And I suppose the moving party on that is the respondent/employer/carrier is the moving party in regard to whether or not the Death & Permanent Total Disability Bank Fund is bound by these things and is obligated to commence the payment of benefits. You know, I am not sure that this is just another case where we just hold the prior hearing as a nullity and that the burden is on the claimants to reprove their case. That's only true if your contention holds up that you're not bound by the prior order or opinion.

FUND'S COUNSEL: And that is our position, Your Honor.

ALJ: I understand that, but, I mean, that's not — that hasn't been decided. I mean, if that had been decided, then maybe we wouldn't be here again retrying this case[.] . . .

* * *

FUND'S COUNSEL: Your Honor, this case does not involve a change of status. It involves the fact that one party is being asked to pay benefits that was not mentioned at all in the previous hearing. It was not mentioned in the style of the case nor the opinion. It was not given notice.

ALJ: All right. It appears, then, that you all have already decided. What you want to do is you want to go on your other deal. You want to go on the issue first. You want the issue tried and decided first, whether this prior opinion is binding against the Death & Permanent Total Disability Bank Fund?

CLAIMANTS' COUNSEL: Yes.

ALJ: That's what everybody wants?

WAUSAU'S COUNSEL: Yes, Your Honor. . . .

ALJ: Well, that's well and good, I mean, if that's what everyone wants, is an opinion first on whether or not this prior decision or whether or not this prior opinion is binding on the Fund, so be it. That's the way we'll proceed. All right. How about the Fund? What evidence do they want to put on in regard to that issue?

FUND'S COUNSEL: Well, Your Honor, again I don't think the Fund has the burden of proving it's binding on the Fund when it was not a party in any way. I think the burden would be on those seeking —

ALJ: I'm not saying it's your burden of proof. I'm just asking you if there's any proof you want to put on. Whether you've got the burden of proof or not, you've got a right to put on proof. That's one of the reasons we're here —

FUND'S COUNSEL: I understand. If you're asking about the issue —

ALJ: — is your argument that you weren't afforded an opportunity to put on proof. Now, do you want to put on any proof to support your argument that it isn't binding on you because you were deprived of putting on proof?

FUND'S COUNSEL: Our position, of course, Your Honor, is it's an issue of law and, obviously, we could cite some law to you in the form of briefs or memorandums or such as that. We did submit direct request for admissions and interrogatories to all the parties regarding that issue, whether we were put on notice. We can introduce those. But I think both claimants — at least would anticipate — would be willing to admit that they did not put the Fund on notice, and I have their sworn answers here that I can introduce.

ALJ: Introduce them. Let's get it all in that you want in on this particular issue.

FUND'S COUNSEL: Specifically, Your Honor, we will be admitting answers to request for admissions submitted to both claimants and the respondents, basically asking them to admit or deny that they had given us notice and their responses accordingly.

* * *

ALJ: . . . Anything else you all want to present in the way of evidence on this limited issue?

FUND'S COUNSEL:	Not in the form of documentary evidence, Judge. We would ask to give some citations of law.
ALJ:	All right. . . . I would request that that be done in the way of trial briefs.
FUND'S COUNSEL:	All right.
ALJ:	I'll allow anyone that wants to file a trial brief to file one within 15 days. Due to the nature of this proceeding and the fact that it is almost an absolute certainty, however I rule, that it will not stop with me, and the fact that these payments are coming to an end, I'll try to expedite this case as much as possible to get you a decision as soon as possible, so have your briefs in within 10 days.

There is no evidence in the record that any party submitted a brief on this matter. Thereafter, the ALJ determined that the Fund was bound by the previous ALJ opinion and entered an order on August 14, 2001, finding that the Fund was collaterally estopped from challenging the previous opinion and barred from relitigating the issue under the doctrine of laches. The Full Commission adopted the decision of the ALJ in an opinion filed August 22, 2002, and this appeal followed.

On appeal, the Fund argues that the Commission erred in (1) holding that it is bound by the March 7, 1997 administrative-law-judge opinion, (2) applying the doctrine of collateral estoppel against it, and (3) applying the doctrine of laches against it. We affirm.

When reviewing a decision from the Workers' Compensation Commission, the appellate court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission and affirms that decision if it is supported by substantial evidence. *Death & Permanent Total Disability Trust Fund v. Brewer*, 76 Ark. App. 348, 65 S.W.3d 463 (2002). Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion. *See id.* The issue is not whether the appellate court might have reached a different result from the Commission; if reasonable minds could

reach the result found by the Commission, the appellate court must affirm the decision. *Id.*

In the case at bar, the Commission issued a brief opinion which set out the specific findings of the administrative law judge, and affirmed and adopted the administrative law judge's opinion as the decision of the Commission. Under Arkansas law, the Commission is permitted to adopt the administrative law judge's decision. *See Odom v. Tosco Corp.*, 12 Ark. App. 196, 672 S.W.2d 915 (1984). Moreover, in so doing, the Commission makes the administrative law judge's findings and conclusions the findings and conclusions of the Commission. *See ITT/Higbie Mfg. v. Gilliam*, 34 Ark. App. 154, 807 S.W.2d 44 (1991). Therefore, for purposes of our review, we consider both the administrative law judge's order and the Commission's majority order.

Appropriated funds for the Death and Permanent Total Disability Trust Fund are administered for the use and benefit or at the direction of the Workers' Compensation Commission. *See* Ark. Code Ann. § 11-9-301 (Repl. 2002). Additionally, Arkansas Code Annotated section 11-9-205 (Repl. 2002) provides the Workers' Compensation Commission with the authority to make any such rules and regulations as it may find necessary. As established under the Commission, the Fund is subject to these rules and regulations. Neither party has provided the applicable rule in the record, but it is agreed upon that Rule 28 of the Workers' Compensation Rules provides:

> a) A party desiring to raise the issue of liability to the Death and Permanent Total Disability Trust Fund shall name the Trust Fund as a party by notifying the Special Funds Administrator of the Workers' Compensation Commission and all other parties no later than ninety days prior to the completion of payment of the first Fifty Thousand or Seventy-Five Thousand (depending on the applicable limit) and weekly benefits pursuant to 11-9-502(b) of the Act in writing by a form of mail requiring a signed receipt. The notice shall include a current Form A-30 to be filed with the Workers' Compensation Commission.
>
> b) Failure to give notice as set out above shall constitute a waiver of a claim of Death and Permanent Total Disability Fund liability until such time as the notice requirements in (a) above are met. In no event shall the employer or his carrier cease payments

for death or permanent total disability prior to compliance with the notice requirement above.

c) This rule shall not apply in claims where a certificate of acceptance has been received from the Death and Permanent Total Disability Trust Fund and there have been no changes since the date of the certification of acceptance.

There is no requirement under the established rules that the Fund receive any notice prior to ninety days before the completion of payment of the first $75,000 and weekly benefits paid pursuant to 11-9-502(b) (Repl. 2002). Nor did any of the parties have reason to believe that any other notice was required. Under Rule 28, the only requirement is that the Fund receive notice ninety days prior to when it was calculated that the carrier would have reached its maximum liability, which was determined to be on July 7, 2001. Therefore, as substantial evidence supports the decision of the Commission, we affirm.

Affirmed.

GLADWIN and ROBBINS, JJ., agree.

Steve W. GUNTER *v.* DIRECTOR,
Employment Security Department and BWJ Electric Service

E03-49 107 S.W.3d 902

Court of Appeals of Arkansas
Division I
Opinion delivered May 28, 2003

Appellant, pro se.

Allan F. Pruitt, for appellees.

OLLY NEAL, Judge. On appeal, appellant Steve Gunter challenges the Board's denial of benefits. The Board determined that appellant voluntarily and without good cause connected to work left his last work with BWJ Electric Service. As substantial evidence does not support the Board's decision, we reverse and remand for an award of benefits.

In unemployment compensation cases, findings of fact by the Board are conclusive if supported by substantial evidence, and review by this court is limited to determining whether the Board could reasonably reach its decision upon the evidence before it. *Hiner v. Director*, 61 Ark. App. 139, 965 S.W.2d 785 (1998). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Rollins v. Director*, 58 Ark. App. 58, 945 S.W.2d 410 (1997). This court reviews the evidence and all reasonable inferences deducible therefrom in a light most favorable to the Board's findings. *Barber v. Director*, 67 Ark. App. 20, 992 S.W.2d 159 (1999). We do not conduct a *de novo* review of the evidence in an appeal from a Board decision. *Hiner, supra.* 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. *Niece v. Director*, 67 Ark. App. 109, 992 S.W.2d 169

(1999). An administrative agency, like a jury, is free to believe or disbelieve any witness, and the appellate court gives the evidence its strongest probative force to support the administrative decision. *Singleton v. Smith*, 289 Ark. 577, 715 S.W.2d 437 (1986).

Gunter was denied benefits pursuant to Ark. Code Ann. § 11-10-513 (Repl. 2002) on the finding that he voluntarily and without good cause connected with the work, left his last work. "In determining . . . the existence of good cause, there shall be considered the degree of risk involved to his health, safety and morals, his physical fitness and prior training, his experience and prior earnings, the length of his unemployment, his prospects for obtaining work in his customary occupation, and the distance of available work from his residence, and prospects for obtaining local work." Ark. Code Ann. § 11-10-515(c)(1) (Repl. 2002). "Good cause" has been defined as "a cause that would reasonably impel the average able-bodied, qualified worker to give up his or her employment." *Ahrend v. Director*, 55 Ark. App. 71, 930 S.W.2d 392 (1996); *Teel v. Daniels*, 270 Ark. 766, 769, 606 S.W.2d 151, 152 (Ark. App. 1980). It is dependent not only on the reaction of the average employee, but also on the good faith of the employee involved, which includes the presence of a genuine desire to work and to be self-supporting. *Id.* The question of what is good cause must be determined in the light of the facts in each case. *Barber, supra.*

Gunter testified that he worked for his employer from August of 2001 to August of 2002 as an assistant to his son-in-law, journeyman electrician Jason McElhaney. He stated that he quit because of the verbal and physical abuse to him by McElhaney. Gunter described several instances of physical abuse, even one incident that occurred in front of BWJ Electric Service co-owner James Shelton. Gunter stated that when Mr. Shelton observed Mr. McElhaney choking him, "he was standing right there and Jason grabbed me by the neck and started screaming and cursing and James just stood there and looked at us . . . he didn't say anything, he just looked at us. He [was] less than 10 feet away, if that far." Thereafter, an altercation took place where McElhaney attacked Gunter at home. Gunter subsequently called co-owner Bruce Steinhardt and told him:

> "Bruce this is Steve, I don't know what Jason told you about what happened," I said, "I can't work with him and I quit. I just can't work with him," and, I said, "with him treating me like that I can't work with him." And Mr. Steinhardt said, "Take care of yourself, goodbye."

In making its determination, the Board stated that it looked to the degree of risk to Gunter's health and determined that he was verbally abused and physically attacked by his supervisor, once in the presence of the co-owner of the business. The Board further recognized that while verbal and/or physical attack of an employee by a supervisor or co-worker could constitute good cause, the question became whether or not Gunter "took appropriate steps to prevent the mistreatment from continuing." *See Teel v. Daniels, supra.* Such reasonable efforts included taking appropriate measures to prevent an unsatisfactory situation on the job from continuing. *Id.* However, an employee is not required to take measures to resolve a problem with his employer if such measures would constitute nothing more than a futile gesture. *Oxford v. Daniels*, 2 Ark. App. 200, 618 S.W.2d 171 (1981).

Viewing the evidence in the light most favorable to the Board, we hold that the Board's finding that Gunter voluntarily quit his employment without good cause connected to the work is not supported by substantial evidence. Gunter testified as to the verbal and physical abuse to which he was subjected. In one instance, he even stated that a co-owner was present. In its opinion, the Board announced that "although the employer was obviously aware of the situation between the claimant and his son-in-law/supervisor, it may have considered that the two were engaged in horseplay, given that the claimant did not advise the employer otherwise." This finding is not supported by the record and is an assumption of the Appeal Tribunal and the Board. The only evidence before the Board was Gunter's testimony, as the Appeal Tribunal could not, after several attempts, reach BWJ Electric Service for the hearing. No reading of Gunter's testimony can support such a finding. Therefore, we reverse and remand for an award of benefits.

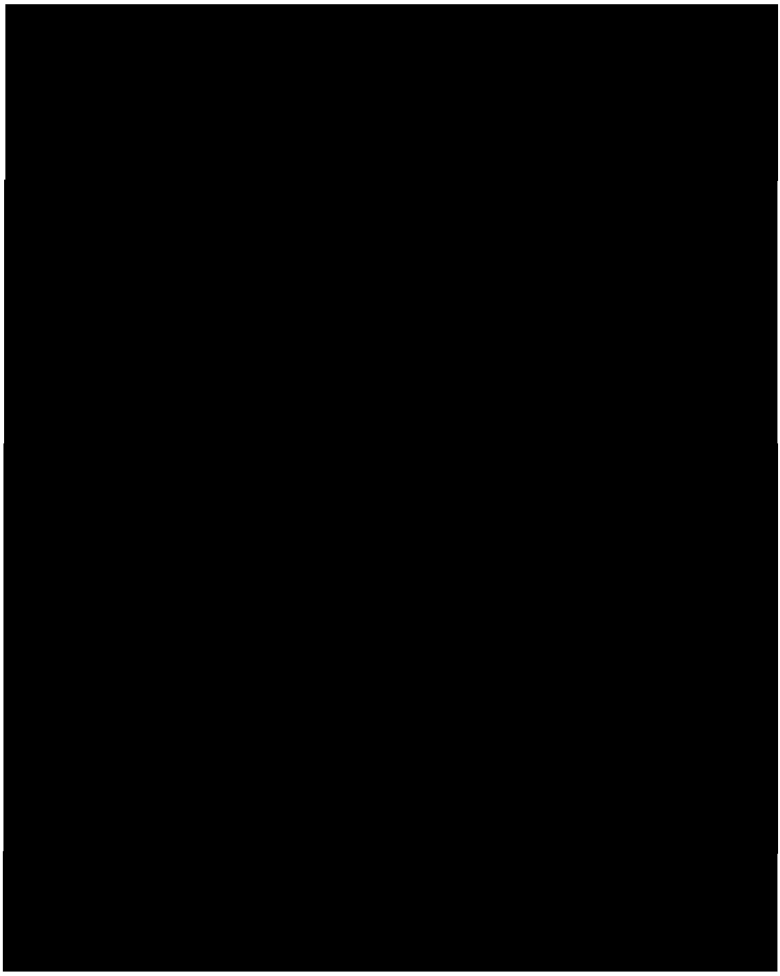
Reversed and remanded for award of benefits.

GLADWIN and ROBBINS, JJ., agree.

Michael MERRITT *v.* STATE of Arkansas

CA CR 02-808 107 S.W.3d 894

Court of Appeals of Arkansas
Division II
Opinion delivered May 28, 2003



Taumon & Koukol, by: *Patrick J. Benca*, for appellant.

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

TERRY CRABTREE, Judge. The appellant was charged with two counts of aggravated assault, but he was found guilty in a jury trial of the lesser-included offenses of first-degree assault for which he was sentenced to concurrent terms of thirty days in jail and fined $1,000. On appeal, he argues that the trial court erred in giving self-defense instructions for the jury to consider with regard to aggravated assault but not to any of the lesser-included offenses. We find no reversible error and affirm.

The charges levied against appellant arose from an incident that occurred on July 24, 2001, in which appellant admittedly brandished a gun in the presence of victims Lonnie Massey and Sheaquonea Hinton. Mr. Massey, a Kirby vacuum-cleaner salesman, testified that he and Ms. Hinton, a trainee, parked in front of appellant's house, which he approached while Ms. Hinton remained in the car. He said that he knocked and appellant answered the door but that appellant was not receptive to the offer of having his carpet cleaned for free and that appellant became upset and used profanity during the encounter. Massey said that he told appellant that he did not have to be rude, and he began walking back to the car. He said that appellant followed and threw something at him and that, as he was reaching for the door handle of the car, appellant nudged him in the chest. Appellant then got between Massey and the car, angrily telling Massey to get off his land. Massey said that he told appellant that he would leave if appellant would get out of his way and that appellant responded, "Well, I've got something that will take care of you." Massey said that he got in the car and that appellant kicked one of the doors, leaving a dent. He drove down the street, which was a dead end, and turned around. Massey related that, as he was driving back

past appellant's house, he saw appellant coming quickly across the yard with a gun in his hand. He said that appellant cocked it and pointed it in the direction of the car. Massey then pushed Ms. Hinton's head down, ducked, and drove to a nearby church parking lot where he called the police. He said that Ms. Hinton quit a few days later. There was testimony that her whereabouts were unknown and that officers had not been able to serve her with a subpoena for trial.

Appellant's version of events was markedly different. He testified that he heard someone approaching the house and that he went to the front door where he saw Massey with his hand on the door handle. Appellant said that Massey opened the door and let himself into the house. Appellant said that he told Massey that he was not interested in having his carpet cleaned. He said that he thought Massey had left but that Massey returned a second time. He said that he told Massey again that he was not interested. Appellant said that Massey came back a third time several minutes later and let himself inside the house again. Appellant said that he had been polite the first time Massey came inside but that he became increasingly angry the second and third times. Appellant said that he then forced Massey outside with his chest and told Massey to get off of his property. He said that, as Massey walked away, Massey stopped, turned, grabbed his crotch and said, "Fuck you." Appellant said that this made him even madder and that he began yelling at Massey to leave. He said that Massey walked to the car but that he stopped and turned towards him with his fists up, as if he were ready to fight. He said that Massey then put his right hand in his pocket. Appellant said that he then put his own hand in his rear pocket and told Massey that his hand had better be empty when he removed it from his pocket. He said that Massey fiddled around for a minute and then got in the car. He said that Massey then spun out and almost ran over him. He said that Massey then pulled into a neighbor's driveway where he saw Massey "bending over doing something." He said that Massey then pulled out of the driveway and started driving slowly down the street. Appellant said that he moved towards his truck where he kept a gun. He said that Massey then pulled into his yard and that Massey had his hands up and that he thought he saw a weapon. He said that he then retrieved his gun and stood behind the door of his truck. He said that Massey sat there for a few seconds and then left.

In discussing jury instructions, the trial court agreed that the jury was to be given instructions on the charged offense of aggravated assault, as well as the lesser-included offenses of first-, second-, and third-degree assault. The court also ruled that appellant was entitled to have the jury instructed on the defense of justification, and the court proposed to give AMCI 704 and 705 which, respectively, pertain to the use of force and deadly force in defense of persons. However, the court's instructions applied these defenses only to the charge of aggravated assault. Appellant argued that the defenses should also apply to the lesser-included offenses, and by way of proffer, appellant asked that the instructions be redacted to delete the reference to "aggravated assault" so that the instructions would apply to all of the offenses. The trial court declined appellant's request and gave the instructions that made justification a defense only to the offense of aggravated assault. Appellant contends that the trial court's ruling was in error. We disagree.

It is well established that one requesting a jury instruction must prepare and submit to the court a correct instruction, and where he fails to do so, he is in no position to argue on appeal that the request should have been granted. *Wood v. State*, 20 Ark. App. 61, 724 S.W.2d 193 (1987). The appellant may not complain of the refusal of the trial court to give an instruction which is only partially correct, as it is his duty to submit a wholly correct instruction. *Coleman v. State*, 12 Ark. App. 214, 671 S.W.2d 221 (1984). The instructions appellant proposed were not wholly correct because justification cannot be interposed as a defense to the offenses of first- and second-degree assault.

A person is justified in using force or deadly force only if he "reasonably believes" that the situation necessitates the defensive force employed. Ark. Code Ann. §§ 5-2-606 and 5-2-607 (Repl. 1997). Both first-degree and second-degree assault are committed if the accused acts "recklessly." Ark. Code Ann. §§ 5-13-205 and 5-13-206 (Repl. 1997). The defense of justification with its requirement of reasonableness is inconsistent with the element of recklessness found in these assault offenses. *See Cobb v. State*, 340 Ark. 240, 12 S.W.3d 195 (2000); *Kendrick v. State*, 6 Ark. App. 427, 644 S.W.2d 297 (1982); *accord Harshaw v. State*, 344 Ark. 129, 39 S.W.3d 753 (2001). Thus, Arkansas Code Annotated section 5-2-614 (Repl. 1997) provides that justification

is not available as a defense to an offense for which recklessness suffices to establish culpability. *See Harshaw v. State*, 71 Ark. App. 42, 25 S.W.3d 440 (2000), *aff'd Harshaw v. State*, *supra*. As is stated in the Original Commentary to § 5-2-614, formerly Ark. Stat. Ann. § 41-514:

> Section 41-514 applies to situations in which force is recklessly or negligently employed. Under such circumstances the defense of justification cannot be successfully interposed in a prosecution for an offense established by proof of reckless or negligent conduct.

Therefore, appellant was not entitled to justification instructions with regard to first- and second-degree assault, and the trial court did not err in refusing an instruction that would have made justification a defense to those offenses.

Affirmed.

GRIFFEN and VAUGHT, JJ., agree.

NORTHPORT HEALTH SERVICES, INC., and Kristy Unkel *v.* Diane OWENS and Alisa Main

CA 02-875 107 S.W.3d 889

Court of Appeals of Arkansas
Division II
Opinion delivered May 28, 2003

[Petition for rehearing denied July 30, 2003.]

Friday, Eldredge & Clark, by: *Michael S. Moore*, for appellants.

Benson, Robinson & Wood, by: *Brian Wood*; and *Kincaid, Horne & Daniels*, by: *Shawn Daniels*, for appellees.

TERRY CRABTREE, Judge. This is a case involving claims of defamation and wrongful discharge. A Washington County jury returned a verdict in favor of appellees and awarded damages. The trial court later awarded attorney's fees and costs. Appellants raise four points on appeal, essentially challenging the sufficiency of the evidence to support the verdict. We affirm.

Appellant Northport Health Services (Northport) operates the Fayetteville Health and Rehabilitation Center (Center), and appellant Kristy Unkel is the Director of Nursing at the Center. Appellees Diane Owens and Alisa Main are licensed practical nurses (LPNs) who worked at the Center until they were fired in April 2000, after allegations were made against them by certain certified nurse's assistants (CNAs) with whom they worked. The specific allegations were that Owens failed to chart a fall by resident Maggie Jones and that Main had verbally abused a resident and failed to give another resident pain medication after being advised by a CNA of the need for such medication. Following their termination, appellees filed suit, alleging that appellants defamed them by reporting the allegations to the state Office of Long Term Care (OLTC) and the Fayetteville Police Department. Appellees also alleged that they were wrongfully terminated in violation of public policy and appellants' own policies because appellees had made complaints to the Director of Nursing concerning improper patient care. The complaint sought compensatory and punitive damages, attorney's fees, and costs. Appellants answered, denying the allegations, asserting that they acted in good faith and that the communications to OLTC and the Fayetteville Police Department were mandated by law and, therefore, privileged. The case was tried to a jury in March 2002.

The jury returned a verdict on interrogatories and found that appellee Owens was wrongfully discharged in violation of public policy but that appellee Main was not wrongfully discharged in violation of public policy. The jury also found that appellant Unkel and other employees had caused appellees to suffer damages by publishing defamatory statements concerning each appellee, that the

statements exceeded the scope of the privilege to communicate the statements, and that the statements were not made in good faith. The jury awarded appellee Owens damages of $67,740 on the wrongful-discharge claim and $200,000 on the defamation claim. The jury awarded appellee Main damages of $65,000 on the defamation claim. The trial court entered judgment on the verdict and also awarded appellee Owens attorney's fees of $15,000 on the wrongful-discharge claim. This appeal followed.

In *Webb v. Bouton*, 350 Ark. 254, 85 S.W.3d 885 (2002), the supreme court explained the standard of review for determining whether there was substantial evidence to support the jury verdict:

> Substantial evidence is evidence of sufficient force and character to compel a conclusion one way or the other with reasonable certainty; it must force the mind to pass beyond suspicion or conjecture. In determining the existence of substantial evidence, we view the evidence in the light most favorable to the party on whose behalf the judgment was entered and give it its highest probative value, taking into account all reasonable inferences deducible from it. In reviewing the evidence, the weight and value to be given the testimony of the witnesses is a matter within the exclusive province of the jury.

Id. at 262, 85 S.W.3d at 889 (citations omitted). *See also Sparks Reg'l Med. Ctr. v. Smith*, 63 Ark. App. 131, 976 S.W.2d 396 (1998).

Appellants' first two points concern the defamation claims. In their first point, appellants argue that they are entitled to judgment as a matter of law. Specifically, appellants argue that there was no substantial evidence that either actionable defamation occurred or that appellees suffered any damages to their reputations. In their second point, appellants argue that the evidence was insufficient to support any award of damages to either appellee.

First, appellants argue that there was no publication because Ark. Code Ann. § 5-28-203(a)(1)(O) (Supp. 2001) requires institutions such as it and persons such as appellant Unkel, the Director of Nursing and thus a facility administrator, to report suspected cases of abuse or neglect to the OLTC. Appellants further

argue that Ark. Code Ann. § 5-28-215 (1997) gives them immunity from suit for making such reports. Section 5-28-215 provides:

> (a) Any person, official, or institution participating in good faith in the making of a report, . . . pursuant to this chapter shall have immunity from liability and suit for damages, civil or criminal, that otherwise might result by reason of such actions.
>
> (b) The good faith of any person required to report cases of adult abuse, sexual abuse, or neglect shall be presumed.

We hold that there was a publication because "publication" occurs when the defamatory matter is communicated to someone other than the person defamed. *Navorro-Monzo v. Hughes*, 297 Ark. 444, 763 S.W.2d 635 (1989). Even though there has been a "publication," the defamatory statement may be protected by a qualified privilege. *Id.*

Here, appellants raised the immunity or privilege issue in motions for summary judgment against each appellee. However, there is nothing in the record to indicate that the trial court ruled on the motions for summary judgment. "Qualified immunity, similar to absolute immunity, is an entitlement not to stand trial under certain circumstances. Such entitlement is an immunity from suit rather than a mere defense to liability; and like absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Robinson v. Beaumont*, 291 Ark. 477, 484, 725 S.W.2d 839, 843 (1987) (quoting *Mitchell v. Forsyth*, 472 U.S. 511 (1985)). Further, appellants could have immediately appealed the denial of a motion for summary judgment based on immunity. *Robinson v. Beaumont, supra.* Because appellants failed to pursue their motions for summary judgment and proceeded to trial, we hold that they have waived their arguments concerning immunity under Ark. Code Ann. § 5-28-215. *Robinson v. Beaumont, supra. See also Ozarks Unltd. Resources Coop., Inc. v. Daniels*, 333 Ark. 214, 969 S.W.2d 169 (1998).

As their second point, appellants argue that appellees failed to prove any damage to their reputations. In order for liability to attach, there must be evidence that demonstrates a causal connection between defamatory statements made by appellants and the injury to appellees' reputations. *Ellis v. Price*, 337 Ark.

542, 990 S.W.2d 543 (1999). A plaintiff must establish actual damage to his reputation, but the showing of harm may be slight. *Id.* A plaintiff must prove that the defamatory statements have been communicated to others and that the statements have affected those relations detrimentally. *Id.* A plaintiff's testimony that his reputation was injured is generally sufficient to take the issue to the jury. *Hogue v. Ameron, Inc.*, 286 Ark. 481, 695 S.W.2d 373 (1985).

Appellants appear to be arguing that, because appellees did not prove any harm to their reputations with either the OLTC or the Fayetteville Police Department, then appellees failed to prove damages. *See Little Rock Newspapers, Inc. v. Fitzhugh*, 330 Ark. 561, 954 S.W.2d 914, 927 (1997) (Newbern, J., dissenting). We do not believe that the law is that restrictive regarding injury to a person's reputation. Here, Linda Millspaugh, a nursing home administration consultant and former director of nursing, testified that, based upon her review of the reports to the OLTC or the Fayetteville Police Department, she would not hire either appellee and that the reports would hurt the appellees' chances of finding employment in the nursing home industry. While appellee Main testified that, following her termination, she was able to obtain subsequent employment as an LPN in the health care field, she also testified that, because of her termination, she doubted herself and her abilities as a nurse. She also testified that she did not believe that she would recover emotionally from the termination and that she had been treated for depression. Appellee Owens testified that she did not receive any responses to applications containing the explanation for her termination that she had faxed to prospective employers. She also testified that she was humiliated by the allegations and that she suffered from depression.

Appellants also appear to argue that the amount of the damage award is excessive. When an award of damages is alleged on appeal to be excessive, we review the proof and all reasonable inferences most favorably to the appellees and determine whether the verdict is so great as to shock our conscience or demonstrate passion or prejudice on the part of the jury. *United Ins. Co. of Am. v. Murphy*, 331 Ark. 364, 961 S.W.2d 752 (1998). While there must be proof of actual damage to a person's reputation, *id.*, there is

no requirement that specific evidence assigning a dollar value to the injury must exist. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). *See also Liles v. Matthews*, 268 Ark. 980, 598 S.W.2d 755 (Ark. App. 1980). Further, the amount of proof required is slight. *Ellis v. Price, supra.* We hold that the above evidence was sufficient to support the jury's verdict of damage to appellees' reputations and that the award of damages was not so great as to shock the conscience of the court. We affirm on this point.

For their third and fourth points, appellants address the verdict in favor of appellee Owens on her wrongful-discharge claim. Specifically, appellants argue in their third point that they are entitled to judgment as a matter of law on the claim. In the fourth point, appellants argue that the verdict amount is excessive and clearly against the weight of the evidence.

The well-established rule is that, when an employee's employment is for an indefinite term, either party may terminate the relationship without cause or at will. *Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 743 S.W.2d 380 (1988).

In *Sterling Drug*, the court stated:

> [W]e have no hesitancy in concluding that Arkansas law would recognize at least four exceptions to the at-will doctrine, excluding implied contracts and estoppel. These are: (1) cases in which the employee is discharged for refusing to violate a criminal statute; (2) cases in which the employee is discharged for exercising a statutory right; (3) cases in which the employee is discharged for complying with a statutory duty; and (4) cases in which employees are discharged in violation of the general public policy of the state.

Id. at 245, 743 S.W.2d at 283. In *Sterling Drug*, the supreme court also recognized the public policy exception to the employment-at-will doctrine when it stated:

> [A]n employer should not have an absolute and unfettered right to terminate an employee for an act done for the good of the public. Therefore, we hold that an at-will employee has a cause of action for wrongful discharge if he or she is fired in violation of a well-established public policy of the state. This is a limited exception to the employment-at-will doctrine. It is not meant to protect merely private or proprietary interests.

Id. at 249, 743 S.W.2d at 385 (citations omitted). In finding a violation of public policy, the court stated that "it is generally recognized that the public policy of a state is found in its constitution and statutes." *Id.*

Appellants argue that there could be no wrongful discharge because Owens did not call OLTC until after her termination. However, the trial court instructed the jury that it could find a wrongful discharge if appellees were discharged for filing or threatening to file reports of patient abuse with OLTC or by making internal complaints of patient abuse or neglect. First, section 5-28-203 requires nurses or facility employees to report suspected cases of patient abuse or neglect to the facility administration. Further, Ark. Code Ann. § 20-10-1007(a) (2000) provides that "[n]o long-term care facility owner, administrator, . . . shall discriminate, retaliate, or seek reprisal in any manner against a resident or employee of a long-term care facility who has initiated or participated in any proceeding provided in this subchapter." The jury could have found that Owens was wrongfully terminated because she told Unkel some time prior to her suspension that the CNAs were leaving her no choice but to make a report to the OLTC and that Owens had made several reports concerning the CNAs to Unkel. This would have been in violation of section 20-10-1007(a). We affirm on this point.

In their fourth point, appellants argue that the verdict in favor of appellee Owens on the wrongful-discharge claim is excessive. Appellants cite no authority for their argument on this point. Our courts have said on numerous occasions that we will not consider an issue if the appellant has failed to cite any convincing legal authority in support of its argument. *Craft v. City of Fort Smith*, 335 Ark. 417, 984 S.W.2d 22 (1998); *Porter v. Harshfield*, 329 Ark. 130, 948 S.W.2d 83 (1997); *Miller v. State*, 328 Ark. 121, 942 S.W.2d 825 (1997). Appellants' failure to cite authority or make a convincing argument is sufficient reason for affirmance of the trial court's judgment on this point. *Ellis v. Price, supra.*

Affirmed.

GRIFFEN and VAUGHT, JJ., agree.

Jason E. WINBUSH *v.* STATE of Arkansas

CA CR 02-864 107 S.W.3d 882

Court of Appeals of Arkansas
Division II
Opinion delivered May 28, 2003

[redacted]

Julia J. Llewellyn, for appellant.

J. Leon Johnson, Att'y Gen., by: *Lauren Elizabeth Heil*, Ass't Att'y Gen., for appellee.

KAREN R. BAKER, Judge. A Sebastian County jury convicted appellant, Jason E. Winbush, of murder in the first degree and sentenced him to a term of forty-five years in the Arkansas Department of Correction. Appellant asserts six points on appeal: (1) The trial court erred when it did not instruct the jury they could find the appellant guilty of negligent homicide; (2) the trial court erred when it did not declare a mistrial during voir dire; (3) the trial court erred when it allowed the prosecutor to introduce evidence of appellant's seven prior felonies; (4) the trial court erred in allowing the introduction of three photographs of the victim lying in the grass; (5) the trial court erred when it allowed the hearsay testimony of Detective Mikeal Bates; (6) there was insufficient evidence to find appellant guilty of murder in the first degree. We affirm.

There was insufficient evidence to find appellant guilty of murder in the first degree.

Although appellant raises a challenge to the sufficiency of the evidence in his sixth point of appeal, double jeopardy considerations require us to consider it first. *See Ramaker v. State*, 345 Ark. 225, 46 S.W.3d 519 (2001). In evaluating a sufficiency-of-the-evidence argument, the court will only consider evidence supporting the verdict and "the testimony of one eyewitness alone is sufficient to sustain a conviction." *Lenoir v. State*, 77 Ark. App. 250, 257, 72 S.W.3d 899, 903 (2002). Decisions regarding the credibility of witnesses are for the jury, and the jury is not required to believe any witness's testimony, especially the testimony of the accused, because he is the person most interested in the outcome of the trial. *Hickson v. State*, 50 Ark. App. 185, 901 S.W.2d 868 (1995).

Appellant was convicted of first-degree murder. A person commits murder in the first degree if, "[w]ith a purpose of causing the death of another person, he causes the death of another person." Ark. Code Ann. § 5-10-102(a)(2) (Repl. 1997). "A person acts purposely with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result." Ark. Code Ann. § 5-2-202 (Repl. 1997). A criminal defendant's intent or state of mind is seldom capable of proof by direct evidence and must usually be inferred from the circumstances of the crime. *Leaks v. State*, 345 Ark. 182, 184, 45 S.W.3d 363, 365 (2001). Furthermore, a jury may infer the intent necessary for first-degree murder from the type of weapon used, the manner of its use, and the nature, extent, and location of the wounds. *Id.*

At appellant's trial, the State introduced the testimony of four eyewitnesses who saw the appellant shoot Mr. Walls. Levi Whitson, a ten-year-old boy who lived across the street from where the shooting occurred, testified that he saw appellant and the deceased arguing. He described how Mr. Walls turned his back and started to walk away. After Mr. Walls turned away, appellant retrieved something from under the seat of his car, said something to Mr. Walls, and when Mr. Walls turned around, appellant shot him.

Levi's mother, Charla Whitson, also witnessed the shooting. She testified that she was standing at her kitchen window watching her son ride his skateboard when she saw him standing frozen at the end of the driveway, looking across the street. She saw a white Cadillac parked in front of the house across the street, and she saw appellant walking from the driver's side of the car into the driveway. Ms. Whitson did not hear any conversation, but she saw Mr. Walls turn around, apparently with his hands raised and opened out. As Mr. Walls turned around, appellant raised his gun and fired two shots.

The other two eyewitnesses to the shooting were Leo Cole and Jeffrey Mainer, who also lived in the neighborhood. Mr. Cole testified that he went to look out his window after hearing a pop that sounded like a firecracker. He then heard a second gunshot and saw Mr. Walls fall to the ground. He further testified that

the only gun he saw was the one held by appellant. Similarly, Mr. Mainer looked out of this window after hearing a gunshot. He saw appellant with his arms extended over the roof of a white Cadillac, and he heard a second shot. In addition to the testimony of these witnesses, the appellant testified that he was upset with Mr. Walls for spreading the rumor that he was a homosexual.

From this evidence the jury could reasonably infer that appellant acted with a conscious desire to kill Mr. Walls. Although appellant's version of the events differed from that of the eyewitnesses, the jury was not required to believe to him. *Hickson*, 50 Ark. App. at 187, 901 S.W.2d at 869. Therefore, substantial evidence supports his conviction for first-degree murder.

The trial court erred when it did not instruct the jury they could find the appellant guilty of negligent homicide.

Appellant argues that the trial court erred by refusing to instruct the jury to consider negligent homicide as a lesser-included offense of manslaughter. The court instructed the jury to consider appellant's guilt according to instructions for first-degree murder, second-degree murder, and both "extreme emotional disturbance" manslaughter, and reckless manslaughter. However, the jury convicted appellant of first-degree murder. When the jury convicts of a greater offense and "skips" a lesser-included offense, there can be no error in failing to instruct on other even lesser-included offenses. *Rainey v. State*, 310 Ark. 419, 837 S.W.2d 453 (1992). Therefore, it was not error for the court to refuse the instruction on negligent homicide.

The trial court erred when it did not declare a mistrial during voir dire.

Appellant also argues that the court should have declared a mistrial during voir dire. A circuit court has wide discretion in declaring a mistrial, and we will not disturb the trial court's decision absent an abuse of discretion or manifest prejudice to the movant. *Brown v. State*, 347 Ark. 308, 65 S.W.3d 394 (2001). During voir dire, a prospective juror, Mr. Mike Brooks, stated he was retired from the Fort Smith Police Department and knew the defense attorney from working with him in the past

when the attorney was a deputy prosecutor. He stated that he also knew appellant from the past. Appellant asserts that these statements connected appellant in the minds of the jury to a criminal past and prejudiced the jury panel against him, thus denying him a fair trial. In the alternative, he argues that the trial court should have admonished the prospective jurors to disregard the comments of Mr. Brooks.

The prospective juror's comment may have suggested that appellant had a criminal record. However, even if the panel drew that inference from Mr. Brooks's remark, it was not solicited by the prosecutor and, like cases involving more explicit references to arrests or convictions, any prejudice could have been cured by an admonition to the jury. *Jones v. State*, 349 Ark. 331, 338, 78 S.W.3d 104, 109 (2002) (suggesting that admonition could have cured prejudice resulting from witness's reference to defendant's being on parole). Nevertheless, appellant did not request an admonition. His failure to request an admonition cannot benefit him now. *Barnes v. State*, 346 Ark. 91, 104, 55 S.W. 3d 271, 280 (2001), *cert. denied*, 535 U.S. 1022 (2002). Furthermore, the failure to give an admonition or cautionary instruction is not error where none is requested. *Id.*

The trial court erred when it allowed the prosecutor to introduce evidence of appellant's seven prior felonies.

Appellant also argues that he was prejudiced when the trial court allowed the State to introduce seven prior felony convictions. He argues that the State only had to prove appellant committed four felonies to prosecute him as an habitual offender under Ark. Code Ann. § 5-4-501 (Repl. 1997) and that the additional convictions unnecessarily prejudiced appellant in the minds of the jury when they deliberated his sentence. Appellant cites no authority for this proposition, and we do not consider an argument when the appellant presents no 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, 179, 55 S.W.3d 756, 759-60 (2001); *Dougan v. State*, 330 Ark. 827, 957 S.W.2d 182 (1997); *Williams v. State*, 325 Ark. 432,

930 S.W.2d 297 (1996). Therefore, we affirm on this point as well.

The trial court erred in allowing the introduction of photographs of the victim lying in the grass.

We also find no error with the trial court's admission of photographs of the victim at the scene of the shooting. Appellant argues that the State had already introduced photographs of the deceased from the autopsy that showed the location of the bullet wounds and other photographs of the scene of the shooting which showed the location of the body before it was moved. He dismisses the prosecutor's claim that in the autopsy photographs, the blood had been cleaned off of the victim, and asserts that the State's desire to show that the victim had been bleeding from the nose and mouth did not make the photographs admissible. He claims that the photographs were cumulative, served no valid purpose, and were only used to inflame the jury's passions.

As in all evidentiary matters, the admission of photographs rests within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *Gates v. State*, 338 Ark. 530, 541, 2 S.W.3d 40, 46-47 (1999). Even the most gruesome photographs may be admissible if they tend to shed light on any issue, to corroborate testimony, or if they are essential in proving a necessary element of a case, are useful to enable a witness to testify more effectively, or enable the jury to better understand testimony. *Weger v. State*, 315 Ark. 555, 869 S.W.2d 688 (1994).

The photographs here helped the jury understand the testimony of the witnesses who arrived shortly after the shooting and observed Mr. Walls's condition at the scene. Ray Whitson, an off-duty police officer and father of Levi Whitson, who lived across the street, testified that Mr. Walls had blood coming from his nose and mouth and that he had difficulty breathing. Scott Barr, the first responder who treated Mr. Walls at the scene, testified that he had gunshot wounds to his chest and back and that he had blood coming from his mouth. Because these photographs corroborate Mr. Whitson's and Mr. Barr's testimony about Mr.

Walls's condition at the scene and help the jury understand their testimony, the trial court did not err in admitting them. *See Mosby v. State*, 350 Ark. 90, 97, 85 S.W.3d 500, 503-04 (2002)(finding photographs more probative than prejudicial where they corroborated testimony of police officer who observed victim's wounds prior to autopsy). We find no danger of unfair prejudice in the admission of the photographs.

The trial court erred when it allowed the hearsay testimony of Detective Mikeal Bates.

Appellant's final point for discussion asserts that Detective Mikeal Bates's testimony that appellant and the victim had an altercation the night before the shooting was inadmissible hearsay. We agree that it was hearsay, but hold that the error was harmless given the overwhelming evidence supporting appellant's conviction.

A trial court has wide discretion in evidentiary rulings, and its ruling on a hearsay question will not be reversed unless the appellant can demonstrate an abuse of discretion. *E.g., Peterson v. State*, 349 Ark. 195, 200, 76 S.W.3d 845, 847 (2002). An out-of-court statement offered to explain a police officer's actions during an investigation is not hearsay. *See Martin v. State*, 316 Ark. 715, 875 S.W.2d 81 (1994).

At trial, Detective Bates testified that as a part of the murder investigation, he also investigated an alleged altercation which occurred between appellant and the victim the night before the shooting. No witnesses to the alleged altercation testified. The trial court allowed the testimony as an exception to the hearsay rule, admitting the testimony to show why the detective investigated the incident rather than for the truth of the matter asserted.

Although the State argues that the statement was offered to explain the officer's actions, this argument does not address why an explanation for the officer's action was required. Nor does a review of the abstract demonstrate that the evidence was offered in the context of explaining a course of conduct. We must, therefore, conclude that the statement was offered for the truth of the matter asserted and should have been excluded as hearsay. However, the witness merely testified to the existence of

an altercation. Where the evidence of guilt is overwhelming and the error allowing the admission of hearsay evidence is slight, we can declare the error harmless and affirm. *E.g.*, *Proctor v. State*, 349 Ark. 648, 79 S.W.3d 383 (2002). Four eyewitnesses testified that they saw appellant shoot the victim, and the appellant himself testified that he drove to the location of the shooting to confront the victim about the defamatory statements. With such overwhelming evidence of appellant's guilt, the error was harmless. Therefore, no reversible error occurred.

Accordingly, we affirm.

HART, J., agrees.

GRIFFEN, J., concurs.

WENDELL L. GRIFFEN, Judge, concurring. I concur because I agree with my colleagues to affirm the trial court, but wish to express my concerns regarding what I perceive to be a very liberal standard in matters of admitting photographic evidence. This case illustrates the need to tighten that standard.

The current standard applying to the issue of admissibility of photographs is quickly summarized. Generally, the admission of photographs rests within the sound discretion of the trial court, and we do not reverse absent an abuse of discretion. *Gates v. State*, 338 Ark. 530, 2 S.W.3d 40 (1999). The mere fact that a photograph might be considered inflammatory or cumulative is not, by itself, enough to exclude it. *Ramaker v. State*, 345 Ark. 225, 46 S.W.3d 519 (2001). Notably, there exist feasible reasons why such photographs might remain admissible, even images showing repulsive human gore, namely if they help the jury to understand accompanying testimony. *Id.* In that vein, our supreme court held that photographs showing a brain cross-section were admissible in support of a medical examiner's testimony as well as photos showing "human debris sprayed on the walls" in corroboration of a police officer's testimony regarding the position of the victim's body. *Mosby v. State*, 350 Ark. 90, 85 S.W.3d 500 (2002).

However, I maintain that this same standard leads our trial courts, and us on appeal, to allow virtually everything. In this case, for instance, the State introduced photographs showing Walls

lying dead in the grass, bleeding from his mouth and head due to gunshot wounds. The prosecutor argued that she was entitled to present photographs to the jury because this was a first-degree murder trial and the other photos of Walls's body were taken after it was cleaned. Allegedly, this was needed to corroborate available witness testimony and police testimony. Given the liberal standard already mentioned, the fact that admission of these images lay within the sound discretion of the trial judge, and that we would have to find an abuse of discretion on the part of the trial judge, we are obliged to affirm the trial court on this point.

However, I find the State's argument unintelligible because I see no probative value in the particular photographs merely to corroborate what everyone already knew and what was not in dispute. The victim was dead. There were eyewitnesses describing how appellant shot the victim in his front yard. Notwithstanding his different version of events, appellant admitted as much. The jury had available photographs from the crime laboratory, and thus saw the victim's dead body and the wounds in question, albeit "cleaned up." Whether a dead body bleeds from the mouth and gunshot wounds or not appears of little relevance to the actual questions involved in this first-degree murder charge. There was no dispute as to the location of the homicide, or the respective positions of appellant and the victim, or the final position of the victim's dead body. The State did not even argue that the blood-and-gore images were necessary to arrive at any conclusions involving blood-spatter patterns and positions.

In light of existing case law, we affirm even though it appears to me that the true reason why these photographs were introduced lay in an attempt to further sway the jury against the perpetrator. No other reason was truly advanced or presents itself for our review. In this context, it also appears interesting that any such attempt on the part of the prosecution appears unnecessary in light of the overwhelming evidence against appellant. Thus, I believe that this case proves the need to tighten the existing standard regarding the admission of photographs.

Robert SPEARS *v.* STATE of Arkansas

CA CR 02-1005 109 S.W.3d 139

Court of Appeals of Arkansas
Division III
Opinion delivered June 4, 2003

John F. Stroud, III, for appellant.

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

JOSEPHINE LINKER HART, Judge. Appellant, Robert Spears, was convicted of one count of possession of a controlled substance, marijuana, with the intent to deliver, and he was sentenced to five years' imprisonment. On appeal, in a brief with an argument section just over one page long, appellant appears to raise three issues: (1) whether the circuit court's admission of testimony concerning appellant's silence violated his Fifth Amendment privilege against compulsory self-incrimination; (2) whether this testimony was properly admitted as an adoptive admission made by appellant; and (3) whether the court improperly allowed the State to impeach appellant's witness on cross-examination with extrinsic evidence on a collateral matter. Because there are three separate deficiencies in appellant's brief, we order rebriefing.

First, we conclude that appellant's abstract is deficient, and consequently, we are unable to reach the merits of his arguments on appeal. Appellant's abstract consists of four pages. A portion of the first page is an abstract of the information, the judgment and commitment order, and the notice of appeal, all of which should be and are properly found in appellant's addendum. *See* Ark. Sup. Ct. R. 4-2(a)(8) (2003). Approximately two pages of the abstract are devoted to the testimony of one police officer, four sentences pertain to the testimony of another officer, and eight sentences concern the testimony of appellant's witness. From our review of the record, these brief excerpts are inadequate to assist this court in understanding all questions presented to the Court for decision. Also, appellant fails to abstract any of his arguments made below on these issues, further hampering our understanding of the questions presented. We also note that the State did not file a supplemental abstract.

While failure to abstract materials essential to the understanding of an argument on appeal has in the past been considered a bar to consideration of the merits of the argument, this court must now allow rebriefing to cure deficiencies in the

abstract or addendum. *See Arkansas Dep't of Human Servs. v. Collier*, 351 Ark. 380, 92 S.W.3d 683 (2002); *Campbell v. State*, 349 Ark. 111, 76 S.W.3d 271 (2002); *Nichols v. Arnold*, 347 Ark. 758, 66 S.W.3d 652 (2002); *Simmons v. State*, 80 Ark. App. 426, 97 S.W.3d 421 (2003), *overruled on other grounds by Larry v. Grady Sch. Dist.*, 82 Ark. App. 185, 119 S.W.3d 513; *McNeil v. Lillard*, 79 Ark. App. 69, 86 S.W.3d 389 (2002). Rule 4-2(b)(3) of the Rules of the Supreme Court provides, in part, that

> [i]f the Court finds the abstract or Addendum to be deficient such that the Court cannot reach the merits of the case, or such as to cause an unreasonable or unjust delay in the disposition of the appeal, the Court will notify the appellant that he or she will be afforded an opportunity to cure any deficiencies, and has fifteen days within which to file a substituted abstract, Addendum, and brief, at his or her own expense, to conform to Rule 4-2(a)(5) and (8).

We order appellant to prepare an abstract that provides this court with a better understanding of the questions presented on appeal, including an abstract of all "material parts of the testimony of the witnesses and colloquies between the court and counsel and other parties as are necessary to an understanding of all questions presented to the Court for decision." Ark. Sup. Ct. R. 4-2(a)(5) (2003).

Second, we observe that in the argument portions of the parties' briefs, reference is made to materials by providing the page number of the record at which the materials may be found. This is in contravention of Rule 4-2(a)(7) of the Rules of the Supreme Court, as the parties are to refer to "the page number of the abstract or Addendum at which such material may be found." *See also King v. Baxter County Reg'l Hosp.*, 79 Ark. App. 97, 86 S.W.3d 13 (2002). We order the parties to provide briefs in compliance with this rule.

Third, we note that the Arkansas Supreme Court has held that "[a]ppellate counsel has a duty to file a brief that adequately and zealously presents the issues and that cites us to persuasive authority." *Pilcher v. State*, 353 Ark. 357, 107 S.W.3d 172. Because the brief filed by appellant's counsel is deficient in that regard, we order rebriefing for this reason as well.

The Arkansas Supreme Court has recently ordered rebriefing when counsel for an appellant in a criminal appeal failed to adequately present the issues raised in appellant's brief. *See Pilcher, supra. See also Latta v. State*, 350 Ark. 488, 88 S.W.3d 833 (2002) (Brown, J., dissenting) (arguing that the majority should have ordered rebriefing because counsel for the defendant provided a deficient brief). Further, the Arkansas Supreme Court has ordered rebriefing when issues have not been fully developed by the parties. *See Ford Motor Co. v. Harper*, 351 Ark. 559, 95 S.W.3d 810 (2003) (ordering parties to rebrief and further develop a jurisdictional issue in an interlocutory appeal); *Worth v. Keith*, 349 Ark. 731, 79 S.W.3d 387 (2002) (ordering rebriefing in a petition for writ of mandamus to consider certain additional issues specifically enumerated by the Arkansas Supreme Court).

As is apparent from the State's brief, the issues raised by appellant are more complex than the brief from counsel for appellant would suggest. Appellant's argument on the first point consists of four sentences and a citation to one case. In response, the State addressed at length whether appellant was in custody, apparently implying that the Fifth Amendment privilege against compulsory self-incrimination does not apply when a person is being detained but is not in custody. Further, appellant's arguments on the remaining two issues respectively consist of four sentences and one case and again four sentences and one case. The State provided substantially more on both issues. Appellant did not file a reply brief in response to the State's analysis of the issues.

We note further that counsel's conduct in this case suggests that he has half-heartedly pursued this appeal on the behalf of appellant. Appellant's brief was originally due on August 20, 2002. The brief, however, was not filed on that date, and on October 30, 2002, this court granted counsel's motion to file a belated brief. Counsel was granted a seven-day extension on December 2, 2002. The brief was tendered on December 9, 2002, but it lacked an addendum, and counsel then filed on December 16, 2002, a brief with an addendum. Further, counsel did not file a reply brief.

Consequently, because the brief from appellant's counsel fails to adequately present the issues raised on appeal, we order

rebriefing so that counsel may correct this problem. As explained in *Pilcher*, upon rebriefing, counsel should

> specifically articulate his allegations of error and support those allegations of error with applicable citation to recent authority. Additionally, [counsel] should apply the persuasive authority to the facts of appellant's case, thoroughly analyze the issues, and advocate for a result that benefits appellant. In drafting his new brief, [counsel] should avoid the use of conclusory arguments or arguments that are not fully developed. We would further suggest that if the State responds to [counsel's] revised brief, [counsel] should consider the arguments raised by the State and respond appropriately.

A revised brief for appellant is due in thirty days, and in the revised brief, counsel should cure all the deficiencies listed above. The State may then respond to the revised brief within fifteen days by filing a brief that complies with Rule 4-2(a)(7). Thereafter, counsel for appellant will have ten days in which to file a reply brief.

Rebriefing ordered.

BIRD and ROAF, JJ., agree.

Freddie TYGART *v.* Charles Wayne KOHLER

CA 02-821 109 S.W.3d 147

Court of Appeals of Arkansas
Divisions III and IV
Opinion delivered June 4, 2003

[redacted]

Barham Law Office, P.A., by: *R. Kevin Barham*, for appellant.

Hixon & Cleveland Law Office, by: *Herschel W. Cleveland*, for appellee.

ROBERT J. GLADWIN, Judge. Appellee, Charles Kohler, brought this civil action in the circuit court, asking for damages against appellant, Freddie Tygart, for assault and battery committed when appellant attacked him with a baseball bat. Although appellant alleged self defense, the trial court found him to be the aggressor in the situation and awarded damages to appellee for medical bills and for pain and suffering. For reversal, appellant contends that the trial court erred in its application of the doctrine of self defense and in its calculation of damages. We affirm.

On December 5, 1999, an altercation occurred between the parties, who had been involved with the same woman for some time. Tammy Lucas was appellee's former common-law wife in another state and had three children with him. Both men testified that Ms. Lucas had lived with each of them off and on; one characterized her as a "floater," and the other described their relationship as "seasonal." At the time of the altercation, Ms. Lucas was not living with either of the parties, but, according to appellant, was presently in a relationship with him.

Appellant testified that he was supposed to meet Ms. Lucas at the Spanish American Restaurant. When he arrived about thirty to forty-five minutes late, he noticed appellee's vehicle at the restaurant. Appellant left, but returned sometime later. Upon his

return, he saw appellee leaning through the window of the truck appellant had loaned to Ms. Lucas. Appellant said appellee's head and shoulders were inside the truck. Appellant stated that he thought something might have been wrong but admitted that he did not see or hear anything that would justify this belief, other than the fact that appellee was leaning through the window. Appellant testified that he yelled at appellee, cursing him, and that when appellee turned around, he had a whisky bottle in his hand that he "raised towards" appellant. Appellant stated that he then grabbed a baseball bat from the back of his truck, approached the truck Ms. Lucas was sitting in, and struck the back of the truck with the bat as a warning to appellee. According to appellant, appellee was turned away from the door of the truck, facing appellant's direction, and was standing near the truck where the cab joins the bed. Appellant struck appellee several times with the baseball bat, even hitting him after he had fallen to the ground.

Appellant contended that he acted in self defense and that his actions were justified because of the circumstances surrounding the encounter. He said that from the time he first became involved with Ms. Lucas in 1997, he had received numerous threats from appellee. Further, appellant stated that when he saw appellee leaning in the truck where Ms. Lucas was sitting, he decided he ought to investigate the situation because appellee had "been known to beat on her." He admitted, however, that appellee was not beating or hurting anyone when he arrived. He further acknowledged that he could have called the police, but did not do so because he believed it would do no good.

Appellee testified that on the day of the altercation, he and his children had followed Ms. Lucas to the restaurant and that he had "tapped" the rear of her vehicle with his when they were waiting at a red light. According to appellee, after he made contact with Ms. Lucas's bumper, she leaned out her window and told him to follow her to the restaurant, where she offered to buy his dinner. He said he told her that he was not hungry but that she could take the children into the restaurant for dinner while he waited outside. He admitted to having a drink while he waited. Appellee testified that he remembered Ms. Lucas coming out of the restaurant but that he did not remember anything that

occurred after that. Appellee admitted that he and appellant had exchanged numerous threats over the course of time.

Donna Green, the proprietor of the restaurant, testified that when she came out to the parking lot to leave, she saw someone leaning into Ms. Lucas's truck, "arguing and fussing and fighting." She saw appellant get out of his truck and hit the tailgate of the truck Ms. Lucas was in with a baseball bat. She then went inside to call the police. Ms. Green testified that her vehicle was blocked in by appellee's van and appellant's truck and that the incident scared her.

Sergeant Mark Willhite testified that he was dispatched to the disturbance at the Spanish American Restaurant. At the scene, Ms. Lucas was complaining about damage to the vehicles, and the sergeant noticed what appeared to be recent damage to the front of appellee's vehicle and the back of the vehicle Ms. Lucas was driving. Appellant was not present when Sergeant Willhite arrived at the scene. The sergeant testified that appellee appeared to be intoxicated, that he was argumentative and pushy, and that he would not follow directions. Willhite said that appellee did not mention that he had been hit with a baseball bat but did say that he had been "swung at." Sergeant Willhite took appellee to the Sheriff's Department to test his blood-alcohol content, the results of which confirmed the sergeant's observation that appellee was intoxicated.

Appellant contends that the trial court wrongly applied an objective standard, that of a reasonable person or reasonable behavior, in determining that he did not act in self defense. Appellant argues that the trial court should have focused only on his perception of threatened force, not what a "reasonable man" might have done. We have reviewed the comments and ruling by the trial court and conclude that the law regarding self defense was correctly applied to this situation.

When a civil case is tried by a circuit court sitting without a jury, our inquiry on appeal is not whether there is substantial evidence to support the factual findings of the court, but whether the findings are clearly erroneous, or clearly against the preponderance of the evidence. *Springdale Winnelson Co. v. Rakes*, 337 Ark. 154, 987 S.W.2d 690 (1999). A finding is clearly erroneous when,

although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been committed. *Neal v. Matthews*, 342 Ark. 566, 30 S.W.3d 92 (2000).

Our research reveals a paucity of recent case law dealing with civil battery and the use of the affirmative defense of self defense in civil cases. In *Magness v. State*, 67 Ark. 594, 50 S.W. 554 (1899), the supreme court presented a thorough discussion of self defense, citing numerous authorities. In this discussion, the *Magness* court referred to *Smith v. State*, 59 Ark. 132, 26 S.W. 712 (1894), wherein the court stated that in ordinary cases of one person killing [causing physical harm to] another in self defense, it must appear that the danger was so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily injury, the killing of [physical harm caused to] the other was necessary. The court made clear that the danger must appear urgent and pressing to the person acting in self defense, not to a hypothetical reasonable man. However, to be justified in acting upon the facts as they appear to him, the actor must act with due circumspection. The *Magness* court noted that when a person is threatened with loss of life or great bodily injury, "he is compelled to act upon appearances, and determine from the circumstances surrounding him at the time as to the course he shall pursue to protect himself. When the danger is pressing and imminent . . . he is, from necessity, the judge of his own action." *Magness*, 67 Ark. 594 at 603, 50 S.W. 554 at 557. However, the court recognized a limitation on this right to judge one's own actions: the law imposes upon one the duty to act with due circumspection and without fault or carelessness on his part. *Id.*

Magness and *Smith* both dealt with killings rather than batteries, thus the use of the word "killing" rather than the broader term "causing physical harm to." As the dissent observes, causing physical harm is not the same as killing. There is, however, no practical difference when applying the law regarding self defense: whether one kills another or merely batters him with a baseball bat, he must have acted with due circumspection if he is to prevail on a claim of self defense.

In order for a person's actions to be justified as self defense, the court must find that circumstances and appearances as presented to the actor were at the time of the incident sufficient to induce in him a reasonable belief that he was in actual and imminent danger of losing his life, or suffering great bodily injury. *Id.* "Unless such was the case, it cannot be said that he acted without fault or carelessness, or that he was justified or excused. It is not sufficient, however, to justify or excuse the killing [physical harm], that the circumstances and appearances were sufficient to inspire the accused with such a belief; but the belief must also have been actually and in good faith entertained by him." *Id.*

In *Downey v. Duff*, 106 Ark. 4, 5, 152 S.W. 1010, 1011 (1912), involving a suit for damages for assault and battery, the supreme court stated the well-settled rule that while the jury must view the transaction from the defendant's standpoint, that view must be one of good faith and free from fault or carelessness on defendant's part. "A man cannot become frenzied from any of the passions that ordinarily move men to acts of violence, and then require of the jury that they imagine their perception and judgment to be so befogged that temporarily their reasoning faculties do not control their actions." *Id.* In *Tankersley v. Fortner*, 170 Ark. 1014, 1016, 282 S.W. 354, 355 (1926), the court noted that "if one is assaulted, he may prove the aggression of his adversary, not only in mitigation of damages, but as an absolute defense, against liability for any damage, provided he used no more force in repelling the assault than appeared to him to be reasonably necessary for that purpose. This is true in a prosecution for a violation of the law as well as in a civil suit for damages." In *Garner v. Scott*, 225 Ark. 942, 286 S.W.2d 481 (1956), the court held that a jury instruction was erroneous because it permitted the defendant to be the sole judge of the method employed or the force necessary to defend himself. The court stated that the jury instruction should have read that the defendant was required to use only such means as were necessary under the circumstances to prevent harm, or acting as a reasonably prudent person, to have tried to avoid harm to himself in some other way. *Id.*

After reviewing the law and the various treatises cited therein, we conclude that when determining whether an action

can be justified as self defense, the fact finder must view the circumstances surrounding the accused, as they appeared to him, and then ask: (1) Did the accused believe himself to be in imminent danger? and (2) Were there circumstances that would justify such a belief in the mind of a person of ordinary firmness and reason? *See Magness, supra.*

There has been some concern that comments made by the trial judge indicated that he was in fact telling appellant that, because he was involved with appellee's ex-wife, he should just expect problems of this nature and that a reasonable man in appellant's situation should expect that he and the woman would be hunted. It appears to us that the judge was speaking of the past conduct of the parties and the circumstances that led up to the altercation. The trial judge's comments may have been ill advised, but they were in the nature of personal observations and not a statement of the law of self defense. However inappropriate some of the comments were, they did not dictate or result in a misapplication of the law regarding self defense.

The trial judge addressed both parties in observing that their prior conduct, the numerous threats and following each other to various locations, while not right, was "pretty normal, predictable behavior," given the fact that they were both involved with the same woman. A reading of the entirety of the judge's comments leads us to believe that, rather than affording appellee an excuse to "hunt" appellant and Tammy Lucas, the judge was considering the totality of the circumstances as to the relationship between these parties in determining whether appellant's conduct was justified. The dynamics of the relationships between these two men and Ms. Lucas certainly affected appellant's perception of the circumstances that prevailed at the time of the incident.

The judge noted that Ms. Lucas had been with appellee on an off-and-on basis for a number of years and knew how to deal with him better than did appellant. He found that appellant was the aggressor in the situation and that he had "stepped in between" Ms. Lucas and appellee. Appellant's own testimony established that appellee was not "beating or hitting" anyone when he arrived. Appellant admitted that he was already irritated about

appellee "ramming" his vehicle that Ms. Lucas was driving. Both parties had been threatening each other off and on for about eighteen months. Appellee was not the one "on a hunt" here; appellant first left the restaurant when he saw that appellee was there, then he returned and chose to intervene in the encounter between appellee and Ms. Lucas. He yelled obscenities at appellee, grabbed a bat out of his truck, approached appellee, who raised a whisky bottle toward him, struck the back of the truck appellee was standing beside to "warn him," and then struck appellee numerous times with the bat.

The judge's comments do not suggest at all that a husband has a right to hunt down and attack his wife or ex-wife. He does not suggest that Ms. Lucas was not worthy of protection. His observations reflect the reality that there was an on-going relationship of enmity between these parties; that they had all functioned thus far without the need to batter one another; that Ms. Lucas was accustomed to dealing with both appellant and appellee and, in fact, continued through the years to have personal relationships with both; and that there was nothing about the situation on December 5, 1999, that would justify appellant's thinking that Ms. Lucas suddenly needed his forceful protection. Appellant interjected himself into this situation in an aggressive manner and followed through with aggressive actions.

All of these factors support the finding by the trial court that appellant was the aggressor in the situation and not entitled to a claim of self defense. We cannot say the findings of the trial court were clearly erroneous or clearly against the preponderance of the evidence.

Appellant's second argument is that the trial court erred in its calculation of damages awarded to appellee for pain and suffering. After awarding $1,128.18 for out-of-pocket medical expenses, the trial court considered general damages for pain and suffering. The trial court first stated that four times the special damages would be appropriate. When questioned as to how he arrived at this figure, the trial judge modified the award to the sum of $5,000 for pain and suffering, plus the medical expenses.

Appellant argues that the sum of $5,000 is so disproportionate to appellee's two-week recovery time as to be unreasonable.

The amount of damages to be awarded for personal injuries rests largely in the discretion of the trial judge. *See Norris v. Johnson*, 214 Ark. 947, 218 S.W.2d 720 (1949). In *Matthews v. Rodgers*, 279 Ark. 328, 651 S.W.2d 453 (1983), the supreme court noted that precedents are of scant value in appeals of this kind, and that in each case we must study the proof, viewing it most favorably to the appellee, and decide the difficult question of whether the verdict is so great as to shock our conscience or to demonstrate passion or prejudice on the part of the trier of fact. After due consideration of the proof in the case before us, we cannot say that the award of damages for pain and suffering was such that it either shocked the conscience of this court or that it demonstrated passion or prejudice on the part of the trial judge.

Affirmed.

ROBBINS, NEAL and VAUGHT, JJ., agree.

PITTMAN and BAKER, JJ., dissent.

JOHN MAUZY PITTMAN, Judge, dissenting. I agree with appellant's argument that the trial judge's remarks from the bench show that he based his finding that appellant was the initial aggressor at least in part on the simple fact that appellant came into appellee's presence. I also agree that this is not the law; it is provocation and aggressive action, not mere presence, that makes one the initial aggressor. *See, e.g., Craig v. State*, 70 Ark. App. 71, 14 S.W.3d 893 (2000).

Although I believe it would be permissible for the fact finder to conclude on this record that appellant was in fact the initial aggressor, it is impossible in light of the trial judge's remarks for us to determine whether or not the finding that appellant was the initial aggressor was based on an incorrect appreciation of the law. Consequently, I would reverse and remand with directions for the trial judge to make new findings regarding initial aggression without considering appellant's mere presence as an act of aggression.

KAREN R. BAKER, Judge, dissenting. The majority concludes that a "reading of the entirety of the judge's comments leads us to believe that, rather than affording appellee an excuse to "hunt" appellant and Tammy Lucas, the judge was considering the totality of the circumstances as to the relationship between these parties in determining whether appellant's conduct was justified."

The entirety of the judge's comments reads as follows:

> Okay. We're back on the record from recess. If no one has any objection, I'd like if the children to wait outside if they would, if no one has any objection.
>
> All right. Before I give you, I'm going to feel free to say some things before I give you my final decision, because I think it might be helpful. It's not going to help anything that happened in the past, but it might be helpful as far as future dealings with each other.
>
> But, I'm trying this case without a jury and if we had a jury here one of the instructions that I would be giving the jury is that the jury is not required to set aside their experiences, their personal experiences in life and their common knowledge and the lawyers will know that we lawyers refer to that as the common sense instruction.
>
> And I heard all the history in this case and I really think you need to hear the history to understand these — these events don't happen in a vacuum. They happen because of other things that have happened and they explain why things happen and just using plain old common sense and of course, where we are, we're using our third brand of government, the Judiciary, which is one of our institutions. But and we're here today because the individuals basically have sought out that institution to resolve that problem. In which they have an absolute right to do that. But neither one of you individuals have demonstrated much respect for our institutions and I'm referring specifically to the institution of marriage. For one thing, living together and having these three children and then Tammy who's not here conducting herself the way she's conducted herself over the years and you taking her back and then going off and doing it again and one thing and another and exposing those children to that, it's just a matter of time before you had — we were going to have problems.
>
> Now I have to assume she's been determined to be a common law wife, but now that would of been in September of '98

and I'm sure before you knew that she was your common law wife, before Mr. Barham — her status was probably pretty questionable. I mean, you didn't have a piece of paper and you didn't have anything to call her your wife, so to speak. But apparently you living together as husband and wife and you had three children together and were raising those three children. And then when Mr. Tygart chooses to get involved in '97, we have to assume since she's been determined to be your wife that she was your common law wife and Mr. Tygart, when you date a woman who's married to another man and has three children you can probably reasonably expect that you're going to start having some problems. You're going to start having some threats and you're going — the behavior that was described is pretty predictable behavior. A male is just going to act that way when somebody else is dating and living with a person that he considers to be his wife. . . And so you're going to have — you're going to have a problem with a man, you'd have problems — some men would of have far more problems than you had with this one.

That's been starting in '97 and the events that took place in the spring of '98 that took place, I guess that's at your home when he's looking for his wife, coming by and talking to your son, which exposes your son to your problems that ya'll have created for him and then at the bar, you know. It's not unusual when his wife's at a bar with another man that, that man's going to go hunting up his wife and he's going to hunt up the man that's with her. That's pretty normal predictable behavior. I'm not saying it's right, but I mean, it's just going to happen.

And then they are told they are married so, Kevin advises them about the common law that some Arkansas doesn't recognize. That's why I was trying to understand, [referring to the court's earlier questioning regarding the marital status of Ms. Lucas and Mr. Kohler at the time of the incident] but living in Texas and Oklahoma are states in particular I know that do recognize common law, and so they're going to undo whatever they've done and all the sudden they're using our institution. They're going through the divorce court or the Chancery Court.

Now in Chancery Court in most cases has a restraining order. Sometimes I never did hear, I don't whether that restraining order — the standing order was ever made permanent. Telling each other to stay away from each other or whatever, but the Chancery Court has a vehicle where people can go into Court if they are bothered by someone after the marriage. There's a mechanism to deal with that just like there's a mecha-

nism to deal with child support, visitation, custody, and all of those things. But they were ignoring that the cause they were going back and forth with each other so they were not looking to the Court system to resolve their problems.

But it becomes important in this way, if Tammy Lucas was having problems with him she had a way to do that. She could of gone to Mr. Barham and filed a motion to get a restraining order. She also could have gone to the Prosecuting Attorney's office if he was harassing her and of course that would of been a condition of her staying away from him. I mean, you can't keep going around someone and then complain that they're bothering you. So she wasn't looking for that kind of help obviously. She still was going to go back and forth and according to the testimony that continued even after — up to and after this event. Likewise you have a mechanism, there's — you can go to the prosecuting attorney's office and seek a warrant for harassing communications, terroristic threatening, there's all types of things that y'all could of done to resolve this problem and avoid it.

What's most troubling to this Court is the way that y'all have dealt with these children. I mean, that is not really before me, but in a sense I've heard it and I can't help but have an opinion about it. But for you to expose these young children to this kind of behavior is one of the most unacceptable things about this whole thing I've heard. For them to be ten years old and have to deal with this is just — it's just not right. There's nothing about it that's right.

Now, I'm going to get up to the incident, of course what we're talking about is reasonable behavior. How a reasonable person would conduct themselves. What they should do and shouldn't do under all the circumstances, and I'm including all the circumstances that we heard here. Tammy obviously knew how to deal with the problem with Mr. Kohler. They — I mean, I imagine based on what I heard, they probably had problems all the time. If I knew that and I saw them fussing and arguing I would figure Tammy can handle her own problems and stay away from it. I would not get in the middle. I would certainly not run to this woman's defense considering the behavior that she's engaged in. Certainly wouldn't run in here to protect her that's for sure. I mean, I don't know what you're protecting her from. She knew how to deal with this man better than you do. When you get involved with him and step in between him and her, all you're going to have is a problem, which is exactly what you've got.

> Now, if you were concerned about her safety, there are many things that you could of done. You could of simply gone into the restaurant and joined Mrs. Green and called the police. A lot of things you could — I can't tell anything that was going on that was an emergency. It may very well be that you were interested in the conversation and that he had — his interests were at odds with your interests or that he had a conflict with your interests, but we don't resolve those problems with a baseball bat. But I mean, if you were really, really genuinely concerned that he was going to hurt her or do something to her, there's a lot of ways to do that. But again, she — with the years that she's had with him and the make ups and break ups they've gone through, there's no reason to run and step in between them and in this particular case the facts — I mean, it's clear based on your own testimony, it's not anybody else's, your own testimony, you drove up, choose to get involved in this situation because of something you anticipated might happen or was going to happen and took a baseball bat to prevent it and you, in my opinion in this case you were the aggressor in this particular case. Even if he had the bottle in, and there's some dispute about that, that is no reason — there's not any testimony or anything that would justify taking a baseball bat, and in fact, just going in and stepping into the situation is not reasonable behavior under all the circumstances that I heard.
>
> So I'm finding in favor of the Plaintiff on the Plaintiff's complaint. I think you were the aggressor and engaged in a literal battery. Now, the issues of damages . . . [colloquy court and counsel regarding damages] . . . .
>
> I will end it by saying this, I wish both you gentlemen would, in the future, would give a little more thought and priority to your children before you bring an individual like that [referring to the ex-wife and mother of Mr. Kohler's children] around your home and expose your children to the problems you've exposed them to and that is a great concern to the Court. Now, that's true of both of you. I think you're both guilty of that. Okay. Thank you very much. I appreciate you.

The following colloquy also occurred between the court and Mr. Tygart's counsel, Mr. Barham, after counsel attempted to elicit testimony regarding previous threats made by Mr. Kohler to Mr. Tygart:

COURT: I've heard the history on all this and I understand it now. I think I need to, but what's the relevance of this testimony as —

MR. BARHAM: Because your Honor, there are specific threats made at this particular time and those threats were communicated to Mr. Tygart, . . . and it goes to show his state of mind and his weariness, what he had going on, and that's part of the defense of self-defense.

COURT: Well, what's going on is these two individuals were married at that point and time. That's — I mean that's what's going on. Mr. Kohler was married to the person we're calling Tammy. In the spring of '98, they weren't divorced yet.

As the judge explained, he used his common sense regarding the relationship of a man and his wife in evaluating the case before him. He found that the woman was not conducting herself the way she should have as a wife, and the natural consequence of this was that the husband was going to go "hunt" his wife and the man with her. He found that the wife had experience dealing with Mr. Kohler's combative behavior through her entire relationship with him, but that she obviously wasn't looking for protection from his harassing behavior or she would have done something to resolve the problem. He found that Mr. Tygart had stepped between Mr. Kohler and Ms. Lucas to protect Ms. Lucas from Mr. Kohler; however, the court found that this protection was unreasonable because she was not worthy of protection.[1] In his words:

> I would not get in the middle. I would certainly not run to this woman's defense considering the behavior she's engaged in. Certainly wouldn't run in here to protect her that's for sure. I mean, I don't know what you're protecting her from. She knew how to deal with this man better than you do. When you get

[1] For a general discussion of how deep-rooted societal biases hamper self-defense claims of battered women, and the judiciary's role in addressing the problem, see Reva B. Siegel, *"The Rule of Love" Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996); Laura Huber Martin, *Ohio Joins the Majority and Allows Expert Testimony on the Battered Woman Syndrome*, 60 U. CIN. L. REV. 877 (1992); Paige Bigelow, *Guilty of Survival: State v. Strieby and Battered Women Who Kill in Utah*, 1992 UTAH L. REV. 979.

> involved with him and step in between him and her, all you're going to have is a problem, which is exactly what you've got.

Nothing in the judge's comments directly references the testimony of the police officer who investigated the December 5, 1998, incident that is the subject of the lawsuit or the testimony of the restaurant owner. However, their testimony certainly supports the court's findings that Mr. Tygart was stepping in between Mr. Kohler and Ms. Lucas to protect Ms. Lucas.

The police officer testified that when he arrived at the scene, Mr. Kohler had a strong odor of intoxicants about his person. He was unsteady on his feet, very argumentative, and aggressive. The officer further testified that he was trying to keep Mr. Kohler away from Ms. Lucas. Mr. Kohler would continually come over to Ms. Lucas who appeared to be frightened and afraid of him as he continued to push his way around the officer. The officer repeatedly asked Mr. Kohler to quiet down because he was screaming, yelling, and cussing. Mr. Kohler refused to follow the officer's directions and would not calm down, and the officer finally placed him into the police unit so that the officer could talk to Ms. Lucas. Because of Mr. Kohler's obvious intoxication and belligerence, the officer took him into custody. At the police station, he administered a breathalyser test. Mr. Kohler registered .14%. Mr. Kohler did not appear to be injured at the scene and made no statements to the officer that he had been hit. The officer also confirmed that the two vehicles had been recently damaged, that it appeared that Mr. Kohler's vehicle had struck Ms. Lucas's truck and that Mr. Kohler's vehicle appeared to have been blocking Ms. Lucas's vehicle.

The owner of the restaurant testified that she left the restaurant right after Ms. Lucas and her three children. She testified that Ms. Lucas and her children were in the vehicle parked next to her behind the restaurant and that she couldn't leave because Mr. Kohler had her car and Ms. Lucas's truck blocked in. While inside her vehicle, she heard Mr. Kohler yelling profanity and other "ugly things." She characterized Mr. Kohler as combative and belligerent and stated that his presence scared her. She witnessed Mr. Tygart drive up, get out with the bat, and hit the tailgate of Ms. Lucas's truck with the bat. Then, she ran inside to call the police.

Mr. Tygart testified that the first time he had contact with Mr. Kohler, that Mr. Kohler threatened to shoot him, that he had made police reports concerning Mr. Kohler's conduct toward him between May 1997 and to the end of December of 1998. Mr. Tygart estimated that Mr. Kohler had made fifty to sixty phone calls to Mr. Tygart prior to the December incident. He estimated that the number of phone calls and "drive-bys" had increased to three hundred up to the date of trial. He explained that he hit the tailgate of the truck Ms. Lucas was in as a warning to Mr. Kohler, but that it did not stop him, and that Mr. Kohler turned toward him with a whiskey bottle in his hand.

Mr. Kohler's testimony was completed devoid of any details of the incident. His memory was limited to recalling that he had only one drink from the whiskey bottle with him in his vehicle, but he wasn't so drunk that it would affect his memory, so his inability to recall any details of the encounter itself must have been from a blow to the head. He also recalled awaking in a jail cell the next morning and asking what had happened, and if the police there beat people up.

While the judge's finding that Mr. Tygart was stepping in between Mr. Kohler and Ms. Lucas to protect Ms. Lucas is supported by the evidence, his conclusion that Mr. Tygart became the aggressor when he came to her defense has no basis in the law.

First, self-defense is a bona fide defense to a civil action for assault and battery. *Bergmen v. Maberry*, 228 Ark. 597, 599, 309 S.W.2d 305, 306 (1958); *Downey v. Duff*, 106 Ark. 4, 152 S.W. 1010 (1912). Second, a person is legally justified to use physical force to defend himself or another person. *See* Ark. Code Ann. § 5-2-606 (a) (Repl. 1997) (noting that a person is justified in using physical force upon another person to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he may use a degree of force that he reasonably believes to be necessary; however, he may not use deadly physical force except as provided in § 5-2-607); *Brockwell v. State*, 260 Ark. 807, 815, 545 S.W.2d 60, 66 (1976) (holding every fact that would be competent evidence in a case of self-defense by the person defended is competent where the killing by the accused is alleged to be in defense of another.)

The fact that the person Mr. Tygart was defending was the wife of the aggressor provides no legal basis for denying Mr. Tygart the protection of the law. Nor does the fact that Mr. Tygart was romantically involved with the aggressor's wife in any way justify Mr. Kohler's actions toward Ms. Lucas. *See Flowers v. State*, 152 Ark. 295, 238 S.W. 37 (1922) (the fact that deceased made indecent proposals to appellant's wife, or that appellant received information that he had done so, afforded no excuse or justification for the homicide); *Fisher v. State*, 149 Ark. 48, 231 S.W. 181, (1921) (the fact of intimacy between appellant's wife and the assaulted person and appellant's receiving information thereof did not constitute a justification in law for the assault).

Eighty-three years ago, our supreme court soundly rejected the idea that men were somehow justified in hunting down seducers of their women. In denouncing a prosecutor's closing remarks to a jury that had been described as "impassioned," the court said:

> They are all this and more; they were inflammatory. They purported to state as a fact that the law in Mississippi permitted relatives of young women who had been seduced to take shotguns and go out and kill the seducer. Such is not the law in Mississippi, nor in any other state of the Union, nor in any civilized country.

Doran v. State, 141 Ark. 442, 447, 217 S.W. 485, 488-87 (1920).

Not only is the majority opinion wrong in the application of our existing case law, they change the law completely. The majority cites *Magness v. State*, 67 Ark. 594, 50 S.W. 554 (1899) and *Smith v. State*, 59 Ark. 132, 26 S.W. 712 (1894) for the proposition that "in ordinary cases of one person killing [causing physical harm to] another in self defense, it must appear that the danger was so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily injury, the killing of [physical harm caused to] the other was necessary." The majority combines the concepts of "causing physical harm to" and "physical harm caused to" with our existing case law regarding the justification of "killing" another person in self-defense. Causing physical harm is not the same as killing. In the criminal context, this distinction is statutorily recognized and codified. One code section explains that

> [a] person is justified in using physical force upon another person to defend himself or a third person from what he reasonably

> believes to be the use or imminent use of unlawful physical force by that other person, and he may use a degree of force that he reasonably believes to be necessary. . . .

Ark. Code Ann. § 5-2-607 (Repl. 1997); *see also Britt v. State*, 7 Ark.App. 156, 645 S.W.2d 699 (1983) (holding that the defense of justification in the use of physical force requires both that the actor reasonably believes that unlawful physical force is about to be used upon him and that he reasonably believes that the degree of force used to repel it was necessary).

"'Physical force' means any bodily impact, restraint, or confinement, or the threat thereof." Ark. Code Ann. § 5-2-601(3) (Repl. 1997). "'Unlawful physical force' means physical force that is employed without the consent of the person against whom it is directed and the employment of which constitutes a criminal offense or tort or would constitute such an offense or tort except for a defense of justification or privilege." Ark. Code Ann. § 5-2-601(4) (Repl. 1997). "'Physical injury' means the: (A) Impairment of physical condition; (B) Infliction of substantial pain; or (C) Infliction of bruising, swelling, or visible marks associated with physical trauma." Ark. Code Ann. § 5-1-102(14) (Supp. 2001). "'Deadly physical force' means physical force that under the circumstances in which it is used is readily capable of causing death or serious physical injury." Ark. Code Ann. § 5-2-601(5) (Repl. 1997). There is a practical difference between killing another and causing another physical injury. There is also a practical, and legally required, difference in the analysis.

The majority's standard requires that before a person is entitled to use any physical force it must appear that the person is in danger of losing his own life or in danger of receiving great bodily injury. That standard only applies in limiting the use of deadly force:

> (a) A person is justified in using deadly physical force upon another person if he reasonably believes that the other person is:
>
> (1) Committing or about to commit a felony involving force or violence;
>
> (2) Using or about to use unlawful deadly physical force; or
>
> (3) Imminently endangering his or her life or imminently about to victimize a person as described in § 9-15-103(a)(2), from the continuation of a pattern of domestic abuse. For the purposes of this section "domestic abuse" shall be that described in § 9-15-103(a).

Ark. Code Ann. § 5-2-607 (Repl. 1997).

Under the majority's new standard, Arkansas becomes the only jurisdiction in the United States where a man defending a woman from her husband is liable for damages sustained by the husband when he is prevented from completing his attack upon the woman. It is unacceptable, and until today, it was not the law.

I dissent.

Marvin and Connie DEBOER *v.* ENTERGY ARKANSAS, INC., and West Tree Service, Inc.

CA 02-1324 109 S.W.3d 142

Court of Appeals of Arkansas
Division I
Opinion delivered June 4, 2003

Stephen D. Ralph, for appellants.

Friday, Eldredge & Clark, by: *Ellen M. Owens*, for appellee Entergy Arkansas, Inc.

OLLY NEAL, Judge. This inverse condemnation case is before us a second time, having previously been dismissed for lack of a final order. That deficiency has been remedied, and we now have jurisdiction to decide the case. Appellees Entergy, an electric utility, and West Tree Service, its contractor, cut trees on appellants' land for the purpose of placing a power line. Appellants, who had not given permission for the cutting, filed suit seeking damages. The circuit court awarded them $1,200, plus $400 in costs. Appellants consider that award insufficient and bring this appeal. We affirm.

Appellants purchased Lots 6 and 7 on Northridge Drive in Faulkner County for $8,000 in 1989. The lots, which comprise 2.28 acres, are heavily wooded and run uphill from south to north. Appellants' home is situated at the top of the hill, primarily on Lot 7.

To appellants' west is Lot 5, owned by Samuel Miller. In July of 1996, Miller was building a house on Lot 5, and he contacted Entergy to request electrical service. Entergy sent out a crew from West Tree Service in August 1996 to cut trees in preparation for placement of the service line. On the morning of August 13, the appellants heard the sound of chainsaws. Upon investigating, they discovered that West was cutting trees on their Lot 6, which abuts Miller's Lot 5. Appellants asked West to stop, which West did temporarily. Appellants contacted Entergy and were told to get a survey done to prove that the cut trees were on their property. They procured the survey, but West and Entergy continued their operations, cutting approximately forty-five trees on the southwestern part of Lot 6. The area of the cut measured approximately 16-feet wide by 127-feet long, according to appellant Connie DeBoer's estimate.

Appellants filed suit against Miller, West, and Entergy, seeking damages for the wrongful cutting of trees and breach of a covenant, and seeking the abatement of a nuisance created by the placement of a utility pole halfway up the hill, which allegedly obstructed appellants' view of a nearby lake. Miller was eventually dismissed from the case, and the breach of covenant and nuisance

counts were resolved against appellants by way of summary judgment. All that remained for trial was the damages portion of the case against Entergy and West regarding the cut trees.

Prior to trial, Entergy filed a motion in limine to prohibit the appellants from introducing evidence of the replacement value of the cut trees and to prohibit them from introducing evidence that would support an award of double damages under Ark. Code Ann. § 15-32-301 (Repl. 2000), which provides that a person who "knowingly" cuts down trees owned by another shall be liable to the owner for double the value thereof. Entergy argued that appellants' exclusive remedy was contained in the inverse condemnation statute, Ark. Code Ann. § 18-15-102 (1987), and that under that statute, appellants were entitled only to the fair market value of the property taken. The court agreed with Entergy and granted the motion, ruling that trial testimony regarding damages would be limited to the fair-market value of the property used by Entergy.

At trial, appellants proffered an appraisal by arborist Bill Long that assessed the replacement value of the cut trees at $12,655. However, the court relied on the measure of damages used by Entergy's expert, Wayne Coates. Coates assessed the value of Lot 6 before the cutting as $24,750, and after the cutting as $23,550, a difference of $1,200. He also opined that, because the damaged area was "off to the side," there was no further damage to the remainder of appellants' property. Based on this testimony, the trial court awarded appellants $1,200, plus $400 in costs. Appellants now appeal that ruling.

Appellants argue that although Entergy was authorized, pursuant to the power of eminent domain, to appropriate private property for its use, its appropriation in this case was excessive and not necessary for delivering electrical power to Samuel Miller. They contend that, as a result, they should have been permitted to recover the replacement value of their trees. We disagree.

■ ■ An electric utility may exercise the power of eminent domain by filing a condemnation petition in court, and, in that proceeding, damages for the taking are assessed. *See* Ark.

Code Ann. § 18-15-503(b) and (c), and § 18-15-504(a) (Supp. 2001). However, if the utility takes an owner's land but does not file an eminent domain proceeding, the owner may initiate his own inverse condemnation action. *See Robinson v. City of Ashdown*, 301 Ark. 226, 783 S.W.2d 53 (1990) (stating that inverse condemnation is a cause of action to recover the value of the property which has been taken in fact although not through eminent domain procedures.) Inverse condemnation actions against utilities are governed by Ark. Code Ann. § 18-15-102 (1987). Subsection (b) of that statute provides that the landowner's measure of recovery shall be the same as that governing proceedings by corporations for the condemnation of property. In other words, the same measure of damages is used whether the proceeding is an eminent domain action filed by the utility or an inverse condemnation action filed by the landowner.

The measure of damages in a condemnation case depends on whether the land is taken by the sovereign or by another entity. When the sovereign exercises its right to take a portion of a tract of land, the proper measure of compensation is the difference in fair market value of the entire tract immediately before and after the taking. *Property Owners Improvement Dist. v. Williford*, 40 Ark. App. 172, 843 S.W.2d 862 (1992). When another entity such as a railroad, telephone company or, in this case, an electric company, exercises the right of eminent domain, just compensation is measured by the value of the portion of the land taken plus any damage to the remaining property. *See id*; *see also Arkansas La. Gas Co. v. Howell*, 244 Ark. 86, 423 S.W.2d 867 (1968); *Arkansas La. Gas Co. v. James*, 15 Ark. App. 184, 692 S.W.2d 761 (1985). Fault has nothing to do with eminent domain or inverse condemnation; it is the taking of property that is actionable. *See Thompson v. City of Siloam Springs*, 333 Ark. 351, 969 S.W.2d 639 (1998). Further, recovery under the inverse condemnation statute is exclusive. *Missouri & N. Ark. RR. Co. v. Chapman*, 150 Ark. 334, 234 S.W. 171 (1921). Additionally, the value of trees destroyed by a utility in constructing a right-of-way is not a separately compensable item of damage. *See Cramer v. Arkansas Okla. Gas Corp.*, 316 Ark. 465, 872 S.W.2d 390

(1994); *Arkansas La. Gas Co. v. Maxey*, 242 Ark. 698, 415 S.W.2d 52 (1967).

In light of the above authorities, we conclude that appellants' remedy for Entergy's taking of their property was governed exclusively by the inverse condemnation statute, which permits them to recover only the value of the portion of the land taken plus any damage to remaining property; the statute does not permit them to recover the replacement value of their trees. Therefore, we affirm the trial court's decision not to consider the replacement value of the trees in assessing appellants' damages.[1]

Appellants also argue that, even if they cannot recover the replacement value of their trees from Entergy, they should be able to do so from West Tree Service. In support of their argument, they cite *City of Fort Smith v. Findlay*, 48 Ark. App. 197, 893 S.W.2d 358 (1995). There, we recognized that a condemnor's contractor might be liable for tort damages under some circumstances, but we also recognized that tort damages by an independent contractor should be "distinguished from damages that inevitably or necessarily flow from the construction of an improvement in keeping with the design of the condemnor." *Id.* at 202, 893 S.W.2d at 361. According to *Findlay*, if damages to land *outside the easement* inevitably flow from the condemnation, they are merely an additional appropriation of land, and such damages are embraced in the just-compensation concept. It is logical then that damages on the right-of-way itself are also embraced within the just-compensation concept. Thus, even in an action against West, appellants would be entitled only to the measure of damages under the eminent domain/inverse condemnation laws, *i.e.*, the difference in the before and after values of the land taken.

Affirmed.

GLADWIN and ROBBINS, JJ., agree.

---

[1] We note that the trial judge did not, technically speaking, use the correct measure of damages in this case. He used the before and after value of the entire tract, as if the defendant were a sovereign, rather than the value of the portion of the land taken. However, this is not raised as an issue on appeal, so we do not address it.

Edna CROSS *v.* MAGNOLIA HOSPITAL RECIPROCAL GROUP OF AMERICA

CA 03-10 109 S.W.3d 145

Court of Appeals of Arkansas
Division II
Opinion delivered June 4, 2003

Compton, Prewett, Thomas & Hickey, L.L.P., for appellant.

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

TERRY CRABTREE, Judge. In this workers' compensation case, the Commission affirmed and adopted the decision of the administrative law judge to deny benefits to the appellant, Edna Cross. The Commission found that appellant

failed to prove by a preponderance of the evidence that she sustained either a specific-incident injury or a gradual-onset injury to her back. On appeal, she asserts that the Commission erred as a matter of law in denying her claim for "temporary total disability benefits and medical benefits because there was no objective finding of the injury." Specifically, appellant argues that objective medical findings are not necessary for the Commission to award temporary total disability benefits pursuant to a gradual-onset injury. We affirm.

Appellee Magnolia Hospital began employing appellant as a registered nurse in 1990. She testified that she was trained to work in many areas of the hospital but was assigned to the intensive care unit. She described her physical job duties in great detail and explained her various activities that required lifting, stooping, bending, pushing, and pulling.

Appellant underwent surgery to her back in 1998 for a condition unrelated to her employment. The pre-surgery radiology report from the Magnolia Hospital dated May 17, 1998, revealed degenerative bone and joint changes and degenerative disc disease at L5-S1. Appellant's treating neurosurgeon, Dr. Scott Schlesinger, interpreted the pre-surgical myelogram and CT scan as revealing a left L4-5 disc herniation with nerve-root compression and an osteophyte and spondylosis at the L5-S1 level. During surgery on June 9, 1998, Dr. Schlesinger located and removed a large disc herniation at the L4-5 level. After five weeks of recovery, appellant returned to work. In his report dated June 29, 1998, Dr. Schlesinger limited appellant to lifting no more than forty pounds for three months.

After being released to return to work, appellant presented to her family physician, Dr. Fred Murphy, with complaints of low-back pain on October 27, 1998. She again returned to Dr. Murphy with complaints of back pain on August 27, 1999. After this visit, she did not complain of lower-back pain upon her visits to Dr. Murphy until January 2, 2001. Appellant testified at her hearing about several incidents at work in which she developed back pain. Appellant completed several Quality Management Performance Reports detailing each incident occurring at work. However, the medical records reveal that she only sought medical treatment for lower-back pain related to one of these incidents.

On appeal, she does not challenge the Commission's determination that she did not sustain a compensable injury resulting from a specific incident. Furthermore, she does not challenge the Commission's determination that she did not sustain a compensable injury resulting from gradual onset. For our review, she only asks us to decide whether the Commission erred as a matter of law in requiring her to provide objective medical findings to support her entitlement to temporary total disability benefits. Appellant's argument fails for two reasons.

First, appellant misunderstood the Commission's determination. The Commission only required her to provide objective medical findings in support of her alleged compensable injury. The requirement that a compensable injury be established by medical evidence supported by objective medical findings applies only to the existence and extent of the injury. *Stephens Truck Lines v. Millican*, 58 Ark. App. 275, 950 S.W.2d 472 (1997).

Second, appellant's argument is misplaced; it presupposes that she sustained a compensable injury. In this case, the Commission rejected her arguments that she sustained a compensable injury resulting from a specific incident or from gradual onset. Without an initial finding of compensability, a claimant cannot be awarded temporary-total disability benefits or additional medical treatment. *See* Ark. Code Ann. § 11-9-102(4)(D) (Supp. 1999). Although objective medical findings are not directly necessary for the Commission to award temporary-total disability benefits, such findings are required for the underlying injury to be compensable. *Williams v. Prostaff Temporaries*, 64 Ark. App. 128, 979 S.W.2d 911 (1998), *aff'd*, *Williams v. Prostaff Temporaries*, 336 Ark. 510 (1999). Because appellant did not establish that she sustained a compensable injury, she cannot be entitled to temporary total disability benefits.

We affirm.

GRIFFEN and VAUGHT, JJ., agree.

DEL MACK CONSTRUCTION, INC., *et al. v.*
James OWENS and Carole Owens

CA 02-1101 118 S.W.3d 581

Court of Appeals of Arkansas
Division IV
Opinion delivered June 11, 2003

Gary R. Burbank; *Don B. Dodson*; *Pat Hall*; and *Teresa Wineland*, for appellants.

Compton, Prewett, Thomas & Hickey, L.L.P., by: *William I. Prewett* and *Matthew J. Shepherd*, for appellees.

JOHN F. STROUD, JR., Chief Judge. This appeal involves the allocation of the burden of proof in a dispute over the priority between a vendor's lien and materialmen's liens. We affirm.

Appellees James and Carole Owens sold a house in Union County, Arkansas, to Alaverene Peace in December 2000, for $325,000, with a $25,000 down payment. Appellees financed the remainder and retained a vendor's lien to secure payment of the balance. Appellants Del Mack Construction, Inc.; Electronic Alarm Company; Storey Floor and Carpet, Inc.; and Quality Electric Company asserted liens totaling $55,437.23.

Peace defaulted on her obligations to appellees, and appellees filed suit to foreclose their vendor's lien. Appellees named appellants as defendants and asserted that appellants' liens were subordinate to appellees' vendor lien. Appellants filed answers to the complaint admitting that they claimed interests in the property but denying that those interests were subordinate to appellees' interest.[1]

At trial, the parties stipulated that a balance of $296,000 was owed on the purchase price. Appellants presented the testimony of

[1] Peace also filed an answer in which she stated that she had filed bankruptcy and had no objection to an *in rem* judgment being entered against the property.

Peter Emig, a certified appraiser, as their valuation expert. Emig testified that he valued the property as of two separate dates: December 14, 2000, the date appellees conveyed the property to Peace, and August 30, 2001, the date Peace quitclaimed the property back to appellees. He testified that, in his opinion, the property was worth $147,000 in December 2000 and worth $210,000 as of August 30, 2001. He testified that the $63,000 increase in value was due primarily to the improvements. He also testified that he appraised the property at $300,000 in March 2001 but stated that this figure included the house and 17½ acres of property. He testified that the $63,000 increase was based upon the value of the house and only one acre of land. He also testified that some of the work remained uncompleted but that he took this into consideration. He also explained his methodology and assumptions made, as well as his disagreements with appellees' appraiser.

Appellees presented the testimony of Ron Robinson, a licensed certified general appraiser, as their valuation expert. He testified that he used the same dates as Emig for purposes of his valuations. His valuation as of December 2000 was $232,000 and his valuation as of August 30, 2001, was $197,000. He testified that one consideration was that the house was in a completed state in December 2000, while the work was incomplete in August 2001. He testified that he was not asked to determine the cost of completing the work necessary to make the house livable. He also testified that he did not visit the property until November 2001 and that he based his appraisals on conversations with other persons, including appellees. He also explained his methodology and assumptions made, as well as his disagreements with appellants' appraiser.

Appellee Carole Owens testified as to changes in the property from the time of the December 2000 sale to the time of trial, such as trees being removed and a carport being demolished, and opined that the property was in worse condition and worth less than when it was sold to Peace. She stated that she had not obtained estimates of the cost of completing the house so that it could be resold.

Following trial, the trial court took the matter under advisement and issued a letter opinion on March 7, 2002. In its opin-

ion, the trial court noted that the parties agreed that the Arkansas Supreme Court's decision in *Simmons First Bank v. Bob Callahan Services, Inc.*, 340 Ark. 692, 13 S.W.3d 570 (2000), set out the applicable law. The trial court noted that *Simmons First Bank* interpreted the materialmen's lien statutes, Ark. Code Ann. §§ 18-44-101 to -135 (1987 and Supp. 2001), as providing that suppliers have a priority over a prior mortgage to the extent that the improvements made to the property with the materials furnished enhanced the value of the property. The trial court placed the burden of proof on appellants and found that, although both experts were credible, "there is not a preponderance of the evidence to cause a conclusion that the unfinished work enhanced the value of the property." The trial court then foreclosed the vendor's lien and ordered the property sold, free of the claims for materialmen's liens.[2] Judgment was entered on March 25, 2002. The trial court denied appellant Quality Electric Company's motion for reconsideration in which Quality Electric argued that appellees had the burden of proving that the improvements did not enhance the value of the property. This appeal followed.

■ ■ This court reviews equity actions *de novo*. *Simmons First Bank, supra.* Moreover, we will affirm the trial court's findings unless the findings are clearly erroneous. *See* Ark. R. Civ. P. 52(a); *see also Adkinson v. Kilgore*, 62 Ark. App. 247, 970 S.W.2d 327 (1998). 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. *Smith v. Parker*, 67 Ark. App. 221, 998 S.W.2d 1 (1999).

Appellants have filed a joint brief in which they argue one point: the trial court erred in placing the burden of proof upon appellants. As noted above, the parties agreed that *Simmons First Bank v. Bob Callahan Services, Inc.*, 340 Ark. 692, 13 S.W.3d 570 (2000), set out the applicable law. The court in *Simmons First Bank* held that the materialmen's lien statutes provide a priority to the extent that the materials furnished for improvements enhanced the value of the property. The *Simmons First Bank* court

[2] Appellees purchased the property at the foreclosure sale.

remanded the case to the trial court to conduct a hearing to determine the value of the property prior to the improvements and the value of the property with the improvements and ordered that the proceeds from the sale of the property be distributed first to the supplier to the extent of the increase in value and then to the owner. *Simmons First Bank* did not specifically answer the issue in the present case, *i.e.*, who has the burden of proof.

The consistent rule has been to place the burden on the supplier to show that the materials for which he claims a lien were used in the improvement on which a lien was sought. *E.C. Barton & Co. v. Neal*, 263 Ark. 40, 562 S.W.2d 294 (1978); *Stone Mill & Lumber Co. v. Finsterwalder*, 249 Ark. 363, 459 S.W.2d 117 (1970); *Lyle v. Latourette*, 209 Ark. 721, 192 S.W.2d 521 (1946); *Half Moon Gin Co. v. E.C. Robinson Lumber Co.*, 207 Ark. 483, 181 S.W.2d 239 (1944); *Reiff v. Redfield Sch. Bd.*, 126 Ark. 474, 191 S.W. 16 (1916); *Marianna Hotel Co. v. Livermore Foundry & Mach. Co.*, 107 Ark. 245, 154 S.W. 952 (1913); *Ragsdell v. Gazaway Lumber Co., Inc.*, 11 Ark. App. 188, 668 S.W.2d 60 (1984). This is because, under Ark. Code Ann. § 18-44-101 (Supp. 2001), the lien does not attach until the materials supplied are actually used and incorporated into the improvement. *Half Moon Gin Co. v. E.C. Robinson Lumber Co., supra.* If the rule were otherwise, it would render meaningless the provision of Ark. Code Ann. § 18-44-110(b)(1) (Supp. 2001) that the materialmen's lien extends only to the enhancement of the value of the improvement for which the materials were used. We believe that this rule makes sense because the supplier is the party with the knowledge of the value of the materials and labor furnished for the improvement. We also believe that this conclusion is bolstered by section 18-44-101(a) (Supp. 2001), which provides:

> Every contractor, subcontractor, or material supplier . . . who supplies labor, services, material, fixtures . . . in the construction or repair of an improvement to real estate . . . by virtue of a contract with the owner . . . *upon complying with the provisions of this subchapter*, shall have . . . a lien upon the improvement and on up to one (1) acre of land upon which the improvement is situated. . . .

(Emphasis added.) In construing an earlier version of this statute, the Arkansas Supreme Court held that the burden was upon the

supplier to prove that his claim came within the reach of the statute. *Royal Theater Co. v. Collins*, 102 Ark. 539, 144 S.W. 919 (1912). The court reasoned that a materialmen's lien exists only by statute and, the power to obtain a lien being given by the statute, no one can obtain a lien unless he comes within the provisions of the statute. *Id.* The general rule is that, between conflicting liens, the one first filed of record shall have priority. Ark. Code Ann. § 18-40-102 (1987); *Sims v. McFadden*, 217 Ark. 810, 233 S.W.2d 375 (1950). The materialmen's lien statute, Ark. Code Ann. § 18-44-110(b)(1), makes it clear that it is an exception to the "first in time, first in right" rule. *See BB&B Constr. Co. v. F.D.I.C.*, 316 Ark. 663, 875 S.W.2d 48 (1994). If appellants in the present case cannot prove that the materials and labor they furnished increased the value of the property, they would not have a lien under the statute. *Royal Theater Co. v. Collins, supra.*

Appellees rely on *Stone Mill & Lumber Co. v. Finsterwalder, supra*, as support for their argument that the trial court correctly placed the burden of proof upon appellants. Appellants, however, argue that *Stone Mill & Lumber Co. v. Finsterwalder* is not applicable because that case did not involve a dispute between the supplier and a mortgage owner. While it is true that *Stone Mill & Lumber Co. v. Finsterwalder* did not involve the mortgage holder, it did hold that, as part of establishing its lien, the supplier must allege and prove that the materials furnished were used in the improvement.

Appellants also argue that the trial court abdicated its responsibility under *Simmons First Bank, supra*, by not determining the extent to which the improvements increased the value of the property. Appellants also suggest that the trial court should appoint a master to conduct a hearing to determine "whether and to what extent" the improvements increased the value of the property. Appellants' phrasing in this manner suggests that they recognize that not all improvements will increase the value of the property, especially those that remain unfinished. The trial court's decision was, effectively, a decision that appellants failed to prove that the improvements increased the value of the property. The trial court had the testimony of two conflicting expert opinions, and it decided that both experts were credible. When the evidence is evenly poised, judgment shall be against the party with

the burden of proof. *See Hays v. Williams*, 115 Ark. 406, 171 S.W. 882 (1914); *see also* Ark. Code Ann. § 16-40-101 (1999). In this case, the trial court resolved the conflicts in the expert testimony in favor of appellees.

Affirmed.

PITTMAN and BAKER, JJ., agree.

MERCANTILE BANK of Arkansas *v.* John G. VOWELL

CA 02-839 117 S.W.3d 603

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered June 11, 2003

Hilburn, Calhoon, Harper, Pruniski & Calhoon, Ltd., by: *Randy L. Grice* and *Traci LaCerra*, for appellant.

No response.

JOHN F. STROUD, JR., Chief Judge. This appeal arose from a civil judgment of $6,014.38 in the circuit court of Pulaski County in favor of appellee and against appellant, Mercantile Bank of Arkansas and its successor entity, Firstar Bank. Appellant argues (1) that the trial court erred in finding that the conduct of appellee, Dr. John G. Vowell, did not substantially contribute to forgeries and unauthorized transactions by his daughter, Suzan Vowell, and that, as a result, appellee was not precluded from asserting the forgeries and unauthorized transactions against appellant pursuant to Ark. Code Ann. § 4-3-406; (2) that the trial court further erred in applying the allocation and preclusion provisions of Ark. Code Ann. § 4-4-406(e); and, finally, (3) that the trial court erred in apportioning the loss between appellee and appellant pursuant to the customer-account agreements. Appellee chose not to file a brief in response. We hold that there is no clear error in the trial court's finding that Dr. Vowell's conduct did not substantially contribute to the forgeries and unauthorized transactions. Neither do we find clear error in the trial court's finding that the appellant bank did not fail to exercise ordinary care. Where we do find error, however, is in the trial court's determination of which items appellee is precluded from recovering from appellant and the trial court's allocation of the loss between appellant and appellee. We therefore affirm in part and reverse and remand in part so that the trial court can enter a new judgment in accordance with this opinion.

Appellee and his wife, now deceased, had an interest-bearing checking account and a savings/money-market account with appellant. Both appellee and his wife signed the customer-

account agreements with respect to each account. Each agreement contained a provision immediately above the signature line, which provided:

> SIGNATURE(S) — THE UNDERSIGNED AGREE(S) TO THE TERMS STATED ON THE FRONT AND BACK OF THIS FORM, AND ACKNOWLEDGE(S) RECEIPT OF A COMPLETED COPY ON TODAY'S DATE. THE UNDERSIGNED ALSO ACKNOWLEDGE(S) RECEIPT OF A COPY OF OUR ACCOUNT INFORMATION BROCHURE[.]

The agreements also contained the following provision:

> **STATEMENTS** — You must examine your statement of account with "reasonable promptness." If you discover (or reasonably should have discovered) any unauthorized payments or alterations, you must promptly notify us of the relevant facts. If you fail to do either of these duties, you will have to either share the loss with us, or bear the loss entirely yourself (depending on whether we exercised ordinary care and, if not, whether we substantially contributed to the loss). The loss could be not only with respect to items on the statement but other items forged or altered by the same wrongdoer. You agree that the time you have to examine your statement and report to us will depend on the circumstances, but that such time will not, in any circumstance, exceed a total of 30 days from when the statement is first made available to you.
>
> You further agree that if you fail to report any unauthorized signatures, alterations, forgeries or any other errors in your account within 60 days of when we make the statement available, you cannot assert a claim against us on any items in that statement, and the loss will be entirely yours. This 60 day limitation is without regard to whether we exercised ordinary care. The limitation in this paragraph is in addition to that contained in the first paragraph of this section.

Appellant's policy regarding bank statements is to mail monthly bank statements on any account that has deposit or withdrawal activity. The bank statement covers the previous month's activity for the time frame that appears on the statement. The statements were usually sent to the account holder two days after the cutoff day listed on the statement and were generally considered as

received two days thereafter. Appellee received bank statements at the Little Rock, Arkansas, address provided in the customer-account agreements. Appellee testified at trial that his wife had been responsible for reviewing the bank statements and balancing the checkbooks. Appellee did not personally review the accounts.

In June of 1997, appellee and his wife allowed their daughter, Suzan Vowell, now also deceased, and her boyfriend to move in with them at their home. At that time, they knew that Suzan and her boyfriend had been involved with drugs, alcohol, writing bad checks, and stealing. They also knew that Suzan had stolen checks from them in the past and forged either appellee's or his wife's signatures. The trial court found that appellee and his wife took precautions against future theft and forgeries by Suzan by hiding Mrs. Vowell's purse, which contained their checkbook, under the kitchen sink. Furthermore, appellee's wife suffered from diabetes mellitus and alcoholism, conditions that forced her to stay in bed either all or most of the time. Appellee, however, continued to rely on his wife to review the bank statements and to balance the checkbooks.

Beginning in June 1997 and continuing into September 1997, Suzan forged appellee's wife's signature on forty-two checks, drawn on both accounts, and committed nine unauthorized ATM withdrawals in the aggregate amount of $12,028.75.[1] Suzan found her mother's purse hidden under the kitchen sink and stole the checkbooks and ATM card from the purse. She apparently had access to, or figured out, appellee's PIN (personal identification number) because the number was identical with appellee's home security-system code. Suzan also stole certain credit cards, which she used to conduct various unauthorized transactions, but they did not involve appellant.

The first unauthorized banking transaction appeared on the June 1997 bank statement for the checking account, covering trans-

[1] Judge Roaf's dissenting opinion mentions a federal statute that pertains to electronic-fund transfers, including ATM transactions, 15 U.S.C. § 1693 *et seq.* The applicability of this statute and the manner in which it affects this case were not raised before the trial court by either party below nor were they raised to this court on appeal. With no Arkansas appellate cases construing this statute and without the benefit of argument from counsel for the parties involved in this case, we decline to address the issue.

actions occurring June 6 through July 7, 1997. This statement was sent to appellee on July 9, 1997. The trial court found that the statement was therefore deemed received as of July 11, 1997. This statement contained unauthorized payments totaling $230.00.

The second set of unauthorized transactions appeared on the July 1997 bank statement for the checking account, covering transactions occurring July 8 through August 6, 1997. That statement was mailed on August 8, 1997, and was thus deemed received as of August 10, 1997. This statement contained unauthorized payments totaling $1,235.25.

The third set of unauthorized transactions also appeared on the July 1997 bank statement for the savings account, covering transactions occurring July 23 through August 21, 1997, which was sent on August 23, 1997, and was deemed received as of August 25, 1997.[2] This statement contained unauthorized payments totaling $5,140.00.

The fourth set of unauthorized transactions appeared on the August 1997 bank statement for the checking account, covering transactions occurring August 7 through September 7, 1997. That statement was mailed to appellee on September 9, 1997, and was deemed received as of September 11, 1997. This statement contained unauthorized payments totaling $1,423.50.

Finally, the fifth set of unauthorized transactions appeared on the August 1997 bank statement for the savings account, covering transactions occurring August 22 through September 22, 1997. This statement was sent on September 24, 1997, and was deemed received as of September 26, 1997. It contained unauthorized payments totaling $4,000.00. The trial court specifically found that appellee did not notify appellant of the unauthorized transactions appearing on the June and July checking-account statements within thirty days from the date each was either sent or deemed received. Finally, on September 15, 1997, appellee discovered a receipt for an

[2] The trial court notes in its findings of fact that the July 1997 bank statement for the savings account was sent out on August 23, 1997, and "deemed received as of September 11, 1997." This must be a clerical error, inadvertently also picked up by appellant in its brief. Pursuant to the stated policy, the trial court deemed statements as received two days after they were sent to the customer, which would have been August 25, 1997.

unauthorized credit-card transaction and notified appellant about his discovery at a meeting with Bill Eldridge, branch manager of appellant's Geyer Springs branch. Immediately, appellant froze appellee's and his wife's accounts, alerted its tellers and computer system, and began investigating the alleged forgeries and other unauthorized transactions pursuant to its policy.

As a result of the alert on appellee's account, Suzan was arrested on September 16, 1997, after she attempted to obtain an unauthorized cash advance at appellant's Riverfront branch. No more unauthorized transactions occurred after the alert was issued. Appellant prepared eight separate "Forged or Altered Check Affidavits of Loss," setting forth the forty-two forged checks and nine unauthorized ATM withdrawals. Appellee's wife signed the affidavits and Bill Eldridge notarized her signature on each affidavit.

Based on the facts before it, the trial court concluded that appellee and his wife "attempted to take proper precautions to safeguard their checkbooks, ATM cards and PIN" and that Dr. Vowell's conduct did not "substantially contribute to the forgeries and unauthorized transactions by Suzan Vowell which were paid in good faith by Firstar." Thus, the trial court determined that appellee was not precluded from asserting any of the forgeries and unauthorized transactions against appellant under Ark. Code Ann. § 4-3-406.

The trial court concluded, however, that appellee failed to exercise reasonable promptness in the examination and reporting of the forged checks and other unauthorized transactions on the June checking-account statement and the July checking-account statement. Therefore, the court found that appellee was precluded from asserting against appellant the forgeries contained on both of those checking-account statements. The trial court also found that appellee was entitled to an allocation of loss as between him and appellant. The trial court ordered appellant to pay $6,014.38, without going into any detailed explanation of how this allocation was calculated.[3]

The trial court further found that appellant had not failed to exercise ordinary care and that it did not substantially contribute

[3] We note that the trial court's order to appellant to pay $6,014.38 constitutes exactly one-half of the entire sum of Suzan Vowell's unauthorized bank transactions and forgeries.

to the losses. Specifically, the court found that appellee was precluded from asserting against appellant the unauthorized payments in the June 1997 checking statement totaling $230.00, as well as the payments contained in the July 1997 checking statement totaling $1,235.25. The court then held:

> As previously noted, the Court finds that the additional amount should be apportioned. Specifically, the Court finds that Dr. Vowell should be responsible for an additional $4,552.12 of the loss. Therefore, Dr. Vowell is entitled to recover from the defendant the total sum of $6,014.38.

From that order arises this appeal.

Arkansas Code Annotated section 4-3-406

Appellant first argues that the trial court (1) erred in finding that appellee's conduct did not substantially contribute to the forgeries and unauthorized transactions, and (2) therefore erred in concluding that appellee was not precluded from asserting the forgeries and unauthorized transactions against appellant pursuant to Arkansas Code Annotated section 4-3-406. We find no error and affirm.

We review findings of fact by determining whether the findings are clearly erroneous, or clearly against the preponderance of the evidence. *Knight v. Day*, 343 Ark. 402, 36 S.W.3d 300 (2001). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *City of Van Buren v. Smith*, 345 Ark. 313, 46 S.W.3d 527 (2001).

Our state uses a version of the applicable Uniform Commercial Code section 3-406, as provided in Arkansas Code Annotated section 4-3-406 (Repl. 2001). It states:

> (a) *A person whose failure to exercise ordinary care substantially contributes* to an alteration of an instrument or *to the making of a forged signature on an instrument is precluded from asserting* the alteration or *the forgery against a person who, in good faith, pays the instrument* or takes it for value or for collection.
>
> (b) Under subsection (a), if the person asserting the preclusion fails to exercise ordinary care in paying or taking the instru-

> ment and that failure substantially contributes to loss, the loss is allocated between the person precluded and the person asserting the preclusion according to the extent to which the failure of each to exercise ordinary care contributed to the loss.
>
> (c) Under subsection (a), the burden of proving failure to exercise ordinary care is on the person asserting the preclusion. Under subsection (b), the burden of proving failure to exercise ordinary care is on the person precluded.

(Emphasis added.)

Here, the trial court concluded that appellee attempted to take proper precautions to safeguard the checkbooks, ATM cards, and PIN from their daughter, Suzan Vowell. We find no clear error in that factual determination. Consequently, we also find that the trial court did not err in concluding that appellee was not precluded from asserting the forgeries and unauthorized transactions against appellant pursuant to section 4-3-406 because the preclusion would only apply if appellee failed to exercise ordinary care that substantially contributed to the loss. Moreover, there could be no allocation of loss in this case under section 4-3-406 because it requires a lack of ordinary care by the customer and the bank, neither of which occurred here.

Arkansas Code Annotated section 4-4-406(e)

For its second point of appeal, appellant contends that the trial court erred in its application of Arkansas Code Annotated section 4-4-406(e). We agree and point out that, generally, section 4-3-406 applies to a customer's conduct before a forgery and section 4-4-406 applies to a customer's conduct after a forgery.

Distinct from the amount of unauthorized payments that appellee may assert against appellant bank under Arkansas Code Annotated section 4-4-406(d)(2), which will be discussed later, we must also analyze whether the trial court properly used the allocation of loss provision that is contained in Arkansas Code Annotated section 4-4-406(e). Section 4-4-406(e) provides:

> (e) *If* subsection (d) applies and *the customer proves* that the *bank failed to exercise ordinary care in paying the item and that the failure substantially contributed to loss, the loss is allocated between the*

> *customer precluded and the bank asserting the preclusion* according to the extent to which the failure of the customer to comply with subsection (c) and the failure of the bank to exercise ordinary care contributed to the loss. If the customer proves that the bank did not pay the item in good faith, the preclusion under subsection (d) does not apply.

(Emphasis added.)

According to Arkansas Code Annotated section 4-4-406(e), if a bank customer can prove that the bank failed to exercise ordinary care in paying the forged item, even though the customer failed to exercise reasonable promptness in examining the bank statements, the loss is allocated between the bank and the customer according to the extent of the customer's failure to comply with the duties of § 4-4-406(c) and the bank's failure to exercise ordinary care in paying the item. In order to prove a bank's failure to exercise ordinary care, a customer must prove that the bank's conduct does not fall within the statutory definition of ordinary care, as found in Arkansas Code Annotated section 4-3-103(a)(7) (Repl. 2001):

> (7) "Ordinary care" in the case of a person engaged in business means observance of reasonable commercial standards, prevailing in the area in which the person is located, with respect to the business in which the person is engaged. In the case of a bank that takes an instrument for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank's prescribed procedures and the bank's procedures do not vary unreasonably from general banking usage not disapproved by this chapter or 4-4-101 *et seq.*

See also Ark. Code Ann. § 4-4-104(c) (Repl. 2001) (making definition in § 4-3-103(a)(7) applicable to chapter 4 of title 4); comment 4 of Uniform Commercial Code, Art. 4, § 4-406 (stating that the "definition of 'ordinary care' in Section 3-103 . . . rejects those authorities that hold, in effect, that failure to use sight examination is negligence as a matter of law" and that where a customer's failure to examine her bank statements has led to loss under subsection (d) of § 4-406 "a bank should not have to share that loss solely because it has adopted an automated collection or

payment procedure in order to deal with the great volume of items at a lower cost to all customers").

In the instant case, the trial court's findings contain no suggestion that appellant was negligent or otherwise failed to exercise ordinary care when it made the payments. To the contrary, the trial court specifically stated that the "Court does not find that Firstar failed to exercise ordinary care and that Firstar substantially contributed to the loss." For purposes of this issue, it is significant that appellant made its last payment pursuant to Suzan Vowell's unauthorized transactions and forgeries on September 4, 1997, eleven days before it received notification from appellee that there was a problem. Appellant could not have known that the transactions were the result of forgery or other unauthorized conduct. Subsection (e) requires proof that appellant failed to exercise ordinary care. Such proof was missing here, and therefore, we reverse the trial court's allocation of loss.

Arkansas Code Annotated section 4-4-406(d)(2)

The fact that appellant exercised ordinary care in paying the items presented to it does not resolve the question of whether appellee is precluded from asserting some or all of those items against appellant. Arkansas Code Annotated subsections 4-4-406(c) and (d) explain a customer's duties with respect to examining his or her bank statements and the consequences of failing to do so. They provide in relevant part:

> (c) If a bank sends or makes available a statement of account . . . , the customer must exercise reasonable promptness in examining the statement . . . to determine whether any payment was not authorized because . . . a purported signature by or on behalf of the customer was not authorized. If, based on the statement . . . the customer should reasonably have discovered the unauthorized payment, the customer must promptly notify the bank of the relevant facts.
>
> (d) If the bank proves that the customer failed, with respect to an item, to comply with the duties imposed on the customer by subsection (c), the customer is precluded from asserting against the bank:

> (1) the customer's unauthorized signature or any alteration on the item, if the bank also proves that it suffered a loss by reason of the failure; and
>
> (2) the customer's unauthorized signature . . . *by the same wrongdoer on any other item paid in good faith by the bank if the payment was made before the bank received notice from the customer of the unauthorized signature . . . and after the customer had been afforded a reasonable period of time, not exceeding thirty (30) days, in which to examine the . . . statement of account and notify the bank.*

(Emphasis added.) The revised commentaries to section 4-4-406(d) offer further explanation:

> 2. Subsection (d) states the consequences of a failure by the customer to perform its duty under subsection (c) to report an alteration or the customer's unauthorized signature. Subsection (d)(1) applies to the unauthorized payment of the item to which the duty to report under subsection (c) applies. If the bank proves that the customer "should reasonably have discovered the unauthorized payment" and did not notify the bank, the customer is precluded from asserting against the bank the alteration or the customer's unauthorized signature if the bank proves that it suffered a loss as a result of the failure of the customer to perform its subsection (c) duty. Subsection (d)(2) applies to cases in which the customer fails to report an unauthorized signature or alteration with respect to an item in breach of the subsection (c) duty and the bank subsequently pays other items of the customer with respect to which there is an alteration or unauthorized signature of the customer and the same wrongdoer is involved. If the payment of the subsequent items occurred after the customer has had a reasonable time (not exceeding 30 days) to report with respect to the first item and before the bank received notice of the unauthorized signature or alteration of the first item, the customer is precluded from asserting the alteration or unauthorized signature with respect to the subsequent items.

Code *Commentaries* at 300-01 (Repl. 1995) (internal cross-references omitted).

Summaries of the unauthorized transactions shown on appellee's bank statements were introduced as Exhibit A. We presume

that the information contained in Exhibit A is correct and therefore reproduce pertinent portions of that exhibit below:

JUNE CHECKING STATEMENT (Deemed Rec'd 7/11/97)

Acct #	Check #	Transaction Date	Amount
4331297996	2554	07/01/97	80.00
	2551	07/01/97	150.00
		TOTAL	230.00

JULY CHECKING STATEMENT (Deemed Rec'd 8/10/97)

Acct #	Check #	Transaction Date	Amount
4331297996	2555	07/08/97	60.00
	2612	07/11/97	60.00
	2614	07/14/97	120.00
	2552	07/15/97	60.00
	2630	07/18/97	100.00
	2631	07/18/97	100.00
	2632	07/21/97	120.00
	2636	07/23/97	125.00
	2645	07/28/97	120.00
	2560	07/30/97	120.25
	2568	08/04/97	250.00
		TOTAL	1,235.25

JULY SAVINGS STATEMENT (Deemed Rec'd 8/25)

Acct #	Check #	Transaction Date	Amount
4331269888	170	07/30/97	110.00
	171	07/30/97	200.00
	172	08/05/97	325.00
	173	08/07/97	320.00
	175	08/07/97	170.00
	176	08/08/97	240.00
	178	08/09/97	360.00
	177	08/11/97	325.00
	179	08/12/97	300.00
	181	08/13/97	350.00
	182	08/14/97	320.00

183	08/15/97	300.00
184	08/18/97	320.00
186	08/18/97	400.00
188	08/19/97	200.00
187	08/19/97	400.00
189	08/20/97	500.00
	TOTAL	5,140.00

AUGUST CHECKING STATEMENT (Deemed Rec'd 9/11/97)

Acct #	Check #	Transaction Date	Amount
	2578	08/18/97	20.00
	ATM wtd/fee	08/21/97	103.50
	ATM wtd.	08/23/97	200.00
	ATM wtd.	08/23/97	100.00
	ATM wtd.	08/24/97	100.00
	ATM wtd.	08/24/97	100.00
	ATM wtd.	08/24/97	100.00
	ATM wtd.	08/26/97	200.00
	ATM wtd.	08/28/97	200.00
	ATM wtd.	08/30/97	300.00
		TOTAL	1,423.50

AUGUST SAVINGS STATEMENT (Deemed Rec'd 9/26/97)

Acct #	Check #	Transaction Date	Amount
4331269888	190	08/22/97	400.00
	193	08/25/97	200.00
	192	08/25/97	400.00
	195	08/25/97	500.00
	196	08/26/97	400.00
	198	08/28/97	350.00
	199	08/29/97	400.00
	202	09/02/97	800.00
	203	09/03/97	150.00
	204	09/04/97	250.00
	205	09/04/97	150.00
		TOTAL	4,000.00

Appellee is precluded from recovering on any of the items contained in the June and July checking account statements because of the thirty-day time limit contained in the customer-account agreement, which was quoted previously. According to the agreement, if the customer fails to examine his or her statement and notify the bank of any unauthorized transactions within thirty days of the date that the statement is deemed to be received, and the bank is not at fault, then the customer is precluded from recovery. The June checking account statement was deemed received on July 11, 1997, and thirty days after that date would have been August 10, 1997. The July checking account statement was deemed received on August 10, 1997, and thirty days after that date would have been September 9, 1997. Appellee did not notify the bank until September 15, 1997, which was outside the agreed-upon time limits.

The terms of the customer-account agreement do not preclude appellee from recovering on the items contained in the other three bank statements, *i.e.*, the July savings, the August checking, and the August savings statements, because the bank was notified before thirty days had elapsed following the deemed-receipt dates of those statements, to wit September 24, October 11, and October 26, 1997.

However, the preclusion provision of Arkansas Code Annotated section 4-4-406(d)(2) does affect the July savings, the August checking, and the August savings statements because "the same wrongdoer," Suzan Vowell, was involved in all of the unauthorized transactions contained in these statements. This section precludes appellee from recovering on any unauthorized transactions that occurred after August 10, 1997, which is thirty days from the deemed receipt-date of the first statement, *i.e.*, the June checking account statement. This totally precludes appellee's recovery under the August checking and the August savings statements. However, the July savings account statement contains seventeen items, some of which are precluded and some of which are not. The last ten items have transaction dates after August 10, 1997, and are therefore precluded. The first seven items, however, precede the August 10 date and are therefore not precluded:

JULY SAVINGS STATEMENT (Deemed Rec'd 8/25)

Acct #	Check #	Transaction Date	Amount
4331269888	170	07/30/97	110.00
	171	07/30/97	200.00
	172	08/05/97	325.00
	173	08/07/97	320.00
	175	08/07/97	170.00
	176	08/08/97	240.00
	178	08/09/97	360.00

These seven transactions total $1,725.

Allowing recovery for the items that the bank paid before August 10, 1997, but precluding recovery for those items that were paid after August 10 is in keeping with the purpose of section 4-4-406 as explained in the comments:

> 3. . . . The rule of subsection (d)(2) follows pre-Code case law that payment of an additional item or items bearing an unauthorized signature or alteration by the same wrongdoer is a loss suffered by the bank *traceable to the customer's failure to exercise reasonable care in examining the statement and notifying the bank of objections to it. One of the most serious consequences of failure of the customer to comply with the requirements of subsection (c) is the opportunity presented to the wrongdoer to repeat the misdeeds. Conversely, one of the best ways to keep down losses in this type of situation is for the customer to promptly examine the statement and notify the bank of an unauthorized signature or alteration so that the bank will be alerted to stop paying further items.* Hence, the rule of subsection (d)(2) is prescribed, and to avoid dispute a specific time limit, 30 days, is designated for cases to which the subsection applies. These considerations are not present if there are no losses resulting from the payment of additional items. In these circumstances, a reasonable period for the customer to comply with its duties under subsection (c) would depend on the circumstances and the subsection (d)(2) time limit should not be imported by analogy into subsection (c).

Code *Commentaries* at 298-99 (Repl. 1995) (internal cross-references omitted and emphasis added).

Effect of the Customer-Account Agreements on Loss Apportionment

Appellant alternatively argues that the trial court erred in apportioning the loss between appellee and appellant pursuant to the Customer-Account Agreements. Generally, Arkansas Code Annotated section 4-4-103 (Repl. 2001) permits certain changes from the requirements set forth in title 4, chapter 4 of the Arkansas Code by means of private agreements between banks and customers. However, in the instant case, we conclude that the language contained in the applicable provisions, quoted previously, does not substantially vary from the requirements under Arkansas Code Annotated section 4-4-406, but rather virtually tracks the statute's language. In addition, the trial court, when addressing that contractual argument below, expressly referred to its finding concerning the allocation of loss under Arkansas Code Annotated section 4-4-406(e), the one it had "previously noted." Therefore, we need not address this argument further because, as we have pointed out previously, we find no error in the trial court's findings of fact that appellee did not substantially contribute to the forgery, that appellant did not fail to use ordinary care in paying the forged items, and that appellee did fail to timely examine and report the forgeries reflected in the bank statements. Thus, there is no basis in this case for allocation under section 4-3-406, section 4-4-406, or the customer-account agreements.

Affirmed in part and reversed and remanded in part for entry of a judgment in the amount of $1,725.

Affirmed in part; reversed and remanded in part.

GLADWIN and BAKER, JJ., agree. GRIFFEN, J., concurs. NEAL and ROAF, JJ., dissent in part; concur in part.

WENDELL L. GRIFFEN, Judge, concurring. I concur, because I agree in the outcome of this case, but write separately to express that I would have found additional error in the trial court's analysis of Ark. Code Ann. § 4-3-406—incidentally, a matter quite distinct from our analysis under Ark. Code Ann. § 4-4-406(d)(2), with which I agree. Concerning the analysis under § 4-3-406, the trial court specifically found that appellee's conduct did not substantially contribute to the forgeries and unauthorized transactions even though the facts of the case, as

reflected in the trial court's findings, appear to suggest otherwise, as I shall explain below. Thus, I disagree with the majority's view that there were not enough facts for the trial court to find that appellee failed to exercise ordinary care and substantially contributed to his daughter's unauthorized transactions and forgeries under the purview of Ark. Code Ann. § 4-3-406.

Arkansas Code Annotated section 4-3-406 (Repl. 2001) states:

> (a) A person whose failure to exercise ordinary care substantially contributes to an alteration of an instrument or to the making of a forged signature on an instrument is precluded from asserting the alteration or the forgery against a person who, in good faith, pays the instrument or takes it for value or for collection.
>
> (b) Under subsection (a), if the person asserting the preclusion fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss, the loss is allocated between the person precluded and the person asserting the preclusion according to the extent to which the failure of each to exercise ordinary care contributed to the loss.
>
> (c) Under subsection (a), the burden of proving failure to exercise ordinary care is on the person asserting the preclusion. Under subsection (b), the burden of proving failure to exercise ordinary care is on the person precluded.

Appellant correctly points out that Arkansas courts have not had many opportunities to provide guidance as to what constitutes negligence under Ark. Code Ann. § 4-3-406(a). The policy behind U.C.C. § 3-406, which is essentially what our State chose to codify under § 4-3-406, appears to be to shift the loss for negligence to the party who was in the best position to have prevented it. *Guardian Life Ins. Co. of America v. Chemical Bank*, 94 N.Y.2d 418 (2000). Courts in other jurisdictions have concluded that the bank customer's failure to promptly discover and report a forgery or unauthorized transaction after it has occurred may also constitute negligence under U.C.C. § 3-406, even though such negligence does not directly contribute to the *making* of a forgery or an alteration. The rationale generally appears to be that such failure to report contributes to the making of subsequent forgeries. *See, e.g.*, *Fundacion Museo de Arte Contemporaneo de Caracas — Sofia Imber v. CBI-TDB Union Bancaire Privee*, 996 F. Supp. 277 (S.D. N.Y. 1998)

(noting that customer's negligence in maintaining and controlling blank checks along with failure to advise bank of the first forgery substantially contributed to the loss); *Kramer v. Chase Manhattan Bank, N.A.*, 653 N.Y.S.2d 546 (1997) (holding that a bank should not be held responsible for losses caused by a customer's failure to safeguard his or her ATM card and PIN and to timely examine statements); *Gulf States Section, PGA, Inc. v. Whitney Nat'l Bank of New Orleans*, 689 So.2d 638 (La. 1997) (finding that checks stolen from unsecured box under printer desk coupled with customer's failure to account for breaks in check numbering and failure to notice employee's substitution of forged account statements supported a finding of negligence on part of customer); *Five Towns College v. Citibank, N.A.*, 489 N.Y.S.2d 338 (1985) (finding that a prolonged delay by a customer in discovering and reporting a forgery may constitute negligence under § 3-406).

In light of this case law, I think we should hold that the trial court applied Ark. Code Ann. § 4-3-406 incorrectly. First, neither appellee, as plaintiff below, nor the trial court reasoned that appellant bank failed to exercise ordinary care in paying or taking the checks, pursuant to Ark. Code Ann. § 4-3-406(b). Second, there is ample evidence that appellee and his wife, as joint account holders, failed to exercise ordinary care and thus substantially contributed to the forgeries. In fact, the trial court found that appellee left the monitoring of all account activities to his very ill wife, that both he and his wife knew of the propensities of their daughter, and that their entire attempt to protect their check books consisted in hiding the purse and the books under the kitchen sink. In addition, appellee's PIN consisted of the same number used for his burglary alarm system, a fact that appears striking when one ostensibly tries to safeguard his ATM cards from unauthorized use by the daughter who is known to try to obtain any means possible to make unauthorized transactions—and when the ATM cards in question are hidden only within a purse under the kitchen sink. Finally, appellee failed to notify appellant of any problem until September 15, 1997. Appellant had no knowledge and, consequently, was unable to do anything about Suzan's forgeries and unauthorized transactions until that date solely because appellee and his wife failed to examine the bank statements and timely notify appellant about the unautho-

rized transactions that they reflected. Thus, appellee's conduct falls squarely under the scope of the cases cited *supra*, holding that a customer's failure to safeguard check books, cards, and PIN, can constitute failure to exercise ordinary care under U.C.C. § 3-406.

It is quite understandable that loving parents will try to provide shelter to their prodigal children, even though the children remain unrehabilitated from propensities that are unsavory. Nevertheless, the decision to house a thieving relative does not absolve one of the duty to exercise common sense regarding family valuables. Although I join the decision to reverse and remand for entry of judgment as prescribed by the majority opinion based on application of Ark. Code Ann. § 4-4-406, I fear that our refusal to reverse and remand under section 4-3-406 sends a powerful, and unsound, message. If the facts in this case do not demonstrate failure to exercise ordinary care under section 4-3-406, what set of facts would ever do so?

ANDREE LAYTON ROAF, Judge, dissenting in part and concurring in part. I would reverse this case because I do not believe that the appellee, John G. Vowell, is entitled to recover any of his losses from appellant Mercantile Bank of Arkansas with regard to the forged checks, and would I reverse and remand with respect to the unauthorized cash withdrawals. First, regarding the checks, I agree with the concurring judge that the trial court erred in finding, pursuant to Ark. Code Ann. § 4-3-406(a) (Repl. 2001), that the Vowells exercised ordinary care in safeguarding their checks from their daughter and her companion while they resided in their home. It is not necessary to reiterate the sad circumstances this family found itself in during the time that the check forgeries took place, for they are set out in the majority opinion. However, I do not believe that simply placing a purse under a kitchen sink, in light of the daughter's history, Ms. Vowell's incapacities, and Dr. Vowell's inattention to family banking matters, constitutes the exercise of ordinary care.

Arkansas Code Annotated section 4-3-406 (Repl. 2001) is titled "Negligence contributing to forged signature or alteration of instrument," and provides:

> (a) A person whose failure to exercise ordinary care substantially contributes to an alteration of an instrument or to the

> making of a forged signature on an instrument is precluded from asserting the alteration or the forgery against a person who, in good faith, pays the instrument or takes it for value or for collection.
>
> (b) Under subsection (a), if the person asserting the preclusion fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss, the loss is allocated between the person precluded and the person asserting the preclusion according to the extent to which the failure of each to exercise ordinary care contributed to the loss.
>
> (c) Under subsection (a), the burden of proving failure to exercise ordinary care is on the person asserting the preclusion. Under subsection (b), the burden of proving failure to exercise ordinary care is on the person precluded.

Accordingly, Vowell should be precluded from asserting his losses regarding any of the forged instruments against Mercantile Bank pursuant to § 4-3-406(a). Because the bank did not fail to exercise ordinary care, Vowell is not entitled to allocation of any of his losses pursuant to § 4-3-406(b). Moreover, there is no need to further consider the applicability of Ark. Code Ann. § 4-4-406 (Repl. 2001) pertaining to Vowell's duty to discover and report any unauthorized signatures or alteration of instruments. This is because the two statutes are alternative in nature, according to 6 *Anderson on the Uniform Commercial Code* (3rd ed. 1998), which provides in pertinent part:

> In the case of commercial paper that passes through the bank collection process, a preclusion of the drawer or maker of the paper may arise either by virtue of UCC § 3-406 or § 4-406. These sections are alternative in nature, the distinction between the two being made in terms of the time when the precluding conduct occurs. UCC § 3-406 typically relates to conduct prior to the original issue of the paper or contemporaneous therewith while UCC § 4-406 relates to conduct after the paper has been issued.

Id. § 3-406:8, at 518.

In 6C *Anderson*, *supra*, it provides:

> "Section 3-406 operates under certain conditions to prevent a purported maker of an instrument whose negligence has contributed to the creation or perpetration of a forgery from recovering

> against a good faith drawee. This relates to the maker's conduct before the fact of forgery, whereas § 4-406(1) relates to the maker's conduct afterwards. The two sections clearly involving and require different factual determinations."
>
> While UCC § 3-406 and § 4-406 are limited to particular situations, they indicate a general policy which is to be followed in cases involving other kinds of deception. "The general pattern of these sections is to absolve a payer bank, which has been deceived by a third party, from liability to its customer if the customer's negligence played a substantial part in making the deception possible. However, the bank is absolved from liability only if it has acted with reasonable care or in accordance with reasonable banking standards."
>
> UCC § 4-406 is narrower than UCC § 3-406, as it applies only to the payor bank and its customer.

Id. § 4-406:10, at 440-41.

It is clear to me that the Vowells' conduct before the forgery played a "substantial part" in making the deception possible. Consequently, Mercantile Bank should be absolved from any liability with regard to the forged checks, and I dissent from the majority's decision to the contrary.

However, the cash withdrawals that were accomplished using the Vowells's ATM card and pin number compel a different analysis. This is because such transfers are governed by federal law. Indeed, Ark. Code Ann. § 4-4A-108 (Repl. 2001), "Exclusion of consumer transactions governed by federal law," provides:

> This chapter [Chapter 4] does not apply to a funds transfer any part of which is governed by the Electronic Fund Transfer Act of 1978 (Title XX, Public Law 95-630, 92 Stat. 3728, 15 U.S.C. 1693 et seq.) As amended from time to time.

15 U.S.C. § 1693a(6) defines "electronic fund transfer" as follows:

> [T]he term "electronic fund transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, or computer or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point—of-sale transfers, *automated teller machine transactions,*

> direct deposits or withdrawals of funds, and transfers initiated by telephone. (Emphasis added.)

Neither Vowell nor Mercantile Bank raised to the trial court the applicability of the federal statute to the cash withdrawals, and the trial court's judgment treats the forged checks and cash withdrawals alike in its analysis of Vowells's right to recover from the bank pursuant to Ark. Code Ann. §§ 4-3-406 and 4-4-406. Clearly, section 4-3-406 pertains to forged instruments and alteration of instruments only, and has no application to cash withdrawals, and section 4-4-406, contained in Chapter 4, excludes funds transfers from its purview.

This court may generally affirm the trial court where it has reached the right result for the wrong reason. *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002). However, in this instance, it would be impossible to discern the "right result" without reviewing the federal statute. The statute generally limits a customer's liability for unauthorized electronic-fund transfers to the lesser of $50 or the amount of money obtained prior to the time the financial institution was notified of such unauthorized transfer. 15 U.S.C. § 1693(g) (2001). Neither Vowell nor the bank raised this law to the trial court, so it was not a "reason" that the trial court was given the opportunity to consider.

It is worth noting that there is no Arkansas appellate case construing this statute. However, at least one state court has held that a bank customer's failure to notify the bank of an initial unauthorized withdrawal of funds using the customer's ATM card releases the bank of liability for unauthorized transfers some months later. *Kruser v. Bank of America*, 230 Cal. App. 3d 741, 281 Cal. Rptr. 463 (1991). In *Kruser*, the California Court of Appeal held that the customers were put on notice when the first transfer appeared on their bank statement, that the wife's illness did not excuse her failure to notify the bank of the unauthorized transfer, and that the husband's understanding that his wife would review the bank statements did not excuse him from the obligation to notify the bank of any such transfer. These facts are remarkably similar to the case before us.

Nevertheless, I cannot conclude that the finding with regard to the cash withdrawals from Vowell's account should be affirmed

based upon the trial court reaching the right result for the wrong reason. Moreover, bank customers receive notification of ATM withdrawals on their bank statements, and appear to have an obligation pursuant to federal regulation to notify the bank of unauthorized transactions appearing on the statements to avoid further liability. *See* 12 C.F.R. § 205.b. Consequently, I concur in the majority's analysis of Vowell's entitlement to allocation pursuant to Ark. Code Ann. § 4-4-406, only as to the cash withdrawals, and only as to those items paid prior to August 10, 1997, and appearing on the July statements.

NEAL, J., joins.

Berniece M. GROCE *v.* DIRECTOR,
Arkansas Department of Human Services

CA 02-1274 117 S.W.3d 618

Court of Appeals of Arkansas
Division II
Opinion delivered June 11, 2003

Ed Daniel, IV, for appellant.

Ann West, Office of Chief Counsel, for appellee.

LARRY D. VAUGHT, Judge. This is an appeal from a Pulaski County Circuit Court order in which appellant's application for Medicaid nursing home benefits was denied. On

appeal, appellant asserts that appellee's hearing officer erred, as a matter of law, in refusing to allow her to claim a homestead exemption under 42 U.S.C. § 1382b(a)(1) (2000), and that the decision was not supported by substantial evidence. We disagree and affirm.

On December 4, 1997, appellant Berniece Groce signed a durable power of attorney in favor of her daughter, Pat Monroe. The durable power of attorney was filed on May 25, 2001. Also on May 25, 2001, appellant, through her daughter, purchased a life estate in her daughter's home at 125 W. Cloverdale in Brinkley, Arkansas, for $43,953.13. The offer and acceptance to purchase the life estate required that appellant pay all of the closing costs, including a $1000 attorney's fee. The deed, which in no way restricted appellant's right to sell her life estate, was also filed on May 25, 2001.

Appellant periodically stayed at the residence for short periods of time as a guest, but never occupied it as her principal place of residence. It is undisputed that appellant receives no income from the property. After the purchase of the life estate, appellant never took possession of the property, but thousands of dollars of her money were spent by her daughter from May 2001 through June 2001 for repairs and improvements to the home. The expenditures included landscaping, upgrading the air conditioning, and adding a patio, carport, and fence.

On July 5, 2001, appellant, through her daughter, applied to the Arkansas Department of Human Services (DHS) for nursing home benefits. At the time, appellant resided in Clay Cliff Nursing Home, where she moved in July 2000, and continued to reside at the time the briefs in this matter were filed. Prior to moving to Clay Cliff, appellant lived alone in an assisted-living complex for disabled and handicapped residents. Appellant, who suffers from Alzheimer's disease, was eighty-four or eighty-five at the time of the administrative hearing on December 14, 2001.

Appellee viewed the purchase of the life estate between appellant and her daughter to be a device through which to divest appellant of assets, without receiving value in return, for purposes of establishing Medicaid eligibility. Appellee found that appellant paid for a life estate from which she received no benefit because

she neither received possession nor rent from her daughter and grandson, who were in possession of the home and never vacated the property. Accordingly, the transaction was deemed to be an uncompensated transfer, and appellant's application for nursing home assistance was denied.

At the administrative hearing, appellant's daughter testified that she had lived at the home in question for approximately twenty-seven years, and did not move out after the sale of the life estate to appellant. Her adult son, Todd Monroe, age thirty-one at the time, testified that he also lived in the home. It is undisputed that neither Pat Monroe nor Todd Monroe is disabled. Additionally, neither is dependent on appellant, as each has his or her own income. Pat Monroe is a retired teacher who receives teacher retirement, social security benefits, and additional income from an unnamed source. Todd Monroe is a nurse and supports himself through a contract with the Arkansas Department of Health. He files his own income taxes and claims himself as a dependent. The hearing officer affirmed the agency's denial of benefits because the home was never appellant's principal place of residence, and the life estate therefore could not be excluded for purposes of Medicaid eligibility. The life estate was determined to be a countable resource in the estimated amount that the sale of the life estate would bring. That decision was affirmed on appeal to the Pulaski County Circuit Court, where the trial judge found that the decision of the hearing officer was supported by substantial evidence and was not arbitrary, capricious, or characterized by an abuse of discretion. From that order comes this appeal.

Before reaching the merits of appellant's arguments, we note that appellant failed to provide an abstract of the material parts of the record from the administrative hearing as required by Rule 4-2(a)(5) (2003) of the Arkansas Supreme Court and Court of Appeals. The abstract does not give an accurate picture of what transpired below or provide the information necessary to understand the questions presented to us. Additionally, the statement of the case is also deficient pursuant to the requirements of Rule 4-2(6) (2003) of the Arkansas Supreme Court and Court of Appeals because appellant failed to include page references to the abstract and addendum.

Failure to abstract an item essential to an understanding of the appeal has traditionally been regarded as a fatal error, which has been held to be an adequate basis to affirm for noncompliance with the abstracting rules. *See McNeil v. Lillard*, 79 Ark. App. 69, 86 S.W.3d 389 (2002). However, pursuant to Ark. Sup. Ct. R. 4-2(b)(3), which was modified by *In Re: Modification of the Abstracting System*, 345 Ark. Appx. 626 (2001) (*per curiam*), the court must now allow rebriefing before summarily affirming. However, in the instant case, appellee filed a supplemental abstract, which is sufficient to allow us to proceed with the merits of the case.

Under the Administrative Procedures Act, our review is limited to ascertaining whether there is substantial evidence to support the agency's decision. *Arkansas Dep't of Human Servs. v. Thompson*, 331 Ark. 181, 959 S.W.2d 46 (1998). Decisions from an administrative appeal will be upheld if they are supported by substantial evidence and are not arbitrary, capricious, or characterized by an abuse of discretion. *McQuay v. Arkansas State Bd. of Architects*, 337 Ark. 339, 989 S.W.2d 499 (1999). To set aside an agency decision as arbitrary and capricious, the party challenging the action must prove that it was willful and unreasoned, without consideration and with a disregard of the facts and circumstances of the case. *See Partlow v. Arkansas State Police Comm'n*, 271 Ark. 351, 609 S.W.2d 23 (1980).

Our scope of review is limited because administrative agencies are better equipped by specialization, insight, experience, and through more flexible procedures that occur to determine and analyze legal issues affecting their agencies. *McQuay, supra.* Additionally, the appellate courts refuse to substitute their own judgment for that of an agency. *See Arkansas Bd. of Reg. for Prof. Geologists v. Ackley*, 46 Ark. App. 325, 984 S.W.2d 67 (1998). It is not our role to conduct a de novo review of the circuit court proceeding; rather, our review is directed at the decision of the administrative agency. *Id.* When conducting our review, we look to the findings of the administrative agency, keeping in mind that courts have held that the hearing officer is in the best position to determine the credibility of witnesses and decide the proper weight to give the evidence. *Id.*

Appellant contends that pursuant to 42 U.S.C. § 1382b(a)(1) (2000), the life estate in the home in question should be excluded from resources when determining Medicaid eligibility. However, appellee maintains that from the facts of the case it appears that appellant's daughter sold appellant a life estate in the daughter's home, then spent thousands of dollars of appellant's money to improve the home in order to artificially impoverish appellant so that appellant would be eligible for Medicaid benefits.

Appellee points out that appellant has overlooked 20 C.F.R. § 416.1212(a) (2001), which defines the word "home" as follows:

> A home is any property in which an individual . . . . has an ownership interest and *which serves as the individual's principal place of residence.*

(Emphasis added.) Additionally, under DHS Medical Services Policy 3331.5(1)(a.) (Medical Services Manual, November 1, 1995), which lists resources which may qualify for exclusion under specific conditions, "home" is defined as "any shelter in which the individual . . . . has an ownership interest . . . . and *which is used by the individual . . . . as his principal place of residence.*" (Emphasis added.) In this case, the hearing officer found that the property in question was never appellant's principal place of residence.

Her daughter answered in the negative when asked if appellant had actually lived in the house and received mail there. She also testified that appellant had never moved in the residence or taken up residency, or given the nursing home notice that she was not returning from a visit. Occasional visits to the home after appellant purchased the interest did not convert the home into her principal place of residence. There was testimony that a nursing home resident may visit a home for as long as fourteen days, and no evidence was presented that appellant ever visited the property in question for a period of time longer than fourteen days.

The federal and state regulations are consistent in requiring a house to be an individual's principal place of residence before allowing it to be excluded as a homestead exemption. The fact that appellant signed an "intent to return" form does not negate this requirement — the house was never her principal place of residence to which she could "return." The evidence supports the hearing officer's finding that appellant's life estate in the resi-

dence remained a countable resource because the house was not her principal place of residence.

Appellant also argues that the hearing officer erred in finding that appellant's daughter and grandson were not dependent on the residence in question for shelter. Medical Services Policy section 3331.5 (1)(b) allows the alleged dependency of a relative to be verified if there is a question about the status. In verifying whether there was such a dependency, the hearing officer obtained testimony from appellant's daughter that: (1) she had lived in the residence for twenty-seven years; (2) she is not disabled; (3) she supported herself; (4) she is a retired teacher who receives teacher retirement; (5) she also receives social security benefits and income from other unnamed sources. Appellant's grandson testified that he was thirty-one years old, not disabled, and worked as a nurse for the Arkansas Department of Health. The hearing officer determined that there was no evidence that either appellant's daughter or grandson were dependent on the residence in question for shelter, other than the fact that they lived there at the time of the hearing.

■ ■ It is the prerogative of the agency to believe or disbelieve any witness and to decide what weight to give the evidence. *See Arkansas State Police Comm'n v. Smith*, 338 Ark. 354, 994 S.W.2d 456 (1999). In order to establish an absence of substantial evidence, appellant is required to demonstrate that the proof before the administrative tribunal was so nearly undisputed that fair-minded persons could not reach the arrived-upon conclusion. The question is not whether the testimony would have supported a contrary finding, but whether it supported the finding that was actually made. *See City of Hector v. Arkansas Soil & Water Comm'n*, 47 Ark. App. 177, 888 S.W.2d 312 (1994).

■ ■ Medicaid is a payor of last resort, and is intended to supplement, not supplant other potential sources of payment. Ark. Code Ann. § 20-77-101(a) (Supp. 1999). Our supreme court has cited that statute with approval, declaring that it is only after the individual has exhausted his or her own resources that the taxpayers are to assume the financial burden of an individual's necessary medical care. *See Arkansas Dep't of Human Servs. v. Walters*, 315 Ark. 204, 866 S.W.2d 823 (1993). Based on our review, the evidence

shows that appellant, albeit through her relatives, was attempting an end-run around the purpose of the statute. Substantial evidence has been defined as valid, legal and persuasive evidence that a reasonable mind might accept as adequate to support a conclusion, and force the mind to pass beyond conjecture. *See Van Curen v. Arkansas Prof. Bail Bondsman Licensing Bd.*, 79 Ark. App. 43, 84 S.W.3d 47 (2002). There was substantial evidence to support the hearing officer's decision. Accordingly, we affirm.

Affirmed.

GRIFFEN and CRABTREE, JJ., agree.

Paul James PASCHAL *v.* Alice PASCHAL

CA 02-995 117 S.W.3d 650

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered June 11, 2003

[Substituted Opinion on Denial of Rehearing
delivered September 17, 2003]

Taylor Law Firm, *Scott Smith* and *John Mikesch*, for appellant.

Sexton Law Firm, by: *Jane Watson Sexton*, for appellee.

KAREN R. BAKER, Judge. Appellant, Paul James Paschal, appeals a decision by the Washington County Circuit Court modifying the previous orders of the court regarding child support. Appellant has two arguments on appeal. First, he argues that the trial court erred in awarding appellee, Alice Paschal, retroactive child support. Second, appellant argues that the trial court erred in considering the bonus that he received in 2001 as income for the purpose of establishing his support obligation. We affirm.

The facts of this case are as follows. The parties were divorced by a decree entered in the Washington County Circuit Court on September 17, 1996. Custody of the parties' two minor children was given to Ms. Paschal. The divorce decree provided that Mr. Paschal's child support would be set at $965 per month and one-half of his net annual bonus from the period of September 1996 to August 1997; $965 per month and twenty-two percent of his annual bonus received from the period of August 1997 to July 1999; and commencing August 1, 1999, Mr. Paschal's support obligation was to be modified based upon his current take-home pay in accordance with the Family Support Chart.

On October 9, 2001, Ms. Paschal filed a petition for contempt alleging that Mr. Paschal had failed to pay the amount of support per the divorce decree. On May 21, 2002, Ms. Paschal amended her petition to add a request for modification of Mr. Paschal's support obligation due to an increase in his income. In an order entered on July 22, 2002, the trial judge granted Ms. Paschal's request to modify Mr. Paschal's support obligation and denied Ms. Paschal's motion for contempt, finding specifically that Mr. Paschal did not properly compute his support obligation due to his failure to include all of his income.

■ ■ We review child-support awards *de novo* on the record. *Davie v. Office of Child Support Enforcement*, 349 Ark. 187, 76 S.W.3d 873 (2002) (citing *Nielsen v. Berger-Nielsen*, 347 Ark. 996, 69 S.W.3d 414 (2002)). In *de novo* review cases, we will not reverse a finding of fact by the trial judge unless it is clearly erroneous. *Id.* (citing *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 and firm conviction that a mistake has been committed. *Id.* (citing *Nielsen, supra).* Further, we give due defer-

ence to the trial judge's superior position to determine the credibility of witnesses and the weight to be accorded to their testimony. *Id.*

■ ■ The amount of child support lies within the sound discretion of the trial judge, and the trial judge's finding will not be reversed absent an abuse of discretion. *Ford v. Ford*, 347 Ark. 485, 65 S.W.3d 432 (2002) (citing *McWhorter v. McWhorter*, 346 Ark. 475, 58 S.W.3d 840 (2001); *Kelly v. Kelly*, 341 Ark. 596, 19 S.W.3d 1 (2000); *Smith v. Smith*, 337 Ark. 583, 990 S.W.2d 550 (1999)). The trial judge is required to refer to the child-support chart, and the amount specified in the chart is presumed to be reasonable. *Id.* (citing *Smith v. Smith, supra*).

Mr. Paschal first argues that the trial court erred in awarding appellee, Alice Paschal, retroactive child support. However, the trial judge did not retroactively modify the child-support order. Rather, he clarified the original order by setting the sum certain amount of support. The trial judge correctly found the terms of the agreement were unambiguous in that the parties intended to set child support in accordance with the child-support chart, yet failed to set a sum certain amount of child support as required by Administrative Order No. 10.

The testimony showed that on August 1, 1999, Mr. Paschal began making child-support payments in the amount of $1080 per month. The trial judge found that based on his income the amount of child support that Mr. Paschal should have paid was $1469 during the period of August 1, 1999, through August 1, 2000; $1234.66 during the period of August 2, 2000, through December 31, 2000; and $2520 during the year 2001. We find no error in the trial judge's clarification of the original child-support order.

■ ■ Appellant's reliance upon the line of modification cases is misplaced. We agree that retroactive modification of a court-ordered child-support obligation may only be assessed from the time a petition for modification is filed. *Yell v. Yell*, 56 Ark. App. 176, 939 S.W.2d 860 (1997) (citing Ark. Code Ann. § 9-14-234 (Supp. 1995); *Grable v. Grable*, 307 Ark. 410, 821 S.W.2d 21 (1991); *Heflin v. Bell*, 52 Ark. App. 201, 916 S.W.2d 769 (1996)). However, where a child-support order fails to recite the amount of support, the order has no sum certain that is capable of modifi-

cation. Thus, the trial judge did not retroactively modify the support order; rather, he calculated the correct amount of support based on Mr. Paschal's income, and set a sum certain amount of support, bringing the child-support order into compliance with Administrative Order No. 10.

■ ■ The trial judge also determined that Mr. Paschal's future monthly child-support payment should be $1,299 based on his current income. Mr. Paschal argues in his second point on appeal that the trial court erred in considering the bonus that he received in 2001 as income for the purpose of establishing his support obligation. He specifically asserts that the bonus was a "non-predictable salary bonus." For the calculation of child support, "income" is statutorily defined as:

> (4)(A) "Income" means any periodic form of payment due to an individual, regardless of the source, including wages, salaries, commissions, bonuses, workers' compensation, disability, payments pursuant to a pension or retirement program, and interest.
>
> (B) The definition of "income" may be expanded by the Arkansas Supreme Court from time to time in the Guidelines for Child Support Enforcement, § 9-99-901.

Ark. Code Ann. § 9-14-201(4) (Supp. 2001). In Administrative Order No. 10, the Arkansas Supreme Court expanded the definition of "income" as follows: "Income means any form of payment, *periodic or otherwise*, due to an individual, regardless of source, including wages, salaries, commissions, bonuses, worker's compensation, disability, payments pursuant to a pension or retirement program, and interest. . . ." *In re*: Administrative Order Number 10: Arkansas Child Support Guidelines § II, 331 Ark. 581 (1998) (emphasis added). The definition is intentionally broad to encompass the widest range of sources consistent with this State's policy to interpret "income" broadly for the benefit of the child. *Ford, supra*. Hence, we find that the $100,000 bonus that Mr. Paschal received in 2001 clearly falls within the definition of income, and the trial court properly considered the 2001 bonus in determining Mr. Paschal's child-support obligation. Based on the foregoing, we affirm.

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

HERITAGE BAPTIST TEMPLE and Utica National Insurance Company *v.* Tammy ROBISON

CA 03-61 120 S.W.3d 150

Court of Appeals of Arkansas
Division III
Opinion delivered June 18, 2003

Friday, Eldredge & Clark, by: *Betty J. Demory* and *Amanda Capps Ross*, for appellant.

Gary Davis, for appellee.

JOHN F. STROUD, JR., Chief Judge. Appellants, Heritage Baptist Temple and Utica National Insurance Company, appeal the Workers' Compensation Commission's grant of benefits to appellee, Tammy Robison. On appeal, they contend that the Commission's determination that appellee sustained a compensable aggravation of her preexisting condition is not supported by substantial evidence. We affirm the Commission's decision.

Robison, a nursery worker in appellant Heritage Baptist Temple's day-care center, suffered an admittedly compensable injury on March 7, 2000, when she crawled under a baby bed to retrieve an object for a child. Robison testified that when she stood up, she had a lot of pain in her hip and down her leg. Although she mentioned it to her supervisor at the time, Robison

said that she did not think it was serious, and she did not seek medical treatment until almost two weeks later. On March 20, 2000, Robison saw Dr. Michael Sung, reporting pain in her right hip and leg, neck, and left shoulder. Dr. Sung treated Robison with medication, ordered x-rays, and scheduled an MRI. At follow-up visits on March 31 and April 4, Dr. Sung's notes indicate that Robison was still having lower back pain; he then referred her to Dr. Blankenship, an orthopedic physician. Robison saw Dr. Blankenship on April 7 and reported that she crawled under a crib and "twisted" her lower back. She also reported pain in her lower extremities. Upon examination, Dr. Blankenship diagnosed Robison with "acute lower back pain with tight lower extremity radiculopathy, possibly on a discogenic basis."

The MRI performed on April 12 was normal. Robison returned to Dr. Blankenship on April 13, and he ordered a triple-phase bone scan, which was performed on April 19. The bone scan found increased activity at the level of the anterior-superior iliac spine on the right, with increased uptake at the level of the right anterior-superior iliac spine. The bone-scan report from the radiographer stated that an avulsion injury of the sartorius was suspected. Robison returned to Dr. Blankenship on April 26, and he recommended an MRI of the right hip and right anterior-superior iliac crest area in light of the bone-scan findings. The second MRI, performed on April 28, found abnormal signal intensity within the anterior-superior margin of the right iliac bone involving the anterior-superior iliac spine. The report stated that the findings were worrisome for an intrinsic lesion near the anterior-superior iliac spine and recommended a CT scan of this region.

A CT scan of the pelvis/right hip was performed on May 12. This scan revealed a lytic lesion within the anterior aspect of the right iliac crest. Robison returned to Dr. Blankenship on May 15 with some slight tenderness in the anterior superior iliac spine area. In light of the results of the CT scan, Dr. Blankenship referred her to Dr. Berry Thompson, who examined her that same day. After examination and review of the medical reports, Dr. Thompson's impression was that the lytic lesion probably represented an enchondroma in the area of the anterior-superior iliac spine. In his letter of May 15, Dr. Thompson stated:

> The increased uptake on the bone scan would suggest that she fractured into it at the time of her on the job injury. I believe that it does need excision by curettage for treatment and to confirm the diagnosis. It is my opinion that while the underlying lesion is not directly related to her on the job injury, the fracture into it is and this represents a pre-existing condition with an aggravation at work. The aggravation accounting [sic] for more than 50 percent of the problem and thus does qualify under workers' compensation laws to be covered.

Dr. Thompson performed surgery on Robison on July 31, 2000, and the biopsy revealed a benign bone tumor, a fibrous dysplasia, instead of a fracture. However, in his deposition testimony, Dr. Thompson stated that there had been ample time for a fracture to have healed. Although he did not see evidence of a healed fracture at the time of the surgery, he stated that the surgical findings did not change his opinion that the tumor was made symptomatic by Robison's work-related incident. He said that he would not expect a fibrous dysplasia to become symptomatic without some trauma.

Dr. Bruce Safman, an independent consultant, reviewed Robison's medical records and came to the conclusion that there was no supporting evidence in the medical records that any pathology to the anterior portion of the iliac crest occurred at the time of Robison's injury. However, upon review of Dr. Sung's notes, Dr. Safman conceded that he was unable to state whether Robison's condition was caused by the admittedly compensable injury:

> Based on the lack of information in the notes, I have no basis on which to determine whether of not there was any iliac crest pain initially. It is not known whether Dr. Sung's reference to right "hip" pain referred to the iliac crest or not. Thus, I believe that we will have to accept the patient's verbalization that her symptoms are related to her initial injury, as there is no good documentation regarding the specific localization of her pain no [sic] the findings on her initial examinations between March 20th and April 4, 2000.

Our standard of review in workers' compensation cases is well-settled. We view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commis-

sion's findings and affirm the decision if it is supported by substantial evidence. *Geo Specialty Chem. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Air Compressor Equip. v. Sword*, 69 Ark. App. 162, 11 S.W.3d 1 (2000). The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Geo Specialty, supra.*

"In workers' compensation law, an employer 'takes the employee as he finds him,' and employment circumstances which aggravate pre-existing conditions are compensable." *Nashville Livestock Comm'n v. Cox*, 302 Ark. 69, 73, 787 S.W.2d 664, 666 (1990). An aggravation of a preexisting noncompensable condition by a compensable injury is, itself, compensable. *Oliver v. Guardsmark, Inc.*, 68 Ark. App. 24, 3 S.W.3d 336 (1999). An aggravation is a new injury resulting from an independent incident. *Maverick Transp. v. Buzzard*, 69 Ark. App. 128, 10 S.W.3d 467 (2000). An aggravation, being a new injury with an independent cause, must meet the definition of a compensable injury in order to establish compensability for the aggravation. *Farmland Ins. Co. v. DuBois*, 54 Ark. App. 141, 923 S.W.2d 883 (1996).

Arkansas Code Annotated section 11-9-102(4)(A)(i) (Supp. 1999) defines "compensable injury" as

> An accidental injury causing internal or external physical harm to the body . . . arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence.

A compensable injury must be established by medical evidence supported by "objective findings." Ark. Code Ann. § 11-9-102(4)(D). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16)(A)(i).

Appellants argue that in the present case, no medical evidence of an injury was presented in connection with the bone tumor. In

support of their contention, they point to the deposition testimony of Dr. Thompson, who testified that such lesions become symptomatic when aggravated by a fracture or muscle loosened from the bone; however, he also testified that when he performed the surgery, he saw no evidence of a fracture or a healed fracture, or of torn or loosened muscle. They contend that Dr. Thompson's opinion that there was an injury was simply speculation and conjecture because he found no evidence of an injury while performing the surgery and because the surgery did nothing to repair any injury, but instead only removed the preexisting tumor.

Appellants also contend that the speculation of an injury stemmed from a positive bone scan, which Dr. Thompson testified usually indicated an injury. Appellants categorize the bone-scan results in this case as only indicating the lesion because no injury was seen by Dr. Thompson when he performed the surgery.

We disagree with appellants' contentions. Dr. Thompson testified in his deposition that the bone lesion was not the only objective finding, that there was a positive bone scan that he described as "hot," which showed an increased uptake; he stated that such a bone scan "suggested that if that was the major factor, that suggested it was an acute injury." Based upon this positive bone scan, Dr. Thompson determined that Robison needed surgery, and the surgery revealed that the bone tumor was benign. The positive bone scan is an objective medical finding of injury that was out of Robison's control, and it formed the basis for the recommendation of surgery. Furthermore, Dr. Thompson also testified that although he did not find evidence of a fracture or a healed fracture at the time he performed Robison's surgery, the surgical findings did not change his opinion that the bone tumor was made symptomatic by the work-related incident. We hold that substantial evidence exists to support the Commission's determination that Robison sustained an aggravation of her preexisting condition. Therefore, we affirm the award of benefits to Robison.

Affirmed.

NEAL and CRABTREE, JJ., agree.

BILL'S PRINTING, INC., and First Security Bank *v.*
George F. CARDER III and Sharon L. Carder

CA 02-1147 120 S.W.3d 611

Court of Appeals of Arkansas
Division I
Opinion delivered June 18, 2003

[Petition for rehearing denied August 20, 2003.]

[redacted]

R. Bryan Tilley, appellant.

John Patterson, P.A., and *Terry J. Lynn*, for appellees.

ROBERT J. GLADWIN, Judge. Appellees George Carder and Sharon Carder brought suit to set aside a deed of cancellation issued by the Commissioner of State Lands and to quiet title to property they had purchased at a public sale. The Cleburne County Circuit Court held that the Commissioner had acted contrary to law in unilaterally canceling the limited-warranty deed granted to appellees and in ordering that the deed of cancellation be set aside. The trial court also found that appellant Bill's Printing, Inc., was not a bona fide purchaser of the subject property. Appellants argue on appeal that (1) the trial court erred in setting aside the deed of cancellation and (2) the trial court erred in finding that Bill's Printing was not a bona fide purchaser for value without notice. We disagree and affirm.

It was stipulated by the parties that C. Patrick Scholes and Laura Scholes owned a lot in Cleburne County that was properly

certified delinquent by the Cleburne County Tax Collector to the State of Arkansas on June 30, 1997, for failure of the landowners to pay the taxes due on the land. On August 14, 1997, the Commissioner gave notice by certified mail to the record owners, C. Patrick and Laura Scholes, informing them that the taxes with respect to the subject property were delinquent and that the lands would be sold at a public sale to be conducted on August 26, 1999. It is stipulated that this notice, which was sent to the Scholeses' last known address but was returned unclaimed, satisfied the requirements of Ark. Code Ann. § 26-37-301 (Repl. 1997).

The subject property was offered at a public sale by the office of the Commissioner of State Lands on August 26, 1999, and was purchased by appellees George and Sharon Carder. It was also stipulated by the parties that the public sale was conducted in compliance with the applicable law. On August 31, 1999, the Scholeses contacted the Commissioner's office and requested information to redeem the land. The Commissioner's office sent them a petition to redeem that contained all information required by law. The petition contained the information that a petition to redeem was valid for ninety days from the date printed, and that in the event the property was sold, they had thirty days from the date of sale to redeem the property. The petition did not notify them that the property had been sold on August 26, 1999, but listed the property as "subject to sale."

On September 29, 1999, the Commissioner executed a limited-warranty deed conveying the property to appellees, which was duly recorded on October 7, 1999. Evidence was introduced to show that on October 13, 1999, Patrick Scholes had the petition to redeem notarized and mailed it to the Commissioner's office with a check for the total amount needed to redeem the property. Thus, he paid the amount due within the ninety-day time frame allowed on property that has been certified to the State but not yet sold, but not within the thirty-day time frame that is required when the property has already been sold.

The Commissioner's office returned Mr. Scholes's check along with notification that the property had been sold in August and that the thirty-day redemption period had expired. Scholes

then contacted the Commissioner's office for review of the sale. Upon review, the Commissioner's office determined that an error had been made in that the office staff had failed to indicate on the petition to redeem that the land had in fact been sold. Although such an indication is not required by law, a representative from the Commissioner's office testified that it was an unwritten office policy to handwrite the date of sale on petitions to redeem land that had already been sold at the time the petition was mailed out. Because this information was not included on the Scholeses' petition, the Commissioner attempted to rectify the situation by executing a deed of cancellation on December 8, 1999, to set aside the limited-warranty deed issued to appellees and, on December 9, 1999, issuing a redemption deed in favor of the Scholeses.

On October 7, 2000, the Scholeses conveyed their interest in the subject property to Bill's Printing, Inc., and this deed was recorded on October 18, 2000. On December 21, 2000, appellees George and Sharon Carder filed a complaint seeking to set aside the deed of cancellation issued by the Commissioner of State Lands and to quiet title to the subject property.

Following a bench trial, the circuit court of Cleburne County found that the sale of the property by the Commissioner was conducted in accordance with the statutory requirements and that no error existed that would justify the cancellation of the limited-warranty deed under the provisions of Ark. Code Ann. § 22-6-102 (Repl. 1996); that because more than thirty days had passed since the sale of the property without redemption as contemplated by the provisions of Ark. Code Ann. § 26-37-203(a) (Repl. 1997), the Commissioner acted contrary to law in unilaterally canceling the limited warranty deed granted to the Carders; that the deed of cancellation was therefore set aside, canceled, and held for naught; and that title to the subject property was quieted and confirmed in appellees. The court further found that the Carders' deed, which was filed in the records of Cleburne County, was notice of their interest in the property and that Bill's Printing, having been put on notice of such claim and having not taken any steps to inquire into the Carders' interest in the property, was not a bona fide purchaser for value without notice.

The facts in this case are not in dispute; it is the trial judge's interpretation of the law that is at issue. When a case is tried by a circuit court sitting without a jury, our inquiry on appeal is whether the factual findings of the court are clearly erroneous or clearly against the preponderance of the evidence. *Springdale Winnelson Co. v. Rakes*, 337 Ark. 154, 987 S.W.2d 690 (1999). However, a trial judge's conclusion of law is given no deference on appeal; manifestly, the trial judge does not have a better opportunity to apply the law than does the appellate court. *Carter v. Green*, 67 Ark. App. 367, 1 S.W.3d 449 (1999). If the law has been erroneously applied and the appellant has suffered prejudice, the erroneous ruling is reversed. *Id.*

On appeal, appellants contend that the circuit court erred in setting aside the deed of cancellation and finding that the Commissioner of State Lands acted contrary to the law in unilaterally canceling the limited-warranty deed granted to appellees. Appellants cite several statutory provisions in support of their argument that the Commissioner acted within his authority when he canceled the limited-warranty deed and issued the redemption deed. Arkansas Code Annotated section 22-6-102 addresses the correction of errors growing out of erroneous sales:

> (a) The Commissioner of State Lands shall have the power to correct errors that exist or may exist arising from the erroneous sale of lands belonging or formerly belonging to the state.
>
> . . .
>
> (e) In all cases where lands have been erroneously confirmed to the state and sold by it, twice sold by commissioners, sold by them when the lands were unconfirmed or misdescribed, in whole or in part, or when the sales are in any way irregular, informal, or incomplete, the Commissioner of State Lands shall issue a certificate or take steps to perfect the entry or to enable the purchasers, their heirs, or assigns to have refunded to them any money which they may have paid on any entry that is void or voidable.
>
> . . .
>
> (h) The Commissioner of State Lands, on production of proof satisfactory to him, may correct errors and put land in a situation to have deeds thereon made.

Ark. Code Ann. § 22-6-102(a), (e), and (h). Appellants also cite Ark. Code Ann. § 26-37-204(b) (Repl. 1997), which provides: "The Commissioner of State Lands shall have the authority to set aside any sale. In the event the Commissioner determines that a sale shall be set aside, the purchaser may be entitled to reimbursement of [monies] paid to the Commissioner of State Lands." Appellants' position is that these statutory provisions gave the Commissioner the authority to correct an error made by the State that caused the Scholeses to fail to timely redeem their property.

In *Gilley v. Southern Corp.*, 194 Ark. 1134, 110 S.W.2d 509 (1937), the court noted that a taxpayer who had made an attempt, in good faith, to pay his taxes, or to redeem his land after failure to do so, was not to be defeated in that attempt by the mistake, negligence, or other fault on the part of the public officers in the discharge of their official duties. However, the court went on to hold that there was no error of the clerk where the failure to include on the redemption certificate all of the property involved was as obvious to the owner as it was to the clerk. The court noted that the slightest examination of the redemption certificate would have disclosed the omission of the sixty-acre tract, and held that the clerk should not be charged with this omission as a neglect of his official duty. The court further observed that, except for the omission, there was no mistake in the certificate issued and that, on the contrary, it was a correct and sufficient description of all the land that it described.

Vanderbilt v. Washington, 249 Ark. 1070, 463 S.W.2d 670 (1971), involved the sufficiency of a tender of delinquent taxes to redeem lands from a tax sale. There the tender of delinquent taxes was considered actual performance, but the landowner had actually paid the delinquent taxes and the collector misapplied the amount. In the case now before us, there was no *timely* attempt by the Scholeses to pay their delinquent taxes.

In *Aldridge v. Tyrell*, 301 Ark. 116, 782 S.W.2d 562 (1990), the supreme court again noted that an attempt by an owner, in good faith, to pay his taxes or to redeem his land after failure to do so, may not be defeated by the mistake, negligence, or other fault on the part of public officers in the discharge of their official duties. Tyrell went to the assessor's office to ensure the change of ownership of two parcels on the tax records. The assessor mistak-

enly transferred only one of the parcels to reflect the change in ownership. Consequently, Tyrell thereafter received a tax statement and paid taxes on only one parcel. The parcel that the assessor had mistakenly not transferred was eventually sold at a tax sale. Tyrell was successful in having the limited-warranty deed that was issued pursuant to the tax sale set aside on the basis of the assessor's mistake in not changing the ownership information on the property. The supreme court held that where Tyrell had made a good-faith attempt to ensure that the taxes on his property would be correctly billed and paid and where the assessor admitted his office did not change the ownership of the property, Tyrell's good-faith attempt to pay his property taxes would not be defeated by the assessor's mistake.

In *Carter v. Green*, 67 Ark. App. 367, 1 S.W.3d 449 (1999),we noted that the Commissioner had the authority to promulgate rules and regulations to further the intent of the Acts governing tax-forfeiture sales in holding that although Arkansas law at the time did not authorize the conveyance of property to unincorporated organizations, the sale was otherwise valid, and that the chancellor was correct in finding that the Commissioner was acting within the scope of his authority to issue correction deeds conveying the property to the trustees of an unincorporated association. In *Carter* we were again dealing with a mistake made by the Commissioner's office, specifically, naming the church, an unincorporated organization, as grantee instead of naming the trustees of the church as the grantees.

[redacted] There were no irregularities or errors in the notice mailed to the Scholeses or in the public sale of the property. There was no erroneous action committed by the State that caused the Scholeses to fail to timely redeem their property. The "error" complained of by appellants and relied upon by the Commissioner in setting aside the limited-warranty deed was the omission of certain information that the State was not even required to provide to the Scholeses. The statutory provisions that give the Commissioner authority to correct errors contemplate erroneous, irregular, informal, or incomplete sales. The failure of the Commissioner's office to handwrite, on a petition to redeem, additional information that is not required by law or a promulgated office procedure does not cause an otherwise proper sale to be erroneous, irregular, informal, or incomplete. We agree with the

trial court that the sale of the property by the Commissioner of State Lands was conducted in accordance with the requirements of Arkansas law and that no error existed that would justify the cancellation of the limited-warranty deed.

Appellants also argue that the trial court erred in finding that appellant Bill's Printing, Inc., was not a bona fide purchaser for value, reasoning that Bill's Printing relied in good faith on the deed of cancellation and the redemption deed as having removed any superior claim to the property. We disagree.

Arkansas Code Annotated section 14-15-404 (Repl. 1998) addresses the effect of recording instruments affecting title to property:

> (a) Every deed, bond, or instrument of writing affecting the title, in law or equity, to any real or personal property, within this state which is, or may be required by law to be acknowledged or proved and recorded shall be constructive notice to all persons from the time the instrument is filed for record in the office of the recorder of the proper county.
>
> (b) No deed, bond, or instrument of writing for the conveyance of any real estate, or by which the title thereto may be affected in law or equity, made or executed after December 21, 1846, shall be good or valid against a subsequent purchaser of the real estate for a valuable consideration without actual notice thereof or against any creditor of the person executing such an instrument obtaining a judgment or decree which by law may be a lien upon the real estate unless the deed, bond, or instrument, duly executed and acknowledged or proved as required by law, is filed for record in the office of the clerk and ex officio recorder of the county where the real estate is situated.

In *Massey v. Wynne*, 302 Ark. 589, 791 S.W.2d 368 (1990), our supreme court noted that recordation of an instrument that affects title to real property is constructive notice of that interest to all persons from the time the instrument is filed, and that a subsequent purchaser will be deemed to have actual notice of a prior interest in the property if he is aware of such facts and circumstances as would put a man of ordinary intelligence and prudence on such inquiry that, if diligently pursued, would lead to knowledge of those prior interests. Here the Carders' limited-warranty deed was properly recorded and became part of the chain

of title, thus putting Bill's Printing on constructive notice of their interest in the property. Additionally, the combined presence of a tax lien, the Carders' deed, a deed of cancellation, and a redemption deed in the chain of title constituted "such facts and circumstances as would put a man of ordinary intelligence and prudence on such inquiry [that], if diligently pursued, would lead to knowledge of his rights." *Bowen v. Perryman*, 256 Ark. 174, 180, 506 S.W.2d 543, 547 (1974).

The trial court was not clearly erroneous in finding that appellees' limited-warranty deed, which was filed in Cleburne County on October 7, 1999, was notice of their interest in the property and that appellant Bill's Printing, Inc., having been put on notice of such claim and having not taken any steps to inquire into appellees' interest in the property, was not a bona-fide purchaser for value without notice. Accordingly, we affirm.

Affirmed.

ROBBINS and NEAL, JJ., agree.

Ronnie B. LAUDERDALE *v.* STATE of Arkansas

CACR 02-1009 120 S.W.3d 106

Court of Appeals of Arkansas
Division I
Opinion delivered June 18, 2003

Lewellen & Associates, by: *Roy C. Lewellen*, for appellant.

Mike Beebe, Att'y Gen., by: *Kelly K. Hill*, Ass't Att'y Gen., for appellee.

SAM BIRD, Judge. Appellant Ronnie Lauderdale entered a plea of nolo contendere to possession of cocaine in the Circuit Court of Crittenden County. He was sentenced to ten years in the Arkansas Department of Correction and fined $5000. In this appeal, he contends that the trial court erred by not granting his motion to suppress evidence found as a result of an illegal search. We reverse and remand for further proceedings consistent with this opinion.

In *Davis v. State*, 351 Ark. 406, 413, 94 S.W.3d 892, 896 (2003), our supreme court clarified the appropriate standard for review of a suppression challenge: "Our 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."

On October 17, 2000, the United States Marshal Service, acting on a federal warrant for arrest for violation of probation, located Mr. Lauderdale at an apartment in Marion, Arkansas. The marshals ultimately arrested him for the probation violation and secured the residence. They also detained Keith McClendon after observing him exit a bathroom where they found in plain view what was suspected to be cocaine. Both individuals were handcuffed and seated on a couch in the living room of the apartment. Based on the discovery of suspected cocaine in the bathroom, the marshals contacted the Marion City Police. The marshals testified that they made a protective sweep through the apartment, and that after the sweep, there was no threat of harm to them by either Mr. Lauderdale or Mr. McClendon.

One of the marshals noticed a black bag that was near the couch on which both suspects were seated. Mr. Lauderdale claimed the bag and was asked if he would consent to a search of it. Mr. Lauderdale refused his consent to the search of the bag, the marshals did not search it based on their belief and experience that a search warrant would have been necessary to do so. The mar-

shals testified that neither Mr. Lauderdale nor Mr. McClendon had access to the bag or had the ability to remove any evidence from it. The Marion City Police were notified, and they arrived at the scene shortly thereafter.

Marion Police Officer John Millsap testified that when he arrived at the apartment with Officer Darren Richardson, the scene was secured and the marshals advised him that they had completed a walk-through of the house. At this time Officer Millsap field tested the substance found in the bathroom. It tested positive for cocaine. Meanwhile, Officer Richardson had gone into the living room and opened the black bag, where he found nearly twenty grams of suspected cocaine. Officer Millsap testified that he then telephoned his supervisor, Captain James Wilson, who directed him to attempt to get consent to search the residence. Mr. Lauderdale refused to consent to a search of the apartment, and Captain Wilson subsequently prepared an affidavit for a search warrant, with the affiant being Officer Millsap.

The affidavit described the items sought and referred to attached Exhibits A and B. Exhibit A consisted of a description of the places to be searched, and Exhibit B recited Officer Millsap's basis for seeking the warrant. His stated basis was limited to the marshals' discovery of cocaine in plain view in Lauderdale's bathroom. It did not refer to the black bag. Attachments to this exhibit included the marshals' arrest warrant and their individual written statements, which, with one exception, were also limited to the arrest and the discovery of the cocaine in the bathroom. The statement of Deputy Marshal Woods, however, contained a reference to the improper search of the black bag in the living room. Deputy Woods' statement presented to the issuing magistrate was that after the local officers arrived, they opened the bag and found more suspected narcotics.

Apparently, this statement was overlooked by Lauderdale, who neither refers to the statement in support of his argument here, nor includes the statement in his addendum.[1] It was also

[1] Lauderdale argued below, as he does on appeal, that the illegal search of the black bag, in and of itself, invalidated the search pursuant to the warrant, and he offers mere

apparently overlooked by the circuit court, as well, because the court stated in its ruling that the contents of the black bag were not used by the issuing magistrate as a basis for the search warrant. Furthermore, the record does not specifically indicate that the judge who issued the warrant even read Marshal Woods' statement, although he testified that he considered the affidavit and attachments in determining the existence of probable cause to issue the warrant. Nonetheless, the fact that the evidence obtained in the black bag was used as a basis for the search warrant is not dispositive.

I. Admission of Evidence

A. Warrantless Search of the Black Bag

Before determining the validity of the search warrant and admissibility of any evidence seized as a result, we must first determine if the search of the black bag was legal. We hold that it was not. Arkansas Rule of Criminal Procedure 12.5 (2001), is applicable in this case. Rule 12.5 states the following:

> *SEARCH OF PREMISES: PERMISSIBLE CIRCUMSTANCES, TIME AND SCOPE.*
>
> (a) If at the time of the arrest:
>
> (i) the accused is in or on premises all or part of which he is apparently entitled to occupy; and
>
> (ii) in view of the circumstances the officer has reason to believe that such premises or part thereof contain things which are:
>
> (A) subject to seizure; and
>
> (B) connected with the offense for which the arrest is made; and
>
> (C) likely to be removed or destroyed before a search warrant can be obtained and served; the arresting officer may search such premises or part thereof for such things, and seize any things subject to seizure.
>
> (b) Search of premises pursuant to subsection (a) shall only be made contemporaneously with the arrest, and search of build-

speculation that "[Officer] Millsap undoubtedly informed the magistrate of the discovery of these items" in the black bag when he appeared before the magistrate.

> ing interiors shall only be made consequent upon an entry into the building made in order to effect an arrest therein. In determining the necessity for and scope of the search to be undertaken, the officer shall take into account, among other things, the nature of the offense for which the arrest is made, the behavior of the individual arrested and others on the premises, the size and other characteristics of the things to be searched for, and whether or not any such things are observed while making the arrest.

In this case, there was no evidence to show that entry into the black bag was necessary to prevent the destruction of evidence. In its ruling, the trial court stated:

> If, if the evidence found in the black bag, the cocaine found in the black bag, were being introduced as a result of that search, and that search alone, the court would have some problems with that search, particularly in the face of a denial of consent and the fact that the court doesn't see much exigent circumstances insofar as the defendants were handcuffed, they didn't have access to the bag, the officers had already ascertained that there was no one else in the house to pose any threat.

Furthermore, there was testimony by the three federal marshals present at the scene that both Lauderdale and McClendon were handcuffed and seated on the couch. Marshal Bradbury testified that at this point there was no threat of Mr. Lauderdale or Mr. McClendon doing any harm to the officers, and that it was safe to assume that neither one had the ability to remove any evidence from the apartment or from the black bag. Marshal Boock testified that once under arrest, neither individual had any ability to do harm to the officers. Officer Richardson, the officer who conducted the search of the black bag, testified that when he arrived, both Mr. Lauderdale and Mr. McClendon were handcuffed and on the couch; and that he did not fear any physical threat to any of the officers when he began to search the black bag. Nonetheless, Officer Richardson stated that he was looking for weapons. Based on the foregoing facts, we conclude that the search of the black bag was illegal.

Since we hold that the initial search of the black bag was illegal, we now must decide if the evidence, including the contents of the black bag and all evidence discovered as a result of the search

warrant, was inadmissable. We note, however, that the evidence initially discovered in plain view in the bathroom was admissible. Arkansas Rule of Criminal Procedure 14.4 allows an officer who is otherwise lawfully present at a place, to seize an object that is in plain view, if its incriminating character is immediately apparent. *Fultz v. State*, 333 Ark. 586, 972 S.W.2d 222 (1998).

B. The Search Warrant

The State urges this court to disregard the trial court's basis for denying Lauderdale's motion to suppress in that it incorrectly concluded that the issuing magistrate did not have illegally obtained information before it. In doing so, the State submits that we should look to *Murray v. United States*, 487 U.S. 533 (1988). The Arkansas appellate courts have only discussed *Murray* in two published opinions, *Fultz v. State*, 333 Ark. 586, 972 S.W.2d 222 (1998), and *Williams v. State*, 327 Ark. 213, 939 S.W.2d 264 (1997). In both cases, *Murray* was read to require a two-part test to determine whether the inclusion of illegally obtained information in an affidavit precludes the application of the independent-source doctrine. First, the appellate court examines the search warrant by excising the offending information from the probable cause affidavit and determines whether the affidavit nevertheless supports the issuance of a search warrant; second, the appellate court examines the motivation of the officer or officers who obtained the warrant and determines whether the motivation to obtain the warrant came as a result of discovering the tainted information, which in our case is the nearly twenty grams of cocaine found in the black bag. *See Williams*, 327 Ark. at 220-22, 939 S.W.2d at 268-69; *Fultz*, 333 Ark. at 594-95, 972 S.W.2d at 224-26.

In *Williams*, our supreme court stated:

> Having decided that the warrantless search was illegal, we move to the question of that illegality's effect on the validity of the warrant. While the exclusionary rule prohibits the introduction of tangible and testimonial evidence derived from an unlawful search, such evidence may nonetheless be admissible if discovered through an independent source. *See Murray v. United States*, 487 U.S. 533, 108 S. Ct. 2529, 101 L.Ed.2d 472 (1988). This tenet is referred to as the "independent-source doctrine." *Murray*

involved an illegal entry into a warehouse where all subsequent activity by the police officers was suspect. While unlawfully in the warehouse, the police officers observed bales of marijuana. They then sought a search warrant. The Court stated:

> The ultimate question, therefore, is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during the illegal entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant. *Murray*, 487 U.S. at 542, 108 S. Ct. at 2536. The first prong of *Murray* is usually approached by excising the offending information from the probable-cause affidavit and then determining whether the affidavit nevertheless supports the issuance of a search warrant. *See United States v. Restrepo*, 966 F.2d 964 (5th Cir. 1992), *cert. denied*, 506 U.S. 1049, 113 S. Ct. 968, 122 L.Ed.2d 124 (1993); *United States v. Herrold*, 962 F.2d 1131 (3rd Cir.), *cert. denied* 506 U.S. 958, 113 S. Ct. 421, 121 L.Ed.2d 344 (1992).

The affidavit in this case contained a wealth of information about the Williams's possible drug-trafficking activities. Even in the absence of the information obtained in the prior search, officers had detailed information from three confidential informants, plus the statement of Henry Glosemeyer, who had just come from the Williams's residence. Thus, the first prong of the *Murray* test weighs in favor of the validity of the warrant.

Williams v. State, 327 Ark. at 220-21, 939 S.W.2d at 268 (1997).

In our case, with respect to the first prong of *Murray*, even if we completely excise any mention of the black bag or its contents, there is still ample evidence in the "affidavit for search warrant" submitted to the trial judge to support the issuance of the search warrant. The remaining evidence consists partly of a rock-like substance that field tested positive for cocaine, along with several plastic baggies, all of which were found in plain view in the bathroom. Thus, we hold that the first prong of *Murray* is satisfied.

While we agree with the State that the first prong of *Murray* is satisfied as a result of the additional legally obtained evidence referred to in the affidavit for search warrant, the trial court

failed to address the second prong of *Murray*. We believe that an analysis of the second prong is an essential consideration in this case. With respect to the second prong of *Murray*, our supreme court stated:

> The second prong of *Murray* focuses on the motivation of the officers in obtaining the warrant. A key consideration in determining this issue is the "relative probative import" of the information secured during the illegal search "compared to all other information known to the officers." *United States v. Restrepo*, *supra*, at 972. While the police should not profit from illegal activity, neither should they be placed in a worse position than they would otherwise have occupied. *Murray*, 487 U.S. at 542, 108 S. Ct. at 2535-36.
>
> In the instant case, unlike the facts in *Murray*, there was no illegal entry. Kathlene Williams allowed the officers to enter the residence, and, while the officers testified that they informed Houston Williams that he could ask them to leave the residence at any time, he never requested that they do so. Furthermore, we think it significant that, when Officer Norman contacted the prosecutor's office about obtaining a warrant prior to entering the residence, he was advised that he lacked probable cause. Thus, we cannot agree that there was a complete absence of motivation on the part of the officers to seek a warrant prior to the lawful entry and subsequent illegal search.
>
> Immediately upon lawfully entering the house, Officer Norman observed a Smith & Wesson .9 millimeter automatic pistol on top of a dresser. While the officers were present, Ronald Fox, whom they had documented as dealing in methamphetamine, arrived at the home but would not enter the residence. This evidence, obtained prior to the illegal search, could be properly considered by the issuing magistrate.
>
> When asked at the suppression hearing to explain the basis for his request for a search warrant of the Williams residence, Officer Norman reviewed not the items seized from the illegal search, but the information received from the confidential informants, the statement acquired from Glosemeyer, and the surveillance conducted by officers. In light of this testimony, we cannot conclude that the officers were prompted to obtain the search warrant after obtaining the tainted information. In any event, as the officers collected ample information to support a search warrant,

> independent of and prior to the items found in the illegal search, we hold that the independent-source doctrine permitted the introduction of evidence seized after the search warrant. To hold otherwise, we would be placing the officers in a worse position than they would otherwise have occupied. Under these circumstances, we affirm the trial court's order upholding the validity of the warrant.

Williams v. State, 327 Ark. at 221-22, 939 S.W.2d at 268-69 (1997).

Another case cited within *Murray* and relied upon by our supreme court in *Williams v. State* is *United States v. Restrepo*, 966 F.2d 964 (5th Cir. 1992), *cert. denied*, 506 U.S. 1049 (1993). The court in *Restrepo* clearly defined the second prong of *Murray*:

> B. MOTIVATION: MURRAY'S NEW REQUIREMENT
>
> *Murray* states that a search pursuant to warrant is not a genuinely independent source of evidence "if the agents' decision to seek the warrant was prompted by what they had seen during the initial [illegal] entry." [FN20] Thus, *Murray* instructs the trial court to determine— separate and apart from its determination of whether the expurgated warrant affidavit contains probable cause [FN21]—whether information gained through the illegal search influenced or motivated the officers' decision to procure a warrant. [FN22] In this case, therefore, this inquiry is answered in the negative if the district court finds that "the agents would have sought a warrant if they had not earlier entered" the Regency residence. [FN23] As LaFave explains, *Murray* is intended to deal with "the so-called 'confirmatory search,' conducted for the precise reason of making sure it is worth the effort to obtain a search warrant." [FN24]
>
> FN20. 108 S. Ct. at 2535.
>
> FN21. "*Murray* is most significant precisely because the majority refused to follow the rather common position taken by the lower courts, namely, that the fruit-of-the-poisonous-tree issue presented by cases of this genre can be resolved by focusing *only* upon the question of whether facts obtained by the prior illegal action were critical to the probable cause finding supporting the warrant." Wayne R. LaFave, *Search and Seizure*, §§ 11.4(f), at 70 [1992 Supp,] (2d ed. 1987).

FN22. *Accord U.S. v. Mithun*, 933 F.2d 631, 636 (8th Cir. 1991) (agent's decision to seek warrant not prompted by seeing flash suppressor); *U.S. v. Bosse*, 898 F.2d 113, 116 (9th Cir. 1990) (remanding to determine effect of illegal entry and search on the officers' decision to seek warrant); *U.S. v. Halliman*, 923 F.2d 873, 880 (D.C.Cir. 1991) (finding that prior entry did not influence decision to seek warrant not clearly erroneous).

FN23. *Murray*, 108 S. Ct. at 2536.

FN24. LaFave, *Search and Seizure*, §§ 11.4(f), at 70 [1992 Supp.].

Here, the district court did not consider whether the results of the illegal search of Regency prompted or motivated the officers' decision to seek the warrant. As motivation is a question of fact, we remand this issue to the district court. We nonetheless point out, by way of guidance only, that, unlike the objective test of whether the expurgated affidavit constitutes probable cause to issue the warrant, the core judicial inquiry before the district court on remand is a subjective one: whether information gained in the illegal search prompted the officers to seek a warrant to search Regency. In the best of all possible worlds, of course, there will be statements or other evidence directly probative of motivation or effect. But in the usual case, in which direct evidence of subjective intent is absent, a court must infer motivation from the totality of facts and circumstances.

966 F.2d at 971-72.

In *Williams v. State*, 327 Ark. at 221, 939 S.W.2d at 268-69, our supreme court took specific note of the fact that the officer had the intention of obtaining a search warrant. In *Williams*, the court stated:

> Furthermore, we think it significant that, when Officer Norman contacted the prosecutor's office about obtaining a warrant prior to entering the residence, he was advised that he lacked probable cause. Thus, we cannot agree that there was a complete absence of motivation on the part of the officers to seek a warrant prior to the lawful entry and subsequent illegal search.

In *Fultz v. State*, 333 Ark. at 594-95, 972 S.W.2d at 225-26, our supreme court once again addressed both the first and second prong of *Murray*, stating:

> Next, Mrs. Fultz challenges the validity of the search warrant and the admission of all evidence retrieved pursuant to it because the suppressed evidence discovered in her purse provided part of the probable cause for the affidavit for the search warrant. Although our initial inquiry might be whether the purse search was valid, assuming, *arguendo*, that it was invalid, we must determine whether the inclusion of that evidence in the affidavit defeats the warrant. In *Williams v. State*, 327 Ark. 213, 939 S.W.2d 264 (1997), this court held that offending information can be excised from a probable cause affidavit to determine if the affidavit nevertheless supports the issuance of a search warrant, and evidence may be admissible if discovered through an independent source. *Id.* at 220, 939 S.W.2d 264 (*citing Murray v. United States*, 487 U.S. 533, 108 S. Ct. 2529, 101 L.Ed.2d 472 (1988)). However, the warrant can be defeated if the officer's motivation for the warrant arose from evidence discovered during the illegal search. This court also noted in *Williams* that the "relative probative import" of the illegally obtained information should be considered as compared to "all other information known to the officers." *Id.*, at 221, 939 S.W.2d 264 (*citing Murray*, 487 U.S. 533, 108 S. Ct. 2529, 101 L.Ed.2d 472; *United States v. Restrepo*, 966 F.2d 964 (5th Cir. 1992), *cert. denied*, 506 U.S. 1049, 113 S. Ct. 968, 122 L.Ed.2d 124 (1993)).
>
> Applying these factors in the instant case and excising the evidence discovered in the purse, the search warrant was, nevertheless, independently supported by probable cause. When viewed in the light most favorable to the State, the evidence in the purse was of little probative value compared to all of the other information known by the officers. For example, based on Mr. Fultz's statements and the smell in the car, there was ample information to independently support the warrant. Arguably, the evidence in the purse was of so little probative value that neither the purse nor its contents were seized. The trial court did not err in finding that the evidence in the purse was not the primary motivation for the officer's obtaining a warrant. Accordingly, its refusal to suppress the evidence found during the execution of the search warrant was not erroneous.

Again, while we have only two cases from our supreme court to use for guidance in this matter, it is clear that both prongs of *Murray* must be addressed when discussing the admissibility of evidence obtained through a search warrant after illegally obtained information had been utilized to determine whether there was

probable cause to support the warrant. In *Williams*, our supreme court examined evidence which clearly indicated that the officer was properly motivated to obtain a search warrant before the discovery of the tainted information. *Williams v. State*, 327 Ark. at 221, 939 S.W.2d at 268-69. In *Fultz*, our supreme court noted that the trial court had made a finding that the illegally obtained evidence was not the primary motivation for obtaining a warrant. 333 Ark. at 595, 972 S.W.2d at 225. In the case now before us, it is unclear whether the officers were motivated to obtain a search warrant before the discovery of the nearly twenty grams of cocaine in the black bag. In fact, there is evidence to the contrary.

It is clear from the federal marshals' testimony that they had no intention whatsoever of procuring a search warrant. In fact, one of the officers stated that he did not look in the black bag when he was denied consent because he did not want to be subpoenaed to court to testify. Thus, we are left with the question of whether the Marion officers had the intention of seeking a search warrant before they conducted the illegal search of the black bag.

The facts tend to indicate that the Marion officers field tested both the evidence found in the bathroom and the evidence found in the black bag prior to calling Captain Wilson for instructions. Additionally, once he was contacted, there is evidence that Captain Wilson first asked the Marion officers to attempt to obtain a written consent to search the premises, and only when that failed did Captain Wilson request the search warrant. Without speculation, it is a difficult task for this court to decide whether the Marion officers would have sought a warrant if they had not earlier illegally searched the black bag and found the nearly twenty grams of suspected cocaine; especially in light of the fact that the illegal narcotics found in the black bag constituted the largest find of narcotics in the apartment.

In this case, as in *Restrepo*, the trial court did not consider whether the results of the illegal search prompted or motivated the officers' decision to seek the search warrant. We note the potential difficulty of this determination. The trial court may well not have any new evidence before it to examine before making its decision. However, we point out for guidance only, that there may be evidence of past practices of the police officers, past conduct of the officers, standard operating procedures, or other

evidence that may shed light on whether the illegally obtained evidence motivated the officers to apply for the search warrant. As the court in *Restrepo* pointed out, "[i]n the best of all possible worlds, of course, there will be statements or other evidence directly probative of motivation or effect. But in the usual case, in which direct evidence of subjective intent is absent, a court must infer motivation from the totality of facts and circumstances." 966 F.2d at 972. Nonetheless, our supreme court has chosen to follow *Murray*, and as motivation is a question of fact, we are compelled to remand this case to the trial court to determine what motivated the officers' decision to seek a search warrant.

Reversed and remanded for further proceedings consistent with this opinion.

VAUGHT, J., agrees.

GLADWIN, J., concurs.

ROBERT J. GLADWIN, Judge, concurring. I concur with the majority. I agree that the initial search of the black bag was illegal and that the independent-source doctrine applies.

I also agree that *Murray v. United States*, 487 U. S. 533 (1988), requires application of the two-prong test and that, after excising the offending information from the affidavit for the search warrant, the remaining facts nonetheless support the issuance of the search warrant.

Finally, I agree that the trial judge did not specifically address the officers' motivation for seeking the search warrant, which is the second prong under *Murray*. The key consideration in determining this issue is "the relative probable import of the information secured during the illegal search compared to all other information known to the officers." *U.S. v. Restrepo*, 966 F.2d 964 (5th Cir. 1992).

In *Williams v. State*, 327 Ark. 213, 221, 939 S.W.2d 264, 269 (1997), the Arkansas Supreme Court discussed the second prong of *Murray* and noted:

> When asked at the suppression hearing to explain the basis for his request for a search warrant of the Williams' residence, Officer Norman reviewed not the items seized from the illegal search, but the information received from the confidential informants,

> the statements acquired from Glosemeyer, and the surveillance conducted by officers. In light of this testimony, we cannot conclude that the officers were prompted to obtain the search warrant after obtaining the tainted information.

327 Ark. at 221.

In the present case, the testimony was that the federal officers went to the appellant's residence to serve a federal warrant for probation violation, that they lawfully found cocaine and drug paraphernalia, that they requested consent to search the bag, and that the black bag was mentioned in only one of several affidavits attached to the search warrant. I believe that, in light of this testimony, we cannot conclude that the officers were prompted to obtain the search warrant after obtaining the tainted information and that we could follow the holding in *Williams*.

James TURNER *v.* John FARNAM, *et al.*

CA 02-1360 120 S.W.3d 616

Court of Appeals of Arkansas
Division I
Opinion delivered June 18, 2003

Appellant, pro se.

Jones & Harper, by: *Charles R. Garner, Jr.*, for appellee David McCormick.

ROBERT J. GLADWIN, Judge. Appellant James Turner appeals from the trial court's denial of his motions to intervene and quash a writ of garnishment. We affirm.

On August 1, 2000, appellees John and Sara Farnam sued Turner Motor Company, Inc. ("TMC") to rescind their purchase of a 1994 Ford Explorer. They alleged that the vehicle, for which they had paid $11,995, had suffered extensive damage and had a salvage title, contrary to TMC's representations. TMC answered the complaint through its attorney and denied that it had misrepresented the history of the vehicle. The answer was verified by appellant as president of TMC.

On July 20, 2001, TMC's counsel withdrew from representation. Thereafter, appellant appeared on behalf of TMC and requested a continuance, which the court granted, but TMC was ordered to obtain counsel within ten days. A hearing on the merits of the case was held on October 21, 2001, but TMC did not appear. After testimony from Mrs. Farnam, the trial court rescinded the contract, awarded the Farnams judgment for $11,995, and declared that, should TMC fail to pay that amount within ten days, the Farnams could execute on the judgment.

TMC did not pay the judgment, and on November 19, 2001, the Farnams issued a writ of garnishment to the Johnson County Sheriff. They were attempting to garnish approximately $2300 in cash that appellant had posted to secure a bail bond as the result of being arrested in Johnson County on a hot-check charge in June 2001. On December 11, 2001, the sheriff responded to the writ by saying that he had in his possession $2300 belonging to TMC.

On May 22, 2002, the State dismissed the criminal charge against appellant. However, when appellant attempted to retrieve the bond money from the sheriff's office, the sheriff would not release it because of the writ of garnishment. Thereafter, appellant appeared at a June 20, 2002, hearing in this case and argued that the Farnams should not be allowed to garnish his individual money when they had obtained judgment against a corporation.

During this hearing, appellant stated repeatedly that the bond money had been posted by his daughter and that he was appearing in court to get the money back for her. At the close of the hearing, the judge gave the Farnams sixty days to conduct discovery, and he ordered the sheriff's office to hold the money.

Discovery was commenced by the Farnams, but in the meantime, appellant began filing pleadings *pro se*. On July 5, 2002, he filed a motion to quash the writ of garnishment, a motion to intervene, and a complaint in intervention in which he named the Farnams and their attorney, David McCormick, as defendants. The complaint sought money damages against the Farnams and McCormick for what appeared to be causes of action for fraud, abuse of process, and violation of Ark. R. Civ. P. 11. The gist of all the pleadings was that the Farnams were wrongfully attempting to use garnishment proceedings to obtain appellant's personal property.

On July 30, 2002, the court entered an order finding that, because appellant had stated at the June 20 hearing that the money in question was his daughter's, appellant lacked standing to intervene or assert any claim to the garnished funds. Appellant moved to set that order aside. The motion was denied, and this appeal followed.[1]

Appellant begins by making three arguments on appeal that were either not made below or not ruled upon below. First, appellant contends that the Farnams did not follow the procedures mandated by Ark. Code Ann. § 16-66-114 (1987). That statute provides that the first process upon a judgment against a private corporation must be a *fieri facias*, which the sheriff shall levy on the property of the corporation. If no property of the corporation can be found or, if found, is not sufficient to satisfy the judgment, then writs of garnishment may issue. We do not know whether the Farnams ever attempted to levy on TMC's property prior to filing a writ of garnishment. This issue was not raised below, was not developed, and was not ruled upon by the trial court. There-

[1] The denial of a motion to intervene is an appealable order, *Northwest Ark. Area Agency on Aging v. Golmon*, 70 Ark. App. 136, 15 S.W.3d 363 (2000), as is an order that sustains a garnishment. Ark. R. App. P.—Civil 2(a)(5) (2003).

fore, we need not address it on appeal. *See Hercules, Inc. v. Pledger*, 319 Ark. 702, 894 S.W.2d 576 (1995). Appellant also argues that he did not receive notice that a garnishment was being asserted against his interests, citing Ark. Code Ann. § 16-110-402 (Supp. 2001). That statute requires that a notice be sent to the "defendant" when a writ of garnishment is issued. The defendant in this case was TMC, and the Farnams sent the statutory notice to that corporation at appellant's post office box. In any event, no argument was made below regarding this statute nor did the court rule on whether it applied to appellant, who was not a defendant.

Appellant argues next that the Farnams failed to comply with Ark. Code Ann. § 16-110-114(a) (1987), which reads:

> When any sheriff shall levy a writ of attachment upon property claimed by a person not a party to the writ, the person may make oath to the property. The property shall then be delivered to the claimant upon him, or his attorney, giving bond in favor of the plaintiff, with good and sufficient security, to be approved by the sheriff, in a sum double the value of the property attached.

Appellant reads this statute to say that the Farnams were required to give a bond before executing on the property at the sheriff's office. While we question appellant's interpretation, we do not reach that issue because this argument was not raised or ruled upon below and thus should not be addressed on appeal. *Hercules, Inc. v. Pledger, supra.*

We turn now to the remaining issues, which we view as twofold: 1) whether appellant should have been allowed to file his complaint in intervention seeking damages against appellees; and 2) whether appellant had standing to challenge the writ of garnishment.

Arkansas Rule of Civil Procedure 24 governs intervention in a civil cause of action and provides for both intervention as a matter of right and permissive intervention. *Midland Dev., Inc. v. Pine Truss, Inc.*, 24 Ark. App. 132, 750 S.W.2d 62 (1988). Intervention as a matter of right cannot be denied. *Id.* Rule 24(a), which governs intervention as a matter of right, reads:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an uncondi-

> tional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

We have recognized that, if the person seeking intervention will be left with his right to pursue his own independent remedy against the parties, regardless of the outcome of the pending case, then he has no interest that needs protecting by intervention of right. *Midland Dev., Inc. v. Pine Truss, Inc., supra.*

Appellant admits in his brief that he could have brought a separate suit against appellees to pursue the claims in his complaint. We likewise conclude that appellant's claims against appellees will not be impaired by the disposition of the current litigation. Therefore, appellant was not entitled to intervene as a matter of right; at best, he could have been allowed to permissively intervene at the court's discretion. However, given the fact that a tort suit would have complicated the issues already before the court and the fact that appellant could have pursued his claim independently, we do not believe that the court abused its discretion in denying the motion to intervene.

Next, we address whether appellant had standing to challenge the writ of garnishment. Arkansas cases have permitted persons who have an interest in attached or garnished property to either intervene or file an independent action to assert their interest. *See, e.g., Pine Bluff Nat'l Bank v. Parker*, 253 Ark. 966, 490 S.W.2d 457 (1973); *Bloom v. McGehee*, 38 Ark. 329 (1881). However, a person has no standing to complain about a garnishment when the object of the garnishment belongs to another. *See Joey Brown Interest, Inc. v. Merchants Nat'l Bank*, 284 Ark. 418, 683 S.W.2d 601 (1985); *see also Nash v. Estate of Swaffar*, 336 Ark. 235, 983 S.W.2d 942 (1999); *McCollum v. McCollum*, 328 Ark. 607, 946 S.W.2d 181 (1997) (a party has no standing to raise an issue regarding property in which he has no interest); *National Enter., Inc. v. Union Planters Nat'l Bank*, 322 Ark. 590, 910 S.W.2d 691 (1995) (generally, intervention as a matter of right requires the

applicant to establish a sufficient interest in the property that is the subject of the action).

Appellant challenges the garnishment of the $2300 in bond money. However, by his own statements at the June 20, 2002, hearing, the money belonged to his daughter; he asserted no ownership of the money. Thus, appellant had no interest in the garnished funds. We therefore conclude that the trial court correctly ruled that appellant had no standing to challenge the garnishment.

Before leaving this issue, however, we take the opportunity to discuss a statute that is not mentioned by either party but is of interest on this point. Arkansas Code Annotated section 16-110-134 (1987) reads as follows:

> (a) Before the sale of any attached property, or before the payment to the plaintiff of the proceeds thereof or of any attached debt, *any person may present his complaint verified by oath to the court.* This complaint shall dispute the validity of the attachment, or state a claim to the property or an interest in, or lien on it under any other attachment, or otherwise, and set forth the facts upon which the claim is founded, and his claim shall be investigated.
>
> (b) A nonresident claimant shall, in such cases, give security for costs.
>
> (c) The court may hear the proof, may order a reference to a commissioner, or may impanel a jury to inquire into the facts.
>
> (d) *If it is found that the claimant has a title to, a lien on, or any interest in the property, the court shall make such order as may be necessary to protect his rights.*
>
> (e) The costs of this proceeding shall be paid by either party, at the discretion of the court.

(Emphasis added.)

We applied this statute in 1994 in *Watkins v. Hadamek*, 48 Ark. App. 78, 892 S.W.2d 515 (1994). There, Watkins obtained a judgment against Hadamek. Watkins then served a writ of garnishment on Tyson Foods, who answered that it was obligated to Hadamek for $13,075 as the result of a poultry-service contract. As it turned out, Hadamek had assigned 100% of the proceeds of the contract to the Bank of Waldron. Hadamek moved to quash the writ of garnishment, and the trial court did so. On appeal, Watkins argued that Hadamek lacked standing to challenge the garnishment. We

noted that, under the abovementioned statute "any person is permitted to present his complaint to the court" to dispute the validity of a garnishment. *Id.* at 82, 892 S.W.2d at 517. However, we also said that it was "obvious that Ms. Hadamek had 'an interest' in the money to the extent of being heard on whether it should be applied to credit her debt to the bank." *Id.*

We believe that the case before us is distinguishable from *Watkins v. Hadamek.* Appellant, as he repeatedly points out, is not the judgment debtor in this case; further, he has disclaimed all association with the judgment debtor, which he considers to be a nonexistent corporation. He has also stated unequivocally that the money that is the subject of the garnishment belongs to his daughter. Thus, unlike the defendant in *Watkins v. Hadamek,* he has shown no identifiable interest in the money; therefore, he has no standing to challenge the garnishment.

Affirmed.

BIRD and GRIFFEN, JJ., agree.

John GARNER *v.* STATE of Arkansas

CA CR 02-1010 122 S.W.3d 24

Court of Appeals of Arkansas
Divisions II, III, and IV
Opinion delivered June 18, 2003

[Petition for rehearing denied July 30, 2003.]

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

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

LARRY D. VAUGHT, Judge. A jury found appellant guilty of possession of methamphetamine with intent to deliver, possession of drug paraphernalia, and fleeing in a motor vehicle. He was sentenced to forty years in prison for possession of methamphetamine, ten years in prison and a $10,000 fine for possession of drug paraphernalia, and six years in prison and a $10,000 fine for fleeing. The prison terms and fines were to run concurrently. He raises five points of appeal. We find no merit in these points and affirm.

On June 3, 2001, Shirley Spencer made a 911 call to the Greene County Sheriff's Department indicating a suspicious vehicle and person outside her residence on County Road 632 in Greene County. Deputies subsequently stopped appellant John Garner in a vehicle matching the description given to them by Ms. Spencer. Appellant gave his consent to search his vehicle and his person, but the deputies found nothing illegal. The deputies then returned to Ms. Spencer's residence to speak with her. They searched the roadway where the suspicious vehicle and person were earlier seen. The deputies found nothing in the area where the person had been seen, but upon searching an area about fifty feet north of the area identified by Ms. Spencer, deputies found a Bushnell, extra-wide binoculars case that contained approximately eighty grams of methamphetamine, various drug paraphernalia, and a letter from James Garner to Chris Garner, who are appellant's brothers. No fingerprints were obtained from the case, but the deputies recalled seeing a pair of Bushnell, extra-wide binoculars during the earlier search of appellant's car.

Green County deputies conducted a cursory search for appellant and, when he could not be located, returned to an area near Ms. Spencer's residence. Approximately three and a half hours later, a motorcycle approached the location where the deputies were sitting at the intersection of County Road 632 and Sunset Avenue, which was approximately one-half mile from Ms. Spencer's residence. After running a stop sign and upon seeing the deputies, the driver of the motorcycle began to flee. The deputies pursued the motorcycle ways until the it crashed, throwing passenger Max Burrow from the motorcycle. Burrow was apprehended, and the driver fled on foot. Deputy Matt Ring identified appellant as the driver,

although Burrow stated that Charles Chamberlain was the driver. Two days later, appellant was arrested and charged with possession of methamphetamine with intent to deliver, possession of drug paraphernalia, and fleeing in a vehicle.

Trial was scheduled for March 27, 2002. Deputy Ring appeared at trial with an incident report and a flashlight he retrieved from the scene of the motorcycle crash that had not been previously disclosed to either the prosecution or the defense. Due to this evidence, the trial was continued. Appellant subsequently filed a motion to bifurcate the charges, which the trial court denied. Appellant also filed a motion in limine, which was denied, to prohibit the State from introducing the flashlight presented by Deputy Ring.

A four-day jury trial began on June 26, 2002. At the close of the State's case, appellant moved for a directed verdict on the issue of constructive possession, arguing that the State could not prove that the location of the contraband was such that it could be said to be under the dominion and control of appellant, or that it was found in a place immediately and exclusively accessible to appellant and subject to his control. A directed-verdict motion was also made on the fleeing charge on the basis that the testimony identifying appellant as the driver of the motorcycle was questionable. The trial court denied both appellant's initial motions and renewed motions.

Appellant also asked the court to instruct the jury on modified versions of AMCI 6404 (Possession of a Controlled Substance) and 6407 (Possession of a Controlled Substance with Intent to Deliver). The court denied the request, and the proposed instructions were proffered. A jury found appellant guilty of possession of methamphetamine with intent to deliver, possession of drug paraphernalia, and fleeing in a motor vehicle.

Appellant raises five points of appeal: (1) the trial court erred in denying appellant's motion for directed verdict on the issue of constructive possession; (2) the definition of constructive possession contained in the Arkansas Model Jury Instructions 2nd—Criminal is incomplete and therefore an erroneous statement of the law, and thus the trial court erred in failing to use appellant's

proffered instructions; (3) the failure of the trial court to bifurcate the charges for trial was erroneous; (4) the trial court erred in admitting the flashlight into evidence; (5) the sufficiency of the evidence does not support the conviction of appellant for fleeing in a motor vehicle.

For double jeopardy reasons, we first consider appellant's arguments that there was insufficient evidence to support his convictions. *See Atkinson v. State*, 347 Ark. 336, 64 S.W.3d 259 (2002); *Haynes v. State*, 346 Ark. 388, 58 S.W.3d 336 (2001). We disregard any alleged trial errors in determining the sufficiency question because to do otherwise could result in avoidance of the sufficiency argument by remanding for retrial on other grounds. *Rose v. State*, 72 Ark. App. 175, 35 S.W.3d 365 (2000).

1. Possession of Methamphetamine with Intent to Deliver and Possession of Drug Paraphernalia

Appellant argues that the trial court erred in denying his motion for directed verdict for possession of methamphetamine with intent to deliver and possession of drug paraphernalia because the proof of constructive possession was insufficient to support the convictions. A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Mills v. State*, 351 Ark. 523, 95 S.W.3d (2003). The test for such motions is whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* Substantial evidence is evidence of sufficient certainty and precision to compel a conclusion one way or another and pass beyond mere suspicion or conjecture. *Id.* On appeal, we review the evidence in the light most favorable to the appellee and consider only the evidence that supports the verdict. *Id.*

In support of reversal, appellant cites *Hodge v. State*, 303 Ark. 375, 797 S.W.2d 432 (1990), in which the supreme court reversed a conviction for possession of methamphetamine with intent to deliver, holding that the circumstantial evidence of possession was insufficient to support the conviction. There, the court stated that proof of actual or physical possession is not required. *Id.* A person can be in constructive possession of contraband

when he either maintains control or a right to control. *Id.* The facts of *Hodge* are distinguishable from the present case.

In *Hodge*, the police were attempting to establish a drug case against Hodge. An informant wearing a police wire went to Hodge's house to buy methamphetamine. Hodge did not have any, but said he would get some from Bo and Belinda the following day. Police followed Hodge the next day when he stopped at a truck stop and met Bo and Belinda, who police recognized as persons previously arrested for running a drug lab. Bo got in the car with Hodge, and police subsequently turned on their lights, and a high-speed, sixteen-block chase through town ensued. After Hodge was arrested, a police officer retraced the route of the chase and found a Pringles can and two Ziplock bags containing methamphetamine, which were scattered twenty-five feet beyond an intersection where Hodge turned.

In its opinion, the supreme court discussed the requisite proof to establish constructive possession:

> We have established the requisite proof for constructive possession in a long line of cases concerning joint occupancy. Where contraband is discovered in jointly occupied premises, and there is no direct evidence that it belongs to a particular occupant, some additional factor must be present linking the accused to the contraband. The state must prove that the accused exercised care, control and management over the contraband. *See Parette v. State*, 301 Ark. 607, 786 S.W.2d 817 (1990); *Plotts v. State*, 297 Ark. 66, 759 S.W.2d 793 (1988); *Osborne v. State*, 278 Ark. 45, 643 S.W.2d 251 (1982). The same analysis applies here. Certainly, *where narcotics are found in an area entirely outside the control of the defendant and exposed to the public at large, the state must provide more definite factors linking the defendant to the contraband* than were provided here.

303 Ark. at 377-78, 797 S.W.2d at 434 (emphasis added).

The State's evidence linking Hodge was the taped conversation of the intended drug buy, the meeting of known drug dealers, and Hodge's fleeing. The evidence revealed no proof of exchange of contraband, no drugs or large amounts of money were found on Hodge, no one saw Hodge drop anything from the car, and the amount of drugs far exceeded the amount of the

intended buy. Further, the area of the chase was heavily traveled, and none of the fingerprints lifted matched Hodge's prints.

Unlike the facts in *Hodge*, we conclude that there are more definite factors linking appellant to the contraband sufficient to sustain the jury's verdict. Around midnight on June 4, 2001, Paragould Police Officer Nate Hergett followed a blue Chevy truck traveling north on County Road 632. He stated that he encountered the truck twice on County Road 632 about fifteen minutes apart, and both times the truck was traveling north as if it and the officer were traveling in circles. Officer Hergett testified that when he first encountered the truck it was being driven at a normal speed, but that the second time he thought it was being driven suspiciously. Shirley Spencer also observed a truck traveling up and down the road slowly, and she reported the suspicious vehicle to the Greene County Sheriff's office after it stopped on her property, a man exited the truck and walked towards her driveway and out in the bushes, shrubs, and weeds grown up on the side of the road. Ms. Spencer testified that she could not tell if the man was picking something up or putting something down. Officer Hergett then received the suspicious vehicle report, which met the description of appellant's truck and the truck that Officer Herget had recently encountered twice on County Road 632. The testimony further revealed that Ms. Spencer watched the truck leave her property and saw the sheriff deputies pull up behind it. When police stopped the truck and identified appellant as the driver, they noticed a pair of extra-wide Bushnell binoculars in his car, as well as a weedeater. Appellant was dirty and explained his presence in the area by saying that he was weed-eating a nearby property belonging to him. *See Alexander v. State*, 78 Ark. App. 56, 77 S.W.3d 544 (2002) (stating that the jury could consider an improbable explanation as evidence of his consciousness of guilty).

When police returned to Ms. Spencer's house, contraband was found near the road approximately fifty feet north of the area she identified, in a Bushnell, extra-wide binoculars case. There was also a letter in the case from one of appellant's brothers to the other brother, which referenced appellant. *See Pacee v. State*, 306 Ark. 563, 816 S.W.2d 563 (1991) (in affirming a joint-occupancy

case, the court recognized as a factor that the evidence revealed that the briefcase where the contraband was found contained records identifying appellant). Deputy Ring identified appellant as the driver of the motorcycle, which was returning to the area of Ms. Spencer's residence after he had been seen outside her house earlier that evening and after he had been stopped by deputies. The motorcycle belonged to appellant's brother, and the driver fled when he spotted the deputies. *See Alexander v. State, supra* (noting that flight following the commission of an offense is a factor that may be considered with other evidence in determining probable guilt). A flashlight that bore the initials J.G. was found at the scene of the motorcycle crash.

As stated previously, the supreme court in *Hodge* stated that "where narcotics are found in an area entirely outside the control of the defendant and are exposed to the public at large, the state must provide more definite factors linking the defendant to the contraband than were provided here." 303 Ark. at 377-78, 797 S.W.2d at 434. Circumstantial evidence provides the basis to support a conviction if it is consistent with the defendant's guilt and inconsistent with any other reasonable conclusion; this determination is a question of fact for the jury to decide. *Polk v. State*, 348 Ark. 446, 73 S.W.3d 609 (2002). The credibility of witnesses is an issue for the jury, and it is free to believe all or part of a witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. *Id.* On appeal, we will only disturb the jury's determination if the evidence did not meet the required standards, thereby leaving the jury to resort to speculation and conjecture in reaching its verdict. *Id.* Based on the circumstantial evidence set out above, we conclude that there were enough factors linking appellant to the contraband for the jury to conclude, without resort to speculation and conjecture, that appellant constructively possessed the contraband.

2. Fleeing

Arkansas Code Annotated section 5-54-125 (Repl. 1997) defines the offense of fleeing as follows:

> If a person knows that his immediate arrest or detention is being attempted by a duly authorized law enforcement officer, it is the lawful duty of such person to refrain from fleeing, either on foot or by means of any vehicle or conveyance.

For his motion for directed verdict, appellant argued that the testimony identifying appellant as the driver of the motorcycle was "questionable at best." His counsel specifically stated that:

> Matt Ring says he can make identification out of John Garner, even though Garner's face was behind the headlights and he broke to the right when he saw police cars. Deputy Ring has testified that he turned his headlights on and [identifies] Garner in that split second on the road. We'd [sic] move for directed verdict to say that [the] State hadn't chinned their pole that he was fleeing from them at the time.

Appellant only challenges the credibility of Deputy Ring's testimony. On appeal, this court does not weigh the evidence presented at trial, as that is a matter for the fact-finder; nor do we assess the credibility of the witnesses. *Howell v. State*, 350 Ark. 552, 89 S.W.3d 343 (2002). We conclude that there is substantial evidence to support the conviction.

3. Jury Instructions

Appellant next argues that the definition of constructive possession contained in the Arkansas Model Jury Instructions 2nd—Criminal is incomplete and therefore an erroneous statement of the law, and thus the trial court erred in failing to use the instructions proffered by appellant. At trial, appellant objected to the State's use of AMCI 6404 and 6407. Both of these instructions include the following definition of constructive possession:

> There are two kinds of possession, actual and constructive. Actual possession of a thing is direct physical control over it. Constructive possession exists when a person, although not in actual physical possession of a thing, has the right to control it and intends to do so, either directly or through another person.

Counsel argued that the definition of constructive possession misstated the law because it does not take into consideration all factors necessary for constructive possession. Specifically, appellant

argued that the instructions should include language taken from case law that "constructive possession may be implied when the contraband is found in a place immediately and exclusively accessible to the accused and subject to his control."

The following definition of constructive possession is contained in appellant's proffered instructions:

> There are two kinds of possession, actual and constructive. Actual possession of a thing is direct physical control over it. Constructive possession may be implied where the contraband is found in a place immediately and exclusively accessible to the accused, and subject to his control.

This definition is incomplete because it fails to include the definition of constructive possession contained in the AMCI, which is "Constructive possession exists when a person, although not in actual physical possession of a thing, has the right to control it and intends to do so, either directly or through another person."

Appellant is attempting to substitute an example of constructive possession for the definition of constructive possession. The appellate courts have held that one way that constructive possession (control or right to control) may be implied is when the contraband is found in a place immediately and exclusively accessible to the accused and subject to his control. While this example is applicable in enclosed areas, such as houses or vehicles, it would have no applicability to contraband found in open spaces that are accessible to the public as described in *Hodge v. State, supra.*

In addition, the supreme court has consistently recognized that a trial court is required to give a model instruction unless it finds that the instruction does not accurately state the law. *McCoy v. State,* 348 Ark. 239, 74 S.W.3d 599 (2002) (citing *In Re: Arkansas Model Criminal Instructions,* 264 Ark. Appx. 967 (1979) (per curiam)). These holdings have created a presumption that the model instruction is a correct statement of the law. It has been said that a non-model jury instruction should not be given unless the model instruction does not accurately reflect the law. *McCoy v. State, supra.* Any party who wishes to challenge the accuracy of a model instruction, be it the State or a defendant, must rebut the

presumption of correctness. *Id.* In *Holloway v. State*, 293 Ark. 438, 738 S.W.2d 796 (1987), the supreme court addressed two challenges, although different from the argument in the present case, to the wording of the AMCI instruction defining constructive possession. In affirming the trial court's use of the AMCI, the court generally stated "we hold the AMCI wording describing constructive possession to be sufficient."

Because the supreme court has found the AMCI wording of constructive possession to be sufficient and the appellant proffered incomplete instructions, we cannot say that the trial court erred in refusing to give the proffered instructions.

4. Denial of Motion to Bifurcate

Appellant next argues that the trial court erred in failing to bifurcate the possession charges from the fleeing charge. The supreme court has explained that the decision to sever offenses is discretionary with the trial court. *Kemp v. State*, 348 Ark. 750, 74 S.W.3d 224 (2002); *see also* Ark. R. Crim. P. Rule 21.1. A trial court's denial of a motion to sever will be affirmed if the offenses at issue were part of a single scheme or plan or if the same body of evidence would be offered to prove each offense. *Id.* Two or more criminal offenses are based on a series of acts connected together when the offenses occurred close together in time and place. *Gillie v. State*, 305 Ark. 296, 808 S.W.2d 320 (1991).

Appellant specifically contends that the fleeing offense had nothing to do with the determination of whether he possessed contraband. We disagree and cannot say that the trial court abused its discretion in denying the motion to sever.

Deputy Ring identified appellant as the driver of the motorcycle, which was returning to the area of Ms. Spencer's residence approximately three and a half hours after appellant had been seen in her yard and after deputies had found the binoculars case containing the contraband near Ms. Spencer's home. Deputies had seen a pair of binoculars that would fit the case found when they stopped appellant earlier after Ms. Spencer reported the suspicious activity. The testimony revealed that appellant began to flee when he spotted the deputies. The three-hour lapse in time

between the fleeing and appellant's presence on Ms. Spencer's property and the finding of the contraband does not alone negate a single scheme or plan. Rather, the proximity in time and place of the crimes provides a basis for the denial of severance. *See Brown v. State*, 304 Ark. 98, 800 S.W.2d 424 (1990). Additionally, some of the State's proof was pertinent to both crimes. The State was using the evidence of appellant's return to the property by motorcycle and subsequent fleeing as circumstantial evidence of appellant's possession of contraband.

5. *Admission of the Flashlight*

For his final argument, appellant contends that the trial court erred in admitting the flashlight that was recovered from the motorcycle crash site and bore his initials, which are the same as one of his brothers. Deputy Ring first presented the flashlight and an incident report on the date that the trial was originally set; the trial court continued the case because neither appellant nor the State were aware of the evidence. Appellant then filed a motion in limine prior to trial to prohibit the introduction of the flashlight on the basis that it lacked authenticity and that the State could not establish a proper chain of custody, which was denied by the trial court.

In *Guydon v. State*, 344 Ark. 251, 255, 39 S.W.3d 767, 769-70 (2001), the supreme court addressed the purpose of establishing chain of custody:

> We have consistently stated that the purpose of establishing a chain of custody is to prevent the introduction of evidence that is not authentic or that has been tampered with. *Newman v. State*, 327 Ark. 339, 939 S.W.2d 811 (1997). To prove authenticity of evidence the State must demonstrate a reasonable probability that the evidence has not been altered in any significant manner. *Gomez v. State*, 305 Ark. 496, 809 S.W.2d 809 (1991). To allow introduction of physical evidence, it is not necessary that every moment from the time the evidence comes into the possession of a law enforcement agency until it is introduced at trial be accounted for by every person who could have conceivably come in contact with the evidence during that period. *Id.* Nor is it 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 tampered with. *Id.* On review, we will not reverse a ruling on an evidentiary matter regarding the admissibility of evidence absent an abuse of discretion because such matters are left to the sound discretion of the trial court. *See Newman, supra.*

It is appellant's assertion that the flashlight was not found at the scene of the motorcycle crash. Instead, he suggests that Deputy Ring obtained the flashlight from a prior arrest of appellant or his brother. His argument is based on the following: (1) the flashlight was not disclosed to either side until the day the case was originally set for trial; (2) Deputy Ring failed to turn the flashlight over to Investigator Martin and instead placed it in his own evidence locker; (3) none of the other officers' reports mention a flashlight; and (4) all of the other officers' reports are typed except Deputy Ring's.

At trial, Deputy Ring testified that he found the flashlight at the scene of the motorcycle crash, seized it at the crash site, and kept it in his personal evidence locker until trial. He added that it was in substantially the same condition as it was when he found it. In explaining his failure to disclose the flashlight earlier, he testified that he had only been on the job four months and that he thought the fleeing incident was a separate incident, and based on this, he filled out a separate report which he did not give to Investigator Martin, who was the drug investigator.

Appellant's argument that the flashlight is not authentic goes to the credibility of Deputy Ring's testimony and the weight to be accorded to it. However, the appellate court does not weigh the evidence presented at trial or weigh the credibility of witnesses, as these are matters to be resolved by the finder of fact. *Lenoir v. State*, 77 Ark. App. 250, 72 S.W.3d 899 (2002). Therefore, we cannot say that the trial court erred in admitting the flashlight into evidence.

Affirmed.

STROUD, C.J., PITTMAN, CRABTREE, and ROAF, JJ., agree.

HART, BIRD, GRIFFEN, and BAKER, JJ., dissent.

WENDELL L. GRIFFEN, Judge, dissenting. The majority employs the correct legal standard but reaches the wrong result in this criminal appeal involving whether the State's circumstantial proof was sufficient to support the jury verdict convicting appellant of possession of methamphetamine with intent to deliver and possession of drug paraphernalia. Because I believe that the result announced today directly violates the standard prescribed by our supreme court in *Hodge v. State*, 303 Ark. 375, 797 S.W.2d 432 (1990), I must respectfully dissent.

I agree with the majority that the *Hodge* standard governs our analysis. In that case, our supreme court reversed and dismissed the conviction of a man who was convicted of possession with intent to deliver methamphetamine and sentenced to life imprisonment plus a fine of $50,000. The conviction in *Hodge* was overturned despite evidence far more incriminating than anything or everything in this record. Undercover police established surveillance of Hodge with the cooperation of a person previously arrested for selling narcotics and who arranged to meet Hodge on a given date and time to consummate a drug sale. Thereafter, the police followed Hodge to the parking lot of an Oklahoma truck stop where he met his suppliers, who the police recognized as a couple previously arrested for running a drug lab. Hodge left that meeting with one of the suppliers riding in his car and returned to Arkansas, where awaiting police signaled for him to stop his car. Instead, Hodge commenced a high-speed sixteen-block flight through Fort Smith, which resulted in his capture and arrest. A search of his vehicle and his person revealed no contraband (although his passenger had a small amount of marijuana in her purse). After Hodge was incarcerated, a police officer retraced the chase route. Halfway along the route and scattered up to twenty-five feet beyond an intersection where Hodge had turned, the police officer found an empty "Pringles" potato chip can and two "Ziploc" bags that contained a total of what was later identified as almost two ounces of methamphetamine.

Despite this proof, the supreme court concluded that the evidence was insufficient and "that the jury could not have reached its guilty verdict without resorting to suspicion and conjecture." *Id.* at 377, 797 S.W.2d at 435. The *Hodge* majority opinion, writ-

ten by Chief Justice Jack Holt, Jr., is unmistakably clear about the standard for testing the sufficiency of evidence in criminal prosecutions based on constructive possession such as the one before us, as follows:

> Where contraband is discovered in jointly occupied premises, and there is no direct evidence that it belongs to a particular occupant, some additional factor must be present linking the accused to the contraband. The state must prove that the accused exercised care, control and management over the contraband. *Certainly, where narcotics are found in an area entirely outside the control of the defendant and exposed to the public at large, the state must provide more definite factors linking the defendant to the contraband than were provided here.*
>
> . . . .
>
> Constructive possession may be established by circumstantial evidence, but when such evidence alone is relied on for conviction, it must indicate guilt and exclude every other reasonable hypothesis. The state's evidence of constructive possession in this case is, in fact, entirely circumstantial. Although it impels the strong suspicion that Hodge was in possession of the contraband, the question is whether such a suspicion is sufficient enough to support a conviction.
>
> . . . .
>
> We hold that the circumstantial evidence was insufficient to convict Hodge of possession with intent to deliver methamphetamine. "No one should be deprived of his liberty or property on mere suspicion or conjecture. Where inferences are relied upon, they should point to guilt so clearly that any other conclusion would be insufficient. This is so regardless of how suspicious the circumstances are."

303 Ark. at 378-379, 797 S.W.2d at 434-435 (emphasis added) (citations omitted).

I see no reason why the proof in the present case justifies a result different from that reached in *Hodge*. Here, the proof is entirely circumstantial; there is no direct proof that Garner ever possessed, or was even intended to possess, the contraband that the police found in an open area near the residence of Shirley Spencer. Spencer never identified Garner as the person she observed

walking into the bushes near her house; in fact, she could not identify the person she saw outside her house. Nothing was found in the area that Spencer directed the police to search off the roadway where she had observed the unidentified man walking, even though the police found a Bushnell extra-wide binoculars case that contained almost eighty grams of methamphetamine approximately fifty feet north of the place Spencer had observed the suspicious person. The binoculars case also contained drug paraphernalia and a letter from James Garner to Chris Garner, appellant's brothers. That letter did not mention the contraband, let alone link appellant to it.

The conviction in this case could have occurred only after the jury, having no direct evidence that appellant ever possessed the contraband, surmised that the unclaimed contraband found near Spencer's house in an open area must have belonged to appellant because he was in the area, owned a set of binoculars similar to the case in which the contraband was found, fled from the police when they pursued him, had the same initials (J.G.) as those found on a flashlight found near the open area, and was named in a letter written by one of his brothers to another brother. That proof might create suspicion of guilt, but it certainly does not exclude every other reasonable hypothesis inconsistent with guilt. Appellant had no contraband on his person or in his truck when the police stopped him. He told the police he had been cutting weeds on his own property which was located in the vicinity.[1] No fingerprints or other indicia of ownership appeared on the binoculars case to link appellant to the case, let alone its contents. The initials found on the flashlight ("J.G.") also fit appellant's brother (James Garner), who wrote the letter found in the binocular case. If "more definite factors linking the defendant to the contraband" were needed in *Hodge* to warrant affirmance, and if the supreme court reversed the conviction and sentence in that case because "more definite factors" were absent, we should not reach a different result on the less incriminating record before us.

---

[1] The police stated that a weedeater was found in appellant's vehicle and that appellant appeared dirty.

The effect of today's decision is troubling. The State has the burden of proving every element of a criminal charge beyond a reasonable doubt. Conviction on the charge of possession of a controlled substance with intent to deliver requires, in the first instance, proof beyond a reasonable doubt that the accused possessed a controlled substance. Although circumstantial evidence of constructive possession can be established according to the *Hodge* standard, the decision today weakens that standard so that the State can obtain a conviction based on sheer suspicion. As the supreme court said in *Ravellette v. State*, 264 Ark. 344, 346, 571 S.W.2d 433, 434 (1978), "No one should be deprived of his liberty or property on mere suspicion or conjecture. . . . This is so regardless of how suspicious the circumstances are."

I respectfully dissent, and am authorized to state that Judges HART, BIRD, and BAKER join this opinion.

CLARENDON NATIONAL INSURANCE COMPANY *v.*
Stanley ROBERTS and Rick Turman

CA 02-1205 120 S.W.3d 141

Court of Appeals of Arkansas
Division III
Opinion delivered June 18, 2003

Appeal from Crittenden Circuit Court; *David Burnett*, Judge; affirmed.

Reid, Burge, Prevallet & Coleman, by: *Richard A. Reid*, for appellant.

Woodruff Law Firm, P.A., by: *Arlon L. Woodruff*, for appellees.

OLLY NEAL, Judge. Appellant, Clarendon National Insurance Company, (Clarendon) appeals the grant of the appellees', Stanley Roberts and Rick Turman, motion for summary judgment. Clarendon raises the following issues on appeal: (1) the trial court erred when it failed to find that the policy language was a condition precedent to coverage and that the appellees had failed to comply with the language of the policy;(2) the trial court erred in finding that there was an enforceable insurance contract when the appellees failed to pay the insurance premium. We affirm.

The appellees own thoroughbred racing horses. Clarendon is an insurance company that issues animal mortality policies. The appellees had an animal mortality policy with Clarendon that provided coverage for all of their animals. The policy also contained an automatic extension provision that provided for coverage of subsequently acquired animals.

On February 5, 2000, the appellees purchased a horse, "Ackadackadoo," at a $20,000 claiming race. During the race, the horse was injured and had to be put to death that same day. The appellees notified Clarendon's agent of the acquisition and loss on February 28, 2000. Clarendon denied coverage, contending that the terms of the automatic extension provision were not complied with, in that the appellees had failed to pay the premium on the new acquisition and failed to provide notice of the acquisition within five days of the actual acquisition. The appellees filed suit alleging that the policy provided automatic coverage. Both parties moved for summary judgment. Clarendon argued that compliance with the terms of the automatic extension provision was a condition precedent to coverage. The appellees argued that notice was irrelevant because the automatic extension provision provided for automatic coverage.

The trial court denied Clarendon's motion for summary judgment and granted the appellees' motion for summary judgment. The trial court found that the policy provided automatic coverage and awarded the appellees $20,000 for their loss. Clarendon only appeals the grant of the appellees' motion for summary judgment.

Normally, on a summary-judgment appeal, the evidence is viewed in the light most favorable to the party resisting the motion, and any doubts and inferences are resolved against the moving party. *Tunnel v. Progressive Northern Ins. Co.*, 80 Ark. App. 215, 95 S.W.3d 1 (2003). But in a case where the parties agree on the facts, we simply determine whether the appellee was entitled to judgment as a matter of law. *Id.* When parties file cross-motions for summary judgments, as was done in this case, they essentially agree that there are no material facts remaining, and summary judgment is an appropriate means of resolving the case. *Id.*

The policy language at issue provides:

> C. AUTOMATIC EXTENSION FOR SECTION III COVERAGE
>
> 1. If YOU insure all of YOUR animals (that YOU insure) with US, all animals subsequently acquired through claiming or bona fide auction will be covered *automatically* by this policy. OUR limit of liability for such animals will not exceed the lesser of:
>
> a. the claiming price or the final bid; or
> b. $50,000.00
>
> 2. This amount of insurance
>
> a. will apply only to YOUR interest in the animal; and
> b. *is subject to OUR receiving notice that insurance is desired within 5 calendar days from time of acquisition, and in consideration of the premium paid.*

(Emphasis added.) A cardinal rule of insurance law is that policies of insurance will be interpreted and construed liberally in favor of the insured and strictly against the insurer. *Keller v. Safeco Ins. Co.*, 317 Ark. 308, 877 S.W.2d 90 (1994). Any ambiguity found in the

insurance contract is to be construed against the insurer since the insurer wrote the policy without any consultation with the insured. *Countryside Cas. Co. v. Grant*, 269 Ark. 526, 601 S.W.2d 875 (1980). An ambiguity exists when a provision is susceptible to more than one reasonable interpretation. *Keller v. Safeco Ins. Co., supra.*

Clarendon argues that the failure to give notice of either the acquisition or loss of the horse within five days prevented any recovery under the policy. Clarendon further argues that compliance with the terms of the provision was a condition precedent to coverage. In contrast the appellees read the provision as providing automatic coverage for a period of five days following the acquisition of an animal; they further interpret the language to read that notice of acquisition and loss is only necessary to support proof of loss and a demand for payment. The appellees also read the provision as requiring them to notify Clarendon prior to expiration of the five-day automatic insurance period if they desire to extend coverage beyond the five-day period.

The language in the provision here at issue is susceptible to either interpretation; therefore, the language in the provision is ambiguous. Thus, construing the language of the provision against Clarendon, we hold that under the facts herein, the horse was insured at the time of acquisition pursuant to the automatic insurance provision. The horse was also insured at the time of the loss, which was only a few minutes after the horse's acquisition. At no time prior to the loss did the horse become uninsured.

In *Horace Mann Mutual Casualty Co. v. Bell*, 134 F.Supp. 307 (W.D. Ark. 1955), the district court interpreted an automatic insurance provision involving newly acquired vehicles. The district court held that despite having partial coverage on the newly acquired vehicle with another company the insured was not precluded from having coverage under the automatic insurance policy that was at issue. The district court explained:

> [T]here is nothing to require the insured to insure his newly acquired vehicles with the company in order to take advantage of the 30-day automatic insurance on the new vehicle. For that matter, he may wait 30 days, having free automatic insurance during that time, and then purchase insurance on the new vehicle from another company.

Id. at 312. The provision at bar is analogous to an automatic insurance provision found in an automobile policy; therefore, appellees did not have to do anything to take advantage of the five-day automatic insurance coverage, and following the expiration of the five-day automatic insurance period, appellees were free to explore other insurance opportunities.

Clarendon also argues that the trial court erred when it found there was an enforceable contract of insurance on the horse when the appellees had failed to tender an insurance premium. An insurance policy is a contract between the insurer and insured. *Southern Farm Bureau Cas. Ins. Co. v. Craven*, 79 Ark. App. 423, 89 S.W.3d 369 (2002). The premium is the consideration for the insurance. *Farm Bureau P. H. v. FM. Bureau Mut. Ins. Co.*, 335 Ark. 285, 984 S.W.2d 6 (1998). In situations involving automatic insurance on vehicles, it has been said that the consideration is the premium or premiums paid by the insured on his previously owned vehicles. *Horace Mann Mut. Cas. Co. v. Bell, supra.* As stated earlier, the present situation is analogous to that involving automatic insurance on a vehicle. Accordingly, the proper consideration was the premium or premiums paid by the appellees on their other animals. Therefore, the parties had an enforceable contract.

We hold that the trial court did not err when it failed to find that the policy language was a condition precedent to coverage and when it found that there was an enforceable insurance contract. Therefore, the trial court's grant of the appellees' motion for summary judgment was proper, and we affirm.

Affirmed.

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

Maurice HARRISON, Executor of the Estate of Worth Harrison *v.* Ronald HARRISON and Robert Harrison

CA 02-1343 120 S.W.3d 144

Court of Appeals of Arkansas
Division III
Opinion delivered June 18, 2003

Phil Stratton, for appellant.

Graddy & Adkisson, P.A., by: *William C. Adkisson*, for appellees.

TERRY CRABTREE, Judge. This appeal challenges the Faulkner County Circuit Court's order holding that part of the estate of Worth Harrison, who died in 1995, must be distributed according to the law applicable to intestates, denying the executor, appellant Maurice Harrison's, petition for an accounting of alleged partnership assets, and awarding attorney's fees to appellee Ronald Harrison.

Procedural History

Worth's 1992 will was admitted to probate. In paragraph II, it mentioned his children, appellant Maurice Harrison, appellees Ronald Harrison and Robert Harrison, and Peggy Harrison:

> I do hereby recognize Ronald Harrison and Robert Harrison, as my natural heirs, however, and nonetheless, I decline to give, devise or bequeath any of estate, real or personal, to said heirs. I do hereby recognize Maurice Harrison, and Peggy Ann Harrison as my natural heirs, however, and nonetheless, I decline to give, devise or bequeath any of my estate to them, except as herein directed.

In paragraph III, Worth gave a life estate in his home and its surrounding eighty acres to his wife, Mamie Harrison. He also gave her a one-third interest in his personal estate; the remaining two-thirds were bequeathed to Maurice and Peggy. In paragraph IV, he devised real property in Faulkner County to Peggy.

The wording of paragraph V is the basis of this dispute. It stated:

> In the event that Mamie Harrison, should predecease me, I then give, devise and bequeath all the rest, residue and remainder of my estate, both real and personal and wherever situated, after payment therefrom of all estate, death and inheritance taxes due from my estate, to my son, Maurice Harrison.

Mamie, however, did not predecease Worth, and the lack of a residuary clause disposing of Worth's estate if Mamie survived Worth prompted Ronald to file this action for construction of the will. In his petition, Ronald asserted that the residue of Worth's estate should be distributed according to the rules of intestate succession (divided equally to his sole heirs, Ronald, Robert, Maurice, and Peggy). Maurice, however, contended that Worth intended to disinherit Ronald and Robert regardless of whether Mamie survived him. He urged the judge to construe the will in accordance with the presumption against intestacy and to excise the phrase "in the event that Mamie Harrison should predecease me" from paragraph V.

Maurice also filed a counterclaim against Ronald, alleging that, at the time of his death, Worth owned a one-half interest in a cattle-farming partnership, and requesting an accounting from Ronald. Maurice also included this purported one-half interest in the estate's inventory. In response, Ronald argued that the partnership had not operated since 1972, when he had purchased Worth's interest, for which he had made payments to Worth from 1972 to 1984. Ronald moved for an award of attorney's fees and costs pursuant to Ark. R. Civ. P. 11, arguing that appellant's petition for an accounting lacked any factual or legal basis and was intended to punish Ronald for filing the petition to construe the will.

The judge issued findings of fact and conclusions of law addressing the construction of the will and the petition for a partnership accounting. He stated:

> The Court is bound by rules of construction of wills as provided by statute and precedent and is aware of the strong presumption against partial intestacy. The cardinal principle of will interpretation is that the testator's intent governs and that intention is to be gathered from the four corners of the instrument. *Gifford v. Estate of Gifford*, 305 Ark. 46, 805 S.W.2d 71 (1991). If at all possible we will broaden or enlarge a residuary clause to avoid intestacy. *Cook v. Estate of Seeman*, 314 Ark. 1, 858 S.W.2d 114 (1993). The purpose of construction is to arrive at the intention of the testator; but that intention is not that which existed in the mind of the testator, but that which is expressed by

> the language of the will. *Park v. Holloman*, 219 Ark. 288, 195 S.W.2d 546 (1946).
>
> Viewing the will on its four corners, the Court finds that there is no residuary clause in the testator's will. If it was the intent of the testator to disinherit all of his children except Maurice Harrison if he died before Mamie Harrison, the will fails to so provide. Whether it was a mistake by the testator or the attorney preparing the will, the Court must look at the language expressed in the will and not what might have been his intent. Further, Paragraph V could be construed to disinherit all the testator's children, including Maurice. The testator's intent is not clear and the Court declines to re-write the will by excising clear language of the will.
>
> Therefore, that part of the estate not disposed of by the will shall be distributed as provided by law with respect to the estates of intestates.

The judge also found that the purported partnership terminated more than twenty years before Worth died and stated that the executor's claim was "without merit."

Ronald then moved for an award of attorney's fees under Ark. Code Ann. §§ 16-22-308 and 16-22-309 (Repl. 1999). In his order, which incorporated his findings of fact and conclusions of law, the judge awarded Ronald $5,000 in attorney's fees without explaining the basis of the award.

Arguments

Maurice contends that the trial judge erred in finding that the residue of the estate must pass according to the law of intestacy; in awarding attorney's fees to Ronald; and in admitting into evidence some documents offered by Ronald to rebut Maurice's claim that the estate held an interest in the cattle farm.

The Will

Maurice argues that the trial judge erred in refusing to excise the phrase "in the event that Mamie Harrison should predecease me" from paragraph V of the will. He contends that Worth obviously intended to disinherit Ronald and Robert, that this phrase is "an absurdity," and that the will should be construed as leaving

the residue of the estate to him alone. He relies on the rules of law that a testator is presumed to dispose of his entire estate and that wills are to be interpreted so as to avoid partial intestacy unless the language compels a different result. Maurice states: "In this case we have a perfectly clear residuary clause clouded only by an absurd introductory phrase."

We agree with the trial judge's recitation of the law. In the interpretation of wills, the paramount principle is that the intent of the testator governs. *Carpenter v. Miller*, 71 Ark. App. 5, 26 S.W.3d 135 (2000). The testator's intent is to be gathered from the four corners of the instrument itself. *Id.* However, extrinsic evidence may be received on the issue of the testator's intent if the terms of the will are ambiguous. *Edwards v. Farm Bureau Mut. Ins. Co.*, 308 Ark. 349, 823 S.W.2d 903 (1992); *Carpenter v. Miller, supra.* An ambiguity has been defined as an indistinctness or uncertainty of meaning of an expression in a written instrument. *Carpenter v. Miller, supra.* There is a strong presumption against partial intestacy, and a will is to be interpreted so as to avoid it unless the language of the will compels a different result. *Rufty v. Brantly*, 204 Ark. 32, 161 S.W.2d 11 (1942). Extrinsic evidence may be admitted only for the purpose of showing the meaning of the words selected by the testator and not to show what the testator meant. *Roy v. McComb*, 232 Ark. 769, 340 S.W.2d 381 (1960). Although the use of extrinsic evidence is appropriate when the will expresses an intent, it is inappropriate when the instrument expresses no intent. *David Terrell Faith Prophet Ministries v. Estate of Varnum*, 284 Ark. 108, 681 S.W.2d 310 (1984). These principles were explained in *Park v. Holloman*, 210 Ark. 288, 291, 195 S.W.2d 546, 547 (1946):

> The function of a court in dealing with a will is purely judicial; and its sole duty and its only power in the premises is to construe and enforce the will, not to make for the testator another will which might appear to the court more equitable or more in accordance with what the court might believe to have been the testator's unexpressed intentions. "The appellants are correct in the statement that the purpose of construction is to arrive at the intention of the testator; but that intention is not that which existed in the mind of the testator, but that which is

expressed by the language of the will." *Jackson v. Robinson*, 195 Ark. 431, 112 S.W.2d 417, 418.

The general rule against partial intestacy is an artificial rule of construction that is to be resorted to when the intent of the testator cannot be determined by giving the words used their usual meaning; it has no application when the language of the instrument compels a different result. *Armstrong v. Butler*, 262 Ark. 31, 553 S.W.2d 453 (1977). The rule against partial intestacy is not used unless there is some ambiguity. *Chlanda v. Estate of Fuller*, 326 Ark. 551, 932 S.W.2d 760 (1996). Furthermore, opposed to that aid to construction is the statutory presumption against the disherison of a child. *Armstrong v. Butler, supra.* The presumption against intestacy is subordinate to the statutory presumption against disherison. *Id.*

In *Cook v. Estate of Seeman*, 314 Ark. 1, 858 S.W.2d 114 (1993), the supreme court held that an exclusionary clause in a will lacking a residuary clause did not control intestate property held by the testatrix. The court acknowledged that the cardinal principle of will interpretation is that the testator's intent governs, that such intention is to be gathered from the four corners of the instrument, and that, if at all possible, the court will broaden or enlarge a residuary clause to avoid intestacy. Nevertheless, the court stated:

> Yet, here, there is no residuary clause disposing of the balance of the decedent's estate so intestacy as to the residence is unavoidable. Our statutes provide that any part of the estate "not disposed of by will shall be distributed as provided by law with respect to the estates of intestates." Ark. Code Ann. § 28-26-103 (1987).
>
> Although there are no Arkansas cases deciding whether the intent to disinherit should affect distribution of intestate property, we have mentioned this issue on one occasion. In *Quattlebaum v. Simmons Nat'l Bank*, 208 Ark. 66, 184 S.W.2d 911 (1945), we stated in obiter dictum, "The fact that a person is disinherited by the will does not prevent his sharing, as heir at law or distributee, in property, a legacy or devise of which has failed by lapse." *Quattlebaum*, 208 Ark. at 69, 184 S.W.2d at 913 (Citation omitted).
>
> . . . .

> We hold that although the will excluded the appellants from the estate, it did not alter their entitlement under the laws of intestate succession, provided in Ark. Code Ann. § 28-26-103 (1987).

314 Ark. at 3-4, 858 S.W.2d at 115-16.

Although Maurice argues otherwise, we see no meaningful distinction between this case and *Cook v. Seeman*. We also disagree with Maurice's contention that, except for the "absurdity," the will contains an effective residuary clause. On the contrary, it contains an omission because it fails to provide for disposition of the remaining assets of the estate in the event that Mamie survived Worth. Therefore, we hold that the residue was not disposed of by the will and that it should be distributed according to the law applicable to intestates. *See* Ark. Code Ann. § 28-26-103 (1987).

Attorney's Fees

Maurice argues that the judge erred in awarding attorney's fees to Ronald under either Ark. Code Ann. § 16-22-308 or § 16-22-309 (Repl. 1999).

Arkansas Code Annotated section 16-22-308 provides for the award of attorney's fees in certain civil actions:

> In any civil action to recover on an open account, statement of account, account stated, promissory note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, or for labor or services, or 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's fee to be assessed by the court and collected as costs.

Maurice argues that this statute does not provide for an award of fees for an accounting in the context of a partnership. In response, Ronald asserts that it does, because a partnership is based upon a contract. It is our conclusion that fees were properly awarded under this statute.

A partnership is defined in Ark. Code Ann. § 4-42-201 (Repl. 2001) as "an association of two (2) or more persons to carry on as co-owners a business for profit . . . ." A partnership is a legal relationship, in the nature of a finite entity, arising out of contract. 59A AM. JUR. 2D *Partnership* § 1 (1987). It is often defined as a contract of two or more competent persons to place their money, effects, labor, and skill in business and to divide the profit and bear the loss in certain proportions. *Id.* at § 3. A partnership is a contractual relationship that may vary, in form and substance, in an almost infinite variety of ways. *Frank v. R.A. Pickens & Son Co.*, 264 Ark. 307, 572 S.W.2d 133 (1978). The accounting sought by appellant, therefore, necessarily involved the terms of the partnership agreement and the parties' rights created by that agreement. We thus affirm the award of fees. Because we hold that fees were allowed under Ark. Code Ann. § 16-22-308, it is not necessary for us to also determine whether an award of fees was justified under Ark. Code Ann. § 16-22-309.

Admission of Evidence

As his final point, Maurice contends that the judge erred in admitting into evidence certain documents[1] that rebutted the claim that the estate had an interest in the partnership. At trial, Maurice objected to their introduction on the ground that the documents had not been appended as exhibits to the answer to his counterclaim, as required by Ark. R. Civ. P. 10(d), which provides: "A copy of any written instrument or document upon which a claim or defense is based shall be attached as an exhibit to the pleading in which such claim or defense is averred unless good cause is shown for its absence in such pleading." The documents were admitted, over Maurice's objection, as evidence supporting Ronald's claim that he purchased his father's interest in the partnership in the 1970s.

Maurice has cited no case holding that the failure to append such exhibits to a pleading should prevent their introduction into evidence at trial. The admission of evidence is at the

[1] Ronald introduced canceled checks, check registers, loan documents, receipts, and tax returns to support his position.

discretion of the trial judge, and this court will not reverse absent an abuse of that discretion and a showing of prejudice. *Dodson v. Allstate Ins. Co.*, 345 Ark. 430, 47 S.W.3d 866 (2001). Maurice does not argue that these exhibits were not relevant, unauthenticated, or otherwise inadmissible. Additionally, he has demonstrated no prejudice resulting from their admission. Even without the supporting documents, Ronald's testimony was sufficient to demonstrate that the partnership terminated in 1972 and that he purchased Worth's interest. The testimony of Ronald's wife, Sue, supported his testimony. We believe that the general rule leaving this question to the trial judge's discretion should apply, and we find no abuse of discretion.

Affirmed.

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

Caroline Sue RAY *v.* Roy Thomas SELLERS
and Wanda Sue Sellers

CA 02-981 120 S.W.3d 134

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered June 18, 2003

Pamela Fisk, for appellant.

Keil & Goodson, by: *John W. Goodson*, for appellee.

JOSEPHINE LINKER HART, Judge. Appellant, Caroline Sue Ray, appeals from the circuit court's decree of adoption, which terminated her parental rights to her minor daughter and granted the adoption of the child by appellees, Roy Thomas and Wanda Sue Sellers. Appellant argues in part that the circuit court erred in finding that her consent to the adoption was not required. We agree with appellant, and without addressing her other allegations of error, we reverse.

The facts are as follows: Appellant was incarcerated in the Arkansas prison system when, on April 23, 1999, she gave birth to her daughter. Appellee Wanda Sellers testified that after the child was two months old, she began caring for the child for two days every week. She further testified that the child lived with the child's grandmother for a month, lived with an aunt for two months, and then lived with her and her husband.[1] Wanda Sellers admitted that when the child first began living with them, they did not expect to adopt her; she talked to appellant and understood that the child would be returned to appellant upon her release from prison. Appellee Roy Sellers likewise testified that when the child first came to live with them, it was his understanding that the child would live with appellant after she was released from prison.

On March 28, 2000, appellant became eligible for parole, and on April 4, 2000, appellees filed for guardianship of appellant's daughter. On June 6, 2000, appellant was released from the Arkansas prison, and according to appellees' petition for adoption, Wanda Sellers was appointed guardian on August 29, 2000. Wanda Sellers testified that she and her husband were allowed to set appellant's visitation with the child. She further testified that appellant could only visit her daughter once a month because of her parole requirements, and appellees allowed appellant to see her daughter once on Saturday and once on Sunday. Wanda Sellers did not allow appellant to be alone with the child for fear that appellant would take the child. Roy Sellers testified that even after obtaining the guardianship, he anticipated that the child would live with appellant upon termination of the guardianship.

Appellant remained out of prison until April 14, 2001, when she was arrested by Texas authorities. According to Wanda Sellers, it was her understanding that appellant had not done anything wrong when she was arrested, but she had been picked up because of a charge for which she had been serving time in Arkansas. According to appellant, she was arrested on a "premature release

[1] We note that this testimony is contradicted by (1) appellant's testimony that the child lived with her aunt for six or seven months; and by (2) appellees' verified amended petition for adoption in which appellees stated that the child had resided with them since October 1999.

warrant." Wanda Sellers took the child to see appellant when appellant was first arrested.

While Wanda Sellers had placed a block on her telephone to preclude appellant from calling from the prison, she was contacted by appellant's friend about allowing appellant to see the child while appellant was in prison. However, because of her work schedule, she could not take the child to see appellant. Wanda Sellers also testified that the child had been receiving cards and letters from appellant after the petition for adoption, which was filed on January 15, 2002, and amended on January 24, 2002.

Wanda Sellers stated that appellant had contributed a maximum of $350 for the care of the child. She recognized, however, that appellant was unable to support the child while appellant was in prison, and she testified that when appellant was out of prison, she furnished clothes and shoes for the child and three $50 money orders.

In the decree of adoption, the circuit court found that the child had lived with a maternal aunt for approximately two months, a maternal grandmother for approximately one month, and with appellees for two years and nine months. The court noted that appellant, after she was paroled from the Arkansas prison, contributed less than $350 for the support of the child over a ten-month period. The court further observed that appellant had four and one-half years remaining on her prison sentence and would be able to apply for parole in 2004. The court concluded that the adoption was in the best interest of the child and that there had "not been substantial contact or contribution of support by the natural mother." The court consequently terminated appellant's parental rights and granted the adoption.

Arkansas Code Annotated § 9-9-207(a)(2) (Repl. 2002) provides in pertinent part that

> [c]onsent to adoption is not required of . . .[a] parent of a child in the custody of another, if the parent for a period of at least one (1) year has failed significantly without justifiable cause (i) to communicate with the child or (ii) to provide for the care and support of the child as required by law or judicial decree[.]

"Adoption statutes are strictly construed, and a person who wishes to adopt a child without the consent of the parent must prove that consent is unnecessary by clear and convincing evidence." *In re Adoption of Lybrand*, 329 Ark. 163, 169, 946 S.W.2d 946, 949 (1997). We review adoption proceedings de novo, and the trial court's decision will not be disturbed unless clearly erroneous, giving due regard to the opportunity and superior position of the trial court to determine the credibility of the witnesses. *Vier v. Vier*, 62 Ark. App. 89, 93, 968 S.W.2d 657, 659 (1998).

A failure to communicate without justifiable cause is one that is voluntary, willful, arbitrary, and without adequate excuse. *In re Adoption of Lybrand*, 329 Ark. at 169-70, 946 S.W.2d at 950. It is not required that a parent fail totally in these obligations in order to fail significantly within the meaning of the statutes. *Id.* at 170, 946 S.W.2d at 950. The one-year period after which a parent may lose the right to consent must accrue before the filing of the adoption petition, and the filing of the petition is the cutoff date. *In re Adoption of K.F.H.*, 311 Ark. 416, 420, 844 S.W.2d 343, 345 (1993). The one-year requirement applies to any one-year period between the date of the child's birth and the date the petition for adoption was filed and is not limited to the year immediately preceding the filing of the adoption petition. *Id.*

Here, the court concluded that there had "not been substantial contact or contribution of support by the natural mother." We conclude that the court's decision to grant the adoption was clearly erroneous, as there was no evidence that appellant's alleged failure to significantly communicate with her child or to provide for the care and support of her child was for a one-year period.

Appellees began caring for the child three months after her birth. Appellant was incarcerated until June 6, 2000. She remained out on parole for approximately ten months until April 14, 2001, at which point she was again incarcerated. There is no testimony regarding appellant's communication or lack thereof with her child during the first three months of the child's life. Appellant did state that she had called her aunt because she was worried about the child and learned that her aunt had left the child with appellees. She then wrote to appellees and agreed to

give them a power of attorney. Wanda Sellers testified that after they began caring for the child, appellant spoke with them regarding the care of the child. Further, appellees presented no testimony regarding whether appellant failed to maintain contact with the child during her second incarceration. The only testimony regarding appellant's communication with her child relates to the ten-month period during which she was not incarcerated, which is two months short of a one-year time period. Further, as for appellant's duty to provide for the care and support of the child, Wanda Sellers acknowledged that appellant was unable to support the child while she was incarcerated. And the ten-month period during which she could contribute financially to the child was two months short of the one-year period.

As we previously noted, adoption statutes are strictly construed, and a person who wishes to adopt a child without the consent of the parent must prove that consent is unnecessary by clear and convincing evidence. While the circuit court found that there had "not been substantial contact or contribution of support by the natural mother," the court did not specify the time period during which the contact or contribution failed to occur. From our review of the record, we cannot say that the evidence established that any period of non-contact or non-contribution lasted for the statutorily mandated one-year period. Given this lack of evidence, we conclude that the circuit court's decision to grant the adoption was clearly erroneous.

Reversed.

BIRD, GRIFFEN, and ROAF, JJ., agree.

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

TERRY CRABTREE, Judge, dissenting. I am convinced that this case should be affirmed. The majority opinion failed to mention certain facts. Wanda Sellers testified that her brother, Joe White, is the child's biological father. At the time of the adoption hearing, White was incarcerated in Texas. He was not a party to this action. Appellant has been incarcerated in three states, Louisiana, Arkansas, and Texas. Upon her release from prison in Arkansas, appellant moved to Texas. The trial court

found it significant that appellant chose to complete her parole in Austin, Texas, rather than in Arkansas where she would be closer to her child. During the ten months following appellant's release from prison in Arkansas, she visited the child under the supervision of appellees approximately ten times. Presently, appellant is incarcerated in Texas with her next possibility for parole in 2004. In 2004, the child will be five years old and will have lived with appellees for almost her entire life.

In August of 2000, the trial court granted guardianship of the child to appellees. Appellant testified that at that time, the trial court gave "appellees discretion whether I had visitation rights or not. We set up visitation of once a month because I lived in Austin, [Texas]." Appellant also testified that it was her "understanding that in talking with Ms. Sellers that when I got out of prison *and proved to her I could take care of Marissa they would have no problem in giving her back to me.*" (Emphasis added.) It seems obvious to me that appellant failed to demonstrate upon her release from prison that she was capable of caring for the child.

We review probate proceedings *de novo*, and we will not reverse the decision of the probate court unless it is clearly erroneous. *Dillard v. Nix*, 345 Ark. 215, 45 S.W.3d 359 (2001); *Amant v. Callahan*, 341 Ark. 857, 20 S.W.3d 896 (2000). Consent for adoption is not required of:

> A parent of a child in the custody of another, if the parent for a period of at least one (1) year has failed significantly without justifiable cause (i) to communicate with the child or (ii) to provide for the care and support of the child as required by law or judicial decree[.]

Ark. Code Ann. § 9-9-207(a)(2) (Repl. 2002). The one-year period may be any one-year period and need not immediately precede the filing of the adoption petition. *Vier v. Vier*, 62 Ark. App. 89, 968 S.W.2d 657 (1998). It is not required that a parent fail "totally" in these obligations in order to fail "significantly" within the meaning of the statutes. *Pender v. McKee*, 266 Ark. 18, 582 S.W.2d 929 (1979).

The trial court granted the adoption to appellees after finding that appellant had failed to provide for or contribute to the child

in over a year. I agree with the trial court. I also believe that appellant failed significantly to communicate with her daughter for over a year. With this in mind, I would hold that the trial court reached the right result for two different reasons.

First, appellant failed significantly to contribute financially to her child for over a year. The majority opinion recounts Wanda Sellers' testimony that she recognized that appellant was unable to support the child while appellant was in prison. It is undisputed that while incarcerated appellant provided absolutely no financial assistance to the child. A parent's imprisonment does not toll a parent's responsibilities toward her children. *See Zgleszewski v. Zgleszewski*, 260 Ark. 629, 542 S.W.2d 765 (1976). "We are aware that imprisonment imposes an unusual impediment to a normal parental relationship. However, even when parenthood is disadvantaged by this unfortunate factor, one could still solicit visits from [her child] and contact [her] with cards, letters and small gifts." *Id.* at 632, 542 S.W.2d at 767. The appropriate inquiry is whether the parent utilized those resources available while in prison to maintain a close relationship with the child. *Id.* I cannot gloss over the fact that while appellant was in prison in Arkansas, she did not send her child a single gift, and I will not excuse her total lack of contribution to her child because she was incarcerated. Although she was not employed while in prison, she could have made some token of a gift for her child.

Second, appellant failed significantly to communicate with her child for over a year. The majority claims that even if appellant failed significantly to communicate with the child that it did not occur for a year's time. I disagree with the majority's representation of the dates that are relevant in our analysis of measuring the one-year period. The majority opinion arbitrarily, and without citation to authority, begins counting time from the date appellees gained custody of the child. Pursuant to Ark. Code Ann. § 9-9-207(a)(2), we are directed to look for a period of time when a parent fails to support or communicate. The statute focuses upon a biological parent's failure to act. Therefore, the date that appellees gained custody is irrelevant.

The following are the critical dates and events that should be considered in the analysis. On April 23, 1999, the child was born. Upon her birth, the child was placed briefly with her grandmother, and then the child was moved to appellant's aunt and uncle's home. Wanda Sellers testified that "[a]fter she was born, [the child's] grandmother had her for about a month. Then she went to her Aunt Brenda's for a couple of months." Appellant testified that she did not know that the child had been moved from her aunt and uncle's home to appellees' home *until a prison caseworker told her.* This is evidence that appellant was not communicating with her aunt during or after the time that her aunt cared for the child.

Appellant gave appellees power of attorney only upon discovering from the caseworker that her child was in their custody. This was the only communication that appellant made or attempted to make with appellees or the child during her incarceration in Arkansas. On June 6, 2000, appellant was released from prison in Arkansas. On that day, rather than traveling within the state to see her child, appellant moved to Austin, Texas, to live with a boyfriend. This demonstrates that even upon her release from prison, appellant did not communicate with her child. Appellant did not communicate with her child until after she moved in with her boyfriend in another state, found employment, and saved enough money to buy a bus ticket to travel to Arkansas to visit her child. Therefore, appellant's first communication with her child was sometime after her release from prison.

For purposes of determining whether appellant failed to communicate with her child for one year, I believe that the relevant time period begins on or shortly after April 23, 1999, and extends until sometime after June 6, 2000. Undoubtedly, this time period extends over one year. I find no evidence, not even from appellant's own testimony, that she mailed cards, letters, or gifts to the infant during this one-year period. Furthermore, I find no evidence that appellant inquired with appellees as to the child's well-being or that she even requested a photograph of the child. The trial court was not required to find appellant's lack of contribution or communication to be a total failure but rather a significant failure. *Pender, supra.* I believe that appellant totally failed in both regards.

The majority opinion mentions that Wanda Sellers put a block on her telephone to prevent appellant from making calls to her from prison. I clarify that statement by saying that Wanda Sellers placed the block on her telephone after appellant was incarcerated in Texas. During the time appellant was incarcerated in Arkansas, no block was placed on Wanda Sellers's telephone. In either case, appellant could have written letters to appellees requesting updated information about the child, including the child's health, developmental progress, and growth. Appellant could have solicited appellees for visits to the prison with the child. There is no evidence that during her incarceration in Arkansas appellant made any effort to maintain a connection to her child other than furnishing appellees with her power of attorney. As such, I would hold that the trial court did not err in finding that appellant's consent for adoption was not required as appellant failed significantly to support and communicate with the child for over a year.

STROUD, C.J., joins.

Garrett SHEETS *v.* DOLLARWAY SCHOOL DISTRICT

CA 02-772 120 S.W.3d 119

Court of Appeals of Arkansas
Divisions I and II
Opinion delivered June 18, 2003

Mitchell, Blackstock, Barnes, Wagoner, Ivers and Sneddon, by: *Marcia Barnes*, for appellant.

W. Paul Blume, for appellee.

JOSEPHINE LINKER HART, Judge. Appellant, Garrett Sheets, appeals the trial court's dismissal with prejudice of his complaint to enforce his teacher employment contract. For reversal, appellant argues (1) that appellee, Dollarway School District, breached the written contracts between the parties for the 1999-2000 and 2000-01 school years when it failed to strictly comply with the Teacher Fair Dismissal Act (TFDA or the Act) and its own personnel policies; and (2) that his contract was automatically renewed on May 21, 2000, and thus, he was a "teacher" as defined by the TFDA during the 2000-01 school year and entitled to the benefits of the Act regardless of the duties relegated to him. We reverse in part and affirm in part.

Procedural History

On July 27, 1999, appellant entered into a written teacher's contract with appellee. The contract provided that appellant was to receive a $28,250 salary as the junior high in-school suspension teacher, the junior high head basketball coach, the assistant junior high football coach, and the assistant senior high baseball coach for the 1999-2000 school year. Superintendent Thomas Gathen later reassigned appellant to two elementary physical education classes in lieu of the two in-school suspension classes. In January of 2000, appellant was reassigned from head junior high basketball coach to assistant junior high basketball coach. His salary was not affected by his job reassignments.

On April 11, the Dollarway School Board voted to discontinue appellant's coaching duties as head junior high basketball coach for the 2000-01 school year. Appellant was presented with

a new "teacher's contract" on May 12, 2000, which stated his duties would be "Middle/Jr. High Teacher." The new contract provided that appellant would be paid $23,400 as a classroom teacher and would work as the physical education instructor and in-school suspension monitor. This contract did not provide for appellant to perform coaching duties or for payment of any coaching duties. This decrease resulted in appellant incurring a net salary reduction of $4,850. Appellant refused to sign the contract and opted, instead, to endorse his previous contract for the 1999-2000 school year. After asking for a hearing on the nonrenewal of his coaching duties, the school board held a hearing on June 8, 2000, and again voted not to renew appellant's coaching contract. During the summer, appellee's superintendent offered appellant the assistant coach position with the football and baseball teams and an additional payment of $4,200, but appellant declined the offer. Appellant did, however, continue to work as the in-school suspension monitor for the 2000-01 school year.

On August 22, 2000, appellant filed a petition for a writ of mandamus alleging that appellee breached its contract with appellant by violating the TFDA and that such breach entitled appellant to all the monetary benefits which he had under the 1999-2000 contract, plus interest and attorney's fees. Appellant later amended his complaint to include a claim for breach of contract.

When appellant's contract was not renewed for the 2001-02 school year, appellant amended his complaint on July 23, 2001, alleging that the district had once again failed to strictly follow the provisions set out in the TFDA and such failure was a breach of his 2000-01 contract. After trial on October 24, 2001, both parties submitted briefs and findings of fact and conclusions of law. On March 20, 2002, the trial court, finding for Dollarway School District, accepted as its judgment appellee's proposed finding of fact and conclusions. From that order comes this appeal.

The trial judge found that appellant was a "probationary teacher" as defined by Arkansas Code Annotated section 6-17-1502(a)(2) (Repl. 1999) and was, therefore, ineligible to appeal under the provisions of the TFDA. The trial court also concluded that because appellant was a probationary teacher the school dis-

trict was not held to a standard of strict compliance mandated by Arkansas Code Annotated section 6-17-1503 (1999). He reasoned that allowing a probationary teacher to superimpose the "strict compliance" standard of the Act on the breach-of-contract action would extend the benefits granted by the Act for a period of time equal to the statute of limitations for a contract claim. The trial judge held that appellant must prove by a preponderance of the evidence that appellee materially breached his contract.

The trial judge then compared the five-year statute of limitations for a contract claim to the specific time limitations of seventy-five days for an appeal by a nonprobationary teacher and concluded that the legislature did not intend to give probationary teachers a greater period of time to bring a common-law cause of action than nonprobationary teachers had to bring an appeal of the decision of the board.

The trial court further found that even assuming that appellant was entitled to judgment on the contract, he had failed to mitigate his damages by refusing to accept the offer of additional coaching duties with the district or the offer of employment from the Altheimer Unified School District. Last, the trial court determined that appellant was not a teacher, probationary or otherwise, during the 2000-01 school year because his position of in-school suspension monitor did not require certification as a condition precedent to employment.

Teacher Fair Dismissal Act

Upon review, although we are mindful that it is not the function of the appellate court to substitute its judgment for the trial court, the question of whether or not a school district has strictly complied is a question of law. *Jackson v. Eldorado Sch. Dist.*, 74 Ark. App. 433, 48 S.W.3d 588 (2001).

The TFDA defined "teacher" as one employed by an Arkansas public school district who is required to hold a teaching certificate from the Department of Education as a condition to employment. "Probationary teacher" is defined as one who has not completed three successive years of employment in the district in which the teacher is currently employed; further, a teacher is

deemed to have completed the probationary period by employment in an Arkansas school district for three years. Ark. Code Ann. § 6-17-1502(a)(1) and (2) (Repl. 1999).

Arkansas Code Annotated section 6-17-1506 (Repl. 1999) provides:

> (a) Every contract of employment made between a teacher and the board of directors of a school district shall be renewed in writing on the same terms and for the same salary, unless increased or decreased by law, for the next school year succeeding the date of termination fixed therein, which renewal may be made by an endorsement on the existing contract instrument unless:
>
> (1) By May 1 of the contract year, the teacher is notified by the school superintendent that the superintendent is recommending that the teacher's contract not be renewed;
>
> . . .
>
> (2)(A) A notice of nonrenewal shall be delivered in person to the teacher or mailed by registered or certified mail to the teacher at the teacher's residence address . . . .
>
> (B) The notice of recommended nonrenewal of a teacher shall include a statement of the reasons for the recommendation, setting forth the reasons in separately numbered paragraphs so that a reasonable teacher can prepare a defense . . . .

Arkansas Code Annotated section 6-17-1503 (Repl. 1999) states in pertinent part:

> A nonrenewal, termination, suspension, or other disciplinary action by a school district shall be void unless the school district strictly complies with all provisions of this subchapter and the school district's applicable personnel policies.

Arkansas Code Annotated section 6-17-1504 (Repl. 1999) states:

> (a) Each teacher . . . must be evaluated in writing annually.
>
> (b) Evaluation criteria and procedures shall be established in the manner prescribed in subchapter 2 of this chapter.
>
> (c) Whenever a superintendent . . . believes or has reason to believe that a teacher is having difficulties or problems meeting the expectations of the district . . . and [the superintendent] believes the problems could lead to termination or nonrenewal of contract, the administrator shall bring the problems and difficulties to the

> attention of the involved in writing and shall document the efforts which have been undertaken to assist the teacher . . . .

For reversal, appellant asserts that the school district failed to strictly comply with the TFDA and its own personnel policies and such failure breached both the 1999-2000 and the 2000-01 teacher's contracts. Appellant states that the district violated Arkansas Code Annotated sections 6-17-1504(a) *et seq.* by failing to provide him with an annual teacher evaluation, notice of his nonrenewal of his contract and his right to a hearing before the school board on or before May 1 of the contract year, and a copy of the district's personnel policies. He further states that appellee denied him the right to a hearing before the school board voted to nonrenew his contract. Appellant also argues that the strict compliance standard equally applies to probationary teachers as well as nonprobationary teachers.

The application of the TFDA to a probationary teacher was addressed by our supreme court in *Love v. Smackover Sch. Dist.*, 322 Ark. 1, 907 S.W.2d 136 (1995). In that case, Love had worked as a certified teacher for a period of one year and was a probationary teacher as defined by Ark. Code Ann. § 6-17-1502. In July, she learned that she would not be rehired for her position in the upcoming school year. In April of the following year, she filed suit alleging that she had not received notice of nonrenewal by May 1 as is required by Ark. Code Ann. 6-17-1506(a) (Repl. 1993). Our supreme court determined that Love was a teacher as defined by the TFDA, and held that school districts must strictly comply with the notice provision of the TFDA. (*Love*, *supra* (citing Ark. Code Ann. § 6-17-1507)).

In *Foreman Sch. Dist. #25 v. Steele*, 347 Ark. 193, 61 S.W.3d 801 (2001), our supreme court considered another "probationary teacher" case. Steele, a first-year employee, received notice of a nonrenewal recommendation on March 21, 1994, citing various managerial and disciplinary problems as the basis for the nonrenewal recommendation for the school year of 1994-95. Steele requested a hearing, sought to obtain additional information about the basis of the nonrenewal recommendation, and asked for a five day extension of time to prepare for the hearing after receipt of the requested information. The district not only failed to agree to

an extension but also failed to hold a hearing before May 2, 1994, the tenth day after Steele's request for a hearing was made.

At the hearing held on May 6, 1994, Steele objected, noting that the hearing was outside the ten day period provided by the TFDA, and sought an automatic renewal of his contract for the 1994-1995 school year. The district refused to renew Steele's contract, and he filed a breach of contract action against the district. Both parties sought summary judgments. Following a hearing, the trial court granted Steele's motion, finding that his contract was automatically renewed because the school district failed to strictly comply with the TFDA which rendered the district's nonrenewal attempt void.

On appeal, the school district argued (1) that as a probationary teacher, Steele could not challenge the school board's decision of nonrenewal, (2) that even if Steele could appeal, his action was barred under the seventy-five day limitations period under the TFDA, and (3) that he had no contract claim because a contract did not exist between the parties. Steele did not challenge the void nonrenewal; but instead, litigated the breach of his contract that had automatically renewed when the district failed to strictly comply with the TFDA. Steele asserted that his complaint was not barred by the seventy-five-day limitation because he was a probationary teacher, not a nonprobationary teacher. Therefore, he was only bound by the five-year statute of limitation for breach of a written contract.

Agreeing with Steele's argument, our supreme court stated:

> [B]ecause the attempted nonrenewal did not strictly comply with the terms of the TFDA, the action became void, and on May 1, 1994, Steele's contract was automatically renewed under the terms of his original contract . . . Steele was a contracted probationary teacher for the 1994-1995 school year.
>
> The District alleges that this action is controlled by the TFDA, which does not allow an outside breach-of-contract claim. However, the District's failure to strictly comply with the TFDA's terms rendered the District's actions void, and takes this lawsuit outside the confines of the TFDA. This is not an appeal from the decision for nonrenewal, which would require us to

> consider the viability of an appeal by a probationary teacher. Rather, the resulting breach became an original cause of action properly filed in circuit court.

Id. at 202, 61 S.W.3d at 806-07.

Commensurate with the *Love* and *Steele* decisions, we hold that the strict compliance standards of the TFDA apply to probationary teachers. Appellant's contracts for 1999-2001 required him to have an Arkansas teaching certificate, and he was, in fact, a qualified teacher as defined by the TFDA. The TFDA set out the requirements which the district must meet in order to prevent the automatic renewal of a teacher contract. The Act requires notification by the superintendent of nonrenewal recommendation by May 1 of the contract year. The Act requires the district to evaluate the teacher annually, *see* Ark. Code Ann. § 6-17-1504(a), give the teacher, in writing, problems that could result in nonrenewal of the contract, *see* Ark. Code Ann. § 6-17-1504(c), and assist the teacher in correcting the problems, *see* Ark. Code Ann. § 6-17-1504(c). Here, although the record does support that some assistance was provided to appellant in an attempt to salvage his basketball programs, the district failed to provide written notice of the problems or evaluations as required by the Act. Further, appellant was not evaluated, not advised in writing of problems that could result in nonrenewal of his contract, and not provided with notice of the nonrenewal recommendations until after he was notified by the April 25, 2000, letter signed by the district's superintendent that his coaching duties were eliminated. The failure of the district to strictly comply with any one of these provisions creates by operation of law a renewal of the teaching contract for the upcoming year. *See* Ark. Code Ann. § 6-17-1506 (Repl. 1999).

Damages

Although the failure of the district to strictly comply with the TFDA rendered the nonrenewal of his contract for the 2000-01 school year void, appellant must establish his damages for breach of contract with the same specificity as any other common law contract claim. In *Marshall Sch. Dist. v. Hill*, 56 Ark. App. 134,

140, 939 S.W.2d 319, 321-22 (1997) (citing *Western Grove Sch. Dist. v. Strain*, 288 Ark. 507, 707 S.W.2d 306 (1986)), this court stated:

> Despite the argument being raised by Mr. Hill, we find that the disposition of this issue is dictated by *Western Grove Sch. Dist. v. Strain*, 288 Ark. 507, 707 S.W.2d 306 (1986). In that case, a teacher prevailed on a contract dispute under the Arkansas Teacher Fair Dismissal Act and the supreme court discussed possible mitigation of damages through other employment. The court held, in such cases, the aggrieved party must use reasonable care, effort, and expenditure to mitigate damages. The court also held that the proper measure of damages is loss sustained by the teacher, less any mitigation earnings that may be realized through subsequent employment.

Marshall, supra.

Appellant's 1999-2000 contract provided that he would receive a salary of $28,250 as the junior high in-school suspension teacher, the junior high head basketball coach, the assistant junior high football coach, and the assistant senior high basketball coach. The district voted to discontinue appellant's coaching duties for the following year and offered him a new contract as a classroom teacher for $23,400, which was $4,850 less than the previous year. Appellant refused to sign the offered contract and instead, indorsed his previous one.

Superintendent Gathen testified that during the summer of 2000, he was authorized by the school board to offer appellant the positions of assistant junior high football coach and assistant baseball coach along with the compensation as a classroom teacher. Appellant refused this offer. According to Gathen, had appellant accepted this offer, he would have received $900 as assistant baseball coach and $3,300 as assistant junior high football coach. Instead, appellant chose only to receive the salary of a classroom teacher. The difference in what appellant would have earned had he accepted the coaching assignments and what he earned during 1999-2000 school year was $650. Appellant's refusal to mitigate his damages limits his damages to $650, the dif-

ference in what he earned under the 1999-2000 contract and what he could have earned had he accepted the offer of appellee.[1]

Further, appellant asserts that he is entitled to attorney's fees pursuant to Arkansas Code Annotated section 16-22-308 (Repl. 1999). Section 16-22-308 states that "in any civil action to recover . . . for breach of contract . . . the prevailing party may be allowed a reasonable attorney's fee to be assessed by the court and collected as costs." Appellant's action against the school district was for breach of contract, and pursuant to the above statute, the circuit court was authorized to award attorney's fees not subject to a specified limit. We agree with appellant that he is entitled to reasonable attorney's fees and remand for a determination by the circuit court of reasonable attorney's fees. Thus, we reverse this point and remand for entry of judgment consistent with this opinion.

Claim for 2001-02 contract

For his second point, appellant argues that on May 1, 2000, his 1999-2000 contract was automatically renewed and therefore, he was a "teacher" as defined by the Act during the 2000-01 school year regardless of the duties relegated to him by the superintendent. Further, he argues that when the school district voted to nonrenew his contract for the 2001-02 school year on May 8, 2001, without allowing appellant to have a hearing, the district violated the TFDA and its own personnel policies for the 2001-02 school year.

In order to obtain the benefits under the TFDA, the employee must meet the definition of a teacher set out in Arkansas Code Annotated section 6-17-1502(a)(1). A teacher is defined "as any person . . . employed in an Arkansas public school district who is required to hold a teaching certificate from the Department of Education as a condition to employment." *See* Ark. Code Ann. § 6-17-1502(a)(1).

---

[1] Although the court found that appellant failed to accept employment with Altheimer Unified School District, we note that the offer for that employment occurred during the 2000-01 school year for the following school year according to his testimony. Appellant's argument of entitlement to a teacher contract for the school year 2001-02 is addressed in the latter part of this opinion. Because appellant was not a teacher during this time period, it is unnecessary to determine whether an actual offer was made.

For the school year of 2000-01, appellant worked as the in-school suspension monitor. It is undisputed that the position did not require appellant or any other person occupying the position to hold a teaching certificate from the Department of Education. Appellant refused to sign his teacher's contract, which required him to have a teacher's certificate, and during the summer, he refused to accept additional coaching duties which also required him to have a teacher's certificate. Instead, he indorsed his previous contract and opted to work as the in-school suspension monitor, a non-certified position.

On May 1, 2001, Gathen hand-delivered a letter to appellant notifying him of his recommended nonrenewal based on the lack of need for the 2001-02 school year as the in-school suspension monitor. On May 8, 2001, the district accepted the nonrenewal recommendation. Appellant testified that he did not request a hearing before the board after receiving that letter because the board had already decided not to renew his contract. In *Western Grove Sch. Dist. v. Terry*, 318 Ark. 316, 885 S.W.2d 300 (1994), our supreme court stated that a teacher or a coach is not required to ask for a school board hearing after the board has already taken action on his contract.

Appellant, although receiving the pay of a teacher, failed to meet the requirements set forth in Arkansas Code Annotated section 6-17-1502(1), and therefore, he is not a teacher for the purposes of the Act. Since appellant's only remedy was to pursue a common-law action on the breach-of-contract claim it was necessary that he serve as a teacher as defined by the TFDA. Thus, appellant lost the benefits provided by the TFDA and cannot pursue an action under the TFDA. Having held that appellant was not a teacher for the purpose of the Act for the school year 2001-02, we decline to address the issue of mitigation for that school year.

The procedures used by the district did not comply with the TFDA. However, appellant was not a teacher for the school year 2000-01 and therefore, the failure of the district to comply with the requirements of the Act does not enure to the appellant's benefit. Therefore, we do not find that the decision of the trial court was erroneous and affirm.

Reversed in part; affirmed in part.

STROUD, CJ., BIRD, and GRIFFEN, JJ., agree.

ROAF, J., concurs.

CRABTREE, J., dissents.

ANDREE LAYTON ROAF, Judge, concurring. I concur in the majority's analysis and conclusion as to Garrett Sheets's entitlement to back pay for the 2000-2001 school year. However, I would affirm the trial court's decision that Sheets is not entitled to any back pay for the 2001-2002 school year on a different basis. Because Sheets has not challenged the trial court's finding that he failed to mitigate his damages in both the 2000-2001 and 2001-2002 contract years, I would not address the issues Sheets raises on appeal with respect to 2001-2002.

In its order, the trial court found that: 1) Sheets was not entitled to the protections of the Arkansas Teacher Fair Dismissal Act (ATFDA), Ark. Code Ann. § 6-17-1501 *et seq.* (Repl. 1999), because he was a probationary teacher in 1990-2000; 2) Sheets was not a teacher, probationary or otherwise, during the 2000-2001 school year because his position as an in-school suspension monitor did not require certification as a condition of employment; 3) even if Sheets was entitled to judgment on his alternative claim for breach of contract, he failed to mitigate his damages both in 2000-2001 while still employed by the appellee Dollarway School District and in 2001-2002 after his termination by failing to accept an offer of employment from the Altheimer School District. The trial court did not specify the dollar amounts at issue in either year in its finding of failure to mitigate.

Sheets makes no argument challenging the trial court's finding that he is entitled to no damages based on the failure to mitigate. With regard to the 2000-2001 school year, Sheets argues that he is entitled to all of the extra coaching stipends, employer matching and retirement contributions, interest, costs, and attorneys fees, and cites to Ark. Code Ann. §§ 6-17-1503 and 1506, Ark. Code Ann. § 16-22-208, and *Love v. Smackover School District*, 329 Ark. 4, 946 S.W.2d 676 (1997). Sheets simply does not

acknowledge or address in any way the duty to mitigate in his arguments or request for relief from this court.

With regard to the 2001-2002 school year, for which the alleged offer of employment with the Altheimer School District was made to Sheets, he argues that he was a "teacher" during 2000-2001, and that he is entitled to a full teacher's salary for this subsequent year because of non-renewal of his position as in-school suspension monitor. However, there was testimony that Sheets would have made a higher salary with the Altheimer School District than with the appellee district. Again, Sheets does not address the trial court's finding that he failed to mitigate his damages in this contract year.

In sum, Sheets has raised no direct challenge to the trial court's findings that he failed to mitigate his damages in either of these two years. The majority has concluded that Sheets is not required to challenge this ruling to obtain a reversal on the merits of his other arguments with respect to the first year, because Dollarway did not offer him the full amount of the coaching stipends that he had received in the previous year, and the trial court's ruling on failure to mitigate would thus only apply to the actual sum offered to Sheets and which was refused by him. I agree with this conclusion. However, it is a familiar rule of practice that an appellate court does not reverse on a ground not argued by the appellant, even when the record is subject to de novo review on appeal. *McGuire v. Smith*, 58 Ark. App. 68, 946 S.W.2d 717 (1997). Arguments not made on appeal are deemed waived. *Crockett v. Essex*, 341 Ark. 558, 19 S.W.3d 585 (2000); *Hazen v. City of Booneville*, 260 Ark. 871, 545 S.W.2d 614 (1977).

Consequently, we cannot reverse the finding that Sheets is entitled to no damages at all for the 2001-2002 school year by addressing and reversing on the points he has selectively chosen to raise. We should therefore affirm the trial court's finding on this contract year without consideration of the other issues Sheets advances on appeal, because Sheets has failed to challenge a ruling which is in effect dispositive of his claim for damages for 2001-2002.

TERRY CRABTREE, Judge, dissenting. In this decision, the majority refuses to abide by precedent established by

the supreme court, and in the process, the majority reverses on an issue that was not raised by the appellant and reverses on an issue that should not be addressed by this court. To make matters worse, the majority makes findings of fact on appeal. I dissent.

In separate years, the school district voted not to renew appellant's existing employment contract. The essence of appellant's complaint was that on both occasions the school district had breached his contract by failing to strictly comply with the requirements of the Teacher Fair Dismissal Act, and he claimed that he was entitled to damages in the form of wages he lost as a consequence of the district's breach. In denying appellant's claim, the trial court made two, equally dispositive findings. The court ruled: (1) that the Act did not apply to appellant's contract because he was a probationary teacher, and thus the district could not be held to the standard of strict compliance; and (2) that, even if the Act did apply, appellant was not entitled to *any* damages because of his failure to mitigate.

In any given case, it is the task of the appealing party to present an argument that warrants reversal of the trial court's decision. Likewise, it is a longstanding principle that on appeal the appellate court reviews only the errors that are assigned. *Rosser v. Columbia Mutual Ins. Co.*, 55 Ark. App. 77, 928 S.W.2d 813 (1996). In this case, the appellant has offered two issues on appeal for our consideration. First, appellant states, "THE DOLLARWAY SCHOOL DISTRICT FAILED TO STRICTLY COMPLY WITH THE TEACHER FAIR DISMISSAL ACT AND ITS OWN PERSONNEL POLICIES THUS BREACHING ITS 1999-2000 AND 2000-2001 WRITTEN TEACHER'S CONTRACTS WITH SHEETS." As his second point, appellant states, "SHEET'S 1999-2000 CONTRACT AUTOMATICALLY RENEWED ON MAY 1, 2000, THUS HE WAS A 'TEACHER' AS DEFINED BY THE TEACHER FAIR DISMISSAL ACT DURING THE 2000-2001 SCHOOL YEAR REGARDLESS OF THE DUTIES TO WHICH THE SUPERINTENDENT RELEGATED HIM." Tucked within the first issue, one can discern an argument that can be read as a challenge to the trial court's ruling that the Act does not apply to probationary teachers. However, appellant makes no argument whatsoever contesting the trial court's alternative ruling that

appellant had suffered no damages as a result of any alleged breach. Not one word is devoted to an argument that the trial court erred either in its application of the law of mitigation or that the trial court's calculations were somehow in error. Indeed, the word "mitigate" is not to be found in the argument section of appellant's brief.

Appellant's total failure to challenge the trial court's ruling with respect to damages is fatal to this appeal. The supreme court has held that, where a trial court makes independent, alternative rulings that are each dispositive of an appellant's claim, and where the appellant attacks only one of those rulings on appeal, the case will be summarily affirmed without addressing either ruling, even if the challenged ruling has merit. *Pugh v. State* 351 Ark. 5, 89 S.W.3d 909 (2002); *Pearrow v. Feagin*, 300 Ark. App. 274, 778 S.W.2d 941 (1989). We, ourselves, have applied the supreme court's reasoning in *Camp v. State*, 66 Ark. App. 134, 991 S.W.2d 611 (1999). Thus, following the law, appellant's failure to challenge the trial court's ruling on damages means that this case must be affirmed in every respect without discussing the merits of either of the trial court's rulings. To put it simply, the trial court's ruling that appellant was not damaged by any alleged breach cannot be reversed because appellant does not claim that this ruling was in error. And, because appellant has not challenged the trial court's ruling on damages, we need not address, and certainly cannot reverse, the trial court's decision that the Act does not apply. Nevertheless, the majority disregards the settled law and reverses both of the trial court's rulings. This court followed the law in *Camp v. State, supra.* That we follow the law one day and ignore it another day will subject this court to the well-deserved criticism that this court is arbitrary in its decision making.

The majority also falls into error by finding as a matter of fact that the district breached appellant's contract. The trial court made no findings of fact as to whether or not the district breached appellant's contract. It was not necessary for the court to make those findings in light of its determination that the Act did not apply. The evidence presented by the parties in this case was sharply conflicting. Yet, the majority resolves the conflicts in appellant's favor. However, the appellate court cannot act as the fact-finder in cases at law appealed from circuit court. *See Coran*

Auto Sales v. Harris, 74 Ark. App. 145, 45 S.W.3d 856 (2001). Thus, if it were necessary to reverse this case, it would also be necessary to remand for the trial court to determine if the district breached appellant's contract.

Vivian S. HOUSTON *v.* STATE of Arkansas

CA CR 02-817 120 S.W.3d 115

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered June 18, 2003

Alvin Schay, for appellant.

Mike Beebe, Att'y Gen., by: *David J. Davies*, Ass't Att'y Gen., for appellees.

JOHN MAUZY PITTMAN, Judge. The appellant in this criminal case was charged with intentional adult abuse, a violation of Ark. Code Ann. § 5-28-103(b)(2) (Repl. 1997). After a bench trial, the trial judge announced that he found the evidence insufficient to prove intentional abuse, but found that appellant was guilty of committing negligent adult abuse in violation of Ark. Code Ann. § 5-28-103(c)(2). For reversal, appellant contends that the evidence is insufficient to support her conviction of negligent adult abuse. We cannot address this argument because it is raised for the first time on appeal, and, therefore, we affirm.

In order to contest the sufficiency of the evidence to support a conviction resulting from a bench trial, the defendant must have moved for dismissal at the close of all the evidence. Ark. R. Crim. P. 33.1(b). A general motion will not suffice; the defendant must specify the manner in which the evidence is insufficient. A motion merely stating that the evidence is insufficient does not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the offense. Ark. R. Crim. P. 33.1(c); *Crisp v. State*, 341 Ark. 893, 20 S.W.3d 394 (2000). In making his motion, a defendant must anticipate an instruction on lesser-included offenses[1] and specifically address the elements of any lesser-included offense he wishes to challenge in the motion. *Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003). This rule applies to bench trials as well as to jury trials. *Green v. State*, 79 Ark. App. 297, 87 S.W.3d 814 (2002).

In her brief, appellant recounts the events at trial, noting that she raised two arguments in her directed-verdict motion:

---

[1] The dissent argues that this rule is inapplicable in the present case because negligent adult abuse is not, in fact, a lesser-included offense of intentional adult abuse. We express no opinion on this question because it was not argued either at trial or on appeal, and is thus not properly before us. *See* note 2, *infra*. We note, however, that appellant had abundant opportunity to raise this question below had she desired to do so. When appellant made her directed-verdict motion, the prosecuting attorney agreed that the element of serious physical injury was absent, and requested that the case should proceed on the "lesser-included offense," a Class B misdemeanor. Appellant did not object. After the defense rested, the trial judge announced that the State had failed to meet its burden with respect to the Class D felony charge, but found that appellant was guilty of the "lesser-included" charge, a Class B misdemeanor violation of Ark. Code Ann. § 5-28-103(b)(2). Appellant did not object. Nor does she even complain on appeal about the trial court's treatment of the offense for which she was convicted as a lesser-included one of the charged offense.

> At the close of the State's evidence, defense counsel argued, first, that the State had not presented evidence that there was serious physical injury or a substantial risk of death to either of the patients, as required by A.C.A. 5-28-103. Second, he argued that there was an intent portion which required purposeful action, and purposely is a culpable mental state. Thus, the proof would have to be that it was Appellant's conscious object to inflict adult abuse on each of the residents by causing substantial physical injury. There was no such proof, he argued . . . .

Appellant then makes her argument on appeal, which is set out fully below:

> The court's finding that the procedure used by appellant was the problem is inconsistent with his finding that she provided negligent care and was guilty under A.C.A. 5-28-103(c)(2), as applied under A.C.A. 5-28-101(8)(A). The appellant did not negligently fail to provide necessary treatment, rehabilitation, care, food, clothing, shelter, supervision, or medical services; she did not fail to report health problems of the patients; and she did not fail to carry out a prescribed treatment plan. At most, appellant's procedure in doing her job was inappropriate.
>
> Just as the due process clause of the 14th amendment to the U.S. Constitution requires the prosecution to prove beyond a reasonable doubt all the elements included in the definition of the crime the defendant is charged with, so too must a trial judge find all the elements of a crime he or she decides an accused has committed.
>
> Because no rational trier of fact could find guilt beyond a reasonable doubt under the statutes the court relied upon, the Appellant's conviction should be reversed and dismissed.

As can be seen, appellant's arguments at trial were directed at the elements of serious physical injury and purposeful intent, whereas her argument on appeal is directed at the trial court's finding that she acted negligently. In essence, her argument on appeal is that there is no evidence to satisfy the element of negligent care and that, in the absence of proof of this element, her con-

viction must be reversed. Because the present argument is raised for the first time on appeal, we cannot address it, and we affirm.[2]

Affirmed.

GLADWIN, ROBBINS and NEAL, JJ., agree.

STROUD, C.J., concurs.

BAKER, J., dissents.

KAREN R. BAKER, Judge, dissenting. I would reverse this case because there was no proof of physical injury, and defense counsel properly apprised the trial court that an essential element of the offense was missing.. Appellant was convicted of violating Ark. Code Ann. § 5-28-103(c)(2), and section 103(c)(2) requires proof of the element of physical injury. Counsel apprised the court that the element of physical injury was missing in his motion to dismiss.

The majority does not address the fact that there was no evidence of physical injury in this case. The State argues, and the majority agrees, that appellant's argument is not preserved for our review. The majority specifically finds that her argument at trial

---

[2] The dissent correctly asserts that appellant properly raised the absence of proof as to the element of physical injury below, but wrongly asserts that this issue is therefore before us on appeal. Although this issue was in fact argued at trial in appellant's directed verdict motion, appellant's argument on appeal contains not one word in reference to the element of physical injury.

It is a familiar rule of practice that an appellate court does not reverse on a ground not argued by the appellant. *See Cummings v. Boyles*, 242 Ark. 923, 415 S.W.2d 571 (1967); *McGuire v. Smith*, 58 Ark. App. 68, 946 S.W.2d 717 (1997). This is so even where there was an appropriate objection at trial that would have entitled the appellant to make such an argument on appeal. *See King v. State*, 323 Ark. 671, 916 S.W.2d 732 (1996); *Dillard v. State*, 313 Ark. 439, 855 S.W.2d 909 (1993); *Mecco Seed Co. v. London*, 47 Ark. App. 121, 886 S.W.2d 882 (1994). This rule is applicable even in cases that are heard *de novo* on appeal, *see Cummings v. Boyles*, *supra*, and has even been applied, in the context of Rule 37.5 appeals following cases where the death penalty has been pronounced. *See, e.g.*, *Echols v. State*, 344 Ark. 513, 42 S.W.3d 467 (2001).

Although it may be difficult to allow an apparent error to go uncorrected, we must sometimes do so because we may not reach out and find an unargued issue on which to reverse a trial court. *White v. Winston*, 302 Ark. 345, 789 S.W.2d 459 (1990). Any basis for reversing a case on appeal should originate in the arguments advanced by the appellant, not from arguments created by appellate judges. *Dalrymple v. Dalrymple*, 74 Ark. App. 372, 47 S.W.3d 920 (2001).

was directed at the elements of serious physical injury and purposeful intent, whereas, her argument on appeal is directed at the trial court's finding that she acted negligently. Immediately following the portion of appellant's brief quoted by the majority, appellant argues that the State failed to prove all of the elements of the offense, stating:

> Just as the due process clause of the 14th amendment to the U.S. Constitution requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the crime the defendant is charged with, so too must a trial judge find all the elements of a crime he or she decides an accused has committed.
>
> Because no rational trier of fact could find guilt beyond a reasonable doubt under the statutes the court relied upon, the Appellant's conviction should be reversed and dismissed.

(Citations omitted.) Appellant argued both at trial and on appeal that the State failed to prove the elements of the crime of which she was convicted.

In refusing to address appellant's challenge to the sufficiency of the evidence, the majority relies upon *Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003) and admonishes that a defendant must anticipate an instruction on lesser-included offenses and specifically address the elements of any lesser-included offense he wishes to challenge in his directed-verdict motion. However, appellant was not actually convicted of a lesser-included offense. Arkansas Code Annotated section 5-1-110(b) (Repl. 1997) states that:

> An offense is so included [in another] if:
>
> (1) It is established by proof of the same or less than all the elements required to establish the commission of the offense charged; or
>
> (2) It consists of an attempt to commit the offense charged or to commit an offense otherwise included within it; or
>
> (3) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpable mental state suffices to establish its commission.

Neglect is defined in Ark. Code Ann. § 5-28-101(8) (Supp. 2001):

> "Neglect" means acts or omissions by an endangered adult; for example, self-neglect or intentional acts or omissions by a caregiver responsible for the care and supervision of an endangered or impaired adult constituting:
>
> (A) Negligently failing to provide necessary treatment, rehabilitation, care, food, clothing, shelter, supervision, or medical services to an endangered or impaired adult;
>
> (B) Negligently failing to report health problems or changes in health problems or changes in the health condition of an endangered or impaired adult to the appropriate medical personnel; or
>
> (C) Negligently failing to carry out a prescribed treatment plan. Neglect of an impaired adult does not fit the definition of a lesser-included offense of purposely abusing an impaired adult.

Even if neglect of an impaired adult were a lesser-included offense of purposely abusing an impaired adult, appellant's motion was sufficient to preserve the issue of whether the State proved the element of "physical injury" as to the misdemeanor offense. In *Ramaker v. State*, 345 Ark. 225, 46 S.W.3d 519 (2001), our supreme court held that in order to preserve challenges to the sufficiency of the evidence supporting a conviction for a lesser-included offense, a defendant is required to address the lesser-included offense, either by name *or by apprising the trial court of the elements* of the lesser-included offense in the motion for directed verdict. (Emphasis added.) As the majority notes, defense counsel's motion stated that there was no proof of serious physical injury or purposeful intent. However, his motion further advanced the argument that there were "*no types of discernable physical injury*."

Appellant's argument is well taken. Ms. Smith, the State's sole witness, testified that there were no marks, bruising or abrasions on either Ms. Shaw or Mr. Lenox and that neither of them required medical treatment as a result of the incident. Without any proof of physical injury, there was insufficient evidence to support appellant's conviction.

I would reverse.

Susan DURHAM *v.* Timothy DURHAM

CA 02-1102 120 S.W.3d 129

Court of Appeals of Arkansas
Division IV
Opinion delivered June 18, 2003

[Petition for rehearing denied July 30, 2003.]

[redacted]

Hurley & Whitwell, by: *Deborah Pipkins*, for appellant.

Katherine Blackmon-Solis, for appellee.

ANDREE LAYTON ROAF, Judge. This case involves a petition to relocate and a counterpetition for change of custody. Susan Durham appeals, arguing that the trial court erred in granting the change of custody to Timothy Durham based on her request to relocate with the parties' children to Texas, and in denying her motion to relocate. We agree that the trial court erred and reverse and remand.

Susan Durham and Timothy Durham were awarded joint legal custody of their two minor children in their divorce decree entered December 20, 2000. Susan was awarded primary physical custody, subject to Timothy's liberal visitation rights, which included every other weekend and two evenings a week, and child support. The divorce decree also contained a provision that the minor children not be removed from the jurisdiction on a permanent basis without obtaining the permission of the court.

On January 5, 2001, approximately two weeks after the divorce decree was entered, Susan filed a motion to relocate with the children to Houston, Texas, where she could live with her mother, seek employment, and possibly attend night school to earn a teaching certificate. Timothy filed an answer and a motion for contempt, alleging that he had been denied phone visitations with the children. Susan responded by filing a counter motion for contempt, alleging that Timothy had an overnight guest of the opposite sex with the children present, failed to transport the children to their activities during his visitation, had been late on numerous occasions during visitation, had not allowed Susan to keep the children when a babysitter was necessary during visitation, was in arrears on child-support payments, and finally that both parties were having difficulties with the visitation schedule then set by the court.

After a hearing in May 2001, the trial court entered an order on July 24, 2001, denying the motion to remove the children from the jurisdiction, finding that since the entry of the decree, there had not been a change in circumstances that would justify a modification. The court further determined that Timothy was behind in child support and ordered him to pay the child-support payments in advance.

In January 2002, Susan filed a second motion for permission to relocate with the children to Texas. She also filed a motion for modification of visitation and for an increase in child support. Timothy filed a response and a counterclaim requesting a change of custody. After a hearing on May 30, 2002, the trial court denied Susan's motion to relocate with the children. The court then determined that Timothy should be awarded custody of the children subject to Susan having the identical visitation that Timothy previously had been granted. The court also ordered Susan to pay Timothy's counsel $1,250 in attorney's fees. Susan appeals from this order.

In the case before us, the alleged difficulties with custody arose not from the alternating weekend visitation, holiday visitation, or summer visitation, but from the extra two evenings per week that Timothy was allowed to visit the children. Timothy

testified that he had between eleven to eighteen meetings a month because of his employment with the Quapaw Council, Boy Scouts of America. These meetings were always held between Monday and Thursday nights. Susan accommodated Timothy's work schedule for a time before concluding that she and the children needed more structure in the visitation schedule. Susan testified that she was very often unable to schedule overtime with her work and that her children were severely limited in the after-school activities they could participate in because of Timothy's erratic work schedule. The trial court stated in its decision that "she lived with him. She knows that he has these meetings with his job. This isn't anything that has changed." However, although Timothy's professional responsibilities may not have changed, Susan's status as a stay-at-home mother had clearly changed to that of an employed single parent.

Susan first sought approval to relocate to Texas with the children shortly after the entry of the divorce decree. At that time, she was unemployed, and child support was her only means of income. Both Timothy's and Susan's family live in Texas, and Susan testified that she and the children would benefit from this extended family support if she relocated. The trial court denied the first request, based in part upon Susan's not making an effort to find a job in Arkansas.

Since the first relocation hearing, Susan has found a job working for Arkansas Blue Cross and Blue Shield making $8.60 per hour. With the child support she receives, Susan testified that she brought home between $1800-$2000 per month, that her rent was $550 per month and her utilities $400 a month, which left around $425 monthly disposable income to care for the children. During this time, Susan's mother came from Texas and lived with her to assist with child care. She also allowed Susan the use of her vehicle to travel to and from work. At the time of the second hearing, Susan's mother needed to return to Texas to care for Susan's father, who had recently had a heart attack, and to maintain the family business. Without her mother to assist her, Susan testified that she would have to pay for child care and buy a vehicle. Susan testified that daycare for the youngest child and after-school care for the other minor

children[1] would total about $580 a month. Neither Timothy nor Susan have family in Arkansas; both families reside within minutes of one another in Texas. Susan testified that when it became evident that her mother needed to return to Texas, she again sought permission to move. Susan testified that her mother had offered to let her and the children live in the family home rent free, and she stated that her mother had offered to take care of the children while Susan pursued a teaching degree at night and worked during the day. Susan's mother testified that Susan had two jobs available to her in Texas, one with the family business and the other with a company where her sister is employed.

Timothy testified that he opposed the relocation and that Susan's attempts to relocate had been stressful to him. He also testified that Susan was uncooperative in working out the weekday visitations. However, Timothy also testified that both sets of grandparents resided in the area to which Susan sought to relocate and agreed that extended family was important. He further testified that he could not afford to exercise his weekend visitation if she did relocate because of the distance to Houston and that he would consider looking for a job in the Houston area if Susan were allowed to relocate. Timothy also admitted to using a babysitter periodically, when the divorce decree gave Susan first opportunity to care for the children if the occasion arose.

In its ruling, the court stated:

> These parties agreed to their custody arrangement, and in the last 18 months they've been in litigation for a year of it. The original motion was filed, what, about two weeks after the divorce was final, but we didn't come to a hearing until May and the order wasn't entered until July. So, then, we have another six-month reprieve and she again files. I could have played the tape from the hearing last year and it would have been almost identical to the testimony she gave today. She's going to go work for her family. Again, second time, her mother didn't know about the job or what she was going to earn, exactly what happened January a year ago. She's made no investigation — or I'll put it this way. She's made no application for any type of education down in that area. It's just

[1] Susan has a child from a previous marriage.

something that she's talked to somebody about; it is available. It may be available to her; it may not be available to her. We don't know because she hasn't applied.

For six months, maybe longer, she worked at a temp agency, not looking for full time employment. She's worked at Blue Cross for three months.

I mean, this is going to be just a constant going on, her attempt to go back to Texas, and I don't want to attribute a lot of motivation to it. But it is clear to me that she is thwarting his relationship with these children. If it's not by the move, it's by putting out a calendar — I mean, she lived with him. She knows that he has these meetings with his job. This isn't anything that has changed. It didn't change from the time that the decree was entered. He has one night a week that he could have consistent visitation, which is Monday, but she didn't like that because then she won't get to see the children three nights in a row twice a month, completely disregarding that if she moves to Houston how many nights a month he won't get to see his children.

She is not working with this custody agreement that she agreed to. Joint legal is not working. It's not working because she's not going to let it work, and I'm going to change custody to the father and he will be the sole custodian and, hopefully, I can get everybody out of litigation for a little bit of time so that some of this can settle down and the parties can — I think they will work together better when apparently there's not this confusion about what joint legal custody means. If she wants to go — if she wants to move to Texas, obviously, she can move to Texas. If she wants to go back to school here, he said he will work with her. I'll give her the same visitation that he had. I'm just going to — I mean, the visitation schedule will stay exactly the way it is except that she'll have the visitation he had, which is two nights a week. They're going to have to resolve what those two nights a week are. She clearly won't be able to get the children after school if she's working until 4:30 or five. If she does go to school at night and they can work out a nighttime visitation, to where when he's got his meetings and try to arrange his meetings around when she would be going to school, it's what they should have been doing for the last 18 months. But, you know, it's been this concerted effort to get to Houston, and it didn't matter what was going on here.

This is not one of those cases to where she has one of those wonderful education opportunities that started off in the *Staab v.*

> *Hurst*; that is, you know, she'd look for something else, she couldn't find it, it was a betterment. It's "this might be available down there. I might be able to do a little bit better if I went down there."

The trial court did not articulate why it would be in the best interests of the children to reside with Timothy. The court simply switched the custodial arrangement between the parties and instructed them to resolve the dispute over evening visitations on their own, despite testimony that Timothy had a job which requires a substantial amount of time on evenings and weekends.

On appeal, Susan first argues that the trial court erred in changing custody of the minor children to Timothy based upon her request to relocate. Susan also argues that the trial court erred in denying her request to relocate. Susan contends that the trial court did not clearly address the factors set forth in *Staab v. Hurst*, 44 Ark. App. 128, 868 S.W.2d 517 (1994), pertaining to relocation requests, and asks that this Court either reverse or remand for reconsideration of her motion pursuant to *Staab*. Timothy argues that under the rule stated in *Hickmon v. Hickmon*, 70 Ark. App. 438, 19 S.W.3d 624 (2000), Susan's failure at trial to request specific findings under *Staab*, *supra*, constitutes a waiver of those issues on appeal. He further contends that as a result of Susan's waiver, the only review available to her is a *de novo* review in which this Court will determine if the trial court's ruling was clearly erroneous.

■ ■ 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). In custody cases, the primary consideration is the welfare and best interests of the child involved, while other considerations are merely secondary. *Drewry v. Drewry*, 3 Ark. App. 97, 622 S.W.2d 206 (1981). *See* Ark. Code Ann. § 9-13-101(a) (Supp. 1999).

Custody awards are not made or changed to gratify the desires of either parent, or to reward or punish either of them. *Watts v. Watts, supra.* In a similar case, *Carter v. Carter*, 19 Ark. App. 242, 719 S.W.2d 704 (1986), this court found that there was no evidence to support a finding that the appellant was intentionally trying to prevent the child from seeing his father. Likewise, in this case there was no evidence that Susan attempted to move without permission of the court or that she intentionally denied or frustrated Timothy's visitation. We agree that the trial court's decision to change custody under these circumstances was erroneous.

With regard to the trial court's denial of Susan's request to relocate, we note that the trial court did not have the benefit of the supreme court's decision in *Hollandsworth v. Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003). In reversing and remanding the trial court's denial of Ms. Hollandsworth's request to relocate out of state with the parties' two children, and grant of custody to Mr. Knysewski, the court overturned the holding of *Staab v. Hurst*, 44 Ark. App. 128, 868 S.W.2d 517 (1994), and announced a presumption in favor of relocation for custodial parents with primary custody, and factors to be considered by the trial court in relocation requests. The court stated:

> Historically, this court has recognized the right of the custodial parent to relocate and to relocate with his or her children, and we adhere to that determination in this case. Today, we hold that relocation alone is not a material change in circumstances. We pronounce a presumption in favor of relocation for custodial parents with primary custody. The noncustodial parent should have the burden to rebut the relocation presumption. The custodial parent no longer has the obligation to prove a real advantage to herself or himself and to the children in relocating.
>
> The polestar in making a relocation determination is the best interest of the child and the court should take into consideration the following matters: (1) the reason for the relocation; (2)

> the educational, health, and leisure opportunities available in the location in which the custodial parent and children will relocate; (3) visitation and communication schedule for the noncustodial parent; (4) the effect of the move on the extended family relationships in the location in which the custodial parent and children will relocate, as well as Arkansas; and, (5) preference of the child, including the age, maturity, and the reasons given by the child as to his or her preference.

In so holding, the supreme court did not indicate that its pronouncement should have only prospective application. However, since we have concluded that this case must be reversed and remanded, we direct the trial court to reconsider Susan's relocation request in light of the presumption in favor of relocation and the new factors listed in *Hollandsworth.*

Reversed and remanded.

PITTMAN and NEAL, JJ., agree.

Charlotte STRICKLAND *v.* PRIMEX TECHNOLOGIES, *et al.*

CA 02-778 120 S.W.3d 166

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered June 25, 2003

Robert L. Depper, Jr., for appellant.

Shackleford, Phillips, Wineland & Ratcliff, P.A., by: *Norwood Phillips*, for appellees.

JOHN MAUZY PITTMAN, Judge. The appellant in this workers' compensation case filed a claim for benefits asserting that she contracted an occupational disease while employed by appellee Primex Technologies. The Commission denied her claim on the basis of its finding that she failed to give the statutorily-required written notice to her employer within ninety days of

the time she first knew or should have known that she had contracted an occupational disease. For reversal, appellant contends that the Commission erred in finding that her failure to give notice of an occupational disease was not excused. We affirm.

Arkansas Code Annotated § 11-9-603(a)(2)(A) (Repl. 2002) provides that written notice of an occupational disease shall be given to the employer by the employee, or someone on his behalf, within ninety days after the first distinct manifestation thereof. We have held that the ninety-day statutory period does not begin to run until the employee knows or should reasonably be expected to know that he is suffering from an occupational disease. *See Quality Service Railcar v. Williams*, 36 Ark. App. 29, 820 S.W.2d 278 (1991). Furthermore, failure to give notice shall not bar any claim if the employer had knowledge of the injury; if the employee had no knowledge that the condition or disease arose out of and in the course of his employment; or if the Commission excuses the failure on the grounds that, for some satisfactory reason, the notice could not be given. Ark. Code Ann. § 11-9-701(b)(1) (Repl. 2002).

In the present case, appellant became ill at work after exposure to aluminum powder in October 1998, but never provided her employer with anything that could be considered written notice until March 2000. The Commission found that appellant knew or should have known in October 1998 that she was suffering from an occupational disease. This is borne out by the October 14, 1998, report of appellant's physician, Dr. Sarnicki, to the effect that appellant was apparently exposed to aluminum dust and that her condition resolved after she was removed from exposure to it. In addition, the Commission relied on testimony by the appellant indicating that she knew that her claim was cognizable under workers' compensation in October 1998. The Commission also found credible and relied on the testimony of Sharon Lemons of Primex's personnel department, who stated that appellant asked her to file a disability claim for appellant following the incident, but never informed Lemons that appellant's condition was related to exposure to aluminum dust or asked her to file a worker's compensation claim relating to the

aluminum dust incident.[1] The issue is therefore one of credibility, and we have frequently recognized that it is the function of the Commission, and not of this court, to determine credibility of witnesses and the weight to be given their testimony. *Horticare Landscape Management v. McDonald*, 80 Ark. App. 45, 89 S.W.3d 375 (2002). Questions of weight and credibility are, instead, within the sole province of the Workers' Compensation Commission, which is not required to believe the testimony of the claimant or of any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Wal-Mart Stores, Inc. v. Sands*, 80 Ark. App. 51, 91 S.W.3d 93 (2002); *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002).

■ ■ Once the Commission has made its decision on issues of credibility, the appellate court is bound by that decision. *Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). Viewing the evidence, as we must, in the light most favorable to the Commission's findings and giving the testimony its strongest probative force in favor of the action of the Commission, *id.*, we think that reasonable minds could conclude that appellant knew in October 1998 that she suffered from an occupational disease, but that appellee did not know that appellant suffered from an occupational disease, and we therefore must affirm.

Affirmed.

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

GLADWIN and BAKER, JJ., dissent.

KAREN R. BAKER, Judge, dissenting. Appellant suffers from an occupational disease, and appellees do not dispute that her condition was caused by her employment. They merely claim that she is prevented from recovering benefits because she failed to give written notice to her employer that she was suffer-

[1] As the dissent notes, Ms. Lemons did subsequently assist appellant in filing a claim for compensation, but this claim related to a separate incident that took place on October 27, 1999, over one year after appellant learned that she suffered from a compensable occupational disease.

ing from an occupational disease within ninety days of the first manifestation of the disease and that her failure was not excused.

In this case, the Commission found that the employee should have been aware that her disease was occupational, but, at the same time, found that the employer did not have sufficient knowledge of the causal connection between appellant's work and her disease to excuse the notice requirement. Under the facts of this case, these two simultaneous findings are irreconcilable.

The Commission found that appellant knew or should reasonably be expected to be aware of the extent or nature of her injury in October 1998. On October 5, appellant's treating physician diagnosed "questionable reactive airway disease secondary to environmental exposure." On October 7, the doctor noted: "There is some question of whether it is located at her work that it may be causing her to have some wheezing and shortness of breath episodes." Then on October 14: "She is apparently exposed to aluminum dust and upon removal that resolved." Appellant remained off work four or five weeks after this exposure to the aluminum dust.

The employer's human resource director testified that she was responsible for processing workers' compensation claims, insurance, and other paper work related to employees' injuries and illnesses. She stated that when appellant was off work for the five weeks, she filed an illness report and she understood that appellant was ill with bronchitis-type symptoms. She also helped appellant fill out her disability form, which she believed was appropriate, related to appellant's condition. Then in 1999, she filed another illness report. The doctor's report at that time said that appellant's condition was work related, so she filed a worker's compensation claim on behalf of appellant.

Our analysis must focus upon whether the employee had knowledge that she had a claim cognizable under workers' compensation law. *See Desoto, Inc. v. Parsons*, 267 Ark. 665, 590 S.W.2d 51 (Ark. App. 1979) (employee had not been in position to give notice of injury because she had not been aware, until notified by her union, that she had a claim cognizable under

Workers' Compensation Law and that employer and carrier had not been prejudiced by failure of notice).

In this case, both the employee and the employer were aware of the employee's physical impairment in October of 1998, and the employer assisted the employee in completing the necessary insurance forms and documentation concerning her disability. As the employer's human resource director testified, when she filed the subsequent illness report in 1999, the doctor's report said the employee's condition was work related so she filed a worker's compensation claim. On these facts, either the employer and the employee both had knowledge that the injury was work related, or neither had knowledge. I would reverse.

GLADWIN, J., joins.

Kirk RANKIN *v.* DIRECTOR,
Employment Security Department

E 03-51 120 S.W.3d 169

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered June 25, 2003

Appellant, pro se.

Phyllis A. Edwards, for appellee.

SAM BIRD, Judge. On July 3, 2002, this court handed down *Rankin v. Director*, 78 Ark. App. 174, 79 S.W.3d 885 *reh'g denied, review denied* (2002)(*Rankin I*), in which we reversed and remanded the Board's decision denying benefits to appellant pursuant to Ark. Code Ann. § 11-10-513 (Repl. 2002) because he had voluntarily left employment without good cause connected with the work. The rationale of our reversal was that because appellant, who was an inmate at the Arkansas Department of Correction (ADC) participating in a work-release program and assigned to Nucor Steel in Blytheville, was involuntarily transferred by ADC so as to render it impossible for him to continue in Nucor's employment, his reason for leaving his employment was not voluntary. Thus, we held that the Board's conclusion that appellant had voluntarily left his employment was not supported by substantial evidence. Our opinion concluded with the recita-

tion that the matter was reversed and remanded to the Board "for further proceedings consistent with this opinion."

Perhaps understandably, the Board took our recitation to mean that it was authorized to conduct further proceedings. After all, that is what our opinion said. On the other hand, it is not understandable how the Board could have reasonably interpreted our instruction to mean that it was authorized, *sua sponte*, to conduct a hearing for the purpose of determining if there was some other basis under Ark. Code Ann. § 11-10-513, aside from voluntarily leaving work, for denying benefits to the appellant. In the first place, such an interpretation is not consistent with our July 3, 2002, opinion. Secondly, although Ark. Code Ann. § 11-10-529(c)(2)(A) (Repl. 2002) authorizes this court to order that additional evidence be taken before the Board, we did not issue such a directive. Last, and perhaps most importantly, such an interpretation of our instruction contravenes the doctrine of the law of the case.

The doctrine of the law of the case provides that a decision of an appellate court establishes the law of the case for trial upon remand and for the appellate court itself upon subsequent review. *Linder v. Linder*, 348 Ark. 322, 72 S.W.3d 841 (2002). The doctrine prohibits a court from reconsidering issues of law and fact that were decided or issues that could have been raised on appeal, and provides that such issues are conclusively adjudicated and can no longer be litigated by the parties. *Rainbolt v. Director*, 6 Ark. App. 204, 639 S.W.2d 532 (1982). We have held that the doctrine is applicable to administrative agencies generally and, specifically, to the Board of Review. *Id.*

Almost exactly the same thing that has occurred here was prohibited in *Rainbolt v. Director*, 6 Ark. App. 204, 639 S.W.2d 532 (1982) (*Rainbolt II*) under the doctrine of the law of the case. In *Rainbolt v. Director*, 3 Ark. App. 48, 621 S.W.2d 877 (1981) (*Rainbolt I*), the claimant appealed from the Board of Review's decision denying her unemployment benefits on the ground that she had voluntarily quit her job to accompany her spouse to a new place of residence but had not made an immediate entry and become available for suitable work in the new labor market. We reversed the Board's decision, holding that "the Employment

Security Division may be estopped to deny that appellant made an immediate entry into the labor market because of the apparent representations of its agent." We also remanded the case to allow the State an opportunity to present evidence in rebuttal to the claimant's estoppel defense.

We considered the remand appropriate in *Rainbolt I* because it was the first case in which the doctrine of estoppel had been applied to the State in a claim for unemployment benefits. However, upon remand, the Board, although receiving and considering the additional evidence that the State had presented on the issue of estoppel, concluded that the claimant was disqualified for benefits because she had quit her job for personal reasons, a basis of denial entirely different from the reason given for the denial originally. In reversing and remanding *Rainbolt II*, we said that our decision in *Rainbolt I* had become the law of the case and that issues other than estoppel were not open for consideration by the Board on remand because of the applicability of the doctrine of the law of the case. *Rainbolt v. Director*, 6 Ark. App. 204, 207, 639 S.W.2d 532, 534 (1982) (*Rainbolt II*).

Our holding in *Rainbolt II* is clearly controlling in the present case. *Rankin I* came to this court on the single issue of whether the appellant was disqualified for unemployment benefits because he had voluntarily left the employment without good cause connected with the work. We reversed, holding that there was no substantial evidence that appellant's departure from his job at Nucor Steel was voluntary. However, on remand, instead of awarding benefits, the Board of Review conducted a hearing on an entirely different issue. From the evidence at that hearing the Board of Review concluded that claimant was disqualified for benefits because of misconduct connected with the work. This was contrary to the law of the case as established by *Rankin I* and was, therefore, erroneous as a matter of law.

The concurring opinion of Judge Griffen has accused the majority of remaining silent about what he calls "flagrantly injudicious conduct" on the part of the Board of Review. We do not share this characterization of our declination to discuss the manner in which the Board proceeded. Under Ark. Code Ann.

§ 11-10-529(c)(1), in the absence of fraud, our review of the decisions of the Board of Review is limited to a determination of whether the Board's findings of fact are supported by the evidence and whether the Board has erred on questions of law. Our decision concludes that the Board's action was erroneous as a matter of law, and it sets forth the bases for that conclusion. Therefore, no purpose within our jurisdiction is served by launching into an intensive examination of the actions of the Board that apparently led to its error.

We also note Judge Crabtree's concurring opinion in which he agrees with our application of the doctrine of the law of the case to reverse the Board of Review, but he expresses his disagreement with *Rankin I*, decided by a three-judge panel of this court, that reversed the Board of Review's decision denying benefits to Rankin. Whether we now agree or disagree with the decision of the three-judge panel in *Rankin I* is simply not pertinent to the application of the doctrine of the law of the case. Even if the *Rankin I* decision was wrong (and some of the majority may believe that it was), when our decision in *Rankin I* became final, its conclusion that the Board of Review had improperly denied benefits to Rankin on the sole ground that he had voluntarily left his employment without good cause connected with the work became the law of the case. While the holding in *Rankin I* can be overruled in a future case, the doctrine of the law of the case precludes the Employment Security Department, the Appeals Tribunal, the Board of Review, and this court from considering any other basis upon which benefits could be denied to Rankin in this case.

In accordance with our decision in *Rainbolt II*, the proceedings of the Appeal Tribunal and the Board of Review on remand were improper. Therefore, this case is again remanded to the Board of Review with instructions to enter an award requiring the Employment Security Department to pay unemployment benefits to the appellant. Also, as we did in *Rainbolt II*, we direct the Board to certify the record of its decision to this court within thirty days from the date thereof.

Reversed and remanded.

VAUGHT and ROAF, JJ., agree.

GRIFFEN AND CRABTREE, JJ., concur.

HART, J., concurs separately.

WENDELL L. GRIFFEN, Judge, concurring. I join the decision to reverse the Board of Review and remand this case with explicit instructions that it enter an order awarding unemployment benefits to Rankin forthwith. However, I write separately because the majority opinion is silent about what I consider flagrantly injudicious conduct by the Board.

It is certainly accurate to state that our first *Rankin* opinion ended with the instruction that the Board conduct further proceedings "consistent with this opinion." Yet, that statement did not license the Board to defy the law of the case, undertake a unilateral investigation for witnesses to testify on behalf of the unrepresented employer, raise a spurious allegation that Rankin was discharged from his employment because of misconduct, and then render a finding of misconduct contrary to all the proof so it could again deny Rankin unemployment benefits. The majority opinion by Judge Bird and concurring opinion by Judge Crabtree reach the proper result but disregard the flagrantly improper conduct by the Board. I refuse to turn a blind eye to it, nor will I be silent about it.

The history of this claim was set forth in our July 3, 2002 three-member-panel opinion that reversed and remanded the Board of Review's decision to deny Rankin's claim for unemployment benefits. *See Rankin v. Director*, 78 Ark. App. 174, 79 S.W.3d 885 (2002). While an inmate at the Arkansas Department of Correction, Rankin took part in a work release program wherein he was employed by Ready Temps Employment, LLC, and placed by that firm to work at the Nucor-Yamato Steel Mill located near Blytheville, Arkansas. When the Department of Correction transferred Rankin to its Brickeys Unit for his eventual parole, he was no longer allowed to participate in the work-release program. Rankin filed for unemployment benefits. Although the Employment Security Department's hearing officer found that Rankin had no choice in his removal from the work-release program, she concluded that he "voluntarily left his last work without good cause connected with the work." The Board of Review affirmed and adopted that

decision. Our previous opinion reversed the Board's finding that Rankin voluntarily left his last employment as defined by Ark. Code Ann. section 11-10-513; we held that the finding was not supported by substantial evidence. The final sentence of the opinion authored by Judge Jennings reads: "We therefore reverse and remand this case to the Board of Review for further proceedings consistent with this opinion."

On remand, the Board of Review did not direct the Department to pay benefits. Rather, the Board, acting on its own instance and without petition from or involvement by the employer (Ready Temps), conducted a second evidentiary proceeding from which issued another decision on January 31, 2003. That decision again affirmed the Department's determination that Rankin was disqualified from receiving unemployment benefits, albeit based on a "modified" finding "that [he] was discharged from last work for misconduct connected with the work." Rankin now raises a *pro se* appeal from the second adverse ruling by the Board and argues that it lacks substantial evidence.

At the outset, I confess that the Board's action in conducting another evidentiary hearing on remand to determine whether to reimpose its earlier decision to deny benefits on the ground of misconduct is disquieting. When Rankin first appealed the denial of his claim by the Department, the Appeal Tribunal order recites that the issue was "Whether the claimant voluntarily left, was discharged, or suspended from last work and whether the circumstances of the separation entitle the claimant to benefits in accordance with Ark. Code Ann. § 11-10-513 *or* § 11-10-514." (Emphasis added). Arkansas Code Annotated section 11-10-513 provides that persons who voluntarily leave their last employment without good cause connected with the work are disqualified from receiving unemployment benefits. Arkansas Code Annotated section 11-10-514 provides that persons discharged from their last employment because of misconduct are disqualified from receiving unemployment benefits. The record associated with Rankin's first appeal indicates that the employer did not participate in the December 11, 2001 hearing by the Appeal Tribunal that led to the original finding that "the claimant voluntarily left last work without good cause connected with the work." Until our previous decision,

Ready Temps had not entered an appearance before the Appeal Tribunal or the Board of Review to argue or prove that Rankin was discharged from employment, let alone for misconduct.

According to the "Hearings and Appearances" section of Board of Review opinion following our remand, "a telephone hearing was conducted before the Board of Review on November 5, 2002. The claimant testified in his own behalf. *The listed employer was not represented, although notice was mailed to its last known address. Warden Joe Porchia, Center Supervisor at the Mississippi County Work-Release Center for the Arkansas Department of Correction, testified at the Board's request.*" (Emphasis added). Thus, it is clear that instead of entering an order directing the Department to pay unemployment benefits to Rankin consistent with our previous decision, the Board of Review conducted another hearing to examine the already unproven misconduct ground for denying benefits.

The record of the proceeding on remand reveals that on October 25, 2002, the Board of Review mailed a "Notice of Telephone Hearing" to Rankin and Ready Temps about a hearing scheduled on November 5, 2002, at 9:00 a.m. Copies of the notice were mailed to the local ESD office, to Joe Porchia, Warden at the Mississippi County Work Release Center, and to Mark Colbert, Attorney for the Arkansas Department of Corrections, as well as to our court. The hearing notice also states:

> Pursuant to a remand by the Arkansas Court of Appeals (E 02-40), the Board of Review directs that additional evidence be taken in further hearing. The primary issue involved is: Whether the claimant was discharged or suspended from last work and whether the circumstances of the separation or suspension entitle the claimant to benefits under Ark. Code § 11-10-514.
>
> The parties are notified that the hearing may involve any questions having a bearing on the claimant's right to benefits up to the time of the hearing. <u>The claimant's and the employer's testimony will be taken by a staff attorney at the date and time indicated below.</u>

The November 5, 2002 telephone hearing was conducted by T. Kevin O'Malley, a Staff Attorney for the Board of Review. Rankin appeared on his own behalf. The employer did not par-

ticipate. Warden Porchia of the Mississippi County Work Release Center testified at the request of the Board of Review. The record of that telephone hearing contains the following preliminary statement by Staff Attorney O'Malley.

> This hearing is being conducted as a result of a remand from the Arkansas Court of Appeals. The, a little short history here: The Arkansas Appeal Tribunal, on December the 12th, 2001, issued a determination denying Mr. Rankin benefits under Arkansas Code Annotated §11-10-513 on the finding that he voluntarily left last work without good cause connected with work. The Arkansas Board of Review, where I am, on January the 25th, 2002, affirmed the Appeal Tribunal decision and Mr. Rankin was disqualified from benefits. Mr. Rankin subsequently filed an appeal to the Arkansas Court of Appeals, and the Court of Appeals, on July the 3rd, 2002, reversed the Board of Review decision and remanded it to the Board. How did they put it? "We therefore reverse and remand this case to the Board of Review for further, for further proceedings consistent with this opinion." And in the Court of Appeals opinion, it held that, "it follows that the Board's finding that Mr., that Rankin voluntarily left his last work is not supported by substantial evidence."
>
> *So they said he was, you didn't voluntarily leave last work and that they wanted us to take another look at this case. So that apparently leaves us with the position that if you didn't, if he didn't voluntarily quit, he must have been discharged, since they didn't say otherwise, and Mr. Rankin did file a motion for clarification. I don't have that specific date down, but that motion was denied, and so we are here today . . . to take more testimony concerning why Mr. Rankin was no longer employed by the Yamato Steel. . . . Nucor-Yamato Steel, and he was employed by Ready Temps Employment, but they're no longer in business and they have not responded to the Notice of Telephone Hearing, and the only person we could figure out might have some information about this was Joe Porchia, the warden at the Mississippi County Work-Release Center, besides Mr. Rankin. So we've contacted Warden Porchia, and he is going to present testimony that he's aware of concerning the circumstances of this case. So the procedure we're going to follow, because this is somewhat of an unusual situation here, . . . normally in a discharge, the employer tells why the employer was discharged, why they're no longer working there. However in this case, we don't have an employer here, ...* (Emphasis added.)

The Board of Review's January 31, 2003 decision following our remand sheds additional light on why it deemed another evidentiary hearing necessary after we reversed its first decision denying Rankin's claim for benefits. At Page 2 of the decision, one reads the following statement:

> To comply with the Court's opinion, the Board conducted a hearing pursuant to its discretionary authority under Arkansas Code Annotated § 11-10-525, to take additional evidence concerning the circumstances of the separation. The Board deemed the additional hearing necessary because the evidence previously obtained by the Department and the Tribunal was relevant to the question of whether the claimant quit the employment, pursuant to Ark. Code Ann. § 11-10-513; no evidence had been adduced on the issue of a discharge and whether or not the discharge was due to misconduct connected with the work, pursuant to Ark. Code Ann. § 11-10-514. *This approach was tacitly approved by the Court when it denied the claimant's motion to clarify on October 23, 2002.* (Emphasis added.)

The assertion that our court "tacitly approved" another evidentiary hearing regarding misconduct on remand is unfounded. We denied Rankin's motion to clarify our July 3, 2002 decision for several reasons. First, we do not issue advisory opinions. Second, the motion to clarify was filed outside the time period for a petition for rehearing. Furthermore, the motion to clarify was not a petition for rehearing in any event because it did not allege any legal error in our original decision. We did not have jurisdiction to direct the Board of Review about anything once our mandate was issued. Acting consistent with these realities did not amount to our approval, tacit or otherwise, of anything the Board of Review did on remand that was not "consistent with" our original decision reversing the denial of benefits.

Furthermore, Ark. Code Ann. § 11-10-525, the provision cited by the Board of Review as authority for conducting the second hearing on remand, does not authorize the Board of Review to disregard an appellate court decision reversing the Board's decision to deny benefits and remanding for "further proceedings consistent with this opinion," nor does the statute empower the Board to conduct an exercise aimed at finding another way around

awarding Rankin's unemployment benefits on remand from our previous decision. Our previous opinion clearly did not remand the case to the Board with instructions that it make additional findings regarding the employment separation, nor did it even suggest that further evidence on the employment separation should be taken and adjudicated before benefits could be paid.

Yet, the record provides clear proof that the November 5, 2002 telephone hearing amounted to an evidentiary proceeding for that specific purpose. The hearing was scheduled although the employer did not request it, did not attend it, and had gone out of business. When he outlined what would happen after the telephone hearing on remand, Staff Attorney O'Malley stated:

> When we're finished with questions and answers, . . . I will give each of you [Rankin and Porchia] the opportunity to make a closing statement, and then we will close the record. . . . The Board will make its decision. This decision will be mailed out to the parties. Whoever is disfavored by the decision, *and I guess the only person that could be disfavored, Mr. Rankin, would be you, especially since Ready Temps no longer is in business. . . . If, if the decision's not favorable to you, you will have appeal rights to the Arkansas Court of Appeals.* (Emphasis added.)

O'Malley's statement demonstrates that the Board fully realized that its exercise could only adversely affect Rankin.

The Board of Review had no basis to conduct a second evidentiary proceeding on remand to determine whether Rankin was disqualified from receiving benefits due to misconduct. Our first decision was the law of the case on the separation. The Department and employer had the chance to argue and prove misconduct before the first appeal. Ready Temps did not cross-appeal from the Board's first decision denying benefits to argue that the Board should have also found Rankin disqualified due to misconduct. Our remand order "for further proceedings consistent with this opinion" did not countenance additional evidentiary hearings surrounding the employment separation. It certainly did not intimate that the Board was authorized to undertake a second analysis aimed at disproving Rankin's unemployment claim.

The Board's hearing officer declared, and the Board's January 31, 2003 opinion states, that the Board contacted Warden Porchia. What the Board's opinion does not disclose, yet what is unmistakable from the record of the November 5, 2002 telephone hearing, is that Warden Porchia was allowed to question Rankin. The hearing officer acknowledged that the Arkansas Department of Corrections was not the employer. Nevertheless, after Rankin was examined by the hearing officer, the hearing officer said to Porchia: "Warden Porchia, any questions to Mr. Rankin?" Porchia then questioned Rankin about the events surrounding his (Rankin's) reassignment by the Department of Corrections from work-release status. This was the same controversy that led to the first appeal and our previous decision. The hearing officer did not explain why Porchia, a nonparty, was allowed to interrogate Rankin. The Board's opinion is mysteriously silent on this "unusual" development. Neither the majority opinion nor the concurring opinion by Judge Crabtree mention this blatant deviation from the process commonly understood to be fair.

Thus, the Board not only instigated the hearing on remand; it also took the highly unusual step of finding a witness (Warden Porchia) from whom it elicited testimony aimed at defeating Rankin's claim on the purported ground that he was discharged because of misconduct. Then the Board allowed that witness to function as Rankin's adversary for the purpose of cross-examination. To this extent, at least, I agree with Staff Attorney O'Malley that "this is somewhat of an unusual situation . . . ."

Plainly, the Board's "modified finding" on remand that Rankin "was discharged from last work for misconduct connected with the work" is not supported by substantial evidence. We have stated the legal standard required to establish misconduct under Ark. Code Ann. § 11-10-514 countless times. Misconduct for the 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 its employees; and (4) disregard of the employee's duties and obligations to the employer. *Greenberg v. Director*, 53 Ark. App. 295, 922 S.W.2d 5 (1996). To constitute misconduct, there must be more than mere inefficiency, unsatis-

factory 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. *Carraro v. Director*, 54 Ark. App. 210, 924 S.W.2d 819 (1996).

No proof in the record before us remotely approaches this standard. No witness testified and no other evidence was introduced, either at the appropriate hearing leading to the first appeal or the unauthorized and unwarranted hearing following remand, that Rankin was discharged, let alone due to misconduct. No evidence was introduced, including the testimony by Warden Porchia that is mentioned in the Board of Review decision, about any Ready Temps policy, directive, instruction, or command violated by the claimant. There is no proof whatsoever supporting the Board's finding on remand that "the claimant's failure to seek permission from Nucor-Yamato to change his work schedule in order to allow his participation in the SATP [Substance Abuse Treatment Program] program was misconduct." Nucor-Yamato was not the employer. There was no proof that Rankin was required to obtain permission from Ready Temps before he could apply for the Substance Abuse Treatment Program, let alone proof that he was discharged because he did not obtain it.

Like Minerva, the Roman goddess of wisdom who sprang full-grown from Jupiter's head, the contention and conclusion on remand that Rankin was discharged and that the discharge resulted from misconduct sprang full-bodied from the mind and effort of the Board of Review. However, what the Board did was neither wise nor fair. Simply put, the Board of Review was wrong to disregard our directive on remand. It also was wrong about having statutory authority to conduct the second evidentiary hearing, and equally wrong in believing that we "tacitly approved" that exercise. It was not only unusual, but was highly improper for the Board to essentially become surrogate counsel for the employer, find Warden Porchia, invite him to the November 5, 2002 hearing, while also purporting to act as impartial arbiter of the facts. Finally, the Board committed reversible error when it found that

Rankin was discharged due to misconduct absent proof that he had been discharged for any reason and in the face of our previous decision. The fact that the Board sought out Warden Porchia, apparently determined that he possessed information it unjustifiably considered pertinent concerning Rankin's separation from employment, accorded Porchia treatment otherwise provided the employer or its designated representative, and then issued a "modified finding" favoring the absent employer with no proof of anything constituting misconduct, could cause some observers to deem the Board's process on remand prejudiced against Rankin and biased in favor of his former employer.[1]

Rankin has endured almost a year of unnecessary and unjustified delay in receiving unemployment benefits the Board should have ordered paid after our July 3, 2002 decision. That delay must end forthwith.

TERRY CRABTREE, Judge, concurring. I concur in the reversal of the Board's decision and join the opinion authored by Judge Bird. However, I write separately to express my disapproval of this court's initial decision in *Rankin v. Director*, 78 Ark. App. 174, 79 S.W.3d 885 (2002) (*Rankin I*).

Based on the evidence before us, in *Rankin I* we held that the claimant could not be said to have "voluntarily" quit his job because he had "no choice in the matter" of being removed from the work-release program. I disagree with that conclusion because it glosses over the reality that the appellant was employed while an inmate in prison.

The public policy behind our Employment Security Act is to benefit persons unemployed *through no fault of their own*. Ark. Code Ann. § 11-10-102(3) (Repl. 2002). Thus, our law provides that an individual is disqualified for benefits if he left his last work voluntarily and without good cause connected with the work.

---

[1] *See* Canon 3(B)(5) of the Arkansas Code of Judicial Conduct. Canon 3(B)(5) states: A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, . . . and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

The appellant, of his own volition, committed an act prohibited by the penal laws of this State and was thus imprisoned as a consequence of his own actions. While in prison, he was necessarily subject to the rules established by the prison authorities. As a matter of grace and privilege, he was allowed to participate in the work-release program. By rule, he was later denied that privilege. In my view, appellant voluntarily placed himself in a position where his choices were dictated by others. In keeping with the stated purpose of the Act, I would conclude that appellant's separation from the work-release program was "voluntary."

Although I disagree with it, I am bound by our decision in *Rankin I.* Therefore, I concur in today's decision.

Justin PORTER *v.* STATE of Arkansas

CA CR 02-1237 120 S.W.3d 178

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered June 25, 2003

Osmon & Ethredge, by: *David L. Ethredge*, for appellant.

Mike Bebee, Att'y Gen., by: *David J. Davies*, Ass't Att'y Gen., for appellee.

WENDELL L. GRIFFEN, Judge. This appeal arises from a conviction of driving while intoxicated, third offense, of appellant, Justin Porter, in Baxter County. Appellant argues (1) that the trial court erred in finding him guilty of driving while intoxicated because the blood test taken in accordance with Ark. Code Ann. § 5-65-201 (Repl. 1997) showed a chemical analysis

of .05% by weight of his blood; and (2) that the trial court erred in admitting and considering a hospital blood test as definitive proof of his intoxication when the test was not taken in accordance with the Arkansas Omnibus DWI Act. We reverse and dismiss.

On the morning of May 20, 2001, appellant crashed his car at roughly 6:30 a.m. while on his way to work, in a one-vehicle accident. Appellant was alone in the vehicle. At appellant's subsequent bench trial, Arkansas State Trooper Jim Brown testified that he arrived on the scene shortly after the accident. Brown smelled the strong odor of alcohol on appellant's person. He questioned appellant at the site of the accident about his operation of the vehicle. Appellant told Brown that he was on his way to work. Brown accompanied appellant to the Baxter County Hospital, where appellant received treatment for his injuries and where two blood-alcohol tests were performed on him.

The hospital's patient summary report indicated that the first blood-alcohol test occurred at or around 7 a.m. The test showed a blood-alcohol content of .0904%. At trial, Deborah K. Williams testified that she was the Director of Laboratory Services at Baxter Regional Hospital and that she was responsible for the supervision of blood samples and processing those samples. She did not supervise the drawing of blood from appellant because she was not then employed at the hospital. However, she testified that the hospital followed a certain protocol for drug blood tests involving cleansing the test site with a non-alcohol preparation substance and drawing the blood only after the site was cleaned. The blood thus drawn was processed in the chemistry department of the hospital's laboratory, followed by a report of the results. Williams testified that she saw no reason to believe that this procedure was not followed in the case of appellant's first blood test. At the end of Williams's testimony, the State moved to admit the hospital patient summary report into evidence. Counsel for appellant did not object.

Counsel for appellant subsequently cross-examined Williams, thus establishing that Williams could not tell whether a nurse, a technician, or a doctor drew the first blood test. Cross-examination also elicited Williams's testimony stating that because the first

blood test was drawn for a physician on a physician's order, the hospital personnel, regardless of who actually drew the blood, would have followed the above procedure.

Concerning the second blood test, Officer Brown testified that he observed the second blood test being conducted at around 9 a.m. Brown stated that Julie McCoy, a lab technician, drew the blood. Brown asked her specifically to use a "red solution" rather than alcohol in preparation for needle insertion. According to the officer, the red substance looked and smelled like Betadine, a substance he had seen being used in preparation of blood alcohol tests several times before. Brown sent the sample to the Arkansas State Crime Laboratory and eventually received a result of .05%.

At the end of the State's case, counsel for appellant moved to dismiss. He stated specifically:

> The State has not proved that my client was intoxicated at the time the accident occurred. By the admission of the Trooper, at six-thirty the time of the collision, the test was drawn some time before seven o'clock. By the blood alcohol given by the State he was .09 at the time that this incident occurred, I believe the blood alcohol of the State of Arkansas was .10. This occurred in May of 2001 and the law had not yet changed. At the time that this occurred, he was under the legal limit of the State of Arkansas, and so with that I don't believe the State can move forward in proving my client was intoxicated.

The following colloquy took place:

> STATE: Judge, I think it's in the discretion of the Court as to the totality of the circumstances between .05 and .10, Judge.
>
> THE COURT: It's a discretionary matter. The motion will be denied.

At this point, counsel for appellant chose to rest his case. The remainder of the hearing concerned sentencing. The trial court convicted appellant of DWI, third offense, and sentenced him to twelve months in county jail with sixty days suspended. Appellant was placed on one year of supervised probation and ordered to pay court costs of $300 and a fine of $1,500. From this conviction arises this appeal.

Analysis

Appellant's first point, and his motion to dismiss in the court below, constitutes a challenge to the sufficiency of the evidence. *See* Ark. R. Crim. P. 33.1(b) (2003); *see also Green v. State*, 79 Ark. App. 297, 87 S.W.3d 814 (2002). On appeal of the denial of a motion for dismissal, we test the sufficiency of the evidence to determine whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* We need only consider the evidence supporting the guilty verdict, and we view that evidence in the light most favorable to the State. *Id.* Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Edmond v. State*, 351 Ark. 495, 95 S.W.3d 789 (2003). Circumstantial evidence may provide the basis to support a conviction, but it must be consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. *Id.*

At the time of appellant's offense, Ark. Code Ann. § 5-65-103 (Rep. 1997) provided:

> (a) It is unlawful and punishable as provided in this act for any person who is intoxicated to operate or be in actual physical control of a motor vehicle.
>
> (b) It is unlawful and punishable as provided in this act for any person to operate or be in actual physical control of a motor vehicle if at that time there was one-tenth of one percent (0.10%) or more by weight of alcohol in the person's blood as determined by a chemical test of the person's blood, urine, breath, or other bodily substance.

In order to convict, the State must prove all elements under both subsections of Ark. Code Ann. § 5-65-103. *Neble v. State*, 26 Ark. App. 163, 762 S.W.2d 393 (1988). Furthermore, the Code provides, based on certain blood-alcohol levels within four hours after the alleged offense:

> (1) If there was at that time one-twentieth of one percent (0.05%) or less by weight of alcohol in the defendant's blood, urine, breath, or other bodily substance, it shall be presumed that the defendant was not under the influence of intoxicating liquor;

> (2) If there was at the time in excess of one-twentieth of one percent (0.05%) but less than one-tenth of one percent (0.10%) by weight of alcohol in the defendant's blood, urine, breath, or other bodily substance, such fact shall not give rise to any presumption that the defendant was or was not under the influence of intoxicating liquor, but this fact may be considered with other competent evidence in determining the guilt or innocence of the defendant.

Ark. Code Ann. § 5-65-206(a)(1)-(2) (Repl. 1997). The Arkansas Supreme Court has held competent evidence supporting a DWI conviction to consist of a defendant's blood-alcohol content of .06 percent, police officers' testimony that they did not doubt that the defendant was intoxicated, that they observed the defendant's slurred speech and red and glassy eyes, and that one officer smelled the odor of intoxicants on the defendant, who also admitted that he had "had a few." *State v. Johnson*, 326 Ark. 189, 931 S.W.2d 760 (1996) (reversing trial court's grant of directed verdict to the defendant based on low blood-alcohol level).

Here, we hold that the State did not prove DWI. The first blood test showed a result of .0904 percent blood-alcohol level. Even though this result may be used as evidence, according to Ark. Code Ann. § 5-65-206(a)(2), it does not trigger a presumption of intoxication. The second blood test, upon request of the investigating police officer, resulted in only .05 percent blood alcohol level, not in excess of the then legal limit.

The State also points us to the testimony of Officer Brown, indicating that appellant emitted a strong odor of intoxication when Brown came into contact with appellant. That happened around 6:30 in the morning, after appellant had crashed his vehicle in a one-vehicle accident, on his way to work. We certainly defer to the trial court's superior ability to assess witness credibility, *Crain v. State*, 78 Ark. App. 153, 79 S.W.3d 406 (2002). We do not doubt officer Brown's credibility in the question whether or not appellant omitted a strong odor of intoxication. However, we find this testimony insufficient to support the DWI conviction.

We recognize that Ark. Code Ann. § 5-65-206(a)(1)-(2) enables our trial courts to consider evidence of blood

alcohol content in excess of .05 percent, but less than .10 percent. We also acknowledge that our supreme court, as stated above, has found sufficient evidence in a case where the defendant's blood alcohol content was .06 percent, but where police testimony also established that defendant had slurred speech, red and glassy eyes, that he smelled of intoxicants, and that defendant admitted that he had a few drinks. *See State v. Johnson, supra.* However, the present case before us involves a defendant whose blood-alcohol content—according to the only blood test conducted according to statutory requirements—was .05 percent. Furthermore, available police testimony merely established that appellant emitted a strong odor of intoxication. There was no testimony concerning speech pattern, appearance of appellant's eyes, any admission of his, or anything else that would support a finding of intoxication. We decline to draw a sweeping inference from an odor alone because odor, by itself, does not yet tell whether the person actually drank alcohol above the legal limit. We have previously held that the fact of an accident and odor of intoxicants alone does not constitute substantial evidence of intoxication. *Stivers v. State*, 64 Ark. App. 113, 978 S.W.2d 749 (1998). In that case, the accused had a one-car accident and the investigating officer testified that the accused seemed unresponsive and sleepy after the accident. *Id.* We found it reasonable to infer that his injuries rather than intoxication could have caused his impaired response. *Id.* In our present case, in light of the fact that neither blood test resulted in blood-alcohol levels in excess of the then legal limit, we cannot now hold that appellant's case is one in which blood-alcohol content and a mere allegation of an odor of intoxication is sufficient proof for DWI. Therefore, we reverse and dismiss.

Concerning appellant's remaining point, we note that appellant failed to preserve for appeal his second argument, concerning the alleged erroneous admission of the results of the first blood-alcohol test, because appellant failed to file a motion *in limine* concerning the test results before the trial or otherwise object to the admission of the results at trial. The failure to object or raise an issue in a motion prevents an issue from being raised for the first time on appeal. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

Reversed and dismissed.

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

BIRD and CRABTREE, JJ., dissent.

TERRY CRABTREE, Judge, dissenting. Based on our standard of review, I am unable to say that there is no substantial evidence to support appellant's conviction for driving while intoxicated, third offense. Therefore, I respectfully disagree with the majority's reversal of this conviction based on insufficient evidence.

The facts of this case are straightforward. State Trooper Jim Brown investigated a one-vehicle accident that occurred at around six o'clock on Sunday morning, May 20, 2001. The appellant was the driver and sole occupant of the vehicle that was involved in the wreck. While at the scene, Officer Brown detected the odor of alcohol about appellant's person. Brown described the odor as being "strong."

Appellant was taken to the hospital. A blood sample was drawn by the hospital at 7:00 a.m., and testing of that sample showed appellant's blood-alcohol content to be .0904%. This test result, and the testimony given about it, were admitted into evidence without objection. Another blood sample was taken at 9:00 a.m. at the direction of Officer Brown. The result of that test showed a blood-alcohol level of .05%.

Our legislature has provided two different ways of proving a DWI violation. *Wortham v. State*, 65 Ark. App. 81, 985 S.W.2d 329 (1999). At the time of the offense, Arkansas Code Annotated section 5-65-103 (Repl. 1997) provided that (a) it is unlawful . . . for any person who is intoxicated to operate or be in actual physical control of a motor vehicle, or (b) it is unlawful . . . for any person to operate or be in actual physical control of a motor vehicle if at that time there was one-tenth percent (0.10%) or more by weight of alcohol in the person's blood as determined by a chemical test of the person's blood, urine, breath, or other bodily substance. In order to be in violation of this statute, it need only be proven that the accused was "intoxicated"; it is not necessary for it to be proven that the accused's blood-alcohol content reached the

level .10%. *Mace v. State*, 328 Ark. 536, 944 S.W.2d 830 (1997); *State v. Johnson*, 326 Ark. 189, 931 S.W.2d 760 (1996); *Tauber v. State*, 324 Ark. 47, 919 S.W.2d 196 (1996). The term "intoxicated" means influenced or affected by the ingestion of alcohol 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 or other motorists or pedestrians. Ark. Code Ann. § 5-65-102(1) (Repl. 1997). Arkansas Code Annotated section 5-65-206(a)(1) (Supp. 2000) provides that, if the amount of alcohol in the defendant's blood within four hours of the offense is .05% or less, then it is presumed that the defendant was not under the influence of an intoxicating liquor. If the defendant's blood-alcohol content exceeds .05% but is less than .10%, there is no presumption that the defendant was or was not under the influence of intoxicating liquor, but this fact may be considered with other competent evidence in determining the defendant's guilt or innocence. Ark. Code Ann. § 5-65-206(a)(2).

Appellant argues on appeal that the evidence is insufficient based on the test result showing a blood-alcohol content of .05% and the afore-mentioned presumption found in Ark Code Ann. § 5-65-206(a)(1). This argument ignores, however, the contradictory blood-alcohol result which showed an increased level of alcohol at .0904%. Variances and discrepancies in the proof go to the weight and credibility of the evidence and are, therefore, matters for the factfinder to resolve. *Hunter v. State*, 62 Ark. App. 275, 970 S.W.2d 323 (1998). Accordingly, it was for the factfinder to resolve any conflicts and inconsistencies in the evidence. *Id.*

In determining the sufficiency of the evidence to support a criminal conviction, the appellate court is to view the evidence in the light most favorable to the appellee and to consider only the evidence that supports the verdict. *Miles v. State*, 350 Ark. 243, 85 S.W.3d 907 (2001). When the evidence is viewed in the appropriate light, it shows a blood-alcohol level of .0904%, which is, incidentally, just shy of .10% and much greater than .05%. In addition to that test result showing a substantial presence of alcohol, there was evidence that appellant was involved in a one-vehicle accident, and there was testimony from the investigating officer

that there was a strong odor of alcohol about appellant's person. The blood-alcohol test result in evidence here distinguishes this case from *Stivers v. State*, 64 Ark. App. 113, 978 S.W.2d 749 (1998), where we found the evidence to be insufficient where the State's proof showed only that the appellant smelled of alcohol and was involved in a one-vehicle accident. Based on the .0904% test result, the strong odor of alcohol, and appellant's apparent loss of control of his vehicle, I cannot say that there is no substantial evidence to support the trier of fact's conclusion that appellant was affected by the ingestion of alcohol to such a degree that his reactions, motor skills, and judgment were substantially altered such that he constituted a clear and substantial danger of physical injury or death to himself and others.

The majority reaches a contrary conclusion by discounting the test result of .0904%. It does so by weighing the evidence, passing judgment on the credibility of the evidence, and resolving the conflicts in the evidence in appellant's favor. However, it was for the factfinder to make those determinations, not this court on appeal. It is simply our job to determine whether there is substantial evidence to support the verdict, viewing the evidence in the light most favorable to the appellee and considering only the evidence that supports the verdict. The .0904% test result was admitted into evidence without objection and was competent evidence for the trial court to consider and deem trustworthy. Under a proper application of our standard of review, appellant's conviction must be affirmed.

Appellant's second point concerns the trial court's admission of the .0904% test result. The majority states that it is not addressing that issue. However, in determining that the evidence is insufficient, the majority has in fact embraced the arguments raised by appellant in his second point for reversal. This is wrong. This test result was admitted without objection and any issue as to its admissibility has not been preserved for appeal. Secondly, in reviewing the sufficiency of the evidence, the appellate court is to consider in its review all of the evidence, even that which might be considered inadmissible. *Harris v. State*, 284 Ark. 247, 681 S.W.2d 334 (1984).

The effect of the majority opinion is that a driver's crashing of his car in a single-car accident, accompanied by proof that the driver had a strong smell of alcohol about him and tested positive with a .0904% blood-alcohol content, is not sufficient, as a matter of law, to sustain a conviction for DWI. The majority opinion suggests that under *State v. Johnson*, 326 Ark. 189, 931 S.W.2d 760 (1996), these factors must also be accompanied by proof of slurred speech, glassy eyes, and a confession before a finding of guilt can be made. This was not the holding of the supreme court in *Johnson v. State*, and today's decision marks a significant departure from existing case law, and is an additional basis for my dissent.

I am authorized to state that Judge SAM BIRD joins in this opinion.

WAL-MART STORES, INC., Employer and
Claims Management, Inc. *v.* Kemberly M. BROWN, Employee

CA 03-81 120 S.W.3d 153

Court of Appeals of Arkansas
Divisions II and III
Opinion delivered June 25, 2003

[Petition for rehearing denied July 30, 2003.]

Roberts Law Firm, P.A., by: *Michael Lee Roberts* and *Patrick L. Spivey*, for appellants.

Philip M. Wilson, P.A., for appellee.

LARRY D. VAUGHT, Judge. This is an appeal from a decision of the Arkansas Workers' Compensation Commission finding that appellee was entitled to a one-time change of physician and at least a one-time visit to that physician at appellants' expense. Appellants raise two points on appeal: (1) the Commission committed legal error by holding that it is without

authority to find that the appellants had fulfilled their obligation of providing adequate medical treatment; (2) there is no substantial evidence to support that appellee's treatment with the new physician was reasonably necessary and related to her compensable injury. We affirm.

Appellee Kemberly Brown sustained an admittedly compensable right-hand injury on December 3, 1997, while lifting boxes at work. Appellee was initially treated by Dr. Charles Cardona, who referred her to an orthopaedic specialist, Dr. Gordon Newbern. In February 1998, Dr. Newbern referred appellee to his partner, Dr. Earl Peeples. Dr. Peeples ordered an MRI, which did not show any abnormality related to appellee's hand.

On October 13, 1999, a hearing was held on the issue of additional medical treatment. The administrative law judge (ALJ) found in his November 22, 1999 opinion that appellee was entitled to additional medical treatment with her authorized treating physician, Dr. Peeples. After being awarded additional medical treatment, appellee went to see Dr. Peeples only one additional time. Appellee did not seek further medical treatment for her injury for almost two years after her last visit with Dr. Peeples.

Pursuant to a hearing conducted on January 23, 2002, the ALJ filed an opinion on March 18, 2002, finding that appellee was entitled to a one-time change of physician from Dr. Peeples to her family doctor, Dr. Jim Citty, pursuant to Ark. Code Ann. § 11-9-514(a)(3)(A)(ii) (Repl. 2002). However, the ALJ also determined that appellee was not entitled to additional treatment from Dr. Citty at appellants' expense because the proposed visit was not reasonably necessary for the treatment of her compensable injury. Appellee appealed to the full Commission, which modified the ALJ's decision in its October 18, 2002 opinion and found that not only was appellee entitled to a one-time change of physician, but also that at least the initial visit with the new physician would be at appellants' expense. From that decision comes this appeal.

■ In reviewing decisions from 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 affirm if the decision is supported

by substantial evidence. *Daniels v. Arkansas Dep't of Human Servs.*, 77 Ark. App. 99, 72 S.W.3d 128 (2002). Substantial evidence exists if reasonable minds could reach the same conclusion. *Id.* The issue on appeal is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm the Commission's decision. *Hayes v. Wal-Mart Stores*, 71 Ark. App. 207, 29 S.W.3d 751 (2000). 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 conclusions arrived at by the Commission. *White v. Georgia-Pacific Corp.*, 339 Ark. 474, 6 S.W.3d 98 (1999).

At the January 23, 2002 hearing before the ALJ, appellee requested to be seen by the doctor of her choice, her family physician, Dr. Citty, or in the alternative, an independent medical evaluation by the Commission's choice of doctor. Appellee had not seen a doctor of her choice regarding the compensable injury and was continuing to have problems with her hand subsequent to her treatment with Dr. Peeples. Appellee testified that ever since the accident, she has had symptoms of pain, burning, and numbness. She subsequently sought an examination from Dr. Citty on her own, and he suggested additional testing or treatment for pain. She further testified that she needed to see her family doctor because he was also treating her for hypoglycemia, and she wanted someone who would consider her whole range of health issues in determining treatment. This was a concern because Dr. Peeples initially prescribed medications that would alter or adversely affect the condition.

On appeal, the Commission found that based upon the evidence, appellee was entitled to a one-time change of physician and held that appellants were also responsible for the payment of the initial visit to Dr. Citty. Although the Commission did not make specific findings of fact on whether any treatment proposed by Dr. Citty was reasonably necessary to appellee's compensable injury, it determined that requiring appellants to pay for the initial visit was the only logical way to allow appellee her one-time change of physician and to determine whether or not that physician's rec-

ommendations with respect to treatment, if any, could be considered reasonable or necessary.

The Commission's decision was based on our holding in *Collins v. Lennox Ind., Inc.*, 77 Ark. App. 303, 75 S.W.3d 204 (2002), where we reversed the Commission, which had found that an injured worker failed to establish that he was entitled to any additional medical treatment, and on that basis denied his request for a one-time change of physician. We discussed Ark. Code Ann. § 11-9-514(a)(3)(A)(ii), which no longer vests discretion in the Commission to grant or deny a change of physician. The statute now provides that if the employer has contracted with managed care, the claimant has an absolute right to a change of physician. We held in *Collins* that the Commission's finding that the employer had fulfilled the obligation of providing adequate medical treatment without allowing the mandatory change of physician was not supported by substantial evidence.

In the instant case, appellants claim that *Collins* is limited to that particular change-of-physician issue, and that it did not specifically address the issue of an employer's financial responsibility for treatment with the physician to whom the individual changes. Appellants maintain that the applicable statute, Ark. Code Ann. § 11-9-514(a)(3)(A)(ii), addresses only whether the new physician will be an "authorized" treating physician, and not whether the employer must pay for treatment provided by the new doctor. They contend that while the Commission has no discretion in granting a change-of-physician request, nothing in the statute takes away the Commission's power to determine the question of fact of whether the additional treatment is reasonably necessary.

Appellants also argue that it is not the change-of-physician statute that addresses employer liability for treatment with a new authorized physician, but rather Ark. Code Ann. § 11-9-508(a) (Repl. 2002), which expressly states that employers are only liable for treatment that is reasonably necessary in connection with the injury received by the employee. Appellants assert that even though appellee may be entitled to a one-time change of physician, she must still pass the threshold issue of proving that the

treatment provided by the new physician is reasonably necessary in order to establish their liability for the treatment.

The holding in *Collins* allows both statutory provisions to be read in harmony. Without an initial visit and report from appellee's one-time-change-of-physician doctor, there is simply no way to determine whether any additional treatment proposed by that physician would be reasonably necessary. It would be inconsistent for the legislature to make a one-time change of physician mandatory without allowing an individual to see that doctor, at least for the initial visit, at the employer's expense.

We hold that in this situation, where appellee has exercised her absolute, statutory right to a one-time change of physician pursuant to Ark. Code Ann. § 11-9-514(a)(3)(A)(ii), appellants must pay for the initial visit to the new physician in order to fulfill their obligation to provide adequate medical services under the provisions of Ark. Code Ann. § 11-9-508.

Appellants' arguments regarding subsequent treatment by Dr. Citty were not addressed by the Commission, and are therefore not before us now.

Affirmed.

HART, BIRD, GRIFFEN, and ROAF, JJ., agree.

CRABTREE, J., dissents.

TERRY CRABTREE, Judge, dissenting. I dissent as I believe that we should reverse and remand this case to the Commission for additional findings of fact.

We are to construe the workers' compensation statutes strictly. Ark. Code Ann. § 11-9-704(c)(3) (Repl. 1996). Strict construction requires that nothing be taken as intended that is not clearly expressed. *Edens v. Superior Marble & Glass*, 346 Ark. 487, 58 S.W.3d 369 (2001). The doctrine of strict construction is to use the plain meaning of the language employed. *American Standard Travelers Indem. Co. v. Post*, 78 Ark. App. 79, 77 S.W.3d 554 (2002). In considering the meaning of a statute, we construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Leathers v. Cotton*, 332

Ark. 49, 961 S.W.2d 32 (1998). The statute should be construed so that no word is left void, superfluous, or insignificant, and meaning and effect must be given to every word in the statute if possible. *Locke v. Cook*, 245 Ark. 787, 434 S.W.2d 598 (1968).

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

The Commission erred as a matter of law when it concluded that it was without authority to find that appellant had fulfilled its obligation to provide medical treatment to appellee. The Commission is not only authorized, but also required to make findings of fact, unless after a *de novo* review, it expressly adopts the findings of the administrative law judge. *See Jones v. Tyson Foods, Inc.*, 26 Ark. App. 51, 759 S.W.2d 578 (1988). In this instance, the Commission arbitrarily chose not to make specific findings as to whether Dr. Citty's treatment of appellee was reasonably necessary. The Commission should have reviewed appellee's medical history, including her failure to seek any treatment for almost two years, to determine whether further treatment was reasonably necessary.

Arkansas Code Annotated § 11-9-514(3)(A)(ii) plainly states that a claimant has an absolute right to a one-time change of physician. Arkansas Code Annotated § 11-9-508(a) provides that employers are only liable for medical treatment and services that are deemed reasonably necessary for the treatment of employees' injuries. I suggest that when we read these statutes together, construing them strictly, we should conclude that an employer is only liable for medical treatment rendered pursuant to a claimant's one-time change of physician if that treatment is deemed reasonably necessary. Because the Commission did not make a finding regarding whether the treatment rendered from Dr. Citty was reasonably necessary, we cannot say whether appellant is liable for that treatment.

The majority contends that *Collins v. Lennox Industries, Inc.*, 77 Ark. App. 303, 75 S.W.3d 204 (2002), requires us to affirm. However, I do not believe that *Collins* holds that employers are required to *pay* for treatment rendered pursuant to a one-time change of physician. I read *Collins* in a more limited fashion to hold that the provisions in Ark. Code Ann. § 11-9-514(3)(A)(ii) are mandatory, which allow a claimant an absolute right to a one-time change of physician. If *Collins* stands for a broader holding, then it should be overturned.

JIM WALTER HOMES; Travelers Insurance *v.* Johnny BEARD

CA 02-903 120 S.W.3d 160

Court of Appeals of Arkansas
Divisions I and IV
Opinion delivered June 25, 2003

Anderson, Murphy & Hopkins, L.L.P., by: *Scott Provencher*, for appellants.

One brief only.

KAREN R. BAKER, Judge. Appellee was employed by appellant Jim Walter Homes from 1980 until he sustained a compensable injury to his back on October 3, 1983. He was injured while moving particle board that was over his head; he

reached, bent back too far, and experienced stabbing pain in his back and down his left leg.

Three hearings were conducted on this claim. Prior to the hearing that is the subject of this appeal, the first of these hearings was conducted on April 22, 1985, at which time the issue was appellee's entitlement to continued temporary total-disability-benefits subsequent to February 26, 1985, or whether appellee had reached the end of his healing period. During the April 22, 1985, hearing, appellee presented testimony regarding his continued complaints of pain attributable to the compensable injury, medication taken relative to his symptoms and complaints, and his inability to engage in gainful employment as a result of his injury. Appellee's principal treating physician was Dr. John Lohstoeter, an orthopedic physician. In addition to Dr. Lohstoeter, appellee was seen and/or treated by Dr. Alfred Kahn, a diagnostic internist; Dr. Carlos Arazo, a neuropathologist; and Dr. Cagle Harrendorf, a neuropsychiatrist. Dr. Lohstoeter opined that the appellee's pre-existing osteoarthritis was asymptomatic prior to the October 3, 1983, compensable injury and noted some nerve root irritation and some abnormal change stemming from the lumbar disc were present at L4-5 and S1 elements.

On March 24, 1988, a second hearing was conducted on the issue of appellee's entitlement to permanent total disability benefits. At this hearing, it was determined that while appellee had not undergone surgery relative to his October 3, 1983 compensable injury, he had been hospitalized on six different occasions for treatment for his injury. He had continued treatment with Dr. Lohstoeter, who noted that while appellee had many inflammatory changes, it was his opinion that the cause of the injury was the same, and as such, it was a post-traumatic or post-injury syndrome of inflammation. During the course of the March 24, 1988 hearing, appellee testified regarding limitations on his physical activities, which included standing, lifting, bending and walking. He attributed these limitations to his compensable injury. Specifically, he attributed the limitations to the constant pain he experienced as a result of the injury. He was found to have been permanently and totally disabled as a result of the October 3,

1983, compensable injury. This decision was affirmed by this court in an August 29, 1990, opinion.

On December 13, 1993, a hearing was conducted to evaluate appellants' claim that there had been a change in appellee's condition that warranted a modification of the previous order of permanent total disability.

Dr. Scott Bowen, a Little Rock orthopedic physician, began treating appellee for his compensable injury after Dr. John Lohstoeter retired. Dr. Bowen first saw appellant in January 1989, and he diagnosed appellee's complaint as that of chronic lumbosacral strain with secondary degenerative changes at the lower L-5, S-1 level. During the December 13, 1993 hearing, evidence disclosed that appellee was being treated by Dr. Henry Good, a Little Rock psychiatrist, who was also his principal treating physician. Appellee had initially been seen by Dr. Good on September 13, 1985, at the request of Dr. John Lohstoeter. Dr. Good prescribed medication for appellee that included Wellbutrine, Lorcet Plus, Soma, and Halcyon. Appellee was also prescribed Feldene, for pain. Dr. Good testified that the claimant suffered from chronic pain syndrome and depression.

Appellee was also seen by Dr. Reginald Rutherford, a Little Rock neurologist, pursuant to a referral by Dr. Bowen. While under the care and treatment of Dr. Rutherford, appellee underwent a course of treatment for myofascial release, comprising three sets of trigger point injections with stretch and spray physical therapy. The treatment regimen of Dr. Rutherford failed to relieve appellee's chronic pain. Ultimately, it was held that appellee's condition had not changed and that he remained permanently and totally disabled.

Appellee has had ongoing and continuing medical treatment since his October 3, 1983, compensable injury. He is currently being treated with Dr. Raymond Remmel, a Little Rock psychiatrist, for his injury. Appellee noted that in his sessions with Dr. Remmel, he continued to relate that his back was getting worse in terms of pain and symptoms, although he had not suffered a subsequent injury after October 3, 1983. Appellee also observed that since his accident, despite the fact that he is taking medication and

physical therapy, he has not experienced a complete relief from pain. His current medication includes Vicoprofen, Soma, Serax, and Desyrel. He also takes Quinine for leg cramps. Nevertheless, his symptoms have begun to progressively worsen.

Appellee stated that he continues to experience sharp pain in his lower back and in both legs, the left more so than the right. Additionally, he explained that he has experienced pain and some numbness in his legs and feet. Appellee testified that when he related his complaints of increased pain in his low back, legs, and feet to Dr. Remmel, he was referred to Dr. Richard Peek, a Little Rock orthopedic surgeon. Dr. Peek then referred him to a diagnostic clinic for possible treatment, however, the insurance company denied the claim. Appellee continued treatment with Dr. Remmel, who referred him back to Dr. Peek, who in turn, referred him to Dr. Robert Valentine. Dr. Valentine performed additional diagnostic tests and has recommended a procedure, IDET, to address appellee's pain. Appellants controverted the compensability of benefits relative to the IDET procedure including treatment under the care of Dr. Robert Valentine.

Appellants argue that the decision of the Commission to award appellee an IDET procedure is not supported by substantial evidence. This court reviews decisions of the Workers' Compensation Commission to see if they are supported by substantial evidence. *Deffenbaugh Indus. v. Angus*, 39 Ark.App. 24, 832 S.W.2d 869 (1992). 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. *Id.*

Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id. Farmers Cooperative v. Biles*, 77 Ark. App. 1, 4-5, 69 S.W.3d 899, 902 (2002). The determination of the credibility and weight to be given a witness's testimony is within the sole province of the Commission. *Id.* 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.* Further, the Commission has the authority to accept or reject medical opinions, and its resolution of the medical evidence has the force and effect of a jury verdict. *Estridge v. Waste Management*, 343 Ark. 276, 33 S.W.3d 167 (2000).

Appellants argue that appellee is sixty-five years of age and suffered a compensable injury over nineteen years ago. He has never had spinal surgery and has not been hospitalized for any back problem since the previous hearing held in 1993. Appellants' argument and citations to medical records can be summarized in one line from their briefs: "Clearly, this is the picture of a man . . . who suffered from degenerative changes throughout his body." Appellants do not contend on appeal that the IDET procedure is an improper mechanism for addressing the annular tears at L4-5 and L5-S1. Their contention is that the tears were not caused by an event which occurred nineteen years earlier. They also contend that the only medical evidence to support the Commission's finding is an August 4, 2000, progress note from Dr. Remmel that states: "It is more likely not a new injury and in fact just a progression of the disease process." They argue that the note is ambiguous and cite to recent medical records from Dr. Rutherford that appellee's MRI imaging "represents a progressive degenerative change consistent with aging."

■ ■ Despite appellants' contentions, the Commission's findings are supported by substantial evidence. In reaching its decision, the Commission found that no evidence in the record reflected that appellee had sustained a new injury relative to his low back since the compensable injury of October 3, 1983. The Commission noted the fact that appellee suffered from degenerative disc disease prior to the October 3, 1983, injury and that appellee's initial treating physician specified that the same was asymptomatic prior to the compensable injury. A preexisting disease or infirmity does not disqualify a claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. *Nashville Livestock Comm. v. Cox*, 302 Ark. 69, 787 S.W.2d 64 (1990); *St. Vincent Medical Ctr. v. Brown*, 53 Ark. App. 30, 917 S.W.2d

550 (1996). In workers' compensation law, the employer takes the employee as he finds him, and employment circumstances that aggravate preexisting conditions are compensable. *Nashville Livestock, supra.*; *Ark. Power & Light, Co. v. Scroggins*, 230 Ark. 936, 328 S.W.2d 97 (1959).

> When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arise out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own negligence or misconduct.

Home Ins. Co. v. Logan, 225 Ark. 1036, 505 S.W.2d 25 (1974).

Accepting Dr. Rutherford's current diagnosis that the present tears identified in appellee's disc are the product of aging, the same is predicated upon a natural consequence growing from the October 3, 1983, compensable injury that was asymptomatic before that injury was sustained.

Accordingly, sufficient evidence supports the Commission's decision, and we affirm.

STROUD, C.J., GLADWIN, ROBBINS, AND NEAL, JJ., agree.

PITTMAN, J., dissents.

JOHN MAUZY PITTMAN, Judge, dissenting. I dissent. This case should be reversed because the Commission's opinion is premised on facts not in evidence and is not supported by substantial evidence.

The appellant was already suffering from a nonwork-related, preexisting degenerative disc disease when he sustained a compensable back injury in 1983.[1] He is permanently and totally disabled as a result of his compensable injury, but he has not been hospitalized for any back problems since 1993. Appellant is now sixty-four years old.

---

[1] The majority opinion mentions a "previous compensable injury that was asymptomatic before the October 3, 1983, injury was sustained." This is incorrect. Appellant sustained only one compensable injury, and sustained it in 1983. It is undisputed that his prior back condition was not work-related.

The current appeal involves a claim for additional medical benefits in the form of an IDET procedure to treat annular tears that arose subsequent to appellant's compensable injury. The issue at the hearing was whether this procedure was reasonably necessary treatment for appellant's compensable injury, as opposed to his preexisting back condition. The Commission decided that the IDET procedure was reasonably necessary for treatment of the compensable injury. It expressly based this finding on the testimony of appellant's psychiatrist, Dr. Remmel. The Commission stated:

> Dr. Remmel assessed the claimant's increase[d] complaint relative to his low back as a progression of his *prior injury*. [Emphasis added.]

There are two problems with this finding. First, it is not factually correct. Dr. Remmel did not say that appellant's increased symptoms were in any way the result of his injury. Instead, Dr. Remmel said only that appellant's problem was most likely "a progression of *the disease process*." (Emphasis added.) The disparity between Dr. Remmel's undisputed actual statement and the Commission's finding regarding that statement is alone enough to require reversal. Administrative decisions may only be affirmed on the agency's findings and for the reason stated by the agency, even where there is evidence in the record that would support the agency's determination on a different basis. *See generally Al-Co Properties, Inc. v. Department of State*, 88 A.D.2d 88, 452 N.Y.S.2d 947 (N.Y. App. Div. 1982). Consequently, our function in reviewing workers' compensation cases is limited to determining whether the Commission's findings as to the existence or nonexistence of essential facts are or are not supported by the evidence. *See Clark v. Peabody Testing Service*, 265 Ark. 489, 579 S.W.2d 360 (1979); *Wright v. American Transportation*, 18 Ark. App. 18, 709 S.W.2d 107 (1986). Simply put, we do not make our own findings of fact in workers' compensation cases, or affirm on the ground that the Commission reached the right result for the wrong reason. *See Cook v. Alcoa*, 35 Ark. App. 16, 811 S.W.2d 329 (1991). Instead, we simply decide whether the facts found by the Commission are supported by the evidence, and whether those facts support the Commission's decision. Here, the

facts found by the Commission regarding Dr. Remmel's statement are not supported by the evidence.

Second, Dr. Remmel's actual statement does not support an award of benefits. Appellant was required to show that the treatment was reasonably necessary for his compensable injury, as opposed to his preexisting back disease. Dr. Remmel's statement that appellant's current condition is a progression of the disease process, without identifying what he meant by "disease," does nothing to resolve this crucial question. It is instructive to compare the situation presented in the present case to that in *Tuberville v. International Paper Co.*, 28 Ark. App. 196, 771 S.W.2d 805 (1989), *aff'd*, *International Paper Co. v. Tuberville*, 302 Ark. 22, 786 S.W.2d 830 (1990), which the Commission cited. In *Tuberville*, there was extensive and definite medical testimony to show that Mr. Tuberville's present condition was causally related to his compensable injury. This record in the present case contains no substantial evidence to support the existence of the necessary causal connection.

In the absence of such evidence, the majority can only arrive at its result by giving appellant the benefit of the doubt with respect to the question of causation. This is patently wrong. It is true that, at the time appellant sustained his compensable injury in 1983, the Commission did give the benefit of the doubt to claimants in making factual determinations. *See Brower Manufacturing Co. v. Willis*, 252 Ark. 755, 480 S.W.2d 950 (1972). However, this practice was eliminated by Act 10 of 1986, § 10, which provided that, "[i]n determining whether a party has met the burden of proof on an issue, administrative law judges and the Commission must weigh the evidence impartially and without giving the benefit of the doubt to either party."[2] This rule is applied retroactively to any case heard by an administrative law judge or the Commission after the effective date of the Act in June 1986, regardless of the date of the claimant's injury. *Wade v. Mr. C. Cavenaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989); *see also Marable v. Southern LP Gas, Inc.*, 25 Ark. App. 1, 751 S.W.2d 15 (1988); *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 663

[2] Identical language was included in Act 796 of 1993 and is now codified at Ark. Code Ann. § 11-9-704(c)(4) (Supp. 2002).

(1987). The claim in this case was heard in 2001 and 2002, and appellant was therefore not entitled to the benefit of the doubt in this factual determination, even had it been properly made by the Commission instead of by this court.

The Commission erred in finding that Dr. Remmel attributed appellant's current condition to his compensable injury, and erred in basing its award of medical benefits on Dr. Remmel's opinion. We should reverse on that basis, and not compound the error by improperly making our own findings of fact and improperly giving appellant the benefit of the doubt in doing so.

I respectfully dissent.

Terri M. WEAVER *v.* DIRECTOR,
Employment Security Department

E 02-305 120 S.W.3d 158

Court of Appeals of Arkansas
Division II
Opinion delivered June 25, 2003

Floyd J. Taylor Jr., for appellant.

Allan Pruitt, for appellee.

KAREN R. BAKER, Judge. Appellant, Terri Weaver, appeals a decision by the Board of Review denying her unemployment benefits. For reversal, appellant argues that the finding of the Board of Review was unsupported by substantial evidence and that denial of unemployment benefits to a claimant whose employment is terminated by reason of the completion or expiration of an employment contract is arbitrary and contrary to law. We agree and reverse and remand for an award of benefits.

Ms. Weaver was employed by the Monticello School District under a contract for a period of nine months beginning August 20, 2001, as a part-time, temporary adult-education paraprofessional. She worked thirty hours a week, which was the maximum allowed by the budget, at eight dollars an hour. Her job consisted of assisting the program secretary in meeting a December 17, 2001, deadline of entering student demographic data into a computer system. When she signed the contract, Ms. Weaver was told that the contract was temporary and could end the second week in January. Ms. Weaver testified that she told Ms. Branch, director of the Adult Education Program, that this was not a problem because she had plans to move to either Little Rock or Indiana where she would have access to assistance with her autistic child while she worked. After the December 17 deadline was met, she was informed that her position would be extended until the end of the school year. In May, Ms. Weaver's contract expired. However, she did not move because, as she stated, "I didn't have the finances

because my unemployment was denied." She testified that she was not offered a contract for the following term and that there was no formal discussion about rehiring her in the fall. She did not request another position with the school because of her understanding that her position was part-time and temporary.

Ms. Branch testified that she did not offer Ms. Weaver her job back because Ms. Weaver did not tell her that she wanted her job back, and she thought Ms. Weaver was moving to Little Rock. Ms. Branch testified that each year she received a copy of a temporary budget in April. The full-time employees signed pending contracts at that time; however, part-time employees did not sign contracts until August. Ms. Branch stated that Ms. Weaver never asked for her job back and that according to the budget for the new year, she would have been able to hire Ms. Weaver.

Ms. Weaver testified that Ms. Branch told her during a telephone conversation that she did not then know what her budget was, so she could not plan to rehire her for the fall. During this conversation they also discussed the fact that unemployment benefits had been denied by the Department.

Ms. Weaver appealed the Department's decision to the Appeals Tribunal, which reversed the Department and awarded benefits. The Board of Review reversed the Tribunal, finding that appellant voluntarily left her last work without good cause connected with the work and denied benefits until Ms. Weaver had thirty days of subsequent, qualifying employment. The Board based this finding on the ground that appellant would not be in the area to continue working for the employer, even though she knew or should have known that the employer would likely have additional work for her. This appeal followed.

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

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

> the scope of judicial review is limited to a determination of whether the Board could reasonably reach its decision upon the evidence before it.

Thornton v. Director, 80 Ark. App. 99, 101-02, 91 S.W.3d 523, 524 (2002) (quoting *Fleming v. Director*, 73 Ark. App. 86, 88, 40 S.W.3d 820, 822 (2001)).

Ms. Weaver argues that the finding of the Board of Review upon which it disqualified her from receiving unemployment benefits was unsupported by substantial evidence. We agree. In *Dingmann v. Travelers Country Club*, 420 N.W.2d 231, 233 (Minn. Ct. App. 1988), the Minnesota Court of Appeals interpreted the term "voluntarily quit," and held that the test is whether the individual has exercised his own free will or choice in the separation. *See Rankin v. Director*, 78 Ark. App. 174, 79 S.W.3d 885 (2002) (holding that there was not substantial evidence to support the Board's finding that appellant voluntarily left his last work where there was undisputed evidence that he had no choice when he was transferred away from his job by the Board of Correction). Arkansas Code Annotated section 11-10-513(a)(1) (Repl. 2002) states that an individual shall be disqualified for benefits if he or she voluntarily and without good cause connected with work left his or her last work.[1]

Here, Ms. Weaver was hired for a part-time, temporary position at the school. She not only completed her deadline in December, but she accepted an extension of her position until the end of the school year. At that time, she did not "voluntarily quit"; rather, her job was completed. Whether there was good cause is irrelevant if the departure was not voluntary.[2] Therefore, the Board's finding that she voluntarily left work without good cause connected with the work is not supported by substantial evidence. Accordingly, we reverse and remand for an award of benefits.

VAUGHT and ROAF, JJ., agree.

---

[1] In *Alcorn v. Daniels*, 603 S.W.2d 478 (Ark. App. 1980), this court held that where the claimant was hired for a temporary "four to five weeks job" and where she completed such job, her leaving to seek permanent employment was not for a reason other than good cause in connection with work. This case does not appear in the Arkansas Appellate Reports.

[2] *See Alcorn, supra* (Newbern, J., concurring).